

Decisions of hospital committees may be subject to judicial review

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The recent decision of the Ontario Divisional Court in *Asa et al. v. University Health Network* is an important reminder to hospitals that their internal decisions may be subject to review by the courts, and that decision making processes by their committees must be fair and decisions themselves reasonable. This is well known in the context of medical staff who hold hospital privileges but Asa takes this message beyond that context.

In *Asa*, a number of renowned endocrine oncology researchers applied to the Divisional Court for judicial review of a decision of the CEO of the University Health Network (the "Hospital") to temporarily suspend the researchers' activities as a result of findings of research misconduct. The decision was made following an inquiry, investigation and internal appeal which were all carried out in accordance with the Hospital's research policy, with the initial formal investigation having been carried out by an investigation committee. In their application for judicial review, the researchers asked the Court to void the decision and direct that it be reconsidered at an oral hearing.

In response, the Hospital argued that the decision of the Hospital's CEO was not a decision which could be reviewed by the Court. The Hospital alternatively argued that if judicial review of the decision was available, the decision was reasonable and it was made according to a fair process.

The Court determined that the decision could be judicially reviewed because it had a serious effect on public rights or interests. The following were key considerations for the Court in determining that the decision was reviewable:

- the decision concerned the researchers' ability to continue to perform cancer research which affects the medical protocols used to treat cancer in Ontario;
- the decision concerned one of the Hospital's core functions – the establishment and operation of research facilities and maintenance of programs for cancer research;
- the Hospital is a public hospital governed by the *Public Hospitals Act*; and
- the research policy under which the decision was made was mandated by three government agencies.

Having found that the decision was appropriate for judicial review, the Court considered whether the decision itself was made fairly and was reasonable. The Court found that the process by which the decision was made was fair and that an oral hearing was not required. Although there was no prescribed process for the inquiry, investigation and appeal, the Court noted the following in finding that the process that the Hospital had followed was fair:

- the researchers were advised of the nature and scope of the allegations;
- the researchers were advised when the allegations were expanded;

- the researchers engaged the investigative committee and participated fully in the investigation, including by making oral and written submissions;
- the researchers were assisted by legal counsel;
- the researchers commented on the draft report; and
- the researchers were notified of the final report, appealed the Decision and made appeal submissions and reply submissions.

The Court ultimately found that the Decision was reasonable in part: the CEO's decision to uphold the investigative committee's finding of research misconduct in the form of material non-compliance with the research policy was reasonable. However, the findings of research misconduct in the form of falsification and fabrication were unreasonable because they were not supported by the evidence. The suspension of the researchers' activities was remitted for reconsideration by the Hospital in light of the Court's findings.

When conducting internal investigations and making decisions that affect medical staff and other hospital staff, hospitals should be aware that their internal investigative processes and decision making may be subject to the external scrutiny and review by a court even if the process and decision is not an exercise of a statutory power of decision. While the level of procedural fairness that a hospital should extend in the context of an investigation or decision will vary with the nature of the investigation and/or decision, hospitals should at a minimum provide parties who are subject to an investigation or potential decision with:

1. full disclosure of allegations;
2. an opportunity to participate in any investigation (including by being interviewed and making submissions);
3. an opportunity to be represented by legal counsel; and
4. notice of a decision with comprehensive reasons for the decision.

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