NOVA SCOTIA COURT OF APPEAL

Citation: *Fashoranti v. College of Physicians and Surgeons of Nova Scotia*, 2015 NSCA 25

Date: 20150311
Docket: CA 428527
Registry: Halifax

Between:

Dr. Oluwarotimi Fashoranti

Appellant

v.

College of Physicians and Surgeons of Nova Scotia
and The Attorney General of Nova Scotia

Respondents

Restriction on Publication: Pursuant to Publication Ban under Inherent Jurisdiction of the Court

Judges: MacDonald, C.J.N.S., Oland and Fichaud, JJ.A.

Appeal Heard: February 2, 2015, in Halifax, Nova Scotia

Held: Appeal dismissed, per reasons for judgment of Fichaud, J.A.; MacDonald, C.J.N.S. and Oland, J.A. concurring

Counsel: Colin D. Bryson, Q.C. and Justin E. Adams for the appellant
Marjorie A. Hickey, Q.C. and Melanie S. Comstock for the respondent
Attorney General of Nova Scotia, not appearing

Order dated October 9, 2014

IT IS ORDERED THAT:

1. The Complainant shall be identified throughout these proceedings as Patient A;

2. The Complainant's partner shall be identified throughout these proceedings as Mr. B;

3. A publication ban is imposed with respect to:

   (a) the names of Patient A and Mr. B;

   (b) any information which could disclose their respective identities, including, but not limited to, addresses, phone numbers, MSI numbers, age, date of birth, family circumstances, including the names of family members, places of work and the nature of employment positions;

   (c) the names, MSI numbers and other identifying information of any other patients mentioned in the oral submissions or documentary evidence filed in this proceeding;

4. The Appeal Book herein shall be redacted to conform with the terms of this Order set out above.

Reasons for judgment:

[1] A disciplinary Hearing Committee of the College of Physicians and Surgeons found that Dr. Fashoranti had conducted an inappropriate examination of a female patient. The Committee had heard both the complainant's description of the examination and Dr. Fashoranti's denial that the examination had occurred. The Committee accepted the complainant's testimony over Dr. Fashoranti's. Dr. Fashoranti appealed under s. 68(1) of the *Medical Act*. Section 68(1) confines this Court's authority to a "point of law". Dr. Fashoranti says that the Committee's written reasons were inadequate.

[2] The question is - How does the sufficiency of a tribunal's reasons on credibility fold into the reasonableness standard of review by a court that may hear only an issue of law?

Background

[3] Dr. Oluwarotimi Fashoranti is a physician, married with three children. He is a sole practitioner in Pugwash, focuses on primary care, and has over 2000 patients. Since 2002, he has served in the Emergency Room at All Saints Hospital ("Hospital") in Springhill, usually for a 24 hour shift on Tuesdays and one weekend monthly. He has provided medical service to the Highcrest Nursing Home situated near the Hospital.

[4] On the afternoon of July 29, 2010, Patient A came to the Hospital's emergency room. She requested the results of her CT scan. Another physician had ordered the scan some time earlier. On July 29, that physician was absent, and Dr. Fashoranti had replaced him on duty.

[5] Dr. Fashoranti knew Patient A from the Highcrest Nursing Home, where she worked, and as a patient. Patient A did not have a family physician, and regularly attended the Hospital's emergency facility for medical care. Since 2003, Dr. Fashoranti had seen her nine times in the Hospital, without incident.

[6] Dr. Fashoranti testified that he prefers not to advise a patient concerning another physician's test results. But that day, at the intake nurse's request, he saw Patient A. At 4:37 p.m., Patient A and Dr. Fashoranti consulted in Examination Room B.

[7] Dr. Fashoranti reviewed the results of the CT scan with Patient A. She said that the results did not address her concerns about abdominal pain, fluid retention and difficulty with urination. She queried whether he had the correct scan. Dr. Fashoranti examined her. After the exam, he ordered another CT scan to image her bladder and kidneys.

[8] The testimony of Patient A and of Dr. Fashoranti differed on the scope of Dr. Fashoranti's examination.

[9] Patient A testified there were two examinations, a pelvic exam followed by a breast exam:

> So, at that time, he was sitting on his stool, and he, you know, is pondering, and he said, "Get up on the bed." So I got up on the bed, and he asked me if I could pull my jogging pants down. So I pulled them down a little ways, and then he asked me if I could pull them further down, and then he just pulled them down a little further. He started to examine my pelvic area, and he would push on the pelvic area and ask me if it was sore, if it hurts, and I would say "yes" or "no".
>
> And then after he was done that, he indicated for me to get – I was done, so I got up off the bed, and I pulled my pants up, and he sat back in his stool, and then I sat in one of the chairs again. And then he was sitting there for a minute, and then he said – he was like sitting there looking at the paper and pondering, and he said, "Get back up on the bed." So I got back up on the bed, and he had asked me to lay down. And when he asked me to lay down, he took my top, and he put it up to my chin, and took my brassiere, my bra, and put it up to my chin as well, and I had a clasp there, and he didn't unbuckle it. And while he was standing there beside the examining bed, he started to twist and pinch and like maul or play with my breasts, and he was making sounds through his nose, like just breathing very heavy through his nose. And when he was done, I just turned my head towards the wall because I could feel my body getting very hot and sweaty and my heart was racing, and I felt – I didn't know what was going on at the time. I was just trying to process everything, like why would he be doing a breast exam when I went there for water retention. So, when he turned over and I was done, I pulled down my top and I sat up and I asked him if I was good to go.

[10] Dr. Fashoranti testified that there was no second examination:

> So she, she did not say anything, and I decided to, to examine her, and I, and I pushed – and, and I told her, you know, I told her, "Tell me where, where it hurts", and then I started palpating the abdomen. When we got to the suprapubic area, she scrummed (sic), she scrummed out, and I told her that in that area – "That is the suprapubic area." And I said, The only structure there is the bladder."

> And then I, I moved away. I went to sit down at the, at the, at the doctor's chair, and she got off from the table and went to sit down at – on the second chair in the room. …

He then explained to Patient A that he would order a CT scan of the bladder and kidneys. He said that was the end of it. As to a second examination, he testified:

> **Q.** Okay. Now, can we be clear about this? How many times did [Patient A] get on the examining table?
>
> **A.** Once.
>
> **Q.** And that was the examination that you've described?
>
> **A.** Yes, sir.
>
> **Q.** The abdominal examination?
>
> **A.** Yes, sir.
>
> **Q.** And when the abdominal examination was completed, what did she do?
>
> **A.** When the examination was closed, she, she, she got off from the examination table, and went to sit down, and at that time, I explained my findings.
>
> **Q.** All right. Did you perform any further examination on her that day?
>
> **A.** No, sir.
>
> **Q.** Very specifically, did you perform a breast examination that day?
>
> **A.** No, sir.
>
> **Q.** Did you ask her to get back up on the table?
>
> **A.** Absolutely no, sir.
>
> **Q.** Did you push up her shirt and bra to uncover her breasts?
>
> **A.** Absolutely no, sir.
>
> **Q.** Did you rub her breasts in a –
>
> **A.** Absolutely no, sir.
>
> **Q.** In a non-clinical way? Did you do anything improper at all?
>
> **A.** Absolutely no, sir.

[11] Patient A contacted the police. On July 30, 2010, Dr. Fashoranti was charged with sexual assault. In June, 2011, a jury acquitted him.

[12] On July 30, 2011, Patient A filed a complaint with the College of Physicians and Surgeons of Nova Scotia ("College"). On June 21, 2013, the College's

Registrar issued a Notice of Hearing charging Dr. Fashoranti with having acted unprofessionally by (1) having an "inappropriate interaction" with Patient A, and (2) engaging in an "inappropriate examination" of Patient A. The Hearing Committee was chaired by Mr. W. Brian Smith, Q.C., and also comprised Drs. Allen J. Bishop, Cynthia A. Forbes and Michael Teehan, and Ms. Mary Hamblin as the public representative.

[13] The Committee conducted the merits hearing over three days in July, 2013. The College and Dr. Fashoranti each had counsel. The testimony took two days. Patient A and Dr. Fashoranti testified and were cross-examined. Other witnesses included staff who were at the Hospital on July 29, 2010.

[14] On September 27, 2013, the Committee issued a written Merits Decision. The Committee dismissed the complaint of "inappropriate interaction". But, on the second charge, the Committee accepted Patient A's testimony that the second examination - the breast exam - had occurred, and disbelieved Dr. Fashoranti's denial. The Committee concluded that this breast examination was inappropriate in the circumstances, and held that Dr. Fashoranti had committed professional misconduct. Later I will discuss the Committee's reasons.

[15] On March 18, 2014, the Committee heard evidence and submissions on the penalty. In a written Penalties Decision of May 12, 2014, the Committee suspended Dr. Fashoranti's license to practice for three months, required that he have a chaperone for any examination of a female patient, directed that he complete the Understanding Boundaries Course offered by the University of Western Ontario, and ordered that he pay the College's costs of $65,000.

[16] On June 13, 2014, Dr. Fashoranti filed a Notice of Appeal to the Court of Appeal.

Issues

[17] Dr. Fashoranti's factum states three issues:

1. Did the Committee err in law by failing to provide sufficient reasons in the Decision of September 27, 2013?
2. Did the Committee err in law by failing to provide sufficient reasons in the Decision of May 12, 2014 in support of the penalty?
3. Were both the Merits and Penalty decisions unreasonable?

[18] I will re-arrange the issues into: (1) appealable grounds, (2) procedural fairness, (3) standard of review, (4) the Merits Decision and (5) the Penalties Decision.

Appealable Grounds

[19] This Court's authority derives from the *Medical Act*, S.N.S. 1995-96, c. 10, s. 68(1):

> 68 (1) The member or associate member complained against may appeal on any point of law from the findings of the hearing committee to the Nova Scotia Court of Appeal.

[20] In *Fadelle v. Nova Scotia College of Pharmacists*, 2013 NSCA 26, this Court considered an appeal from a Disciplinary Committee under the *Pharmacy Act*, S.N.S. 2001, c. 36, s. 58(1). Section 58(1) permitted an appeal "on any point of law", as does s. 68(1) of the *Medical Act* in Dr. Fashoranti's case.

[21] In *Fadelle*, this Court said:

> [12] Before superimposing the administrative standard of review, the Court isolates the threshold grounds of appeal that are permitted by the statute: *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, para 36; *Royal Environmental Inc. v. Halifax (Regional Municipality)*, 2012 NSCA 62, para 39. Section 58(1) of the *Pharmacy Act* permits an appeal to the Court of Appeal on "any point of law". There is no appeal on issues of fact.
>
> [13] Ms. Fadelle's grounds allege errors in assessing credibility, apprehending and weighing evidence, drawing inferences and making findings of fact.
>
> [14] In *Young v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2009 NSCA 35, paras 17-25, this Court reviewed the authorities respecting when an error in an administrative tribunal's fact finding process may constitute an appealable error of law.
>
> [15] Put simply, a finding based on no evidence is arbitrary. Tribunals are not supposed to act arbitrarily in any aspect of their process, including fact finding: *Toronto (City) Board of Education v. O.S.S.T.F.*, [1997] 1 S.C.R. 487, para 44, per Cory J. for the majority, referring to *Douglas Aircraft Co. of Canada v. McConnell*, [1980] 1 S.C.R. 245, at 277. So an arbitrary finding, based on no evidence, is an error of law. I add that a fact finding tribunal is entitled to draw inferences, meaning the evidential foundation need not be direct evidence. Further, I am not commenting on judicial notice, which has no application to this appeal.

> [16] If there is evidence, then a submission that the tribunal gave the evidence either too much weight and wrongly preferred it over other evidence, or too little weight and wrongly discounted it compared to other evidence, raises an issue of fact: *Toronto (City) Board of Education*, paras 44-45, 48; *Young*, para 22. Whether the tribunal should draw an inference from the evidence is a question of fact: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, paras. 19-25. Similarly, "[a]ssessments of credibility are quintessentially questions of fact": *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, para 38.
>
> [17] In short, Ms. Fadelle's factual grounds are beyond the Court's appellate jurisdiction, that is confined to errors of law under s. 58(1) of the *Pharmacy Act,* except insofar as they suggest that the Hearing Committee made an arbitrary finding based on no evidence.

[22] This reasoning applies to Dr. Fashoranti's appeal.

[23] Before applying the administrative standard of review, the court isolates the ground of appeal that is permitted by statute. Here that is a "point of law".

[24] The Committee's Merits Decision accepted Patient A's testimony that the second examination - the breast exam – occurred, and rejected Dr. Fashoranti's testimony that it did not. There was evidence – *i.e.* Patient A's testimony – to support the Committee's finding. So the finding of fact was not arbitrary and, in that sense, the Committee did not err in law.

[25] Either Patient A or Dr. Fashoranti gave untruthful testimony. The Committee's finding derived from an assessment of credibility. Assessments of credibility "are quintessentially questions of fact".

[26] The Legislature has not authorized the Court of Appeal to re-try facts and re-assess credibility. Insofar as Dr. Fashoranti challenges the Committee's finding of fact and assessment of credibility, his grounds are not appealable.

[27] Dr. Fashoranti seeks to circumvent this roadblock by fashioning his submissions in terms of the Committee's "insufficient reasons". An absence of reasons, when some are required, may be an error of law as a contravention of procedural fairness. Also, insufficient reasons may contribute to an error of law within the reasonableness standard of review. So it is necessary to address how procedural fairness and the standard of review govern sufficiency of the Committee's reasons.

Procedural Fairness

[28] Dr. Fashoranti submits that, apart from the reasonableness standard, this Court should apply correctness to assess the sufficiency of the Committee's reasons under principles of procedural fairness. He cites *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. At the hearing in this Court, his counsel acknowledged that, given Patient A's testimony, the Committee's acceptance of her account inhabited the range of possible outcomes under the reasonableness standard of review. His factum similarly acknowledges that "the penalty is within the bounds of reasonableness". Dr. Fashoranti's appeal focusses on the requirement of a sufficiently reasoned decision that, he submits, derives from principles of procedural fairness independently of the standard of review.

[29] In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708, Justice Abella dismissed a similar submission with these comments:

> [20] Procedural fairness was not raised either before the reviewing judge or the Court of Appeal and it can be easily disposed of here. *Baker* stands for the proposition that "in certain circumstances", the duty of procedural fairness will require "some form of reasons" for a decision (para. 43). It did not say that reasons were *always* required, and it did not say that the *quality* of those reasons is a question of procedural fairness. In fact, after finding that reasons were required in the circumstances, the Court in *Baker* concluded that the mere notes of an immigration officer were sufficient to fulfil the duty of fairness (para. 44).
>
> [21] It strikes me as an unhelpful elaboration on *Baker* to suggest that alleged deficiencies or flaws in the reasons fall under the category of a breach of the duty of procedural fairness and that they are subject to a correctness review. As Professor Philip Bryden has warned, "courts must be careful not to confuse a finding that a tribunal's reasoning process is inadequately revealed with disagreement over the conclusions reached by the tribunal on the evidence before it" ("Standards of Review and Sufficiency of Reasons: Some Practical Considerations" (2006), 19 *C.J.A.L.P.* 191, at p. 217; see also Grant Huscroft, "The Duty of Fairness: From Nicholson to Baker and Beyond", in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context* (2008), 115, at p. 136).
>
> [22] It is true that the breach of a duty of procedural fairness is an error in law. Where there are no reasons in circumstances where they are required, there is nothing to review. But where, as here, there *are* reasons, there is no such breach. Any challenge to the reasoning/result of the decision should therefore be made within the reasonableness analysis. [Justice Abella's italics]

[30] Similarly, this isn't a case of "no reasons". The Committee gave written reasons for preferring Patient A's testimony over that of Dr. Fashoranti. Its written Penalties Decision summarized the principles from which it drew sanctions. There is no contravention of procedural fairness. Rather, the sufficiency of these reasons is assessed under the reasonableness standard.

Standard of Review

[31] Reasonableness governs the articulation and application of the standards of professional conduct by a disciplinary tribunal, and that tribunal's discretionary application of the factors that affect sanctions and costs: *Fadelle*, para. 18; *Creager v. Nova Scotia (Provincial Dental Board)*, 2005 NSCA 9, paras. 20(a) and 93; *Hills v. Nova Scotia (Provincial Dental Board)*, 2009 NSCA 13, paras. 32-34, 64; *Osif v. College of Physicians and Surgeons of Nova Scotia*, 2009 NSCA 28, paras. 58-59, 184, 196-97. See also *Dr. Q.*, *supra*, paras. 36-42 and *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, para. 42.

[32] Generally, reasonableness means that the reviewing court respects the Legislature's choice of a decision maker by analysing the tribunal's reasons to determine whether the result, factually and legally, occupies the range of possible outcomes: *Newfoundland and Labrador Nurses' Union* , paras. 11, 14-17, per Abella J., for the Court.

[33] Here the suggested error is insufficient written reasons.

[34] In *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, Justices Bastarache and LeBel said:

> [47] … A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

[35] *Dunsmuir*'s reference to "justification, transparency and intelligibility" does not direct the court to undertake a separate and freestanding review of the sufficiency of the tribunal's written reasons. In *Newfoundland Nurses*, *supra*, Justice Abella explained how sufficiency of reasons dovetails into reasonableness review:

[14] Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses — one for the reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at §§12:5330 and 12:5510). It is a more organic exercise — the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).

[15] In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.

[16] Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

…

[18] Evans J.A. in *Canada Post Corp. v. Public Service Alliance of Canada*, 2010 FCA 56, [2011] 2 F.C.R. 221, explained in reasons upheld by this Court (2011 SCC 57, [2011] 3 S.C.R. 572) that *Dunsmuir* seeks to "avoid an unduly formalistic approach to judicial review" (para. 164). He notes that "perfection is not the standard" and suggests that reviewing courts should ask whether "when read in light of the evidence before it and the nature of its statutory task, the Tribunal's reasons adequately explain the bases of its decision" (para. 163). I found the description by the Respondents in their Factum particularly helpful in explaining the nature of the exercise:

> When reviewing a decision of an administrative body on the reasonableness standard, the guiding principle is deference. Reasons are not to be reviewed in a vacuum – the result is to be looked at in the context of the evidence, the parties' submissions and the process. Reasons

> do not have to be perfect. They do not have to be comprehensive. [para. 44]

To the same effect: *Construction Labour Relations v. Driver Iron Inc.*, [2012] 3 S.C.R. 405, para. 3, *per curiam*.

[36] That is the standard I will apply to the Committee's reasons in Dr. Fashoranti's case.

Merits Decision

[37] I will relate the key components of the Committee's reasons for finding an infraction.

[38] The Committee recited the burden of proof:

> 9. … the Committee is cognizant that in the matter before us, the burden of proof which rests upon the College is to prove its case against Dr. Fashoranti on a balance of probabilities, otherwise known as the "civil" burden of proof. …

[39] The Committee summarized the conflicting evidence of Patient A and Dr. Fashoranti on the scope of the physical examination. I have quoted their testimony above (paras. 9-10). The Committee summarized the testimony of other witnesses.

[40] On credibility, the Committee said:

> … When Dr. Fashoranti testified on other points and why he made certain entries on Ms. A's admissions documents, the Committee found his evidence to be self-serving and at times evasive. On the issue of her physical examination by Dr. Fashoranti, the Committee favors the depiction of this examination as posed by Ms. A. …
>
> … Cst. MacDonald testified that he found and retrieved a Kleenex box which had been entered as Exhibit 4 earlier in the proceeding. This Kleenex box was located in Exam Room B, in the approximate position which Ms. A had said it was when it was placed there by Dr. Fashoranti. Notably on the underside of the box, was written the following "[street address omitted]" which is the address of Ms. A which she stated had been written by the Doctor. Dr. Fashoranti confirmed that he did this notation but that it was for the purpose of later sending an "encouragement" card to Ms. A. …
>
> … Also during the course of his interview with the police, the Doctor provided a sketch of the Examining Room in which he said that he had examined Ms. A. This sketch was introduced as part of Exhibit 1, Document 2 found at Tab 14. Dr.

> Fashoranti prepared this sketch in the presence of Counsel, however depicted examining room "A" and not the room in which Ms. A had been examined which was Exam Room B. Dr. Fashoranti confirmed in his testimony that he knew the layout of the hospital emergency rooms "very" well. In the opinion of the Committee, this was something more than just an honest mistake by the Doctor but was an attempt by the Doctor to mislead the police investigation.
>
> … Upon returning to the chair, Ms. A then said that the Doctor quizzed her as to where she lived. When she replied "Springhill" he then asked her specifically where in Springhill to which she replied "[street address omitted]". It was at this time the Doctor wrote her address on the Kleenex box (Exhibit 4). She also said the Doctor asked her if she lived alone and stated that he would see her later that night. She said to the Doctor "are we done here?" and then proceeded to return to the Nursing Station area.
>
> …
>
> While this committee does not feel it necessary to review each tendered exhibit or to review each witnesses sworn testimony in detail, suffice it to say that the Committee has considered each tendered exhibit and the testimony of each witness called by the parties.
>
> The Committee is cognizant of it reaching a conclusion on a balance of probabilities and how the factors of credibility and demeanor fit into determining how they impact upon the balance of probabilities. …

[41] The Committee dismissed the first charge that Dr. Fashoranti's alleged future intentions toward Patient A constituted an inappropriate interaction. The Committee said:

> … Given the evidence of how busy the Emergency Room was on the day and at the time in question, the Doctor's apparent habit of sending cards to some patients and the length of time remaining in his shift, there is not an air of reality to the supposition by Ms. A of Dr. Fashoranti's future intentions toward her. Accordingly the Committee finds that this allegation has not been proven on a balance of probabilities.

[42] But the Committee found that the College had established the second charge of an "inappropriate examination":

> With respect to the second allegation, there was nothing which the Committee heard in testimony or upon review of the many exhibits, which would support the need for a second examination of the nature and type conducted by the Doctor. The examination may not have been inappropriate had there been medical evidence to support the need for such an examination. There was none. The Committee accordingly finds that the second allegation has been proven on a balance of probabilities.

> … The Committee, in light of its decision in the matter, concludes that the conduct of Dr. Fashoranti does constitute professional misconduct.

[43] The Committee said that Dr. Fashoranti's evidence was "self-serving and at times evasive". From that perspective, the Committee discounted his credibility.

[44] At the appeal hearing, counsel for Dr. Fashoranti submitted that, as the Committee's Decision didn't cite examples of "self-serving" and "evasive" evidence, the court shouldn't probe the record to infill that gap in the Committee's written reasons. I agree it's not for the reviewing court to engineer its own thoroughfare to the tribunal's conclusion. But the Committee illuminated its pathway: it believed Patient A and disbelieved Dr. Fashoranti, finding his evidence "self-serving and at times evasive". This enables the court to "look to the record" and assess the reasonableness of the Committee's assessment of credibility (*Newfoundland Nurses*, para. 15).

[45] The record includes instances from which the Committee could reasonably infer that Dr. Fashoranti's evidence was self-serving and at times evasive:

(a) Dr. Fashoranti's police statement said that Nurse Smith told him - "Once she [Patient A] heard it was me, she insisted on seeing me". To the Committee, he testified that it was Nurse Smith who "insisted" he see Patient A. Nurse Smith's testimony did not relate insistence by anyone. Rather, she told Patient A that Dr. Fashoranti was on duty, to which Patient A said "Oh great. Thanks."

(b) Dr. Fashoranti testified that Patient A reported blood in her urine:

> **Q.** Okay. What did she say, Doctor?
>
> **A.** She said, "I am been peeing blood."

Patient A, on the other hand, unequivocally denied reporting to Dr. Fashoranti any complaint of blood in her urine. On cross-examination Dr. Fashoranti acknowledged:

> I asked her, 'Can you see the blood?' She said, 'No' .

It was put to him that Patient A "did not complain that she had blood in her urine; rather, it was simply your impression that she had that. Do you agree?" Dr. Fashoranti replied "I don't agree." Then Dr. Fashoranti was confronted with his testimony, at the earlier criminal

trial, where he had said it was "just my impression" that she had microscopic hematuria. To this, Dr. Fashoranti replied:

> … from the question and answer, I meant, I meant – I, I, I thought this is what she meant. From the question and answer "Do you have blood in your urine?" "No." "Did you see blood in your urine?" "No."

(c) At the Committee's hearing, Dr. Fashoranti said that, to facilitate the pelvic exam:

> And I told her to pull her blouse to the breast line, and I asked her to pull her pants to the hip line.

In his police statement, he had denied asking her to pull her clothes down:

> **A.** She did not pull it down.
>
> **Q.** Okay.
>
> **A.** She – you don't need to pull down before you – no.
>
> **Q.** So you're doing it right on her clothes?
>
> **A.** Yes.

(d) Dr. Fashoranti told the Committee that he asked Patient A to get on the examination table:

> … and so I told her to, to get up on the examination couch; that I'm going to examine her.

His statement to the police had been that she laid on the table without being asked:

> **Q.** Okay. Continue on. Just tell me what happened.
>
> **A.** And I, and I turned back, and then she went, she went to lie down on the bed.
>
> **Q.** Okay. Did you tell her to go lie down?
>
> **A.** I did not tell her.
>
> **Q.** She just –

A. She went to lie down on the bed, and I approached her.

(e) The police found a Kleenex box in the examination room with Patient A's address written on the underside. Both Patient A and Dr. Fashoranti said that she had written the address there at his request. The Committee found that his request was innocent, as Dr. Fashoranti had a practice of sending "encouragement cards" to patients. But Cst. MacDonald testified he found the box "tucked in that corner underneath a paper dispenser". This was the location described by Patient A. She testified that Dr. Fashoranti had "pulled the paper towel dispenser down and put it in there, tucked it underneath the paper towel". It was not the location described by Dr. Fashoranti:

Q. Where did you put the Kleenex box, Doctor?

A. I left it on the table.

(f) Patient A's file indicated at that, at the date of this event, she took only one medication, Lyrica, prescribed for neuropathic pain. Patient A confirmed that and added that, in addition, she had Toradol, a non-narcotic anti-inflammatory, to be taken if needed. Dr. Fashoranti gave inconsistent statements, to the police, at the criminal trial and at the Committee's hearing, respecting Patient A's medications. He said variously that Patient A used anti-depressants and narcotic pain relief, including Percocet, Dilaudid, Celexa, and Demerol. Eventually, in cross-examination, Dr. Fashoranti testified:

A. Lyrica, that's, that's, that's the medication she told me she was on.

Q. That's what she told you she was on?

A. Yeah, she was on.

Q. So that's the correct evidence?

A. Yes.

(g) Dr. Fashoranti sketched, for the police, the wrong examination room. His sketch of Room A would have the table in a location where an inappropriate examination would be visible from the hall. The actual exam occurred in Room B, where the table would not be observable. In his cross-examination before the Committee, Dr. Fashoranti denied any intent to mislead:

> **Q.** … I'm going to suggest to you that the reason you drew that examination room when you met with the police was to suggest to the police that you couldn't have done the inappropriate examination of [Patient A] because she was readily observable from the doorway.
>
> **A.** That is incorrect. I, I will correct that. This, this particular examination room is one of the examination rooms in, in, in All Saints Hospital, Springhill. This is Examination B. This is Examination A. In the Examination A these are not – of that, of, of that, of, of, of [inaudible] room, and when I was doing this, this is just an honest mistake.

The Committee disagreed with him, and found "this was something more than just an honest mistake by the Doctor but was an attempt by the Doctor to mislead the police investigation".

[46] The issue is whether the Committee's "reasons allow the reviewing court to understand why the tribunal made its decision" so the court may determine whether the conclusion is within the range of acceptable outcomes (*Newfoundland Nurses*, para. 16). I have no difficulty understanding why the Committee disbelieved Dr. Fashoranti and believed Patient A. The Committee's conclusion occupied the range of acceptable outcomes.

Penalties Decision

[47] The Committee's penalties hearing heard evidence of two character witnesses, called by Dr. Fashoranti. Neither had observed the events of July 29, 2010. The Committee admitted a letter from Dr. Fashoranti's employee.

[48] The Penalties Decision summarized these witnesses' evidence, and related the submissions of counsel on penalties. The Committee cited authority for the principle that the sanction should be tailored to the individual circumstances of the infraction. The Decision stated that the Committee had "listened carefully to the arguments of Counsel and has reviewed the cases to which it has been referred" and "has considered both the mitigating and aggravating circumstances of this matter". The Decision said that the Committee was "cognizant of its responsibility toward the protection of the public and the other principles of sentencing which are applicable in matters of professional discipline".

[49] Then the Decision recited the penalties mentioned above (para. 15).

[50] Dr. Fashoranti's factum says:

> 71. With respect to penalty, Dr. Fashoranti acknowledges that the penalty is within the bounds of reasonableness.

[51] The Supreme Court has rejected the suggestion that sufficiency of reasons is analyzed separately from the outcomes analysis. The court may draw upon the record to assess the reasonableness of the penalty. (*Newfoundland Nurses*, paras. 14-16).

[52] The Committee's record for the penalties hearing includes authorities, an affidavit on costs, and detailed submissions on principles of sanctioning and costs. This record supports an acute reproach to Dr. Fashoranti, that the Committee tailored to the infraction and, for costs, to the expense of the proceeding, prorated for the partial success. The Committee's Decision, supplemented by the record, allows the Court to understand why the Committee fashioned the sanctions and to determine whether the sanctions occupy the range of permissible outcomes. This satisfies the reasonableness standard and principles of procedural fairness.

Conclusion

[53] I would dismiss the appeal without costs.

Fichaud, J.A.

Concurred: MacDonald, C.J.N.S.

Oland, J.A.