

## LEGAL CONSEQUENCES OF BREACH OF THE "CODE OF HEALTH AND DISABILITY SERVICES CONSUMERS' RIGHTS"

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The Code of Health and Disability Consumers' Rights (the Code) came into force on 1 July 1996. The Code provides that every consumer has 'the rights in this Code', and that providers shall be 'subject to the duties contained in this Code' (reg 1). However, the Code provides no indication of the consequences which can ensue from a breach of its provisions. To determine these, it is necessary to examine the Health and Disability Commissioner Act 1994 (the Act).

Several points can be made at the outset. One is that a provider cannot be prosecuted for a breach of the Code. Another is that there is no general right to damages for a breach of the Code: it is only in the circumstances specified in the Act that a provider may be required to pay damages if the Code is breached. A third point is that, in the case of a registered health professional, breach of the Code will not automatically give rise to a finding of professional misconduct, or of any other disciplinary offence.

The Act provides for the investigation of complaints by the Commissioner (s35). However, the fact that, following this investigation, the Commissioner is of the opinion that a consumer's rights have been infringed, will not of itself entitle the consumer to any of the statutory remedies. The statutory remedies are available only in the course of proceedings before the Complaints Review Tribunal.

It is not possible to 'leap-frog' the Commissioner and simply seek a remedy from the Complaints Review Tribunal: the Tribunal may only deal with a complaint if it has already been the subject of an investigation under the Act (see s50(1)). This article will therefore deal first with investigations by the Commissioner and then with proceedings before the Tribunal.

### INVESTIGATIONS BY THE HEALTH AND DISABILITY COMMISSIONER

The Act provides that any person may make a complaint, alleging that a provider's conduct is in breach of the Code (s31). The complaint may be made orally or in writing, and either to an advocate or to the Commissioner (ss31-32).

If a complaint alleging a breach of the Code is made directly to an advocate - as many will be - the complaint must be referred to the Commissioner if the advocate is unable to resolve the matter (s34). Such a complaint will then be treated as if it had been made directly to the Commissioner (s34(c)).

One of the functions of the Commissioner is to investigate conduct which is, or which appears to the Commissioner to be, in breach of the Code (ss14(1)(e), 35(1)). These investigations will result from complaints received by the Commissioner by the routes already specified or following notification of the Commissioner under a health registration enactment (s33). However, investigation can also be commenced on the Commissioner's own initiative (s35(2)).

On receiving a complaint, the Commissioner may proceed immediately to investigate it. However, in the case of complaints that have not come to the Commissioner by way of an advocate (s34), the Commissioner is likely to make frequent use of the power to refer the complaint to an advocate, for the purpose of resolving the complaint by agreement between the parties

concerned (ss36(1)(b), 42). This power to refer matters to an advocate, to seek agreement between the parties, may also be exercised at any stage after an investigation has commenced. There will also be cases where the Commissioner will make use of the power to call a conference of the parties concerned, in an endeavour to resolve the matter by agreement (s61).

The Commissioner is not required to take action on every complaint (s36(1)(c)). The Act permits the Commissioner to decide to take no action (or no further action) where the Commissioner is of the opinion that one of the specified grounds is present. The five grounds include cases where the subject-matter of the complaint is trivial, the complaint is not made in good faith, too long a time elapsed before the complaint was made, or there is an adequate remedy or right of appeal (see s37(1)).

In addition to this power to decide not to investigate a complaint, the Commissioner also has a discretion to take no further action on a complaint if, in the course of the investigation, it appears to the Commissioner that further investigation is unnecessary or undesirable (s37(2)).

If, following an investigation, the Commissioner is of the opinion that the provider's conduct was in breach of the Code, the Commissioner is authorised to make reports and recommendations (s45(a)-(c), and see also ss46, 48). The Commissioner may also complain to a health professional body, or assist someone else to do so (s45(d)-(e)). The Commissioner may also refer the matter to the Director of Proceedings (s45(f)), so the Director of Proceedings can decide whether to institute proceedings before the Complaints Review Tribunal, whether to institute or participate in disciplinary proceedings, or whether to take no further action (s49(1)(a)).

In deciding about these matters, the Director of Proceedings is to have regard to the wishes of the

complainant (if any), and also to the need to ensure that appropriate disciplinary proceedings are instituted 'in any case where the public interest ... so requires' (s49(3)(d), (e)). (As to the office and powers of the Director of Proceedings, see generally ss15, 47, 49).

The fact that, following an investigation, the Commissioner is of the opinion that the provider's conduct was in breach the Code, will not of itself ensure that proceedings are instituted against the provider - much less that the consumer will be compensated in any way. As with the promulgation of the Code in the first place, the Commissioner has a very important role in the process, without in all cases being responsible for the final result.

### PROCEEDINGS BEFORE THE COMPLAINTS REVIEW TRIBUNAL

The Act provides a number of remedies, but they cannot be obtained unless the Complaints Review Tribunal ('the Tribunal') is satisfied, on a balance of probabilities, that the Code has been breached (s54). This is a matter which the Tribunal must determine for itself.

If a matter has been resolved under the Act by agreement between the parties, proceedings cannot be brought before the Tribunal unless there has been an omission to comply with a term of the agreement (s53). In other words, a settlement will usually bar proceedings before the Tribunal.

Where an aggrieved party wishes to obtain a remedy and there is a real likelihood of doing so, proceedings will usually be commenced by the Director of Proceedings (s50). In some cases an aggrieved person will be able to bring proceedings in his or her own name - even if the Director of

Proceedings is of the opinion that the complaint does not have substance (s51).

If the Complaints Review Tribunal is satisfied that the provider's conduct - or, in some cases, the conduct of the provider's employee or agent (see s72) - is in breach of the Code, it is permitted to grant one or more of the specified remedies, or such other relief as it thinks fit (s54). The specified remedies are best discussed under two heads: declarations and orders, and damages.

#### *Declarations and orders*

The Tribunal may make a declaration that the action of the defendant provider was in breach of the Code (s54(1)(a)). In some cases such a declaration will be sufficient on its own, as a provider will have indicated a willingness to change practice if an earlier practice is held to be in breach of the Code.

It is, however, open to the Tribunal to do more than make a declaration. It can make an order restraining the provider from continuing to act in breach of the Code, and it may order the provider to perform specified acts with a view to redressing damage the consumer has suffered in consequence of the breach of the Code (s54(1)(b), (d)). A provider who refused to comply with one of these orders could be convicted and fined up to \$5,000 (s58; Human Rights Act 1993, s121(2)).

#### *Damages*

Since 1972 people who suffer 'personal injury', within the meaning of the Accident Compensation legislation, have not been able to recover compensatory damages for such injury, even if it has been caused intentionally by some other person.

The Health and Disability Commissioner Act maintains this statutory bar. It specifically provides

that where a person has suffered 'personal injury' (within the meaning of the Accident Rehabilitation and Compensation Insurance Act 1992) no damages (other than punitive damages: see below) can be sought or awarded for the direct or indirect consequences of such injury (s52(2)). This is a major qualification on the remedies available for a breach of the Code.

The Act specifies the circumstances in which damages may be awarded for a breach of any of the provisions of the Code (ss54(1)(a), 57). Where the consumer has suffered financial loss in consequence of the breach, damages may sometimes be awarded (see s57(1)(a)(b) for these and related circumstances). The Tribunal may also require a provider to pay damages in respect of the 'Humiliation, loss of dignity, and injury to the feelings of the aggrieved person' which resulted from a breach of the Code (s57(1)(c)). It can also award damages - sometimes described as 'punitive damages' (see s52(2)) - where the provider's conduct was 'in flagrant disregard' of the rights of a consumer (s57(1)(d)).

#### *Conclusion*

The Health and Disability Commissioner Act has stopped well short of providing a right to damages for all breaches of the Code, or even for all breaches of the Code which result in significant damage to a consumer. Nevertheless, the power of the Complaints Review Tribunal to award damages in the circumstances specified, and also other appropriate remedies, puts consumers in a stronger position than they were previously. The existence of these remedies is likely to provide an incentive for providers to agree to resolve matters by agreement, and to comply with the terms of any agreement.



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