[2015] WASCA 142

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	**:**	THE COURT OF APPEAL (WA)
CITATION	**:**	H -v- THE INFORMATION COMMISSIONER WA [2015] WASCA 142
CORAM	**:**	NEWNES JA MURPHY JA
HEARD	**:**	2 JUNE 2015
DELIVERED	**:**	15 JULY 2015
FILE NO/S	**:**	CACV 158 of 2014
BETWEEN	**:**	H Appellant AND THE INFORMATION COMMISSIONER WA First Respondent ROYAL PERTH HOSPITAL Second Respondent

ON APPEAL FROM:

Jurisdiction	**:**	SUPREME COURT OF WESTERN AUSTRALIA
Coram	**:**	MCKECHNIE J
File No	**:**	GDA 7 of 2014

Catchwords:

Practice and procedure - Application to withdraw a notice of discontinuance of appeal - Grounds of appeal have no reasonable prospect of succeeding - Application dismissed

Legislation:

Nil

Result:

Application dismissed

Category: B

Representation:

Counsel:

Appellant	:	In person
First Respondent	:	No appearance
Second Respondent	:	Mr J M Misso

Solicitors:

Appellant	:	In person
First Respondent	:	No appearance
Second Respondent	:	State Solicitor for Western Australia

Case(s) referred to in judgment(s):

H v Nursing and Midwifery Board of Australia [No 2] [2015] WASCA 141

1 **JUDGMENT OF THE COURT**: This is an application by the appellant to withdraw a notice of discontinuance she filed on 28 April 2015 and to reinstate the appeal. It was heard with a similar application in another appeal: see ***H v Nursing and Midwifery Board of Australia*** [No 2] [2015] WASCA 141. As in that matter, the circumstances in which the appellant came to file the notice of discontinuance are quite unclear from the affidavit in support of the application, but it appears to be alleged by the appellant that she had to do so in order to procure her release from a psychiatric hospital in which she was then being detained as an involuntary patient.

Background

2 The appellant was previously employed as a nurse by the South Metropolitan Health Service - Royal Perth Hospital (the agency) at Royal Perth Hospital. It appears that her employment was terminated in 2012. By an application dated 10 April 2014, the appellant applied to the agency for access under the *Freedom of Information Act 1992* (WA) (the Act) to 'every page of my personal records, including interview records and doctors reports, especially the conclusive findings and reports.'

3 The agency considered that 780 documents would fall within the application and that some of the documents would contain personal information about third parties who would have to be consulted or the information redacted, or other information that may be exempt information under the Act. In discussions with the FOI Co-ordinator of Royal Perth Hospital the appellant declined to reduce the scope of the request.

4 Section 20 of the Act provides, relevantly:

> (1) If the agency considers that the work involved in dealing with the access application would divert a substantial and unreasonable portion of the agency's resources away from its other operations, the agency has to take reasonable steps to help the applicant to change the application to reduce the amount of work needed to deal with it.
>
> (2) If after help has been given to change the access application the agency still considers that the work involved in dealing with the application would divert a substantial and unreasonable portion of the agency's resources away from its other operations, the agency may refuse to deal with the application.

5 Pursuant to s 20, the agency refused to deal with the application on the ground that to do so would divert a substantial and unreasonable portion of the agency's resources away from its other operations.

6 On 22 May 2014, pursuant to s 39 of the Act, the appellant sought internal review by the agency of that refusal. On 3 June 2014, the agency confirmed the decision, noting the number of documents involved and that many of them contained information about third parties; that the appellant had not reduced the scope of the application; and that since 2010 the appellant had submitted four previous requests under the Act that in part duplicated this application.

7 The appellant then sought external review of the decision by a complaint to the Information Commissioner under s 65 of the Act. On 15 August 2014, the Commissioner wrote to the appellant and the agency expressing his preliminary view that the agency's decision to refuse to deal with the application under s 20 of the Act was justified and inviting further submissions from the appellant by 29 August 2014. The Commissioner informed the appellant that if he did not receive additional relevant submissions from the appellant by that time he was likely to stop dealing with the complaint under s 67(1)(b) of the Act, on the basis that the complaint was now lacking in substance.

8 On 19 August 2014, the appellant informed the Commissioner that she did not intend to make any further submissions and asked the Commissioner to proceed to a decision. The Commissioner wrote to the appellant on 21 August 2014 informing her that he had decided to stop dealing with the complaint under s 67(1)(b) of the Act, on the basis that the complaint was now lacking in substance.

9 The appellant lodged an appeal from that decision to the general division of this court on 27 August 2014. That appeal was filed pursuant to s 85 of the Act which provides that an appeal lies 'on any question of law' arising out of a decision of the Commissioner relating to an access application. Such an appeal is not by way of rehearing but is in the nature of judicial review.

10 The appeal came on for hearing before McKechnie J on 21 November 2014, who dismissed it.

The decision of the primary judge

11 The primary judge found that the grounds of appeal relied upon by the appellant did not raise any question of law. His Honour observed that

at a previous directions hearing Corboy J had pointed that out to the appellant and had given the appellant an opportunity to amend the appeal notice to identify a question of law. The primary judge noted that no amendment had been made and the appellant had still not identified any question of law. Nor was his Honour able to identify any question of law from the papers before him. The primary judge concluded no purpose would be served by adjourning the matter as the position was unlikely to change and in the circumstances the proper course was to dismiss the appeal, which his Honour did.

The disposition of the application

12 Assuming, without deciding, that this court has the power to set aside the notice of discontinuance and reinstate the appeal, no grounds have been made out upon which it would be proper to do so. The grounds of appeal in this court did not allege any appellable error. They consisted instead of a number of references to other legislation under which the appellant contended she was entitled to inspect her employment records, and complaints about the way in which she said she was treated by the agency during the course of her employment and about her subsequent treatment for mental illness.

13 Having reviewed the relevant material, there is nothing to suggest that the primary judge was in error in dismissing the appeal from the decision of the Commissioner. His Honour was, with respect, plainly correct in finding that the grounds of appeal below raised no question of law. They simply set out a number of reasons why the appellant sought access to the documents. Nor is any question of law apparent from the material referred to on the appeal. There was also no error by his Honour in the exercise of his discretion not to further adjourn the matter. The appellant did not seek an adjournment and his Honour was entitled to conclude that an adjournment would serve no useful purpose.

14 It follows that the appeal to this court had no reasonable prospect of succeeding. In those circumstances, it would be pointless to reinstate the appeal, assuming a power to do so exists.

Conclusion

15 The application should be dismissed.