

Confidentiality and privacy concerns Not a justifiable reason for non-compliance

Carver and Comcare [2019] AATA 1534

Key Points

- The Tribunal was required to consider a claim for costs arising from a doctor complying with a summons.
- The Tribunal found that concerns about medical record confidentiality does not constitute a reasonable excuse for failing to comply with a summons.
- Reasonable expenses incurred in producing documents to the Tribunal includes fees for time spent at a hearing, costs of photocopying or printing and in some circumstances, obtaining legal advice regarding compliance with a summons.

Background

Ms Miranda Carver (the applicant) submitted an application to the Administrative Appeals Tribunal in relation to a claim for workers' compensation under the *Safety, Rehabilitation and Compensation Act 1988* (the SRC Act).

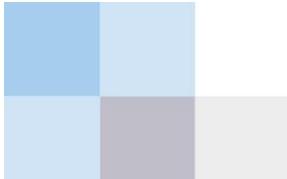
The applicant withdrew her application on 10 September 2018. However, before the withdrawal, Comcare (the Respondent) requested that the Tribunal issue a summons to her treating occupational physician, which was issued and dated 28 November 2017 (the Summons). After receiving the Summons, Dr Sharman wrote to the Tribunal and his communications were treated as an objection to the production of documents.

A Return of Summons hearing was held where Deputy President Melick heard Dr Sharman express concerns about privacy, patient-doctor confidentiality and the effect of being compelled to produce the entirety of the applicant's medical file.

Deputy President Melick gave a preliminary view that the only practical way to deal with the matter was for him to look at all the documents and discard those which he considered were not relevant by applying the legitimate forensic purpose principle. As such, Dr Sharman produced the records to the Tribunal. The parties were given leave to inspect a reduced bundle of documents.

Dr Sharman sought \$6,061.47 from Comcare for the cost of complying with the summons. Comcare offered to pay \$633.80, in accordance with the findings of the Tribunal in *Bestt and Military Rehabilitation and Compensation Commission [2017] AATA 1235*.

Dr Sharman refused the offer and made an application for a costs determination which was



heard on 18 January 2019. At that hearing, Dr Sharman contended that the time taken to respond to a Summons, including tasks such as considering what's being asked, identifying recordkeeping systems and documents which might exist, identifying potentially harmful documents, communicating with the Tribunal, attending hearings and producing the materials should be reimbursed by either the party who had filed the summons, or by the Commonwealth.

The Decision

In her decision, Ms Taglieri made a distinction between a Doctors duty to the Medical Board of Australia and the requirements under law when served with a Summons.

Ms S Taglieri found that it was reasonable for Dr Sharman to seek legal advice and was not satisfied he was unreasonable in addressing his mind and time to what the Summons required him to produce.

Although Dr Sharman spent time engaging in those tasks due to personal concerns and to garner support, Ms Taglieri was not satisfied that they were reasonable for the purpose of complying with the Summons.

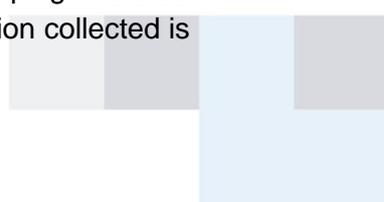
Lastly, Ms Taglieri made a distinction between what doctors are required to do to discharge their professional duty to patients or to participate according to standards expected by the Medical Board of Australia and that which is required by law when served with a Summons.

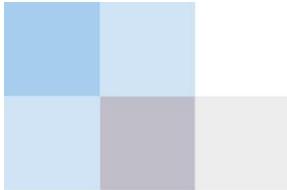
Ms S Taglieri was of the view that as Dr Sharman was required to appear in the Tribunal, and participated in the return of Summons hearing, regulations 13(3) and 13(4) were engaged. Therefore, she was satisfied that when Dr Sharman appeared, he gave evidence as is contemplated by procedures under the Act. The Tribunal found that Dr Sharman was entitled to recover fees and allowances for appearing at the return of Summons hearing (45 minutes at his hourly rate) as well as an allowance for the reasonable expenses incurred in producing the documents.

Ms Taglieri noted that the legal costs incurred for the advice about compliance with the Summons was, in her view, recoverable as a reasonable expense pursuant to regulation 13(6) on this occasion. However, it was noted that now he has the legal advice, if he was to incur legal costs each time he receives such a Summons, they're not likely to be unrecoverable.

Lessons Learnt

When a medical professional is required to produce documents under Summons, the Tribunal considers concerns about confidentiality or privacy an issue that is predominantly for the patient. Professional requirements imposed on Doctors concerning recordkeeping could be satisfied by advising patients at the commencement of treatment that information collected is





compellable to production to courts and tribunals. If a medical practitioner has particular concerns about the privacy of records, those concerns do not justify non-compliance with a Summons. The documents that are the subject of such concerns should still be produced to the Tribunal, but should be separated, with an explanatory note.

When a person is summoned to produce documents, the Tribunal is vested with the function of decision-maker and it isn't the summoned parties' issue to determine the relevance of the records.

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