

LITIGATION



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Auckland labs decision - what was it about and what are the implications?

The High Court has just released its decision in the high profile dispute between competing laboratory service suppliers in Auckland. Here we examine the issues at the heart of the case and the wider implications.

What were the issues in the case?

Diagnostic Medlab Limited (DML) had been the incumbent, near monopoly, supplier of laboratory services in Auckland. Between December 2005 and June 2006 the three Auckland district health boards (DHBs) conducted an Request For Proposal (RFP) process to choose a sole supplier for community laboratory services from 1 July 2007. The contract was awarded to Lab Tests Auckland Limited (Lab Tests).

DML challenged this decision on a number of grounds. They were joined in the challenge by Harbour Primary Health Organisation as a representative of Auckland PHOs and GPs.

There were two main issues dealt with in the decision. Firstly, whether there was procedural unfairness in the decision-making process as a result of:

- a conflict of interest by Dr Tony Bierre, who had been an Auckland District Health Board (ADHB) member at relevant times up until December 2005;

- Dr Bierre using confidential information obtained from his DHB role in the RFP response from Lab Tests.

Secondly, whether the DHBs were obliged to, or adequately, consulted PHOs and GPs.

The decision

The High Court set out all the facts in relation to Dr Bierre's relationship with the ADHB. At the time he was elected to the ADHB, he had incorporated a company to run a boutique lab with the intention of applying for funding from ADHB in the future. He also repeatedly suggested to ADHB over his time as a board member that DML was making super profits in the performance of its contract, and that a new lab supply arrangement should be entered into. This new arrangement would involve the supplier of laboratory services providing much greater financial information about the profits it was deriving. He said that in this way the current "information asymmetry" would be removed.

The tenor of Justice Asher's judgment is that Dr Bierre was a key influence in the DHB's development of its laboratory funding strategy and RFP process. Its thinking, although not necessarily set out in the RFP document, was to seek considerable savings

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and the new type of model which he had suggested (i.e. one in which the information asymmetry was removed).

Dr Bierre, in November 2005, became employed by and a shareholder in the consortium which successfully tendered for the laboratory testing contract. He stood down as an ADHB board member in December 2005.

The court held that the process was procedurally unfair for two reasons. First, Dr Bierre was in a conflict of interest throughout his time as a board member given his actions in pushing the DHBs towards an RFP seeking a major shift in the nature of laboratory services provided. Second, he used confidential information obtained from his position as an ADHB board member to assist the successful tenderer for the contract.

The court held that ADHB failed to manage this conflict of interest.

The court also held that the DHBs had an obligation to consult with PHOs and that this obligation was not discharged by simply providing a copy of a pre-RFP document, and asking for comment, at the start of the RFP process. The obligation to consult was particularly acute where the GPs were directly affected by the Lab Tests proposal which may see all practitioners assuming much greater responsibility for collecting samples for testing. Overall, the proposed changes were of such significance that PHOs should have been fully consulted on the decision.

Overall result

The court found that the contract entered into with Lab Tests was ultra vires so that it was of no legal effect.

Further analysis

The facts of the case concerning Dr Bierre's conflict of interest are stark. However, the

court took a very firm line on his conflict finding that it arose from the time he joined the ADHB. This was because, at that time, he had incorporated a company with the intention of seeking funding for laboratory work in Auckland from ADHB.

Dr Bierre had made a general disclosure of interest indicating that although he had no current employment or contractual relationship with ADHB, as he was a pathologist and ADHB was the major funder, this may change in the future. He also entered on the ADHB interest register his ownership or directorship of various companies including Lab Tests Auckland New Zealand Limited.

The judge held that it was not sufficient simply to refer to the potential for a conflict and list roles which may represent a conflict. To be meaningful, a disclosure statement had to disclose the nature of any conflict of interest that might arise so that other DHB members could properly assess it. Dr Bierre ought to have given an indication that his companies were actually carrying out laboratory work or intended to carry them out in the future and, if so, whether DHB funding was to be sought for that.

Because of his conflict of interest, and the confidential information he possessed, the judge held that the only way the position could have been “cured” was if the DHBs had refused to accept the Lab Tests proposal when it became clear that Dr Bierre was involved in it. In reaching this position, Justice Asher placed much emphasis on the statutory scheme including the third schedule of the New Zealand Public Health and Disability Act.

The judge also drew a distinction between an elected or appointed DHB member whose election or appointment was on the basis of certain strongly held views (which is not a conflict of interest) and the actions of such board member in seeking personal financial



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gain from the position (which is a conflict of interest).

The court held that there was an obligation to consult PHOs as a result of the NZPHD Act, consultation guidelines issued by the Ministry of Health, the contract between the DHBs and the relevant PHOs, and the importance of laboratory testing in relation to primary healthcare. The judge also seemed heavily influenced by the fact that the decision represented a major shift in the delivery of laboratory testing and would result in a greater move towards GPs assuming responsibility for collecting samples. Although there was some consultation with the PHOs, this was just before the RFP stage and did not draw sufficient attention to the significant changes to laboratory service that could ensue. As a result of this failure to consult, the contract was ultra vires.

Lessons to be learned

The lessons to be learned from the judgment are:

1. DHBs (and indeed any statutory or public body) must be particularly aware of conflicts of interest. It is not sufficient for there to be nominal declaration of a conflict of interest in a register by referring to a directorship or shareholding. Rather, an explanation ought to be given as to the reason for the conflict, or potential conflict, of interest so that its true nature and implications can be readily understood.
2. A conflict of interest will arise, and must be fully disclosed and managed, from the time a board member forms an intention to seek financial gain from his or her organisation (other than payment as a board member) even if active steps have not yet been taken to that end.
3. Confidential information received by a DHB member (or the member of any public or statutory body) should not be used for any

other purpose. Such use could call into question the validity of any subsequent decisions by the body in relation to that information.

4. If an actual conflict of interest is discovered, the DHB or public or statutory body needs to take swift and efficient steps to manage that. That may include advising a potential tenderer that its tender cannot be accepted because of the conflict of interest and/or misuse of confidential information.

5. A public body has an obligation to consult with stakeholders who will be affected by a decision. This can be a judgment call depending upon the importance of the decision and whether it represents a significant change from the status quo.

Finally, because of the stark facts here and the length of the judgment, there are some statements in it which may be seen as representing a shift from conventional judicial review analysis. In particular, the judgment may be seen as representing a more liberal trend towards judicial intervention in a commercial tender. This does not appear to be the intention of the judgment. But given some statements, it is possible that unsuccessful tenderers may believe they have greater prospects of success in challenging the outcome of a tender process. More litigation may follow.

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