

**ONTARIO PHYSICIANS AND SURGEONS DISCIPLINE TRIBUNAL**

**Citation:** *Fagbemigun v. College of Physicians and Surgeons of Ontario*, 2024 ONPSDT 30

**Date:** December 10, 2024

**Tribunal File No.:** 24-016

**BETWEEN:**

Ayokunle Fagbemigun

**Applicant**

- and -

College of Physicians and Surgeons of Ontario

**Respondent**

**REINSTATEMENT APPLICATION REASONS**

**Heard:** November 11-12, 2024, by videoconference

**Panel:**

Jennifer Scott (panel chair)

Rupa Patel (physician)

Rob Payne (public)

Linda Robbins (public)

James Watters (physician)

**Appearances:**

Ayokunle Fagbemigun, self-represented

Elisabeth Widner and Sayran Sulevani, for the respondent

**RESTRICTION ON PUBLICATION**

Pursuant to Rule 2.2.2 of the OPSDT Rules of Procedure and ss. 45-47 of the Health Professions Procedural Code, no one shall publish or broadcast the names of patients or any information that could identify patients or disclose patients' personal health information or health records referred to at a hearing or in any documents filed with the Tribunal. There may be significant fines for breaching this restriction.

## Introduction

[1] Dr. Fagbemigun's license was revoked by the Tribunal when it found he stole from Ontario's publicly funded health care system and harmed his patients for his own financial gain. The Tribunal's decision was upheld on appeal.

[2] Dr. Fagbemigun applies for reinstatement of his certificate of registration.

[3] Dr. Fagbemigun has not demonstrated that he is a suitable candidate for reinstatement and his application is dismissed. These are our reasons.

## Background

[4] Dr. Fagbemigun was a family physician practising at a clinic in Etobicoke where he was the sole physician. Prior to coming to Ontario in 2014, he practised in Manitoba and before that, in the Caribbean. Dr. Fagbemigun practised at the Etobicoke clinic from 2015 until 2023 when his license was revoked.

[5] Allegations of misconduct relating to Dr. Fagbemigun's billing practices at the clinic were referred to the Tribunal. The Tribunal found Dr. Fagbemigun had intentionally billed the Ontario Health Insurance Plan (OHIP) for thousands of tests and procedures that he had not provided or were not billable and had accepted fees for referring his patients to a private provider (Hart Medical) for cardiac tests. It found further that Dr. Fagbemigun had failed to meet the standard of practice of the profession because his documentation was inaccurate, he sent patients for unnecessary tests and documented tests that never happened. The Tribunal revoked Dr. Fagbemigun's certificate of registration. See *College of Physicians and Surgeons of Ontario v. Fagbemigun*, 2022 ONPSDT 11; *College of Physicians and Surgeons of Ontario v. Fagbemigun*, 2022 ONPSDT 22.

[6] Dr. Fagbemigun appealed the Tribunal's decision. The Divisional Court dismissed the appeal and found that "given the compelling evidence that the Appellant intentionally billed OHIP for thousands of tests he did not provide, received kickbacks for referring patients to the Hart Medical clinic, and conducted unnecessary tests of numerous patients, the revocation of his license was unquestionably fit." See *Fagbemigun v. College of Physicians and Surgeons of Ontario*, 2023 ONSC 2642 at para. 48.

[7] Dr. Fagbemigun applied for reinstatement in June 2024. If reinstated, he intends to return to solo practice.

### **The Application**

[8] Section 72 of the Health Professions Procedural Code, Schedule 2 to the *Regulated Health Professions Act, 1991*, SO 1991, c. 18 provides that a person whose certificate of registration has been revoked in disciplinary proceedings may apply to have a new certificate issued. The application cannot be made earlier than one year after revocation for misconduct unless the misconduct is sexual abuse of a patient. In that case, the physician must wait five years before applying.

[9] An application for reinstatement is not an appeal of the findings that led to revocation. The panel hearing the application proceeds on the basis that the misconduct as found occurred.

[10] The onus is on Dr. Fagbemigun to establish his suitability for reinstatement. We must determine, based on the evidence before us, whether Dr. Fagbemigun has met this onus. The standard of proof is a balance of probabilities, based on clear, cogent, and convincing evidence.

[11] There are two broad questions the Tribunal must answer on the reinstatement application:

- a. What is the risk of further misconduct, and if there is a risk, is it manageable with terms, conditions, and limitations?
- b. Is the applicant suitable to practise both in terms of protection of the public and confidence of the public in the profession's ability to govern itself? (*College of Physicians and Surgeons of Ontario v. Gillen*, 2010 ONCPSD 14)

[12] The Tribunal may also consider additional factors when determining the suitability of reinstatement. Some of these factors relate to the risk of further misconduct and other factors relate to the general requirements of certification of a physician. On the question of risk, the Tribunal may consider the facts of the misconduct, changes in the physician's circumstances since revocation and rehabilitation. On the general requirements of certification, the Tribunal must be satisfied the physician is mentally competent, will practise medicine with decency, integrity, and honesty, has sufficient knowledge, skill,

and judgment, and can communicate effectively and display a professional attitude. There may be some overlap between the factors that apply to risk and those that apply to certification. See O. Reg. 865/93 under the *Medicine Act, 1991*, SO 1991, c. 30, s.2.

[13] If the Tribunal finds there is a risk of further misconduct, the inquiry ends. A finding of risk means the public cannot be protected and the public's confidence in the profession's ability to govern itself is eroded if the physician is reinstated. A physician cannot be reinstated in either of these circumstances.

## **Analysis**

### **Misconduct**

[14] Dr. Fagbemigun engaged in very serious misconduct for his own financial gain and put the wellbeing of his patients at risk. His misconduct was intentional, multi-faceted, ongoing, and violated the public trust. He defrauded the public healthcare system, depriving it of funds that might have been spent on patient care. He billed for services that were never provided, provided care that was unnecessary and referred patients for tests for no clinical reason. His actions exposed his patients to harm.

[15] Dr. Fagbemigun says his misconduct was not deliberate – that it was an oversight arising from a lack of necessary information, resources and supports in Ontario. He says he was given no information or guidance from the College and the Ministry of Health on the need for training in billing before commencing his medical practice.

[16] Dr. Fagbemigun states his excessive workload, and the resulting stress, led to poor record keeping. He developed anxiety and a sleep disorder. He states his practice was disorganized, with inadequate documentation in his clinical records and the Electronic Medical Record system (EMR) was poorly designed. In a nutshell, Dr. Fagbemigun states his misconduct was caused by poor record-keeping because he was overworked and did not have appropriate supports.

[17] It is clear from Dr. Fagbemigun's explanations that he does not accept the Tribunal's finding that he engaged in an intentional scheme to defraud OHIP, a scheme which benefited him and harmed his patients.

[18] The College takes the position that unless Dr. Fagbemigun accepts the Tribunal's findings of misconduct, he cannot be reinstated.

[19] It is not a requirement on a reinstatement application that Dr. Fagbemigun admit guilt or even agree with the Tribunal's findings. He must, however, acknowledge that those findings have been made and must show he has taken sufficient steps to prevent the misconduct as found from reoccurring. See *Gillen*.

#### Risk of Future Misconduct

[20] The central question before us is whether, if Dr. Fagbemigun is reinstated, the public will be protected and confidence in the integrity of the profession and the College's ability to regulate the profession in the public interest is maintained. See *Kitakufe v. College of Physicians and Surgeons of Ontario*, 2021 ONPSDT 41 at paras. 14 and 15.

[21] With respect to risk of future misconduct, Dr. Fagbemigun has adduced scant evidence to show he is at low risk. In his letter of apology, he says he has full insight into the cause of his mistakes, has learned from them and promises that going forward, there will be positive changes in his character. He has proposed no terms, conditions, or limitations on his license to mitigate the risk of future misconduct.

[22] Dr. Fagbemigun has taken several steps following revocation. The question before us is whether these steps mitigate the risk of future misconduct.

[23] Dr. Fagbemigun has participated in psychotherapy with Ayo Akanbi. He filed a letter from Mr. Akanbi which says that Dr. Fagbemigun has made notable improvements in managing his stress and anxiety, has developed enhanced coping strategies, and has a strong commitment to his mental health. Mr. Akanbi states Dr. Fagbemigun is aware of the need to manage his workload and maintain a work/life balance. Mr. Akanbi states Dr. Fagbemigun is ready to return to his professional duties. Dr. Fagbemigun's work with Mr. Akanbi relates to anxiety, stress, and coping strategies. There is no evidence that these issues were linked to the Tribunal's findings of misconduct or that Dr. Fagbemigun's psychotherapy would lower the risk of him committing misconduct in the future.

[24] Dr. Fagbemigun has completed a medical record-keeping course at the University of Toronto. There is no evidence that a deficient knowledge of record-keeping practices was a factor in his misconduct. More specifically, the fact that Dr. Fagbemigun has taken

this course gives us no assurance that he would no longer falsify patient charts and misrepresent the care he was providing.

[25] In addition to the steps he has taken, Dr. Fagbemigun proposes to take additional steps if reinstated. Dr. Fagbemigun will use an upgraded EMR system which he says will have better templates and will improve his patient charting. We have no evidence that any shortcomings in his prior EMR were a factor in Dr. Fagbemigun's misconduct.

[26] He will retain a third-party billing agent. The agent would use billing sheets created by Dr. Fagbemigun to submit claims to OHIP for payment. We do not see how this measure would prevent Dr. Fagbemigun from creating billing sheets with false or ineligible claims.

[27] Dr. Fagbemigun will limit his working hours. He will work from 9 am to 6 pm and will avoid working weekends, if possible. He says he would employ an office manager to handle his purchasing and documentation. He has not explained how any of these things would reduce the risk of future misconduct. He has not proposed practice supervision, practice assessment, ongoing monitoring of OHIP billings or other measures that could prevent future misconduct.

[28] Dr. Fagbemigun has provided inadequate evidence to show he has or will take steps that reduce his risk of committing further misconduct. To understand the quality of evidence that should be called, it is useful to examine the evidence of Dr. Jamal, a physician who was granted reinstatement after engaging in fraudulent conduct.

[29] Dr. Jamal intentionally fabricated research data over a prolonged period and attempted to cover up her conduct and avoid responsibility. She blamed others to protect herself. Patients were exposed to the risk of harm after enrolling in clinical trials that were undertaken in response to falsified data. Dr. Jamal's license was revoked because of her conduct. See *College of Physicians and Surgeons of Ontario v. Jamal*, 2020 ONCPSD 23.

[30] On her application for reinstatement, Dr. Jamal called extensive evidence to show she was at low risk of repeating the misconduct. Dr. Jamal testified about the many changes she had made since confronting her misconduct. She engaged with the Physician Health Program (PHP) and signed a monitoring contract. She worked with a professional coach to understand the multiple breaches in her professionalism. Dr.

Jamal testified she would not work in academia because she believed she had succumbed to the expectations of others to achieve in that environment. If permitted to do so, she would work in a clinical practice.

[31] Dr. Jamal called third-party witnesses on the question of risk. She called expert evidence from a forensic psychiatrist who opined she was at low risk of committing professional misconduct in the future. She called evidence from her treating psychiatrist who testified Dr. Jamal committed professional misconduct because of a very particular set of circumstances which would not reoccur. Her psychiatrist testified that through therapy, Dr. Jamal was aware of the psychological causes which led to her conduct, and she would ensure it would not be repeated. Dr. Jamal called evidence from a professional coach who identified the failures of professionalism by Dr. Jamal and the steps required to reduce the risk of these recurring. And finally, Dr. Jamal called evidence from the Associate Director of the PHP on her compliance with the PHP Monitoring Contract. All of this evidence went to the question of whether Dr. Jamal was at risk of committing misconduct again. The Tribunal concluded the risk that Dr. Jamal would commit further misconduct was low and Dr. Jamal was reinstated.

[32] None of the steps that Dr. Fagbemigun has taken or intends to take decreases the likelihood of further misconduct. Reducing stress, anxiety and office hours does not prevent Dr. Fagbemigun from committing billing fraud and putting his own interests ahead of his patients. The same can be said of a new EMR system, third-party biller, and office manager. If there is no connection between these steps and his misconduct, they do little to reduce the risk that he may engage in misconduct in the future.

## **Conclusion**

[33] Dr. Fagbemigun has not taken meaningful action to address his misconduct. This may be because he does not accept the Tribunal's findings or because he has little insight into his misconduct. We do not have to determine why he has failed to take meaningful action. Our role is to determine whether the steps that Dr. Fagbemigun has taken or proposes to take will prevent him from engaging in misconduct in the future. None of the steps relied upon by Dr. Fagbemigun reduce the risk that he will engage in a

billing scheme to put his own financial interests ahead of his patients. Given our conclusion on the issue of risk, there is no need to consider the other relevant factors.

[34] It is Dr. Fagbemigun's onus to establish that he is of low risk and should be reinstated. He has failed to meet that onus and his application is dismissed.