

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Health Ombudsman v De La Rey* [2020] QCAT 223

PARTIES: **DIRECTOR OF PROCEEDINGS ON BEHALF OF
THE HEALTH OMBUDSMAN**
(applicant)

v

ELLA DE LA REY
(respondent)

APPLICATION NO/S: OCR354-19

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 15 July 2020

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Judicial Member Robertson
Assisted by:
Professor R Dooley
Dr K Fritzon
Ms F Petty

ORDERS:

- 1. Pursuant to section 107(2)(b)(iii) of the *Health Ombudsman Act 2013 (Qld)*, the respondent has engaged in professional misconduct;**
- 2. Pursuant to section 107(3)(a) of the *Health Ombudsman Act 2013 (Qld)*, the respondent is reprimanded;**
- 3. The respondent is fined the sum of \$2000 to be paid to the Health Ombudsman within 3 months of today's date; and**
- 4. Each party will pay its own costs.**

CATCHWORDS: PROFESSIONS AND TRADES – HEALTH CARE
PROFESSIONALS – PSYCHOLOGISTS – where
respondent engaged in a boundary violation with a
vulnerable patient – where respondent admitted
professional misconduct – whether the respondent should
be fined

Health Practitioner Regulation National Law
(Queensland) s 5, s 7
Health Ombudsman Act 2013 (Qld) s 107

Health Ombudsman v Jolley [2019] QCAT 173
Health Ombudsman v Rissanen [2020] QCAT 96
Legal Services Commissioner v Fellows [2017] QCAT 337
Medical Board of Australia v Holding [2014] QCAT 632
Nursing and Midwifery Board of Australia v Tainton [2015] QCAT 161
Psychology Board of Australia v Garcia [2015] VCAT 128

REPRESENTATION:

Applicant: Director of Proceedings on behalf of the Health Ombudsman

Respondent: Thynne & Macartney

APPEARANCES: This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld)

REASONS FOR DECISION

- [1] These disciplinary proceedings were referred to the Tribunal by the applicant Director on 31st October 2019 pursuant to sections 103 and 104 of the Health Ombudsman Act 2013 (the Act). At all relevant times, the respondent was a registered psychologist under the National Law with the Psychology Board of Australia (the Board); a health service provider within the meaning of section 8(a)(i) of the Act; and subject to the following guidelines and codes approved by the Board pursuant to section 41 of the National Law:
- (a) Code of Ethics published by the Board in 2007;
 - (b) Ethical Guidelines for managing professional boundaries and relationships (the Guidelines);
- [2] The respondent practiced as a psychologist in a Health Centre in Brisbane.
- [3] From about May 2013 until the 12th April 2016, the respondent was the treating psychologist for a patient (ZA) who was vulnerable and suffering from a number of psychological disorders including complex PTSD, major depressive disorder and borderline personality disorder.
- [4] The referral alleges that during the relevant period, the respondent engaged in a boundary violation (Ground 1); she did not terminate the therapeutic relationship and refer ZA to another health service provider once professional boundaries had deteriorated (Ground 2); and she failed to obtain professional advice and guidance from her peers once the professional boundaries had deteriorated (Ground 3).
- [5] The applicant alleges that the respondent's conduct amounts to professional misconduct.

The Relevant Conduct

- [6] The parties have agreed to a statement of facts which can be summarised as follows.
- [7] During the relevant period, ZA attended the respondent for psychological services approximately 62 times, that is between the 18th May 2013 and April 2016.
- [8] On the 25th May 2015, ZA told the respondent that she was in love with her. On the 11th December of that year, ZA emailed the respondent and stated, inter alia, “I think I am in love with you. Not just transference.”
- [9] On the 22nd December 2015, during a consultation in her rooms, the respondent told ZA that she had feelings for her and that:
- (a) Her feelings of affection were based in countertransference which needed to be managed in the therapy and “shut-down” in terms of the patient having any expectation around the disclosure; and
 - (b) A personal relationship was not possible between them.
- [10] From late 2015 until approximately late August 2016, the respondent engaged in a large number of inappropriate email communications with ZA.¹In these emails, the respondent and ZA discussed their feelings for each other.
- [11] During the six month period between December 2015 and June 2016, there were also several telephone calls between them, and a number of face to face meetings outside the consultation room. On 9th February 2016, they met by arrangement at the Wynnum foreshore and on 2nd March, they met at Manly.
- [12] On the 12th April, the respondent terminated the therapeutic relationship with ZA, and during that consultation, she held ZA.
- [13] Despite this, the respondent and ZA continued to communicate and see each other after the 12th April. On 24th May, they again met at Manly where there were some inappropriate statements made and the respondent gave ZA a hug. On about the 7th June, the respondent met with ZA at her home when there was no therapeutic reason to do so, and during this visit she entwined her hands with ZA’s hands for a period of time. There continued to be some email communication between them until 25th August, when the respondent stopped responding to ZA’s emails.

Characterisation of the Conduct

- [14] In her submission filed on her behalf by her solicitors on the 14th May 2020, the respondent unreservedly accepts that her conduct, in respect of each allegation, either considered separately or together, amounts to “professional misconduct” as defined in section 5 of the National Law. This appropriate concession is consistent with the expert opinion obtained by the applicant from clinical psychologist Kristie Clarke whose report is dated 23rd August 2017.

¹ There are 574 emails in total

- [15] As Ms Clarke notes in her clinical advice to the regulator², after reviewing all the material, the conduct set out now in the 3 allegations, is contrary to a number of sections in both the Guidelines and Code of Ethics, and falls “substantially below the standard reasonably expected of a health practitioner by the public or the practitioners’ professional peers”.
- [16] Ms Clarke acknowledged that ZA had a complex presentation, and that she was also under the care of a general practitioner and a psychiatrist during the relevant period who had prescribed various medications to treat her various conditions. She notes that the respondent could have readily discussed with both practitioners a plan for transferring ZA to another psychologist, once she realized that she had allowed professional boundaries to be crossed inappropriately. Ms Clark is of the opinion (which I accept) that the effect of the relationship with the respondent would likely have contributed to ZA’s declining mental health and further hospitalisation.
- [17] I am satisfied that the applicant has satisfied the onus of proving that the admitted conduct amounts to professional misconduct.

Sanction

- [18] The paramount guiding principle is that the health and safety of the public are paramount.³ These proceedings are protective in nature, and not punitive.⁴
- [19] An appropriate disciplinary response to professional misconduct is apt to act as a general deterrent to other health practitioners who may consider behaving in the same way, and to maintain public confidence in health professionals by promoting proper ethical and professional standards.
- [20] In relation to the facts of each case, the Tribunal may consider various factors in determining the appropriate sanction, including the nature of the conduct itself; the insight and remorse shown by the respondent;⁵ any evidence of steps taken by the practitioner to address the reasons behind his or her conduct, relevant both to insight and the Tribunal’s assessment of future risk; and any matters personal to the respondent that may give context to the conduct. This will also include any past disciplinary notifications, incapacity, criminal history and co-operation with the regulator and in the disciplinary proceedings.
- [21] Although the relationship was never sexual, it is serious as it involved boundary violations and failures to act in relation to an extremely vulnerable patient under the respondent’s care. In her affidavit dated 10th March 2020, the respondent acknowledges that ZA had been greatly traumatized by the relationship which had romantic overtones and which did, in fact, traumatize ZA.⁶ It continued for approximately 2 years and the respondent should have known in late 2015 that the professional boundary had been violated, and she should have terminated the therapeutic relationship at that time. It is also serious that even after she did terminate the relationship in April 2016, she continued to see and communicate with ZA.

² Hearing Brief pages 215-221

³ Sections 3 and 4 of the Act

⁴ See for example *Health Ombudsman v Jolley* [2019] QCAT 173 at [75]

⁵ *Jolley* Ibid [78]

⁶ See the Victim Impact Statements pages 209-213 of Hearing Brief

Insight and Remorse

- [22] The applicant fairly accepts that the respondent has shown considerable insight and remorse.
- [23] The matter came to the attention of the regulator after ZA complained to the respondent's employer who made a mandatory disclosure to OHO on 2nd November 2016. On the 19th December 2016, after being notified of the investigation, the respondent made a self-notification of her relationship with ZA.
- [24] The respondent was dismissed from her employment but was able to obtain other employment as a psychologist. Her registration has never been suspended, however on 12 May 2017, the HO took immediate action by imposing conditions on her registration. It is common ground that she has fully complied with those conditions and these were removed by the HO on 27th April on the basis that the respondent no longer posed a risk to persons. This is an important consideration for the Tribunal in formulating an appropriate disciplinary response.
- [25] In her self-notification of 19th December, the applicant submits that the respondent downplayed the extent of her relationship with ZA and did not explain that she was a fairly active participant in the inappropriate email exchanges between them. The respondent disagrees with this submission. She provided the emails she still had available to her, and assumed that the regulator would have all the emails she had exchanged with ZA. In my view, this minor disagreement does not matter. The respondent expressed shame and insight from the outset once the complaint had been made. She obviously realized at various stages during her relationship with ZA, that boundaries had been violated, so even then she realized that she was ethically compromised. Sadly, she did not follow through with her intention to terminate the therapeutic relationship when she realized that boundaries had been violated; and that is why the matter has proceeded to this stage. However, she had undertaken education in professional boundaries and regular supervision with another psychologist. She also began treatment with a psychologist Dr Jillian Millar in August 2016, and this treatment continued until recently when Dr Millar commenced maternity leave.

Delay

- [26] The impugned conduct occurred between late 2015 and August 2016 that is almost 4 years ago. The relevance of delay in proceedings of this kind, is primarily to demonstrate to the Tribunal what the respondent has done (or not done) to address the causes of her conduct,⁷ which in this case is substantial and in her favour. It demonstrates (as the HO accepts) that she no longer presents as any risk to the health and safety of the public.

⁷ *Legal Services Commissioner v Fellows* [2017] QCAT 337

- [27] Clearly the relationship between a psychologist and a patient, and in this case an extremely vulnerable one with complex health issues, involves a considerable power imbalance which makes general deterrence a significant factor in such cases.⁸

Comparable cases

- [28] The applicant seeks a sanction of a reprimand and a fine of \$10000. The respondent contends that a fine is not necessary given her full co-operation with both the regulator and in these proceedings, and her very significant efforts to address the reasons behind her professional misconduct. As noted in the report of Dr Brian Kable⁹, who engaged in 6 sessions with the respondent on boundary violations, she “was most unlikely to reoffend”.
- [29] The applicant has referred the Tribunal to two decisions¹⁰ involving boundary violations of a non-sexual nature. Neither involved conduct as serious as the respondents. Dr Holding was found to have engaged in unprofessional conduct and was fined \$5000 and given a reprimand, however, he attempted to mislead AHPRA in the early stages of the investigation and this was a factor that played into the sanction.
- [30] The respondent relies on *Health Ombudsman v Rissanen*¹¹ which involved a psychologist engaging in non-sexual boundary violations with a 22 year old female patient that he had care of as a case manager. The case is comparable to the present. The psychologist was 55 and the patient, who Judicial Member McGill SC described as “vulnerable”, was 22 at the time of the boundary violation. At [14] the Tribunal noted:

What makes the conduct in this case more serious is that the respondent persisted in seeking to maintain the inappropriate relationship even when the patient sought to bring it to an end, to the point of pestering the patient and pressuring her to continue contact. This occurred despite clear evidence that it was harmful to her psychological state, which gives the relationship a seriously inappropriate character

- [31] The practitioner was found to have engaged in professional misconduct. He was reprimanded. By the time of the Tribunal hearing he was no longer registered.
- [32] In my view, a proper balance can be struck here, having regard to the paramount principle, by reprimanding the respondent and imposing a fine of \$2000.
- [33] The non-publication order made by his Honour Judge Allen QC on 18th November will remain in force.
- [34] The Tribunal makes the following orders:
1. Pursuant to section 107(2)(b)(iii) of the *Health Ombudsman Act 2013* (Qld), the respondent has engaged in professional misconduct;

⁸ *Psychology Board of Australia v Garcia* [2015] VCAT 128 at [46]

⁹ Dated 20th April 2017

¹⁰ *Nursing and Midwifery Board of Australia v Tainton* [2015] QCAT 161 and *Medical Board of Australia v Holding* [2014] QCAT 632

¹¹ [2020] QCAT 96

2. Pursuant to section 107(3)(a) of the *Health Ombudsman Act 2013* (Qld), the respondent is reprimanded;
3. The respondent is fined the sum of \$2000 to be paid to the Health Ombudsman within 3 months of today's date; and
4. Each party will pay its own costs.