QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Health Ombudsman v Upadhyay* [2020] QCAT 163
PARTIES:	**DIRECTOR OF PROCEEDINGS ON BEHALF OF THE HEALTH OMBUDSMAN** (applicant) **v** **RITESH UPADHYAY** (respondent)
APPLICATION NO/S:	OCR241-19
MATTER TYPE:	Occupational regulation matters
DELIVERED ON:	27 May 2020
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	Judicial Member D J McGill SC, assisted by Dr D Khursandi, Dr J Cavanagh, Ms C Eliot.
ORDERS:	**1. The Tribunal decides that the respondent behaved in a way that constituted professional misconduct.** **2. The Tribunal reprimands the respondent.** **3. The respondent is fined the sum of $10,000, to be paid to the applicant within six months.** **4. The parties bear their own costs of this proceeding.**
CATCHWORDS:	PROFESSIONS AND TRADES – HEALTH CARE PROFESSIONALS – MEDICAL PRACTITIONERS – DISCIPLINARY PROCEEDINGS – PROFESSIONAL MISCONDUCT AND UNPROFESSIONAL CONDUCT – DEPARTURE FROM ACCEPTED STANDARDS – Boundary violations – social contact with vulnerable former patient – financial assistance – mitigating circumstances – joint submissions - sanction *Health Ombudsman Act* 2013 s 107 Health Practitioner Regulation National Law (Qld) s 5 *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 *Health Ombudsman v Kimpton* [2018] QCAT 405 *Health Ombudsman v Rissanen* [2020] QCAT 96 *Medical Board of Australia v de Silva* [2016] QCAT 63

Medical Board of Australia v Dolar [2012] QCAT 271
Medical Board of Australia v Holding [2014] QCAT 632
Medical Board of Australia v Martin [2013] QCAT 376
Nursing and Midwifery Board of Australia v Tainton [2014] QCAT 161

REPRESENTATION:

Applicant:	Office of the Health Ombudsman
Respondent:	Ms E Watson of Ashurst Lawyers.
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] This is a reference by the applicant of disciplinary proceedings against the respondent under the *Health Ombudsman Act* 2013 s 103(1)(a), s 104. In accordance with that Act, I am sitting with assessors Dr Khursandi, Ms Elliot and Dr Cavanagh.[1]

[2] The respondent is a registered health practitioner for the purposes of the Health Practitioner Regulation National Law (Qld), being a registered medical practitioner. The applicant alleges that the respondent engaged in professional misconduct in a particular respect, in that he engaged in inappropriate communications with a person who had come under his care as a patient at a hospital.

[3] The parties have provided the Tribunal with an agreed statement of facts. The respondent has been legally represented in these proceedings. The parties have provided a joint submission to the Tribunal, and the respondent has filed an affidavit, affirmed on 29 January 2020. The hearing proceeded on the papers, in accordance with the *Queensland Civil and Administrative Tribunal Act* 2009 s 32.

[4] The Tribunal accepts the facts set out in the agreed statement of facts. They, and some other information before the Tribunal, may be summarised as follows: The respondent was born in 1979 and is now 40. He obtained a medical qualification in 2005, and he was first registered as a medical practitioner in 2007. From 2008 he held various hospital appointments, generally in the area of emergency medicine. In 2015 he was employed at a Brisbane hospital as an emergency medicine registrar. One morning he attended a young woman who had presented at the hospital concerned that she had suffered ill effects from the consumption of illegal drugs. The respondent examined her and performed an ECG, and concluded that she was not suffering from any condition requiring further treatment. He counselled her against taking illegal drugs, recommended that she see a general practitioner, and discharged her, saying that he would contact her the next day to ensure she was well. He did so, and asked about her condition, and if she was safe.

[5] Over the following four months, there were a number of communications between the respondent and the former patient, by telephone or by text. These were generally of a social nature, although during them she did at times ask him for

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1 *Health Ombudsman Act* 2013 s 126; see s 127 for their function.

advice about medical concerns she had. When she did so, he advised her to see a general practitioner. As well, they met at times at cafes or other hospitality venues, and in the respondent's car. These were social meetings, although occasionally she would mention health concerns. Because of her age, substance abuse and addiction problems, and a difficult relationship with her family, the former patient was a vulnerable person. The respondent was aware of these matters, and of her medical history. On occasions the respondent provided her with amounts of money, in total about $1,500, at the request of the former patient, who did not repay any of it. In fact the money was used to pay for illegal drugs. In time the respondent became suspicious about this, and on occasions paid for things for her rather than provide her with cash.

[6] On one occasion when she was unwell he examined her in his car, then wrote a prescription for antibiotics for her which he paid to have dispensed. On another, she told him she had been kicked out of her home, and he provided accommodation at a hotel for her. He later discovered she had invited others to the room, and following this he ceased to contact her.

[7] Subsequently the former patient spoke to other hospital staff about the respondent, as a result of which the respondent was interviewed in November 2015 by his employer. After this, the employer notified the applicant, and there was an investigation during which the respondent provided a statement to the applicant, and was later interviewed. During the interview, the respondent made a number of relevant admissions, and demonstrated great insight and remorse. In May 2016 the applicant imposed conditions on the respondent's registration, requiring a chaperone to be present for each interaction with a female patient, and requiring further steps to be taken by the respondent in connection with this. Those conditions were amended in July 2019, and removed by the applicant in January 2020. While the conditions were in place, they were complied with by the respondent in all respects, except that on three occasions there was a short delay in the provision of chaperone logs to the applicant. On six other occasions, the applicant raised supposed failures to comply with the conditions with the respondent, when in fact there had been no failure to comply.

[8] The existence of these conditions has imposed significant difficulties on the respondent's pursuit of his career path, principally by preventing him in practice from obtaining employment which he required to pursue specialist qualifications. The employment he has been able to secure has generally been less remunerative than hospital employment, which has imposed a financial strain on him and his family. In addition, he has had the stress of having this proceeding hanging over his head, and has not been responsible for the considerable delay in bringing the matter before the Tribunal.

[9] The parties submitted that this behaviour of the respondent amounted to professional misconduct. I am aware of the definition of professional misconduct in s 5 of the National Law, and that in the past boundary violations have commonly been characterized by the Tribunal as professional misconduct. In the present case relevant features include that the former patient was young, albeit not a juvenile, and was a vulnerable person for reasons known to the respondent. The conduct extended over a period of some months, involving a good deal of contact during that period, although it did not become intimate or sexual. Mitigating features include that there was only one patient involved, and it was a misguided attempt by the respondent to assist the former patient, which was to some extent manipulated by

her for her benefit. It is also relevant that the respondent desisted from this conduct after a threat to report him, although there was no complaint made at that time. He demonstrated insight and remorse during his interview with the investigator of the applicant, and in his affidavit before the Tribunal, and cooperated with the investigation and in this proceeding.

[10] The submissions referred to the decision of the Tribunal in *Medical Board of Australia v Holding* [2014] QCAT 632, where the respondent, a medical practitioner, sent a patient three text messages requesting that she meet him socially. When his contact was rebuffed, he had not persisted. This was characterized as unprofessional conduct, and the respondent was required to complete further education in boundary violation issues, and pay a fine of $5,000. He was continuing to practice, and his registration was not suspended. The behaviour here was much more persistent, and involved social meetings and financial support.

[11] There are other earlier decisions of which I am aware, involving social contact with a patient. In *Nursing and Midwifery Board of Australia v Tainton* [2014] QCAT 161 the respondent, a registered nurse, communicated by telephone and by post on a number of occasions with a person met as a patient. This was characterized as professional misconduct, although "not at the serious end of such cases", with the possible aggravating feature that the patient was an inmate at a correctional facility when they met. The respondent had surrendered her registration two years earlier; she was reprimanded, and prevented from reapplying for registration for three months.

[12] In *Health Ombudsman v Kimpton* [2018] QCAT 405 an experienced enrolled nurse formed an inappropriate relationship with a patient who was being discharged from a secure mental health facility. There were communications over three years, no intimacy but the respondent provided financial support. This was characterized as professional misconduct, on the basis of the importance of enforcing ethical rules, but "at the lower end of the spectrum."[2] It was acknowledged that the relationship was supportive and there was no evidence of harm to the patient. The respondent was reprimanded, but no other sanction was imposed.

[13] In *Health Ombudsman v Rissanen* [2020] QCAT 96 the respondent, a psychologist, had been communicating for some time on a social basis with a young, vulnerable patient, and had met her socially, and expressed affection, although it was not reciprocated. An aggravating feature was that he persisted in communicating when she sought to stop further contact from him. This was characterized as professional misconduct. The respondent was reprimanded, but no other sanction was imposed, as he was no longer registered, had not worked full time since the incident which occurred five years earlier, and had left the health care field for two years.

[14] Given the significance and persistent of the boundary violation in this case, and in the light of the earlier decisions, I agree with the joint submission that the respondent's conduct amounted to professional misconduct as defined in the National Law s 5. In imposing a sanction, the health and safety of the public are paramount.[3] Relevant considerations include both personal and general deterrence, the maintenance of professional standards and the maintenance of public confidence.[4] The function of the Tribunal is protective, not punitive.[5] The relevant

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2 [2018] QCAT 405 at [48], [49].
3 Health Ombudsman Act 2013 s 4(2)(c).
4 *Health Ombudsman v Kimpton* [2018] QCAT 405 at [79].

conduct occurred some five years ago, and there is no allegation that there has been any further similar incident. The period of time which has elapsed is relevant, because it suggests that the respondent has rehabilitated since this conduct occurred. The respondent has cooperated with the investigation, and in the proceeding. Other relevant matters have already been referred to.

[15] The parties provided a joint submission as to sanction to the Tribunal. The effect of a joint submission as to sanction was discussed by Horneman-Wren DCJ in *Medical Board of Australia v Martin* [2013] QCAT 376 at [91] – [93], by reference to authorities, in terms with which I respectfully agree. I would merely add reference to the later decisions in *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482, in particular at [59], and *Medical Board of Australia v de Silva* [2016] QCAT 63 at [29] – [31]. I do not propose to depart from the outcome proposed by the parties.

[16] Part of the sanction proposed is that the respondent pay a fine to the applicant. Fines should always take into account the capacity of the individual practitioner to pay: See by analogy the *Penalties and Sentences Act* 1992 s 48(1). Unfortunately, the only material before the Tribunal from either side as to the financial capacity of the respondent is the references in the respondent's affidavit to the financial difficulty caused to him by the conditions imposed on his practice. Nevertheless, where the fine is proposed in a joint submission, I am content to proceed on the basis that the respondent has the capacity to pay a fine of $10,000 as proposed, and within the period of six months proposed.

[17] Accordingly the orders of the Tribunal are:

1. The Tribunal decides that the respondent behaved in a way that constituted professional misconduct.

2. The Tribunal reprimands the respondent.

3. The respondent is fined the sum of $10,000, to be paid to the applicant within six months.

4. The parties bear their own costs of this proceeding.

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[5] *Medical Board of Australia v Dolar* [2012] QCAT 271 at [30].