

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Health Ombudsman v Abdelkadiri* [2020] QCAT 199

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

v

NOURDDINE ABDELKADIRI
(respondent)

APPLICATION NO/S: OCR098-19

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 6 May 2020 (*ex tempore*)

HEARING DATE: 6 May 2020

HEARD AT: Brisbane

DECISION OF: Judicial Member Robertson

ORDERS:

- 1. Pursuant to s 113(1) of the *Health Ombudsman Act 2013*, the Tribunal finds that because of his conduct, the respondent poses a serious risk to persons;**
- 2. Pursuant to s 73(2)(a)(ii) of the *Health Ombudsman Act 2013*, the Tribunal sets aside the decision to issue the interim prohibition order dated the 7th of October 2016;**
- 3. Pursuant to s 113(4)(a) of the *Health Ombudsman Act 2013*, the respondent is permanently prohibited from providing any health service;**
- 4. Each party must bear their own costs of the proceedings.**

CATCHWORDS: PROFESSIONS AND TRADES – HEALTH CARE PROFESSIONALS – OTHER HEALTH CARE PROFESSIONALS – where the respondent was an unregistered health care professional – where the respondent provided massage therapy – where the applicant instituted disciplinary proceedings against the respondent – where the respondent has not been convicted guilty of any offending – where the respondent did not engage with the proceedings – whether the Tribunal should make an order permanently prohibiting the respondent from providing any health service

Health Ombudsman Act 2013 (Qld) s 8, s 107, s 113

Health Ombudsman v Kirk [2019] QCAT 301

Health Ombudsman v MacBean [2019] QCAT 300

Health Ombudsman v Newman [2019] QCAT 397

Office of the Health Ombudsman v Costello [2016] QCAT 117

**APPEARANCES &
REPRESENTATION:**

Applicant: C Lloyd of Office of the Health Ombudsman

Respondent: No appearance

REASONS FOR DECISION

- [1] On the 29th of March 2019, the applicant Director referred these disciplinary proceedings to the Tribunal. The proceedings are protective in nature, not punitive, and a primary consideration for the Tribunal, as stated in s.3(1)(a) of the *Health Ombudsman Act 2013* (“The Act”) is to protect the health and safety of the public.
- [2] The application relates to allegations of quite serious boundary violations by the respondent in 2016, involving two separate female patients, at a time when he was working as a massage therapist in an Ipswich clinic, where he was an employee. As such, he was a healthcare provider and health practitioner, as defined in s 8(a)(i) of the Act.
- [3] As massage therapy is not a “health profession” under the National Law, the respondent was not required to be registered.
- [4] The two instances, the subject of the complaint occurred on the 9th of January 2016, involving a 27-year-old female patient and then on the 7th of March 2016, involving a 28-year-old female patient. The factual circumstances surrounding each boundary violation are set out in significant detail at paragraphs 26 to 36 and 39 to 45 of the applicant’s submissions, and there is no need for me to refer to them in detail.
- [5] The Health Ombudsman has sought the opinion of a qualified remedial massage therapist, Mr Flaxman, in relation to the behaviour, and his opinion is that in relation to both patients, the respondent’s behaviour violated sexual boundaries during treatment, and involved conduct which had no regard to the patients’ rights, particularly their right to consent or otherwise, and, in each case, particularly in relation to the first patient, caused them to feel most uncomfortable. They both made complaints to the owner of the clinic, who, in turn, referred the matter to the Health Ombudsman on 16th of May 2016.
- [6] On the 7th of October 2016, the Health Ombudsman issued an interim prohibition order, which prohibited the respondent from providing any massage therapy services to female patients, either in a clinical or non-clinical setting and whether for remuneration or not.
- [7] The respondent has not engaged in these disciplinary proceedings. Prior to the filing of the proceedings, he made contact with the Office of the Health Ombudsman using a Hotmail email address; and on the 22nd of October 2019, the Tribunal directed that informal and substituted service of the referral and evidence in support be

effected on the respondent by sending all relevant documentation to him at that email address.

- [8] This has been done and the respondent has made no response. His present whereabouts are unknown. In an email to the principal legal officer, Mr Lloyd, whose affidavit is filed in these proceedings and contains the evidence in support of the referral application; on the 20th of December 2019, the respondent did reply to an email addressed to that address and I'll refer to that later in relation to the issue of insight.
- [9] The referral calls up the now-repealed s 113 of the Act. These proceedings were commenced prior to the commencement of the Act that repealed Part 10 Division 4 of the Act, so continue as if s.113 had not been repealed.
- [10] I accept the opinion of the expert, that in both cases involving the respondents' female clients, his conduct involved a serious boundary violation involving sexualised and/or indecent conduct while providing a massage service to two patients, who by the very nature of the service were vulnerable. I also accept the submission made by the applicant that both boundary violations involved a significant breach of trust and caused significant distress to both women.
- [11] The first consideration for the Tribunal to determine is whether pursuant to the now repealed s 113 of the Act, the respondent presents as a serious risk to the public. In *Health Ombudsman v Kirk* [2019] QCAT 301, the Deputy President of the Tribunal, his Honour Judge Allen QC wrote (at [14]):
- “The term, “serious risk”, is not defined in the HO Act, the National Law or the Acts Interpretation Act 1954. The term therefore takes its ordinary meaning in its statutory context. The word, “serious”, is defined in the Macquarie Dictionary as:
- “Of grave aspect; weighty or important; giving cause for apprehension; critical; to be considered as an extreme example of its kind.””
- [12] The meaning of “serious risk” has also been considered by the Tribunal in *Office of the Health Ombudsman v Costello* [2016] QCAT 117, and also in *Health Ombudsman v MacBean* [2019] QCAT 300 and *Health Ombudsman v Newman* [2019] QCAT 397. The Tribunal has adopted a set of criteria to determine if a “serious risk” exists. It is described aptly in the submission of the applicant as a three-limb test but is not intended to be exhaustive. This will always depend upon the individual facts of the case and the context in which the impugned conduct occurs. The Tribunal will consider the risk, the likelihood of the risk eventuating and the seriousness of the consequences if the risk eventuates.
- [13] The above decisions highlight important indicators of propensity in the form of past and repeated offending behaviour. Other relevant factors that the Tribunal takes into account include:
- (a) Any explanation as to why the relevant conduct occurred, evidence of the particular circumstances of the conduct, or evidence of the respondent's character, generally;
 - (b) The existence of any physical or psychological condition which may impact upon the ability or likelihood of the person engaging in particular conduct in the future;

- (c) The level of insight and remorse shown by the practitioner, and evidence of any remedial steps taken to address issues leading to the conduct and to ameliorate the risk of similar conduct in the future, for example, in the form of counselling, psychological/psychiatric intervention or education/training/professional development programs.

- [14] In applying this principled approach to the facts of the present case, I am satisfied that the behaviour of the respondent in the context makes him a serious risk to persons in terms of s 113. In this case, his conduct demonstrates that he puts his own interests above the care of his patients who were vulnerable and who trusted him to respect and comply with appropriate boundaries between himself and his patients. On the evidence, the conduct was clearly deliberate in each case, and constitutes a serious boundary violation and breach of the ethical behaviour expected of a health practitioner. His general lack of engagement in these proceedings, and denial of the conduct in the email referred to earlier leads me to conclude that I have no confidence that he has any real insight or has sought to address his inappropriate conduct. It is also important that conduct of a markedly similar nature occurred on two separate occasions with two female patients. His location is presently unknown. He was born in Morocco and educated there, but he is an Australian citizen. He may presently be residing overseas.
- [15] Given that no criminal conviction arose from this conduct, if, in fact, he is overseas, there is no obstacle to him re-entering Australia. In this case, the absence of criminal findings concerning the particular conduct increases the risk. That is because if the respondent obtains employment in a health service, such as a massage provider a potential employer would not have access to any criminal history check so as to understand the serious nature of his conduct. It is also relevant that because he was practising as a massage therapist, he doesn't have to be registered under the National Law, and there is therefore not the additional protection to the public that comes from having to apply for registration or re-registration.
- [16] Pursuant to s 113 of the Act, in deciding whether a practitioner poses a serious risk to persons, the Tribunal may also have regard to a prescribed conduct document. In this case, both the Australian Charter of Healthcare Rights published by the Australian Commissioner of Safety and Quality and Healthcare and the COAG Health Council "National Code of Conduct for Healthcare Workers (Queensland)" are prescribed conduct documents for the purposes of s 288 of the Act. The conduct on both occasions offends various requirements of the Charter and the Code of Conduct.
- [17] For the reasons set out above, his insight and remorse are very limited indeed. In the email sent to the principal legal officer on the 20th of December 2019, he appears to deny the conduct, the subject of the referral;
- "...this person (redacted), the owner of the place where I used to work, this person an evil (*sic*) she used her power and people around (redacted) and her clients to put in a complaint...
- ...people who complained they her friends (*sic*) they know her very well...
- ...she is very smart using people to destroy my life...I don't know them and all fake complaints, how come not liking massage still sitting there the whole hour then later you complaine (*sic*) if something happen to you you get up straight away from the table not finishing your massage."

- [18] As noted before, predominantly, the respondent has chosen not to engage in these proceedings and there is no material before the Tribunal evidencing any understanding of the inappropriateness of his conduct and the harm and potential for harm caused to the complainants, nor is there any evidence of any steps taken by him to ameliorate the risk of similar behaviour in the future.
- [19] Given his general lack of engagement in these proceedings and his denial as to the conduct, some three years after he had knowledge of the complaint, I accept the applicant's submission that it is appropriate to draw an inference that he does not have any insight, or remorse for his conduct. This plays into the finding that the Tribunal makes, that he poses a serious risk to persons. In the submission, helpfully, the applicant refers to a number of comparable decisions for the purposes of assisting the Tribunal in making appropriate orders by way of protection of the public. I'm satisfied that the orders sought in the submission are appropriate, and, in those circumstances, I order as follows:
1. Pursuant to s 113(1) of the *Health Ombudsman Act 2013*, the Tribunal finds that because of his conduct, the respondent poses a serious risk to persons;
 2. Pursuant to s 73(2)(a)(ii) of the *Health Ombudsman Act 2013*, the Tribunal sets aside the decision to issue the interim prohibition order dated the 7th of October 2016;
 3. Pursuant to s 113(4)(a) of the *Health Ombudsman Act 2013*, the respondent is permanently prohibited from providing any health service;
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