QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Health Ombudsman v KDB* [2020] QCAT 288
PARTIES:	**DIRECTOR OF PROCEEDINGS ON BEHALF OF THE HEALTH OMBUDSMAN** (applicant) **v** **KDB** (respondent)
APPLICATION NO/S:	OCR094-19
MATTER TYPE:	Occupational regulation matters
DELIVERED ON:	11 August 2020
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	Judicial Member D J McGill SC Assisted by: Dr J Black Dr J Cavanagh Ms S Harrop

ORDERS:

1. **The Tribunal decides that, in respect of the conduct the subject of the referral, the respondent behaved in a way that constitutes professional misconduct.**
2. **The Tribunal reprimands the respondent.**
3. **The respondent is required to pay a fine of $25,000 to the applicant within a period of two years.**
4. **The Tribunal imposes conditions on the respondent's registration in the terms set out in the Schedule attached to this order.**
5. **The Tribunal decides that the National Law, part 7, division 11, subdivision 2 applies to those conditions, and fixes a review period of 12 months.**
6. **Pursuant to s 66(1) of the *Queensland Civil and Administrative Tribunal Act* 2009, until further order publication of the following is prohibited:**
   - **(a) the contents of a document or thing produced to the Tribunal, or order made or reasons given by the Tribunal; and**

(b) evidence given before the Tribunal; and

(c) any other information about the proceeding,

to the extent that it identifies, or may enable to be identified, the respondent, any member of the respondent's family, the person who complained to the applicant, or any member of the family of the complainant, or to the extent that it is, or is part of, a report by a psychiatrist concerning any of those persons, other than for the respondent to provide to AHPRA the decision and reasons for the decision of the Tribunal.

7. The parties bear their own costs of the proceeding.

CATCHWORDS: PROFESSIONS AND TRADES – HEALTH CARE PROFESSIONALS – MEDICAL PRACTITIONERS – DISCIPLINARY PROCEEDINGS – PROFESSIONAL MISCONDUCT – DEPARTURE FROM ACCEPTED STANDARDS – commencing a professional relationship with person in personal relationship – boundary violations – inappropriate and potentially harmful treatment – mitigating circumstances - sanction

Health Ombudsman Act 2013 s 103(1)(a), s 104, s 107
Queensland Civil and Administrative Tribunal Act 2009 s 66(1).

Health Ombudsman v Bricknell [2019] QCAT 340
Health Ombudsman v Kimpton [2018] QCAT 405
J v L & A Services Pty Ltd (No 2) [1995] 2 Qd R 10
Legal Services Commission v XBV [2018] QCAT 332
Medical Board of Australia v DEL [2019] QCAT 63
Medical Board of Australia v de Silva [2016] QCAT 63
Medical Board of Australia v Dolar [2012] QCAT 271
Medical Board of Australia v Martin [2013] QCAT 376
Medical Board of Australia v Thompkins [2019] SAHPT 18
Medical Board of Australia v Waldron [2017] QCAT 443

REPRESENTATION:

Applicant: D A Holliday, instructed by the Office of the Health Ombudsman

Respondent: K A Mellifont QC, instructed by Moray & Agnew 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 the Act I am sitting with assessors Dr J Black, Dr J Cavanagh and Ms S Harrop.[1]

[2] The respondent is and was at the relevant time a registered medical practitioner, and hence a registered health practitioner for the purposes of the Health Practitioner Regulation National Law (Qld). The applicant alleges that the respondent engaged in professional misconduct, in that she failed to maintain proper professional boundaries and failed to provide proper clinical care to a particular person.

[3] The parties have provided the Tribunal with an agreed statement of facts. The respondent, who has been legally represented in these proceedings, admits the grounds alleged, and that the conduct in question amounts to professional misconduct. The parties have provided written submissions to the Tribunal, and the Tribunal also has an affidavit of the respondent.[2] The hearing proceeded on the papers, in accordance with the *Queensland Civil and Administrative Tribunal Act* 2009 s 32.

Facts

[4] The Tribunal accepts the facts set out in the agreed statement of facts. They, and some additional information before the Tribunal, may be summarised as follows: The respondent was born in 1976 and is now 44. She was first registered as a medical practitioner in 1998, and qualified and practised as a specialist psychiatrist, although from 2015 she has confined her practice to medico-legal work. She met the complainant in 2008 when the complainant lived with the respondent and her husband as an au pair. The complainant and the respondent became friends, and she returned to that position in late 2013. As well, during this second period the respondent entered into a therapeutic relationship with the complainant, providing her with prescriptions for medication, including for depression, but did not keep proper medical records for the medical interactions with the complainant.

[5] Around the end of 2013 the complainant confided in the respondent that she had issues with sexual anxiety. The respondent offered her a choice of seeing a counsellor, her providing the complainant with advice or the complainant practising various sexual activities with the respondent's husband; the complainant chose the third option. The respondent provided her with what was said to be "sex therapy", although it did not comply with any conventional therapy for sexual problems.[3] The complainant and the respondent's husband engaged in various types of sexual activity, from holding hands to sexual intercourse, while the respondent watched and provided the complainant with reassurance if necessary. In addition, the respondent and her husband engaged in sexual acts in front of the complainant, as a demonstration.

[6] It is agreed that, in so acting, the respondent failed to maintain professional boundaries, engaged in conduct that was potentially exploitative, and provided therapy which did not meet accepted professional standards, did not help the complainant, did not constitute good medical care, and had the potential to harm the complainant. By acting in this way, the respondent failed to comply with a number of the provisions of the

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1 *Health Ombudsman Act* 2013 s 126. For their function, see s 127.

2 Affidavit signed 17 January 2020. There was also an affidavit by her solicitor, signed 21 January 2020, exhibiting some documents.

3 See the summaries of the independent expert opinion in the Statement of Agreed Facts, paragraphs 19 – 21.

Good Medical Practice Code of Conduct for Doctors in Australia, with Sexual Boundaries: Guidelines for Doctors, and with provisions of the RANZCP Code of Ethics, as set out in the statement of agreed facts.

Characterisation of conduct

[7] The applicant alleges that this conduct amounted to professional misconduct. That the factual allegations are correct, and that the conduct amounted to professional misconduct, are admitted by the respondent. I am conscious of the definition of "professional misconduct" in the National Law s 5. The applicant relies on paragraph (a) of the definition. It is not appropriate for a medical practitioner to develop a personal relationship with a patient, even if the relationship does not become intimate. That involved a failure to maintain proper boundaries; however, the situation here is not typical, in two respects.

[8] First, the personal relationship preceded the professional, and was marked with a degree of informality, so that initially the respondent did not realize that what had been provided, ostensibly as therapy, could be seen as something involving a professional relationship. But the respondent was providing the complainant with medication for a mental health problem, in the form of depression, and managing the dosage, and thus in a practical way treating her as a patient. In these circumstances, when the complainant sought advice about another mental health issue, the response should have been seen in the context of a professional relationship. Evidently it was not at the time,[4] and this led to therapy which was inappropriate, involving boundary violations, damaging the relationship between the respondent and the complaining and potentially causing psychological harm to the complainant.

[9] The second respect is that, although the complainant was involved in sexual activity, it was not with the respondent, but with the respondent's husband. On the whole, I do not regard this as a matter of great significance in itself, in terms of the degree of wrongfulness of her conduct. The complainant ended up in a sexual relationship into which she would almost certainly not have entered without the intervention of the respondent.

[10] I therefore agree with the characterisation of the conduct as professional misconduct, being unprofessional conduct by the respondent that amounts to conduct substantially below the standard reasonably expected of a registered health practitioner of an equivalent level of training and experience. Such a characterisation is consistent with the decisions to which the Tribunal was referred, discussed below.

Sanction

[11] As to sanction, in imposing a sanction, the health and safety of the public are paramount.[5] Relevant considerations include both personal and general deterrence, the maintenance of professional standards and the maintenance of public confidence.[6] The function of the Tribunal is protective, not punitive.[7] The relevant conduct occurred some 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.

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4 As appears from the initial submission of the respondent of 22 May 2015, as summarized in the statement of agreed facts, paragraph 15.

5 *Health Ombudsman Act* 2013 s 4(2)(c).

6 *Health Ombudsman v Kimpton* [2018] QCAT 405 at [79].

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

[12] Although initially the respondent did not accept that her behaviour should be seen in this way, it is clear from submissions provided by her in 2017 that before then she had accepted the wrongfulness of her conduct, and had taken steps to rehabilitate herself, by further education and self-education.[8] She had also received treatment from a psychiatrist,[9] and modified her practice, to confine it to medico-legal work from about August 2015.[10] It is also relevant that the respondent desisted from the inappropriate activity spontaneously, no complaint having been made at that time.[11] The respondent cooperated with the investigation, and in this proceeding.[12]

[13] The respondent has not faced any other disciplinary proceeding, and has provided a favourable reference from a colleague with whom she has worked. She has demonstrated insight and remorse, including in her affidavit and by her conduct since the complaint came to her attention.[13] The respondent did not engage in conduct known at the time to be wrongful, since then she saw her actions as just helping a friend. Because she did not recognize at the time that she was acting professionally, she did not approach the matter in a proper professional way, as she now accepts. She has already imposed on herself a substantial limitation in her practice, and has sought and obtained psychiatric care.

[14] The parties agree on the appropriate sanction. This is similar to a joint submission to the Tribunal as to sanction. 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 of *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.[14]

[15] The proposed sanction is a reprimand, a fine of $25,000 and the imposition of conditions on the respondent's registration, which would confine her in practice to medico-legal work. Since that work is all she has been doing for the last five years, I doubt if the conditions are really necessary, but will not depart from the agreed sanction.

[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, there is no material before the Tribunal from either side as to the financial capacity of the respondent, but because the respondent has supported this part of the proposed sanction, I am content to proceed on the basis that the respondent has the capacity to pay a fine of $25,000 as proposed, without unreasonable imposition on her finances, so that despite its size, the fine does not stray into a sanction which is merely punitive. Unfortunately I am not told of any agreed period within which the fine is to be paid. In the

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8 Statement of agreed facts, paragraphs 17, 18.; affidavit of respondent, paragraph 20, annexure KS7.

9 Affidavit of the respondent paragraphs 24, 25. The report of the treating psychiatrist is exhibit ARC2 to the affidavit of the respondent's solicitor filed 21 January 2020.

10 Affidavit of respondent, paragraphs 10, 11.

11 The conduct stopped early in 2014 and the complaint was made on 1 Aril 2015: Statement of Agreed Facts paragraphs 8, 13, 15.

12 In view of that, it is hard to understand why it has taken so long for the matter to reach the Tribunal.

13 This is also supported by the report of her treating psychiatrist.

14 Accordingly it is unnecessary to address the applicant's submission that the conduct could justify cancelling the respondent's registration, except to point out that, in the circumstances, such a submission is unhelpful.

circumstances, I allow two years, but it can be paid more quickly if the respondent chooses.

Earlier decisions

[17] The applicant has referred to a number of earlier decisions, although it is conceded that the circumstances of this case are different from those decisions. Perhaps the closest was *Medical Board of Australia v Thompkins* [2019] SAHPT 18, where a professional relationship followed a sexual relationship, which in time became a de facto relationship, and where the practitioner dealt with others about the patient without disclosing the personal relationship. The practitioner was reprimanded, suspended from practice for twelve months, and conditions were placed on his registration.

[18] In *Health Ombudsman v Bricknell* [2019] QCAT 340 a professional relationship led to a sexual relationship and indeed marriage, which later ended, leading to the complaint. The practitioner's registration was cancelled, but in that case there was also a finding of persistent dishonesty in dealings with the applicant, and an absence of evidence of fitness to practice. In *Medical Board of Australia v DEL* [2019] QCAT 63 the practitioner engaged in a brief sexual relationship with a patient who was vulnerable, and persisted in contacting the patient after he broke off the relationship. The practitioner was reprimanded, her registration was suspended for six months, and conditions were placed on it. To the extent that they assist, these decisions do not suggest that the proposed sanction is inadequate.

Non-publication order

[19] The respondent has sought a non-publication order in relation to her identity. She relied on a recent report from her treating psychiatrist, which expressed the opinion that identification of her in the decision of the Tribunal would cause her mental health to be severely compromised, such that she would be at risk of suicide.[15] The applicant does not oppose that course, and has referred to s 66 of the QCAT Act. That section authorizes a non-publication order if the Tribunal considers it necessary having regard to five specific matters, one of which is "(b) to avoid endangering the physical or mental health or safety of a person". There is therefore evidence to support the proposition that this requirement is satisfied.

[20] I appreciate that the starting point is that the Tribunal operates in public, and the power to conduct all or part of a hearing in private should be strictly regulated: see *Legal Services Commission v XBV* [2018] QCAT 332 at [26], where the Honourable P Lyons QC pointed out that the Tribunal had a broader power to constrain the open court principle than is available to courts generally. In that case there was evidence that the respondent had been receiving treatment from a psychiatrist and a psychologist for a major depressive disorder, and there was a risk of suicide. A non-publication order was made, but under another Act, as it concerned a legal practitioner. Reference was made there to the decision of *J v L & A Services Pty Ltd (No 2)* [1995] 2 Qd R 10, where the open court principle was discussed. Under that principle, as applied in courts, it was said at p 45 that "information may not be withheld from the public merely to save a party or witness from loss of privacy, embarrassment, distress, financial harm, or other collateral disadvantage."

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15 Affidavit of solicitor Exhibit ARC2 page 3. She also referred to the risk of harm to the mental health of her young children, and more broadly her family.

[21] There is also authority that a non-publication order under s 66 will not be made lightly: *Medical Board of Australia v Waldron* [2017] QCAT 443 at [81], [82]. I accept that approach. In the present case, on the evidence the requirement of s 66(2)(b) is satisfied, and that enlivens the discretion for a non-publication order. In view of the medical evidence, and the considerable efforts at rehabilitation undertaken by the respondent, in all the circumstances I am prepared to make such an order in this case. It was not contentious that the order should also cover the complainant and any family members, and the members of the respondent's family.

[22] A non-publication order is currently in place, made by the Deputy President on 16 May 2019. There is no express limitation on the term of that order, but the context suggests that it was intended to operate only on an interlocutory basis, and to guard against the possibility of that interpretation, I will make a fresh order.

[23] Accordingly the decision of the Tribunal is as follows:

1. The Tribunal decides that, in respect of the conduct the subject of the referral, the respondent behaved in a way that constitutes professional misconduct.

2. The Tribunal reprimands the respondent.

3. The respondent is required to pay a fine of $25,000 to the applicant within a period of two years.

4. The Tribunal imposes conditions on the respondent's registration in the terms set out in the Schedule attached to this order.

5. The Tribunal decides that the National Law, part 7, division 11, subdivision 2 applies to those conditions, and fixes a review period of 12 months.

6. Pursuant to s 66(1) of the *Queensland Civil and Administrative Tribunal Act* 2009, until further order publication of the following is prohibited:

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    to the extent that it identifies, or may enable to be identified, the respondent, any member of the respondent's family, the person who complained to the applicant, or any member of the family of the complainant, or to the extent that it is, or is part of, a report by a psychiatrist concerning any of those persons, other than for the respondent to provide to AHPRA the decision and reasons for the decision of the Tribunal.

7. The parties bear their own costs of the proceeding.