

ACT CIVIL & ADMINISTRATIVE TRIBUNAL

PSYCHOLOGY BOARD OF AUSTRALIA v ROYCHOWDHURY (Occupational Discipline) [2019] ACAT 50

OR 19/2018

Catchwords: OCCUPATIONAL DISCIPLINE – psychologist – sexual relationship with former client – physical and emotional abuse during inappropriate physical relationship – lack of candour – lack of insight – finding of professional misconduct – registration cancelled – disqualified for applying for registration for three years

Legislation cited: *ACT Civil and Administrative Tribunal Act 2008* s 38, 39, 60
Health Practitioner Regulation National Law (ACT) ss 149, 156, 160, 196, 201, 222, 225, (division 5, part 8)
Legal Profession Act 2005 s 423A
Legislation Act 2001 s 179
Mental Health Act 2015 s 194

Subordinate

Legislation cited: *Australian Psychological Society Code of Ethics* (2007) cl 1.2, 4.3, 7.1

Cases cited: *HCCC v Do* [2014] NSWCA 37
HCCC v Iskander [2015] NSWCATOD 30
Health Care Complaints Commission v BXD (No 2) [2015] NSWCATOD 135
Honey v Medical Practitioners Board of Victoria [2007] VCAT 526
Howard v Psychology Board of Australia [2018] ACAT 127
John Fairfax Publications Pty Ltd & Anor v District Court of NSW & Ors [2004] NSWCA 324
Medical Board of Australia v Arvid Herbert Gunnar Lind (VR165/2016)
Medical Board of Australia v Dr Helmy [2017] ACAT 85
Medical Board of Australia v Veness [2012] ACAT 36
Nursing and Midwifery Board v Hogan [2018] TASHPT 3
Nursing and Midwifery Board of Australia v Nurse DZ [2015] ACAT 93
Psychology Board of Australia v D [2010] VSC 375
Psychology Board of Australia v Fox (2) [2015] ACAT 25
Psychology Board of Australia v King [2016] QCAT 140
Psychology Board of Australia v Shahinper [2016] QCAT 259
Psychology Board of Australia v Sullivan [2017] ACAT 104

Psychology Board of Australia v Tunstall [2016] VCAT 1263
Psychology Board of Australia v Wakelin [2014] QCAT 516
Xu v Council of the Law Society of NSW [2009] NSWCA 430

Tribunal: Senior Member H Robinson
Senior Member K Lubbe

Date of Orders: 31 May 2019

Date of Reasons for Decision: 31 May 2019

BETWEEN:

PSYCHOLOGY BOARD OF AUSTRALIA
Applicant

AND:

DR DEV ROYCHOWDHURY
Respondent

TRIBUNAL: Senior Member H Robinson
Senior Member K Lubbe

DATE: 31 May 2019

ORDER

The Tribunal orders that:

1. Pursuant to section 196(1)(b)(iii) of the *Health Practitioner Regulation National Law (ACT)* (**National Law**) the Tribunal finds that the respondent has behaved in a way that constitutes professional misconduct.
2. Pursuant to section 196(2)(e) of the National Law, the respondent's registration is cancelled.
3. Pursuant to section 196(4)(a) of the National Law, the respondent is disqualified from applying for registration for a period of three years, from 6 February 2019.
4. The respondent is to pay the costs of these proceedings on a party/party basis at the Supreme Court of the ACT scale, in an amount to be agreed or failing agreement, to be assessed by the Tribunal.
5. Pursuant to section 39 of the *ACT Civil and Administrative Tribunal Act 2008*:
 - (a) these reasons are to be published, with the name of the patients, witnesses (other than the respondent) and third parties anonymised; and

(b) there is to be no public access to the file for this proceeding.

.....
Senior Member H Robinson
For and on behalf of the Tribunal

REASONS FOR DECISION

1. By way of this application the Psychology Board of Australia (**the Board**) seeks occupational discipline orders against the respondent practitioner (**the psychologist**) pursuant to the *Health Practitioner Regulation National Law (ACT)* (**National Law**).
2. Many of the factual allegations the subject of this application were set out in an agreed statement of facts filed by the parties. In summary, the psychologist concedes that he commenced an intimate sexual relationship with a person with whom he had a clinical relationship. The intimate relationship was emotionally and physically abusive. The Australian Health Professional Regulatory Authority (**APHRA**) became aware of the relationship through a mandated report, and commenced an investigation. The psychologist initially denied the allegations and failed to cooperate with the investigation. During the course of the APHRA investigation he sought references and support from colleagues without disclosing the full or true nature of the allegations against him. The matter then proceeded to this Tribunal where, on the first day of the hearing, the psychologist agreed to a statement of facts.
3. Because the parties filed an agreed statement of facts, the primary issues for the Tribunal¹ were the characterisations of the conduct and the disciplinary penalty to be imposed.
4. The Board contends that the psychologist's actions, considered both individually and cumulatively, amount to professional misconduct or, in the alternative, unprofessional conduct. The Board seeks an order that the psychologist's registration be cancelled.
5. The psychologist concedes that he has engaged in unprofessional conduct but denies that his actions, whether considered individually or cumulatively, amount to professional misconduct. He seeks orders that his registration be suspended for a period of two years, that he be subject to a period of supervision

¹ A reference to 'ACAT' or 'tribunal' refers to the ACT Civil and Administrative Tribunal generally, whereas 'Tribunal' refers to the member who heard the application

upon re-registration and that he complete eight hours training to enhance his ethical knowledge.

6. A further question arises as to the appropriate orders for a private hearing or non-publication under section 39 of the *ACT Civil and Administrative Tribunal Act 2008 (ACAT Act)* given the personal information contained in evidence in the proceedings.

The hearing

7. The hearing was conducted on 5 and 6 February 2019. The Board was represented by Mr Archer of Counsel, instructed by the ACT Government Solicitor. The psychologist was represented by Ms Costin, a solicitor. The psychologist was the only witness called to give evidence.
8. On the first day of the hearing, the parties advised the Tribunal that they may be in a position to file an agreed statement of facts. Accordingly, the hearing was adjourned to allow the parties to negotiate. An agreed statement of facts, signed by both parties, was filed on the afternoon of 5 February 2019.
9. The hearing the next day went to the issues of characterisation and penalty. The psychologist gave evidence and was cross-examined. At the conclusion of the hearing, the Tribunal asked the parties to prepare a version of the statement of agreed facts that would be suitable for publication. The parties attempted to do so, but ultimately failed to reach agreement and filed different versions.
10. In the circumstances, the Tribunal has adopted as the agreed facts the version filed at hearing. However, as this document contains medical information relating to a third person, the complainant, the Tribunal is of the view that this document should not be published to anyone who is not a party.
11. Accordingly, what is set out below under “agreed facts” below is a version of the agreed statement of facts, prepared by the Tribunal, based on the agreed statement of facts, but edited and amended for clarity and to suit the structure of these reasons. These reasons omit material that the Tribunal considers inappropriate for publication.

The agreed facts

12. The agreed facts are as follows, except where otherwise noted.

Practitioner's background

13. The psychologist is a registered psychologist, having been registered to practice psychology in Australia on 20 July 2009. Prior to the respondent's registration expiring, it was suspended due to a decision of the Board on 18 October 2016.
14. The psychologist holds a Bachelor of Arts with Honours and a Postgraduate Diploma in Psychology. He also holds a Doctor of Applied Psychology (Sport Psychology) which he obtained in 2012.
15. Between approximately December 2013 and January 2015, the psychologist worked at a practice in the Australian Capital Territory.

The first ground boundary violation inappropriate sexual relationship

16. For some time between 13 August 2014 and 25 September 2014, the psychologist was in a therapeutic relationship with a patient (**the patient**).
17. On 14 August 2014, the patient accompanied her former partner (**the former partner**) to a consultation with the respondent. The former partner was attending the respondent for counselling under his mental health care plan.
18. The issue of a potential conflict of interest arising from these circumstances was not addressed in the agreed statement of facts. However, when asked by the applicant's counsel whether these circumstances gave rise to any conflict of interest, the psychologist's evidence was that it did not: "...it was practise at that practice that if you saw one partner, it was sometimes recommended for you to see the other matter through."² No suggestion contrary to this was made by the applicant.
19. On 21 August 2014, the patient was independently referred to the psychologist by a general practitioner under a GP mental health care plan for psychological sessions to assist with "adjustment disorder with depressed mood".

² Transcript of proceedings 6 February 2019 at page 34, lines 13-15

20. On 26 August 2014, the patient attended upon the psychologist for a psychological session referred to in her patient records as “Session 1 of New Care Plan.” The psychologist recorded details of the consultation in the patient notes. These notes included reference to the patient being “emotional” as a consequence of the breakup with her former partner.
21. On an unknown date, referred to in the patient records for the patient as “Session 2 of New Care Plan”, the patient attended upon the respondent for a second psychological session. This service was not claimed under the Medicare Benefits Scheme. The patient notes refer to her concerns about her personal relationships.
22. On 9 September 2014, the patient attended upon the respondent for a third psychological session referred to in the patient records for the patient as “Session 3 of New Care Plan”. The patient notes again indicate that they spoke about the consequences of her breakup with her former partner.
23. On 16 September 2014, the psychologist wrote to the patient’s GP in relation to the referral. Amongst other things, he said:

I intend to support [the patient] through cognitive behaviour therapy (CBT), interpersonal therapy (IPT), psychological skills training and acceptance and commitment therapy (ACT).³
24. On 24 September 2014, the patient attended upon the psychologist for a psychological session referred to in her patient records as “Session 4 of New Care Plan.” The records again refer to the patient talking about her feelings and personal relationships.
25. Sometime shortly after this, from approximately early October 2014 until March 2015, the respondent engaged in an intimate romantic and sexual relationship with the patient.
26. In relation to the facts of ground 1, as set out above, the parties agree that:

³ Letter of Respondent re patient dated 16 September 2014

- (a) the commencement of an intimate relationship with the patient was conduct substantially below that reasonably expected of a registered psychologist of an equivalent level of training or experience; and
 - (b) the respondent's conduct failed to meet the standard of practice articulated in standard C.4.3 of the relevant code of ethics (*Australian Psychological Society Code of Ethics (2007)*).
27. The Board says that the facts of ground 1 amount to professional misconduct or, in the alternative, unprofessional conduct, because the psychologist failed to maintain appropriate professional boundaries with the patient by commencing an intimate romantic and sexual relationship with her within two years of the termination of the professional relationship.
28. Notwithstanding that the psychologist, in the agreed statement of facts, appears to have agreed that the conduct the subject of ground 1 meets the legal definition of professional misconduct, as set out in section 5 of the National Law, he contends that the Tribunal should characterise this conduct as unprofessional conduct but not professional misconduct.

Ground 2 — Physical and emotional abuse during inappropriate physical relationship

29. From approximately early October 2014 until March 2015 the psychologist and the patient engaged in an intimate relationship during the course of which the practitioner engaged in violent behaviour and emotional intimidation.
30. In the early part of November 2014, the respondent and the patient argued in the home of the patient. The patient's flatmate was at home in the lounge room while the patient and the psychologist were in the bedroom arguing. The flatmate heard the argument stop and entered the bedroom to ensure everything was okay. The flatmate saw the patient lying face up on the bed and the respondent kneeling over her with his hands around her neck. She pushed the respondent off her and the respondent left the apartment. The patient's neck area was photographed. When examined by a doctor a week later it was noted that the patient suffered discomfort when eating or drinking. At the time of her examination her neck was non-tender. Minor residual bruising was noted. The

event was reported to the Australian Federal Police on 28 June 2015, although the complainant asked that no prosecution action be taken.⁴

31. From approximately early October 2014 until March 2015, the respondent would obtain access to the patient's mobile phone for the purpose of reading her text messages and viewing her photographs.
32. It was agreed between the parties that as result of the facts of ground 2, the patient suffered:
 - (a) short term injury; and/or
 - (b) psychological harm (including anxiety, hypervigilance, fear, insomnia); and/or
 - (c) a breakdown of trust in respect of personal relationships; and/or
 - (d) a breakdown of trust in psychologists and other care providers.
33. The parties agree that the psychologist's conduct as per ground 2:
 - (a) was substantially below that expected of a registered health practitioner of an equivalent level of training and experience; and
 - (b) was inconsistent with the psychologist being a fit and proper person to hold registration in the profession; and
 - (c) failed to meet the standard of practice articulated in standard C.1.1 and C.1.2 of the relevant code of ethics (*Australian Psychological Society Code of Ethics (2007)*).
34. Again, the Board says that this is professional misconduct or, in the alternative, unprofessional conduct. Notwithstanding that the respondent appears to have agreed that the conduct meets the legal definition of 'professional misconduct,' the practitioner contends that the conduct should be characterised as unprofessional conduct.

⁴ Australian Federal Police Incident Report dated 10 October 2016 (date reported 28 June 2015)

Ground 3 — Lack of candour with APHRA

Background — The investigation process

35. The Board received its first notification in relation to the psychologist on 10 October 2016, when AHPRA received a mandatory notification about the respondent's conduct from another psychologist (**the notifier**).
36. The patient was referred to the notifier on 1 June 2016 for an opinion and management of anxiety. The patient attended a consultation with the notifier on 4 October 2016. During that consultation she disclosed matters relating to ground 1 and ground 2, above, to the notifier. The notifier reported to APHRA that the patient was emotional during the consultation of 4 October 2016 and that “[she] suffers high levels of anxiety.”⁵ The patient reported having nightmares related to the conduct of the psychologist and that “the problems for which she consulted [the psychologist] were far less problematic psychologically for her than what she is dealing with now.”⁶
37. Pursuant to Division 5 of Part 8 of the National Law APHRA referred the matter to the Board. Pursuant to section 149 of the National Law the Board conducted a preliminary assessment of the notification. The Board decided that:
- (a) the notification related to a person who is a health practitioner registered by the Board;
 - (b) the notification related to a matter that is a ground for notification under section 144(1)(a) of the National Law; and
 - (c) the patient's notification was one that could also be made to the Health Services Commissioner for the ACT (**the HSC**).
38. On 11 October 2016, the Immediate Action Committee (**IAC**) of the Board met to consider the notification. The IAC, being of the state of mind required by section 156(1)(a)(i) and (ii) of the National Law, proposed, subject to a show cause process, to take immediate action to suspend the psychologist's

⁵ Initial Notification (complaint) dated 10 October 2016 at page 6

⁶ See above footnote [5]

registration and to investigate the notification under section 160 of the National Law.

39. The same day, AHPRA also advised the HSC of the notification from the patient. The HSC agreed that the Board was the appropriate entity to handle the matter.
40. Further, on the same day, the Board notified the respondent of the notification and outlined the powers the Board might exercise in relation to the notification and the procedural rights the respondent had under the National Law. A response was sought from the respondent in respect of the proposed immediate action decision.
41. The respondent provided a written submission through his lawyers by letter dated 16 October 2016. In that written submission the psychologist denied the allegations made by the patient in their entirety, without addressing the specifics of the allegations that had been made.

IAC meeting — 18 October 2016

42. The IAC met on 18 October 2016 to consider the notification relating to the conduct of the respondent towards the patient.
43. Following review of that material, the IAC concluded that it held a reasonable belief that the respondent posed a serious risk to persons and it was necessary to take immediate action to protect public health and safety.
44. It was proposed that immediate action would be taken pursuant to section 156(1) of the National Law by suspending the respondent's registration.
45. The immediate action conditions were stated to take effect from 18 October 2016.
46. At the meeting, the Board also decided relevantly to:
 - (a) give written notice of the IAC decision to the respondent; and
 - (b) investigate the notification regarding the respondent's conduct towards the patient.

47. The psychologist was notified of the Board's decisions in writing on 20 October 2016 and was given further information about the investigation on 3 November 2016.
48. The psychologist provided a further written submission through his lawyers on 18 November 2016. This included the following:
 - (a) written legal submissions from the respondent's lawyers;
 - (b) a written statement from the respondent dated 17 November 2016;
 - (c) email correspondence between the patient and the respondent between 24 September 2014 and 26 September 2014;
 - (d) copies of text messages between the patient and the respondent between 22 December 2014 and 14 April 2015; and
 - (e) character references (**the references**) from:
 - (i) "A", a registered psychologist, dated 8 November 2016;
 - (ii) "B", a registered psychologist and research assistant, dated 7 November 2016;
 - (iii) "C" dated 9 November 2016;
 - (iv) "D", a registered medical practitioner and general surgeon, dated 16 November 2016;
 - (v) "E", a registered psychologist, dated 9 November 2016;
 - (vi) "F", dated 13 November 2016; and
 - (vii) "G" (undated).
49. In totality, the written statements and submissions advanced on behalf of the respondent involved a denial that psychologist and the patient had been in a therapeutic relationship and that he had ever been "physically, verbally or emotionally abusive towards her." The response otherwise involved a denial of the specifics of the allegations of violence and emotional abuse that had been made by the patient. The character references indicated that the respondent had not been candid with the authors of those references about the fact of and extent

of his relationship with the patient. Some of them were unnecessarily critical of the patient for that reason.

50. The results of the investigation were communicated to the respondent. Subsequently, by letter dated 24 July 2017 the respondent provided a further submission to the Board. He denied that a therapeutic relationship existed between the patient and himself. He denied that he was emotionally, physically, sexually or professionally inappropriate or violent towards the patient.

Decision to refer the matter to the responsible tribunal

51. On 14 August 2017, the Board met to further consider the notification made relating to the respondent's conduct with the patient and the final AHPRA investigation report and documents gathered in the context of that investigation.
52. The Board formed the view that a reasonable belief existed that the respondent had behaved in a way which constitutes professional misconduct and the notification should be referred to the responsible tribunal, being the ACAT and that the orders sought should be cancellation of the respondent's registration.
53. The Board was of the view that the suspension of the registration of the respondent should not be removed as the respondent continues to pose a serious risk to persons because of his conduct and that it was necessary to maintain the immediate action to suspend his registration to protect public health and safety.
54. The respondent has been suspended from practice since 18 October 2016.

Lack of candour

55. In relation to the facts of ground 1, as set out above, the parties agree that:
- (a) in the submissions made to APHRA dated 17 October 2016, 18 November 2016 and 24 July 2017 the psychologist denied:
 - (i) that professional or psychotherapeutic services were provided by him to the patient;
 - (ii) there was any abuse or violence against the patient; and
 - (iii) that he was emotionally abusive towards the patient; and
 - (b) the psychologist made these assertions knowing them to be untrue.

- (c) Again, the Board says that this is professional misconduct or, in the alternative, unprofessional conduct. The respondent contends the conduct is unprofessional conduct but not professional misconduct.

Consideration

General comments about the characterisation of conduct

56. Section 5 of the National Law defines professional misconduct and unprofessional conduct as follows:

professional misconduct, of a registered health practitioner, includes—

- (a) *unprofessional conduct by the practitioner that amounts to conduct that is substantially below the standard reasonably expected of a registered health practitioner of an equivalent level of training or experience; and*
- (b) *more than one instance of unprofessional conduct that, when considered together, amounts to conduct that is substantially below the standard reasonably expected of a registered health practitioner of an equivalent level of training or experience; and*
- (c) *conduct of the practitioner, whether occurring in connection with the practice of the health practitioner's profession or not, that is inconsistent with the practitioner being a fit and proper person to hold registration in the profession.*

...

unprofessional conduct, of a registered health practitioner, means professional conduct that is of a lesser standard than that which might reasonably be expected of the health practitioner by the public or the practitioner's professional peers, and includes –

57. Interestingly, while the definitions of 'unprofessional conduct' and 'professional misconduct' in the National Law are different, the forms of disciplinary action available to the Tribunal are the same. These are set out in section 196 of the National Law as follows:

196 Decision by responsible tribunal about registered health practitioner

- (1) *After hearing a matter about a registered health practitioner, a responsible tribunal may decide—*
 - (a) *the practitioner has no case to answer and no further action is to be taken in relation to the matter; or*
 - (b) *one or more of the following—*
 - (i) *the practitioner has behaved in a way that constitutes unsatisfactory professional performance;*

- (ii) *the practitioner has behaved in a way that constitutes unprofessional conduct;*
 - (iii) *the practitioner has behaved in a way that constitutes professional misconduct;*
 - (iv) *the practitioner has an impairment;*
 - (v) *the practitioner's registration was improperly obtained because the practitioner or someone else gave the National Board established for the practitioner's health profession information or a document that was false or misleading in a material particular; or*
- (2) *If a responsible tribunal makes a decision referred to in subsection (1)(b), the tribunal may decide to do one or more of the following—*
- (a) *caution or reprimand the practitioner;*
 - (b) *impose a condition on the practitioner's registration, including, for example—*
 - (i) *a condition requiring the practitioner to complete specified further education or training, or to undergo counselling, within a specified period; or*
 - (ii) *a condition requiring the practitioner to undertake a specified period of supervised practice; or*
 - (iii) *a condition requiring the practitioner to do, or refrain from doing, something in connection with the practitioner's practice; or*
 - (iv) *a condition requiring the practitioner to manage the practitioner's practice in a specified way; or*
 - (v) *a condition requiring the practitioner to report to a specified person at specified times about the practitioner's practice; or*
 - (vi) *a condition requiring the practitioner not to employ, engage or recommend a specified person, or class of persons,*
 - (c) *require the practitioner to pay a fine of not more than \$30,000 to the National Board that registers the practitioner;*
 - (d) *suspend the practitioner's registration for a specified period;*
 - (e) *cancel the practitioner's registration.*
- (3) *If the responsible tribunal decides to impose a condition on the practitioner's registration, the tribunal must also decide a review period for the condition.*
- (4) *If the tribunal decides to cancel a person's registration under this Law or the person does not hold registration under this Law, the tribunal may also decide to—*

- (a) *disqualify the person from applying for registration as a registered health practitioner for a specified period; or*
- (b) *prohibit the person, either permanently or for a stated period, from—*
 - (i) *providing any health service or a specified health service; or*
 - (ii) *using any title or a specified title.*

58. Still, while the available sanctions are the same, professional misconduct has at common law been regarded as the graver characterisation, found in more serious cases or where there are aggravating factors.⁷ This greater seriousness remains evident from the use of the words ‘substantially below’ and the requirement of ‘more than one instance’ in the various definitions in section 5.⁸ Undoubtedly a finding of ‘misconduct’ also carries with it a greater public and professional notoriety – there could be little doubt that a finding of misconduct may have greater ramifications for the future of the psychologist’s career than a finding of unprofessional conduct.

59. The psychologist’s solicitor suggested that the more serious notoriety associated with a finding of misconduct should be a consideration for the Tribunal when characterising the psychologist’s offending conduct. She submitted that the psychologist is still a young man, early in his career, and the prospect of rehabilitation is understandably high in his mind. This Tribunal accepts that a finding of professional misconduct may make it more difficult for the psychologist to re-establish his career. We accept that this should be a consideration, particularly in more marginal cases where the seriousness of the offending is an issue. However, the relative seriousness of the offending conduct is only one element of the distinction between the unprofessional conduct and misconduct.

60. ‘Unprofessional conduct’ relates primarily to the conduct of a profession. By contract, paragraph (b) of the definition of professional misconduct in section 5 of the National Law broadens the scope of the definition to include conduct that may be outside the practice of the profession entirely. It potential covers a

⁷ See discussion in *Xu v Council of the Law Society of NSW* [2009] NSWCA 430

⁸ *Xu v Council of the Law Society of NSW* [2009] NSWCA 430

broader range of offending. That said, the intrusion of regulatory authority into a professional's personal life would usually require a higher bar than the governance of their professional conduct, and cases where this ground is made out will usually be the graver forms of offending as a result.

Ground 1: the commencement of a relationship with a patient

61. Section 41 of the National Law provides that codes approved by a relevant Board are admissible as evidence of what constitutes appropriate professional conduct or practice.
62. The Australian Psychological Society's Code of Ethics (**the Code** or **the Code of Ethics**) is one such code. The two clauses relevant to ground 1 are:
 - (a) Clause 4.3(a) of the Code of Ethics prohibits a psychologist from engaging in sexual activity with a client.
 - (b) Clause 4.3(b) of the Code of Ethics prohibits psychologists from engaging in sexual relationships with a former client within two years after terminating the professional relationship.
63. It is not disputed, and is in any case apparent, that the psychologist breached clause 4.3 of the Code of Ethics. The psychologist appears to have conceded, in the agreed statement of fact, that he breached clause 4.3(a) of the Code of Ethics by commencing a sexual relationship without formally terminating the therapeutic relationship. However, even if an argument could be made that he terminated the clinical relationship before commencing the personal relationship (such an argument appears to have been made by his solicitor in her closing submissions), he breached paragraph (b).
64. Did the breach amount to unprofessional conduct or misconduct?
65. In support of the psychologist's position that ground 1 constitutes only unprofessional conduct, but not misconduct, his solicitor submitted that the codes were "guidance", were "not created to impose a clear structure that should be followed *ad litteram* in relation to any breaches"⁹ and that the tribunal should

⁹ Transcript of proceedings 6 February 2019 at page 9 lines 20-22

take into account the facts of the case. She further submitted that the ‘two years’ prohibition on the commencement of a relationship:

*...is a guiding period of time and we, of course, acknowledge that in our case the period of time was very short, was within weeks after the professional relationship ended, the romantic relationship started. However, we still think that the tribunal should keep in mind that it is just guidance and is not an imposition that should be taken...ad litteram.*¹⁰

66. This submission, presumably made pursuant to instructions with the goal of reducing the weight given to the ethical breach in characterising the conduct, was misguided. In this Tribunal’s view, the Code of Ethics is not ‘guidance’ – at least not in the sense suggested by this submission. Rather, as stated clearly in the Code, it “provide[s] the minimum expectations with regard to psychologists’ professional conduct”.¹¹ Flexibility may be required where the Code conflicts with higher sources of authority, for example statute, or where there is a practical conflict between ethical principles. However, nothing in the Code suggests that a psychologist may treat the rules as optional or flexible or create ambiguities that do not exist. The rules applicable to the present circumstances were abundantly clear and unambiguous: psychologists do not engage in sexual activity with a client at all, or with a former client for at least two years. Mr Roychowdhury clearly breached his ethical obligations.
67. Moreover, even if the Tribunal agreed that the Code of Ethics was ‘just guidance’, which it does not, this would not assist the practitioner. There is nothing in the evidence before the Tribunal that suggests any reasonable basis for a deviation from the rules in this case. There is nothing exceptional about this relationship, or the practitioner, that would make this case an exception to which the usual standards would or could not apply. Indeed, if anything, the opposite is the case. The practitioner commenced a relationship with a patient during or very shortly after the cessation of a professional relationship, in circumstances where the patient was both particularly vulnerable, and known by the psychologist to be so vulnerable. The circumstances of ground 1 are precisely those that the ethical rules are intended to prevent.

¹⁰ Transcript of proceedings 6 February 2019 at page 9, line 29

¹¹ Page 7

68. The Tribunal is satisfied that in breaching the requirements of the Code of Ethics, the psychologist's professional conduct was clearly of a lesser standard than that which might reasonably be expected of the psychologist by the public or the psychologist's professional peers, and amounted to unprofessional conduct. But does the conduct also amount to misconduct?
69. Unfortunately, there is no shortage of cases that consider the appropriate characterisation of ethical breaches involving a relationship between a health care professional and a patient.¹² In nearly all these cases, the health professional's actions were either conceded as, or found to amount to misconduct. Nonetheless, each case must be considered on its own facts.
70. One case in which differently constituted bench of this tribunal found a practitioner to have engaged only in unprofessional conduct, rather than misconduct, despite very serious allegations of sexual misconduct, was *Medical Board of Australia v Dr Helmy (Helmy)* [2017] ACAT 85. This case was relied upon by the psychologist.
71. *Helmy* involved multiple allegations of inappropriate conduct and boundary violations by a medical practitioner. As in the present case, the complainants declined to give evidence. However, in contrast to the present case, the parties could not agree on a statement of facts. A hearing proceeded, but the Tribunal was ultimately unable to reach factual conclusions on the more serious allegations. Lesser allegations of kissing and hugging were substantiated, but the Tribunal could not draw conclusions about Dr Helmy's intentions, and whether the interactions had a sexual element to them. By contrast, in this case, there is no doubt as to the sexual element of the relationship between the psychologist and the patient. There is little in the reasoning in *Helmy* that assists the psychologist in the characterisation of his ethical breaches.
72. The ethical prohibition on sexual relationships between a psychologist and a patient reflects the special relationships between psychologists and their

¹² See discussion about sanction at paragraphs 92 to 109 below

patients, and the position of trust they are placed in. In *Psychology Board of Australia v Shahinper* [2016] QCAT 259, the tribunal observed that:

*The power imbalance by virtue of the therapeutic relationship is always an aggravating factor in these cases. The relationship between a psychologist and patient is necessarily one involving a high degree of personal exposure on the part of the patient. That fact alone, notwithstanding any particular psychological issues, will place a patient in a position of greater vulnerability than may be the case in other therapeutic relationships.*¹³

73. That the patient in this case was vulnerable, particularly in the area of relationships, is evident from the case notes, recorded by the psychologist. In entering into a relationship with the patient, in such circumstances, the psychologist exploited this vulnerability. He failed to adequately protect the interests of the patient, and indeed caused her further harm. The Tribunal is satisfied that the circumstances of this case, the vulnerability of the patient and the lack of any real mitigating factors, put this case in the more serious categories of boundary violation, for which professional misconduct is the usual finding.
74. The Tribunal is satisfied that such conduct is unprofessional conduct that is substantially below the standard reasonably expected of a practitioner of any level of training or experience, and that such conduct is appropriately characterised as professional misconduct.
75. The Tribunal is also satisfied that the conduct of the psychologist, in engaging in a relationship with a particularly vulnerable patient, is conduct occurring in connection with the practice of his profession that is inconsistent with the psychologist being a fit and proper person to hold registration in the profession.

Ground 2 – Physical and emotional abuse during inappropriate physical relationship

76. The provisions in the statement of facts relating to this ground are sparse on detail and gives no indication as to the intention of the psychologist. Still, for the most part, the agreed facts speak for themselves. The psychologist put his hands around the patient’s neck while she was lying prone on a bed and applied

¹³ at [69]

sufficient pressure to bruise her. The psychologist and the patient were intimate, sexual partners at this time. This incident was immediately preceded by an argument that was audible to the patient's roommate. The practitioner left after being interrupted. There was no suggestion that the incident was in any way consensual, and in any case, the patient sustained physical injuries. The aggression was a breach of trust and, on any view, amounted to an incident of intimate partner violence.

77. The incident took place in the context of a relationship that already involved a vulnerable patient and a significant power differential.
78. The controlling behaviours evidenced by the psychologist in obtaining access to the patient's mobile phone for the purpose of reading her text messages and viewing her photographs are a further aggravating factor.
79. The Tribunal accepts, for the purposes of these reasons, that the relationship may have been a tumultuous one. However, the psychologist should be expected to have exercised better insight and control in relations to his interpersonal relationships. In any case, nothing can excuse or explain the act of physical violence perpetrated by the respondent upon the patient.
80. The Tribunal is satisfied that the psychologist's conduct during the course of the relationship, in terms of both the physical assault and the controlling behaviours, was conduct that is inconsistent with the psychologist being a fit and proper person to hold registration in the profession.

The investigation process

81. On any view of the agreed facts, the psychologist misled, and indeed lied, to APHRA and the Board during the initial investigation process.
82. In explaining his conduct to the Tribunal the psychologist sought to minimise his culpability in a number of ways. He said that his denials were made on the advice of lawyers, including a local ACT firm, who advised him to "deny everything now".¹⁴ The lawyers then became difficult to contact,¹⁵ such that he

¹⁴ Transcript of proceedings 6 February 2019 at page 27

¹⁵ Transcript of proceedings 6 February 2019 at page 28

was not able to remedy the situation at an earlier stage. He also explained that the allegations did not register with him because of his other personal, medical and professional issues,¹⁶ and that it was only after he started treatment in ‘mindfulness’ and took a trip overseas that he was finally in the frame of mind to return to Canberra to defend the case. When he did so, he consulted his current lawyers, and eventually, albeit late in the day, conceded to the agreed statement of facts.

83. This Tribunal finds it surprising that a law firm, properly instructed, would advise a client, faced with serious disciplinary allegations, to simply “deny everything”, but even if that indeed happened, it is no excuse for the psychologist’s conduct. Clause C.7.1 of the Code of Ethics clearly requires psychologists to co-operate with ethics investigations and proceedings. The psychologist should have been aware of this obligation. He cannot hide behind alleged legal advice as an excuse for a flagrant breach of his ethical obligations.
84. The Tribunal does accept that, by the time APHRA commenced its investigation, the psychologist did have a number of personal and professional concerns. It is conceivable that he felt overwhelmed and was not thinking clearly. Such conduct, while not excusable, is at least understandable, and is hardly uncommon in these kinds of proceedings.¹⁷ Absent other considerations, the Tribunal may have been prepared to accept that the psychologist’s deceptive conduct during the investigation was an aberration explained by panic or desperation about the potential ruin of his career. There are, however, several other considerations.
85. First, there are the references. When confronted with the allegations, the psychologist understandably sought the support and assistance of colleagues within the profession. However, he did so without disclosing to those persons either the full circumstances of the investigation, or the true basis for it. As a consequence, these colleagues provided references without being fully apprised of facts that may have altered their opinions of the psychologist, and would certainly have altered the references they provided for him. In seeking

¹⁶ Statement of fact at [27]-[28]

¹⁷ See discussion of cases below under ‘sanction’

the references under false pretences, the psychologist abused the trust of his colleagues and, indeed, sought to manipulate them for his personal gain.

86. Secondly, when seeking the references, the psychologist made misleading assertions about the patient. Again, this conduct was deliberate and calculated, was done without regard to her interests, and had the potential to cause her further harm.
87. Third, the period of obfuscation and then non-cooperation was extensive, beginning at the commencement of the investigation and ending only on the first day of the hearing. While the Tribunal acknowledges the psychologist never actively denied the allegations during the Tribunal proceeding, he did not concede them either. The Board was left with little option but to continue to liaise with the patient, her family, her former partner and her former roommate. A number of witnesses were subpoenaed. The proceedings undoubtedly caused all involved, including the patient, who refused to participate, further stress. While the psychologist deserves some credit for ultimately conceding the allegations, thus avoiding the need to call the subpoenaed witnesses and prolong the hearing, his failure to fully engage in the process right up to the date of the hearing was unhelpful.
88. The Board has sought to make the psychologist's conduct during the investigation a separate ground for disciplinary action. Generally, dishonesty during the investigation process is treated only as an aggravating factor in determining sanction, rather than a separate ground of disciplinary action.¹⁸ However, having regard to all the circumstances, the Tribunal's view is that the psychologist's conduct in this case, involving as it does a prolonged period of dishonesty and the drawing in his unwitting colleagues, and apparently executed without any regard for the wellbeing of the patient, is of sufficient distinctiveness and seriousness that it should be treated as another ground for professional discipline.

¹⁸¹⁸ See *Psychology Board of Australia v Shabimper* [2016] QCAT 259 at [52]

89. Having regard to all the factors, the Tribunal is satisfied that the psychologist's conduct in relation to ground 3 meets both definitions of misconduct by reason of being:
- (a) unprofessional conduct by the psychologist that amounts to conduct that is substantially below the standard reasonably expected of a registered health practitioner of an equivalent level of training or experience; and
 - (b) conduct of the psychologist, whether occurring in connection with the practice of the health practitioner's profession or not, that is inconsistent with the psychologist being a fit and proper person to hold registration in the profession.

Conclusion — characterisation

90. For the reasons set out above, the Tribunal is satisfied, on the agreed facts, that the psychologist:
- (a) deliberately manipulated a vulnerable patient to achieve a sexual purpose;
 - (b) committed an act of violence upon her;
 - (c) lied to regulatory authorities during the investigation process; and
 - (d) abused the trust of his colleagues for personal gain.
91. The Tribunal is satisfied that the totality of the psychologist's conduct clearly and comfortably falls within the definition of 'professional misconduct'. Additionally, for the reasons set out above, each of the three grounds would individually constitute professional misconduct.

Sanction

92. The parties are in agreement that the psychologist should be excluded from practice for a period of some years. The questions that arise are whether he should be suspended from practice, or disqualified, and for how long.
93. The essential principle in relation to disciplinary action was stated by the New South Wales Court of Appeal in *HCCC v Do* [2014] NSWCA 37 at paragraph 35 as follows:

The objective of protecting the health and safety of the public is not confined to protecting the patients or potential patients of a particular

practitioner from the continuing risk of his or her malpractice or incompetence. It includes protecting the public from the similar misconduct or incompetence of other practitioners and upholding public confidence in the standards of the profession. That objective is achieved by setting and maintaining those standards and, where appropriate, by cancelling the registration of practitioners who are not competent or otherwise not fit to practise, including those who have been guilty of serious misconduct. Denouncing such misconduct operates both as a deterrent to the individual concerned, as well as to the general body of practitioners. It also maintains public confidence by signalling that those whose conduct does not meet the required standards will not be permitted to practise.

94. While these comments were made in relation to a medical practitioner, they apply equally in relation to a psychologist.

95. The jurisdiction is protective and not punitive. As was observed in *HCCC v Iskander* [2015] NSWCATOD 30, the Tribunal said at paragraph 174:

*Generally, it is a pre-requisite for the making of an order cancelling a practitioner's registration that there is a finding that the psychologist is probably currently unfit to practice [sic] and is likely to remain so for a significant or indefinite period (see *HCCC v Della Bruna* [2014] NSWCATOD 31; *HCCC v Jamieson* [2014] NSWCATOD 56).*

96. In *Nursing and Midwifery Board v Hogan* [2018] TASHPT 3 (**Hogan**) the Tasmanian Health Practitioners Tribunal surveyed the authorities, and set out a number of relevant considerations as follows (citations omitted):

46 *In determining an appropriate sanction a number of matters require consideration. The matters which follow are inter-related and are not mutually exclusive. There may be others. They are as follows:*

- (a) *Any need to protect the public against further misconduct by the psychologist.*
- (b) *The need to protect the public from similar conduct, through general deterrence, of other practitioners.*
- (c) *The need to protect the public and maintain confidence in the profession by reinforcing high professional standards, denouncing transgressions and thereby articulating the high standards expected of the profession such that even where there may be no need to deter a practitioner for repeating the conduct, the conduct is of such a nature that the Tribunal should give an emphatic indication of its disapproval*
- (d) *In the case of conduct involving misleading conduct, including dishonesty, whether the public and fellow*

practitioners can place reliance on the word of the psychologist.

- (e) *Whether the psychologist has breached any Act, regulations, guidelines or code of conduct issued by the relevant professional body and whether the psychologist has done so knowingly.*
- (f) *Whether the psychologist's conduct demonstrates incompetence, and if so, to what level.*
- (g) *Whether or not the conduct was isolated such that the Tribunal can be satisfied of his or her worthiness or reliability in the future.*
- (h) *The psychologist's disciplinary history.*
- (i) *Whether or not the psychologist understands the error of his or her ways, including an assessment of any remorse and insight (or lack thereof) shown by the psychologist. It has been said a practitioner who fails to understand the significance and consequences of misconduct is a risk to the community.*
- (j) *The desirability of making available to the public any special skills possessed by the psychologist.*
- (k) *The psychologist's personal circumstances at the time of the conduct and at the time of imposing the sanction. The weight to be given to personal circumstances cannot, however, override the fundamental obligation of this Tribunal to provide appropriate protection of the public interest in the honesty and integrity of practitioners and in the maintenance of proper standards of such practice.*
- (l) *The Tribunal may consider any other matters relevant to the psychologist's fitness to practice and other matters which may be regarded as aggravating or which mitigate its seriousness. Generally speaking, mitigating factors such as no previous misconduct or a practitioner's service to the profession are of considerably less significance than in the criminal process because the jurisdiction is protective, not punitive.*

- 97. While the list is not necessarily exhaustive, the factors in *Hogan* provide a useful guide to the relevant considerations.
- 98. Of these factors, only (f) and possibly (h) are irrelevant to his case.
- 99. As to factor (a), the Tribunal considers the psychologist's insight, or lack of it, in greater depth below. In brief, the Tribunal is not convinced that the psychologist either fully understands the gravity of his misconduct or accepts

the wrongness of it. Nonetheless, the Tribunal is reasonably satisfied that he is now appreciative of the consequences of ethical breaches for his career, and that as a consequence he will exercise better restraint in the future.

100. In respect of paragraphs (b) and (c), the psychologist's misconduct is of such a nature that the public should be protected through general deterrence. The sanction imposed should be sufficient to act as a deterrent to other psychologists.
101. In relation to paragraph (d), the psychologist's misleading and dishonest behaviour during the initial stages of the investigation, the nature of the misleading information he provided to APHRA, and his willingness to make wrong and scurrilous allegations about complainant when seeking references, cast doubt as to whether either the public or other practitioners can rely upon his word when he is faced with a stressful situation or allegations of wrongdoing. There is, however, no suggestion of other forms of dishonesty.
102. In relation to paragraph (e) the psychologist has admitted to breaching the Code of Ethics. The breaches include both the boundary violation and the failure to cooperate with the APHRA investigation. The psychologist did not deny knowing about the Code, and a lack of knowledge would be no excuse anyway.
103. In relation to paragraph (f), there is no suggestion of clinical incompetence as such, although the manner in which the psychologist willingly entered into a relationship with a patient with the clinical profile of the complainant suggests that his professional judgement on this issue was below the standard reasonably expected of a psychologist of his training and experience.
104. In relation to factor (g), while there is no suggestion that the psychologist engaged in an inappropriate relationship with any other patient, the conduct in issue in this case took place over some months, and therefore could not be considered an isolated event. Additionally, the combination of the manner in which the relationship started (ground 1) and developed (ground 2) and the psychologist's subsequent pattern of deception when it was discovered (ground 3) suggests a troubling pattern of manipulative behaviour by the psychologist.

105. In relation to factor (h), the psychologist has no disciplinary history.
106. In relation to factor (i) the Tribunal is not satisfied that the psychologist truly accepts the error of his ways. His expressed remorse is of a limited nature, and much of it appears self-pitying and self-indulgent. As this factor is a significant one for the Tribunal, it is considered further below.
107. In relation to factor (j), the psychologist appears to be well qualified. His expertise in sports psychology is different to the work he was undertaking at the time of the offending. There is, however, no evidence before the Tribunal of anything unique about his skills that make it a public imperative that he return to work.
108. In relation to (k), the Tribunal acknowledges that the respondent was under considerable personal and professional pressure at the time of the offending, that he had few friends and limited support networks in Australia. Given the significance of this as a mitigating factor, this Tribunal has given the psychologist's personal circumstances additional consideration below. The other mitigating factor is the psychologist's agreement, albeit late in the process, to an agreed statement of facts, which alleviated the need for the Board to call witnesses and prolong the hearing.
109. In relation to factor (l), the other aggravating factors include the patient's clinical profile and particular vulnerability, the power differential between the parties, and the manipulative and violent aspects of the relationship between them.

Insight

110. The Tribunal remains concerned that the psychologist does not have true insight into his offending.
111. At no stage in his written submissions, or his oral evidence, did the psychologist express any true compassion or consideration for the patient, or the consequences his actions have had for her. Indeed, in both his written submissions and oral evidence, the psychologist demonstrated a self-involved focus on his story, and the effect these events have had on his life. The Tribunal

considers that he showed little concern about the patient's story and the consequences for her life of his offending.

112. For example, the psychologist's witness statement in these proceedings attests, in some detail, to his medical and personal issues and his plans "moving forward in relation to employment". While these are, of course, relevant considerations for the Tribunal, the statement is remarkable in its complete failure to address the substance of the allegations, express any real contrition, or even express any consideration for the patient at all. Even accepting that the statement was carefully crafted so that the psychologist did not express any sentiments that may expose him to criminal sanction, the lack of an expression of any true remorse, or any understanding or empathy for the patient, is suggestive of a significant lack of insight.
113. That continued lack of insight was also evident in his oral evidence to the Tribunal. An example is the following exchange during the hearing in which the psychologist, despite prompting from both the Board's counsel and the Tribunal, struggled to express any understanding of the patient's circumstances:

MR ARCHER: Dr Roychowdhury, in light of the event in the bedroom and on the bed, the statement of facts describes it in a particular way – we won't go there again. I will ask you this question: in relation to the outcomes of that event for [the patient] what effect do you think it had on her?

Dr Roychowdhury: I think, you know, reading the – the ... (inaudible) ... I think she was shaken and she was a bit anxious.

Mr Archer: Is that it?

SENIOR MEMBER ROBINSON: Dr Roychowdhury, let me ask you this: on the agreed statement of facts before the tribunal, [the patient] was lying face up on the bed. You were kneeling over her with your hands around her neck. As a consequence of that incident, and we don't need to look behind it, but as a consequence of that incident, she suffered bruising and she had difficulty or discomfort eating and drinking. How do you think that incident, and the consequences of it, affected her, if not physically, emotionally? What is the outcome of an event like that?

Dr Roychowdhury: Anxiety.

MR ARCHER: The statement of facts records that as a result of the overall effect of the relationship between you and her, [the patient] suffered short term injury, and the neck incident might be an example of that, psychological harm, including anxiety, hypervigilance, fear, insomnia and possible PTSD, a breakdown of trust in respect of personal

relationships and a breakdown of trust in psychologists and other care providers. Do you accept that your conduct may have had those consequences?

Dr Roychowdhury: Yes.

Mr Archer: How do you think this particular episode may have fed into those consequences?

Dr Roychowdhury: It may have contributed her – to her anxiety.

114. The psychologist's answer is entirely inadequate. By this stage, the psychologist had admitted to the relationship and to the violent incident described above. No purpose was to be served by minimising his conduct. As a qualified and experienced psychologist, he should be expected to demonstrate a higher ability to empathise with – to put himself in the position of – the patient. At the very least, he should have been able to identify, with more fullness, the likely consequences of the relationship for the patient. His circumspect and reluctant answer suggests a lack of true contrition, and perhaps even understanding, on his part.
115. Given the above, the Tribunal remains concerned that the psychologist lacks true insight into his offending. As long as this is the case, he remains a risk to the public.

The psychologist's personal circumstances

116. The Tribunal has taken into account the psychologist's evidence about his personal circumstances, including his medical challenges, work pressures and his general isolation from friends and family.
117. There is no need to set out the details of the psychologist's medical issues, particularly in a public decision. Briefly stated in 2016 the psychologist suffered a number of gastric issues, as well as "...strong intercurrent stress relating to the investigation conducted by ARPHA and the subsequent suspension of [his] registration."¹⁹
118. Medical evidence filed by the psychologist largely confirms these assertions. That medical evidence does not link those conditions to the practitioner's

¹⁹ Witness statement, paragraph 6

offending conduct, and there is no suggestion by either party that this is an impairment case.

119. The Tribunal is satisfied that the psychologist experienced a period of stress in 2016, contributed to by isolation from his friends and family. By the psychologist's own admission, he did not manage this period of his life very effectively. The practitioner appears to have taken steps to improve his 'mindfulness' and resilience since. He has engaged in some degree of self-reflection, and has commenced therapy sessions to work through concerns about his behaviours.
120. In his statement, the psychologist said that:

I know I am not the same person I was five years ago. I tried to learn the past and move forward in a constructive way as recommended by my psychologist. During my therapy sessions with my psychologist we discussed about self-identity, learning from the past, and moving forward positively in the future. I now want to work in my field and contribute positively to the society.

While there is minimal evidence before the Tribunal that suggests he would be better able to manage stressors now, but he does appear to be in a better position to recognise them.

121. The practitioner goes on to outline his plans for his career which include employment and research opportunities. He notes that he was offered a PhD program but due to the Tribunal proceedings and his health and financial constraints he could not take the offer. The practitioner has worked hard to achieve what was a promising career. He is well aware that his conduct, the subject of this case, will have a detrimental effect on his career. He is motivated to study and improve his prospects, and there are prospects of the psychologist maintaining a successful and useful career in the future. The Tribunal is conscious that any sanction imposed should not crush that possibility – but at the same time, the possibility of reformation must be balanced against any risk to the public.

Sanction - Conclusion

122. Having regard to the above considerations, the Tribunal is satisfied that the psychologist is currently not fit to practise as a psychologist.

123. Cancellation of registration involves a judgement that, at that time of the cancellation, the practitioner is not suitable for registration, and if he or she seeks to return to the profession, that must involve applying for registration afresh. Suspension involves a judgement that at the time of the period of suspension the person will be fit for re-registration.²⁰
124. The Tribunal is not in a position to assess how long it will take for the psychologist to regain his fitness to practise. It will certainly be a substantial period of time, and it will certainly be some years.
125. Accordingly, the only appropriate disciplinary action is cancellation of the practitioner's registration, as well as a period of disqualification.
126. Upon the expiration of the period of disqualification, the psychologist will need to satisfy the Board that he is, at that time, a fit and proper person to be registered as a psychologist. As part of that process, he will need to satisfy the Board of his awareness of his ethical obligations, particularly in relation to professional boundaries. He will also need to demonstrate genuine insight into his wrongdoing, and the affect it has had upon the patient. This will likely require the provision of an expert report, by an independent psychologist, and the period of disqualification should be sufficient to allow this to happen.
127. The remaining question is: how long should the period of disqualification be?
128. These proceedings are not intended to punish the psychologist. The principle purpose is to protect the public from practitioners who fail to maintain the high standards necessary to treat patients safely. A further purpose is to demonstrate both to the public and to the members of the profession that significant breaches of the obligations of a practitioner are not acceptable, and that to ensure the confidence of the public in professionals that those breaches have consequences.²¹ Consequently, the period of disqualification must be sufficient

²⁰ *Psychology Board v Tunstall*, [68]; See also *Honey v Medical Practitioners Board of Victoria* [2007] VCAT 526, [42]

²¹ *Medical Board of Australia v Veness* [2012] ACAT 36

to ensure the protection of the public, and to act as a general deterrent, but it should not be unduly crushing, nor veer into punitive punishment.

129. While each case must be considered on its facts, other health professional cases involving similar boundary violations can provide some guidance as to how long the period of disqualification should be.
130. In *Psychology Board of Australia v King* [2016] QCAT 140 (**King**), the Queensland Civil and Administrative Tribunal undertook a useful review of cancellation periods imposed for boundary violation cases. The Tribunal has had regard to the information in that case, although we do not intend to quote the relevant parts in full here.
131. In *King*, Mr King, engaged in a six month sexual relationship with a patient during the course of a therapeutic relationship. The patient was a vulnerable person who had suffered sexual abuse as a child. During the investigation, Mr King attributed the relationship to the patient and showed a lack of insight. He had had a previous sexual relationship with a patient that was considered an aggravating factor. The Tribunal determined that King's conduct fell within the higher end of the spectrum of misconduct, but not the most serious. He was disqualified for applying for registration for a period of four years.
132. The psychologist is less experienced than Mr King and has not had a previous disciplinary offence. While the Tribunal is concerned about a similar lack of insight, he does appear to have some prospects for rehabilitation.
133. Also at the higher end of the scale is the case of *Psychology Board of Australia v Shahinper* [2016] QCAT 259. Mr Shahinper also engaged in an inappropriate relationship with a patient, and the case involved a range of aggravating circumstances, including prior disciplinary proceedings involving a vulnerable patient, a breach of undertaking and subsequent lying to colleagues (which was treated as an aggravating factor, rather than a separate ground of misconduct). There was, however, no suggestion that Mr Shahinper's conduct was predatory or grooming. Mr Shahinper was disqualified for a period of three years.

134. A significantly lighter sanction was imposed on the psychologist in *Psychology Board of Australia v Wakelin* [2014] QCAT 516. Wakelin involved a psychologist who entered into a sexual relationship with a former patient immediately after the termination of the therapeutic relationship. She falsely denied the allegations and misled APHRA during the investigation. By agreement, the parties proposed that QCAT impose a sanction of 18 months suspension. The Tribunal imposed the sanction, but expressed some concern that it was too light, particularly given the deception involved. Significantly, Wakelin had voluntarily ceased practice, complied with undertakings, and entered into counselling. The professional relationship, as here, had lasted only a few sessions, but Ms Wakelin had clearly terminated it before entering into the sexual relationship.
135. Also on the lower end was *Psychology Board of Australia v Tunstall* [2016] VCAT 1263. Tunstall entered into a sexual relationship with a patient. In treating the patient, he practiced outside his expertise, failed to seek appropriate supervision and failed to disclose the relationship to other health professionals. The Victorian Civil and Administrative Tribunal (VCAT) took into account Mr Tunstall's admissions, the changes in his life, and the time that has elapsed since the offending behaviour. He was disqualified for a period of 18 months. Although satisfied he was no longer practising, and hence presented little risk to the public, VCAT determined that any lesser period of disqualification would not convey to the profession the Tribunal's strong disapproval of his conduct.²²
136. In *Medical Board of Australia v Arvid Herbert Gunnar Lind* (VR165/2016) the Western Australian State Administrative Tribunal appears to have accepted that a period of 15 months suspension may have been appropriate in the case of a medical practitioner who engaged a sexual relationship with a patient, but who, at the time of the hearing, had developed insight into his conduct, admitted the allegations, and was genuinely contrite. The respondent had, however, already surrendered his registration.

²² At [75]

137. The psychologist's conduct is more serious than that of the psychologist in *Tunstall*, and his situation lacks many of the mitigating factors that apparently weighed in favour of *Wakelin* and *Lind*. It is not, however, as serious as *King* or *Shahinper*, as the therapeutic relationship did not continue alongside the relationship and the psychologist has no prior history of offending.
138. The Tribunal is satisfied, having had regard to a range of cases, that it is appropriate to cancel the psychologist's registration and prohibit him from applying for registration for a period of three years.
139. The Tribunal is aware that this is a lengthy period of time for the psychologist to be out of practice. However, the psychologist has a lot of work to do, in terms of self-reflection and self-development. If he is to return to practice, he will need to address the stressors that led him to down the path to misconduct evident in this case. He will need to gain insight into his conduct, so as not to offend again. Moreover, he will need to ensure that, if he does obtain re-registration, he is in a position to earn back the trust of his colleagues.
140. The cancellation and disqualification will be backdated, to commence from the date this decision was reserved, being 6 February 2019.

Costs

141. Section 201 of the National Law gives the tribunal an apparently unfettered costs power, exercisable in relation to proceedings for review brought pursuant to the National Law.
142. The Tribunal's position is that the principle that "costs follow the event" should be applied when exercising the costs discretion under section 201 of the National Law.²³ The established qualifications to that principle are also applicable.²⁴

²³ *Howard v Psychology Board of Australia* [2018] ACAT 127

²⁴ *Ibid*

143. The Board has successfully sought sanctions against the psychologist. The usual position in such circumstances is that the psychologist would pay the Board's costs.
144. While the Tribunal is cognisant of the crippling burden a costs order may impose upon the psychologist, that alone is not a reason not to make the usual order. The respondent provided no other persuasive reason why the usual rule should not apply.
145. The Board undoubtedly incurred significant costs in investigating this matter, and ultimately preparing for hearing. Those costs were increased by the psychologist's misleading conduct during the investigation and delayed admissions during the hearing. The psychologist deserves some credit for agreeing to an agreed a statement of facts, but as this was done on the first day of the hearing it is unlikely to have significantly reduced the costs.
146. In the circumstances, the Tribunal is satisfied that the psychologist should pay the Board's costs of these proceedings on a party/party basis at the Supreme Court of the ACT scale, in an amount to be agreed or failing agreement, to be assessed by the Tribunal.

The decision to hold a private hearing and make non-publication orders

147. The final issue is whether the Tribunal should make a non-publication order.
148. The Tribunal's power to make non-publication orders in occupational discipline proceedings was discussed at some length in *Psychology Board of Australia v Sullivan* [2017] ACAT 104 (*Sullivan*). In that case, the Tribunal observed that:

Proceedings before the Tribunal are required to be public,²⁵ unless legislation provides otherwise²⁶ or the Tribunal orders otherwise. In the usual course of events any member of the public can attend an occupational discipline hearing, and the written reasons for the decision will be published online. As a concomitant of the obligation to provide a public hearing, documents which were before the Tribunal for the hearing are usually able to be viewed by the public should a request be made to inspect the Tribunal's file. With limited exception²⁷, the names of

²⁵ ACAT Act section 38

²⁶ See for example the *Mental Health Act 2015*, section 194

²⁷ Section 423A of the *Legal Profession Act 2006* specifies that disciplinary proceedings in the Tribunal in relation to lawyers are de-identified until all appeal processes are finalised

parties to an occupational discipline matter are also available to the public through the daily lists, the reasons for decision, or upon inspecting a file.

Although there is an important public interest served by this transparency, competing private and public interests can in some cases outweigh the public interest served by a public hearing. Section 39 of the ACAT Act provides the mechanism by which specified competing interests are weighed up, and gives the Tribunal power in appropriate cases to make orders for a private hearing or restricting publication of information in relation to the hearing:

39 Hearings in private or partly in private

(1) This section applies in relation to an application, or part of an application, if the tribunal is satisfied that the right to a public hearing is outweighed by competing interests.

Note See s (5) in relation to competing interests.

(2) The tribunal may, by order, do 1 or more of the following:

- (a) direct that the hearing of the application, or part of the hearing, take place in private and give directions about the people who may be present;*
- (b) give directions prohibiting or restricting the publication of evidence given at the hearing, whether in public or private, or of matters contained in documents filed with the tribunal or received in evidence by the tribunal for the hearing;*
- (c) give directions prohibiting or restricting the disclosure to some or all of the parties to the application of evidence given at the hearing, or of a matter contained in a document lodged with the tribunal or received in evidence by the tribunal for the hearing.*

(3) The tribunal may make an order under subsection (2) on application by a party or on its own initiative.

(4) A person must not contravene an order under subsection (2) (b) or (c).

Maximum penalty: 50 penalty units, imprisonment for 6 months or both.

(5) For this section, the right to a public hearing is outweighed by competing interests if the tribunal is satisfied that the application, or part of the application, should be kept private—

- (a) to protect morals, public order or national security in a democratic society; or*
- (b) because the interest of the private lives of the parties require the privacy; or*
- (c) to the extent privacy is strictly necessary, in special circumstances of the application, because publicity would otherwise prejudice the interests of justice.*

...

The non-publication and private hearing orders were precipitated because the vast majority of the information contained in the documents before the Tribunal consisted of personal health information of the client, interspersed with personal information relating to the practitioner and the notifiers. Most of the personal health information, in particular, fell within the operation of the Health Records (Privacy and Access) Act 1997 which would oblige a person in possession of that information to maintain its confidentiality except in specified circumstances.

Subsection 39(5) of the ACAT Act does not expressly provide for the private interests of third parties such as the client to be taken into account as outweighing the public interest served by a public hearing.

In this case, the Tribunal was satisfied that the right to a public hearing, and specifically the interest served by public access to the documents filed with the Tribunal and public attendance during the hearing, was outweighed by the prejudicial effect that public access to the information contained in those documents and discussed during the hearing would have on the interests of justice. The Tribunal was satisfied that it was contrary to the interests of justice for private health information relating to named third parties, normally subject to statutory confidentiality obligations, to become publicly available as an incident of the bringing of disciplinary proceedings against a practitioner. Not only does such an approach undermine the objectives of the Health Records (Privacy and Access) Act 1997, the inevitable consequence of such disclosure routinely occurring would be a reluctance on the part of clients to notify regulatory bodies of inappropriate conduct, or to participate in subsequent disciplinary proceedings.²⁸ Conducting the hearing publically, but with adjustments to de-identify the client or minimise the amount of personal health information being openly discussed, would be cumbersome, lengthen the hearing and become administratively inefficient, contrary to the objectives set out in section 7 of the ACAT Act.

149. The same principles apply here. Accordingly, in advance of the hearing a differently constituted Tribunal ordered that there be no public access to the file pending further orders, that the hearing of the disciplinary application take place in private, and that there be no public access to the transcript or audio recording of the hearing. By agreement of the parties, those orders remained in effect during the hearing.
150. The psychologist sought to extend those orders indefinitely. The psychologist also sought a continuation of the non-access and non-publication orders, and

²⁸ See the principles set out in *John Fairfax Publications Pty Ltd & Anor v District Court of NSW & Ors* [2004] NSWCA 324

also sought that there be no publication of the reasons for decision other than to the parties. The Board opposed that application.

151. The Tribunal in *Sullivan* discussed the approach to be taken after the conclusion of the hearing as follows:

After an occupational discipline hearing, in the ordinary course of events, a decision would be made with written reasons provided to the parties and also published. The written reasons would ordinarily name the practitioner, and witnesses, and set out findings of fact together with the evidence on which those findings were made.²⁹ The Board would then, in accordance with its obligations under the National Law³⁰, record in the public register outcomes such as any reprimand issued by the Tribunal, suspension of practice or conditions imposed upon the practitioner's registration.

...

While de-identification of the client in published reasons might be one way to address the issue of sensitive personal health information, it was submitted by the practitioner that because of the unique medical information and the circumstances of the case, including the facts that the practitioner and client continued to have a personal relationship, the outcome would be recorded against the practitioner on the public register, and the small number of practitioners in the ACT, the use of a pseudonym in relation to the client was unlikely to prevent a member of one sector of the public identifying the client, and thus his personal health information.

152. Many of the same arguments as those made in *Sullivan* were advanced by the psychologist in this case, although obviously, as the psychologist and the patient in this case are no longer in a relationship, identification by means of their continuing relationship was not suggested. Additionally, while Dr Roychowdhury's solicitor phrased much of her argument in terms of protecting the patient, there was an acknowledgment that he wished to ensure his anonymity so as to better protect his prospects of rehabilitation and the advancement of his career in the future.
153. The Board, also, took a similar position in this case to that which it took in *Sullivan*. While the Board agreed that the orders preventing public access to the file and record of proceedings should be continued, it opposed orders restricting

²⁹ Section 60 of the ACAT Act and section 179 of the *Legislation Act 2001*

³⁰ Sections 222 and 225 of the National Law

publication of the reasons for decision, on the basis that the public interest in reasons for the decision being made publically available outweighed the other interests, which it submitted could be addressed by de-identification. The Board noted the legislated requirement that hearings be public, referred the Tribunal to the open justice principle, and the approach to section 39 of the ACAT Act established in previous cases.³¹ The Board was also concerned to ensure information about offending practitioners be publically available, so as to protect the public and enhance confidence in the disciplinary process.

154. While the Tribunal is sympathetic to the Board's position, it is also very concerned about the welfare of the patient. Her sensitive personal health information is integral to this case, but the publication of that information is likely to have a further detrimental effect on her health and peace of mind. In our view, there is little public interest served by the disclosure of such information to the public, and any which exists is outweighed by the potential harm to the patient likely to arise from its release.
155. Details of the patient's condition, and particular vulnerabilities, are contained in the agreed statement of facts. This should not be published to any person other than the parties.
156. While the Tribunal has carefully avoided referring to the details of the patient's records in these reasons, the Tribunal remains concerned that, in a small jurisdiction such as the present one, any release of the detail of the allegations has some potential to identify the patient, and cause her further harm. The Tribunal is most reluctant to do this. Nonetheless, we have had regard to the submissions of the Board, and particularly the submissions made about the public interest in ensuring information about professionals is available for the public protection. The only way to completely protect the patient would be to anonymise these proceedings, and hence protect the name of the psychologist as well. We have given serious consideration to doing this.

³¹ *Psychology Board of Australia v Fox (2)* [2015] ACAT 25; *Health Care Complaints Commission v BXD (No 2)* [2015] NSWCATOD 135; *Nursing and Midwifery Board of Australia v Nurse DZ* [2015] ACAT 93 and *Psychology Board of Australia v D* [2010] VSC 375

157. Although it is not an easy decision, we have ultimately decided that these reasons, and the name of the practitioner, should be published in order to protect the public. However, orders prohibiting public access to the file pending further order, that the hearing of the disciplinary application take place in private, and that there be no public access to the transcript or audio recording should remain in effect.

Conclusion

158. The Tribunal orders that:

1. Pursuant to section 196(1)(b)(iii) of the National Law the Tribunal finds that the respondent has behaved in a way that constitutes professional misconduct.
2. Pursuant to section 196(2)(e) of the National Law, the respondent's registration is cancelled.
3. Pursuant to section 196(4)(a) of the National Law, the respondent is disqualified from applying for registration for a period of three years, from 6 February 2019.
4. The respondent is pay the costs of these proceedings on a party/party basis at the Supreme Court of the ACT scale, in an amount to be agreed or failing agreement, to be assessed by the Tribunal.
5. Pursuant to section 39 of the *ACT Civil and Administrative Tribunal Act 2008*:
 - (a) These reasons are to be published, with the name of the patients, witnesses and third parties anonymised; and
 - (b) There is to be no public access to the file for this proceeding.

.....
 Senior Member H Robinson
 For and on behalf of the Tribunal

HEARING DETAILS

FILE NUMBER:	OR 19/2018
PARTIES, APPLICANT:	Psychology Board of Australia
PARTIES, RESPONDENT:	Dev Roychowdhury
COUNSEL APPEARING, APPLICANT	Mr K Archer
COUNSEL APPEARING, RESPONDENT	N/A
SOLICITORS FOR APPLICANT	ACT Government Solicitor
SOLICITORS FOR RESPONDENT	Bradley Allan Love Lawyers
TRIBUNAL MEMBERS:	Senior Member H Robinson Senior Member K Lubbe
DATES OF HEARING:	6 February 2019