

CITATION: *Medical Board of Australia v Azam (No 2)*
[2017] QCAT 206

PARTIES: Medical Board of Australia
(Appellant)
v
Muhammad Azam
(Respondent)

APPLICATION NUMBER: OCR184-14

MATTER TYPE: Occupational Regulation Matters

HEARING DATE: 19 June 2017

HEARD AT: Brisbane

DECISION OF: **Judge Sheridan, Deputy President**
Assisted by:
Dr Kong Goh
Dr Glenda Powell
Mr Michael Halliday

DELIVERED ON: 28 June 2017

DELIVERED AT: Brisbane

ORDERS MADE:

- 1. Pursuant to s 196(2)(e) of the *Health Practitioner Regulation National Law (Queensland)* (National Law), Dr Azam's registration is cancelled, effective from 29 June 2017.**
- 2. Pursuant to s 196(4)(a) of the National Law, Dr Azam is disqualified from applying for registration for a period of four years, commencing on and from 29 June 2017.**
- 3. Dr Azam is to pay the Medical Board of Australia's costs of and incidental to these proceedings, to be agreed or, failing agreement, to be assessed on the District Court scale.**

CATCHWORDS: PROFESSIONS AND TRADES – HEALTH CARE PROFESSIONALS – MEDICAL PRACTITIONERS – DISCIPLINARY PROCEEDINGS – PROFESSIONAL MISCONDUCT – where the Tribunal previously found that the practitioner behaved

in a way that constituted professional misconduct – whether the practitioner’s registration should be cancelled or suspended – whether the practitioner should be prevented from re-applying for registration – whether the practitioner should pay the costs of the proceedings

Health Practitioner Regulation National Law (Queensland), s 3A, s 196(1)(b)(iii), s 196(2)(e)
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 100, s 102(3)

Health Ombudsman v Antley [2016] QCAT 472, cited
Medical Board of Australia v Alroe [2005] QHPT 004, considered
Medical Board of Australia v Alroe [2016] QCA 120, cited
Medical Board of Australia v Azam [2017] QCAT 156, cited
Medical Board of Australia v Blomeley [2014] QCAT 160, distinguished
Medical Board of Australia v Love [2013] QCAT 608, distinguished
Medical Board of Australia v Putha [2014] QCAT 159, cited
Medical Board of Australia v Quan [2006] QHPT 005, cited
Medical Board of Australia v Wong [2017] QCA 42, cited
Psychology Board of Australia v Wakelin [2014] QCAT 516, cited
Ralacom Pty Ltd v Body Corporate for Paradise Island Apartments (No 2) [2010] QCAT 412, considered
Shahinper v Psychology Board of Australia [2017] QCA 96, considered

APPEARANCES:

APPLICANT: P J Davis QC, with M P Williams instructed by Lander & Rogers

RESPONDENT: D K O’Gorman SC, with S Lane instructed by K&L Gates

REASONS FOR DECISION

- [1] By its decision dated 29 May 2017, the Tribunal determined that Dr Azam had behaved in a manner which constitutes professional misconduct pursuant to s 196(1)(b)(iii) of the *Health Practitioner Regulation National Law (Queensland)* (**National Law**).¹ The Tribunal must now decide the appropriate sanction to be imposed.
- [2] In considering the issue of sanction, it was acknowledged by Dr Azam, agreeing with the statement made by the Board, that the guiding principle in the administration of the National Law is that the health and safety of the public are paramount.² The jurisdiction is essentially protective rather than punitive. Nevertheless, upholding the standards of the profession is a matter of relevance and the Tribunal must also be concerned with issues of general deterrence.
- [3] The Board submitted that the appropriate order for the Tribunal to make is that Dr Azam's registration be cancelled and that he be disqualified from applying for registration for a period of four years. The Board's alternative position is that Dr Azam's registration be suspended for a period of four years and that following suspension, his registration be subject to conditions requiring the presence of a chaperone and that Dr Azam undertake an education course addressing professional boundaries and ethical obligations within a period of 12 months.
- [4] Counsel for Dr Azam contended that the appropriate sanction is for his registration to be suspended for a period of one to two years. It was accepted that, following the period of suspension, his registration should be subject to the conditions as proposed by the Board.

Issue in dispute

- [5] The primary issue in dispute is whether the conduct of Dr Azam, as found by the Tribunal, warrants the cancellation or suspension of Dr Azam's registration.
- [6] The submissions on behalf of Dr Azam focus on the finding to the effect that Dr Azam had sexual intercourse with a patient. The submissions refer solely to cases involving medical practitioners engaging in sexual relationships with patients. In referring to those cases, appropriately it was acknowledged that the cases involving medical practitioners engaging in sexual misconduct with a patient vary considerably and that the sanction to be imposed will depend upon the particular circumstances.
- [7] Reference was made in the submissions to the decision of the Honourable James Thomas AM QC in *Medical Board of Australia v*

¹ *Medical Board of Australia v Azam* [2017] QCAT 156.

² *National Law*, s 3(A).

Blomeley.³ There, following a review of a number of cases to which the Tribunal was referred involving the disciplining of medical practitioners for sexual misconduct, the Tribunal accepted those cases showed a range of suspensions of between three months to two years.

- [8] In comparing those cases, it was said that, here, there was only one instance of sexual intercourse. In mitigation, it was suggested that Dr Azam showed remorse immediately, thereby showing insight into the inappropriate nature of his conduct. In support of that submission, reliance was placed upon the evidence of JBD where she said, Dr Azam “sat down on the log with his head in his hands.” JBD also gave evidence in her AHPRA statement that she knew from Dr Azam’s reaction that he knew “what happened between us was wrong.”
- [9] Further, it was submitted that Dr Azam needed to be given credit for some aspects of his conduct of the hearing before the Tribunal; his agreement to a screen being placed between JBD and him when JBD was giving evidence and his decision not to rely on his affidavit and to not require two witnesses for cross-examination.
- [10] Reference was also made on behalf of Dr Azam to the adverse media attention, the fact that he had already had conditions on his registration for some five years and to the considerable adverse effects upon Dr Azam and his family, including, it was said, the loss of his medical practice.
- [11] Taking into account those factors, on behalf of Dr Azam it is submitted support a sanction of suspension and a suspension within the range referred to in *Blomeley*.⁴
- [12] The submissions fail to address the various other allegations in the referral, each of which the Tribunal found to be proven and the various findings of fact made by the Tribunal. It was simply said on behalf of Dr Azam that the sexual intercourse allegation is the most serious of the allegations.
- [13] In the circumstances of this case such an approach to sanction is clearly flawed. In determining sanction the Tribunal must have regard to all the allegations and the totality of the conduct as found by the Tribunal. A determination as to which of the seven allegations is the most serious is not necessary, nor helpful. No one allegation should be considered in isolation to the other events. Particularly in this case, it is necessary for the Tribunal to reflect on various aspects of Dr Azam’s overall conduct and then for the Tribunal to have regard to any comparative cases. There are various aspects of that conduct which the Tribunal finds very troubling.

³ [2014] QCAT 160.

⁴ *Medical Board of Australia v Blomeley* [2014] QCAT 160.

Dr Azam's conduct

- [14] Dr Azam's conduct in relation to both JBD and ANS should be considered predatory in nature. His behaviour during the consultations was clearly grooming both patients for something more. ANS found the grooming behaviour abhorrent and did not attend upon Dr Azam again. The next day she reported the incident to Police. JBD spoke of feeling initially that she was being pursued and admitted to being flattered by the attention. JBD said his treatment of her after the act of sexual intercourse, in particular the payment of \$300 cash, had made her feel like a "whore"; she felt used and humiliated. It is not correct to suggest that JBD was not deceived by Dr Azam.
- [15] Both JBD and ANS were vulnerable, which Dr Azam knew. They had both presented to Dr Azam suffering mental health issues of anxiety and depression, which inevitably increased the potential power imbalance.
- [16] The admitted failure to comply with the chaperone conditions together with the overt steps taken by Dr Azam to falsify or have others falsify the chaperone register and/or medical records, shows a willingness by Dr Azam to mislead the Board and shows little regard for the protective functions performed by the Board.
- [17] This conduct is compounded by Dr Azam's bullying behaviour towards Ms Tankey and Ms Langford. It was clear when Ms Langford was giving evidence before the Tribunal that Dr Azam had placed Ms Langford under enormous pressure to falsify the records in circumstances where she knew what she felt forced to do was wrong. She remained traumatised and scared as to the consequences of her actions.
- [18] The evidence shows Dr Azam has never gained any insight into his behaviour. The evidence of JBD at its highest shows he may have regretted the act of sexual intercourse with the patient; regretted it because he knew it was wrong and there would be consequences. The Tribunal does not accept, as was suggested, that Dr Azam has any remorse. There is nothing he did after the initial reaction of regret that shows any level of contrition. In fact, all his subsequent actions show that he never once gave any thought as to the impact of his actions, and that of others, on JBD.
- [19] He paid a private investigator with the intent of getting JBD to retract her version of events. He condoned the offering of a financial reward to JBD if JBD did so. He was complicit in her being harassed at her home by others and he harassed JBD himself at her children's school and at her home, leading to his being charged with unlawful stalking and released on a bail undertaking including conditions that he have no contact with JBD and her family. Ultimately, a restraining order was made against Dr Azam. These events reflect very poorly upon the character of Dr Azam.

- [20] Dr Azam maintained a denial of each of the allegations against him and that necessitated a three day trial and the calling of eight witnesses. JBD and ANS were extensively cross-examined.
- [21] It is true that by the time the matter came before the Tribunal Dr Azam had been subject to conditions for some five years. The conditions were initially directed solely to the allegations of boundary violations, and later resulted in conditions that he must not treat any female patients.
- [22] The restrictions on his practice in the last five years, and particularly since January 2014, have to be taken into account in sanctioning. Those matters have to be weighed with his continuing denials of any misconduct and the fact that it is only now that he is being dealt with for the totality of his conduct.

Comparative cases

- [23] In its submissions, the Board referred the Tribunal to cases involving dishonesty by practitioners. In *Psychology Board v Wakelin*, the Tribunal commented that a registrant's dishonest responses in the course of an investigation is in some respects an even more serious reflection on the character of the registrant than the sexual transgression.⁵
- [24] There is no doubt acts of dishonesty certainly compound the other misconduct, particularly on the facts here.
- [25] The Board referred to *Medical Board of Australia v Love*,⁶ though submitted that the offending behaviour was not as serious as that found in *Love*. As counsel for Dr Azam in oral submissions commented, *Love* is "clearly in a category of its own." In *Love*, the sexual relationship spanned some five years and the patient was much more vulnerable than the patients here. The practitioner's conduct in continuing the relationship in circumstances where the patient was hospitalised showed a total disregard to the vulnerable patient's welfare. By the time the matter came before the Tribunal, the practitioner in *Love* had retired but the Tribunal still made an order prohibiting any application for registration for a period of six years.
- [26] The Board considered Dr Azam's conduct to be more serious than that in *Blomeley*,⁷ *Chiappalone*,⁸ *North*,⁹ *Yasin*,¹⁰ *Quan*,¹¹ *Chandra*¹² and *Putha*.¹³

⁵ [2014] QCAT 516 at [27].

⁶ *Medical Board of Australia v Love* [2013] QCAT 608.

⁷ *Medical Board of Australia v Blomeley* [2014] QCAT 16.

⁸ *Medical Board of Australia v Chiappalone* [2014] QCAT 170.

⁹ *Medical Board of Australia v North* [2012] QCAT 546.

¹⁰ *Medical Board of Australia v Yasin* [2011] QCAT 300.

¹¹ *Medical Board of Australia v Quan* [2006] QHPT 005.

¹² *Medical Board of Australia v Chandra* [2014] QCAT 271.

¹³ *Medical Board of Australia v Putha* [2014] QCAT 159.

- [27] The decision in *Putha* involved dishonesty in obtaining registration and as such the conduct was quite different. The practitioner had exaggerated the extent of her overseas work experience. The Tribunal's order of cancellation and prohibition from re-applying for a period of one year shows, however, how seriously acts of dishonesty are treated. The practitioner in *Quan* was found to be suffering an impairment and it is therefore difficult to compare the two cases.
- [28] Otherwise, the cases referred to involved registrants engaging in sexual relationships, usually with vulnerable patients. With the exception of *Chandra*, there was no suggestion of subsequent acts of dishonesty. The cases confirm, like the cases referred to the Tribunal in *Blomeley* and the cases relied upon by Dr Azam, a range of suspension of between three months and two years. However, in all those cases there was simply not the totality of egregious conduct as occurred here.
- [29] The Board relied more particularly on *Medical Board of Australia v Alroe*,¹⁴ submitting that there were some aspects of Dr Azam's conduct that put his conduct in the same category as that of Dr Alroe. In oral submissions, it was said that the totality of the conduct in these proceedings takes the seriousness of it equal to, or greater than, *Alroe*. Dr Alroe had exploited his former professional psychiatrist relationship over a 12 year period and during that time engaged in four acts of sexual intercourse. His conduct was considered predatory and he was found to have displayed no real insight into the true nature of his behaviour. In comparing the totality of the behaviour of Dr Azam and Dr Alroe, the Board referred in particular to Dr Azam's failure to comply with the chaperone conditions, the pressure placed on staff to falsify records and the employment of a private investigator.
- [30] In the Board's oral submissions, counsel placed reliance on the decision of the Court of Appeal in *Shahipner v Psychology Board of Australia*.¹⁵ However, in *Shahipner*, despite there being some payment of money, such payments were not found to have been made in an attempt to force the complainant to withdraw her complaint. By the time the matter was before the Tribunal, the psychologist had conceded some of the factual circumstances against him. The Court of Appeal did not consider the sanction of cancellation with three years' prohibition from applying for registration excessive.

Conclusion on Sanction

- [31] The Board submitted that Dr Azam's behaviour following his awareness of the notification demonstrates a dishonesty and bad character such that a cancellation of his registration with a period of disqualification from applying for registration for a period of four years is appropriate.

¹⁴ *Medical Board of Australia v Alroe* [2005] QHPT 004.

¹⁵ [2017] QCA 96.

- [32] The Tribunal accepts, as submitted by the Board, that Dr Azam's lack of remorse and insight, his continued denial of the allegations and dishonest behaviour are inconsistent with his being a fit and proper person to hold registration in the profession. The Tribunal is of the view that his registration should be cancelled. It will be up to Dr Azam to prove to the Board his competence and fitness to practice at the time of seeking to renew his registration.
- [33] As Dr Azam is currently not in Australia,¹⁶ there is no reason to delay the effective date upon which Dr Azam's registration is cancelled. The Tribunal accepts that the appropriate period of disqualification from applying for registration is four years.

Costs

- [34] The Board seeks its costs of and incidental to the proceedings in an amount to be agreed or, failing agreement, to be assessed on the District Court scale.
- [35] The making of costs orders in health disciplinary proceedings is governed by Div 6 of Part 6 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (**QCAT Act**); that is the accepted consequence of the repeal of s 195 of the National Law.¹⁷
- [36] Pursuant to s 100 of the *QCAT Act*, the starting point is that each party must bear its own costs.¹⁸ In *Medical Board of Australia v Wong*, the Court of Appeal said there would have to be "a basis for departing from the default position."¹⁹
- [37] The Tribunal may depart from that position if it considers that the interests of justice require it to do so.²⁰ That gives to the Tribunal a broad discretionary power.²¹
- [38] In deciding whether the interests of justice require an award of costs, s 102(3) of the *QCAT Act* relevantly provides that the Tribunal may have regard to whether a party has acted in a way that unnecessarily disadvantages another; the nature and complexity of the dispute; the relative strengths of the claims made by each of the parties; the financial circumstances of the parties, and "anything else the Tribunal considers relevant."
- [39] The "costs follow the event" principle, as applies to proceedings under the *Uniform Civil Procedure Rules 1999* (Qld), does not apply in QCAT

¹⁶ Affidavit of David Watt sworn 19 June 2017.

¹⁷ *Health Ombudsman v Antley* [2016] QCAT 472, [58].

¹⁸ *Ralacom Pty Ltd v Body Corporate for Paradise Island Apartments (No 2)* [2010] QCAT 412 (**Ralacom**).

¹⁹ *Medical Board of Australia v Wong* [2017] QCA 42, [35].

²⁰ *QCAT Act*, s 102(1).

²¹ *Ralacom*, [4].

proceedings.²² Justice Wilson observed in *Ralacom*, the question that will usually arise in each case is “whether the circumstances relevant to the discretion inherent in the phrase ‘the interests of justice’ point so compellingly to a costs award that they overcome the strong considerations against costs orders in s 100.”²³

- [40] On behalf of Dr Azam, it was submitted that his financial position is such that he is unable to pay the legal costs. In written submissions, it was said that in any event costs should not be allowed for two counsel; though that submission was not pressed in oral argument. In oral submissions, it was acknowledged by counsel for Dr Azam that the authorities were probably against his starting proposition that there should be no order as to costs.
- [41] Against that, the Board submits that it is registrant funded and has limited resources. The Board submits that the allegations were serious and the case against Dr Azam was overwhelming but still Dr Azam put the Board to proof on most issues.
- [42] Given the seriousness of the allegations, the undisputed need for legal representation, the strength of the Board’s case and that the proceedings were prolonged by Dr Azam’s denials which were all ultimately unsuccessful, the Tribunal considers that the interests of justice make it appropriate that there be an order that Dr Azam pay the Board’s costs of the proceedings.
- [43] While the *QCAT Act* encourages the Tribunal to fix the costs itself, no submissions were made suggesting the Tribunal should do so in this case. Absent submissions, given the complexity of the matter, it would not be possible for the Tribunal to fix costs.
- [44] The appropriate order, absent the amount of costs being agreed, is for costs to be assessed on the District Court Scale.

²² *Medical Board of Australia v Alroe* [2016] QCA 120.

²³ *Ralacom*, [24].