

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Health Ombudsman v Trotta* [2019] QCAT 161

PARTIES: **HEALTH OMBUDSMAN**
(applicant)
v
GIUSEPPE DOMENICO TROTTA
(respondent)

APPLICATION NO/S: OCR163-18

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 16 July 2019

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Judge Allen QC, Deputy President

Assisted by:
Mr P Cattach
Mr M Halliday
Dr A Jones

- ORDERS:
- 1. Pursuant to s 107(2)(b)(iii) of the Health Ombudsman Act 2013 (Qld), the Tribunal decides that the respondent has behaved in a way that constitutes professional misconduct.**
 - 2. Pursuant to s 107(3)(a) of the Health Ombudsman Act 2013 (Qld), the Tribunal reprimands the respondent.**
 - 3. Pursuant to s 107(4)(a) of the Health Ombudsman Act 2013 (Qld), the respondent is disqualified from applying for registration as a registered health practitioner for a period of three years, four months.**
 - 4. Pursuant to s 107(4)(b)(i) of the Health Ombudsman Act 2013 (Qld), the respondent is permanently prohibited from providing any health service in a clinical or non-clinical capacity (paid or otherwise) to any female persons and to any male persons under the age of 18 years.**
 - 5. Each party bear their own costs.**

CATCHWORDS: PROFESSIONS AND TRADES – HEALTH CARE PROFESSIONALS – PHYSIOTHERAPISTS – where the applicant instituted disciplinary proceedings against the

practitioner in relation to criminal convictions – where the criminal convictions related to conduct including the covert recording of female patients attending the practitioner’s physiotherapy practice – where the practitioner accepts that the conduct amounts to professional misconduct – where the parties have reached a joint position as to sanction – whether the sanction proposed is appropriate

Health Ombudsman Act 2013 (Qld), s 103, s 104, s 107
Health Practitioner Regulation National Law (Qld), s 5

Medical Board of Australia v Fitzgerald [2014] QCAT 425

Medical Board of Australia v Martin [2013] QCAT 376

Medical Radiation Technologists Board of Queensland v Groves [2010] QCAT 528

Nursing and Midwifery Board of Australia v Brearley [2012] QCAT 323

Pharmacist Board of Queensland v Gordon [2010] QCAT 181

REPRESENTATION:

Applicant: Director of Proceedings, on behalf of the Health Ombudsman

Respondent: Apel Solicitors & Notary

APPEARANCES:

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009 (Qld)*.

REASONS FOR DECISION

- [1] The respondent was a registered physiotherapist during 2009 to 2015 when he covertly video recorded female patients of his practice, including children, undressing in the treatment room of his practice and when he made “up skirt” videos of other women in 2011 at a shopping centre. The respondent made such recordings for his own sexual gratification. The respondent was convicted of criminal offences constituted by his conduct and imprisoned. The respondent is no longer registered as a physiotherapist or practising as a health practitioner. The applicant has referred this matter to the Tribunal pursuant to ss 103 and 104 of the *Health Ombudsman Act 2013* (Qld) (HO Act). The parties have filed a statement of agreed facts and joint submissions. There is no dispute as to the relevant facts, the characterisation of the respondent’s conduct and appropriate orders by way of sanction.
- [2] The respondent’s conduct resulted in him being convicted on his pleas of guilty in the District Court at Cairns of the following offences:

Count/Offence	Patient/Age
Count 1: Making child exploitation material between 13.01.2009 and 04.11.2015	Unknown number (more than three) of girls between 13.01.2009 and 04.11.2015 aged 8 to 15 years (including three aged 12, 14, and 15).
Count 2: Recording in breach of privacy (genital region) on 03.02.2011	Unknown Woman 1
Count 3: Recording in breach of privacy (genital region) on 03.02.2011	Unknown Woman 1
Count 4: Recording in breach of privacy (genital region) on 03.02.2011	Unknown Woman 2
Count 5: Making child exploitation material on a date unknown between 31.05.2013 and 04.11.2013	Patient KM - 15 years
Count 6: Recording in breach of privacy on a date unknown between 01.01.2015 and 30.10.2015	Patient JJ - 33 years
Count 7: Recording in breach of privacy on a date unknown between 01.01.2015 and 30.10.2015	Patient JJ - 33 years
Count 8: Recording in breach of privacy on 25.06.2015	Patient PC - 25 years
Count 9: Recording in breach of privacy on a date unknown between 07.09.2015 and 07.10.2015	Patient TS - 18 years
Count 10: Recording in breach of privacy on or about 08.10.2015	Patient SL - 41 years
Count 11: Making child exploitation material on 14.10.2015	Patient TC - 12 years
Count 12: Recording in breach of privacy on 17.10.2015	Patient KM - 17 years
Count 13: Making child exploitation material on 22.10.2015	Patient NC - 14 years

Count 14: Recording in breach of privacy on 03.11.2015	Patient TS - 18 years
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- [3] Each person the subject of counts 1 and 5 to 14 were patients of the respondent's physiotherapy practice. The offending behaviour relates to videos covertly filmed by the respondent. When a woman or girl he wanted to record was in his treatment room, the respondent would set up his camera phone in a strategic position with the video recorder running, ask the woman or girl to undress and then leave the room for a few minutes to afford them ostensible privacy while his camera phone continued recording. Each video depicted the patient unknowingly exposing her breasts to the respondent's phone camera while removing clothes and putting them back on within the respondent's treatment room. Among those ten videos were three recordings of three different girls who were under 16 years of age when the respondent filmed them; 12, 14 and 15 years, respectively. Those recordings of girls under 16 constituted the making of child exploitation material and were part of the criminal conduct constituting count 1. The respondent also made an unknown number of other child exploitation recordings, including at least one video of an eight year old girl, and such other recordings were also part of the criminal conduct constituting count 1. Counts 2 to 4 were videos created outside the conduct of the physiotherapy practice. Such video recordings were "up skirt" videos depicting the genital region and underwear of two unknown women secretly recorded on 3 February 2011 at a shopping centre using a strategically placed mobile phone inside a shopping basket.
- [4] The respondent's misconduct came to light on 3 November 2015 when an 18 year old patient (patient TS whom the respondent had secretly filmed earlier that year) noticed the respondent's phone propped up against his computer in a suspicious position with its camera facing the massage table and decided to investigate. Patient TS discovered that the phone had been recording her for the past 10 to 15 minutes including when she exposed her breasts as she removed her clothes at the start of the session. Patient TS replaced the phone and paid for the session without mentioning what she had discovered to the respondent. A little while later she went to police and provided a statement. In the meantime, the respondent retrieved his mobile phone and took it with him to the toilet intending to view the video recording while masturbating. The respondent saw footage showing patient TS noticing the camera phone, picking it up and then putting it back down again. When the respondent saw that footage he panicked, deleted the video and, expecting police attention, took some steps to destroy evidence and deflect police attention. The police executed a search warrant at the respondent's business premises later that day and then travelled to the respondent's home where they found the respondent. The respondent claimed that his phone had been stolen earlier that day. Police seized computer devices from the respondent's home which were later found to contain the three "up skirt" videos recorded in February 2011. During a subsequent interview, the respondent made admissions to his misconduct. He told police that he had a masturbation addiction which led him to compulsively record indecent videos of his patients and masturbate to them before deleting them. He said he was sorry for what he had done and claimed that he needed professional psychiatric help.
- [5] On 8 August 2017, the respondent entered pleas of guilty in the District Court at Cairns to the 14 counts detailed earlier in these reasons. In relation to count 1, the respondent was sentenced to imprisonment for a period of two years and six months.

He was sentenced to lesser concurrent terms of imprisonment for the other counts. It was ordered that the sentence of imprisonment be suspended after serving a period of six months' imprisonment for an operational period of three years.

- [6] The parties jointly submit and the Tribunal readily accepts that the respondent's conduct should be characterised as professional misconduct as defined by limbs (a) and (c) of the definition of "professional misconduct" in s 5 of the *Health Practitioner Regulation National Law*; that is:
- (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
 - ...
 - (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.
- [7] The Tribunal decides that the respondent has behaved in a way that constitutes professional misconduct.
- [8] The parties agree and jointly submit that appropriate orders by way of sanction are that:
- (a) the respondent is reprimanded pursuant to s 107(3)(a) of the HO Act;
 - (b) the respondent is disqualified from applying for registration for a period of three years, six months pursuant to s 107(4)(a) of the HO Act; and
 - (c) the respondent is permanently prohibited from providing a specified health service, that is, any health service in a clinical or non-clinical capacity (paid or otherwise) to any female persons, and to any male persons under the age of 18 pursuant to s 107(4)(b) of the HO Act.
- [9] The parties have referred to the following comparative cases in support of the submission as to the period of disqualification from re-registration:
- (a) *Nursing and Midwifery Board of Australia v Brearley* [2012] QCAT 323;
 - (b) *Medical Radiation Technologists Board of Queensland v Groves* [2010] QCAT 528; and
 - (c) *Pharmacist Board of Queensland v Gordon* [2010] QCAT 181.
- [10] The parties submit that upon consideration of those comparative cases a period of disqualification of three years, six months would be an appropriate sanction in the present case and would satisfy the need for deterrence, particularly general deterrence, and uphold the standards of the profession and maintain public confidence in the profession.
- [11] Since 23 December 2015, the respondent has been subject to an interim prohibition order prohibiting him from providing any massage therapy, acupuncture or

physiotherapy service or any other health service involving physical contact to any female patient or any patient under the age of 18 years.

- [12] The parties sought a permanent prohibition order pursuant to s 107(4)(b) of the HO Act in addition to the disqualification period because of the seriousness of the respondent's conduct and the capacity of the respondent to readily gain employment as a massage therapist which, as an unregistered profession, does not have the oversight of a registration body with the associated protective mechanisms in place to assess ongoing fitness to practise.
- [13] The Tribunal had some concerns as to the breadth of the permanent prohibition order sought by the parties given there had been no offending by the respondent against males and sought further submissions from the parties as to that matter. The applicant provided further detailed submissions contending for the prohibition order. The solicitors for the respondent confirmed the agreed position of the parties, including the joint contention for a prohibition order in the terms sought, and the respondent's instructions not to make any further submissions but instead to seek orders accordingly.
- [14] The Tribunal ought not depart from a proposed sanction agreement between the parties unless it falls outside a permissible range.¹ The Tribunal accepts that the orders proposed by the parties do fall within a permissible range of orders for sanction and will make orders in those terms. The period of disqualification will be shortened to reflect the period of two months that has passed since the hearing. Accordingly, the Tribunal orders that:
1. Pursuant to s 107(2)(b)(iii) of the *Health Ombudsman Act 2013* (Qld), the Tribunal decides that the respondent has behaved in a way that constitutes professional misconduct.
 2. Pursuant to s 107(3)(a) of the *Health Ombudsman Act 2013* (Qld), the Tribunal reprimands the respondent.
 3. Pursuant to s 107(4)(a) of the *Health Ombudsman Act 2013* (Qld), the respondent is disqualified from applying for registration as a registered health practitioner for a period of three years, four months.
 4. Pursuant to s 107(4)(b)(i) of the *Health Ombudsman Act 2013* (Qld), the respondent is permanently prohibited from providing any health service in a clinical or non-clinical capacity (paid or otherwise) to any female persons and to any male persons under the age of 18 years.
 5. Each party bears their own cost.

¹ *Medical Board of Australia v Martin* [2013] QCAT 376, [91] and *Medical Board of Australia v Fitzgerald* [2014] QCAT 425, [17].