Nursing and Midwifery Board of Australia v Barnes **[2017] SAHPT 11**

HEALTH PRACTITIONERS TRIBUNAL OF SOUTH AUSTRALIA

NURSING AND MIDWIFERY BOARD OF AUSTRALIA

v

BARNES, Christopher John

JURISDICTION: Health Practitioners

FILE NO/S: 5498 of 2014

HEARING DATE/S: 3 February 2017 and 27 April 2017

DECISION OF SA HEALTH PRACTITIONERS TRIBUNAL
constituted by**:** Deputy President P Y Wilson
Ms C Whiteford
Ms M Chamney
Ms S Raphael

DELIVERED ON: 21 July 2017

CATCHWORDS: *Complainant alleged that the respondent behaved in a way that constitutes professional misconduct – the respondent, an enrolled nurse, admitted that he engaged in professional misconduct as alleged in the complaint – the respondent admitted that he engaged in an improper sexual relationship with the spouse of a patient whilst the respondent was providing nursing services in the course of his employment as an enrolled nurse to the patient –* ***HELD –*** *the conduct set out in the complaint constitutes professional misconduct – the respondent is reprimanded in the strongest possible terms – the respondent's registration is cancelled – the respondent is disqualified from applying for registration as an enrolled nurse for a period of two years – the respondent is to pay the complainant's costs of and incidental to the proceedings to be agreed or in default of agreement to be adjudicated – Ss 195 and 196 of Schedule 2 Health Practitioner Regulation National Law (South Australia) Act 2010*

Nursing and Midwifery Board of Australia v Stephenson [2016] SAHPT 6
Nursing and Midwifery Board of Australia v Highet [2016] SAHPT 11
Honey v Medical Practitioners Board of Victoria [2007] VCAT 526
HealthCare Complaints Commission v Litchfield 41 NSWLR 630

REPRESENTATION:

Counsel:
Complainant: Mr S Ward
Respondent: Ms J Abbey

Solicitors:
Complainant: Piper Alderman Lawyers
Respondent: Len King Chambers

Introduction

1 The Complainant, pursuant to the provisions of s 193 Schedule 2 of the Health Practitioners National Law (South Australia) Act 2010 ("National Law") referred to the Tribunal for hearing and determination the issue of whether or not the Respondent has behaved in a way that constitutes professional misconduct.

2 Section 5 of Schedule 2 of the National Law defines professional misconduct 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 or 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."

3 Unprofessional conduct is also defined in s 5 of Schedule 2 as:

> "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…"

4 Subsections (a) to (h) inclusive then proceed to set out specific examples of such conduct.

5 The behaviour alleged to constitute professional misconduct is set out in the complaint. At the commencement of the hearing on the application of Counsel for the Respondent, with the consent of Counsel for the

Complainant, the Tribunal made a suppression or confidentiality order in the broad terms as appearing on file. However, the surname initial of the patient and his wife will be referred to as X. The Tribunal was unanimously of the view that this suppression order should be made in order to prevent hardship to the patient.

6 The respondent is Christopher John Barnes. He admitted before the Tribunal that he engaged in professional misconduct as alleged in the Complaint.

7 The Tribunal notes that there are three types of conduct which attract disciplinary sanctions under the National Law namely:

(1) professional misconduct

(2) unprofessional conduct

(3) unsatisfactory professional performance.

8 Professional misconduct is the most serious conduct and unsatisfactory professional performance being the least serious conduct of the three.

9 The respondent is now aged 59 years and at all material times was registered as an enrolled nurse on the register of nurses kept by the complainant pursuant to the National Law.

Background

10 The respondent was employed as a nurse at the Hampstead Rehabilitation Centre (HRC).

11 A patient, JX, was admitted to the HRC spinal unit from the Royal Adelaide Hospital on 19 November 2009 for treatment and rehabilitation in relation to serious traumatic spinal and brain injuries suffered by him

on 11 September 2009. Those injuries rendered him a paraplegic and he presently remains a paraplegic.

12 The patient JX received those injuries when he attended his children's sports day on 11 September 2009 and a large tree branch fell onto him.

13 The patient JX is now 51 years of age and is married to HX and has two children, now aged 18 and 16.

14 JX was initially a paraplegic patient at the Royal Adelaide Hospital from 11 September 2009 until he was transferred to HRC on 19 November 2009.

15 JX remained a paraplegic patient at HRC from 19 November 2009 until 7 January 2011 when he was discharged back to his matrimonial home in the northern suburbs of Adelaide.

16 At all material times until March 2012 JX's wife, HX, lived with JX and their two children in the matrimonial home.

17 From the date of JX's admission to HRC on 19 November 2009 until his discharge to his home on 7 January 2011 the respondent was a nurse treating JX.

Agreed facts

18 The respondent admits that from 17 December 2010 and ongoing he engaged in an improper sexual relationship with the spouse of JX whilst the respondent was providing inpatient nursing services in the course of his employment as an enrolled nurse at the Hampstead Rehabilitation Centre.

19 The respondent made admissions before this Tribunal on 27 April 2017 to professional misconduct via a statement of agreed facts.

20 The respondent further admitted before this Tribunal that he gave to an investigator from the Australian Health Practitioners Regulation Agency (AHPRA) false and misleading explanations about the alleged improper sexual relationship with HX by:

1. a letter to AHPRA dated 26 June 2012

2. 15 May 2013 during an interview carried out by an AHPRA investigator pursuant to Schedule 5 of Sch 2 of the National Law.

21 The respondent further admitted that on about 17 December 2010 he and HX engaged in a personal and intimate communication by text messages and FaceBook.

22 HX sent him via mobile phone photographs of her provocatively posed and in various states of undress.

23 In the agreed facts the respondent admitted sexual intercourse with HX in a pre-booked room at the Pooraka Motor Inn on 29 January 2011.

24 The respondent further admitted that his improper sexual relationship continued without the knowledge of JX until March 2012 when HX left her matrimonial home and moved in to live with the respondent.

25 Since March 2012 and ongoing the respondent and HX have lived together in a sexual relationship.

26 However, in his letter of 26 June 2012 to investigator of AHPRA[1] the respondent said:

> "I emphatically and categorically deny any inappropriate, illegal or unprofessional behaviour towards Mr X or his wife at any time. During the course of his stay at Hampstead I was nothing but

[1] Exhibit C1 p 40

> professional towards him and his wife, and he has stated this in his correspondence.
>
> …
>
> In early 2012 (January) Mrs X left the matrimonial home again and went to stay with friends … later in the year my marriage had broken down and I was preparing to leave home.
>
> …
>
> The relationship between myself and Mrs X started in January 2012.
>
> I do not believe I have done anything against the Nursing Codes of Practice **as my relationship with Mrs X started 18 months after Mr X's discharge from Hampstead**.
>
> …
>
> **I do not believe I have been inappropriate in the workplace and have always been able to differentiate between work and my private life."** (emphasis added)

27 The respondent was interviewed by an investigator of AHPRA on 10 July 2013 and maintained his false explanations.

28 It is obvious from the documents presented before the Tribunal that an extensive and diligent amount of investigation has been instituted by AHPRA including various mobile phone records and Mrs X's home computer being forensically examined.

29 Once all the evidentiary material was collected and presented to nurse Barnes it is no surprise that he now accepts the allegations of the improper sexual relationship with Mrs X commenced from 17 December 2010 whilst Mr X was then a patient at HRC.

30 The Tribunal notes that it was not until late 2016 that nurse Barnes admitted to the sexual relationship and he did not pursue his original false claim that his relationship with Mrs X commenced in January 2012.

Highly sexualised relationship

31 The material before the Tribunal discloses a highly sexualised relationship and communications between both the respondent and Mrs X.

The patient's complaint to AHPRA

32 The Tribunal notes various passages of Mr X's complaint to AHPRA[2]:

> "My wife Mrs X has been greatly affected by my accident and the damage it has done to my body, and sex was never going to be the same again, so all of this has been on her mind.
>
> At some stage I had feelings that a relationship was forming between the nurse and my wife, and I asked the nurse some questions, and any relationship was denied. I believed he was telling the truth and I told him that I trusted him.
>
> …
>
> In March 2012 my wife left myself and her two children to live in a two bedroom unit. … I didn't realise at the time that there was a relationship with the nurse, and simply assumed she just needed to get away from myself, as I considered I ought to be no longer considered as a suitable husband.
>
> …
>
> I looked up her mobile phone record on the internet and discovered a mobile phone number which was called quite often. I rang the number and tried to get the person to determine if I knew the voice. Immediately identified the nurse … and then I hung up.
>
> …
>
> This has hit myself harder than the tree. I feel useless, weak, defeated, hopeless, I was very angry too …
>
> My experience at Hampstead was a good one. The staff are excellent and they have trained myself to be able to cope with a life of disability. However the behaviour of this one particular nurse makes myself feel disgusted. **He broke my trust, he lied to myself, deceived myself, he stole from myself, he had sex with my wife, he took my wife away from myself and my children, and he posed as a good person helping my family.** His actions

[2] Exhibit C1 pp 30-34.

> reinforced my wife's belief that I am no longer a suitable husband, due to the physical damage to my body. He demonstrated to my wife what she would be missing out on if she stayed married to myself." (emphasis added)

33 The Tribunal totally agrees with Mr X's comments concerning the breaking of his trust and that the respondent lied to him whilst posing as a good person helping his family.

Dr Diamond's opinion

34 The complainant sought an opinion from Dr M Diamond, a specialist psychiatrist, as to the propriety of nurse Barnes' conduct.

35 Dr Diamond's opinion is not challenged by nurse Barnes.

36 The Tribunal notes that Dr Diamond's report was written before the respondent made admissions.

> "I draw particular attention to Conduct Statement No. 8 that states 'Nurses promote and preserve the trust and privilege inherent in the relationship between nurse and people receiving care.' This statement specifically deals with an inherent power imbalance in the relationship between people receiving care and the nurse providing that care. It identifies the vulnerability of people receiving care. It deals particularly with nurses having a responsibility to maintain a professional boundary between themselves and the person being cared for, and between themselves and others, such as the person's partner and family and other people nominated by the person to be involved in their care. It further deals with the responsibility of the nurse to always conduct professional relationships with the primary intent of benefit for the person receiving care. This statement also deals with sexual relationships between nurses and persons with whom they have previously entered into a professional relationship. One can consider the receiver of care in the setting of a rehabilitation hospital to include family members of the designated patient. The content of this document was considered in the course of providing my expert opinion."
>
> …
>
> "In my opinion, EN Barnes has clearly failed to maintain professional boundaries in accordance with Conduct Statement 8.3 of the Code of Professional Conduct for Nurses in Australia. At all

times his professional relationship with his patient, Mr X, was that of an Enrolled Nurse in a specialist treatment and rehabilitation facility where Mr X was severely compromised as a man with a severe spinal injury and paraplegia. It placed Mr X in a compromised, dependent position where his vulnerability was obvious from the start and where his clinical state was at the centre of the nursing management responsibility throughout his admission to that facility."

…

"It is of fundamental importance to understand that the access that EN Barnes had to Mrs X arose only because of her relationship with the hospitalised patient, as his wife. From the outset Mrs X was part of the family unit involving the nominated patient, Mr X, who were all in a compromised state given Mr X's serious injury and ongoing compromised state in the long term."

…

"To have lost sight of that overriding responsibility and to have engaged in a flirtatious and ultimately seductive relationship with the wife of his patient, in those circumstances, is clear evidence of failure to maintain professional boundaries in accordance with the Code."

…

"Regardless of when they first had sexual intercourse, the relationship was already an established sexual relationship involving explicit, detailed, sexualised communications between EN Barnes and Mrs X from as early as Christmas 2010 and very clearly documented in the communication between them on Valentine's Day 2011. Communication of that nature is not consistent with maintenance of professional boundaries. It demonstrates a clear breach of the professional boundary. The nature of the communication cannot, by any stretch of the imagination, be understood in terms of appropriate communication between a health practitioner and their client or client family responsibilities."

…

"It is cynical and irrelevant comment to suggest that any professional responsibility to maintain appropriate professional boundaries in relation to Mr X and his family by EN Barnes would disappear at the point that Mr X was discharged from HRC. I do not accept that the act of discharge from HRC affects the responsibility of EN Barnes in relation to maintaining professional boundaries."

…

> "It make this point since it is not an unforeseen scenario for people working in such an environment to anticipate. The potential pitfalls including the propensity to become over-involved with families, to over-identify with family members who may be stressed by the tragedy and its consequences, and even a perceived desire to want to be helpful by offering practical assistance such as performing handyman tasks or servicing a motor vehicle, should all be anticipated and understood to be questionable in terms of maintaining professional boundaries."

…

> "In this case, the fact that the signals that were clearly present, were ignored, and that the behaviour became secretive and the communication with the patient necessitated duplicitous conduct, makes the conduct more severe in its destructiveness and in its negative impact upon the most vulnerable person at all times, the injured and disabled person, in this case Mr X."

37 The Tribunal unanimously agrees with Dr Diamond's opinions that he has expressed.

The Code of Professional Conduct

38 The Code of Professional Conduct for nurses in Australia provides:

> "3. Nurses have a responsibility to maintain a professional boundary between themselves and the person being cared for, and between themselves and others, such as the person's partner and family and other people nominated by the person to be involved in their care."

…

> "5. Sexual relationships between nurses and persons with whom they have previously entered into a professional relationship are inappropriate in most circumstances. Such relationships automatically raise questions of integrity in relation to nurses exploiting the vulnerability of persons who are or who have been in their care. Consent is not an acceptable defence in the case of sexual or intimate behaviour within such relationships."

Patient's wife's letter to AHPRA

39 The Tribunal's attention was drawn to a letter written by Mrs X that she wrote to AHPRA on 28 June 2012. Amongst other paragraphs she said the following:

> "Chris Barnes was good to my husband during his stay at Hampstead and was nothing but kind and professional towards me. After my husband's release from Hampstead Chris was kind enough to come over a few times to help me out around the house, fixing our lawn mower, servicing our car and helping out with a clean-out in the garage. I do not believe that Chris has done anything wrong. **He never pursued or harassed me in any way whilst my husband was in Hampstead. We did not become close friends until at least a year after my husband's discharge.**
>
> (emphasis added)

40 This statement was clearly false.

41 It is unknown what influence, if any, the respondent had upon Mrs X in writing these false statements. The Tribunal finds her false claims does her no credit.

42 The complainant referred the Tribunal to *Nursing and Midwifery Board of Australia v Stephenson*[3]. That case involved a nurse engaging in a sexual relationship with the spouse of a patient where the circumstances were that the respondent was providing palliative care to the patient. That nurse also engaged in sexual contact with his 15-year-old female relation. In that case the respondent's registration as a nurse was cancelled and he was disqualified from applying for registration for a period of four years.

43 A major distinction between that case and the present case is that in that case the notifications were received by AHPRA on 30 July 2013, 20 August 2013 and 21 August 2013 with the last of the notifications being a voluntary notification from Stephenson himself. When Stephenson was

[3] [2016] SAHPT 6.

interviewed by officers of AHPRA on 5 September 2013 he immediately made admissions concerning his sexual conduct with his relation and the wife of his palliative care patient.

44 In *Nursing and Midwifery Board of Australia v Highet*[4] that Tribunal observed that actively seeking to hide the truth from AHPRA is an aggravating factor to be taken into account. The Tribunal agrees with those observations.

Submissions by respondent

45 Counsel on behalf of the respondent said that her client made an unqualified apology for his behaviour and conceded at the same time that it was belated. The respondent's now instructions are that he has compounded Mr X's injury as the respondent recognises that Mr X trusted him and that he betrayed that trust. The relationship continues with Mrs X.

46 The respondent recognises the power imbalance and he agrees that Mrs X was in a vulnerable position. The respondent is currently suffering from bowel cancer, has undergone surgery and is undergoing treatment for bowel cancer including radio-therapy. His prognosis is at the time of the Tribunal hearing unknown.

Submissions by complainant

47 The complainant submitted to the Tribunal an appropriate sanction against the respondent was to be reprimanded and a suspension for two years. The complainant tendered various draft Minutes of Order that would apply to the nurse after the period of two years. Those draft Minutes include time to take education and attend for mentoring.

[4] [2016] SAHPT 11.

48 Counsel for the respondent did not oppose that submission by the complainant that his registration be suspended for two years.

49 The Tribunal has given anxious consideration to the submissions by both parties. The Tribunal has considered the decision of *Honey v Medical Practitioners Board of Victoria*[5] where the issue of cancellation of registration or suspension of registration was discussed at length.

50 The Tribunal is acutely aware that the major difference between a period of suspension and cancellation is that once a nurse's registration is cancelled he/she must re-apply after a specified period. In this case Nurse Barnes is not guaranteed that he will be re-registered. He must satisfy the Board that registration is appropriate and that he fulfils the qualifications for registration as required by the Nurse's Board.

51 The Tribunal forms the view that the sanctions to be imposed cannot be ascertained merely by comparing decided cases. In each case it is the gravity of departure from the standard which must be addressed. Otherwise, as noted in *HealthCare Complaints Commission v Litchfield*[6] the risk is that the standard of the profession would be set by the worst cases.

52 The Tribunal recognises that cancellation of registration sends a clear message of unsuitability to practice. Suspension may be thought to indicate confidence in the nurse's future ability to practice once the period of suspension is served.

53 There are some cases in which it is abundantly clear that de-registration is the appropriate option available to protect the public and securing maintenance of professional standards and deterring other members of

[5] [2007] VCAT 526.
[6] 41 NSWLR 630 at 638.

the profession who might be minded to act in a similar way. The Tribunal is of the opinion that this is such a case.

54 It is the unanimous view of the Tribunal that the conduct set out in the Complaint constitutes professional misconduct. It is the further view of the Tribunal that the conduct is a grave departure from the standards expected of a professional nurse.

55 It is the unanimous view of the Tribunal that the appropriate public protection and discipline would be achieved in the following terms:

- the respondent is reprimanded in the strongest possible terms;
- the respondent's registration as a nurse is cancelled effective immediately;
- the respondent is disqualified from applying for registration as a registration for a period of two years effective immediately.[7]
- the respondent is to pay the complainant's costs of and incidental to these proceedings which are to be agreed or in default of agreement to be adjudicated.

[7] The date of these reasons being published is 21 July 2017