

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

**OCCUPATIONAL & BUSINESS
REGULATION LIST**

VCAT REFERENCE NO.B143/2007

CATCHWORDS

Health Professions Registration Act 2005- professional misconduct – failure to attend counselling in compliance with order -professional misconduct found proved.

APPLICANT Dental Practice Board of Victoria
RESPONDENT: Paul Gardner
WHERE HELD: Melbourne
BEFORE: Her Honour Judge Harbison, members
Dickinson and Keith
HEARING TYPE: Hearing
DATE OF HEARING: 13,14 March 2008
DATE OF ORDER: 14 May 2008
CITATION: Dental Practice Board of Victoria v Gardner
(Occupational and Business Regulation) [2008]
VCAT 908

ORDER

1. The Tribunal finds the Respondent guilty of professional misconduct under Section S77 (1) of the *Health Professions Registration Act 2005*:-
2. The Tribunal reprimands Dr Gardner.
3. The Tribunal cautions Dr Gardner.
4. The Tribunal fines Dr Gardner \$10,000, which fine is to be paid on or before 30 June 2008.

**Her Honour Judge Harbison
Vice President**

**Member Anthony
Dickinson**

Member Ben Keith

APPEARANCES:

For Applicant

Mr P. Monahan

For Respondent:

The Respondent in person.

REASONS FOR DECISION

BACKGROUND

- 1 Dr. Paul Gardner is a dentist practising as a sole practitioner in Highton, having previously practised in partnership in a dental surgery in another suburb in Geelong for approximately 20 years.
- 2 His present practice and previous practices were registered, as required by law, with the Dental Board and subsequently, the Dental Practice Board of Victoria.
- 3 Up until 2006 Dr Gardner appears to have had no contact with the Board, other than with routine matters concerning his registration and receipt of information sent by the Board to all registered dentists concerning professional practises and standards. He had certainly had no disciplinary dealings with the Board.
- 4 In 2006 Dr Gardner came to the attention of the Board following a complaint by a patient. In brief, the conduct complained of was an inappropriate and unsolicited advice made to the patient suggesting that he could assist her condition of paranoid schizophrenia. He suggested to her that she was possessed by evil spirits, suggested she should attend his church for spiritual healing, and suggested once this had occurred she could discontinue the medication prescribed for her,
- 5 A Panel hearing was constituted under the *Dental Practice Act 1999*. A formal hearing was held on 30 October and 20 November 2006, at which Dr Gardner was represented by solicitors and counsel.
- 6 On 21 March 2007 the Panel handed down its findings. It held that the conduct which we have outlined above was unprofessional conduct of a serious nature as defined in section 47(1) (a) of the *Dental Practice Act 1999*.
- 7 The Board determined to impose the following sanctions:-
 1. Dr Gardner was reprimanded for the conduct found proven.
 2. Dr Gardner was cautioned as to his future conduct.
 3. Dr Gardner was required to undergo counselling.
- 8 Following the Panel determination, the Board, through its Chief Executive Officer and other staff, attempted to arrange counselling to fulfil the requirements of the Panel.

- 9 The Board alleges Dr Gardner has refused and/or failed to attend for counselling.
- 10 The Board alleges that his refusal or failure to attend counselling constitutes unprofessional conduct or professional misconduct.
- 11 It is this question that this Tribunal is asked to decide.

THE LAW

- 12 In 2005 the *Dental Practice Act 1999* was replaced by the *Health Professions Registration Act 2005*. This new legislation brought together the disciplinary processes of a wide range of medical health professionals. The function of Panels previously established to hear disciplinary proceedings was taken over by this Tribunal. This is the first occasion in which the Tribunal has exercised original jurisdiction under the *Health Profession Registration Act*. Several cases have been heard previously by the Tribunal which involved the review of decisions of various health boards, but this is the first case in which the Tribunal has been asked to deal with a health practitioner in its original jurisdiction.
- 13 The Act defines professional misconduct as including:-
 - “(b) conduct that violates or falls short of, to a substantial degree, the standard of professional conduct observed by members of the profession of good repute and competency.”
- 14 The Act defines unprofessional conduct as including:-
 - “(a) conduct of a health practitioner occurring in connection with the practice of the practitioners health profession that is of a lesser standard than a member of the public or the health practitioners peers are entitled to expect of a reasonably competent health practitioner of that kind;
 - (b) professional performance which is of a lesser standard than that which the registered health practitioners peers might reasonably expect of a registered health practitioner.”
- 15 The Board suggests that Dr. Gardner’s refusal or failure to comply with the Board’s order to attend counselling is conduct that violates or falls short of to a substantial degree, the standard of conduct observed by other dentists of good repute and competency. It also suggests this refusal or failure constitutes conduct occurring in connection with his dental practice which is of a lesser standard than members of the public or his peers are entitled to expect from him, and that this failure or refusal constitutes professional performance which is of a lesser standard than that which other dentists might reasonably expect of a registered health practitioner.

THE FACTS

- 16 The Board relied on a witness statement of Peter Michael Gardner, the Board's Chief Executive Officer (who we understand is not related to the Respondent). Mr Gardner gave evidence before us. His evidence was that following the making of the Panel's orders, he contacted the Respondent to organise counselling. His attempts to do so were hampered by the Respondent's refusal to accept the authority of the Panel and obvious desire to reventilate jurisdictional arguments made before the Panel and rejected by it.
- 17 We note that Panels established under the *Dental Practice Act 1999* have for several years ordered that dentists undergo counselling. The power to order counselling contained in the *Dental Practice Act*, is now established in the *Health Professions Registration Act*. Counselling takes place between the offending dentist and another person or persons (usually one, at least being a dentist) nominated by the Board. It has proved a very useful tool in resolving disciplinary issues within a positive framework. It allows a measure of informality and flexibility. Senior members of the profession make themselves available voluntarily as counsellors for the benefit of the profession and to assist in upholding appropriate standards of professional behaviour and ultimately, the protection of the public. It provides a mechanism for transfer of knowledge and guidance from experienced, well respected practitioners to dentists who are having professional difficulties and have come to the notice of the Board. It is a well-known and well-accepted process within the dental profession.
- 18 As well as the Respondents refusal to accept the authority of the Board to make the counselling determination, Peter Gardner encountered further difficulty when the Respondent sought to renegotiate the terms on which he would agree to undertake the counselling. He questioned the suitability of various dentists suggested by Mr Gardner as appropriate for counselling. In the correspondence generated by the Respondent, there is a suggestion that a suitable counsellor must share his faith. In giving evidence before us, he said he thought a suitable counsellor need not necessarily be another dentist, but could be a layperson with qualifications in psychology. The litany of criticisms and unreasonable demands which the Respondent made of Mr Peter Gardner betray a fundamental misunderstanding of the process of counselling and of his obligations under the order.
- 19 Nevertheless, Mr Gardner attempted to meet these concerns by asking the Respondent to nominate his own choice of counsellor. However, the Respondent then stipulated that he would not cooperate in counselling unless certain other wholly extraneous conditions were met by the Board.
- 20 He then issued what he described as "Notice of Demand" to the Board. This notice, dated 5 July 2007, contains a completely fanciful and absurd

demand that the Board answer certain incomprehensible allegations, and remove the record of the Panel determination from the Board website. Another equally fanciful letter followed this on 23 November 2007, which sought payment of \$175,000 as compensation for the Board's failure to remove the record. Further letters of this nature were sent, suggesting that the claim would accumulate at the rate of \$7,000 each week until satisfied.

THE COUNSELLING ORDER

- 21 Although it was not spelled out in any comprehensible manner in the material filed by the Respondent in this proceeding, it appears that one of the difficulties which the Respondent found in complying with the counselling order was the terms of the order for counselling which was made by the Panel.
- 22 The Panel's determination as to counselling was as follows:-
- “Dr Gardner is required to undergo a course of counselling with a counsellor approved by the Board concerning the relationship between Dr Gardner's religious views and his dental practice. The counsellor will provide a report on the counselling within six months from the date of this determination. The focus of counselling will be the avoidance of dual relationships with patients.”
- 23 The Respondent took umbrage at the reference to “dual relationships” in this determination.
- 24 The reference to dual relationships needs to be explained. The Dental Practice Board of Victoria promulgates Codes of Practice and related documents from time to time as to appropriate dentist-patient behaviour. One of these documents, to be read in conjunction with the Board's Code of Practice on Professional Boundaries (C008), is an information document entitled: “*Professional Boundaries*”. This document was issued on 13 September 2005 and provides illustrative material about professional relationships, behaviours and standards of interpersonal conduct that are expected of registered dental care providers in their professional life. It was sent to all registered dental health care providers, including the Respondent shortly thereafter, and the Respondent has referred to this document in his correspondence to the Board.
- 25 The document deals at length with the professional relationship between a dentist and patient. Often transgressions of this relationship will involve sexual behaviour, but this document provides guidelines that cover much more than this.
- 26 Dual relationships are those which practitioners may enter into with patients, beyond what is required for clinical treatment. The document recognises that a dentist may have a “*dual relationship*” with a patient in

many different contexts. Examples are given in the document, such as of a financial or business involvement with a patient, an employment relationship, or a relationship with a relative. A familiar romantic or sexual relationship with a patient would be another type of dual relationship.

- 27 The document warns that the existence of such a dual relationship might cause a dentist's professional judgment to be clouded if, for instance, the treatment was not successful or if the personal relationship was in some way altered. In short, these relationships have the potential to distort or otherwise affect the impartiality of the practitioner's clinical judgment.
- 28 In the context of the case before the Panel, counselling as to the avoidance of dual relationships was clearly seen to be appropriate so that the Respondent could be assisted to establish boundaries – to reflect on the inappropriateness of engaging in uninvited theological discussions with patients, to respect a patient's personal boundaries, and to recognise, acknowledge and respect cultural differences.
- 29 From the correspondence sent by the Respondent to the Board, and from the Respondent's evidence before this Tribunal, it was evident that the Respondent thought that the reference to dual relationships in the determination meant that he was to be counselled not to discuss matters of religion at all with his patients. He believed such a course to be contrary to his religious beliefs. He gave evidence that many of his patients shared his religious beliefs and he wished to continue to share his beliefs with them. He therefore resisted complying with the determination.
- 30 It is unfortunate that Dr Gardner's misapprehension of the counselling order was fuelled by uninformed advice given to him by an acquaintance by the name of Peter Olney. Mr Olney describes himself as a Christian minister and a law clerk. He is the author of several completely misconceived submissions which have been filed on behalf of the Respondent on the legislative authority and capacity of the Panel and this Tribunal to deal with this matter.

IS DR GARDNER'S NON-COMPLIANCE WITH THE PANEL DETERMINATION PROFESSIONAL MISCONDUCT OR UNPROFESSIONAL MISCONDUCT?

- 31 The Board submits that non-compliance by a dentist with a determination of the Dental Practice Board is a very severe type of misconduct. The profession is tightly regulated; the purpose being patient safety. The objects of the *Dental Practice Act*, under which the determination was made, include the protection of the public by the maintenance of high standards.
- 32 The Board submits that for a dentist to disobey such a determination strikes at the heart of the regulatory system and should be regarded very seriously

indeed. All persons who obtain an appropriate qualification are eligible to be registered to provide dental care to the public. But a qualified person can only practise dentistry once they fulfil the requirements for registration and accept the accompanying responsibilities under the Act. No dentist has the right to decide for himself what his own professional standards should be. All dentists must comply with the framework of regulation for the good of the profession and of the public.

- 33 This being the first ruling on the definitions of misconduct and unprofessional conduct in the Act, we have no guidelines available to us to distinguish between the various forms of conduct prohibited under the Act.

UNPROFESSIONAL CONDUCT

- 34 The new concept of “unprofessional conduct” appears to us to comprehend conduct which falls short of acceptable standards, but which is of a less serious nature than professional misconduct.
- 35 In relation to paragraph (a) of the definition of unprofessional conduct, we take the view that it is designed to cover conduct towards a patient whilst actually performing dental treatment. The conduct, not necessarily the dental treatment, must be of a standard of which is so unacceptable that it would not be expected by a member of the public or another dentist.
- 36 In relation to paragraph (b) of the definition of professional misconduct, we take it to refer to actual dental treatment itself which is of an inferior quality, not necessarily observable as such by a patient, but properly characterised as such by a dentist of good repute and competency.
- 37 It is our view that Dr Gardner’s conduct is not appropriately described as unprofessional conduct under section 3(a) or (b) of the Act, as we take those subsections to be concerned with conduct connected with the administration of dental treatment and the performance of the dentist, or conduct of the dentist, in administering that treatment.

PROFESSIONAL MISCONDUCT

- 38 The previous Act referred to serious misconduct as a punishable offence. In our view, what is referred to in this Act as professional misconduct is the closest equivalent to serious misconduct and describes activity of a very serious nature.
- 39 The definition of professional misconduct in the Act is an inclusive one – that is, it provides paragraphs which may be included in the definition, but does not confine professional misconduct to the matter contained in those paragraphs. We consider this to be a reflection that there should be an emphasis on the standards of the profession itself in coming to a decision as to whether particular conduct is professional misconduct. It may therefore

include conduct not specifically encompassed by the definition, thus allowing for changing or augmented professional standards over time.

40 It is clear that professional misconduct must involve a serious falling short of accepted standards within the dental profession. Although the Board relied in this case only on subsection (a) of the definition, the nature of the other subsections said to constitute professional misconduct confirms this view.

41 In *Pillai v Messiter (no 2)* (1989) 16 NSWLR 197 President Kirby described professional misconduct as including:-

“A deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse of the privileges which accompany registration as a medical practitioner.”

42 It is our view that the Respondent’s action in refusing to cooperate with the Chief Executive Officer of the Board to arrange to attend for counselling as directed by the Panel is professional misconduct under the Act

43 Professional misconduct is usually determined in the context of behaviour by a professional towards a patient or a client. However, in our view behaviour by a professional towards his registration or disciplinary body is as clearly capable of constituting misconduct. We take the view that the actions of the Respondent in this case in refusing or failing to attend counselling, his insolent attitude to the Board, reflected in his correspondence to the Board, his outrageous demands that the Board pay him damages, and his insistence on placing irrelevant or absurd conditions on his attendance at counselling, are in the aggregate properly to be described as professional misconduct.

THE HUMAN RIGHTS CHARTER

44 Dr Gardner claimed that the Boards determination breached the Charter of Human Rights and Responsibilities. It was difficult to follow the way in which the Charter was said to apply in this case. We asked Mr Peter Olney to explain this to us on Dr Gardner’s behalf. It appeared that he relied on the rights to freedom of expression and freedom of religion protected by the Charter. He said that the fact that the Respondent had been required to undergo counselling limited his right to speak with patients about other matters in his surgery.

45 In our view the Charter argument is misconceived. The Charter was not operative at the time of the Panel’s determination.

46 Even if the Charter did apply, we record our view that the Professional Boundaries document issued by the Board does not appear to contravene

any of the terms of the Charter. None of the rights enshrined in the Charter are absolute. Each right must be assessed in context. No dentist has an unfettered right to say what he likes to a patient or to express his religious views to a patient without restriction. The Respondent is obliged to attend for counselling as a condition of the determination that has been made. The requirement imposed by the Board is consistent with the Code of Practice C008 or the Professional Boundaries document. It is not in our view a breach of the Charter. It simply reflects the reasonable limit demonstrably justified by the need for the Board to carry out its statutory role of protection of the public.

- 47 The argument is in any event premature, as there have been no restrictions placed on the Respondent during counselling which need to be analysed in accordance with the provisions of the Charter.

PENALTY

- 48 It is clear that the various officers of the Board have attempted many times to explain to the Respondent his obligation to abide by the Panel determination. It is clear also, from the Respondent's own evidence, that his own solicitors have attempted to give him the same advice. Instead of listening to that advice, he has determined to place himself on a collision course with the Board by flagrantly defying the order that was made.
- 49 He has compounded this by forwarding a nonsensical claim to the Board for damages.
- 50 We suspect that his bizarre behaviour has been influenced by the support of Mr Peter Olney, but it is the Respondent, as a registered dentist, who must take responsibility for his threatening correspondence and irrational behaviour.
- 51 We know little of the Respondent's personal circumstances. He has told us that he has recently opened a practice in Highton, having previously practised in partnership with another dentist in another part of Geelong for 18 years. We are told that his wife and sister are employees in the practice.
- 52 The Respondent told us that he has a significant debt connected with the opening of the practice, but we are not otherwise aware of his finances.
- 53 The Respondent has represented himself to us as a committed Christian. We observe that his threatening letters and clearly unsustainable, perhaps even fraudulent, claims to damages are hard to reconcile with his professed beliefs.
- 54 In assessing the appropriate penalty, we are aware that our task is not primarily to punish an offender, but to signal to the profession of dentistry and the community that the Board, the Panels appointed under the Act and

the mechanisms for regulation of the profession are of the highest importance. The Board exists to safeguard the health of the community. It is unacceptable for an individual dentist to decide for himself whether to obey orders made under the authority of the Board or a Panel, just as it is unacceptable for a dentist to decide for himself whether to obey orders of a Court or a Tribunal.

- 55 It was suggested to us by counsel for the Board that matters of personal relevance regarding the offender, such as the effect on him of orders we proposed to make, are irrelevant to our determination.
- 56 This is true in the sense that we are not primarily concerned to impose punishment. However, we have taken into account the Respondent's personal circumstances in coming to a view about his prospects for reoffending in the future, and the utility of making various orders.
- 57 We are very concerned that the Respondent does not appear to accept that he has done anything wrong. We are very concerned that he appears to be painting himself as a martyr, inappropriately relying on scripture to justify a clear and calculated defiance of the authority of the Board and the Panel. In this he is, we believe being assisted by Mr Olney.
- 58 In our view the penalty should therefore be a significant one. We warn Dr Gardner that his continuing breach of the order for counselling is unacceptable .
- 59 We are of the view that the Tribunal should send a strong message to both Dr Gardner and to all health professionals who practice as a consequence of their registration under the *Health Professions Registration Act 2005*, that they have responsibilities and privileges under the Act and that they are required to abide by the directives of their particular Board; in this case the Dental Practice Board.
- 60 It is our view that Dr Gardner feels (whether himself or as a consequence of the influence of Mr Olney) that he can allow his personal beliefs to override his professional responsibilities under the Act. We place weight on the question as to whether he is likely to continue to, or again ignore, a future determination of the Board. Unfortunately we have little confidence that he will comply with future determinations.
- 61 Given the gravity of Dr Gardner's conduct, and the arrogant disregard he has shown to the Board and the officers of the Board, we have considered whether he should be suspended from practising dentistry. However, we have regard to the fact that he has had an unblemished record up until the time of the Board's determination. We also take into account that it appears he may have been encouraged by Mr Olney to take such an aggressive and misguided stance against compliance with the determination. Consequently, we have decided not to suspend his registration on this occasion, but to

impose a significant fine. We warn Dr Gardner that any future refusal to cooperate with the Board or to comply with Board or Tribunal determinations may well jeopardise his continued registration as a dentist.

62 We have considered whether to make an order for further counselling. In our view the Respondent would greatly benefit from counselling if he was prepared to listen carefully and learn from the experience. However, the manner in which he has conducted himself during the hearing before us, his most unfortunate reliance on the advice of Mr Olney and his outright refusal to acknowledge the authority of the Board and this Tribunal through his actions in defying the Board's determination and raising nonsensical points of law render it unlikely that he would cooperate with the Board if a fresh counselling order was made.

63 We commend to him that he should seek out and take the advice of experienced and respected dentists, should he wish to avail himself of such advice. However, in our view it would be too great an imposition on the Board for us to make any further orders for compulsory counselling and we have therefore decided not to do so.

64 The penalty we impose is therefore as follows:-

Under S77 (4) of the *Health Professions Registration Act 2005*:-

1. The Tribunal reprimands Dr Gardner.
2. The Tribunal cautions Dr Gardner.
4. The Tribunal fines Dr Gardner \$10,000, which fine is to be paid on or before 30 June 2008

Her Honour Judge Harbison
Vice President

Member Anthony
Dickinson

Member Ben Keith