

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

**OCCUPATIONAL & BUSINESS
REGULATION LIST**

VCAT REFERENCE NO. B86/2009

CATCHWORDS

Health profession – dentist – *Health Professions Registration Act 2005* – ss77(4)(b), (c), (e) and (g) – suspension of registration, reprimand, caution and order for counselling

APPLICANT	Dental Board of Australia
RESPONDENT	Dr Paul Gardner
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird Mr Rowan Story AM, RFD and Dr Colin Riley
HEARING TYPE	Hearing
DATE OF HEARING	14 June 2011
DATE OF ORDER	3 August 2011
CITATION	Dental Board of Australia v Gardner (Occupational and Business Regulation) [2011] VCAT 1483

ORDER

- 1 Pursuant to s77(4)(c) of the *Health Professions Registration Act 2005* ('the HPR Act') Dr Gardner is reprimanded for his past conduct and for his breach of the Code of Practice C008.
- 2 Pursuant to s77(4)(b) of the HPR Act Dr Gardner is cautioned against a repeat of his past conduct and against future breaches of the Code of Practice C008.
- 3 Pursuant to s77(4)(g) of the HPR Act Dr Gardner's registration as a dental practitioner is suspended for a period of 6 months effective from 3 September 2011
- 4 Pursuant to s77(4)(e) of the HPR Act a condition is placed on Dr Gardner's registration such that he is required, at his own cost and expense, to undergo counselling for a period of 12 months from the date of this determination as follows:

- (i) such counselling is to be conducted by a psychologist or psychiatrist approved by the Dental Board of Australia ('the approved practitioner') focussing on potential boundary issues concerning Dr Gardner's religious beliefs and the conduct of his dental practice, and in particular the avoidance of dual relationships with his patients;
- (ii) Dr Gardner must attend at least 10 counselling sessions, with the first 5 sessions to be completed before he resumes practice after the period of suspension of his registration and must provide evidence to the Board that he has attended such counselling sessions;
- (iii) The approved practitioner is to provide a written report to the Board within 2 weeks of the end of 6, 9 and 12 months from the date of this determination. All costs and expenses associated with such counselling and reporting are to be borne by Dr Gardner.

DEPUTY PRESIDENT C AIRD

Presiding Member

APPEARANCES:

For Applicant

Mr P Monahan, Solicitor

For Respondent

Mr J Gleeson SC

REASONS

- 1 On 11 March 2011 the tribunal made a finding that Dr Gardner had engaged in unprofessional conduct as defined in section 3(1) of the *Health Professions Registration Act 2005* ('the HPR Act') meaning that his professional performance was of a lesser standard than that which his peers might reasonably expect of a registered health practitioner practising as a dentist.
- 2 The matter now comes before us for determination. Once again, the Dental Board of Australia ('the Board') was represented by Mr Monahan, solicitor and Dr Gardner was represented by Mr Gleeson, Senior Counsel.
- 3 Our Reasons for the finding of 11 March 2011 included findings of fact that:
 - i Dr Gardner inappropriately took a conversation with the notifier about her interest in dragons to religion and his own beliefs;
 - ii Dr Gardner had discussions with his wife about religious matters whilst treating the notifier when she was in a reclined position and unable to respond;
 - iii Dr Gardner offered the notifier a copy of the DVD *Israel, Islam and Armageddon* which contains graphic and disturbing content, in circumstances where he had no knowledge of her cultural or religious beliefs and that this was a contravention of the Code of Practice;
 - iv when a patient visits a dentist they are in a position of vulnerability and there is a power imbalance.
- 4 The determination hearing was listed for 4 May 2011, which was subsequently adjourned by consent to 14 June 2011, due to Mr Gleeson's non-availability. Dr Gardner was unable to attend the hearing having been delayed in Brisbane due to the 'volcanic ash cloud' which had disrupted flights along the east coast of Australia. Leave was granted to Dr Gardner to advise the tribunal by 20 June whether he sought a further hearing so that he could give oral evidence. By facsimile dated 20 June Dr Gardner's solicitors advised they did not require the matter to be fixed for further hearing.
- 5 The Board relies on witness statements of Dr Anthony Roseman dated 15 March 2011 and 6 June 2011 and Dr Robert Butler dated 14 August 2009. Dr Gardner relies on witness statements from eight patients and two practising dentist referees and his accountant. Neither party required any of the witnesses to attend the hearing for the purposes of cross-examination.
- 6 Mr Monahan prepared extensive written submissions to which he spoke. Mr Gleeson, once again, made very eloquent oral submissions.

The Legislation

7 Under s289 of the *Health Practitioner Regulation National Law (Victoria) Act 2009* the complaint or notification is to be dealt with under *the Act of the participating jurisdiction under which it was made* (in Victoria, the HPR Act) *as if that Act had not been repealed*. The determinations which the tribunal may make are set out in s77(4):

- (4) VCAT may make one or more of the following determinations with respect to a health practitioner –
 - (a) require the health practitioner to undergo counselling;
 - (b) caution the health practitioner;
 - (c) reprimand the health practitioner;
 - (d) enquire the health practitioner to undertake and complete specified further education or training within a specified period;
 - (e) impose any condition on the registration or endorsement of registration of the health practitioner;
 - (f) impose a fine on the health practitioner of not more than \$50000 to be paid to the responsible board;
 - (g) suspend the registration of the health practitioner for the period specified in the determination;
 - (h) cancel the registration of the health practitioner;
 - (i) order that the practitioner undertake a specified period of practice under specified supervision;
 - (j) order that the practitioner do or refrain from doing something in connection with the practice of his or her health profession;
 - (k) order that the practitioner's practice be conducted for a specified period in a specified way or subject to specified conditions;
 - (l) order that the practitioner's practice be subject to periodic inspection by a specified person for a specified period;
 - (m) order that the practitioner report on the health practice of the practitioner to a specified person at specified intervals;
 - (n) order that the practitioner not employ, engage or recommend a specified person or class of persons;
 - (o) disqualify the health practitioner from applying for registration under section 4 within a specified period if the health practitioner's registration is cancelled by the Tribunal or by a health practitioner registration authority of another State or Territory of the Commonwealth or of New Zealand

The Board's position

8 The Board seeks the following determinations pursuant to s77(4) of the HPR Act:

- (a) a caution against a repeat of Dr Gardner's conduct and against future breaches of the Code of Conduct;
 - (b) a reprimand for Dr Gardner's conduct and for his breach of the Code of Practice;
 - (c) a significant fine of up to \$50,000
 - (d) cancellation of Dr Gardner's registration coupled with an order under s77(4)(o) of the HPR Act disqualifying him from applying to register again within a specified period (and a period between 12 to 18 months might be considered an appropriate period); or (alternatively)
 - (e) suspension of Dr Gardner's registration for a defined period, and again a period of 12 to 18 months might be an appropriate period.
- 9 Mr Monahan submitted that in considering the appropriate determinations we should have regard to Dr Gardner's previous conduct, and in particular the findings of the Dental Practice Board of Victoria ('the DPBV') on 21 March 2007¹, following a Formal Hearing in October and November 2006. The DPBV found that Dr Gardner had engaged in inappropriate religious conversations with a patient, that such conduct was severe and serious and had the potential to jeopardise the medical condition and treatment of his patient, who was a paranoid schizophrenic.
- 10 The DPBV found pursuant to s47(1)(a) of the *Dental Practice Act 1999* that Dr Gardner had engaged in unprofessional conduct of a serious nature, reprimanded and cautioned him, and required him to undergo counselling concerning the relationship between his religious beliefs and his dental practice. Dr Gardner did not accept the Panel's decision and refused to undergo counselling. Instead, he wrote a number of threatening letters to the DPBV and also sent it documents headed Notice of Default and Notices of Demand.
- 11 On 23 November 2007 Dr Gardner wrote to the DPBV demanding payment of \$175,000 as compensation for the DPBV's failure to remove the record of the Panel's determination from its website. He then sent the DPBV a Tax Invoice dated 30 November 2009 for \$203,000 being the \$175,000 claimed on 23 November and \$7,000 per week for each subsequent week and continuing.
- 12 When he refused to undergo counselling, the DPBV referred the matter to the tribunal. On 14 May 2008 the tribunal found pursuant to s77(1) of the HPR Act that Dr Gardner had engaged in professional misconduct, reprimanded and cautioned him and fined him \$10,000². The tribunal declined to make an order for further counselling because:
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

¹ Dr Paul Gardner [2007] DPBV 1

² *Dental Practice Board of Victoria v Gardner* [2008] VCAT 908

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.

- 13 From its Reasons it is clear the tribunal had grave concerns about Dr Gardner's failure to accept that he had done anything wrong, and reservations about his compliance with any future determinations. The tribunal said:

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.

- 14 The comments by the tribunal in its May 2008 Reasons are significant in circumstances where the conduct which is the subject of this referral occurred on 3 December 2008, some 7 months later.

Dr Gardner's position

- 15 Mr Gleeson submitted that in considering the appropriate determinations we must be mindful that Dr Gardner has 2,900 registered patients and take steps to ensure they are not denied the opportunity to receive treatment from an excellent dentist.
- 16 He conceded on behalf of Dr Gardner that the previous matter was serious – Dr Gardner's conduct has been ill-considered, regrettable and he had been ill-advised. Further, that the nature of the previous conduct was fundamentally different to the matter currently before us because, in the previous matter, Dr Gardner had entered into areas where there was a potential for serious harm to a vulnerable patient.

- 17 However, we note that the previous matter before the tribunal was not primarily concerned with Dr Gardner's conduct towards a vulnerable patient, but rather his blatant refusal to accept the decision of the Panel, including the refusal to undergo counselling, and the inappropriate correspondence he entered into with the DPBV following the Panel's decision.
- 18 Mr Gleeson further submitted that Dr Gardner had been humiliated by the public judgement (the tribunal's earlier decision), he had been fined, had attended counselling, and had since received appropriate legal advice. Further, that this incident should be regarded as a lapse in circumstances where, despite having treated a large number of patients in the intervening period since the first incident, there had only been one complaint.
- 19 We were referred to the witness statement from Mr Rae who is Dr Gardner's accountant, about the significant financial impact cancellation or a period of suspension would have on Dr Gardner's financial situation.

Discussion

- 20 Whilst Mr Gleeson submitted that Dr Gardner now fully appreciates that his conduct was unacceptable, we cannot be satisfied on the evidence before us that it is unlikely there will be any repetition of his conduct.
- 21 Rather, the evidence supports a conclusion that Dr Gardner is more likely than not to repeat his previous conduct. Not only did this incident occur within 7 months of the tribunal's earlier determination, it occurred less than five months after Dr Gardner attended one counselling session with Dr Robert Butler, on 11 July 2008, who he was able to persuade there was unlikely to be a repetition of similar conduct. Relevantly, in his report to the DPBV dated 25 July 2008 Dr Butler reported:

...He [Dr Gardner] is of strong and uncompromising fundamentalist Christian beliefs but is an intelligent person who recognises that any future conflict with the Board would be unwise. He has a clear understanding of the Dental Practice Board regulations and Code of Practice relating to dual relationships. He acknowledged the risks inherent in such relationships and gave me an assurance that there will not be any future problems in this regard.

...He assured me that he had no intention of using his dental practice as a means of proselytising but I would not be so naïve as to assume that he would never pray with those who share his beliefs or have indicated their willingness to participate. This risky situation of dual relationships will remain, I feel, but I am confident that I don't believe that the Board will have to deal with a similar situation to that which has led to the previous charges against him.

- 22 As we observed in our earlier Reasons:

27. Dr Gardner acknowledges that he was aware of the Code of Practice at the relevant time, but denies that he has breached any of the Guidelines. It seems to us that Dr Gardner does not

appreciate that the unsolicited sharing of his religious beliefs with a patient, particularly when they are reclined and being treated, is a clear example of inappropriate behaviour.

28. This was exemplified by his responses to questions put to him when he was giving his evidence in chief, during cross-examination and then in re-examination. He frequently made biblical references to illustrate his evidence espousing his Christian beliefs and demonstrating his religious zeal. At times it felt as though he was preaching to the tribunal.
- 23 The inescapable conclusion is that Dr Gardner simply fails to understand and appreciate appropriate professional boundaries in relation to his religious beliefs and the conduct of his dental practice.
- 24 Mr Monahan submitted that we should apply the rule in *Jones v Dunkel*³ and draw a negative inference from Dr Gardner's failure to give evidence at the determination hearing. As noted above, Dr Gardner was unable to attend the hearing on 14 June. However, Mr Gleeson indicated that it had not been intended that he would give further evidence, until Dr Gardner's solicitors received details of the determinations being sought by the Board which they did not receive until late on the Thursday prior to the hearing. As mentioned during the hearing, this delay is of considerable concern especially where we delivered our findings on 11 March 2011, some three months earlier. In all disciplinary proceedings, as a matter of fairness, it is desirable that a practitioner be given some indication of the determinations that will be sought by the relevant Board, should the allegations be proven, at the earliest possible stage.
- 25 In circumstances where Dr Gardner gave evidence at the first hearing we decline to apply the rule in *Jones v Dunkel*. It is doubtful whether there is much he could have added to the fulsome evidence he gave on that occasion. Any insight that he might now demonstrate, with the benefit of having read our earlier Reasons, would not assist us in our consideration of the appropriate determination. Rather, we consider Dr Gardner's conduct over the past four or five years to be of greater relevance in our deliberations.

Determination

- 26 In considering an appropriate determination, the protection of the public is of paramount importance. The purpose of disciplinary proceedings is the protection of the public and the maintenance of professional standards of the profession. In *Craig v The Medical Board of South Australia* (2001) SASC 169 Doyle CJ said:

The purpose of disciplinary proceedings is to protect the public, not to punish a practitioner in the sense in which punishment is administered pursuant to the criminal law. A disciplinary tribunal protects the public by making orders which will prevent persons who are unfit to

³ (1959) 101 CLR 298)

practise from practising, or by making orders which will secure the maintenance of proper professional standards. A disciplinary tribunal will also consider the protection of the public, and of the relevant profession, by making orders which will assure the public that appropriate standards are being maintained within the relevant profession. [41]

27 In *Honey v Medical Practitioners Board of Victoria*⁴ the tribunal made the following comments which we adopt:

14. It is of prime importance in assessing the appropriate sanction that we bear in mind that the purpose of the determination is not to punish Dr Honey. Rather, the purpose is to protect the public, by preventing persons who are unfit to practice from practising as medical practitioners, and by maintaining proper professional standards.

...

16. Our aim must be to protect the public, and we achieve that aim by imposing sanctions aimed at regulating professional performance of the particular individual under consideration and also by way of general deterrence to the profession as a whole.

28 Mr Monahan referred us to a number of previous decisions of this tribunal where the registration of dentists, who had been found to have engaged in unprofessional conduct, had been suspended or cancelled. However, each case must be considered in accordance with its particular facts and circumstances. As the tribunal observed in *Psychology Board of Australia v Ildiri*⁵

...Whilst a degree of parity in determinations for like matters is desirable, the most appropriate determination is a matter of discretion for the Tribunal, after considering the principles holistically, and in the particular circumstances of the case before it.

29 The only similarity between the circumstances of this matter, and the authorities to which we were referred, is that the health professional was a dentist. As we noted in our earlier Reasons this is not the sort of application that generally comes before the Board or the tribunal.

30 We are not persuaded that Dr Gardner's registration should be cancelled, but being mindful that our paramount consideration must be protection of the public, maintenance of professional standards, and general and specific deterrence, we determine his registration should be suspended for a period of 6 months.

31 We have had particular regard to the close proximity between the conduct which is the subject of this referral, and the May 2008 Reasons, to Dr Gardner's statement on 30 October 2006, in an affidavit prepared for the Formal Hearing before the DPBV in the earlier matter, that he would:

⁴ [2007] VCAT 526

⁵ [2011] VCAT 2036 at [36]

...avoid any conversation of a sensitive nature – personal, emotional or spiritual – with any new patients, with those whom I have not developed an adequate level of trust or those who have not consented to those conversations

and

...not precipitate any conversation about religious matters unless a patient has first raised the topic.

We refer again to our comments at paragraph 23 above.

- 32 In determining that 6 months is the appropriate period of suspension, we refer to our observations in our earlier Reasons referred to above, and have had regard to Dr Gardner's conduct since the tribunal's 2008 determination when a fine of \$10,000 was imposed and he was specifically warned that any failure to comply with orders of the tribunal might well jeopardise his continued registration as a dentist.
- 33 To enable Dr Gardner to reschedule current patient appointments we determine that the period of suspension should commence on 3 September 2011.
- 34 In addition, we reprimand Dr Gardner for his past conduct and breach of the Code of Practice C008 and caution him against a repeat of his past conduct and against future breaches of the Code of Practice.
- 35 We also consider it appropriate that Dr Gardner undergo a period of counselling, to be conducted by a psychologist or psychiatrist approved by the Board ('the approved practitioner'), to assist him in understanding the potential boundary issues which may arise from his religious beliefs and the conduct of his dental practice, and in particular the avoidance of dual relationships with his patients. Although he has indicated in the past that he understands these issues, his conduct indicates otherwise. As noted above, in his affidavit of 30 October 2006, Dr Gardner assured the DPBV that he would not engage in similar conduct again.
- 36 Further, in his letter of 27 April 2007, the first of the many letters he wrote to the DPBV following the Panel's determination in March 2007, Dr Gardner stated:
- I am aware the experience of coming before the Board has made me a wiser person and, in that regard, I am thankful. I am also aware that the issue of dual relationship is a matter I will be more circumspect about in the future – this being a matter I referred to in communication with those at the formal panel "hearing".
- 37 We consider it appropriate that Dr Gardner have a minimum of 10 counselling sessions over the next 12 months, with at least five of those sessions to be completed before he resumes practice after the period of suspension of his registration. Having regard to his previous refusal to comply with the order of the DPBV that he attend counselling, this will be a condition on his registration. The approved practitioner will be required to

provide a written report to the Board within two weeks of the end of 6, 9 and 12 months. All costs and expenses associated with such counselling and reporting are to be borne by Dr Gardner.

- 38 Any failure to comply with this determination may well have serious implications for Dr Gardner's continued registration as a dentist.

DEPUTY PRESIDENT C AIRD
Presiding Member