



Health Professions Review Board

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DECISION NO. 2011-HPA-0035(a)

In the matter of:

1. an application by the Complainant (the "Application") under section 50.6 of the *Health Professions Act*, R.S.B.C. 1996 c. 183 (the "Act"), as amended, for review of a complaint disposition made by an Inquiry committee; and
2. applications by the College and the Registrant under section 31(1)(f) of the *Administrative Tribunals Act*, S.B.C. 2004 c.45, as amended (the "ATA"), for summary dismissal of the Application.

BETWEEN: The Complainant **COMPLAINANT**
AND: The College of Physicians and Surgeons of BC **COLLEGE**
AND: A Physician **REGISTRANT**
BEFORE: J. Thomas English, Q.C., Chair

DATE: Conducted by way of written submissions concluding on October 13, 2011

APPEARING: For the Complainant: Self-represented
For the College: Lara Zee, Counsel and Sharon Mah
For the Registrant: Lindsay R. Johnston, Counsel

I INTRODUCTION

[1] Except for a concern as to whether the conduct of the Registrant constituted "professional misconduct or unprofessional conduct" under s. 33(4)(c) of the Act, I would have for the reasons set out in paragraph [15] summarily dismissed the Application under s. 31(1)(f) of the ATA as having no reasonable prospect that the Application would succeed, given the employer/employee relationship between the Complainant and the Registrant, and the case law of this Review Board on that subject matter. As a result of the above concern, on August 5, 2011 I requested further submissions from the parties on the professional misconduct or unprofessional conduct issue, required the College to produce and distribute the Record in this matter to all

parties, and deferred the summary dismissal application. I am now in a position to properly address the issues raised by this case; in the result, the application for summary dismissal is granted, and as a consequence the complainant's application for review of the College's refusal to investigate her complaint is dismissed.

II ISSUES

[2] Notwithstanding that there is a conflict as to what actually happened between the Complainant and the Registrant, for the purpose of this opinion I am assuming the version of the Complainant is what happened. The first issue is therefore, did the assumed conduct of the Registrant constitute professional misconduct or unprofessional conduct under s.33(4)(c) of the Act?

[3] The second issue is, based on the Record produced in this matter, whether the Application should be summarily dismissed under s.31(1)(f) of the ATA.

III DECISION

[4] I find that the assumed conduct of the Registrant did not constitute professional misconduct or unprofessional conduct under s.33(4)(c). Accordingly, I summarily dismiss the Application under s.31(1)(f) of the ATA as having no reasonable prospect of success given the employer/employee relationship between the Complainant and Registrant, or alternatively, under s.31(1)(a) of the ATA on the basis that the College had no jurisdiction to hear the matter except in relation to the professional misconduct or unprofessional conduct issue.

IV ASSUMED FACTS

[5] I am basing this decision on the following facts which reflect the Complainant's version of what happened (which conflicts with the Registrant's version of the facts):

- (a) The Complainant was employed as a medical office assistant at the Registrant's office beginning February 2, 2010, and ending on or about June 12, 2010;
- (b) The College received an initial complaint letter from the Complainant on June 15, 2010. As noted later in this decision, the College declined to accept jurisdiction over the matter on the basis that there are other forums better suited to the resolution of what is in essence a dispute between employer and employee;
- (c) The Complainant alleged the Registrant spoke poorly of the Complainant's performance to patients and told patients he had terminated her employment;
- (d) The Complainant alleged that when she confronted the Registrant about this matter on June 12, 2010, the Registrant used profanity, threw a box of tissues at the Complainant, and punched the counter with his fist;
- (e) The Complainant also alleged the wife of the Registrant, who worked for the Registrant, told the Complainant to leave, used profanity and abusive

language, and pushed the Complainant causing her to trip as she left the office;

- (f) Additionally, the Complainant alleged the Registrant's accountant withheld the Complainant's final paycheque and Record of Employment when she refused to withdraw her complaint against the Registrant pursuant to the Registrant's instructions;
- (g) The Complainant reported the matter to the police, who telephoned the Registrant; and
- (h) The Complainant also contacted the Employment Services Standards office as a result of which she was paid all amounts due to her and received her Record of Employment.

V APPLICABLE LEGISLATION

[6] Section 31(1) of the ATA reads in part as follows:

31 (1) At any time after an application is filed, the tribunal may dismiss all or part of it if the tribunal determines that any of the following apply:

(a) the application is not within the jurisdiction of the tribunal;

...

(f) there is no reasonable prospect the application will succeed;

...

VI SUBMISSIONS ON PROFESSIONAL MISCONDUCT OR UNPROFESSIONAL CONDUCT ISSUE

[7] On the above issue, counsel for the Registrant made the following submissions:

- (a) As the issue of regulating the professional medical practice of the Registrant is not involved, the College has no jurisdiction to hear the complaint except in the clearest and most serious of cases. If the College has no jurisdiction then neither does the Review Board;
- (b) Even if the allegations of the Complainant are admitted, they are not sufficiently clear and serious enough to constitute professional misconduct or unprofessional conduct under the Act. In other words, the conduct does not come within the exception referred to in (a) above.

[8] The College agreed with the position adopted by the Registrant that it has no jurisdiction in the matter. Further, the allegations of the Complainant are not reasonably connected to the mandate of the College to act in the public interest.

[9] The sur-reply of the Complainant to the submission of the Registrant was that she had been treated as a patient by the Registrant a couple of times so that the relationship was more than employer/employee.

VII ANALYSIS – FIRST ISSUE

[10] The assumed facts raise the issue of whether the conduct comes within s.33(4) which reads:

- 33** (4) The inquiry committee may, on its own motion, investigate a registrant regarding any of the following matters:
- (a) a contravention of this Act, the regulations or the bylaws;
 - (a.1) a conviction for an indictable offence;
 - (b) a failure to comply with a standard, limit or condition imposed under this Act;
 - (c) **professional misconduct or unprofessional conduct**; [*my emphasis*]
 - (c.1) [Repealed 2008-29-34.]
 - (d) competence to practice the designated health profession;
 - (e) a physical or mental ailment, an emotional disturbance or an addiction to alcohol or drugs that impairs his or her ability to”

[11] The issue then becomes what constitutes “professional misconduct or unprofessional conduct” within the meaning of the Act. Each of those expressions is defined in s.26 as follows:

26 In this Part:

“**professional misconduct**” includes sexual misconduct, unethical conduct, infamous conduct and conduct unbecoming a member of the health profession;

“**unprofessional conduct**” includes professional misconduct.

[12] The case law is clear that the conduct does not have to occur in the practice of the profession if it is egregious enough. One of the leading cases is *Gwinn and the Law Society of Upper Canada* (Ont. C.A.) [1980] O.J. No. 3548, 108 D. L. R. (3d) 381 where Mr. Gwinn was disbarred for conduct unbecoming a barrister and solicitor. The conduct was seducing several young girls resulting in a jail sentence in the United States. The conduct had nothing to do with the practice of law. The Court of Appeal judge at paragraph 10 stated:

...it is my view that his conduct was not only reprehensible, but that it does seriously reflect upon and shatter his professional integrity to the point where the protection of the public is involved. In my opinion, therefore, Convocation was correct in finding the solicitor guilty of conduct unbecoming a barrister and solicitor.

[13] In a case where the facts are more aligned to the assumed facts in this matter, *Li v. College of Pharmacists of British Columbia* (B.C.C.A.) [1994] B.C.J. No. 1830, 116 D.L.R. (4th) 606, the Discipline Committee of the College found that the pharmacist had

treated his patients in an extremely rude, condescending and wholly unreasonable manner such that the pharmacist was guilty of misconduct in the practice of his profession. On Judicial Review, the chambers judge concluded that the Discipline Committee was without jurisdiction to find the pharmacist guilty of misconduct in the conduct of his profession by reason of bad manners. On appeal the majority upheld the decision of the chambers judge. The majority noted and in effect adopted the chambers judge's conclusion that "short temper, intemperate language, and rude behaviour were matters to be regulated by business considerations, not by the College".

[14] Even based on the assumed facts in this matter, I concur with the College and do not find the conduct of this Registrant egregious enough to constitute professional misconduct or unprofessional conduct within the meaning of the Act.

VIII ANALYSIS – SECOND ISSUE

[15] The interaction between the Complainant and Registrant was clearly in connection with an employer/employee relationship. The Complainant says she was a patient of the Registrant on some occasions but she does not raise any complaints about the professional conduct or competence of the Registrant. Her complaints all relate to the interactions which followed when her employment was terminated. The College declined to accept jurisdiction over the complaint taking the position that there were other forums for such disputes which is in accord with other decisions of the Review Board in a generic sense, see Review Board Decision No. 2009-HPA-0057(a) and Review Board Decision No. 2010-HPA-0073(a). I concur.

IX DECISION

[16] Even based on the assumed facts the Registrant's conduct did not constitute professional misconduct or unprofessional conduct. Pursuant to s.31(1)(f) of the ATA or alternatively, s. 31(1)(a) of the ATA, the application for summary dismissal is granted. Accordingly, the complainant's Application for Review of the College's refusal to investigate her complaint is summarily dismissed.

[17] In making this decision I have considered all the evidence before me, whether or not specifically reiterated in these reasons.

"J.Thomas English"

J. Thomas English, Q.C., Chair
Health Professions Review Board

November 22, 2011