

**DISCIPLINE COMMITTEE OF THE ONTARIO COLLEGE OF SOCIAL WORKERS
AND SOCIAL SERVICE WORKERS**

PANEL: Sophia Ruddock Chair, Public Member
Thomas Horn Professional Member
Judy Gardener Professional Member

BETWEEN:

ONTARIO COLLEGE OF SOCIAL WORKERS) Jordan Glick for Ontario
AND SOCIAL SERVICE WORKERS) College of Social Workers
) and Social Service Workers
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-and-)
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)
LYNETTE HEYWOOD) No representation for
) Lynette Heywood
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)
) Johanna Braden,
) Independent Legal Counsel
)

Heard: November 18, 2016

ORDER AND REASONS FOR ORDER ON PENALTY

On September 7, 2016, this Panel released its decision and reasons with respect to findings of professional misconduct made against Lynette Heywood (the “Member”). These findings were made after a 12-day hearing spread out over four months. While part of the hearing proceeded on the basis of an Agreed Statement of Facts, other aspects were contested. The hearing involved a motion for third-party records, the examination and cross-examination of seven witnesses, and written and oral submissions.

On November 18, 2016, the Panel reconvened to deal with the matter of penalty.

While the Member was represented by counsel through the hearing on liability, she was self-represented at the penalty hearing.

The Findings

The detailed findings and reasons for them are set out in the Panel's written reasons from September 7, 2016. In sum, the Panel found that the Member engaged in boundary violations with her client, [the Client] up to and including having had a sexual relationship with [the Client] while she provided him with social work services. This means the Member abused [the Client] sexually, failed to meet the standards of the profession, and engaged in conduct that would reasonably be regarded by members as disgraceful, dishonourable and unprofessional.

Positions on Penalty

In light of the Panel's findings, the College asked for an order as follows:

1. requiring the Member to be reprimanded, and that the fact of the reprimand be recorded on the register for an unlimited period of time;
2. directing the Registrar to revoke the Member's certificate of registration;
3. fixing the period of time during which the Member may not apply to have a new certificate of registration issued for five years;
4. directing that the finding and order of the Panel be published, in detail, with the name of the Member (but without the name of [the Client] or information that would tend to identify [the Client]) in the official publication of the College, on the College's website and on any other media-related document that is provided to the public and is deemed appropriate by the College; and
5. fixing costs to be paid by the Member in the amount of \$130,000, being approximately 2/3 of the actual legal costs spent on the hearing. On this point, the College submitted evidence showing that the total costs of the 12-day hearing were \$200,904.74. This includes the cost of College Counsel, independent legal counsel to the Discipline Committee, and the College's internal costs of the hearing.

The Member agreed to the first four components of the order sought by the College. However, she indicated that she could not afford to pay a costs order of \$130,000 and she asked for a significantly lower order with respect to costs. She submitted that she could pay \$5,000 immediately, and an additional \$25,000 over a period of time. The Member did not lead specific evidence about her ability to pay, but made general submissions that she did not work from January 2015 until recently, that she now has part-time work in a field unrelated to social work that pays less than one-third of her previous wage, and that she has experienced significant financial hardship as a result of this matter.

Submissions on Costs

This is the first hearing at this College where there has been a dispute between the parties as to the amount of costs to be paid. In light of the importance of this issue, the Panel asked for further submissions from the parties, which were delivered in writing after the hearing on November 18, 2016.

i) The College

The College submitted that the rationale for costs orders against members of a professional self-regulating body was that the general membership should not unfairly bear the cost of a successful prosecution of a member whose conduct had been found wanting. The Alberta Court of Appeal decisions in *Shulakewych v. Alberta Association of Architects*, 1997 ABCA 157 (CanLII) and *Hoff v Pharmaceutical Association (Alberta)*, 1994 A.J. No. 218 (A.C.Q.B.) were referred to in support of this principle.

The College submitted that there were several relevant factors to consider when determining whether to award costs and the amount of costs to be awarded, including:

- (i) the seriousness of the misconduct (including whether it was repeated, or involved a number of victims);
- (ii) whether (and the extent to which) the College was successful in proving the misconduct alleged;
- (iii) the length, complexity and conduct of the hearing;
- (iv) the facts of the underlying case;
- (v) the member's refusal to acknowledge any error/admit wrongdoing, prolonging the hearing; and,
- (vi) the member's failure to act reasonably and professional to address the concerns and avoid hearing

The College referred to the Divisional Court's decision in *Bayfield v. College of Physiotherapists of Ontario*, 2014 ONSC 6570, which upheld a cost award of two-thirds of the College's actual costs, in its submission that a similar percentage was appropriate in this case. The College submitted that in the present case a cost award of two-thirds of the fees and hearing expenses incurred by the College was appropriate in light of the following considerations:

- (i) The College was fully successful in proving all allegations of professional misconduct;
- (ii) This case was fully contested
- (iii) The Member's misconduct was serious, repeated and occurred over a lengthy period of time
- (iv) The conduct involved harm to a client;
- (v) The Member brought her third party records motions late in the game which unduly lengthened the proceeding. The motion was brought at the last possible date, which significantly disrupted scheduling and resulted in numerous witnesses having to travel back and forth repeatedly to attend hearing dates; and

- (vi) There is nothing unreasonable about any of the items for which costs have been sought.

The additional submissions of the College provided a survey of cost awards across regulatory bodies focusing on regulatory colleges of similar size and member income levels. The College submitted that their findings from this survey included the following:

- a) Virtually all colleges of similar sizes and incomes order costs where findings of professional misconduct are made for contested hearings.
- b) While almost all colleges have rules that permit the ordering of costs, virtually none of the rules provide guidance as to how to approach the question of quantum.
- c) There is tremendous discretion as to the quantum of costs ordered by a panel of a discipline committee of a regulatory college. However, in most cases for contested hearings, costs ranging from 50% to 67% of actual costs are ordered.
- d) In most cases the discipline committees of other colleges note the factors they were asked to consider in determining costs, but do not explain how each factor actually influenced the ultimate amount ordered.

The College further submitted that in most cases, the factors considered to be most central to the analysis include: 1) the seriousness of the misconduct, 2) the success of the parties, 3) the length and complexity of the proceeding, and 4) whether the conduct of either party unduly lengthened the proceeding.

The College submitted that other factors have been considered on a case-by-case basis including: 1) the ability of the member to pay, although panels in general have been hesitant to emphasize this factor in serious cases and/or in cases where the member has not supplied evidence of their own financial position; 2) the novelty of the proceeding; 3) whether the type of case is on the rise at the college and in the profession being regulated by the college; and 4) whether this was the first discipline committee hearing for the Member.

The College submitted that in the present case the following factors militate towards a higher cost award, that being 2/3 of the actual costs: 1) the Member's conduct was extremely serious; 2) the proceeding was long and complex, involving multiple motions; 3) the College was entirely successful in proving the allegations; 4) there is no evidence of the Member's financial position or ability to pay; 5) sexual abuse cases are on the rise at the College and there are likely to be more contested hearings in the coming years; and 6) the timing of the Member's third party records application significantly extended the hearing.

With respect to the third-party records motion, the College submitted that the concern was not that the Member brought the motion, which the College does not want to discourage members from doing. The College's concern was solely the timing of the motion, which they submitted came at the last possible moment and unduly lengthened the hearing process. As noted by the College, Rule 5 of the College's *Rules of the Discipline Committee* requires motions to be brought at least two weeks in advance of the hearing itself. The third-party records motion in this case was heard during the first four-day block of dates scheduled for the hearing. The College submitted that a higher cost order is necessary in this case in order to deter last minute

motions that have the potential to unduly lengthen proceedings and cause difficulty for the various parties.

Overall, the College submitted that the request for \$130,000 in costs is reasonable, legally defensible, and in line with orders of other colleges of regulated professions.

ii) The Member

The Member submitted that she agreed that the membership should not have to pay the entire cost of this hearing. She submitted that had she fully understood the amount of costs involved in defending her case, apart from penalty, she would have been deterred from doing so. She submitted that cost was a factor in a number of decisions she made throughout this process including:

1. agreeing at the outset of the hearing to several boundary violations, which were set out in an Agreed Statement of Facts that formed part of the evidence before the Panel; and
2. agreeing to all other aspects of the College's proposed penalty besides the costs.

The Member submitted that the real issue with regard to the third-party records motion was that the Panel determined the Member was entitled to the documents requested, and issued an order for production. She submitted this cost could have been avoided had the College done the investigation thoroughly and used its powers of investigation to obtain the documents before referring allegations of professional misconduct to the Discipline Committee.

The Member further submitted that the hearing was also prolonged by the constant flow of new documents and disclosure, from the College and from the social work agency, just prior to the hearing and throughout its duration. The Member submitted that she was constantly responding to a changing case all through the course of the hearing, which made the process longer and more expensive for her. The Member submitted this would not have occurred if the College had done a more thorough investigation, including obtaining all of [the Client's] records, and conducting all of their interviews before referring the allegations to the Discipline Committee and arranging for the hearing dates. The Member submitted that given the success of her third-party records motion, and these other factors showing that the College also contributed to the extra length of the hearing, she should not be expected to pay any cost for the time spent during the motion, or during the hearing to obtain additional documents that were eventually produced. She submitted that to award the College costs for these steps would be a deterrent to seeking and providing an appropriate defense.

The Member submitted that almost half the Discipline Committee decisions published from this College involve allegations that are sexual in nature, yet the highest published costs award is \$10,000 in a case which does not involve allegations of a sexual nature (*OCSWSSW v. Singh-Boutiller*, Discipline Committee, 2014). She submitted that there was nothing novel or unique about her case other than it was a partially contested hearing. She submitted that a high cost award in this case, because it was contested, seems unfair, biased and would deter others from defending against similar allegations.

The Member further submitted that several of this College's Discipline Committee decisions stated that costs were issued as a component of penalties in part because the members implicated in those hearings refused to participate in the discipline hearing. In contrast, the Member participated in every request put forward by the College and made herself available on any dates proposed. She cooperated in entering into an Agreed Statement of Facts in which she admitted all but the sexual misconduct. She further submitted that she has never had a complaint filed against her or any other investigation into her professional conduct.

The Member submitted that there were several cases from some of the other regulatory colleges referred to by the College, which showed that not all cases rely on the two-thirds guideline relied upon by the College in this case. The Member referred to a number of these cases from the College of Physicians and Surgeons (the "CPSO"), which uses a daily tariff that is currently \$4,460 per hearing day as a starting point. The CPSO's costs regime has resulted in, for example, cost awards of \$95,812 following a 36-day hearing into allegations of sexual abuse (*CPSO v. Sazant*, 2009 ONCPSD 26 (CanLII)) and a cost award of \$48,000 following a 14-day hearing of sexual abuse allegations (*CPSO v. Sliwin*, 2015 ONCPSD 12). For colleges where the membership may have less earning potential than physicians and surgeons, the Member relied upon a summary of a 2003 decision of the College of Physiotherapists regarding Michael Tam where, following an 11-day hearing, the discipline committee made a costs award of \$25,000 to be paid in equal installments over 5 years; and on a 2016 decision of the College of Chiropractors of Ontario regarding Ernest Perry where the discipline committee of that college made an order for costs in the amount of \$25,000, which was part of a joint submission on penalty following a six-day contested hearing on sexual abuse allegations.

Order on Penalty

The Panel orders as follows.

1. The Member shall be reprimanded in writing, and that the fact of the reprimand shall be recorded on the register for an unlimited period of time.
2. The Registrar is directed to revoke the Member's certificate of registration.
3. For a period of five years from the date of this Order, the Member may not apply to have a new certificate of registration issued.
4. The finding and Order of the Panel shall be published, in detail, with the name of the Member (but without the name of [the Client] or information that would tend to identify) in the official publication of the College, on the College's website and on any other media-related document that is provided to the public and is deemed appropriate by the College.
5. Costs to be paid by the Member to the College shall be fixed in the amount of \$ 36,000 which may be paid over a period of time. The parties are directed to see if they can agree on a schedule for payment within 30 days of the date of this Order. If the parties cannot agree on a schedule, then the parties can set out their positions in writing to the Panel, to be delivered no more than 45 days after the date of this Order.

Reasons for Order

The Panel recognized that the penalty should maintain high professional standards, preserve public confidence in the ability of the College to regulate its members, and, above all, protect the public. This is achieved through a penalty that considers the principles of general deterrence, specific deterrence and, where appropriate, rehabilitation and remediation of the Member's practice.

i) Agreed-Upon Provisions of the Order (#1-4)

As previously indicated, the Member agreed to the first four components of the penalty order sought by the College. Given the serious nature of the misconduct, and the Member's agreement, the panel considers that this penalty order is reasonable and in the public interest. The Panel concluded that the penalty was reasonable in light of the goals and principles of maintaining high professional standards, preserving public confidence in the College's ability to regulate members, and most importantly protecting the public.

ii) Costs

The Panel considered the submissions of the parties in fixing the costs award at \$36,000, which is equivalent to \$3,000 a day for this 12 day hearing. The Panel balanced the need to not deter members from defending themselves, with the need to send a clear message to members of the College and the public that sexual abuse of clients is a very serious concern that will be addressed accordingly. Given the facts of this case, and the balancing of these interests, the Panel determined that the cost award of \$36,000 was appropriate in this case. While this is a small portion of the actual costs expended, it will relieve the College of some of the costs associated with the hearing.

The Panel considered several aggravating and mitigating factors in determining the cost amount. The aggravating factors included: i) the Member's misconduct was serious, repeated and occurred over a lengthy period of time; and ii) the conduct involved harm to a client.

The Panel did not consider the timing of the Member's third-party records motion as an aggravating factor. While members should be encouraged to bring motions as soon as reasonably possible, the motion was made within the time frame allowed by the Rules of the College. While the timing of the motion might have caused some costs and aggravation associated with rescheduling, the motion itself was determined efficiently and the Member was successful in her motion request.

The mitigating factors considered by the Panel included: i) this was the first Discipline Committee hearing for the Member; and ii) the Member acknowledged several boundary violations which were set out in the Agreed Statement of Facts, which increased the efficiency of the hearing and showed the Member's willingness to cooperate with the College on certain matters.

For all the above reasons, the Panel considered a cost award of \$36,000, in conjunction with the other provisions of the Order, as reasonable in this case. The penalty provides both specific deterrence and general deterrence to deter members of the profession from engaging in similar

misconduct, and sends a strong message that such misconduct will not be dealt with lightly. The penalty is also consistent with decisions in analogous cases from other regulatory colleges.

I, Sophia Ruddock, sign this Decision as Chairperson of the panel and on behalf of the panel members listed below.

Date: _____

Signed: _____

Sophia Ruddock, Chair
Thomas Horn
Judy Gardner