MERIDIAN LAWYERS

October 2019

Health Insights

Nurse slammed for profiting under patient's will and pressuring peers

Meridian Lawyers recently published a Health Insights **article** discussing the risks involved when health care professionals receive and retain gifts from their patients. Since then, the Victorian Civil and Administrative Tribunal (**VCAT**) has issued a decision which serves to not only underscore that counsel, but also to highlight the severe reprimands which may follow findings of professional misconduct in this context.

Before we examine the facts involved, it is worth noting that the nature and extent of the professional boundaries transgression in this instance rendered it so acutely inappropriate that the outcome of the VCAT hearing was in no way surprising. However, the specific features of the practitioner's conduct which contributed to the findings, including the manner in which she treated fellow colleagues at her place of employment, were unusual. The sanctions ordered against her were also uncommonly severe.

For the purposes of our discussion the key facts of this case were as follows (the full decision is available **here**):

Mr Lionel Cox was admitted for respite care at Cambridge House (a residential aged care facility operating under the auspices of St Vincent's Health) on 3 July 2015. He was 92 years of age and had no known family. Up until this time, Mr Cox had lived at home with the assistance of neighbours and a case manager from the Brotherhood of St Laurence, who encouraged him to attend Cambridge House for respite due to failing health.

Ms Abha Kumar (a registered nurse) was the Nurse Unit Manager at Cambridge House at the relevant time. On the day of admission, Ms Kumar was told that Mr Cox had no friends or family, that he owned his own home and that he had not made a will.

Within three days, Ms Kumar started "researching avenues for Mr Cox to obtain legal advice to prepare a will.[1]" Approximately 3 weeks after he was initially admitted to the facility, she purchased a post office will-kit for Mr Cox, which he used to make a handwritten will in Ms Kumar's favour as executor and sole beneficiary of his estate. Ms Kumar later admitted that she knew or suspected that Mr Cox intended to name her as a beneficiary under his will prior to his death.

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[1] *Nursing and Midwifery Board of Australia v Kumar (Review and Regulation)* [2019] VCAT 1099 (24 September 2019), paragraph 7.

Ms Kumar directed staff at Cambridge House to witness the will, to which they expressed anxiety and concern. Importantly, St Vincent's Health Australia actually maintained a policy at that time regarding testamentary capacity and witnessing of wills which stated that:

> *(A) staff should inform patients and family members that they are not allowed to witness legal documents on behalf of patients, especially wills; and*
>
> *(B) anyone needing witnesses to legal documents be encouraged to seek independent assistance where possible…*[2]

Nevertheless, Ms Kumar insisted the staff oblige her, and ultimately they complied with her request.

On 9 August 2015 Mr Cox died. Ms Kumar was not at work, but when informed of his death she rang nursing staff to ask them to search his room for his house key. The staff found this request distressing because Mr Cox's body had not yet been removed from the room. They asked if it could wait and expressed notable discomfort about Ms Kumar's instruction, however she insisted and the staff again, reluctantly obliged.

In November of the same year, Ms Kumar obtained a grant of probate, following which she obtained a transfer of Mr Cox's house and subsequently sold it for over $1,100,000. She retained the proceeds of the sale, together with additional property to the value of over $35,000.

VCAT's findings in this case can be summarised as being that Ms Kumar engaged in professional misconduct within the definitions of the National Law, in that she:

1. transgressed the boundaries that should and ordinarily do exist between a registered nurse and her patient in that she was over involved in the affairs of Mr Cox;
2. failed to adequately manage a conflict of interest in that she obtained a benefit under Mr Cox's will in circumstances where she knew prior to Mr Cox's death that he intended to name her as a beneficiary under his will, and
3. failed to practise the profession of nursing in a reflective way by failing to have regard to the views and beliefs expressed by her colleagues.

Ms Kumar agreed to admit each of these allegations after evidence at the hearing was concluded. The matter was then adjourned to enable the parties to make written submissions on the appropriate determinations/orders, before which Ms Kumar voluntarily surrendered her registration as a nurse.

As we have already mentioned, the findings with respect to Ms Kumar's involvement in Mr Cox's affairs, and particularly in the creation and execution of the will under which she was named executor and sole beneficiary, are uncontroversial. However, the allegation and finding with respect to her behaviour towards her colleagues is unusual.

The facts underpinning this allegation related to Ms Kumar's instruction to staff to witness Mr Cox's will, despite organisational policy to the contrary and their overt uneasiness in doing so. It also relates to Ms Kumar's insistence that staff search Mr Cox's room for his house key immediately following his death and in the presence of his deceased body, in circumstances where it was not urgent to do so.

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[2] Ibid, paragraph 33.

The Board considered these instances of conduct a failure to practise the profession of nursing in a way that adhered to *A Nurse's Guide to Professional Boundaries,* the *Code of Professional Conduct for Nurses in Australia,* the *Registered Nurse Competency Standards* and the *Code of Ethics for Nurses in Australia* which, in particular, states:

> *(A) Nurses value respect and kindness for self and others*
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> *...*
>
> *(3) respect for colleagues involves acknowledging and respecting their knowledge, experience, expertise and insights. It includes practising kindness and modelling consideration and care towards each other; and; taking into account the informed views, feelings; preferences and attitudes of colleagues. Dismissiveness, indifference, manipulativeness and bullying are intrinsically disrespectful and ethically unacceptable.*[3]

When deliberating the appropriate sanctions to be imposed, VCAT considered the possible determinations available under section 196 of the National Law, including prohibition orders (section 196(4)(b)).

Firstly, because of the seriousness of the conduct, it was agreed by all parties that disqualification was appropriate. The VCAT members found that Ms Kumar's conduct constituted "determined, goal-directed actions…to ensure that Mr Cox – a vulnerable, elderly man in her care – made a will in her favour, and that no-one knew he had done so until after he died.[4]" They said that in the interests of preserving trust in the profession, "a nurse must not accept any benefit under a patient's will but must instead refuse it.[5]"

Further, the members held that Ms Kumar abused her leadership role by directing staff to breach their own professional obligations, and that her conduct in overriding the distress and unwillingness of staff to witness the will and search Mr Cox's room was "manipulative and entirely self-interested[6]". The fact that Ms Kumar retained the benefit under the will was also an aggravating factor, and although she made admissions late in the proceedings, they were very late and until that point she had not only denied any wrongdoing but also sought to put responsibility on others. The members rejected the submission that Ms Kumar's conduct should be seen as "a one-off aberration[7]".

Ultimately, VCAT ordered a disqualification period of 5 years. However, the members believed that even with a disqualification order on foot, Ms Kumar still presented a risk to the health and safety of the public because disqualification as a nurse would not prevent Ms Kumar working in other capacities in the aged care or disability sector. As such, VCAT made a prohibition order that prohibits Ms Kumar from:

> *"…providing, whether as employee, contractor, manager or volunteer, and including as a Personal Care Attendant, and whether directly or indirectly, any health service involving provision of care to*

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[3] Ibid, paragraph 34 citing the *Code of Ethics for Nurses in Australia (in effect from 8 May 2013 to 28 February 2018)*.
[4] Ibid, paragraph 56.
[5] Ibid, paragraph 55.
[6] Ibid, paragraph 58.
[7] Ibid, paragraph 71.

> *persons in residential aged care, or receiving home or community based aged care or disability care, for a period of five (5) years from the date of these orders.[8]"*

The members believed the breadth of this order was warranted in circumstances where Ms Kumar's conduct occurred even absent responsibility for Mr Cox's direct clinical care, and that "she would also be a risk if she were in a managerial in a health service that provided services to the vulnerable.[9]" Contravention of a prohibition order is an offence carrying a maximum penalty of $60,000 or 3 years imprisonment or both.

While the facts of this case are highly specific and will likely provoke an instinctive sense of moral wrongfulness in most practitioners, the message it sends as to the seriousness of maintaining appropriate boundaries with patients is clear. The severity of the orders also make it plain that AHPRA, the Boards and VCAT have little appetite for tolerating professional boundary transgressions of this nature and practitioners ought to consider the appropriateness of their behaviour not only towards patients but also their colleagues, as a point of potential scrutiny in any disciplinary investigation.

Meridian Lawyers regularly assists practitioners regarding AHPRA investigations and disciplinary proceedings.

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[8] Ibid, paragraph 107.
[9] Ibid, 106.