

MEDICAL TRIBUNAL OF NEW SOUTH WALES

DEPUTY CHAIRMAN: **Staff J**

MEMBERS: **Dr D Child**
 Dr K Ilbery
 Dr M Gleeson

Wednesday, 10 June 2009

Matter No 40017/07

HEALTH CARE COMPLAINTS COMMISSION v SWAPAN CHOWDHURY

IMPORTANT NOTE

SUPPRESSION ORDER

PURSUANT TO CLAUSE 6 SCHEDULE 2 OF THE MEDICAL PRACTICE ACT 1992 THE TRIBUNAL HAS ORDERED THAT THERE BE NO PUBLICATION OF THE NAMES OF THE PATIENTS OR OF ANY MATERIAL CAPABLE OF IDENTIFYING THEM.

DETERMINATION AND ORDERS

- 1 Dr Swapan Chowdhury graduated from the All India Institute of Medical Sciences, New Delhi in 1977. He came to Australia in 1982 and commenced work as a Resident Medical Officer at Alice Springs Hospital in 1982. In late 1985, Dr Chowdhury relocated to Perth and worked as a Senior Resident Medical Officer in plastic surgery at the Queen Elizabeth II Medical Centre Trust and as a Registrar in Urology at Sir Charles Gairdner Hospital in Perth. Apart from working as a locum general practitioner in Preston, Victoria for two months in 1987, Dr Chowdhury continued to work in general practice in Perth until July 2000. In August 2000, Dr Chowdhury moved to Sydney and commenced working at the Blue Cross Medical Centre in Kingsgrove, the Australian Health Care Centre in Kirrawee and as a general practitioner at the Practise known as "Spectrum Health" in Waverley. Dr

Chowdhury, who we shall therefore refer to subsequently in this Determination as "Mr Chowdhury", did not renew his registration as a medical practitioner when it expired in April 2007.

THE COMPLAINTS

- 2 The present proceedings concern two complaints. Firstly, a complaint was made by a former patient of Mr Chowdhury, who shall be referred to as "Patient A". This complaint, which was made to the Health Care Complaints Commission ("the HCCC") on 24 January 2006, involved allegations that Mr Chowdhury had visited Patient A's flat in March 2003, and that during one of these visits, had engaged in oral sex with Patient A.
- 3 The second complaint, which was brought by the HCCC against Mr Chowdhury, alleged that between 19 July 2005 and 19 September 2006, Mr Chowdhury had contravened a condition to which his registration was subject. Such conditions were imposed by a Performance Review Panel Inquiry held on 28 April 2005. The *Medical Practice Act 1992* ("the Act") makes provision for a performance review to be conducted into the professional performance of a registered medical practitioner. We shall refer to this Inquiry in more detail shortly.
- 4 Mr Chowdhury conceded this complaint in his material filed in the present proceedings. It appears that because of the matters contained in this complaint, Mr Chowdhury did not renew his registration to practice as a medical practitioner in 2007.
- 5 Both complaints were brought pursuant to s 36 and s 37 of the Act alleging that Mr Chowdhury was guilty of unsatisfactory professional conduct in terms of the first of these sections and/or professional misconduct within the meaning of s 37 of the Act. It is convenient to here set out the terms of the

complaints and the particulars provided by the HCCC in respect of both complaints.

First Complaint

6 The first complaint alleged that the practitioner:

Has been guilty of unsatisfactory professional conduct within the meaning of section 36 of the Act and/or professional misconduct within the meaning of section 37 of the Act in that he has:

- (i) demonstrated that the knowledge, skill or judgment possessed, or care exercised, by him in the practice of medicine is significantly below the standard reasonably expected of a practitioner of an equivalent level of training or experience; and/or
- (ii) engaged in improper or unethical conduct relating to the practice of medicine.

7 The particulars of this complaint were:

The practitioner treated Patient A between 3 March 2003 and 12 January 2006 at Spectrum Health at Waverley and at Simply Beautiful at Edgecliff.

- 1. On the following occasions between 3 March 2003 and 23 May 2003 (inclusive), the practitioner failed to maintain proper professional boundaries in relation to Patient A, in that:
 - (a) On 3 March 2003, at the first consultation with Patient A, he offered to attend her home to do breath "work" to assist her to overcome her discomfort with intimacy.
 - (b) Some days after the first consultation, he attended Patient A's home and
 - (i) brought food and champagne with him;
 - (ii) gave Patient A a booklet entitled "Cultivating Female Sexual Energy" to which he had added handwritten annotations;

- (iii) pulled down Patient A's yoga pants and underpants, kneeled down in front of her and placed his forehead on her pelvic bone;
 - (iv) played a video he had brought with him which depicted a man masturbating;
 - (v) told Patient A to take off her clothes and to touch her breasts and her clitoris, whilst she watched the video.
- (c) Approximately a week after the first home visit (paragraph b), the practitioner again attended Patient A's home and
 - (i) asked Patient A to change into her best lingerie, and then photographed her;
 - (ii) underdressed himself until he was only wearing underpants;
 - (iii) told Patient A to remove her underwear and lie down on this bed;
 - (iv) gave a tablet to Patient A to take, and took a tablet himself; stating words to the effect of that it would clear or move the energy in her body;
 - (v) knelt above Patient A on the bed and asked Patient A to touch herself on the clitoris;
 - (vi) performed cunnilingus on Patient A;
 - (vii) asked Patient A to lie on top of him and continued to perform cunnilingus on her.
- (d) Some time later after the second home visit (paragraph c) he attended Patient A's home with champagne and food for breakfast, ostensibly to celebrate Patient A finding her "goddess energy".
- (e) Some time later after the third home visit (paragraph d) he took Patient A to lunch, to again celebrate her goddess energy".

- (f) On 23 May 2003, he attended at Sydney Airport on Patient A's departure to Los Angeles, and
 - (i) gave her a bottle of perfume;
 - (ii) bought her traveller's cheques.

Second Complaint

8 The second complaint alleged that:

The practitioner has been guilty of unsatisfactory professional conduct within the meaning of s 36 of the Act and/or professional misconduct within the meaning of s 37 of the Act in that he has contravened a condition to which his registration was subject.

9 The particulars of this complaint were:

1. A Performance Review Panel Inquiry was held on 28 April 2005 to review the professional performance of the practitioner.
2. The Performance review Panel ("the Panel") concluded that the practitioner's performance was unsatisfactory pursuant to section 86N of the Act and directed that conditions be imposed on the practitioner's registration. These conditions had effect from 19 July 2005. The conditions are set out in Schedules B to the complaint.
3. Between 19 July 2005 and 19 September 2006 the practitioner did not comply with conditions on his registration imposed by the Panel in that the practitioner:
 - (a) Breached Conditions 1 to 6 inclusive of the Conditions contained in Schedule B.

10 The six conditions set out in Sch B to the complaint were in the following terms:

1. That Dr Chowdhury spend a total of 10 sessions as an observer with an experienced general practitioner. A session is defined as a block at least 4 hours.

- (a) Within two months of this decision, Dr Chowdhury is to nominate to the Board for the purpose of approval, an experienced general practitioner.
- (b) That within 3 months of Board approval of the experienced general practitioner, Dr Chowdhury is to spend a total of 10 sessions as an observer with this practitioner.
- (c) Dr Chowdhury is to provide a report detailing the dates when he attended, what he learnt and his plans for implementing changes to his practice based on his observations during the placement. Dr Chowdhury should make specific reference to the issues that were found by the Performance Review Panel to be below the standard reasonably expected of a practitioner of equivalent level of training or experience, but he should not restrict his report to addressing those issues. The specific issues are as follows:
 - (i) Basic Clinical Skills;
 - (ii) Diagnostic/Problem Solving Skills;
 - (iii) Patient Management Skills;
 - (iv) Interaction/communication with patients;
 - (v) Medical Records.
- (d) That within four weeks of the completion of the placement this report is then sent to the Board.
- (e) That Dr Chowdhury give a copy of his report referred to in (c) above to the approved practitioner. The approved practitioner is to write a report describing Dr Chowdhury's progress during the period of the observation period and to make written comments on the authenticity of the observations and observation dates recorded in Dr Chowdhury's report.
- (f) Dr Chowdhury is to authorise the approved practitioner to forward the approved practitioner's report to the Board within four weeks of the completion of the placement.

- (g) Dr Chowdhury is responsible for any costs incurred in relation to the period of observation and any subsequent report.
2. There after, for a period of six months, Dr Chowdhury is to meet with the general practitioner referred to in condition 1 for at least one hour on a monthly basis at Dr Chowdhury's practice. These meetings should include, but not be limited to, discussion of clinical issues relating to patient consultations that have occurred in the previous month. The records of these consultations should also be viewed and discussed. Discussion should be in regard to the following:
- (i) Basic Clinical Skills;
 - (ii) Diagnostic/Problem Solving Skills;
 - (iii) Patient Management Skills;
 - (iv) Interaction/communication with patients;
 - (v) Medical Records.
- (a) At each meeting the approved practitioner is required to complete a record of matters discussed at the meeting in a format which is approved by the Board.
 - (b) Dr Chowdhury is to authorise the approved practitioner to forward to the Board, a report and copies of the records of each meeting. This is to occur at the end of the first three months and then again at the end of the second three month period. The report should describe Dr Chowdhury's overall clinical performance and is to be in a format approved by the NSW Medical Board.
 - (c) Dr Chowdhury is responsible for any costs incurred in the monthly meetings, and any subsequent reports.
3. That Dr Chowdhury attends all the sessions of the Annual Revision Seminar in February 2006 held by the RACGP, NSW Faculty, and within 2 months of the Seminar provides the Board with proof of his attendance. Dr Chowdhury is responsible for any costs incurred.

4. That Dr Chowdhury undertakes and completes all components of the Clinical Communication Program conducted by the Cognitive Institute. Dr Chowdhury is to focus on having a two-way interaction by listening to the patients concerns and also is to focus on how he can better relay appropriate information to the patient.

The Clinical Communication Program is conducted over six months and comprises three phases.

Phase 1: Preparation and Goal Setting - to occur in the six weeks prior to Phase 2.

Phase 2: Attend and participate in all sessions of the three-day residential workshop to be held 30 September 2005 - 2 October 2005 in Brisbane Queensland.

Phase 3: Implementation and Mentoring.

Dr Chowdhury is required to supply to the NSW Medical Board the following:

- (i) Copy of letter from Cognitive Institute confirming registration within two weeks of this decision.
- (ii) Copy of Cognitive Institute Phase 1 and Workshop Progress Statements within one week of receipt.
- (iii) Copy of Cognitive Institute Certificate detailing successful completion or otherwise of all program components within one week of receipt

Dr Chowdhury is responsible for any costs incurred in participating in the Clinical Communication Program.

5. That Dr Chowdhury is to undertake and satisfactorily complete the Interactive Risk Management Program provided by his indemnity provider MDASA.

(a) As a part of this program Dr Chowdhury attend and successfully complete the Group Workshops being held in Sydney on 8 October 2005. these Workshops are 'Medical Notes', 'Failure to Diagnose - Medical-legal issues' and 'Dealing with Difficult Clinical Interactions'.

(b) Within two weeks of this decision Dr Chowdhury is to supply to the Board a copy of a letter from his indemnity provider acknowledging his registration in the program.

- (c) Within two weeks of completing the program Dr Chowdhury is to provide documentary evidence to the Medical Board that he has satisfactorily completed the program.
 - (d) Dr Chowdhury is responsible for any costs incurred.
6. Pursuant to section s 60 of the Act, no sooner than twelve months after the date of this decision, Dr Chowdhury's professional performance is to be reassessed. The form of reassessment is at the discretion of the Performance Committee.
- ...

THE PERFORMANCE REVIEW PANEL INQUIRY ("PERPI")

11 In order to understand the background to the second complaint, it is necessary to refer back to the Inquiry conducted by the Performance Review Panel on 28 April 2005. Part 5A Div 4 of the Act makes provision for a Performance Review to be conducted into the professional performance of a registered medical practitioner, if required by the New South Wales Medical Board ("the Board"). In its "reasons for decision" the Panel set out the practitioner's background which included his qualifications, experience, work and family situation. Relevantly the Panel observed:

Dr Chowdhury first came to the attention of the Medical Board in July 2001 when a complaint was made to the Health Care Complaints Commission. The matter was referred to the Medical Board but no further action was taken. Another complaint was made in December 2001 and a further complaint in December 2002. All complaints were about the adequacy of Dr Chowdhury's treatment of patients. No disciplinary action was taken in respect of any of these complaints.

In July 2003, a patient at the Spectrum Medical Centre made a complaint about Dr Chowdhury's behaviour and comments during a pap smear (sic). She alleged he talked to her about Sanskrit words for vagina and penis and offered to show her where her G-spot was. At its December 2003 meeting the Board's Performance Committee considered the complaint and, noting a history of previous complaints, resolved that he should be interviewed. A Performance Interview was conducted on 14 May 2004. This raised concerns about the adequacy of his communication and his judgment. The interviewers recommended that he participate in a Performance Assessment. At its June 2004

meeting the Performance Committee accepted the recommendation. In October 2004 another complaint was received about Dr Chowdhury failing to diagnose malaria. The Board decided that this matter should also be considered at the Performance Assessment.

On 18 October 2004 the Performance Assessment Team of Dr Victoria Sutton and Dr Vinoo Lele, assisted by Dr Joanne Hely of the Board, conducted an assessment of Dr Chowdhury's professional performance at the Spectrum Medical Centre in Waverley. This incorporated an introductory interview with Dr Chowdhury, three observed consultations, a record review of 10 records selected at random, and a clinical practice interview.

The assessors found that the professional performance of Dr Chowdhury was unsatisfactory in that it was below the standard reasonably expected of a practitioner of an equivalent level of training or experience, in the areas of:

- (i) Basic clinical skills;
- (ii) Diagnostic/problem solving skills;
- (iii) Patient management skills;
- (iv) Interaction/communication with patients;
- (v) Medical records.

The assessors recommended that a Performance Review Panel be convened to review the professional performance of Dr Swapan Chowdhury.

- 12 In reviewing the personal performance of the practitioner the Panel considered the practitioner's current practice arrangements, basic clinical skills, diagnostic/problem solving skills, patient management skills, interaction/communication with patients, medical records and the five complaints made against the practitioner had in the five years since he has been registered in New South Wales in 2000. After considering these matters, the Panel concluded that the abovementioned skills of Mr Chowdhury were not of a standard reasonably expected of a practitioner of an equivalent level of training or experience. The Panel further concluded that the professional performance of Mr Chowdhury was unsatisfactory

- 13 The Panel also concluded that Mr Chowdhury's professional performance should be reassessed in the future pursuant to s 86 O of the Act.
- 14 For completeness, it is appropriate to record here that in January 2006 the Board notified the practitioner that no communication or correspondence had been received from him to show that he had been complying with his registration conditions. In July 2006, after ongoing attempts to correspond with the practitioner, a letter dated 28 July 2006 was received from his solicitors which attached a certificate from his psychiatrist, Dr Samir Benjamin, stating that the practitioner was "suffering from Adjustment Disorder with Depressed Mood (moderate to severe)" and unable to deal with the current litigation, or give appropriate instructions to his solicitor. Dr Benjamin considered him to be unfit to attend court or give instructions for the following six to eight weeks.

SECTION 66 INQUIRY

- 15 Part 12 of the Act enables the Board to constitute Professional Standard Committees, which may conduct Inquiries.
- 16 On 15 August 2006, the Board's Health Committee considered the letter dated 28 July 2006 from Mr Chowdhury's solicitors and resolved to refer the practitioner to an Inquiry pursuant to s 66 of the Act.
- 17 Section 66 of the Act relevantly provides:

66 Suspension or conditions to protect the public

(1) The Board must, if at any time it is satisfied that it is appropriate to do so for the protection of the health or safety of any person or persons (whether or not a particular person or persons) or if satisfied that the action is otherwise in the public interest:

(a) by order, suspend a registered medical practitioner from practising medicine for such period (not exceeding 8 weeks) as is specified in the order, or

(b) impose on a registered medical practitioner's registration such conditions relating to the practitioner's practising medicine as the Board considers appropriate.

...

18 An Inquiry under s 66 of the Act was convened on 19 September 2006. Dr Michael Pasfield and Dr Jennifer Kendrick were appointed as the Board's delegates to conduct the Inquiry pursuant to s 136 of the Act. The Inquiry concluded that Mr Chowdhury had not been complying with the conditions imposed upon him on 8 April 2005 (which took effect from 19 July 2005), although the practitioner had provided some reasons why this was the case. It appeared that the practitioner was no longer engaged in general practice. The Board's delegates also concluded that whilst it seemed that the practitioner's "condition had improved significantly", a detailed psychiatric assessment should be obtained from a Board nominated psychiatrist. The practitioner's registration conditions were amended accordingly.

IMPAIRED REGISTRANT'S PANEL INQUIRY

19 On 27 September 2006, Dr Bruce Westmore, the Board's nominated psychiatrist, assessed the practitioner. The Board's Health Committee considered Dr Westmore's report at a meeting on 21 November 2006 and resolved to refer the matter to an Impaired Registrant's Panel Inquiry ("IRP"). Part 5 of the Act deals with impairment of practitioners or students. Section 72 provides that the Board may refer any matter to an IRP if the

Board considers that a medical practitioner or student suffers from impairment.

20 An IRP was convened on 22 January 2007, which the practitioner did not attend, despite confirming his proposed attendance in writing.

21 A further IRP was convened on 16 February 2007, which the practitioner attended. The Panel's Report included the following commentary:

They (the Panel) had found Dr Chowdhury to be reactive and to have interacted well, although at times becoming quite emotional and tearful. He did not present as depressed. His cognitive functioning was reasonable and he appeared quite insightful.

The Panel did consider that inclusion within the Health Program of the Board would be of support to him ...

22 The practitioner agreed to further registration conditions, including restriction of his practice to work only as a cosmetic physician, skin cancer surgeon and sedationist.

23 On 20 June 2007, the practitioner's name was deleted from the Register after he failed to renew his registration when it fell due in April 2007.

SCHEDULE 1 INQUIRY

24 On 4 July 2007, the practitioner applied for re-registration. At a meeting held on 10 July 2007, the Board's Conduct Committee determined to refer the practitioner's application for re-registration to a Schedule 1 Inquiry. Schedule 1 of the Act sets out the registration procedure that is required to be followed by a person seeking to be registered as a medical practitioner. Clause 10 of the schedule provides that the Board may hold an inquiry into the eligibility of an applicant for registration as a medical practitioner if it considers it appropriate. At the time that Mr Chowdhury's name was deleted from the Register, his registration was the subject of two sets of employment

conditions, in addition to certain health conditions. The relevant conditions were as follows:

Employment Conditions

1. To not undertake work in a solo practice.
2. To work only as a Cosmetic Physician, Skin Cancer Surgeon and Sedationist.
3. To advise the NSW Medical Board prior to changing the nature or place of practice.
4. To authorise the NSW Medical Board to notify his employer/s of any issues arising in relation to compliance with these conditions.

Health Conditions

1. Not to prescribe for self-medication.
2. To attend for treatment by a general practitioner of his choice, at a frequency to be determined by Dr Swapan Chowdhury and the treating practitioner. To authorise his treating practitioner to inform the NSW Medical Board of failure to attend for treatment, termination of treatment or if there is a significant change in health status (including a significant temporary change).
3. To attend for treatment by a psychiatrist of his choice, at a frequency to be determined by the treating psychiatrist. To authorise his treating psychiatrist to inform the NSW Medical Board of failure to attend for treatment, termination of treatment or if there is a significant change in health status (including a significant temporary change).
4. To continue taking any medication prescribed by his treating psychiatrist.
5. That the extent of his professional medical duties is to be guided by his health status and the advice of his treating & Board-nominated practitioners.
6. To attend for review by the Board-nominated psychiatrist on a 3 monthly basis or as otherwise directed by the NSW Medical Board at the NSW Medical Board's expense.

7. To attend a Review Interview at the NSW Medical Board in 3 months or as otherwise directed by the NSW Medical Board.
8. To authorise the NSW Medical Board to forward copies of the Impaired Registrants Panel report, subsequent Board Review Interview reports and other information relevant to his impairment to the Board-nominated practitioners and his treating practitioners (which have been nominated by Dr Chowdhury).

25 The above conditions are in addition to the Employment Conditions, the subject of complaint two, which have been set out earlier in this Determination.

26 The Schedule 1 Inquiry noted that:

... Dr Chowdhury's non-compliance with his registration conditions cannot be justified by reference to their complexity. Nor, in the circumstances under consideration, does the fact that he suffers from depression ameliorate the necessity for strict compliance with his registration conditions. Dr Chowdhury has referred to his "passive/aggressive" attitude in dealing with the Board. This attitude raises serious concerns with regard to Dr Chowdhury's genuine commitment to comply with registration conditions in the event that he is re-registered.

The issues relating to character raised by the complaints by [Patient A and Patient B] are also relevant. The Inquiry notes that [Patient A's] complaint is currently being investigated by the HCCC.

Dr Chowdhury's failure to respond to the Inquiry's request for additional information does not assist his application.

In his appearance before the Inquiry, Dr Chowdhury failed to demonstrate any meaningful insight in relation to the need to address the issues regarding his professional performance identified by the Performance Review Panel Inquiry.

27 The decision of the Inquiry was expressed as follows:

The Inquiry must be reasonably satisfied of any findings that it makes. In forming its views on these matters, the Inquiry has taken into account the seriousness of the matters, the inherent likelihood of

an occurrence of a given description and the gravity of the consequences flowing from a particular finding.

The Inquiry is comfortably satisfied that on the basis of the evidence presently available that Dr Chowdhury's application for re-registration should be refused.

RELEVANT PRINCIPLES

28 The Tribunal's jurisdiction is a protective one and not punitive: *Zaidi v Health Care Complaints Commission* (1998) 44 NSWLR 82 at 99; *Health Care Complaints Commission v Litchfield* (1997) 41 NSWLR 630 at 637.

STANDARD OF PROOF

29 The standard of proof to be applied by the Tribunal is that referred to in *Rejtek v McElroy* (1965) 112 CLR 517 at 521:

No matter how grave the fact which is to be found in a civil case, the mind has only to be reasonably satisfied and has not with respect to any matter in issue in such a proceeding to attain that degree of certainty which is indispensable to the support of a conviction upon a criminal charge.

30 That standard was applied in *Bannister v Walton* (1993) 30 NSWLR 699 where it was held that the requirement is that the Tribunal be "comfortably satisfied on the balance of probabilities".

31 The Tribunal must have regard to the gravity and importance of the matters which it is deciding in accordance with the principles stated in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 360 - 363. At 361 - 362 *Sir Owen Dixon* stated:

Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The

seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

THE HCCC'S CASE

Complaint One

32 The HCCC called Patient A to give evidence. In addition, it relied upon evidence from the following three persons: a close friend of Patient A; her psychotherapist and her boyfriend from December 2003 to June 2004. These witnesses, to protect the identification of Patient A, shall be referred to in this Determination as Ms X, Ms Y and Mr Z respectively. All witnesses were required for cross-examination.

33 On 3 March 2003, Patient A first consulted Mr Chowdhury at the Spectrum Health Medical Practice at Waverley for treatment of a sore shoulder. Ms X, her best friend, had recommended the doctor to her because he was spiritual and holistic in his approach and that appealed to Patient A. Mr Chowdhury's clinical notes for this consultation recorded:

1. Recurrent sinusitis.
1/52 with blood stained mucus discharge
 2. Right shoulder and trapezius pain
Elite athlete, gymnast, javelin thrower, triathlon
 3. Past H/O stress fractures in spine while doing gymnastics and since then Ch LBP.
 4. Chronic insomnia
 5. Chronic candidiasis
- Management
1. For sinusitis - Klacid 250 Mg BD X 14
 4. Stilnox 10 Mg nocte PRN X 20
 5. Difflucan 150 Mg X 1
- Review in 1/52
Medicare item:
36 S

34 When she saw Mr Chowdhury, Patient A says she was feeling very upset and very emotional and cried a lot during the consultation. Mr Chowdhury asked her what she was feeling guilty about and, according to her evidence, explained to her that her shoulder problems were associated with feelings of guilt. She says she told him that the only thing she could really think of that she felt guilty about was sex, which was associated with her Catholic upbringing, and an abusive relationship with an ex-boyfriend. She said she felt uncomfortable about intimacy. Patient A says that Mr Chowdhury told her he could help her overcome these feelings and asked if he could come around to her place to do breath work with her. She agreed because it was something that she was keen to work through and overcome and because he was a doctor, she trusted him.

35 About four days to a week after her first consultation, she says Mr Chowdhury came to her flat at Coogee. It was about mid afternoon and it was a weekday because her flatmate at the time was at work. He stayed for about an hour or two. He brought some grapes, sushi and a bottle of champagne with him. They sat on the sofa and ate the food and drank the champagne. Mr Chowdhury talked about sensuality a lot and told Patient A to taste the food and to think of how sensual it was. She says that he gave her a booklet called "Cultivating Female Sexual Energy" ("the booklet"), which he had photocopied. He had written additional information on the booklet about how to do exercises and breathing. A copy of this booklet was produced to the Tribunal. Mr Chowdhury acknowledges providing copy extracts of the abovementioned book but says this was in August 2004, after Patient A had broken up with her boyfriend.

36 While they were sitting on the sofa, Mr Chowdhury leaned over and pulled Patient A's underwear down. She was wearing yoga pants and underwear and he pulled them down at the same time. Patient A says that he did not tell her what he was going to do, he just did it. He then kneeled down in front of her and placed his forehead on her pelvic bone. She says that he said

- 37 He also brought a video with him, which he played. The video was of a man masturbating. It was not a pornographic video but, according to Patient A, a tantric one. She says that Mr Chowdhury told her to take her clothes off, which she did, and they started to watch the video. While they watched the video, he told her to touch her breasts in a circular motion and to touch her clitoris, as illustrated and described in the booklet that he had given her. While this was happening, they remained sitting on the sofa directly opposite the television watching the video. He did not touch her.
- 38 Patient A says that she did what he asked because he spoke in a manner that was very spiritual and what he said resonated with her. She was hoping he would be able to help her overcome her intimacy problems. She says that before he left he arranged to come back again in about a week to do more breath work. However, Mr Chowdhury's clinical notes record a further consultation on Friday 7 March 2003, where he notes "sinuses better, insomnia relieved with Stilnox."
- 39 Patient A says that Mr Chowdhury came back to her flat about a week after his first visit and stayed for about two hours. She believes that again this occurred on a weekday because her flatmate was not home.
- 40 On this occasion, he brought a "big black camera" with him, the same one he used in the surgery. She was a bit worried when she saw the camera because it was not a digital camera. She says Mr Chowdhury assured her that the photos were being taken for her benefit and that he would give her the photos and the negatives. Mr Chowdhury asked her to put on her best lingerie, which she did. They then went into the bedroom and he took a number of photos of her in various poses in her lingerie. Mr Chowdhury then

removed his clothes but left his underpants on. He was wearing white panelled underpants. They stood and did some breath work.

41 Patient A's evidence is that she felt embarrassed and unsure of what they were trying to achieve and she told Mr Chowdhury she could not do it. She says Mr Chowdhury told her to remove her clothes and to lie down on the bed, which she did. He then gave her a tablet to take and took one himself. She asked him what it was and he told her that it would clear or move the energy in her body, or something to that effect. Mr Chowdhury knelt above her on the bed. He asked her to touch herself on her clitoris and to do the breathing like he had shown her. Her hips were elevated and he was holding them up. She told him she was feeling very self-conscious and that it was not going to work. He then started to orally stimulate her genitals, using his mouth. Patient A says she felt uncomfortable about this but allowed him to do it because she wanted to move through her sexual block. She had an orgasm. She does not know whether the tablet that she took made her feel aroused quickly. There was no other sensation that she could attribute to the tablet.

42 Patient A then says that Mr Chowdhury laid on the bed and asked her to lie on top of him, head to toe, so that he could continue to orally stimulate her genitals with his mouth. He told her to continue doing the breathing. He was still wearing his underpants and had an erection. She says that she did not see him ejaculate, nor did she orally stimulate him, nor did he ask her to do that. After only a short time, she started to cry because she felt upset about what was happening. Mr Chowdhury asked who had hurt her in the past and she said what had upset her was what had just happened. He told her she looked five years younger.

43 They then got dressed and Mr Chowdhury dropped her off at a cafe in Coogee where she rang Ms X and asked her to come and meet her. Ms X's evidence was that Patient A had told her that she had gone to see Mr Chowdhury

about a shoulder injury and that he had told her that the shoulder problem resulted from an emotional issue which could be rectified through spiritual practises. Patient A's evidence in her statement is: "I told Ms X all about what had happened." Ms X's recollection was that she only had a conversation about this one occasion that Mr Chowdhury came to Patient A's flat. Despite feeling shocked and confused about what had happened, Ms X continued to consult Mr Chowdhury, as did Patient A.

44 When Mr Chowdhury came to Patient A's flat on the first occasion, she says he gave her his mobile telephone number. Patient A said that there was a lot of text messaging between them, particularly from her to him. She said she would often text him and tell him that she was unhappy with what he had done. No telephone records were provided to corroborate this. After Mr Chowdhury visited the flat for the second time, Patient A said that another date was made for him to visit the flat but she sent a text message cancelling it.

45 Patient A again consulted Mr Chowdhury on 13 March 2003. Clinical records disclose:

History:
Past H/O HSV
For all swabs and blood tests

46 Her evidence was that she felt really upset about what had happened but that Mr Chowdhury had told her it had not been a sexual act but a spiritual one. It was at this consultation she says that Mr Chowdhury said that he could do some procedures on her face to make her look younger. This is disputed by Mr Chowdhury, who says that it was Patient A who first raised the issue of cosmetic surgery.

47 Approximately three weeks after this consultation, Patient A says that Mr Chowdhury again visited her flat. In between this period, she had a further

consultation with Mr Chowdhury on 20 March 2003. The clinical notes of this consultation record:

HSV serology positive
all else normal

- 48 Patient A's evidence is that after initially cancelling by text message a third visit by Mr Chowdhury to her flat, she subsequently received a further text message from him saying he would come over and bring food. She agreed because Mr Chowdhury was good at reassuring her what happened was nothing to be ashamed of; that he was a doctor; that he had her best interests at heart; that he was there to care for her and that what happened was going to empower her and she should trust him.
- 49 On the third occasion that Mr Chowdhury visited Patient A's flat, he brought an expensive bottle of champagne, some champagne glasses and a spread of food. It was about 8.00 am in the morning. Patient A's flatmate, Mr M, was at home at the time, but did not join them for breakfast. Patient A has lost contact with Mr M since he moved out of the flat. They sat on the balcony and drank a bottle of champagne and ate the food. Mr Chowdhury told her that it was to celebrate the "goddess energy" that she had found. He stayed for about an hour and then went to work. He gave her the photos and negatives, which she threw out when she started a new relationship, as she did not want her boyfriend to see them. About two months later, which, based on Patient A's recollections of the timeframe, would be around the middle of June, Patient A said that Mr Chowdhury took her out to lunch as another celebration of her "goddess energy". It would appear that Patient A is mistaken about the timing of this lunch, as she left to travel overseas on 23 May 2003. Patient A says that Mr Chowdhury picked her up and they went to an Asian restaurant. She could not remember where it was, or the suburb, although she recalls they drove for about 20 minutes to get there. As Mr Chowdhury had to return to work, she caught the train home. Mr Chowdhury denies taking Patient A to lunch.

50 On 23 May 2003, Patient A travelled overseas, returning to Perth on 2 July 2003, where she stayed for a week before returning to Sydney. Her evidence is that Mr Chowdhury turned up at the Airport on the day of her departure to Los Angeles. He bought her a bottle of perfume and gave her \$600 to \$1,000 in travellers' cheques, which he paid for by credit card. Patient A believes that the plane left Sydney mid morning, at about 10.00 am or 11.00 am, which meant that she arrived at the Airport around 8.30 am or 9.00 am. She recalled that she saw Mr Chowdhury at the Airport "early, like, in between 9.00 am and 11.00 am is the best of my recollection. It was definitely earlier than lunch." Patient A described Mr Chowdhury using a credit card, which she thought was an American Express credit card, to purchase \$1,000 worth of travellers cheques for her. She was unable to explain how she countersigned for the travellers cheques, or the process involved in obtaining the travellers cheques and how they were drawn in her name. She could not remember how she negotiated the travellers' cheques in America, stating that she thought she signed for them.

51 Mr Chowdhury denies attending the Airport on 23 May 2003. Records produced by the Bondi Junction Medical Practice for 23 May 2003 show that Mr Chowdhury saw his first patient at 9.00 am and was still in the Practice writing a short letter about a patient at 11.35 am. His credit cards were cancelled between 1998 and 2002. No credit card records or bank statements were tendered.

52 Upon Patient A's return from overseas, she continued to consult Mr Chowdhury. After missing out on a television role in the second half of 2003, Patient A said that she went to see Mr Chowdhury and asked him to carry out a cosmetic procedure. She says that she was not charged for these procedures as they were covered by Medicare. However, on one occasion, she paid him \$500, even though the procedure was more than this amount. Mr Chowdhury denies not charging Patient A for procedures, although he

concedes that he discounted cosmetic procedures for her because she did not have any money. Mr Chowdhury says that the first cosmetic procedures that he carried out, as disclosed in the medical records, was on 9 June 2004.

53 Patient A says that she received a Christmas card from Mr Chowdhury in 2003 with a note from him saying "I hope you like your Christmas gift". This, she said, was a reference to the procedure that he had done for her on her face. She discarded this card. Mr Chowdhury denies sending a Christmas card in 2003. He acknowledged that he sent Patient A a Christmas card in 2005. She kept this card, together with the envelope. The card contained the message "may the new year usher in a new phase in your life". Mr Chowdhury says that it was the practise of the cosmetic surgery Practice, "Simply Beautiful", which he had joined, to send Christmas cards to patients. He said it was not the practise at "Spectrum Health" to send Christmas cards. He said the management of "Simply Beautiful" had requested doctors to send Christmas cards as part of their networking protocol because it was a purely promotion venture. He explained that the notation on the card was in reference to her ongoing relationship difficulties, her lack of jobs and lifestyle. Mr Chowdhury moved to "Simply Beautiful" some time in 2005. In total, Patient A saw Mr Chowdhury on 44 occasions between 3 March 2003 and 10 December 2005.

54 In April 2004, Patient A had tested positive to a home pregnancy test. On 22 April 2004, she was referred by Mr Chowdhury to a private clinic and also given an oral contraception prescription. At a consultation on 16 June 2004, Mr Chowdhury noted in his clinical records:

Distressed as boyfriend had decided to leave
Allowed to express herself and is also seeing a counsellor

55 Mr Chowdhury's evidence is that during a consultation on 16 June 2004, Patient A discussed with him sexual matters and that she was seeing a counsellor who was not helping her. This was the first time these matters

had been discussed, according to Mr Chowdhury. At the next consultation (28 August 2004) Mr Chowdhury says he provided the booklet to her.

56 Patient A was also seeing a psychotherapist, Ms Y, whilst she was a patient of Mr Chowdhury. She commenced seeing Ms Y on 24 September 2003 and saw her on a weekly basis over the next two and a half years. However, she did not raise the issue of Mr Chowdhury visiting her flat until during a consultation on 22 October 2005. Although Ms Y observed that Patient A mentioned Mr Chowdhury initially on 17 October 2003, and subsequently on five further occasions up to 9 August 2005, Mr Chowdhury was mentioned in the context of cosmetic procedures. She continued to see Mr Chowdhury after discussing his visits to her flat with Ms Y on 22 October 2005.

57 Ms Y recorded in her clinical notes that Patient A, between 17 October 2003 and 2 April 2004, was repeatedly distressed and was experiencing suicidal thoughts. Patient A's evidence was that on one occasion she had attempted suicide by cutting her wrist. Ms Y's evidence was that Patient A, during the course of her therapy became increasingly distressed, with at times, a fairly high level of suicidal ideation. Patient A also disclosed to Ms Y that she had a long-standing history of bulimia. This condition was never disclosed to Mr Chowdhury. When questioned about her suicidal thoughts between October 2003 and April 2004, Patient A's evidence was that she could not recall what they were about. She said that the suicidal thoughts happened after the event with Mr Chowdhury, but she was simply not willing to discuss the event with Ms Y at that time, but only willing to discuss that she had suicidal thoughts. She said there was only one person that she raised any issue and anxiety and discomfort over what happened between Mr Chowdhury and her, and that was Mr Chowdhury.

58 On 17 January 2006, Patient A told Mr Z about the incidents involving Mr Chowdhury. Mr Z had been Patient A's boyfriend from approximately

December 2003 until approximately June 2004, when the relationship concluded.

59 Although Patient A discussed such matters as insomnia, premenstrual tension, backache, contraception and various related matters, she made a conscious decision not to inform Mr Chowdhury that she was suffering from bulimia. She agreed that she did not seek a reference to a psychiatrist, or psychologist in respect of this condition. Her evidence was that she had never seen a psychiatrist, although Mr Chowdhury's evidence was that she informed him that she had seen a psychiatrist in Perth. He says that he suggested that she see a psychiatrist, but she declined. There is no notation in his clinical notes of this advice.

Complaint Two

60 Mr Chowdhury admitted this complaint and all of the particulars of the complaint. He accepted that he received numerous letters from the Board in relation to his failure to comply with the conditions imposed between 2005 and 2008. In relation to the first condition which required Mr Chowdhury to spend 10 sessions as an observer with an experienced general practitioner, who was approved by the Board, Mr Chowdhury said that in 2004 he made a decision to practice only cosmetic medicine and has not practised as a general practitioner since mid 2005. He did, however, spend some time as an observer with a plastic surgeon at Bankstown. He also spent 40 hours with a senior skin cancer surgeon practising in a skin cancer clinic, as he believed this would be more beneficial to his practice. The Board did not accept this as an appropriate alternative. Mr Chowdhury's evidence was that at the time of the Performance Review Panel Inquiry, he was clinically depressed. His treating psychiatrist had diagnosed him with an adjustment disorder and with depressed mood. He was also seeing a clinical psychologist at this time. He said that he was suffering from what he described as a "passive aggressive syndrome" which meant that whatever he was told to do, he

61 Mr Chowdhury's evidence was that he now has a genuine understanding of the inappropriateness of his behaviour in failing to comply with the conditions and the lack of professional judgment he showed in his failure to comply. He assured the Tribunal that he has developed an insight into his entirely inappropriate behaviour and said that he was truly contrite for it. He believes that he is now fit to be re-registered as a medical practitioner. If he was to return to practice, he said he would seek work in the cosmetic medicine and skin cancer area. His evidence was that he is now a bankrupt and that he has liquidated whatever assets he had.

THE EVIDENCE OF THE RESPONDENT

62 Mr MG *Ainsworth* of counsel, who appeared for Mr Chowdhury, tendered a written statement in which Mr Chowdhury denied the allegations of sexual misconduct. He was extensively cross-examined. Ms GB *Furness* of counsel, who appeared for the HCCC, submitted that the Tribunal would not be persuaded by Mr Chowdhury's evidence, contending that from the beginning it was non-responsive, evasive, argumentative and not direct. Counsel submitted that he was a most unreliable witness and his evidence insofar as it conflicted with that of the complainant, should be wholly rejected. True it is that Mr Chowdhury answered questions he perceived were being asked, rather than on occasions, the actual question asked by Ms *Furness*. This led to some tension during the cross-examination. The Tribunal is not prepared to reject Mr Chowdhury's evidence on these bases. Ms *Furness* pointed to his evidence to the Medical Board where he admitted providing the booklet to Patient A, but without the additional evidence that she had expressed an interest in the booklet and did not have any money to purchase it. Ms *Furness* also pointed to his evidence before the Medical Board where he said

he worked more or less ordinary hours, which conflicted with his evidence before this Tribunal, where he said he worked extraordinary hours.

63 The Tribunal does not regard these matters as diminishing Mr Chowdhury's evidence to such an extent that it could be found that he was an unreliable witness. A more fundamental criticism of Mr Chowdhury could be made in respect of his deliberate failure to comply with the conditions imposed by the Medical Board. However, Mr Chowdhury expressed what the Tribunal accepts as contrition for his failure to comply with the conditions imposed. This is a matter which will be dealt with in more detail later in these reasons.

64 Relevant to this complaint is the respondent's character. The respondent has practised medicine in this country since 1982. Mr Chowdhury had a complaint made against him by Ms B in 2002. Ms B was a medical student who saw Mr Chowdhury for a pap smear examination. During the consultation, Mr Chowdhury discussed with her Vedic teachings, which are related to certain forms of yoga. Vedic teachings are found in the booklet that was provided to Patient A. During the consultation with Ms B, Mr Chowdhury also discussed the Sanskrit language for intimate parts of the body (words for vagina and penis). These discussions took place in the surgery and did not involve any physical contact. A performance interview was recommended by the Board with the focus on doctor/patient communication.

65 Mr Chowdhury's evidence of his working week at the times relevant to the complaints, was set out in his written statement as follows:

DAY	AM	PM
Monday	8.15am to 2pm General Practice and cosmetic work at Spectrum Health, Bronte	3pm to 11pm at Blue Cross Medical Centre, Kingsgrove (General Practice work only)
Tuesday	8.15am to 4pm General Practice and cosmetic work at Spectrum Health, Bronte	From 4pm to 11pm at The Australian Health Care Centre Kirrawee as required (General Practice work only)
Wednesday	8.15am to 5pm General Practice and cosmetic work at Spectrum Health, Bronte	From 5pm to 11pm at The Australian Health Care Centre Kirrawee as required (General Practice work only)
Thursday	7am to 3pm at The Australian Health Care Centre Kirrawee as required (General Practice work only)	3/4pm to 7pm general practice and cosmetic work at Spectrum Health, Waverly
Friday	8.15am to 2pm General Practice and cosmetic work at Spectrum Health, Bronte	3pm to 11pm at Blue Cross Medical Centre, Kingsgrove (General Practice work only)
Saturday	8.15am to 2pm General Practice and cosmetic work at Spectrum Health, Bronte On-call sedationist for Dr Andrea Williams	

FINDINGS

Complaint One

- 66 There is no direct corroboration of Patient A's allegations about Mr Chowdhury. There was, however, some evidence of complaint.
- 67 Patient A told the Tribunal that she had complained of the conduct of Mr Chowdhury to three people: Ms X, a close friend, Ms Y, her psychotherapist and her boyfriend, Mr Z.
- 68 Patient A recalled that after the second visit to her flat by Mr Chowdhury, he dropped her off at a cafe in Coogee. She rang Ms X and asked her to come and meet her at the cafe. In her written statement her evidence was that she told Ms X "all about what had happened."

69 Ms X's evidence was that she cannot remember exactly when Patient A told her that Mr Chowdhury "had overstepped the boundary of a medical professional", but places it on an occasion before she moved to Perth in November 2003.

70 Ms X cannot recall where she was told, but that it was during a face-to-face conversation. In her statement, she says:

"She then told me that shortly after the consultation [this apparently being a reference to the first consultation], Dr Chowdhury went to her place with a bottle of champagne. I also remember her telling me that he had a tablet that he gave her. They engaged in some kind of sexual act. I can't recall the nature of the act, but I do recall that she said that they did a lot tantric breathing exercises and that she was naked but he was not. She told me that she expressed her concerns to him and that he told her it was all ok, that it had not been a sexual act but a spiritual act.

I felt quite concerned about what [Patient A] had told me. I didn't convey this to [Patient A] as she seemed to want some assurance that what happened wasn't bad. She was very vulnerable at that time following a broken relationship.

I also felt shocked and confused about what had happened. I had a very good doctor/patient relationship with Dr Chowdhury and I never felt threatened when I consulted him. He had a sincere, keen interest in spiritual practises which appealed to me. It never felt perverse to me. But I felt that his decision to do what he did with [Patient A] was inappropriate."

71 Notwithstanding what Ms X said in her statement (that she couldn't remember the exact nature of the sexual act), Ms X said in her oral evidence that Mr Chowdhury had performed oral sex on Patient A.

72 Patient A's evidence was that Mr Chowdhury brought a bottle of champagne to her flat on the first and third visits. Ms X's evidence was that Patient A only discussed Mr Chowdhury going to her flat on one occasion (the second visit).

- 73 Mr Chowdhury's clinical notes show that Patient A's first consultation with him was on Monday 3 March 2003. Patient A's second consultation was on Friday 7 March 2003 and her third consultation took place on Thursday 13 March 2003.
- 74 Accepting for the purposes of analysis Patient A's evidence, it would appear that the discussion with Ms X occurred after the second visit to Patient A's flat, which would have been after the second surgery visit, although Patient A puts it after the first surgery visit, implying that it occurred before the second surgery visit. That would mean the discussion took place some time in March 2003.
- 75 The Tribunal cannot be comfortably satisfied that Patient A met Ms X immediately after the second visit. If that time is accepted as correct, it makes very puzzling that Ms X continued to see Mr Chowdhury until she left for Perth in November 2003. This leads to the real possibility that if such a conversation occurred, it occurred long after March 2003, and possibly not long before Ms X's departure for Perth.
- 76 Ms X described having "a great doctor/patient relationship with him." The Tribunal would have thought what Patient A informed her about may have made her relationship with Mr Chowdhury uncomfortable in light of firstly, her recommending Patient A to Mr Chowdhury and secondly, in view of her own assessment of Mr Chowdhury. Ms X's practise of continuing to consult Mr Chowdhury also tends to point to the conversation regarding the second visit to the flat occurring later in 2003, and possibly around the time of her departure to Perth, rather than when Patient A says it occurred. On this aspect alone, Patient A's evidence must be approached with caution.
- 77 Furthermore, Patient A's evidence is that Mr Chowdhury only took champagne with him when he visited her at her flat on the first and third visits. Ms X's evidence is that she was told of only one occasion that Mr

Chowdhury visited the flat, being the second occasion, and that Patient A spoke to her "shortly after, or immediately after the event had occurred."

78 Ms X could not remember where the conversation took place, speculating that it could have been at her house or at Patient A's flat. She did not have a recollection of the venue. Her evidence was that it was soon after the incident happened, because Patient A was still quite shocked. However, she only recalled having a conversation about this one occasion Mr Chowdhury visited Patient A. In cross-examination, Ms X's evidence was that the conversation with Patient A could have occurred any time prior to November 2003.

79 Although the Tribunal was satisfied that Ms X was attempting to tell the truth to the best of her recollection, her evidence was, understandably, vague, as she was attempting to recount one conversation in respect of which she conceded that she did not have any recollection of what month of the year it occurred in 2003.

80 This analysis is useful to show how vague and uncertain the evidence of Patient A and Ms X are and whether the evidence of complaint can, in any safe and practical way, together with the evidence of Ms X, be accepted as any form of corroboration.

81 The fundamental issue is whether this complaint is true. Apart from the evidence of Ms X, there is no other evidence of any early complaint being made by Patient A.

82 The absence of complaint, firstly to Patient A's psychotherapist, whom she saw on a weekly basis from 24 September 2003 until 16 February 2006; secondly, to Mr Z, her boyfriend from December 2003 to June 2004 who was not informed of the allegations until 17 January 2006, and thirdly, that the complaint to the HCCC was not filed until 2 February 2006, raises a question as to the reliability of the complainant and a risk in reaching a finding based

83 Apart from the single complaint to Ms X, which as we have held, must be treated with some caution, neither Ms X, nor Patient A suggests that Patient A told her about the other visits to the flat. These omissions show the limited weight that can be given to Ms X's evidence as corroboration of the material aspects of the evidence of Patient A.

84 In order to be satisfied that the allegations are established, this Tribunal must be comfortably satisfied, on the balance of probabilities, that Patient A's account of those alleged incidents of misconduct are to be accepted. Such a finding could only be made after careful scrutiny of the evidence of Patient A herself, and in the light of a most careful consideration of all of the evidence in this Inquiry. Patient A was extensively cross-examined. Counsel for the respondent submitted that Patient A was an actress and that she thus gave her account having "learned her lines". In that respect counsel submitted that Patient A, in answering questions, gave speeches. Although we accept there is substance in this submission, a more significant matter was the lack of detail given by Patient A in respect of certain matters, for example, the Airport and the lunch which we will come to shortly. Counsel for the respondent contended that Patient A's account that she had been involved in sexual misconduct by the respondent, should be rejected.

85 Matters such as this clearly require a close analysis of the evidence in order to reach a finding that the allegation of sexual misconduct should be accepted.

86 Counsel for respondent pointed to the following issues in submitting that the Tribunal could not reach a conclusion based on the appropriate standard that complaint one was established:

- (i) the general wellbeing and state of mind of Patient A at the relevant time;
- (ii) inconsistency between the evidence of Patient A and Mr Chowdhury;
- (iii) Patient A's credibility.

General wellbeing and state of mind of Patient A

87 It was contended by Ms *Furness* for the HCCC that there was no evidence that Patient A suffered from any psychiatric or psychological condition. This is correct in the sense that there is no evidence in precisely those terms, but counsel's contention must be seen in the context of there being evidence that Patient A suffered from variable mood swings; had a suicidal ideation; had attempted suicide and had suffered for a long period of time from bulimia; that Patient A found it necessary to have a weekly consultation with a psychotherapist (that is, Ms Y, who gave evidence and noted that between 17 October 2003 and 2 April 2004, Patient A "was repeatedly distressed and was expressing suicidal thoughts"). Ms Y also gave evidence that she saw Patient A on 25 December 2004 (sic) when Patient A said she was distressed about her face. Patient A had a long history of suffering from bulimia, although this was never raised with Mr Chowdhury.

88 Although the evidence directly bearing on Patient A's general wellbeing and state of mind may be incomplete, there is nevertheless clear evidence of an emotional disorder of some significance which has to be taken into account in respect of the evidence generally and particularly in respect of the complaint made against Mr Chowdhury.

Inconsistency between evidence of Patient A and Mr Chowdhury

89 Patient A's evidence is that when she got back from overseas (on or around July 2003), Mr Chowdhury provided her with cosmetic procedures free of charge. She says he cajoled her into the procedures. Mr Chowdhury says he did not encourage her. Mr Z's evidence was that she was obsessed with her "looks." Mr Chowdhury's evidence was that Patient A expressed concern about her face and not getting work in the previous year. She asked if he could help her. The medical records make no reference to the provision of any cosmetic procedures until 9 June 2004, when Patient A was charged an amount of \$500 for a cosmetic procedure. On 31 October 2003, the medical notes record a procedure known as "lipolysis". Mr Chowdhury explained this as a treatment or process by which needles are put into the legs of a patient and an electrical charge is administered which burns cellulite. It was described as a type of electro acupuncture. The medical notes record that the procedure was again administered to Patient A on 11 November 2003. Patient A was charged for each consultation. Patient A's evidence is that she also received at this time a procedure known as "Aquamid" which is a procedure that involves injecting Botox into facial lines and into her forehead. There is no record of this procedure being provided to Patient A on either the October or November occasion. Patient A also saw Mr Chowdhury on 29 November 2003 where the medical records record a diagnosis of insomnia and that Stilnox was prescribed.

90 The first reference to the treatment of Aquamid is recorded for a consultation which occurred in 2004. Patient A's evidence is that in the Christmas card forwarded to her by Mr Chowdhury in 2003, he wrote inside the card "I hope you enjoy my gift". Her evidence was that this was a reference to the "Aquamid" treatment, which she says Mr Chowdhury did not charge her for. Mr Chowdhury denies forwarding a Christmas card to Patient A in 2003 and furthermore, denies providing Patient A with any cosmetic procedures in 2003.

- 91 Having given all this evidence relating to these matters, including the clinical notes close attention, we prefer the evidence of Mr Chowdhury. Further, having regard to the nature of the clinical notes, we can identify no basis to conclude that they are other than factually correct.
- 92 Patient A's evidence includes an allegation that Mr Chowdhury saw her at the International Airport on 23 May 2003. She says he bought her perfume and used an American Express card to purchase \$1,000 worth of travellers' cheques for her. Her evidence is that her flight to Los Angeles left mid-morning, about 10.00 am or 11.00 am, which meant that she arrived at the Airport around 8.30 am or 9.00 am. She recalled that she saw Mr Chowdhury "early, like, in between 9.00 and 11.00 is the best of my recollection. It was definitely earlier than lunch."
- 93 Mr Chowdhury denies visiting the Airport on 23 May 2003. Medical records produced by the Bondi Medical Practice for 23 May 2003 show that Mr Chowdhury saw his first patient at 9.00 am and was still in the Practice having seen other patients at 11.35 am when he was writing a short letter. According to his evidence, he commenced work at 8.15 am each weekday with the exception of Thursday, when he commenced at 7.00 am. His evidence is that his credit cards were cancelled between 1998 and 2002 and that he only had a supplementary card to his wife. He did not hold a card in his name and as at May 2003, he said there was no account that permitted him to withdraw money by producing a credit card.
- 94 Further, Patient A was cross-examined at length about how Mr Chowdhury was said to have gone about using a credit card to purchase the travellers' cheques. She was unable to give any specific evidence. Indeed, her evidence was vague and lacking in any detail.

95 We do not consider it is possible to find, to the requisite standard, that Mr Chowdhury was at the Airport, or engaged in the conduct alleged to have occurred there. We should stress that whilst it is to be appreciated that this is one of the particulars of the allegations against Mr Chowdhury, our findings on this matter have another significance. That is, this is another important area, as with the evidence concerning the cosmetic procedures alleged to have been carried out by Mr Chowdhury in 2003, where the evidence of Patient A, when considered against evidence which we have found to be either factually correct or reasonably likely to be so, Patient A's evidence cannot be accepted as accurate.

96 This conclusion raises considerable doubts as to the weight that can be given to Patient A's evidence overall, and, in turn, these conclusions are significant where Patient A's evidence is the essential foundation to the case against Mr Chowdhury in relation to complaint one.

97 We do not consider that the evidence of Ms Y's takes the matter any further. She records in her notes that during a consultation on 17 October 2003, Patient A informed her that "her doctor had said he would give her injections into her nose and mouth lines for nothing and has suggested Botox and has told her how strong and amazing she is." Although the notes record in summary form what occurred during the consultation, they do not purport to record verbatim what was said and record a statement of intention, rather than something which had been carried out on Patient A. We do not think it takes the matter any further.

98 Ms Y records that Mr Chowdhury was again mentioned during a consultation on 5 August 2005. Her record of this consultation noted that Patient A said she was "going to see the doctor who puts stuff in. She indicated that she wanted to sue [him]." Patient A's evidence is that it was after she believed Mr Chowdhury had damaged her forehead that she raised this complaint with Ms Y. This discussion occurs almost 12 months after Mr

Chowdhury's medical notes record that he initially provided a cosmetic procedure to Patient A and therefore does not cast any doubt as to the accuracy of Mr Chowdhury's records.

Patient A's credibility

99 The respondent points to the significant delay in raising the complaint with Mr Z and Ms Y. Mr Z was her boyfriend from late 2003 until June 2004 and remained friendly with Patient A after the relationship ceased. Patient A sought to explain the delay in informing Mr Z on the basis that she was confused and upset and did not want to think that her doctor, who was reassuring her that what had occurred was spiritual and was helping her, was abusing her. We have difficulty finding such justification credible.

100 Similarly, Ms Y, was not informed of the allegation until October 2005, according to her records, despite Mr Chowdhury's name being mentioned on five occasions during consultations between October 2003 and October 2005. On each occasion that his name was mentioned, it was in respect of cosmetic procedures.

101 Patient A saw Ms Y on a weekly basis for two and a half years commencing on 24 September 2003. She did not raise the allegation regarding Mr Chowdhury until 22 October 2005, although she discussed failed and abusive relationships from when she commenced counselling with Ms Y. This is despite informing Ms Y of matters such as that she was bulimic, which she did not tell Mr Chowdhury and that between 17 October 2003 and 2 April 2004, she was repeatedly distressed and experiencing suicidal thoughts. When asked about this, Patient A could not recall why she had such thoughts. She also advised Ms Y that she was distressed about her face and that no-one would love her. Ms Y described Patient A as an extremely vulnerable and distressed individual. On one occasion, she attempted self-harm by cutting her wrist, which did not require medical attention.

- 102 Furthermore, on Patient A's evidence, the sexual misconduct occurred over a period of two months, but Patient A continued to consult Mr Chowdhury on at least a further 40 occasions after the alleged second visit to her flat.
- 103 Patient A was a mature woman, aged 29, at the time that the alleged sexual misconduct occurred, but was unable to determine for a significant period of time, whether such conduct was spiritual and not sexual. She said in her oral evidence that she saw Mr Chowdhury as a mentor and father figure as explaining her delay in raising the complaint with others, apart from Ms X.
- 104 The allegations contained in complaint one are very serious. If they happened, we find it difficult to comprehend how a 29 year old woman could be "hazy" (as Patient A deposed) as to whether such conduct was inappropriate.
- 105 In her written statement, she explains the delay on the basis that she trusted Mr Chowdhury and that she was always very upset and crying whenever she saw him. She says she was "bulimic and just messy". She thought he could help her with her intimacy issues and she really wanted to be the goddess that he said she would be. In her oral evidence, Patient A says that the reason that she did not make any formal complaint for approximately three years, was because of the amount of shame that she had in respect of the incident. Her oral evidence was that she already had issues with her sexuality, so this was just "another layer for her." She was very confused for a long time because of her feelings about it and what Mr Chowdhury said it was. Patient A says that he was saying that she would be empowered and that what occurred was good for her. She says that it was only after having therapy and feeling like she had a safe place to discuss the incident that she was able to see that it was inappropriate behaviour for a doctor and patient. She did not want to think of herself as a victim.

106 Ms *Furness* submitted that in these circumstances it was entirely understandable that she would not want to reveal to Mr Z, or Ms Y, the incident until she did.

107 In order to accept Patient A's explanation for the delay, the Tribunal would have to reach a conclusion that she was so gullible and incapable of analytical thought for a period of years before she concluded Mr Chowdhury had breached professional boundaries. The Tribunal would have great difficulty in reaching such a conclusion. Having regard to all of the evidence, the Tribunal cannot accept as plausible, the reasons that Patient A gave for her inaction in respect of the complaint.

108 There are some other difficulties with the acceptance of Patient A's evidence.

109 Apart from Patient A's evidence of her discussions with Ms X regarding the allegations, there is no other corroborative evidence. There are no phone records of calls that Patient A alleged had been exchanged between her and Mr Chowdhury; there are no photographs said to have been taken of her by Mr Chowdhury and given to her; Mr M, Patient A's flatmate, who was said to have been present on the occasion of the third visit, allegedly when it was he had taken champagne and food, was unavailable to give evidence because Patient A had lost contact with him; a person whom we shall call C, who Patient A described as a close friend at the time, and who she may have mentioned the incident to, did not give evidence. There is also a lack of specific evidence in respect of the name, location or suburb where Mr Chowdhury was alleged to have taken Patient A to lunch.

110 In essence, Mr Chowdhury has denied that he engaged in sexual conduct with Patient A. He adhered to his denials in cross-examination, stating that he never attended Patient A's flat. The respondent's account of his dealings with Patient A was not fundamentally shaken in cross-examination. The Tribunal concludes that Mr Chowdhury's evidence as to this matter should

be accepted. Although Patient A's evidence is entitled to sympathetic consideration, the authorities referred to earlier are clear that the Tribunal must reach comfortable satisfaction, on the balance of probabilities. We have not been able to reach such a conclusion.

111 Having regard to all of the evidence in respect of complaint one, the Tribunal is satisfied, on the relevant basis, that complaint one has not been established.

PENALTY

Complaint Two

112 Although complaint one has not been made out, complaint two was admitted by Mr Chowdhury. The next question to be determined is whether, in the light of complaint two being established, Mr Chowdhury has been guilty of merely unsatisfactory professional conduct, or whether the conduct goes further, to come within the ambit of professional misconduct.

113 Pursuant to s 36 of the Act, unsatisfactory professional conduct includes any contravention by the practitioner, whether by act or omission, of a condition to which his or her registration is subject. There is no doubt that the respondent has been guilty of unsatisfactory professional conduct in this respect.

114 Section 37 defines professional misconduct as unsatisfactory professional conduct of a sufficiently serious nature to justify suspension of the practitioner from practising medicine or the removal of the practitioner's name from the Register.

115 In *Re Dr Tan Than Le* (20 September 2001), the Medical Tribunal in considering a breach of conditions stated at [95]:

Conditions are imposed on the registration of medical practitioners in the public interest. As with disciplinary proceedings generally, such conditions are intended to maintain proper ethical and professional standards, primarily for the protection of the public, but also for the protection of the profession: cf. *Health Care Complaints Commission v Litchfield* (1997) 41 NSWLR 630 at 637. The effect of such conditions may be to prohibit or regulate the conduct of a practitioner in various ways, commonly in relation to areas of practice, the prescription of certain types of drugs, the forms of permissible employment as a practitioner, requirements for supervision, training or notification, or by providing for the monitoring of aspects of a practitioner's life, such as conditions concerning the use of alcohol or drugs. Invariably they superimpose on the usual collection of responsibilities expected of all practitioners added burdens or restrictions. Moreover, those burdens or restrictions are imposed for reasons peculiar to the individual practitioner and create burdens or restrictions particular to that practitioner. Particularly when imposed in a disciplinary context, such restrictions are not lightly imposed nor may be treated lightly. Any practitioner whose registration is subject to conditions could not reasonably hold any view of those conditions other than that they must be scrupulously observed. Repeated wilful breaches of conditions are treated by the Medical Tribunal as a most serious finding against a practitioner, "containing as it does a grave criticism of the standard of the practitioner's conduct": *Health Care Complaints Commission v Matter* (Medical Tribunal, 3 August 2000, unreported, at 26).

- 116 In *Prakash v Health Care Complaints Commission* [2006] NSWCA 153, Santow JA, (Tobias JA agreeing) approved the Tribunal's observations in *Dr Tan Than Le* observing at [74]:

When conditions are imposed, as they were here, for restoration to practise, those conditions must be scrupulously observed, as observed in *Re Dr Than Le* (supra). It is even more serious when dishonesty supervenes, reflected here in the appellant's statement...

- 117 Mr Chowdhury accepts that between 19 July 2005 and 19 September 2006, that he did not comply with the conditions on his registration imposed by a Performance Review Panel Inquiry. Between July 2005 and 2006, he ignored correspondence from the Board regarding his compliance with his registration conditions. This conclusion was reached by the Board's delegates who conducted a s 66 Inquiry on 19 September 2006. The Inquiry noted that

118 The Board's Health Committee considered the Board's psychiatrist's report on 21 November 2006 and resolved to refer Mr Chowdhury to an Impaired Registrant's Panel Inquiry, which was convened for 22 January 2007. Mr Chowdhury failed to attend this Inquiry which was re-convened to 16 February 2007 when he attended.

119 In the opinion of the Tribunal, Mr Chowdhury deliberately and repeatedly breached the conditions imposed upon him on 8 April 2005. Even if the Tribunal was to accept that part of the reason for his failure to comply with the conditions was that he was suffering from an adjustment disorder, this condition appears to have significantly improved by 16 February 2007 when he attended the Impaired Registrant's Panel Inquiry. However, Mr Chowdhury took no steps to comply with the conditions imposed by the Board, such conditions being imposed because of adverse findings in respect of his competence as a medical practitioner.

120 Applying the principles in *Re Dr Tan Than Le* as approved by the Court of Appeal in *Prakash* and this Tribunal's findings, we are comfortably satisfied, on the balance of probabilities, that the conduct of Mr Chowdhury in breaching the conditions imposed, effective from 19 July 2005, amounted to:

- (a) unsatisfactory professional conduct as alleged in complaint two within the meaning of that expression in s 36 of the Act;
- (b) professional misconduct because it is of a sufficiently serious nature to justify suspension or removal of the practitioner's name pursuant to s 37 of the Act.

121 In reaching this determination, we are mindful of the principles to be applied in determining the appropriate order under s 61 of the Act. Such principles are set out in *Health Care Complaints Commission v Litchfield; William*

Gayed v Merrilyn Walton NSWCA (31 July 1997, unreported); *Bannister v Walton*. They include:

- (i) the protection of the public is the paramount consideration;
- (ii) the maintenance of the high standards of the medical profession;
- (iii) deterring not only the particular practitioner but others who may stray from the appropriate standards;
- (v) a reminder to the profession; and
- (iv) to emphasise the unacceptability of the conduct involved.

122 The Court of Appeal in *Saville v Health Care Complaints Commission & Anor* [2006] NSWCA 298 at [45] stated:

The primary purpose of disciplinary orders is protective of the public welfare, particularly for those in need of medical services. That purpose may in part be served by making orders which provide direct protection to the public (such as deregistration or suspension), but also by orders which demonstrate the need for medical practitioners, both individually and collectively, to ensure that professional standards are maintained. That may be done by way of an order which, on its face, may seem punitive rather than protective, such as a fine. Despite its appearance, its purpose, if justified, is that of protection of public welfare and maintenance of high professional standards.

123 In *Prakash*, *Basten JA*, in a separate judgment (*Tobias JA* agreeing with *Santow JA* in a separate judgment) observed at [91]:

... any order made upon a finding that a complaint has been proved, is said to be protective of the interests of the public at large, but more particularly patients or potential patients of the practitioner concerned. However, the public interests include, indirectly, the standing of the medical profession and the maintenance of public confidence in the high standards of medical practitioners. There is also an element of deterrence or, to put it more positively, encouragement to other practitioners to recognise the importance of complying with professional standards and the risks of failing to do so. The powers of a Tribunal having two members of the medical profession should, at least in relation to professional standards be accorded a degree of

flexibility which might not necessarily be accorded to a Tribunal differently constituted.

124 Ms *Furness* submitted that whether a practitioner fully appreciates the wrongness of their conduct is of vital importance in determining whether there is a risk of recurrence of further misconduct. Counsel referred to the decision of the Court of Appeal in *Law Society of New South Wales v Walsh* (unreported, 15 December 1997) where *Beazley* JA stated at 6:

Another relevant factor will be whether the practitioner fully understands the error of his or her ways ... Whilst a practitioner's expressed intention not to re-offend is relevant to mitigation, it will have little weight unless accompanied by an understanding of the wrongfulness of the conduct which was the subject of the disciplinary charge.

125 In this matter, Mr Chowdhury has admitted the second complaint and acknowledged that his failure to comply with the conditions imposed upon him would inevitably lead to his being ineligible for registration as a medical practitioner. Mr Chowdhury said that he believed that he had a genuine understanding of the inappropriateness of his behaviour and the lack of professional judgment he showed in his failure to comply with his conditions. He sought to assure the Tribunal that he has developed an insight into his entirely inappropriate behaviour and that he was truly contrite for it.

126 In *Childs v Walton* (CA 40252/90, 13 November 1990, unreported) *Samuels* JA, (with whom *Priestly* and *Meagher* JA agreed) said at 18 - 19:

The law does not require the expression of contrition as the satisfaction of some arcane ritual. In cases such as this, where the protection of the community is the paramount interest, contrition, if accepted as honest, may indicate that no occasion for protection exists. In the present case, however, although counsel most eloquently contended that there was no need to protect the community from Dr Childs, the lynchpin of such an argument, namely her recognition that what she had done was wrong, not the least of its fault being that it had damaged former patients who were still dependent upon her, was wholly lacking.

127 Ms *Furness* submitted that Mr Chowdhury's contrition was contrived because of his demeanour and the words he actually used. The Tribunal is inclined to form the view that Mr Chowdhury accepts that it was wrong for him to behave in the way that he did in ignoring the conditions. He now says he would accept whatever restrictions or conditions are imposed upon him. The Tribunal is also mindful of Mr Chowdhury's evidence that he was suffering from depression and what he described as active/passive syndrome during the period that he chose to ignore the conditions. This evidence has to be balanced against the evidence given by the Board's psychiatrist in the Schedule 1 Inquiry referred to earlier.

128 The Tribunal is of the view that although Mr Chowdhury has ceased to be registered, his conduct is sufficiently serious to order, pursuant to s 64(2) of the Act that he not be re-registered. We have been asked to fix a period, pursuant to s 64(3) within which an application for review of this order may not be made. We have given considerable thought to this matter. It is noted that Mr Chowdhury's breach of the conditions occurred between 19 July 2005 and 19 September 2006. It is also borne in mind that the longer the period nominated by the Tribunal, the more difficult it is for the practitioner to keep up to date with current changes in practise within his specialty. We have also taken into account Mr Chowdhury's age. We fix a period of two years which shall run from the date that the Tribunal reserved its decision.

129 Mr Chowdhury's evidence was that subject to complying with any conditions imposed by the Tribunal, he wished to return to cosmetic and skin cancer work, which he said was outside the general field of medical practise. Mr Chowdhury does not intend to work as a sedationist or to return to general practice. Currently, Mr Chowdhury is undertaking laser hair removal in a hair salon approximately once a week, or more, subject to demand.

130 The Schedule 1 Inquiry was concerned to understand more about the type of work that Mr Chowdhury was doing and adjourned the Inquiry to permit him to provide more information in respect of the sorts of treatments that he was providing. He failed to provide this information. Some of the work which he was doing included the removal of spider veins or capillaries. The procedure does not require an anaesthetic. It is totally non-invasive. Although Mr Chowdhury said that part of the equipment he still had included surgical lasers, his evidence was that he had not used these for the past four or five years and they remain in a warehouse.

131 Given that Mr Chowdhury failed to comply with the conditions imposed upon him by the Board and has now not practised general medicine for a period of over three years, the Tribunal finds that Mr Chowdhury is not competent to practise medicine. The wilful breach of conditions imposed by the Board is regarded by the Tribunal as a most serious matter. It therefore proposes to make a prohibition order which will prohibit Mr Chowdhury from providing any health services, or specified health services, as that term is defined in cl 4 Definitions of the *Health Care Complaints Act* 1993. We make such order pursuant to s 64(2A) of the Act.

132 Ultimately, of course, it is a matter for the Tribunal as to what conditions it may seek to impose upon Mr Chowdhury if he again seeks registration as a medical practitioner. However, the Tribunal would observe that the conditions that were previously imposed by the Board and with which Mr Chowdhury has vowed to comply, should, at the very least, be required to be met by Mr Chowdhury. In addition, Mr Chowdhury should be required to provide a psychiatrist's report confirming that he has recovered from his depression and passive/aggressive syndrome which was put as a basis for his non-compliance with the conditions.

133 Ms *Furness* submitted that the Tribunal should give consideration to imposing a fine in light of Mr Chowdhury's failure to comply with the

conditions imposed by the Board. We are not minded, in the circumstances of this case and noting that Mr Chowdhury is bankrupt, to impose a fine. However, taking into account the substantial period of non-compliance, we propose, pursuant to s 61(1)(a) to reprimand Mr Chowdhury for his conduct.

FINDINGS

134 The findings of the Tribunal are that on the basis of the evidence before it, we are not comfortably satisfied that complaint one has been established. Complaint two was admitted and is therefore found proved.

COSTS

135 The parties have liberty to apply in respect of the question of costs.

ORDERS

136 The Tribunal makes the following orders:

1. The complaint that the respondent has been guilty of professional misconduct or conduct within the meaning of s 37 of the *Medical Practice Act* 1992 in respect of the second complaint is found proved.
2. It is ordered that Mr Chowdhury having ceased to be registered, he be not re-registered.
3. Pursuant to s 64(2A) of the *Medical Practice Act* 1992, Mr Chowdhury is prohibited from providing any health services, or specified health services, as that term is defined in cl 4 Definitions of the *Health Care Complaints Act* 1993.

4. An application for review of these orders may not be made until the expiration of two years from the date that the Tribunal reserved its decision in this matter, being Friday 27 February 2009.
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