

**DISCIPLINE COMMITTEE OF THE COLLEGE OF REGISTERED
PSYCHOTHERAPISTS AND REGISTERED MENTAL HEALTH THERAPISTS OF
ONTARIO**

Citation: *College of Registered Psychotherapists and Registered Mental Health Therapists of Ontario v. Muscat*, 2023 ONCRPO 5

Date: August 9, 2023

File No.: C2021-57

BETWEEN:

College of Registered Psychotherapists and Registered Mental Health Therapists of
Ontario

- and -

Suzanne Muscat

FINDING AND PENALTY REASONS

Heard: June 28, 2023, by videoconference

Panel:

David A. Wright (Chair)

David Keast

Michael Machan, RP

Miranda Monastero, RP

Jeffrey Vincent

Appearances:

Natasha Danson, for the College

Lisa Feinberg, for the registrant

Introduction

- [1] Children need special protection and care because of their vulnerability. The *Child, Youth and Family Services Act, 2017*, SO 2014, c. 14, Sched. 1, s. 125(6) (*CYFSA*) imposes a duty on everyone, and in particular on health care and other professionals, to report to a children's aid society when they become aware of information that a child may be in need of protection. Section 125(1) of the *CYFSA* lists 13 circumstances that trigger this obligation, including when a registrant reasonably suspects that harms like physical, emotional or sexual abuse have happened or that there is a risk that they are likely to happen. There is a low bar for reporting; it only requires suspicion of a risk. Failure to report is not only professional misconduct, but a health professional can be found guilty of a provincial offence and required to pay a fine of up to \$5,000 (*CFSYA*, s. 125(9)).
- [2] Suzanne Muscat, the registrant, did not report to a children's aid society on three occasions she was obligated to do so. She also failed to ensure confidentiality by storing records of her private practice in her office at a facility where she was employed. These actions were professional misconduct. The parties have jointly submitted that she should be suspended for two months, required to complete a course with a professional ethics consultant, have her practice monitored for two years and pay costs of \$1,500. The proposed penalty does not bring the administration of the professional discipline system into disrepute, the test we must apply, and we therefore made the requested order at the hearing. These are our reasons.
- [3] Panel member David Wright conducted case management conferences in this matter and sits on the panel with the agreement of both parties.

Findings of Misconduct

- [4] Ms. Muscat did not contest the facts presented by the College and pleaded no contest. This means that, applying Rule 11 of the Rules of Procedure of the Discipline Committee, we can accept the facts in the Statement of Uncontested Facts as true for the purposes of this hearing and make a finding of professional misconduct on that basis, as we have done.

[5] As we noted above, the duty to report arises whenever a psychotherapist has a reasonable suspicion that abuse has happened or that there is a risk that it will happen. In *Ontario College of Teachers v. Quaglia*, 2018 ONOCT 17, the Discipline Committee described the duty to report to a children's aid society as both a legal and ethical duty. It explained:

First, the duty to report is immediate; members must not delay when reporting suspected abuse. Second, the duty to report is direct; members cannot rely on someone else to report on their behalf. Third, the duty to report is ongoing; further reports must be made if the suspected abuse continues. Fourth, the duty to report overrides concerns about confidentiality; members must still report suspected abuse if students disclosed it to them in confidence. Fifth, the duty to report requires members to report suspected abuse to a children's aid society, and not to investigate it themselves.

[6] The registrant worked at a facility where she provided psychotherapy services to vulnerable children who had witnessed or experienced different forms of sexual abuse. In the first case, a mother separated from the father of an 18-month-old child told the registrant she was concerned about the child's safety with the child's father, who had access rights. He had children from a previous relationship, would drink and smoke excessively and had grabbed the arm of a child from a previous relationship with excessive force. He had also demonstrated abusive and stalking behaviour toward the mother in the past. While there were no instances of child abuse in relation to the 18-month-old, Ms. Muscat should have made a report because of the risk of harm.

[7] In the second situation, a father who abused alcohol to the point of passing out from alcohol use had physically and verbally abused the children before he and the mother separated. About a year after the separation, one of the children, who was 15 years old, told Ms. Muscat that he chose to see his father for short visits because the father was "ok to be around" when he was not drunk. While no instances of physical or sexual abuse since the separation had been reported to the registrant, she should have made a report to the children's aid society. There was a reasonable suspicion of risk to the child because he was spending time with the father who continued to abuse alcohol.

[8] In the third situation, a mother told the registrant that the children's father had used drugs and was abusive towards her. At the time, the father was incarcerated

because he had breached a no-contact order with the child's mother. The mother disclosed that after the no-contact order was made, it was breached and the mother allowed the father back into the family home. His behaviour then continued and escalated. There was no formal custody arrangement in place and it was unclear when the father would be released. Even though the father was still in jail at the time of the disclosure and there were no immediate safety concerns, Ms. Muscat was obligated to report the reasonable suspicion that incidents had happened while the father was in the home and that there were risks of future abuse once the father was released from prison.

[9] Ms. Muscat also committed misconduct by storing client records from her private practice in a locked desk that could be accessed by employees of the facility where she worked. According to Ms. Muscat, the records were at the facility temporarily, in a locked drawer and only one other employee of the facility had the key. Regardless, it was her responsibility to ensure that no one unconnected to her private practice had access to the records. The College's Professional Practice Standard, s. 5.6, emphasizes that registrants "must take reasonable measures to ensure that unauthorized persons do not gain access to the files."

[10] The Professional Practice Standard on General Conduct, s. 1.5, requires that registrants "share a vision of respect for clients, and a commitment to practising with integrity and professionalism."

[11] The Professional Misconduct Regulation, O. Reg. 317/12 made under the *Psychotherapy Act, 2007*, SO 2007, c. 10, Sched. R, s. 1, includes the following among the listed acts of professional misconduct:

- Contravening, by act or omission, a standard of practice of the profession or failing to maintain the standard of practice of the profession.
- Contravening, by act or omission, a law in Canada if...the contravention is relevant to the member's suitability to practise
- Engaging in conduct that would reasonably be regarded by members as conduct unbecoming a member of the profession.

[12] Ms. Muscat’s failure to fulfil her child protection obligations falls under all three heads of professional misconduct. Her insecure storage of records is both a failure to maintain a standard of practice and disgraceful, dishonourable or unprofessional conduct. We therefore found misconduct as alleged.

Joint Submissions

[13] We turn now to penalty and begin with the principles that apply when the College and the registrant make a joint submission. The College and the registrant’s agreement on penalty must be implemented unless it is so “unhinged from the circumstances” that implementing it would bring the administration of the College’s professional discipline system into disrepute: *Bradley v. Ontario College of Teachers*, 2021 ONSC 2303 at paras. 9-12; *Ontario College of Teachers v. Merolle*, 2023 ONSC 3452. The test is adapted from the Supreme Court’s analysis in the criminal law context in *R. v. Anthony-Cook*, 2016 SCC 43. While criminal law approaches should not be automatically imported into professional regulation, courts and discipline committees have found that on the issue of joint submissions, the test is the same.

[14] The Committee must accept and implement a joint submission in all but the most exceptional circumstances. There must be something completely unacceptable, unusual or unconscionable to reject it, not just a disagreement or belief that a different outcome would better serve the public interest or be a more fit penalty. Just because the joint submission is not the penalty the Committee would have ordered had the case been contested does not mean that the proposed resolution would bring the administration of the discipline system into disrepute.

[15] The Committee may not “tinker” with a joint submission, which is the result of a careful balancing by the parties of the relevant considerations. It should take the joint submission “as is” and proceed on the basis that any aspects of penalty that were not included were intentionally excluded.

[16] There are many reasons for this high bar. It encourages settlement. If the College and registrants do not have confidence that settlements will be implemented, they will be less likely to happen, with negative consequences for the public interest. Settlements have many benefits for the discipline process. They avoid the stress of a hearing for witnesses, the registrant and those close to them. They save time and

costs and lead to a faster resolution of the issues for the parties and quicker action to protect the public interest.

- [17] Compromise also avoids an “all or nothing” situation for either party. Both parties avoid the risk that challenges in their case, such as weaknesses in witness testimony, legal arguments or evidence that may be inadmissible will affect the outcome. This information is not available to the panel but is usually an important factor in the parties’ decisions. Joint submissions help protect the public interest by making sure that, subject to very limited exceptions, a finding will be made and a penalty implemented. For the registrant, they maximize certainty about the result of the case and the penalty, including its timing. Where there is a suspension, registrants can plan and arrange for substitute care of clients based on the agreed starting date. Settlement can also involve creative and meaningful terms, conditions and limitations that would be difficult to order and implement without buy-in from both parties.
- [18] The Committee must consider a joint submission with humility and confidence that negotiations by the parties have resulted in both the public interest and the registrant’s interest being balanced. As the Supreme Court said in *Anthony-Cook* at para. 44, the College and the member together “are entirely capable of arriving at resolutions that are fair and consistent with the public interest.”
- [19] Deciding whether a penalty meets the test is about the forest, not the trees. Neither the parties’ arguments nor the panel’s reasons need identify every consideration that a panel would apply if it were deciding what penalty to impose without an agreement. What is important are the key penalty factors that place this misconduct at a general point along the spectrum of potential penalties. Comparing the penalty factors with those in other cases and their results helps the panel determine if the penalty is so far removed from what would be expected that it meets the high bar to consider rejection of the joint submission.
- [20] If a panel is considering departing from a joint submission, it must advise the parties and provide them an opportunity to make submissions. The decision can only be based on the facts agreed upon in the agreed statement of facts and any other evidence the parties may have called. The parties are not required to share

information about other facts or the circumstances that led to the joint submission: *Bradley* at para. 13.

Application to this Case

- [21] The joint submission of a two-month suspension, practice monitoring, education on ethics and costs of \$1,500 is not unhinged from the circumstances, nor would it bring the administration of the professional discipline system into disrepute. The most significant factor here is the nature of the misconduct, which can be compared with the decisions in other cases involving the same issues.
- [22] The parties relied on several cases from other colleges that demonstrate that this penalty is well within the appropriate range. In *Quaglia*, above, and in *College of Nurses of Ontario v. Routley*, 2010 CanLII 100025 (ON CNO) the professionals failed to report under child protection legislation on one occasion. In each case, the registrant was reprimanded and required to receive education; there was no suspension. In *Ontario College of Social Workers and Social Service Workers v. Carere*, 2015, unreported, and *College of Psychologists of Ontario v. Schnayer*, 2019 ONCPD 2, the penalty for a single failure to report was a two-month suspension.
- [23] In *Ontario College of Early Child Educators v. Kidwai*, 2019 ONCECE 11, there was a four-month suspension for failing to report multiple reports of abuse by a staff member at the centre where Ms. Kidwai was Executive Director. These penalties vary not only because of the number of incidents, but also because of the seriousness of the failure to report based on factors like the effects of the non-disclosure and the nature of the situation that required reporting.
- [24] On the confidentiality issue, the parties rely on *Ontario College of Social Workers and Social Service Workers v. Osher*, 2022 ONCSWSSW 3. This decision is helpful because of its differences with this case. In *Osher*, the registrant had disposed of 450 client files in a dumpster that could be accessed by the public. Some of those files had not been digitized and the applicable retention periods had not yet passed. The registrant received an effective suspension of three months. This suspension for much more serious breach of confidentiality helps demonstrate that the two-month suspension here fulfils the objectives of penalty.

[25] The order's requirements for ethics education and practice monitoring promote public protection and the rehabilitation of the registrant, and we expect them to assist Ms. Muscat in practising with a much higher standard of professionalism when she returns to practice. The costs proposed are also reasonable.

Order

[26] We made the following order:

1. The Registrant is required to appear before a panel of the Discipline Committee immediately following the hearing of this matter to be reprimanded.
2. The Registrar is directed to suspend the Registrant's certificate of registration for a period of two months, to commence on the date of this order.
3. The Registrar is directed to immediately impose on the Registrant's certificate of registration the following terms, conditions and limitations, all of which shall be fulfilled at the expense of the Registrant and to the satisfaction of the Registrar:
 - i. The Registrant shall successfully complete a course with a professional ethics consultant regarding the issues raised by the facts and findings of professional misconduct in this case, within six months of the date of this order;
 - ii. The Registrant shall refrain from providing psychotherapy to clients under 18 until the Registrant completes the requirement set out in paragraph 3a; and
 - iii. The Registrant shall undergo practice monitoring regarding the issues raised by the facts and findings of professional misconduct in this case for a period of two years from the date of this order, where the Registrant will meet with the practice monitor every three months. The Registrant shall ensure the practice monitor submits a written report to the Registrar every three months that confirms that the Registrant co-operated and complied with the practice monitor and incorporated any advice from the practice monitor.
4. The Registrant is required to pay costs fixed in the amount of \$1,500 payable within 30 days of the date of this order.

David A. Wright, on behalf
of the panel