

- (1) ORDER PROHIBITING PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF AGGRIEVED PERSON
- (2) ORDER PREVENTING SEARCH OF THE TRIBUNAL FILE WITHOUT LEAVE OF THE CHAIRPERSON OR OF THE TRIBUNAL

IN THE HUMAN RIGHTS REVIEW TRIBUNAL

[2021] NZHRRT 35

I TE TARAPIUNARA MANA TANGATA

Reference No. HRRT 020/2021

UNDER

THE HEALTH AND DISABILITY
COMMISSIONER ACT 1994

BETWEEN

DIRECTOR OF PROCEEDINGS

PLAINTIFF

AND

STEVE ROLSTON

DEFENDANT

AT WELLINGTON

BEFORE:

Ms GJ Goodwin, Deputy Chairperson

Dr SJ Hickey MNZM, Member

Ms SB Isaacs, Member

REPRESENTATION:

Mr G Robins, Acting Director of Proceedings

Mr M Bott for defendant

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 26 July 2021

(REDACTED) DECISION OF TRIBUNAL¹

¹ [This decision is to be cited as *Director of Proceedings v Rolston* [2021] NZHRRT 35. Note publication restrictions.]

[1] These proceedings under the Health and Disability Commissioner Act 1994 were filed on 30 April 2021.

[2] Prior to the filing of the proceedings the parties resolved all matters in issue and the Tribunal is asked to make a consent declaration. The parties have filed:

[2.1] A Consent Memorandum dated 30 April 2021.

[2.2] An Agreed Summary of Facts, a copy of which is annexed and marked "A".

[3] In the Consent Memorandum the parties request that the Tribunal exercises its jurisdiction and issues:

2. (a) A declaration pursuant to section 54(1)(a) of the Health and Disability Commissioner Act 1994 ("the Act") that the defendant has breached the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996 ("the Code") in respect of:
 - (i) Right 4(2) by failing to provide services to the aggrieved person that complied with legal, professional, ethical, and other relevant standards; and
 - (ii) Right 6(1) by failing to provide information to the aggrieved person that a reasonable consumer, in the aggrieved person's circumstances, would expect to receive;
 - (iii) Right 7(1) by failing to obtain the aggrieved person's informed consent prior to the provision of services; and.
- (b) A final order prohibiting publication of the name and identifying details of the aggrieved person in this matter (Ms A).

[4] Having perused the Agreed Summary of Facts the Tribunal is satisfied on the balance of probabilities that an action of the defendant was in breach of the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996 and that a declaration should be made in the terms sought by the parties in paragraph 2(a) of the Consent Memorandum.

[5] The Tribunal is also satisfied that it is desirable to make a final order prohibiting publication of the name and identifying details of the aggrieved person (Ms A) as sought in paragraph 2(b) of the Consent Memorandum.

DECISION

[6] The decision of the Tribunal is that:

[6.1] A declaration is made pursuant to s 54(1)(a) of the Health and Disability Commissioner Act 1994 that the defendant breached the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996 in respect of:

[6.1.1] Right 4(2) by failing to provide services to the aggrieved person with reasonable care and skill.

[6.1.2] Right 6(1) by failing to provide information to the aggrieved person that a reasonable consumer, in the aggrieved person's circumstances, would expect to receive.

[6.1.3] Right 7(1) by failing to obtain the aggrieved person's informed consent prior to the provision of services.

[6.2] A final order is made prohibiting publication of the name and any other details which might lead to the identification of the aggrieved person (Ms A). There is to be no search of the Tribunal file without leave of the Tribunal or of the Chairperson.

.....
Ms GJ Goodwin
Deputy Chairperson

.....
Dr SJ Hickey MNZM
Member

.....
Ms SB Isaacs
Member

“A”

This is the Agreed Summary of Facts marked with the letter “A” referred to in the annexed decision of the Tribunal delivered on 26 July 2021.

**BEFORE THE HUMAN RIGHTS REVIEW TRIBUNAL
I TE TARAIPUNARA MANA TANGATA**

HRRT /21

UNDER Section 50 of the Health and Disability Commissioner Act 1994

BETWEEN **THE DIRECTOR OF PROCEEDINGS**, designated under the Health and Disability Commissioner Act 1994

Plaintiff

AND **STEVE ROLSTON** of Porirua, Massage Therapist

Defendant

[REDACTED] AGREED SUMMARY OF FACTS



Level 11, 86 Victoria Street, Wellington 6011
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Phone: 04 494 7900 Fax: 04 494 7901

Greg Robins – Acting Director of Proceedings

[REDACTED] AGREED SUMMARY OF FACTS**Introduction**

1. The plaintiff is the Director of Proceedings exercising statutory functions under sections 15 and 49 of the Health and Disability Commissioner Act 1994 ("the Act").
2. The aggrieved person in these proceedings is Ms A. At all material times Ms A was a consumer of health services.
3. At all material times, the defendant ("Mr Rolston") was a registered massage therapist, was a health care provider within the meaning of s 3 of the Act, and was providing health services to Ms A within the meaning of s 2 of the Act.
4. In May 2019 Ms A complained to the Health and Disability Commissioner ("HDC") about the services provided to her by Mr Rolston.
5. In June 2020 the HDC (appointed under s 8 of the Act) finalised his opinion that Mr Rolston had breached Ms A's rights under the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996 ("the Code") and in accordance with s 45(2)(f) of the Act, referred Mr Rolston to the plaintiff.

Background

6. Mr Rolston graduated from the New Zealand College of Massage ("NZCM") with Diplomas in Health Science for Therapeutic Massage, and Massage and Sports Therapy. He also has a Certificate in Relaxation Massage. Mr Rolston is registered with Massage New Zealand

("MNZ"), which is a self-regulating voluntary membership association. MNZ promotes the massage profession by requiring members to achieve educational competency and clear standards of client care, practice, and ethics, and to meet ongoing requirements to maintain membership.

7. On 2 May 2019 at 5pm Ms A went for a 90-minute relaxation massage at Mr Rolston's home (from where he operates his massage business). This was the first occasion on which Mr Rolston had provided a massage for Ms A.
8. At the start of the session Mr Rolston asked Ms A if there were any parts of her body that she did not like being massaged and she replied no. Ms A assumed Mr Rolston was asking about areas such as her head, hands or feet.
9. Ms A recalls Mr Rolston explained to her that:

"he would get me to lie on my front, would start with my upper body and include a head massage then move to my glutes, legs and feet before asking me to turn over. He stated he would then massage my legs and arms and finish with a face/scalp massage. I told him that sounded fine."
10. Mr Rolston asked Ms A to complete a 'Client Intake Form', which he would get clients to do at their first visit. The 'Client Intake Form' completed by Ms A does not identify what specific areas of the body Ms A consented to as part of the massage, nor does it record any verbal discussions with, or responses by, Ms A.
11. While Ms A completed the 'Client Intake Form', Mr Rolston began completing a 'Relaxation Massage Record', recording that Ms A's goals and expectations for the session were "[R]↑" (i.e. increased relaxation).

Under "Session plan", the form states: "Full body massage", and is signed by Ms A. Under "dislikes/special requirements" the form states: "none".

12. Mr Rolston instructed Ms A to get undressed and place herself prone on the table with her face in the head cradle and to cover herself with the sheet provided. He then left the room and waited until Ms A indicated that she was ready for him to re-enter.
13. Ms A thought Mr Rolston's massage while she was on her front was "OK". When Ms A turned over onto her back, Mr Rolston used the sheet she was under as a drape to protect her privacy.
14. After massaging the front of her legs and arms, Mr Rolston moved the sheet so that he could massage Ms A's upper chest area. Ms A felt as though the sheet was very close to exposing her nipples and she felt uncomfortable but she trusted that Mr Rolston would not be exposing her.
15. With no warning, Mr Rolston removed the sheet, exposing Ms A's breasts and stomach. He tucked the sheet down the front of the top of her underwear and proceeded to massage Ms A's stomach, and then massage her breasts and nipples. Ms A did not expect this and felt frozen to the table and shocked. She wanted to say something to Mr Rolston but she felt extremely vulnerable and scared. Ms A knew there was not a lot of time left before the massage was due to end and hoped that would be the end of it. Before moving to her upper torso and head, Mr Rolston again massaged Ms A's breasts and nipples. Ms A felt frozen with disgust, fear, anxiety, and anger but she felt too exposed to speak up and she was aware that she was possibly alone in Mr Rolston's house. Mr Rolston then moved on to Ms A's head and face.

16. Once the massage finished Mr Rolston left the room while Ms A got dressed. Feeling less vulnerable once dressed, Ms A told Mr Rolston on his return that she was not happy with him touching her breasts and felt it was very inappropriate. Mr Rolston replied that he had checked with Ms A at the start and she had told him she did not mind her body being massaged; he felt he had her permission to do so. Ms A told Mr Rolston that she did not give him permission to massage her breasts, and that if he had made it clear he intended to do so, she would have told him no. Mr Rolston told Ms A she should have spoken up while he was doing it if she did not want it. Ms A told Mr Rolston she had not expected him to do that, and when he did so she was in shock. Ms A did not want to continue talking with Mr Rolston so she left feeling very upset and violated.
17. After Ms A left, Mr Rolston sent her a phone text message saying he would like to “sincerely apologise again for the misunderstanding tonight. Please understand I did not intend to upset you and it upsets me to think that I did, as I try very hard to please my clients....” He offered Ms A a refund or an opportunity to provide another massage “with better understanding of your wishes of course”. Ms A did not respond to Mr Rolston’s message.
18. On the ‘Relaxation Massage Record’ (below the section containing Ms A’s signature consenting to the massage), Mr Rolston recorded retrospectively that the massage he provided included massaging Ms A’s glutes, legs, feet, “chest/abs”, arms and face.
19. Under the “client feedback” section of the ‘Relaxation Massage Record’ Mr Rolston recorded retrospectively that Ms A:

“was upset that I had uncovered and massaged the breast area. I understood this was part of what she wanted. I had asked and confirmed:

- 90 min full body massage “yes”
- Were there any areas she did not want massaged? “No”
- I described the process including specifically “chest/breast area and tummy.” Answer “yes.”
- Also gave client permission to say “no/stop etc if she was uncomfortable at any time. There was no such indications.”

20. Mr Rolston told the HDC that when he described the planned massage to Ms A he included the chest and abdomen/tummy, which he said he noted to Ms A are sensitive for some people, especially women, and asked Ms A if that was something she would like included. Mr Rolston told the HDC that Ms A’s response “was affirmative”. Mr Rolston also told the HDC he asked whether Ms A was comfortable with her chest uncovered or would prefer him to use a towel, and that she said something along the lines of “that’s fine.” Mr Rolston told the HDC he ensured Ms A knew she had “permission” to stop him if she was uncomfortable at any time; she just had to say stop or something similar. He said that at no point during the massage did she do so.
21. Mr Rolston told the HDC he accepts that asking Ms A whether she wanted her chest area to be left uncovered or preferred to use a towel did not necessarily correlate to obtaining consent to massage her breast area. Mr Rolston said that he was trying to be discreet, as he felt that as a male, to ask whether Ms A wanted breast work would have come across as “creepy” and inappropriate, and may have caused offence.
22. In contrast, Ms A told the HDC that Mr Rolston did not fully inform her regarding the areas of massage she would receive. Mr Rolston never mentioned her chest area and he never said he intended massaging her

breasts and nipples. Had he done so, Ms A would have made it clear that was not an area she wanted massage done. Ms A is clear that she never gave Mr Rolston consent to massage her breasts and nipples.

23. Ms A also told the HDC that Mr Rolston never asked her whether she was comfortable with her chest being uncovered or whether she preferred it to be covered by a towel, and she would never have given him an “affirmative” reply.
24. Mr Rolston told the HDC that generally speaking, clients who come for relaxation massage do not want the massage therapist talking throughout the massage. They want to relax and some go to sleep, so he tries to interrupt the relaxation process as little as possible. Mr Rolston said he checked in with Ms A at least four to five times during the session. Mr Rolston said that each time he asked Ms A, including at the end, she confirmed that she was comfortable and gave him no cause to believe she was not happy with the massage.
25. However, Ms A advised the HDC that Mr Rolston asked her for feedback at the start of the massage regarding pressure applied and comfort with the booster under her ankles, at which point she was happy so she replied positively. Ms A told the HDC Mr Rolston did not ask her for feedback once she was on her back, nor did he ask her at the end.

Relevant standards

26. Massage New Zealand (MNZ) Standards of Practice state:

“All registered MNZ therapists abide by these standards as well as the Code of Ethics which is required to be displayed at all clinic spaces where a registered therapist works.”

27. The MNZ Code of Practice states:

“Interpersonal skills

...

Give clients information they need in a way they can understand.

Obtain client’s informed consent before commencing treatment.

...

Privacy

Use appropriate draping to preserve the dignity and modesty of the client.

...

Client Health

...

Inform client during session on what treatment will be provided and continue to monitor and update where required.

...”

28. The MNZ Code of Ethics states:

“Practitioners will:

...

- Provide draping and explanation sufficient to meet the client’s needs for comfort and privacy.

...

- Ensure informed client consent has been obtained prior to massage.
- Maintain open communication throughout the massage session ensuring ongoing informed client consent, explaining rationale for proposed massage.

...

Practitioners will not:

...

- Engage in sexual conduct with a client.

...

- Be affiliated with, or employed by, any therapeutic massage business that utilises any form of sexual suggestiveness or explicit sexuality in its advertising or promotion of services, or in the actual practice of its services."

Expert advice

29. Mr Barry Vautier provided expert advice to the HDC. Mr Vautier has a Bachelor of Health Studies (Massage and Neuromuscular Therapy) and a Diploma in Therapeutic Massage. Mr Vautier has been in clinical practice for 30 years and has lectured in massage therapy at the NZCM. He is a life member and past president of MNZ.
30. Mr Vautier advised that the 'Client Intake Form' Mr Rolston used for Ms A is not clear about consent for body areas to be massaged or not, and does not record any verbal consent by, or instructions that may have been given to, Ms A. Mr Vautier stated that Mr Rolston seemed to assume that as Ms A had consented to a full body relaxation massage, it would include massage of the abdomen and breasts. Mr Vautier advised that the big departure from care was this assumption and lack of

informed consent with his client by failing to communicate adequately with Ms A prior to the massage and clarifying what she wanted massaged or not. This lack of informed consent would be regarded by peers as a breach of ethical standards and a lapse in good practice.

31. Further, Mr Vautier advised that from the evidence of both parties, Mr Rolston failed to maintain open communication throughout the massage and to confer adequately with Ms A about what he intended to do to ensure ongoing informed consent, and Ms A's comfort and dignity. Mr Vautier advised that this was a serious departure from standard practice. Mr Vautier noted that there appeared to have been no informed consent and warning that Mr Rolston was going to massage the vulnerable area of the breasts. Mr Vautier also noted that massaging the stomach is an area of sensitivity for many people, and great care needs to be taken to obtain informed consent and get adequate feedback during the application of the strokes. Mr Vautier advised that although Mr Rolston claimed having a relaxation massage might infer less communication, it is still vitally important to confer when changing depth, location and style of stroke to establish client comfort and safety.
32. Mr Vautier also advised that Mr Rolston's draping of Ms A was unacceptable in that it did not meet the four main principles of draping (to provide warmth to the client, to provide dignity to the client, to define the area being massaged (with the rest of the body covered), and that treatment should not be performed under draping or clothing). Mr Vautier advised that fully exposing Ms A's breasts and abdomen without her clear consent would be considered unacceptable behaviour by Mr Rolston's peers.

33. Mr Vautier advised that massage of the breasts is unusual to give to a client for a full body massage, especially for a male treating a female. Further, Mr Vautier advised that the nipples should never be massaged, as these are considered erogenous zones and sexual in nature. Massage of the nipples would be considered by the therapeutic massage industry as engaging in sexual misconduct with a client and is considered like the genitals, a no-touch area of the body.

34. Mr Vautier advised that Mr Rolston's informed consent failures would be seen as a major departure of care by peers in the therapeutic massage industry.

Mr Rolston's response to complaint

35. Mr Rolston told the HDC that his rationale for massaging Ms A's chest area was simply to provide a more comprehensive full body massage and relaxation experience. Mr Rolston accepts that a reasonable person in Ms A's position would expect to be informed explicitly that his intention was to massage her breasts, and that reference to the "chest" could be taken to refer to the upper chest area. Mr Rolston advised the HDC that Ms A's nipples were not targeted as such and that he has never engaged in "nipple massage". However, he accepts he could have taken greater care to avoid "unintentional" brushing of the nipples whilst performing strokes to the chest area.

36. Subsequently, Mr Rolston told the HDC he may have misheard Ms A as he has had a severe hearing loss since birth. Mr Rolston did not inform Ms A of his hearing loss. Mr Rolston told the HDC he had come to realise that due to his hearing impairment, his reliance on his subjective assessment as to his clients' understanding of what he is communicating was problematic, and that in Ms A's case he made incorrect assumptions

and inadvertently missed key matters that would have ensured he had obtained full and informed consent both prior to and during the massage. Mr Rolston advised the HDC that he has now been fitted with a set of hearing aids for both ears.

37. Mr Rolston told the HDC that he deeply regrets this incident and has made a number of changes to prevent a reoccurrence, including the following:

- Mr Rolston has changed the form he uses to a more detailed Relaxation Massage Form.
- With reference to the tick boxes on the reverse of the form, he now verbally highlights with each client prior to their massage that they should advise him if they feel uncomfortable at any time.
- He has added wording to the Customer Intake Form to the effect that if the chest or groin area is to be the subject of massage, it will be noted specifically and initialled by the client to indicate their agreement.
- He has added wording to the original confirmation and reminder emails, saying that clients who require sensitive therapeutic work may bring a chaperone if they wish.
- He uses a draping method that he was taught by NZCM during his training, to ensure that sensitive areas are wrapped in sheeting and secure from accidental touch or slipping.
- He no longer offers relaxation massage for the chest and abdominal area.
- He has asked a former NZCM tutor to be his mentor.

Breaches of the Code of Rights

38. Right 4(2) states: "Every consumer has the right to have services provided that comply with legal, professional, ethical, and other relevant standards."
39. Right 6(1) states: "Every consumer has the right to the information that a reasonable consumer, in that consumer's circumstances, would expect to receive ..."
40. Right 7(1) states: "Services may be provided to a consumer only if that consumer makes an informed choice and gives informed consent ..."
41. Mr Rolston accepts he failed to meet professional and ethical standards in that it was inappropriate to massage Ms A's breasts and nipples; unacceptable to expose her breasts and abdomen without warning her this was his intention and without obtaining her prior consent; and he failed to communicate adequately with Ms A throughout the massage. Accordingly, Mr Rolston accepts he breached Right 4(2) of the Code.
42. Mr Rolston also accepts he failed to communicate adequately with Ms A, and that he did not inform Ms A prior to the massage that he specifically intended to massage her breasts and abdomen. Mr Rolston acknowledges the importance of obtaining informed consent for massage treatment to sensitive areas of the body, and that a person cannot give consent without first being adequately informed of the proposed massage site. He acknowledges it is not sufficient to assume a person has given informed consent because they do not object to specific actions. Mr Rolston accepts that he failed to inform Ms A adequately and therefore Ms A was not able to give informed consent and, accordingly, he breached Right 6(1) and Right 7(1) of the Code.

Greg Robins
Acting Director of Proceedings

I, Steve Rolston, agree that the facts set out in this Summary of Facts are true and correct.

Steve Rolston

Date: