

IN THE MATTER OF THE *HEALTH PROFESSIONS ACT*, R.S.A 2000, c. H-7
AND IN THE MATTER OF A HEARING CONCERNING ALLEGATIONS OF
UNPROFESSIONAL CONDUCT ABOUT JINGPEI (LISA) DUAN, RDA, REGULATED
MEMBER OF THE COLLEGE OF ALBERTA DENTAL ASSISTANTS

DECISION OF THE HEARING TRIBUNAL ON SANCTIONS

INTRODUCTION

Following a hearing in Calgary, Alberta on November 18-19, 2019, October 5, 2020, April 19, 2021 and September 27, 2021, the Hearing Tribunal consisting of Ms. Patricia Demchuk, RDA and chairperson, Ms. Lorraine Aldridge, RDA, Ms. Arlene Pettifer, RDA and Mr. David Rolfe, public member found Ms. Jingpei (Lisa) Duan to have engaged in unprofessional conduct. The Hearing Tribunal's merits decision finding the allegations proven was issued to the parties on March 8, 2022. It was sent to Ms. Duan by registered mail and by email.

Ms. Duan was found guilty of the following allegations of unprofessional conduct:

1. On or about November 6, 2017, Jingpei (Lisa) Duan carried out a restricted activity she was not authorized to perform, specifically using the high speed handpiece in a patient's mouth, which contravenes section 1(1)(pp)(ii) of the Health Professions Act, section 4 of Schedule 7.1 to the Government Organization Act, section 12 of the Dental Assistants Profession Regulation and College of Alberta Dental Assistants Standards of Practice section 2.9 and the College of Alberta Dental Assistants Code of Ethics articles 1.4, 2.1 and 3.1.
2. On or about November 6, 2017, Jing Pei (Lisa) Duan performed dental assisting services that were not authorized to her by the College of Alberta Dental Assistants, specifically fabricating, fitting, trimming and/or cementing temporary crowns which contravenes section 1(1)(pp)(ii) of the Health Professions Act, and College of Alberta Dental Assistants Standards of Practice section 2.9 and the College of Alberta Dental Assistants Code of Ethics articles 1.4, 2.1 and 3.1 and the Granting of Intra-Oral Skills Policy.

The Hearing Tribunal's merits decision requested submissions on sanctions from the parties. The Complaints Director was requested to provide written submissions on sanctions within 4 weeks. Ms. Duan was requested to provide her written submissions on sanction within 1 further week. The parties were asked to advise the Tribunal if they would be unable to meet these timelines, or if they wished to request an oral hearing on sanctions.

Mr. Maxston provided the Complaints Director's submissions on sanctions on March 15, 2022. On March 22, 2022 the College's Hearings Director sent the Complaints Director's submissions on sanctions to Ms. Duan by registered mail and email. Neither Ms. Duan, nor anyone on her behalf responded to the Hearing Tribunal's findings of unprofessional conduct. Ms. Duan did not

provide any submissions on sanction by the 5-week deadline in the Hearing Tribunal's merits decision, nor has she done so since.

SUBMISSIONS OF THE COMPLAINTS DIRECTOR

Mr. Maxston's submissions reviewed the Hearing Tribunal's authority to make sanctions orders and orders for fines and investigation and hearing costs following findings of unprofessional conduct. Mr. Maxston submitted that in this case the Complaints Director was seeking the following orders against Ms. Duan:

1. Ms. Duan will pay 60% of the costs of the investigation and hearing;
2. Ms. Duan will pay a fine of \$750 concerning the finding of unprofessional conduct on charge 1;
3. Ms. Duan will pay a fine of \$250 concerning the finding of unprofessional conduct on charge 2;
4. There will be publication of the Hearing Tribunal's findings and penalty orders with Ms. Duan's name.

Mr. Maxston then reviewed relevant factors for determining the appropriate sanctions. He submitted that the purpose of sanctions in professional discipline matters is to ensure the public is protected from unprofessional conduct and to maintain the integrity of the profession. These goals can be achieved by ensuring the public is not at risk from the member whose conduct has been found wanting, by ensuring public confidence in the profession, and by sending an appropriate message to other members of the profession regarding conduct that is found to be unprofessional.

Mr. Maxston then referred to factors described in *Jaswal v. Newfoundland (Medical Board)*, 1996 CanLII 11630 for the determination of professional discipline sanctions. The nature and gravity of the proven allegations is the first factor. Mr. Maxston submitted that Ms. Duan was found guilty of two counts of serious unprofessional conduct, as reflected in the Tribunal's merits decision. Mr. Maxston highlighted the severity of the potential irreversible harm arising from the conduct in allegation 1. He also highlighted that Ms. Duan acted deliberately.

Mr. Maxston acknowledged that Ms. Duan had completed the appropriate PCR training after her conduct in allegation 2 and this was a mitigating factor. Mr. Maxston concluded that the public must be able to have confidence that regulated professionals will observe their scopes of practice and refrain from carrying out restricted activities without authorization.

Considering Ms. Duan's age and experience, Mr. Maxston submitted that Ms. Duan had been a regulated member of the College since June 1, 2010. She was not new to the profession and she should have been well aware of the limitations on her practice as a Registered Dental Assistant.

Mr. Maxston advised the Hearing Tribunal that Ms. Duan has no prior discipline history. This serves as a mitigating factor.

In terms of Ms. Duan's role in acknowledging what occurred, Mr. Maxston submitted that Ms. Duan vigorously contested the allegations but then seemingly abandoned the proceedings. She did not take any responsibility for her conduct or demonstrate any recognition that her conduct was inappropriate.

Mr. Maxston next addressed the need for deterrence. He submitted that the Complaints Director's proposed sanctions orders would communicate to Ms. Duan and to the rest of the profession that her proven unprofessional conduct was serious and must not be repeated in the future.

Regarding the need to maintain public confidence in the profession, Mr. Maxston submitted that Ms. Duan's proven conduct represented a significant and substantial departure from the conduct expected of healthcare workers. He submitted that the public would expect the Hearing Tribunal to order serious sanctions since Ms. Duan was practicing beyond her authorized scope and contravened the College's Standards of Practice and its Code of Ethics.

Considering the degree to which Ms. Duan's proven unprofessional conduct was outside the range of permitted conduct, Mr. Maxston submitted that her conduct was a marked deviation from the range of acceptable conduct. She was practicing beyond the scope of what she was legally authorized to do. Her conduct did not fall into a "grey" area.

Mr. Maxston next addressed the Complaints Director's submission that Ms. Duan should be ordered to pay 60% of the investigation and hearing costs. Mr. Maxston referred to *Lysons v. Alberta Land Surveyors' Association*, 2017 ABCA 7 where the Alberta Court of Appeal held at paragraph 13 that it is not inappropriate for a professional to pay all or part of the investigation and hearing costs, including legal fees incurred by the administrative tribunal and the regulatory body.

The rationale for this is that the College has a mandate to investigate complaints and prosecute discipline allegations where warranted. The costs of investigations and discipline proceedings should be borne by the regulated member of the profession whose conduct has been found wanting, at least in part, and not by the compliant members of the profession. Mr. Maxston next referred the Tribunal to additional factors described in the *Jaswal* case for the determination of costs orders.

These factors may be summarized as (1) whether the regulated member of the profession successfully resisted any of the allegations, (2) whether all of the witnesses and any other expenses were necessary, (3) whether the Complaints Director could have anticipated the results based on what they knew prior to the hearing, (4) whether the regulated member cooperated and offered to facilitate proof through admissions, and (5) the financial circumstances of the member and whether her financial position has already been affected by other aspects of any penalty imposed.

Mr. Maxston explained that the costs of the investigation and hearing to the date of the Complaints Director's submissions were approximately \$200,000. The Complaints Director's request for an order for Ms. Duan to pay 60% of this approximate amount was based on several considerations.

Mr. Maxston asked the Hearing Tribunal to consider that Ms. Duan's representative for most of the hearing was Mr. Vang Wang. Mr. Wang's behaviour during the hearing was highly disruptive. In particular, Mr. Maxston referred to Mr. Wang's aggressive and at times threatening statements to other hearing participants. He repeatedly challenged the Hearing Tribunal's jurisdiction, authority and directions and he was rude, misleading and abusive in his efforts to cross-examine witnesses, despite repeated warning from the Hearing Tribunal Chair. Mr. Wang's approach significantly increased the amount of hearing time that was spent and

significantly increased the costs. Mr. Maxston submitted that Ms. Duan is responsible for her representative's actions and the deleterious effect of those actions on the overall costs of the proceedings.

Mr. Maxston pointed out that the Complaints Director proved both of the allegations in the Notice of Hearing. All of the witnesses who testified were necessary to prove the allegations. The outcome of the hearing was foreseeable to the Complaints Director and ought to have been foreseeable to Ms. Duan, whose failure to abide by clear professional obligations led to the proceedings. Ms. Duan did not facilitate any proof by admissions and instead frustrated the hearing process through the approach taken by Mr. Wang. There was no evidence of Ms. Duan's financial circumstances, but Mr. Maxston submitted that she was no longer working as a Dental Assistant.

Based on all of the considerations including the aggravating factors, Mr. Maxston submitted that Ms. Duan could be ordered to pay 100% of the investigation and hearing costs. The Complaints Director was seeking only 60% since Ms. Duan's earning potential may have been limited.

SUBMISSIONS OF MS. DUAN

As described above neither Ms. Duan, nor anyone on her behalf responded to the Hearing Tribunal's merits decision and the Hearing Tribunal's request for submissions on sanction.

FURTHER SUBMISSIONS ON SANCTION

On May 10, 2022, after reviewing Mr. Maxston's submissions on sanction, the Hearing Tribunal requested the Hearings Director Ms. Collison to advise the parties that the Tribunal was considering whether to add a reprimand to the sanctions proposed by the Complaints Director. The Tribunal offered the parties an opportunity to provide submissions on this point by May 16, 2022.

Mr. Maxston replied to this request the same day. He advised that the Complaints Director believes that a reprimand is an appropriate additional sanction to be ordered in this matter. Ms. Duan did not reply by May 16, 2022 and had not replied by the date of this decision.

SANCTIONS AND COSTS ORDERS

The Hearing Tribunal considered the findings of unprofessional conduct and Mr. Maxston's submissions on behalf of the Complaints Director. The Hearing Tribunal makes the following orders pursuant to section 82 of the *Health Professions Act*:

1. Ms. Duan will receive a reprimand with the Hearing Tribunal's written decisions to serve as the reprimand;
2. Ms. Duan will pay 60% of the costs of the investigation and hearing;
3. Ms. Duan will pay a fine of \$750 concerning the finding of unprofessional conduct on charge 1;
4. Ms. Duan will pay a fine of \$250 concerning the finding of unprofessional conduct on charge 2;

5. There will be publication of the Hearing Tribunal's findings and penalty orders and the publication will identify Ms. Duan by name.

REASONS FOR SANCTIONS AND COSTS ORDERS

Ms. Duan's proven unprofessional conduct was very serious. Ms. Duan was not authorized to operate a highspeed handpiece inside a patient's mouth in Alberta. The Tribunal heard substantial evidence of the potential for serious and irreversible tissue damage. This risk of serious harm is the reason why restricted activities exist and why specific legal authorization is required to perform restricted activities. It is imperative for regulated health professionals to know and respect the limits of their scope of practice and to refrain from engaging in restricted activities they are not trained and authorized to perform in Alberta. Ms. Duan's performance of PCR without the training and authorization to do so in Alberta was also dangerous. It created the risk of tissue damage and infection and possible harm for her patient.

Ms. Duan's conduct contravened the *Health Professions Act*, the *Government Organization Act*, the College's *Standards of Practice* and the *Code of Ethics*. Understanding the obligations imposed by these statutes, standards and codes is a basic minimum expectation for regulated members of the College. These statutes, standards and codes are intended to protect the public from the unsafe and unprofessional practice of dental assisting and to maintain the public's confidence in the profession of dental assisting and its proper regulation. Ms. Duan's conduct was a marked departure from the College's and the public's expectations of all Registered Dental Assistants.

Ms. Duan was not new to the dental assisting profession. She had been registered to practice in Alberta since 2010. By the time of the events in the allegations she had been practicing for over 6 years and should have been very familiar with the applicable statutes, the Standards of Practice and the Code of Ethics.

Ms. Duan had no prior discipline history. This was a mitigating factor, as was Ms. Duan's efforts to take the appropriate PCR training after the conduct in question.

Ms. Duan did not admit the allegations of unprofessional conduct and instead chose to contest the allegations and defend herself. She was entitled to do this. The Tribunal has not considered Ms. Duan's decision to contest the allegations as a factor in determining sanctions.

The Hearing Tribunal considered the need for deterrence and to maintain public confidence in the profession of dental assisting. The Tribunal accepts that deterrence and public confidence are important aspects of professional discipline sanction since the primary purpose of the College is to protect the public.

The Hearing Tribunal carefully considered the Complaints Director's proposed sanctions which consisted of fines for allegations 1 and 2 and publication of the decisions with Ms. Duan's name. These proposed sanctions are fair and appropriate in light of the mitigating factors, but the fines are modest. Given the severity of Ms. Duan's unprofessional conduct the Tribunal considered that a further sanction may be warranted. After inquiring of the parties and receiving Mr. Maxston's response, the Tribunal decided to impose a reprimand in addition to the fines and publication order. A reprimand is a formal discipline measure intended to censure unprofessional conduct. The Tribunal expects that the reprimand, the fines and the order for

publication will sufficiently deter Ms. Duan and also other members of the dental assisting profession from engaging in any similar unprofessional conduct in the future.

It is within the Hearing Tribunal's discretion to determine whether to order Ms. Duan to pay a portion of the investigation and hearing costs, and if so what that portion should be. The Tribunal understands that costs are not an additional sanction. Where costs are ordered, they are to provide some indemnity for the College's investigation and hearing costs so those costs are not borne entirely by the College and its other regulated members. In determining whether to make an order for Ms. Duan to pay some of the investigation and hearing costs, the Tribunal has considered that the proven allegations of unprofessional conduct in this case were very serious. It was very important for the College to investigate and prosecute the allegations in this case.

The Hearing Tribunal has also considered the conduct of the parties as a factor in costs. Ms. Duan's decision to contest the allegations was not a factor in determining the appropriate sanctions, but the manner in which Ms. Duan and Mr. Wang conducted themselves during the proceedings is relevant to costs. This case was procedurally very challenging. The Tribunal issued a number of preliminary decisions on matters such as adjournments, rescheduling, documents and witnesses. These preliminary decisions were necessary largely because Mr. Wang refused to cooperate with efforts to schedule the hearing and to arrange Ms. Duan's witnesses.

The Tribunal also agrees with Mr. Maxston's submissions that Mr. Wang acted in an aggressive and at times threatening manner during the proceedings. He made combative and disrespectful comments. He conducted lengthy cross-examinations with little in the way of relevant questions, but with misleading and at times abusive questioning of the witness despite repeated warnings to refrain from such behaviour.

All of this made the proceedings far longer, more complicated and costlier than necessary. Ms. Duan and Mr. Wang had many opportunities to participate in a cooperative and efficient manner that would minimize the expenses. They did not take those opportunities and many times did the opposite. It is therefore appropriate that Ms. Duan bear some of the investigation and hearing costs, and that she bear a higher portion of the costs than may otherwise have been ordered as a result.

In Mr. Maxston's submissions he explained that the investigation and hearing costs to date are approximately \$200,000. While there was no evidence of Ms. Duan's financial circumstances, we accept that \$200,000 is a large sum for anyone, particularly in the dental assisting profession. The Tribunal also considered that Ms. Duan lost her job at Practice as a result of the conduct that led to the allegations.

The Hearing Tribunal considered that both allegations of unprofessional conduct were proven. Ms. Duan made no admissions and she abandoned the proceedings without calling any evidence of her own. The Hearing Tribunal received no evidence to substantiate any defence to the allegations. The Tribunal has also considered that the witnesses called by the Complaints Director provided relevant and useful evidence for the Tribunal. The Complaints Director did not call any unnecessary or irrelevant evidence, and even dispensed with her plan to call one witness, S.G. to testify.

The Hearing Tribunal considered the Complaints Director's proposal that Ms. Duan be ordered to pay 60% of the investigation and hearing costs. In the Tribunal's view it is appropriate that

Ms. Duan bear a portion of the costs, and that 60% is an appropriate portion of the costs. This represents just over half of the overall investigation and hearing costs, even though both of the allegations were proven and the Complaints Director occupied no unnecessary hearing time and called no unnecessary witnesses.

The Hearing Tribunal recognizes that 60% of approximately \$200,000 is approximately \$120,000 and this is a large sum of money. The Hearing Tribunal believes that it is appropriate for Ms. Duan to bear this portion of the costs in this case for the reasons discussed above. Ms. Duan did not participate in the sanctions process and made no request for a lesser amount of costs or time to pay the costs.

Signed on behalf of the Hearing Tribunal by its Chair this 18 day of May, 2022



Patty Demchuk, RDA