

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Health Ombudsman v Vue* [2020] QCAT 200

PARTIES: **DIRECTOR OF PROCEEDINGS ON BEHALF OF
THE HEALTH OMBUDSMAN**
(applicant)

v

CHARLES VUE
(respondent)

APPLICATION NO/S: OCR055-19

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 27 April 2020 (*Ex Tempore*)

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Judicial Member McGill SC
Assisted by:
Mr B Muller
Dr G Neilson
Mr P Zimon

ORDERS:

- 1. The Tribunal decides that the respondent has behaved in a way that constituted professional misconduct;**
- 2. The Tribunal reprimands the respondent;**
- 3. The respondent is required to pay a fine of \$5000 to the applicant within one month;**
- 4. The parties be of their own costs for this proceeding.**

CATCHWORDS: PROFESSIONS AND TRADES – HEALTH CARE PROFESSIONALS – PHARMACEUTICAL CHEMISTS – DISCIPLINARY PROCEEDINGS – CONVICTION OF OFFENCE – Professional misconduct – stealing medication from employer and overpaying his wages – second appearance before the Tribunal; – sanction – whether a fine is appropriate – whether to overturn the join sanction

Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate [2015] HCA 46
Lake v Pharmacists Board of Queensland [2009] QHPT 2
Medical Board of Australia v de Silva [2016] QCAT 63
Medical Board of Australia v Martin [2013] QCAT 376
Pharmacy Board of Australia v Christie [2016] QCAT 291
Pharmacy Board of Australia v Thomas [2011] QCAT 637

REPRESENTATION:

Applicant: Director of proceedings on behalf of the Health Ombudsman

Respondent: Mr Whitla of Hartley Whitla Lawyers

APPEARANCES: This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld)

REASONS FOR DECISION

- [1] This is a reference by the applicant of disciplinary proceedings against the respondent under the Health Ombudsman Act 2013: s 103(1)(a), s 104. Under s 126 of that Act, I constitute the Tribunal. I am sitting with assessors Mr Muller, Dr Neilson and Mr Zimon in accordance with the Act: s 126. Their function is to advise me in relation to questions of fact: s 127. The respondent was, at the relevant time, a registered pharmacist and hence a registered health practitioner for the purposes of the *Health Practitioner Regulation National Law* (Qld).
- [2] The applicant alleges that the respondent engaged in professional misconduct in that, while registered and employed as a pharmacist, he misappropriated a sum of money belonging to his employer, stole a quantity of medication from the stock of the pharmacy and overclaimed on his wages. This occurred between June 2011 and December 2012. The parties have provided the Tribunal with an agreed statement of facts. The respondent, who has been legally represented in these proceedings, admits the grounds alleged and that the conduct in question amounts to professional misconduct. The parties have provided written submissions to the Tribunal. The hearing proceeded on the papers in accordance with the *Queensland Civil and Administrative Tribunal Act 2009*: s 32.
- [3] The Tribunal accepts the facts set out in the agreed statement of facts. They, and some additional information before the Tribunal, may be summarised as follows. The respondent was born in 1988 and is now 31. He was first registered as a pharmacist in September 2010. He was, at the relevant time, working as an employed pharmacist at a pharmacy in a country town. He began to take cash from the pharmacy to support a gambling addiction. He subsequently admitted that between June 2011 and December 2012 he took a total of \$60,500 in cash, falsifying the records in an attempt to conceal his actions. He also took medications worth \$10,000 and had overclaimed on his wages to the extent of \$1500 during this period.

- [4] In late 2012, after suspicions were aroused about the pharmacy accounts, he was confronted and admitted to this, and in January 2013 signed a written admission of his conduct and agreed to repay \$82,500 to cover these losses as well as sums by way of lost interest, the cost of an audit and the amount of a loan to him. Some payments were made, but in 2015 he fell behind, and in early 2016 the owner of the pharmacy complained to the police and to the applicant about the respondent's conduct. After he recommenced payments, these complaints were withdrawn, but the applicant continued to investigate. The respondent has subsequently repaid the agreed amount in full.
- [5] This is not the first occasion on which the respondent has been before this Tribunal because of dishonest conduct. When the respondent applied for general registration a pharmacist in December 2010, he supplied a document which purported to state that he had passed a prerequisite examination when, in fact, he had failed that examination. The document had been altered by the use of a computer program.
- [6] Although this conduct preceded the relevant conduct in this matter, he was not dealt with by the Tribunal until 15 April 2013, after he had entered into the repayment agreement.
- [7] The respondent cooperated with investigators and did not contest that matter. He was reprimanded and subject to conditions on his registration but not suspended. The Tribunal took into account his work as a pharmacist in a country town and that he had the support of the local community. He subsequently lost that employment but has since worked at other pharmacies in managerial positions without any complaints. Since July 2018, he is no longer working as pharmacist but as a medical sales representative. He renewed his registration in November 2018 but not in November 2019. He proposes to develop a career outside pharmacy.
- [8] I am conscious of the definition of professional misconduct in the national law: s 5. The relevant part is paragraph (c): conduct inconsistent with the practitioner being a fit and proper person to hold registration in the profession. This case is an example of dishonesty in carrying out his managerial responsibilities in the pharmacy over a period of 18 months, which was a serious breach of trust on his part. The respondent does not dispute the characterisation of his conduct in this way, and I find that the relevant conduct did amount to professional misconduct on this basis.
- [9] I have been referred to a number of decisions of this and another Tribunal where such conduct has been characterised. In *Pharmacy Board of Australia v Christie* [2016] QCAT 291, a finding of professional misconduct was made when the pharmacist had, on a number of occasions over a number of years, obtained various controlled, restricted and addictive drugs, including from his employer, by dishonest means such as creating fictitious transactions. He had had a longstanding problem with the misuse of prescription and other drugs and had allowed his registration to lapse. That respondent had already been dealt with in a criminal court and had obtained employment in a different field. He was reprimanded, disqualified from applying for registration for a period of three years and ordered to pay the costs of the board, fixed at \$12,000.
- [10] In *Pharmacy Board of Australia v Thomas* [2011] QCAT 637, the respondent had taken a total of \$93,000 from his employer, either by taking cash or by overpaying himself. He had been dealt with by a criminal court but only for a small part of the amount taken. This was found to be unsatisfactory professional conduct. The

respondent's registration was suspended for 12 months, with the suspension itself suspended after three months, and a number of conditions were imposed on his registration. The Tribunal took into account that the full amount had been repaid and that there had been no reoffending during the six years which had passed before the hearing. There were other strong indications of rehabilitation. In that matter, Kingham DCJ, who constituted the Tribunal, said at [31] that he:

...was dishonest over a sustained period. That calls into question his character. Good character and honesty bear directly upon professionalism. In assessing what disciplinary sanction it should impose, the Tribunal must assess Mr Thomas' fitness to practise at the time of the hearing, not at the time of the conduct. The evidence before the Tribunal suggests that his dishonesty, as sustained and serious as it was, does not reflect his character now.

- [11] That could equally be said about the behaviour of the present respondent, who had also been dishonest in another way before, also in connection with his practice as a pharmacist.
- [12] In *Lake v Pharmacists Board of Queensland* [2009] QHPT 2, a pharmacist convicted of defrauding the Commonwealth of over \$400,000 over two years had his registration cancelled for 12 months, on top of eight months he had already lost from his practice and was subject to conditions when registered again.
- [13] In imposing a sanction, the health and safety of the public are paramount. Disciplinary proceedings are protective, not punitive, in nature. Relevant considerations include both personal and general deterrence, the maintenance of professional standards and the maintenance of public confidence. Insight and remorse on the part of the respondent are also relevant and are shown here by the respondent. It is relevant in this case that the money taken has been repaid and that the respondent has subsequently worked in the profession without complaint.
- [14] The respondent has cooperated with this proceeding. The respondent has put before the Tribunal two affidavits: one by him and one by a psychologist which verifies a report prepared for these proceedings. The respondent spoke about his background and work history and deposed to his intention to pursue a career outside pharmacy. He provided details of his financial position. The psychologist said that the respondent met the criteria for gambling disorder and probably a major depressive disorder while in the country town and at the time of the report had significant anxiety symptoms.
- [15] The applicant proposed that the respondent be reprimanded, that he undertake and complete a program of education approved by APHRA, including a reflective practice report in relation to professional ethics, within six months of the date of the Tribunal's order, that the respondent be mentored for at least six months by a registered pharmacist approved by APHRA after he commences employment and that he pay a fine of \$5000. The respondent, in a written submission, accepted the orders proposed by the applicant. The material shows that such a fine would be significant for the respondent but that it would not be outside his capacity to pay.
- [16] This is a similar situation to a joint submission as to sanction. The effect of a joint submission as to sanction was discussed by Horneman-Wren DCJ in *Medical Board of Australia v Martin* [2013] QCAT 376 at [91]-[93] by reference to authorities in terms with which I respectfully agree. I would merely add reference to the later decisions in *Commonwealth of Australia v Director, Fair Work Building Industry*

Inspectorate [2015] HCA 46, in particular at [59], and *Medical Board of Australia v de Silva* [2016] QCAT 63 at [29]-[31]. Ultimately, it is a matter for the Tribunal to determine what sanction to impose.

- [17] The matter is complicated by the fact that the respondent is currently proposing not to return to practice as a pharmacist and did not renew his registration last November. Of course, he may seek to do so in the future, but that could be some years away, and the need then for further education, in particular in ethics, would depend as well on what happens in the interim. On the other hand, getting him to complete a program of education now may be of no use if he never returns to pharmacy. If at some stage in the future he applies for registration as a pharmacist, it would be open for AHPRA to impose conditions for further education and, indeed, for mentoring which it considered appropriate in the light of the overall situation at that time.
- [18] I record for the assistance of AHPRA that if the respondent was proposing to return to practice as a pharmacist in the immediate future, the Tribunal would make the conditions as to further education and as to mentoring as proposed in the joint submissions, but since it appears that that will not happen, I prefer to leave those matters to the judgment of AHPRA, who will be in a position to consider, as well, what happens between now and any future application for registration in deciding what approach to follow at the time any future application is made.
- [19] Accordingly, I do not impose those conditions. I consider that the circumstances justify my departure from the outcome proposed in the submissions in view of the fact that since they were prepared and filed, the respondent has allowed his registration to lapse for the reasons I've given.
- [20] The order of the Tribunal will therefore be:
1. The Tribunal decides that the respondent has behaved in a way that constituted professional misconduct;
 2. The Tribunal reprimands the respondent;
 3. The respondent is required to pay a fine of \$5000 to the applicant within one month;
 4. The parties be of their own costs for this proceeding.