QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Health Ombudsman v ECA* [2020] QCAT 216
PARTIES:	**DIRECTOR OF PROCEEDINGS ON BEHALF OF THE HEALTH OMBUDSMAN** (applicant) **v** **ECA** (respondent)
APPLICATION NO/S:	OCR220-19
MATTER TYPE:	Occupational regulation matters
DELIVERED ON:	26 June 2020
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	Judicial Member D J McGill SC, Assisted by: Dr T Chamberlain, Dr D Khursandi, and Ms J Felton.

ORDERS:

1. **The Tribunal decides that the respondent behaved in a way that constituted professional misconduct.**
2. **The respondent is reprimanded.**
3. **The respondent is fined the sum of $5,000, to be paid to the applicant within one month.**
4. **The parties bear their own costs of the proceeding.**
5. **Save as is necessary for the Office of the Health Ombudsman to provide information about this matter to the Australian Health Practitioner Regulation Agency, until further order publication is prohibited, pursuant to the *Queensland Civil and Administrative Tribunal Act* 2009 s 66(1), to the extent that it would identify the respondent or enable the respondent to be identified, of:**
   - **(a) The contents of a document or other thing produced to the Tribunal;**
   - **(b) The evidence given before the Tribunal;**
   - **(c) Any order made or reasons given by the**

Tribunal.

CATCHWORDS:	PROFESSIONS AND TRADES – HEALTH CARE PROFESSIONALS – MEDICAL PRACTITIONERS – DISCIPLINARY PROCEEDINGS – PROFESSIONAL MISCONDUCT – writing prescriptions for friend for medication not clinically required - obtaining restricted and controlled drugs through friend – feeding addition – impairment managed by Board – good rehabilitation – sanction – non-publication order made
	Health Ombudsman Act 2013 s 103(1)(a), s 104, s 107 *Queensland Civil and Administrative Tribunal Act* 2009 s 66
	Health Care Complaints Commission v Do [2014] NSWCA 307 *Health Ombudsman v Kimpton* [2018] QCAT 405 *Health Ombudsman v NLM* [2018] QCAT 164 *Health Ombudsman v NLM (No 2)* [2019] QCAT 366 *Health Ombudsman v Shemer* [2019] QCAT 53 *Legal Services Commissioner v Madden (No 2)* [2009] 1 Qd R 149 *Legal Services Commission v XBV* [2018] QCAT 332 *Medical Board of Australia v Blomeley* [2018] QCAT 163 *Medical Board of Australia v Martin* [2013] QCAT 376 *Pharmacy Board of Australia v Thomas* [2011] QCAT 637
REPRESENTATION:	
Applicant:	A Forbes of Turks Legal
Respondent:	R M O'Gorman, instructed by Avant Law
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 referral by the applicant of disciplinary proceedings against the respondent under the *Health Ombudsman Act* 2013 s 103(1)(a), s 104. In accordance with the Act I am sitting with assessors Dr T Chamberlain, Dr D Khursandi and Ms J Felton.[1]

[2] The respondent is and was at relevant times a registered medical practitioner, and hence a registered health practitioner for the purposes of the Health Practitioner Regulation National Law (Qld). The applicant alleges that the respondent engaged in professional misconduct in that, while registered, he obtained opiates, benzodiazepines and other restricted and controlled drugs, to which he was addicted, by self-prescribing, or by writing prescriptions for a friend who passed the drugs over to him.

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1 *Health Ombudsman Act* 2013 s 126. For their function, see s 127.

[3] The parties have provided the Tribunal with an agreed statement of facts, and an agreed bundle of documents. The respondent, who has been legally represented in this proceeding, filed a response to the referral, admitting all the facts alleged in the referral except for the question of whether two drugs were restricted drugs, and did not admit that his conduct had the potential to affect adversely his performance as a medical practitioner. The parties have provided joint submissions to the Tribunal.

Facts

[4] 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 1985 and is now 35. He was first registered as a medical practitioner in 2010. From 2011 to June 2014 he worked at a provincial hospital as a Principal House Officer. From 2011 he was a regular user of Oxycodone and Morphine, restricted drugs, and other drugs, Oxazepam, meloxicam, diclofenac and various antibiotics. This was because he was addicted to opiates, benzodiazepines and other restricted and controlled drugs.

[5] During 2013 and 2014, when he was in a relationship with another person, he obtained the drugs by writing prescriptions in the name of that other person, who had them dispensed and then provided the drugs to the respondent, who self-administered them. For example, between May 2013 and June 2014 he wrote 115 prescriptions for Oxycodone in the other person's name, securing in this way 920 capsules of Oxycodone 10 mg and 3,620 capsules of Oxycodone 5 mg. He also wrote 6 prescriptions for Morphine, 21 prescriptions for Diazepam, and other prescriptions used to obtain drugs in this way. He had no clinical reason to prescribe such drugs for the other person.

[6] The respondent would have been affected by drugs from time to time while working at the hospital, which had the potential to affect his performance. The matter was drawn to the attention of AHPRA by a pharmacist. In late June 2014 he resigned his position at the hospital. On 14 August 2014 he offered to undertake not to return to practice until his substance abuse disorder was stable, which was accepted by the Medical Board. The respondent did not renew his registration in 2015, and for a time was overseas.

[7] During 2016 he undertook a drug rehabilitation programme, which involved in-patient treatment. In November 2016 he applied for registration, and agreed to undergo a health assessment. A psychiatrist reported to AHPRA in January 2017 that the respondent had substance use disorder in long term remission, that he had made a remarkably strong recovery, was undertaking further rehabilitation including long term psychotherapy, and could return to practice with restrictions, including working in a supervised environment, and not being able to prescribe Sch 4 or Sch 8 medication.

[8] In April 2017 the Board approved the respondent's registration subject to conditions. In July 2017 the respondent agreed to conditions of registration, including working in a hospital under supervision, continuing to receive treatment, and regular drug testing. He began work in a hospital in 2017, and has held registration subject to conditions since then, although the Board has adjusted the conditions at least three times.

[9] In April 2018 the psychiatrist reported that the respondent was continuing to receive regular treatment, and complying with the conditions of his registration, with no positive drug tests. In April 2019 he provided another report, to similar effect, and advised that the respondent was ready to exit the programme. In January 2019 the respondent moved to a different hospital, where his supervisor has reported very favorably on his performance. The respondent has complied with all conditions on his registration, and no drugs have been detected in any testing.

Position of parties

[10] The applicant alleges that the respondent's conduct the subject of the referral amounted to professional misconduct. The respondent accepts that characterization. I am aware of the definition of professional misconduct in the National Law s 5, and that there have been earlier decisions of the Tribunal that misuse of a doctor's position to obtain drugs of addiction amounts to professional misconduct. In this case the conduct extended over a long period, and a substantial quantity of drugs was obtained, in particular, opiates. Such behaviour is very serious, and I agree that it amounted to professional misconduct.

[11] In imposing a sanction, the health and safety of the public are paramount.[2] Disciplinary proceedings are protective, not punitive in nature.[3] Relevant considerations include both personal and general deterrence, the maintenance of professional standards and the maintenance of public confidence.[4] Insight and remorse on the part of the respondent are also relevant.[5] What matters is the fitness to practice of the respondent at the time of the hearing.[6]

[12] The parties in a joint submission propose that by way of sanction that the respondent be reprimanded, and be required to pay a fine of $5,000. They point out that the respondent was away from the practice of medicine for about three years, and has subsequently practiced subject to conditions, which have been complied with. There has been no recurrence of abuse of opioids. He has made a good recovery, and is now spoken of in positive terms by his supervisor. His impairment is being, and will continue to be, managed by the Board, by the imposition of conditions it determines to be appropriate, so long as it considers that to be necessary. The respondent has demonstrated remorse and insight into his conduct.

Earlier decisions

[13] Reference was made to two earlier decisions of the Tribunal. In *Health Ombudsman v Shemer* [2019] QCAT 53 the practitioner had taken and self-administered restricted and controlled drugs from hospitals, to feed an addiction, over an extended period. At times this adversely affected his performance at work. He had made early admissions, cooperating with the investigation and in the proceeding, been suspended for about 20 months, and undertaken rehabilitation. He had shown remorse and insight, and had the benefit of favourable medical opinion. He was reprimanded and conditions were imposed on his registration.

[14] In *Health Ombudsman v NLM* [2018] QCAT 164 the practitioner had over a period of 9 months stolen and self-administered Schedule 8 drugs. This was prompted by the existence of a medical condition which was painful, and for which he had since sought other, more appropriate treatment. He had taken steps towards rehabilitation, and had complied with the conditions placed on his registration, which would continue. He was reprimanded, and required to pay a fine of $5,000. Sheridan DCJ, the then Deputy President, said at [66]: "The community must be able to rely on medical practitioners to deal with drugs strictly and practitioners must be deterred from ever breaching that trust." The reasons for decision reviewed a number of earlier decisions dealing with similar situations, involving a range of health practitioners.

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2 *Health Ombudsman Act* 2013 s 4(1).
3 *Legal Services Commissioner v Madden (No 2)* [2009] 1 Qd R 149 at [122].
4 *Health Care Complaints Commission v Do* [2014] NSWCA 307 at [35]; *Health Ombudsman v Kimpton* [2018] QCAT 405 at [79].
5 *Medical Board of Australia v Blomeley* [2018] QCAT 163 at [140] – [143].
6 *Pharmacy Board of Australia v Thomas* [2011] QCAT 637 at [31].

Analysis

[15] It is a matter of significance that the parties have placed a joint submission before the Tribunal. 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) 258 CLR 482, 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.

[16] The respondent is working as a medical practitioner in a hospital, and in circumstances where the fine is proposed in a joint submission, I assume he has the capacity to pay such a fine, without undue hardship. In a case where a fine is under consideration, it is always relevant to consider the capacity to pay of the practitioner.[7]

[17] In view of all the circumstances of this matter, and bearing in mind that the respondent's registration is subject to conditions because of his impairment, I consider that it is appropriate to impose a sanction in line with that proposed in the joint submissions.

Non-publication order

[18] The respondent has also applied for an order that the publication of any documents, evidence or other material held by the Tribunal that could enable the respondent to be identified be prohibited, and that these reasons be de-identified. The *Queensland Civil and Administrative Tribunal Act* 2009 s 66(2) authorizes a non-publication order if the Tribunal considers it necessary having regard to five specific matters, one of which is "(b) to avoid endangering the physical or mental health or safety of a person", and another is "(e) for any other reason in the interest of justice."

[19] The starting point is that the Tribunal operates in public, and the power to conduct all or part of a hearing in private should be strictly regulated: see *Legal Services Commission v XBV* [2018] QCAT 332 at [26], where the Hon P Lyons QC pointed out that the Tribunal had a broader power to constrain the open court principle than is available to courts generally. That case concerned a barrister who had failed to notice in his brief a document fundamentally inconsistent with the client's instructions, and had failed to appreciate the significance of a legal point raised by the matter. There was evidence that the respondent had been receiving treatment from a psychiatrist and a psychologist for a major depressive disorder, and there was a risk of suicide.

[20] A non-publication order was made, but under another Act, and on the basis that that provision gave a wider discretion than did the QCAT Act. Reference was made to the decision of *J v L & A Services Pty Ltd (No 2)* [1995] 2 Qd R 10, where the open court principle was discussed. Under that principle, as applied in courts, it was said at p 45 that "information may not be withheld from the public merely to save a party or witness from loss of privacy, embarrassment, distress, financial harm, or other collateral disadvantage."

[21] In *Medical Board of Australia v Waldron* [2017] QCAT 443 Sheridan DCJ noted that the discretion is to be exercised only if it was "necessary" and only where the circumstances came within one of the categories nominated. The fifth category, although expressed in broad terms, was to be interpreted as subject to that limitation. Her Honour referred to a number of authorities, most of which dealt with the open court

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7 Cf *Penalties and Sentences Act* 1992 s 48.

principle in the context of a court. A limited approach to s 66(2)(e) was consistent with the approach adopted by the then President of the Tribunal, A Wilson J, in *Cutbush v Team Maree Property Service* [2010] QCATA 89 at [7] – [10]; see also *Pharmacy Board of Australia v Christie* [2016] QCAT 291 at [31] – [37].

[22] In *Health Ombudsman v NLM (No 2)* [2019] QCAT 366 Sheridan DCJ made a non-publication order in a matter which involved an impairment of the practitioner which was closely bound up with the relevant misconduct, although it was not an impairment matter. She pointed out that there is a special statutory provision for confidentiality in the case of an impairment matter, and said at [10]:

> These provisions indicate the importance which the legislature attaches to the need for privacy in matters relating to the impairment of practitioners. There is good social policy reasons for that approach which justify a restriction to openness in the administration of justice. Clearly, the aim of the legislative regime is to encourage impaired practitioners to fully disclose their condition without fear that it might prejudice their otherwise good standing in the community.

[23] The position is similar in this case. The matter has been managed by the Board as an impairment matter, and there is evidence from the psychiatrist who undertook the health assessment, and other evidence, that the respondent has suffered from an impairment, in the form of a psychiatric condition. Publication of the details of the matter would necessarily disclose this. The applicant does not oppose the making of a non-publication order, so long as it remains possible for the applicant to provide information to AHPRA concerning this proceeding. That appears to be an appropriate qualification, but subject to that, it is appropriate to apply the approach in *NML* and made a non-publication order in this case.

[24] Accordingly the decision of the Tribunal is as follows:

1. The Tribunal decides that the respondent behaved in a way that constituted professional misconduct.
2. The respondent is reprimanded.
3. The respondent is fined the sum of $5,000, to be paid to the applicant within one month.
4. The parties bear their own costs of the proceeding.
5. Save as is necessary for the Office of the Health Ombudsman to provide information about this matter to the Australian Health Practitioner Regulation Agency, until further order publication is prohibited, pursuant to the *Queensland Civil and Administrative Tribunal Act* 2009 s 66(1), to the extent that it would identify the respondent or enable the respondent to be identified, of:
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