

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Nursing and Midwifery Board of Australia v Laughlan (No.2)* [2019] QCAT 250

PARTIES: **NURSING AND MIDWIFERY BOARD OF AUSTRALIA**
(applicant)

v

JODI LAUGHLAN
(respondent)

APPLICATION NO/S: OCR278/14

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 4 September 2019

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Judge S Sheridan

ORDERS:

- 1. The respondent pay the applicant's costs of the proceeding fixed at \$15,000.**
- 2. The parties must file in the Tribunal a payment plan by 4pm on 4 October 2019, and in default of agreement, each party must file in the Tribunal a draft payment plan with supporting evidence, if any, by 4pm on 18 October 2019.**
- 3. The Tribunal will proceed to determine the payment plan on the papers.**
- 4. Each party has liberty to apply.**

CATCHWORDS: PROFESSIONS AND TRADES – HEALTH CARE PROFESSIONALS – NURSES – DISCIPLINARY PROCEEDINGS – where the practitioner put the Board to proof and challenge the evidence on which the Board sought to rely – where the tribunal found that the practitioner had behaved in a way that constitutes professional misconduct following an oral hearing – where the parties were subsequently asked to make written submissions on the question of costs – whether the practitioner should pay the costs of the proceedings

Health Ombudsman Act 2013 (Qld)
Health Practitioner Regulation National Law (Queensland)

Queensland Civil and Administrative Tribunal Act 2009
(Qld) s 32, s 100, s 102

Cruceru v Medical Board of Australia [2016] QCAT 111,
cited

Health Ombudsman v Antley [2016] QCAT 472, cited

Health Ombudsman v Dalziel [2017] QCAT 442, cited

Medical Board of Australia v Wong [2017] QCA 42, cited

*Ralocom Pty Ltd v Body Corporate for Paradise Island
Apartments (No. 2)* [2010] QCAT 412, cited

REPRESENTATION:

Applicant: Moray and Agnew Lawyers

Respondent: The respondent appeared on her own behalf

APPEARANCES:

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

REASONS FOR DECISION

Background

- [1] The Tribunal gave its substantive decision in the matter on 20 November 2017.
- [2] At the time of giving its decision, the Tribunal noted that, in making its oral submissions, the Nursing and Midwifery Board of Australia (**Board**) had sought its costs. At the hearing, counsel for the Board had stated, “The Board would also seek its costs and one would imagine that in a case such as this, that it would be very difficult to suggest that they are not entitled to them if the factual findings are resolved in the Board’s favour.”
- [3] In giving its decision, the Tribunal commented that subsequent to the hearing, the Court of Appeal had given a decision in *Medical Board of Australia v Wong*, in which the Court of Appeal had occasion to consider the costs power of the tribunal in health disciplinary matters subsequent to the introduction of the *Health Ombudsman Act 2013* (Qld) (**HO Act**) and the consequential change to the *Health Practitioner Regulation National Law (Queensland)* (**National Law**) to remove the express and unfettered power given to the tribunal to award costs.¹
- [4] In its decision, the Tribunal gave directions allowing the Board an opportunity to make further submissions on costs and Ms Laughlan an opportunity to respond.
- [5] Subsequent to the Tribunal’s decision, the Board filed additional submissions on costs maintaining its request for an order for costs. Ms Laughlan did not file any submissions in response.

¹ [2017] QCA 42 (**Wong**).

Approach to costs

- [6] The effect of the legislative change following the introduction of the HO Act is that the parties must each pay their own costs unless the “interests of justice require” the tribunal to make a costs order against a party. This is the approach which had been laid down for the tribunal from its inception,² and the consequence of the amendment to the National Law was to make that approach applicable to health disciplinary matters.
- [7] Section 102(3) of the QCAT Act gives the Tribunal guidance as to the matters that it may have regard to in considering whether the interests of justice require a costs order; including, necessarily disadvantaging another party, the nature and complexity of the dispute, the relative strengths of the claims made by each of the parties, the financial circumstances of the parties and anything else the tribunal considers relevant.
- [8] The Tribunal is given a broad discretion and in the exercise of that discretion, the question for the Tribunal has been formulated as:
- ...Whether the circumstances relevant to the discretion inherent in the phrase ‘the interests of justice’ points so compellingly to a costs award that they overcome the strong contra indication against cost orders in s 100.³
- [9] Judicial Member Thomas in *Health Ombudsman v Antley*, referring to previous decisions of the tribunal, described the considerations as being whether there are “countervailing considerations”.⁴ The Court of Appeal in *Wong*, described it as “a basis for departing from the default position.”⁵
- [10] In applying the legislative framework to health disciplinary matters, Judicial Member Thomas commented:
- Different factors may well operate in commercial litigation to make it in the interests of justice to award costs against the losing party to those in cases in the disciplinary jurisdiction concerning health workers. The objectives of the two classes of litigation are entirely different, and so too may be the criteria that help to determine whether it is in the interests of justice to make a costs order.⁶
- [11] Judicial Member Thomas observed the changes in the nature of the disciplinary jurisdiction extending as it does now to not only health professionals, who are upper income earners, but also health service providers, who are predominantly employees on wages, many of whom are on lower incomes. That extension, coupled with the escalation in the quantum of costs incurred in the bringing of such proceedings, with awards of \$40,000 and above not uncommon, he commented that an order for costs

² *Queensland Civil and Administrative Tribunal Act 2009 (QCAT Act)*, s 100 to s 107.

³ *Ralacom Pty Ltd v Body Corporate for Paradise Island Apartments (No.2)* [2010] QCAT 412, [29] Wilson J.

⁴ [2016] QCAT 472 (*Antley*) referring to Keane JA in *Tamawood Ltd & Anor v Paans* [2005] QCA 111, [30].

⁵ *Wong*, [35].

⁶ *Ibid*, [64].

may be “quite crippling” and may bring about a “disproportionate result”. He noted that such a result may not be in the interests of justice.⁷

- [12] Against this, there is the fact, as is often submitted on behalf of the regulator, that the regulator must bring the proceedings and does so funded by registrants. However, as the tribunal has commented previously, those facts alone cannot be considered sufficient to justify a costs order.⁸ They must be considered in the context of s 102 and more generally.

Countervailing considerations ?

- [13] In its written submissions, in maintaining its request for costs, the Board referred to Ms Laughlan’s conduct, both in her approach to the proceedings and the evidence given before the Tribunal, the nature and complexity of the matter, the strengths of the claims and the financial circumstances of the parties.
- [14] In particular, reference was made to the delays occasioned as a result of her non-compliance with Tribunal directions including the delay in the filing of her evidence, and her continued denial of the allegations in the referral. As was submitted, the position taken by Ms Laughlan meant that the Board was required to provide affidavit evidence from multiple witnesses, though ultimately Ms Laughlan only required two nurses for cross-examination. The evidence filed by the Board included a range of records from the Queensland Police Service and Blue Care.
- [15] A practitioner in the position of Ms Laughlan is clearly entitled to put a regulatory authority to proof and to challenge the evidence on which it relies, though that conduct may be a relevant consideration determining whether it is in the interests of justice to make an award of costs.
- [16] The Tribunal found that it disbelieved Ms Laughlan in comparison with the two witnesses cross-examined by Ms Laughlan. The Tribunal found that Ms Laughlan gave a number of implausible explanations, seeking to blame others, and that she showed little regard to any systems of management of dangerous drugs.
- [17] On the basis of the evidence before the Tribunal, however, the Tribunal was not prepared to find the allegations made by the Board, that Ms Laughlan had misappropriated the ordine and self-administered it, proven. The Tribunal accepted the allegation, which was denied, that Ms Laughlan had added water to the remaining ordine in the bottle for the purpose of making the quantity the same as that recorded in the drug record sheet.
- [18] The allegations which were found proven by the Tribunal were such that the Tribunal found Ms Laughlan’s overall conduct amounted to professional misconduct; the categorisation of the conduct as such was also not accepted by Ms Laughlan.
- [19] In giving its decision, the Tribunal commented that Ms Laughlan had still not reached a stage where she was able to accept responsibility for what occurred and was still seeking to blame others.

⁷ Ibid, [65] – [68].

⁸ *Health Ombudsman V Dalziel* [2017] QCAT 442.

- [20] The substantive proceedings were unnecessarily protracted because of her conduct and her continuing inability to be prepared to omit any failing.
- [21] The Tribunal considers that in this case, the conduct of Ms Laughlan is sufficient reason to justify the making of an order for costs.

Nature of Costs Order

- [22] Pursuant to s 102(1) of the *QCAT Act* in exercising its discretion, the Tribunal can make an order requiring the payment of all or a stated part of the costs. Section 107 of the *QCAT Act* contemplates that the Tribunal will fix costs whenever possible.
- [23] Having regard to the objects of the *QCAT Act*, the discretion to fix costs under s 107 has been described as “an extremely wide one” and one which should be “exercised robustly”.⁹
- [24] Given the likely quantum of costs incurred by the Board, a relevant consideration is whether the award of costs should be limited in any respect. The factors to which Judicial Member Thomas referred in *Antley* seem particularly relevant; like Ms Antley, Ms Laughlan is a nurse and an employee on wages.
- [25] An order for the payment by Ms Laughlan of the Board’s costs on a standard basis would, in her circumstances, have a crippling effect with the resultant punitive elements. I agree with the comments of Judicial Member Thomas that such a result is a relevant factor in the exercise of the Tribunal’s discretion.

Orders

- [26] Taking all matters into account, the Tribunal considers it is appropriate to fix costs and considers the costs should be fixed in the amount of \$15,000.
- [27] The parties will need to agree a payment plan. The Tribunal will order the parties agree a payment plan within 28 days. Absent agreement, the Tribunal will order the parties to each file in the Tribunal a proposed payment plan with any supporting evidence within 35 days of the making of this order.
- [28] The Tribunal will then determine the payment plan on the papers.

⁹ *Cruceru v Medial Board of Australia* [2016] QCAT 111, [49].