

# QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Health Ombudsman v David Tichaona Mutasa* [2019]  
QCAT 315

PARTIES: **HEALTH OMBUDSMAN**  
(applicant)

v

**DAVID TICHAONA MUTASA**  
(respondent)

APPLICATION NO/S: OCR114-18

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 1 October 2019 (*ex tempore*)

HEARING DATE: 1 October 2019

HEARD AT: Brisbane

DECISION OF: Judge Allen QC, Deputy President

Assisted by:  
Dr C Oltvolgyi  
Dr J Osborne  
Ms A Bains

- ORDERS:
- 1. Pursuant to section 107(2)(b)(iii) of the *Health Ombudsman Act 2019 (Qld)*, the Tribunal finds that the respondent has behaved in a way that constitutes professional misconduct;**
  - 2. Pursuant to section 107(3)(a) of the *Health Ombudsman Act 2019 (Qld)*, the respondent is reprimanded; and**
  - 3. Each party must bear the party's own costs for the proceeding.**

CATCHWORDS: PROFESSIONS AND TRADES – HEALTH CARE PROFESSIONALS – MEDICAL PRACTITIONERS – DISCIPLINARY PROCEEDINGS – PROFESSIONAL MISCONDUCT – where the respondent was employed as a locum doctor – where the respondent was convicted on his own plea of guilty of one count of assault – where the assault involved the respondent making sexual advances towards a female paramedic whilst on duty – whether the respondent's conduct should be characterised as professional misconduct or unprofessional conduct – where the respondent had his employment terminated –

where the applicant concedes that there has been significant delay in the matter attributable to the applicant – where the respondent has made significant attempts at rehabilitation - where the applicant submits that a reprimand and the imposition of a period of suspension of 6-12 months is the appropriate sanction – where the respondent submits that the imposition of a period of suspension is unnecessary – whether the Tribunal ought to impose a period of suspension

*Health Ombudsman Act 2013 (Qld)*, s 103, s 104, s 107  
*Health Practitioner Regulation National Law Act 2009 (Qld)*, s 5

*Fittock v Legal Profession Conduct Commissioner (No 2)* [2015] SASFC 167

*Medical Board of Australia v Davis* [2018] QCAT 215

*Medical Board of Australia v Holding* [2014] QCAT 632

*Craig v Medical Board of South Australia* [2001] 79 SASR 545

*Psychology Board of Australia v Cameron* [2015] QCAT 227

#### APPEARANCES & REPRESENTATION:

Applicant: M Nicholson instructed by the Director of Proceedings, on behalf of the Health Ombudsman

Respondent: Self-represented

#### REASONS FOR DECISION

- [1] This is a referral of a health service complaint against Daniel Tichaona Mutasa (“the respondent”) pursuant to sections 103(1)(a) and 104 of the *Health Ombudsman Act 2013 (Qld)* (“HO Act”) by the Director of Proceedings on behalf of the Health Ombudsman (“the applicant”). The applicant alleges the respondent has behaved in a way that constitutes professional misconduct by reason of him, on 8 May 2017, being found guilty in the District Court at Rockhampton of one count of common assault, contrary to section 335 of the *Criminal Code Act 1899*. The applicant alleges in the alternative that the respondent has engaged in unprofessional conduct for the same reasons.
- [2] The respondent contests a finding of professional misconduct, submitting that he should be found instead to have engaged in unprofessional conduct.

#### Conduct

- [3] The facts of the conduct are not in dispute and are the subject of an agreed statement of facts. At the relevant time, the respondent was employed as a locum doctor at a Queensland rural hospital. Both he and the female paramedic the subject of the conduct (“the paramedic”) had worked together at the hospital for about six months. On the evening of 18 April 2015 the paramedic was on duty with a fellow paramedic

when they were both called to the local rugby league club to assist injured persons. The paramedic was treating one of the patients when the respondent, who it seems had been at the club on a social occasion, approached the paramedic at her ambulance. The paramedic asked the respondent if he was on call and he confirmed he was and then assisted with the treatment of the patient before organising to meet the ambulance back at the hospital.

- [4] After the paramedics had transferred two patients to the care of the hospital and the respondent had travelled to the hospital, the respondent approached the paramedic and invited her into a room to talk. The respondent then closed the door behind the paramedic and took a step towards her. The respondent grabbed the paramedic's right breast for several seconds and attempted to kiss her, using his right hand to pull the paramedic's neck towards him. The paramedic smelled alcohol on the respondent's breath. The paramedic backed away and accused the respondent of drinking on the job, which he denied. The paramedic then left the room and spoke to her colleague. The respondent, soon after, approached the paramedic and said words to the effect of, "I really like you. I want to be with you." The respondent made other inappropriate sexual comments towards the paramedic.
- [5] On 8 May 2017, the respondent appeared before the Rockhampton District Court and pleaded guilty to one count of common assault. He was fined \$2000 with such sum directed to be paid to the paramedic as compensation. No conviction was recorded.

#### **Characterisation of conduct**

- [6] "Unprofessional conduct" is defined in section 5 of the *Health Practitioner Regulation National Law Act 2009* ("National Law"), as "professional conduct that is of a lesser standard than that which might reasonably be expected of a health practitioner by the public or the practitioner's professional peers" and is stated to include, amongst other things, "the conviction of the practitioner for an offence under another Act, the nature of which may affect the practitioner's suitability to continue to practise the profession".
- [7] "Professional misconduct" is defined in section 5 of the National Law as including "unprofessional conduct by the practitioner that amounts to conduct that is substantially below the standard reasonably expected of a registered health practitioner of an equivalent level of training or experience".
- [8] The meaning of "substantial" was considered by the Full Court of the Supreme Court of South Australia in *Fittock v Legal Profession Conduct Commissioner (No 2)* [2015] SASCFC 167 at [110]:
- "...it is apparent that what is required is more than a mere departure from the standard of conduct required of a practitioner. In the context of this appeal, "substantial" connotes a large or considerable departure from the standard required. This large or considerable departure could be the result of the extent and seriousness of the departure from the requisite standard of conduct, the deliberateness of the conduct, the consequences for the client or other aspects of the conduct."
- [9] The respondent's conduct was a large and considerable departure from the standard expected of a registered health practitioner of his level of training and experience. The features demonstrating the extent of such departure include:

- (a) the sexual nature of the assault;
- (b) the significant power imbalance between the respondent and the paramedic, and between their respective roles;
- (c) the respondent's isolation of the paramedic in a private room away from her colleagues and others prior to the assault; and
- (d) the significant impact of the assault upon the paramedic.

[10] The Tribunal has no hesitation in finding that the respondent has behaved in a way that constitutes professional misconduct.

#### **Other relevant circumstances and events**

[11] The paramedic complained about the respondent's conduct the following day, 19 April 2015. The respondent was immediately stood down from his locum employment and police were contacted. The respondent's locum contract was terminated soon afterwards.

[12] On 29 April 2015, the Office of the Health Ombudsman commenced an investigation into the health service complaint. On 19 August 2015 the Office of the Health Ombudsman referred part of the complaint to the Australian Health Practitioner Regulation Agency ("AHPRA"), namely, that the respondent suffered from a health impairment (alcohol dependence).

[13] A health assessment was conducted by a consultant psychiatrist who was unable to conclude that the respondent suffered from a substance use disorder or an impairment that detrimentally affected, or was likely to detrimentally affect, his capacity to practice the profession. AHPRA took no further action at that time.

[14] On 9 December 2015 the respondent surrendered himself to the Ipswich Police Station. He declined to participate in an interview. He was arrested and charged with one charge of sexual assault and released on bail.

[15] The paramedic was significantly affected, both personally and professionally, by the conduct. She suffered a loss of enthusiasm for her job which caused her to question the whole system. She found it necessary to relocate which had a financial impact on her. She was formally diagnosed with post-traumatic stress disorder and required psychological and medical treatment.

[16] In 2017 the respondent was employed in a rural New South Wales health district. The New South Wales Office of the Children's Guardian was notified of the criminal proceedings then pending against the respondent. The Office of the Children's Guardian notified the respondent in March 2017 that, as a consequence of those criminal proceedings, he was a person who was disqualified from holding, and the Children's Guardian was, therefore, required to cancel, his Working With Children Check clearance, something, it seems, equivalent to the Queensland Blue Card. As a consequence, the respondent's employment with the New South Wales health district was terminated.

[17] The respondent has informed the Tribunal that, apart from six days employment in February 2018, he has not been employed as a medical practitioner since the termination of his employment in New South Wales in March 2017. It seems that he

ceased applying for employment as a medical practitioner, pending resolution of the criminal proceedings and these tribunal proceedings, having formed the belief, because of attempts at gaining employment, that he would be unsuccessful in doing so until these proceedings had been concluded.

- [18] As earlier mentioned, on 8 May 2017 the respondent was convicted in the Rockhampton District Court of one count of common assault. On 30 November 2017 the acting Health Ombudsman decided to refer the matter to the Director of Proceedings. The referral to the Tribunal was filed on the 30 April 2018. It originally alleged three charges, including two charges of failing to comply with the notification requirements of section 130 of the National Law.
- [19] The respondent filed a response on 13 June 2018. He did not contest any of the allegations in the referral, but did, in relation to the two charges of failing to comply with section 130 of the National Law, raise the issue that any failure to notify may have been as an oversight or delay on the part of the lawyers who had acted for him in the criminal proceedings. The applicant ultimately obtained evidence from those lawyers which, essentially, confirmed that contention on the part of the respondent and led to the discontinuance of the two charges of failing to comply with section 130 of the National Law, by the filing of an amended referral and amended statement of agreed facts on 8 July 2019.
- [20] In the meantime, there had been an unexplained and inexcusable delay in the conduct of the proceedings by the applicant. A failure by the applicant to comply with directions made by the Tribunal led to a five month abeyance in proceedings, about which the respondent is particularly aggrieved. The timing of that delay is of some significance, because of other circumstances I will now detail.
- [21] On 5 June 2017 the respondent was convicted in the Darwin Local Court, in the Northern Territory, of one charge of driving with a medium range blood alcohol content, and was disqualified from driving for a period of six months and fined \$500, with no conviction recorded. On 28 February 2018 the respondent was convicted in the Darwin Local Court of one charge of driving with a high range blood alcohol content, namely 0.3 %. The respondent was disqualified from driving for a period of 18 months and fined \$1500. On 8 March 2018 the respondent advised AHPRA of the conviction for an offence of high range drink driving.
- [22] On 26 April 2018 the Northern Territory Immediate Action Committee of the Medical Board of Australia decided that, because of the respondent's health and conduct, he posed a serious risk to persons and it was necessary to take immediate action against him. The Committee imposed conditions on the respondent's registration, requiring that he not practise medicine, and those conditions applied until 13 January 2019. On 14 January 2019 the Committee, having received a health assessment report stating that the respondent had an alcohol use disorder, removed the previous conditions and replaced them with a number of conditions, including that the respondent not practise as a medical practitioner until such time as he had produced evidence demonstrating abstinence from drinking alcohol for a period of at least three months, engagement and compliance with treatment, and fitness to return to work as a medical practitioner. Those conditions applied until 12 May 2019. From 13 May 2019 the respondent's registration has been subject to conditions that he not practise within certain hours and undertake treatment with his treating practitioner. The evidentiary certificate produced by the applicant shows that such

registration was current until 30 September 2019. The respondent has informed the tribunal that he has not yet applied for a renewal of his registration because he was awaiting the resolution of these proceedings. Pursuant to section 107(2) of the National Law, the respondent must make application for renewal of his registration by the end of October 2019.

- [23] The Tribunal has a report of Dr Christine Watson, the Director Addiction Medical Service, Royal Darwin Hospital, dated 29 April 2019. Dr Watson reports that the respondent has been her patient since January 2018, being treated for an alcohol use disorder, and has been in remission for that condition for eight months at the time of writing her report. Dr Watson reports that the respondent struggled to control his drinking throughout 2018, with only partial engagement with the Addiction Medical Service until 4 October 2018, when he was admitted to a detox facility for one week of medicated alcohol withdrawal, followed by completion of a three month residential inpatient program which finished on 11 January 2019. She reported that, for the eight months preceding her report, he had been subject to one monthly breathalyser tests and one monthly LFT blood tests. She had discussed with him the 2015 events the subject of these proceedings and the “snowballing” effect which seems to have happened over the following three years, with every aspect of his life becoming more chaotic. Initially the respondent reported that his alcohol use had only become heavy and problematic since early 2017, but more recently acknowledged that his drinking was escalating through 2015 and 2016. He reported that, although he was not intoxicated at the time of the conduct the subject of these proceedings, he feels that his drinking contributed to his behaviour by making him more emotionally unstable, impairing his judgment and limiting his ability to manage stress.
- [24] The results of breathalyser testing and blood test results confirmed abstinence for a period of eight months leading up to the writing of the report. The respondent had continued to attend weekly AA meetings and had sought psychological treatment and the Tribunal also has before it reports from his psychologist, as well as reports confirming his completion of the residential program.
- [25] Dr Watson’s diagnosis was of an alcohol use disorder currently in remission, and she was satisfied that he was fit to return to work as a medical officer. The respondent reported to her wanting to return to work as a doctor in the near future and understanding that abstinence from alcohol was vital for him for the indefinite future and that his vulnerability to relapse was likely to be lifelong.

### **Sanction**

- [26] The respondent was born on 15 December 1973 in Zimbabwe. He is currently aged 45 years, and was aged 41 at the time of the conduct. The respondent obtained a Bachelor of Medicine and a Bachelor of Surgery degree from the University of Zimbabwe in 1998. He first obtained registration as a medical practitioner in Australia on 24 April 2006. He has a previous notification history, having been cautioned in 2015 pursuant to section 178(2)(a) of the National Law with respect to a failure to make contemporaneous notes whilst caring for a patient in July 2011.
- [27] The applicant submits that the important consideration of deterrence would be best achieved by a sanction that includes the suspension of the respondent’s registration

for a period of six to 12 months, whilst acknowledging that considerations of delay may lead the Tribunal to moderate such period of suspension in this case.

- [28] The respondent argues against a suspension of his registration. He submits that he faced a substantial period when he was unable to obtain employment as a medical practitioner because of the criminal proceedings and the Tribunal proceedings resulting from his conduct. He points to those consequences of his conduct in submitting that a period of suspension is not required in the circumstances of his case. He also refers to the consideration of the delay in the conduct of proceedings before the Tribunal, making it now unfair that his registration now be suspended.
- [29] In considering the matter of sanction, the Tribunal must be mindful that the main principle for administering the HO Act is that the health and the safety of the public are paramount. Purposes of sanction are protective, not punitive. As has been noted in many previous decisions, often citing *Craig v Medical Board of South Australia* [2001] 79 SASR 545 at 553-555, the imposition of sanction may serve one or all of the following purposes:
- (a) preventing practitioners who are unfit to practise from practising;
  - (b) securing maintenance of professional standards;
  - (c) assuring members of the public and the profession that appropriate standards are being maintained and that professional misconduct will not be tolerated;
  - (d) bringing home to the practitioner the seriousness of their conduct;
  - (e) deterring the practitioner from any future departures from appropriate standards;
  - (f) deterring other members of the profession that might be minded to act in a similar way; and
  - (g) imposing restrictions on the practitioner's right to practise so as to ensure that the public is protected.
- [30] The matter of the impairment of the respondent has been, and is being, appropriately managed by AHPRA. There is no need for a suspension of the respondent's registration for an immediate protective purpose. There is no suggestion now that he is unfit to practise because of any impairment and the Tribunal is not asked by either party to make any finding in relation to that matter.
- [31] The real purposes of any suspension of registration would be for the purposes of deterrence, both personal deterrence, to bring home to the respondent himself the seriousness of his conduct and to deter similar conduct in the future, and general deterrence, to deter any other members of the profession who might be minded to act in a similar way. The purpose of sanction is not to further punish the respondent. The significance of deterrence is not by way of punishment but by way of the protective purpose of sanction.
- [32] The Tribunal considers the conduct of the respondent to be very serious. It was a gross departure from the standards expected of a medical practitioner. It involved a serious invasion of the personal integrity of the paramedic and it had serious consequences for her. If there were no mitigating factors arising from circumstances

of delay and consequences already suffered as a result of the conduct, the Tribunal considers that a suspension of registration in the vicinity of 12 months would be an appropriate order for sanction.

- [33] However, there are considerations in this case which cannot be ignored when determining an appropriate sanction. The respondent immediately suffered the cancellation of his locum employment in Queensland for a period of about 12 months between March 2017 and March 2018. The respondent's unemployment was primarily as an indirect result of his conduct, although his impairment may also have been a factor in his continued unemployment. The restrictions on his registration since April 2018 have arisen as a result of his impairment rather than as a consequence of his conduct. However, the respondent has used that time to commendably and successfully address his substance abuse problem and place himself in a position where he is able to demonstrate fitness to practise.
- [34] Further, the delay in the prosecution of this matter by the applicant has resulted in a delay of the hearing by a period of about five months. If this matter had been prosecuted in a timely fashion by the applicant, any suspension that may have been ordered would have, at least partly, run concurrently with the restrictions on the respondent's registration imposed by AHPRA. In those circumstances, to order a suspension of the respondent's registration at this time would result in orders that would carry an undue punitive effect.
- [35] Those circumstances, peculiar to this case, lead the Tribunal to not order a period of suspension of registration.
- [36] The respondent's conduct was disgraceful and deserves the denunciation of the Tribunal by way of a reprimand. A reprimand is not a trivial penalty and has the potential for serious adverse implications to a professional person.<sup>1</sup> A reprimand is a matter of public record, affecting the reputation of a practitioner.<sup>2</sup>
- [37] Neither party submits that there should be any order for costs so the default position, pursuant to section 100 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld), will apply and will be reflected in the orders of the Tribunal.
- [38] Accordingly, the Tribunal orders:
1. pursuant to section 107(2)(b)(iii) of the *Health Ombudsman Act 2019* (Qld), the Tribunal finds that the respondent has behaved in a way that constitutes professional misconduct;
  2. pursuant to section 107(3)(a) of the *Health Ombudsman Act 2019* (Qld), the respondent is reprimanded; and
  3. each party must bear the party's own costs for the proceeding.

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<sup>1</sup> *Psychology Board of Australia v Cameron* [2015] QCAT 227.

<sup>2</sup> *Medical Board of Australia v Holding* [2014] QCAT 632, [39]; *Medical Board of Australia v Davis* [2018] QCAT 215, [62].