

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Health Ombudsman v Blay* [2019] QCAT 346

PARTIES: **HEALTH OMBUSDMAN**
(applicant)

v

JOANNE FRANCIS BLAY
(respondent)

APPLICATION NO/S: OCR002-19

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 6 November 2019 (*ex tempore*)

HEARING DATE: 6 November 2019

HEARD AT: Brisbane

DECISION OF: Judge Allen QC, Deputy President

Assisted by:
Ms M Barnett
Ms S Hopkins
Professor M Lupton

- ORDERS:
1. Pursuant to section 107(2)(b)(iii) of the *Health Ombudsman Act 2013 (Qld)*, the Tribunal decides that the respondent has behaved in a way that constitutes professional misconduct;
 2. Pursuant to section 107(3)(a) of the *Health Ombudsman Act 2013 (Qld)*, the respondent is reprimanded.
 3. Pursuant to section 107(3)(b) of the *Health Ombudsman Act 2013 (Qld)*, the following conditions are imposed on the respondent's registration:
 - (a) The practitioner is to undertake and successfully complete a program of education approved by the Nursing and Midwifery Board of Australia and including a reflective practice report in relation to the standards of ethical and professional conduct expected of nurses.
 - (b) Within 28 days of the imposition of these conditions, the practitioner must nominate a program of education to the Nursing and

Midwifery Board of Australia for its approval.

- (c) The practitioner must complete the education within six months of the notice of the Board's approval of the program.**
 - (d) The practitioner must provide the Board with evidence of her successful completion of the above education within one month of her completion of that education.**
 - (e) The practitioner is to be responsible for meeting any reasonable costs arising from compliance with these conditions.**
- 4. The Tribunal decides that, for the purposes of both sections 125(2)(b) and 127(3)(b) of the *National Law*, part 7, division 11(2) of the *National Law* applies.**
- 5. Each party must bear their own costs of the proceeding.**

CATCHWORDS:

PROFESSIONS AND TRADES – HEALTH CARE PROFESSIONALS – NURSES – DISCIPLINARY PROCEEDINGS – where the applicant brought disciplinary proceedings against the respondent in relation to academic misconduct – where the academic misconduct involved the respondent submitting falsified documents in the course of further studies she was undertaking in the nursing profession – where the respondent admits the conduct but opposes a finding of professional misconduct – whether the conduct ought to be characterised as professional misconduct

Health Ombudsman Act 2013 (Qld), s 103, s 104, s 107,
Health Practitioner Regulation National Law Act 2009, s 5, s 225, s 226

Fittock v Legal Profession Conduct Commissioner (No. 2)
[2015] SASCFC 167

Health Care Complaints Commission v Payne [2007]
NSWNMT 10

Nursing and Midwifery Board of Australia v Walker
[2016] SAHPT 2

Nursing and Midwifery Board of Australia v Williams
[2013] SAHPT 1

Pharmacy Board of Australia v Hung [2014] QCAT 148

**APPEARANCES &
REPRESENTATION:**

Applicant:

M Price instructed by the Director of Proceedings, on behalf of the Health Ombudsman

Respondent: Self-represented

REASONS FOR DECISION

- [1] The Director of Proceedings on behalf of the Health Ombudsman (“the applicant”) has referred to the Tribunal this matter concerning Joanne Francis Blay (“the respondent”), pursuant to sections 103(1)(a) and 104 of the *Health Ombudsman Act* 2013 (Qld) (“*HO Act*”), seeking a finding that the respondent has behaved in a way that constitutes professional misconduct or, alternatively, unprofessional conduct, and consequent orders by way of sanction pursuant to section 107 of the *HO Act*.
- [2] The respondent has not admitted that her conduct should be characterised as unprofessional conduct or professional misconduct. There is no substantial dispute as to the relevant facts, and the respondent has admitted the conduct the subject of the referral.
- [3] The respondent is 30 years of age, having been born on [redacted] and was aged 27 at the time of the conduct. The respondent was first registered as a registered nurse on 29 August 2013. She has no prior disciplinary history.
- [4] At the time of the conduct in 2017, the respondent was employed part time, three days per week as a practice nurse at a Brisbane suburban general practice.
- [5] In 2016, the respondent enrolled in a Graduate Certificate in Nursing Studies course at the Queensland University of Technology. Such course required completion of four units. The respondent successfully completed the first unit of the course.
- [6] As part of the second unit of the course, specialising in caring for children and families, the respondent undertook a clinical placement assessment at a Brisbane suburban child health centre. The respondent successfully completed assessment requirements for the unit of a 2000-word case study, 3000-word clinical portfolio and clinical assessments by a qualified assessor in developmental assessment and breastfeeding assessment.
- [7] The respondent thus required only completion of a clinical practice assessment tool (CPAT) to successfully complete the unit. To complete her clinical placement, the respondent was required to submit a “clinical placement assessment form” (“CPA form”) to the QUT course coordinator. The form was required to be completed and signed by a suitably qualified clinical lecturer.
- [8] On 16 February 2017 (the last day of the placement), the respondent submitted the CPA form to the QUT course coordinator. The form purported to have been completed, signed and stamped by a clinical nurse who was employed at the child health centre. The CPA form was false, fraudulent and misleading, in that the respondent had forged the signature of the clinical nurse on the form, had applied a stamp bearing the name and position of the clinical nurse to the form without authority, thus representing that the outcomes on the form and comments on the form were written by the clinical nurse.
- [9] In fact, the form had been entirely completed by the respondent herself. That involved the respondent ticking some 35 boxes indicating that the respondent was either developing competency or competent in various aspects assessed. It also

involved the respondent entering some written comments to some of the items of assessment and signing the form in the name of the clinical nurse.

- [10] On 28 February 2017, the course coordinator sent an email to the respondent advising that she had received the CPA form and that the clinical nurse who had ostensibly authored the form had not previously been accepted by QUT as a clinical lecturer, and that a copy of her curriculum vitae would be required to be submitted. The respondent subsequently advised the course coordinator that she would attempt to obtain a copy of the clinical nurse's CV.
- [11] On 1 March 2017, the respondent sought to obtain a copy of the clinical nurse's CV from the nurse educator of the relevant child and youth community health service. The nurse educator contacted the clinical nurse who confirmed that she did not complete, sign or stamp the respondent's CPA form. The circumstances were brought to the attention of relevant persons at QUT, and disciplinary action taken by QUT resulted in a finding that the respondent had breached the QUT student code of conduct, and she was excluded from study for six months. She also received a fail mark for the unit.
- [12] QUT subsequently notified the Office the Health Ombudsman of the respondent's conduct. The Office of the Health Ombudsman commenced an investigation on 3 November 2017 and on 25 January 2018 the respondent provided a response to the Office of the Health Ombudsman admitting to the fraudulent completion of the CPA form.
- [13] The respondent has provided the Tribunal with information as to her circumstances at the time of the conduct. The respondent entered into the course of study with the intent of improving her skills, and hopefully working in the future as a paediatric nurse. She encountered several problems with completion of the unit. It seems that the respondent genuinely misunderstood the extent of the practical component required of her. That caused her a great deal of stress, as she had to arrange to take further time off from her employment, and make changes to arrangements for her annual leave. She suffered health difficulties during the unit, including a serious asthma attack. She was suffering from sleep apnoea, which contributed to fatigue. She experienced difficulty in identifying an appropriate assessor for her practical assessments, and in particular the CPAT. She found herself at the end of the course in a situation where she had invested considerable time, money and effort in undertaking the unit. She felt that all such effort would be wasted because of the absence of the final CPAT assessment.
- [14] The applicant has referred to evidence that completion of the graduate certificate would have qualified the respondent for a role in community child health, and if working in that area, the respondent would have been entitled, with a graduate certificate, to receive a three per cent pay rise. The applicant, however, does not suggest, and the Tribunal does not find, that the respondent's conduct was directly motivated by any prospect of financial advantage.
- [15] The Tribunal has some sympathy for the situation the respondent found herself in at the time of her conduct. She had honestly misunderstood the extent of the requirements of the unit. She experienced health issues during the unit. Whilst the Tribunal does not accept that such health issues had any significant effect on the respondent's decision making capacity, they would have contributed to the stressors

upon the respondent at the time of her conduct, and no doubt go some way towards explaining why the respondent acted in a way that was otherwise out of character. The respondent had invested considerable time, money and effort in completing all the requirements of the unit, apart from the CPAT. Despite the admirable assistance offered her by her course coordinator, she had been unable to arrange a suitable assessor to complete the CPAT. Rather than further extend the unit and find a suitable assessor, and fearing that all her effort in the unit would be wasted, she instead engaged in the conduct the subject of the referral. Those circumstances help explain the conduct and are mitigating circumstances relevant to the determination of sanction, but they do not mean that the conduct should not be characterised as unprofessional conduct or professional misconduct.

- [16] The respondent resists the finding of professional misconduct and submits that if the Tribunal finds that she has a case to answer, the Tribunal should alternatively make a finding of unsatisfactory professional performance, or unprofessional conduct, rather than professional misconduct.
- [17] Unsatisfactory professional performance is defined in section 5 of the *Health Practitioner Regulation National Law Act 2009* (“*National Law*”) in terms which make it clear that it is concerned with the degree of knowledge, skill or judgment possessed or care exercised by a practitioner in the practice of the health profession. It is concerned with clinical performance, and it is not properly applicable to the type of conduct that is the subject of this referral. The respondent’s conduct was not in the performance of her clinical duties. If it is to be characterised, it would be either as unprofessional conduct or professional misconduct.
- [18] Unprofessional conduct is defined in section 5 of the *National Law* as meaning “professional conduct that is of a lesser standard than that which might reasonably be expected of the health practitioner by the public or the practitioner’s professional peers”.
- [19] Professional misconduct is relevantly 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”.
- [20] The respondent has made some submissions under a misapprehension as to the definition of professional misconduct, to the effect that satisfaction of all three subparagraphs, (a), (b) and (c), of the definition is required before conduct can be characterised as professional misconduct. That is quite clearly not the case.¹
- [21] The fact that the respondent’s conduct was not related to the performance of her clinical duties does not prevent it being characterised as unprofessional conduct or professional misconduct.
- [22] The applicant has referred to a number of authorities in that context. In *Nursing and Midwifery Board of Australia v Williams* [2013] SAHPT 1, the Health Practitioners’ Tribunal of South Australia was concerned with a case where a registered nurse falsely claimed to have a diploma in enrolled nursing. The Tribunal commented at [14]:

¹ *Pharmacy Board of Australia v Hung* [2014] QCAT 148.

The complainant submitted that her conduct was professional misconduct in that it was directly concerned with her nursing practice in that she was trying to get access to a course and to obtain further nursing qualifications which she was then intending to use. The complainant submitted, and we agree, that it was intertwined with what she did as a nurse and part of her practice of nursing. We accept that her conduct was related to the practice of nursing because the practice of nursing is not to be narrowly confined to nursing activities.

- [23] In *Nursing and Midwifery Board of Australia v Walker* [2016] SAHPT 2, the South Australian Health Practitioners' Tribunal was dealing with a case where a registered nurse falsely claimed a master's degree in an area of specialised nursing. The Tribunal stated at [40]:

The tribunal regards the respondent's conduct, in presenting forged and false documents accompanying false representations that he held a master's degree and the endorsement as a nursing practitioner, as behaviour that amounts to a serious example of non-clinical professional misconduct.

- [24] The Tribunal, at [41], went on to quote from a decision of the New South Wales Nurses and Midwives Tribunal in the matter of *Health Care Complaints Commission v Payne* [2007] NSWNT 10, at [46]:

The tribunal considered that her conduct was related to the practice of nursing because the practice of nursing is not narrowly confined to nursing activities. It includes a range of other activities relating to the practice of nursing including the seeking and obtaining of employment as a nurse.

- [25] The decisions of the Health Practitioners' Tribunal of South Australia in both *Williams* and *Walker* are not relied upon by the applicant as comparative cases with respect to sanction. They are both much more serious examples of misconduct. They do support the applicant's submission that the conduct engaged in by the respondent is capable of being characterised as unprofessional conduct or professional misconduct notwithstanding that it was not directly related to her practice as a registered nurse.

- [26] It can be seen from the terms of the definitions of unprofessional conduct and professional misconduct in section 5 of the *National Law* that the difference between the two is the degree of departure from professional standards. The definition of professional misconduct requires a substantial departure. 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] SASFC 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.

- [27] The respondent has resisted a finding of a case to answer or a consequent finding of professional misconduct on the basis of her previous unblemished academic and disciplinary record, the circumstances surrounding her conduct, as explained earlier,

and that no other cases equivalent to hers, where a finding of professional misconduct was made, have been placed before the Tribunal.

- [28] That the respondent's conduct was out of character and in straitened circumstances, as earlier described, are matters which go towards mitigation and the determination of sanction. They are not matters which so mitigate the seriousness of the respondent's departure from professional standards that they would prevent a finding of professional misconduct. The fact that no other equivalent cases where there have been findings of professional misconduct have been placed before the Tribunal does not mean that the respondent's conduct cannot be so characterised.
- [29] The respondent's conduct was a large or considerable departure from the standard expected of a registered nurse of her level of training or experience because of the extent and seriousness of the departure from the required standard of conduct, and the deliberateness of the conduct. Whilst it was an isolated incident, in the sense that the respondent has not engaged in any other academic or professional misconduct, it involved a sustained effort in completing the contents of the form, forging the signature, and using the stamp. That all involved some calculation and effort. Furthermore, the respondent's dishonesty was only discovered after she took the further step of seeking the CV of the clinical nurse whose identity she sought to fraudulently maintain.
- [30] The Code of Professional Conduct for Nurses in Australia includes conduct statement 9:

Nurses maintain and build on the community's trust and confidence in the nursing profession.

Explanation

1. The conduct of nurses maintains and builds public trust and confidence in the profession at all times.
 2. The unlawful and unethical actions of nurses in their personal lives risk adversely affecting both their own and the profession's good reputation and standing in the eyes of the public.
- [31] The respondent's unprofessional conduct was substantially below the standard reasonably expected of a registered health practitioner of an equivalent level of training or experience. The Tribunal decides that the respondent has behaved in a way that constitutes professional misconduct.
- [32] With respect to the matter of sanction, the purpose of sanction is not punitive. The purpose of any sanction imposed by the Tribunal is not to further punish the respondent for conduct for which she has already received salutary punishment by way of the academic disciplinary proceedings. The purpose of sanction in this jurisdiction is protective, with the health and safety of the public being the paramount consideration. Protection of the public includes protection from similar conduct by the respondent and other practitioners, and upholding public confidence in the standards of the profession. Considerations of both specific and general deterrence and denunciation are thus important when considering sanction in this matter.

- [33] There are a number of mitigating factors relevant to the determination of sanction. The circumstances around the conduct discussed earlier go to explain what was otherwise out of character behaviour by the respondent. The respondent has cooperated with the investigation by the Office of the Health Ombudsman, and in the conduct of these proceedings. She is very obviously remorseful for her conduct. It seems that she was so distressed by the circumstances in which she found herself at the time of the conduct, and the consequences she subsequently suffered as a result, that she, at least at this time, cannot see herself resuming her studies towards the ambition she held to be a paediatric nurse. She suffered the penalties through the academic disciplinary process, including gaining no credit for what was a substantially completed unit of study.
- [34] The respondent has asked the Tribunal to consider, rather than a reprimand pursuant to section 107(3)(a), a caution pursuant to the same provision. The applicant has submitted that a caution would not adequately meet the purposes of sanction, in that unlike a reprimand, there would be no requirement, pursuant to section 225 of the *National Law* for a caution to be recorded in the register. The applicant submits that a caution would not adequately express the requisite denunciation of the respondent's conduct and would not adequately meet the considerations of personal and general deterrence which are required by way of sanction.
- [35] The Tribunal accepts the applicant's submissions that a caution would not adequately address the denunciation and deterrence required by way of a sanction for the respondent's professional misconduct. A reprimand is not a trivial sanction. Pursuant to section 225(j) of the *National Law*, it must be recorded on the register until such time as the Board decides, pursuant to section 226(3) of the *National Law*, that it's no longer necessary or appropriate for such information to be recorded on the register. Nevertheless, the Tribunal has concluded that the respondent's professional misconduct is such that it requires the denunciation by the Tribunal by way of a reprimand.
- [36] Both the applicant and respondent have submitted that it would be appropriate to order that a condition be imposed on the respondent's registration requiring her to undertake an appropriate course in professional ethics and it does seem appropriate that such a condition be imposed. The Tribunal will make it clear that part 7, div 11(2) of the *National Law* applies to such condition.
- [37] The applicant has not sought any order for costs and, in all the circumstances, it is appropriate that the default position pursuant to section 100 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) apply and that each party bear their own costs of the proceeding.
- [38] Accordingly, the Tribunal orders as follows:
1. Pursuant to section 107(2)(b)(iii) of the *Health Ombudsman Act 2013* (Qld), the Tribunal decides that the respondent has behaved in a way that constitutes professional misconduct;
 2. Pursuant to section 107(3)(a) of the *Health Ombudsman Act 2013* (Qld), the respondent is reprimanded.
 3. Pursuant to section 107(3)(b) of the *Health Ombudsman Act 2013* (Qld), the following conditions are imposed on the respondent's registration:

- (a) The practitioner is to undertake and successfully complete a program of education approved by the Nursing and Midwifery Board of Australia and including a reflective practice report in relation to the standards of ethical and professional conduct expected of nurses.
 - (b) Within 28 days of the imposition of these conditions, the practitioner must nominate a program of education to the Nursing and Midwifery Board of Australia for its approval.
 - (c) The practitioner must complete the education within six months of the notice of the Board's approval of the program.
 - (d) The practitioner must provide the Board with evidence of her successful completion of the above education within one month of her completion of that education.
 - (e) The practitioner is to be responsible for meeting any reasonable costs arising from compliance with these conditions.
4. The Tribunal decides that, for the purposes of both sections 125(2)(b) and 127(3)(b) of the *National Law*, part 7, division 11(2) of the *National Law* applies.
5. Each party must bear their own costs of the proceeding.