

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Health Ombudsman v Le* [2020] QCAT 170

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

v

JHAI KIET NGHI LE
(respondent)

APPLICATION NO/S: OCR138-18

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 22 June 2020

HEARING DATE: 8 June 2020

HEARD AT: Brisbane

DECISION OF: Judicial Member D J McGill SC, assisted by Dr G
Neilson, Mr A F Petrie and Mrs F K Petty.

ORDERS:

- 1. The respondent engaged in professional misconduct in respect of the matters set out in allegations 1, 3 and 4.**
- 2. The respondent engaged in unprofessional conduct in respect of the matters set out in allegation 2.**
- 3. The respondent is reprimanded.**
- 4. The registration of the respondent is cancelled.**
- 5. The respondent is disqualified from applying for registration until 20 May 2021.**
- 6. The parties bear their own costs of the proceeding.**

CATCHWORDS: PROFESSIONS AND TRADES – HEALTH CARE
PROFESSIONALS – PHARMACEUTICAL CHEMISTS
– DISCIPLINARY PROCEEDINGS – CONVICTION
OF OFFENCE – Professional misconduct – stealing money
and medication from employer – failure to notify of
charge or conviction – breach of conditions on
registration – providing false information – sanction

Health Ombudsman Act 2013 s 103(1)(a), s 104
Health Practitioner Regulation National Law (Qld) s 130

Chen v Health Care Complaints Commission [2017]
NSWCA 186
Health Care Complaints Commission v Caken [2018]

NSWCATOD 5
Health Care Complaints Commission v Townsend [2014]
 NSWCATOD 65
Health Ombudsman v Field [2019] QCAT 243
Health Ombudsman v Sabo [2019] QCAT 256
Nursing and Midwifery Board of Australia v Dizon [2013]
 VCAT 1881
Nursing and Midwifery Board of Australia v Morley
 [2014] SAHPT 17
Nursing and Midwifery Board of Australia v Roos [2016]
 QCAT 231
Pharmacy Board of Australia v Arulogun [2013] QCAT
 685
Pharmacy Board of Australia v Thomas [2011] QCAT
 637
Psychology Board of Australia v Wakelin [2014] QCAT
 516

**APPEARANCES &
 REPRESENTATION:**

Applicant: C Templeton, instructed by the Office of the Health
 Ombudsman

Respondent: Self-represented

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. In accordance with the Act I am sitting with assessors Dr G Neilson, Mr A F Petrie and Mrs F K Petty.¹
- [2] The respondent is and was at the relevant times a registered pharmacist, 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 entered the premises where he had been employed as a pharmacist and stole a sum of money belonging to his employer, and other property, that he was later found in unlawful possession of a quantity of prescription drugs, that he was charged with and convicted of this offending but did not notify the National Board of the charge or the conviction as required by the National Law s 130, that he subsequently breached conditions placed on his employment by the National Board, and that he knowingly provided incorrect information to the Pharmacy Council of New South Wales about his employment status.
- [3] The parties have provided the Tribunal with an agreed statement of facts. The respondent, who has not been legally represented in these proceedings, admits the facts in that statement. Each party has provided written submissions to the Tribunal, and the respondent has made oral submissions during a hearing by telephone.

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

Background 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 1973 and is now 47. He was first registered as a pharmacist in February 1998. Prior to May 2016 he worked at a number of pharmacies, the last being in a Brisbane suburb, where he was the pharmacist in charge of the store. On 2 May 2016 that employment came to an end. Prior to that, he had come into possession of a key to the pharmacy which had been issued to another employee. Eighteen days after his employment came to an end, he used that key to enter the pharmacy early one morning when it was closed, and stole \$4,400 from the pharmacy safe, together with some prescription drugs and other items. When he left he locked up the pharmacy behind him.
- [5] Two days later, police searched his premises and located quantities of Schedule 8 controlled drugs and Schedule 4 restricted drugs. The former consisted of five boxes of Oxycontin tablets, each containing 28 20 mg tablets, and 37 Ritalin 10 mg tablets. The latter were quantities of Aripiprazole 30 mg tablets, Codeine 30 mg tablets, Gliclazide 60 mg tablets, Montelukast GH 10 mg, Oseltamivir, Phentermine 40 mg, Diazepam 5 mg, Famciclovir 500 mg, Nitrazepam 5 mg and Zydol SR200 Tramadol. There were ten boxes of Aripiprazole, seven boxes of Gliclazide and three boxes of Tramadol; the remainder were in quantities from one dose to 36 tablets. The respondent was charged with entering premises and committing an indictable offence, for which the maximum penalty is 10 years imprisonment, and twelve charges of unlawful possession of controlled or restricted drugs.
- [6] On 25 July 2016 he took part in a recorded police interview. He initially claimed that he was not in the relevant suburb that day. When shown video footage of a vehicle in the suburb near the pharmacy, he claimed he had been there to meet a friend as they had arranged by phone. Phone records did not support that account. He admitted he had no lawful excuse to possess the Schedule 8 and Schedule 4 drugs.
- [7] On 16 December 2016 the respondent pleaded guilty to all of thirteen charges in the Magistrates Court at Brisbane. Fines were imposed for the drug offences, and he was placed on probation for the property offence. A restitution order was made in respect of the \$4,400. The respondent did not notify the National Board of the fact that he had been charged with the property offence, nor did he notify the National Board of the fact that he had been convicted of the thirteen offences.
- [8] In July 2016 the respondent obtained employment in a country town in New South Wales.² On or before 22 August 2016 the Pharmacy Council of New South Wales placed conditions on the respondent's registration, that he:
- (a) not work in a pharmacy as the pharmacist in charge.
 - (b) not work as a sole pharmacist.
 - (c) advise the Pharmacy Council of NSW in writing within seven days of changing employment.

² In late July 2016 his employer notified the applicant that the respondent was involved in suspicious activity with medications. This is the subject of separate proceedings in the New South Wales Civil and Administrative Tribunal, which has been heard but not decided. .

- (d) not possess, supply, dispense, administer or manufacture Schedule 8 or Schedule 4D drugs.

When this occurred, his employment was terminated.

- [9] Between 16 October 2016 and 20 February 2017 the respondent was employed, on a locum basis, as a sole pharmacist in charge of a pharmacy in a Queensland country town. He did not advise the Pharmacy Council of NSW in writing of this employment within seven days of taking it up, and in that position dispensed Schedule 8 and Schedule 4D drugs, the former on hundreds of occasions. Hence he breached all four of those conditions.
- [10] On 12 December 2016 the respondent wrote to the Pharmacy Council of New South Wales, seeking to have the conditions removed. In the course of that letter, he claimed that, in the four months since the restrictions were imposed, he had not sought employment as a pharmacist. That was false as he had then worked as a pharmacist in the Queensland Country town on sixteen occasions. When confronted by his employer on 20 February 2017 about the conditions on his registration, he claimed that they had been in place only from the previous week, which he knew was false.

Applicant's case

- [11] The applicant advances this application on the basis of four allegations:

Allegation 1: The conviction of the respondent of the thirteen offences.

Allegation 2: The failure of the respondent to notify the National Board as required of his having been charged with, or of his having been convicted of, the offence of entering premises and committing an indictable offence therein.

Allegation 3: Breach of the conditions placed on his registration by working as he did in the Queensland country town.

Allegation 4: Knowingly provided false and/or inaccurate and/or misleading information to the Pharmacy Council of New South Wales about his employment and compliance with the conditions on his registration.

- [12] The applicant alleges that Allegations 1, 3 and 4 constituted professional misconduct, and that allegation 2 constituted unprofessional conduct. The applicant referred this matter to the Tribunal on 28 May 2018, but an amended referral was filed on 4 September 2019, referring to all four allegations as set out above. On 20 September 2019 the respondent filed a response to the referral, in which he stated simply that he admitted the allegations. On 18 November 2019, he wrote to the Tribunal a letter which has been treated as his submissions, and which contains a plea in mitigation.
- [13] The applicant submitted that the Tribunal should cancel the registration of the respondent, and should disqualify him from applying for registration for a period of two years, as well as reprimanding him. The respondent made no specific submission about the sanction to be imposed, but sought generally some leniency in that regard.
- [14] In support of its submissions the applicant referred to the serious nature of the offence of entering premises and stealing, which involved a serious breach of trust, the importance of compliance by practitioners with conditions placed on their registration, and of their dealing honestly with regulatory bodies. It was further submitted that, in view of the respondent's persistence in dishonesty, his behaviour was indicative of a character flaw rather than just an unfortunate lapse in judgement. The applicant

conceded that the respondent had entered a plea of guilty in the criminal proceedings, cooperated with the investigation of the applicant and made admissions, and cooperated in this proceeding so that the matter proceeded on the basis of an agreed statement of facts.

- [15] The applicant submitted that the written submissions from the respondent indicated that he lacked proper insight into the seriousness of his conduct, and was not truly remorseful. It was further submitted that the respondent had not put material before the Tribunal to demonstrate any change in his character or other rehabilitation attempt since the suspension was imposed. He had not undertaken any relevant further education, or undergone any treatment to deal with any underlying condition.

Respondent's position

- [16] In his letter the respondent spoke of having had his hours of work at the suburban pharmacy reduced, and of having committed the property offence in a moment of weakness because of the difficult financial position he found himself in. He claimed he was not paid for his last two weeks in that job, but the Tribunal does not know the employer's position about this. He said he had difficulties at the time with his wife's pregnancy and the illness of his mother with cancer, from which she passed away in late August 2016. That would have been traumatic for him. He said that, after being unemployed from early August to late October 2016, he took the job in the Queensland country town as it was the only position he had been able to get, and he needed income.³ He said that he has not worked in a pharmacy since February 2017, was unemployed until September 2017, then worked as a labourer until April 2018 when he obtained employment with a hearing assessment and care company. He still has that employment, which he said produces only a modest income. He said that as a result of the loss of his pharmacy employment he had amassed substantial debts to family and friends.
- [17] The respondent said that he had not been required by his probation officer to undertake any psychiatric or psychological treatment, and had not been able to afford any such treatment privately, although he did see a psychologist once. He also said that he could not afford to do any further courses, given his limited income and substantial debts. He provided clarification about parts of his letter to the Tribunal, which referred to matters the subject of the proceeding in New South Wales, and indicated that the reference to "probation" was a reference to the conditions placed on his registration in early August, rather than the probation order made by the Magistrates Court in December 2016. He said that he had completed the requirements of that order, which lasted until December 2017.
- [18] The respondent explained that he had taken some Schedule 8 drugs with him when he went for his police interview in July 2016, so as to illustrate the operation of Webster packs.⁴ This is an odd thing for an experienced pharmacist to do, but the respondent has persisted in the explanation, and it is not necessarily false. It is possible that he thought, for example, that it was desirable to use the actual medication in order to provide

³ The assessors informed me that the employment market for pharmacists at about that time was tight, and there would not have been a lot of positions compatible with the conditions placed on his registration.

⁴ This is a medication timing aid to assist vulnerable patients with medication compliance by placing tablets in different compartments depending on when they are to be taken. The assessors informed me that it is common for pharmacists to dispense tablets packed in Webster packs.

authenticity in his explanation to the police. That would be consistent with the explanation offered, which was just that he was naïve.

- [19] It is true that, apart from his cooperation with the applicant and in this proceeding, there is no positive material about rehabilitation, but the respondent's explanation, of financial constraint, is plausible. There is also no negative material. There is no evidence of misbehaviour in the employment he took in breach of the conditions in the Queensland country town, although evidently he was dispensing Schedule 8 drugs regularly in that position. His current employer has been at least sufficiently satisfied with him to continue his employment for over two years. The respondent has not had the benefit of legal advice in this matter, no doubt in itself a reflection of his tight financial position.

Analysis

- [20] 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.
- [21] 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 over a period of some months in relation to the pharmacies where he had been or was employed, and in his dealings with the Pharmacy Council, although not in his day to day work as a pharmacist. It involved a serious breach of trust on his part. In respect of the first allegation, entering unlawfully the premises of a former employer and stealing a significant amount of money, and a quantity of drugs and other items, is serious criminal conduct, and in itself inconsistent with his being a fit person to hold registration in the profession. In this case, there was other misconduct. 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.
- [22] Apart from this, the definition of "professional misconduct" in the National Law s 5 includes the following:
- (b) more than one instance of unprofessional conduct that, when considered together, amounts to conduct that is substantially below the standard reasonably expected of a registered health practitioner of an equivalent level of training or experience.
- [23] The definition of "unprofessional conduct" in the National Law includes: "(c) the conviction of the practitioner for an offence under another Act, the nature of which may affect the practitioner's suitability to continue to practice the profession." Each of the offences of which the respondent was convicted was such that his conviction of it amounted to unprofessional conduct as defined in this way, so that they amount to a number of instances of unprofessional conduct which considered together can be seen to satisfy paragraph (b) of the definition of professional misconduct.
- [24] The failure to notify the fact of his being charged with, and the fact of his being convicted of, the property offence was each a breach of the obligation in s 130 of the National Law, which also satisfied the definition of "unprofessional conduct." His having worked in breach of conditions placed on his registration was also a serious matter, as was his having been dishonest in his letter to the Pharmacy Council of New

South Wales. This dishonesty came on top of his dishonesty when the police interviewed him in July 2016, and was followed by dishonesty to the Pharmacy Council, and when confronted by his then employer about the conditions on his registration.

- [25] As was pointed out in the applicant's submissions to the Tribunal, this conduct breached two express provisions of the Code of Conduct issued by the Pharmacy Board of Australia.
- [26] In *Pharmacy Board of Australia v Thomas* [2011] QCAT 637 an employed managing pharmacist took cash from the takings, and overpaid himself, over a lengthy period, involving tens of thousands of dollars. He failed to advise the Board of his conviction. He lost that employment, but had continued to work for some years as a pharmacist, and presented favourable references from his employers. Kingham DCJ said at [29], [31]:

While conviction for an indictable offence is a ground for taking disciplinary action, this does not mean the purpose of disciplinary proceedings is to punish that conduct further. Rather, it is an indication the professions expect their members to be law abiding. If a member of the profession commits a criminal offence punishable by imprisonment, this reflects on the reputation of the profession and may damage public confidence in it.

Mr Thomas 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.

- [27] In that matter a sanction was imposed under an earlier scheme, and that practitioner had different circumstances. There are other matters where stealing from an employer has been characterised as professional misconduct.⁵ Failing to comply with conditions placed on registration, as in this case, has been characterised as professional misconduct.⁶ In the present case, however, there is no material to suggest that the respondent did not do the job he was employed to do properly. The problem was that it was a breach of his conditions to take that job. For over three years, the respondent has not worked as a pharmacist, and has suffered significant financial loss over that period. This is a relevant factor.⁷
- [28] There are also cases where dishonesty in providing information to a regulatory body has been regarded seriously, either as relevant conduct in itself, or as a factor touching on the seriousness of the substantive conduct.⁸ This was not an isolated example of dishonesty, and that must give rise to concern about the respondent's character.

⁵ See for example *Health Ombudsman v Jamieson* [2017] QCAT 172.

⁶ *Pharmacy Board of Australia v Arulogun* [2013] QCAT 685, where the conditions were imposed after the practitioner was charged with drug offences, the conviction of which was also relevant conduct. See also *Nursing and Midwifery Board of Australia v Fisher* [2018] VCAT 1340 at [69]; *Nursing and Midwifery Board of Australia v INZ* [2018] VCAT 99 at [104], [107].

⁷ *Pharmacy Board of Australia v Arulogun (supra)* at [37], per the Hon J B Thomas QC.

⁸ *Psychology Board of Australia v Wakelin* [2014] QCAT 516, at [21], [27], in a case where the practitioner had provided false denials to investigators. At [25] the Hon J B Thomas QC suggested that this dishonesty merited a suspension of registration for 18 months. See also *Medical Board of Australia v Putha* [2014] QCAT 159 (false information on application for registration); *HCCC v Picones* [2018] NSWCATOD 56 at [103], [105].

- [29] In order to cancel the respondent's registration, it is necessary for the Tribunal to decide that the respondent is not a fit and proper person to be registered as a pharmacist.⁹ That is to be decided as at the date of hearing.¹⁰ The important distinction between suspension and cancellation of registration is that, in the latter case, it is necessary for the respondent on seeking registration to demonstrate that he is then a fit and proper person to be registered as a pharmacist.¹¹ A number of matters relevant to such a finding were identified in *Health Ombudsman v Field* [2019] QCAT 243 at [36].¹² In this case, the persistence in dishonesty suggests a defect in character rather than an error of judgment, and it was not an isolated incident. In a number of cases the respondent resorted to dishonesty when placed in a difficult position, and the dishonesty was at times intrinsically significant.
- [30] The material shows that, as at February 2017, the respondent was not a fit and proper person to be registered as a health practitioner. Since then the positive material has been the respondent's cooperation with the applicant and in this proceeding, but there is no other material to show positively a reform of this aspect of his character. In those circumstances, it remains appropriate to find that the respondent is still now not a fit and proper person to be registered as a pharmacist. Accordingly, it is appropriate to cancel his registration.

Earlier decisions

- [31] That approach is supported by a number of earlier decisions relied on by the applicant. In *Nursing and Midwifery Board of Australia v Dizon* [2013] VCAT 1881 the practitioner was convicted of two charges of armed robbery, and other offences, There were expressions of contrition before the Tribunal but it was not satisfied about rehabilitation, and cancelled his registration. It decided that an overall period of non-practice of five years was appropriate, and, taking into account the suspension prior to the hearing, fixed a preclusion period at a date about eighteen months in the future.
- [32] In *Nursing and Midwifery Board of Australia v Roos* [2016] QCAT 231 the practitioner had ben convicted of fraudulent use of taxi vouchers over a period of some months. There had been other dishonest conduct twelve years earlier, taking money from other nurses. The practitioner was no longer registered, and a preclusion period of three years was imposed, on top of a period of most of a year out of the profession.
- [33] In *Health Ombudsman v Sabo* [2019] QCAT 256 a nurse had been convicted of a number of offences involving the use of fraudulent prescriptions to obtain Schedule 4 or Schedule 8 drugs. The nurse had not renewed his registration three years earlier, and was disqualified for a further period of two years from the order. There was evidence that at an earlier stage the nurse had untreated substance abuse, and there was no evidence of any change, the nurse not having engaged with the proceeding.

⁹ *Medical Board of Australia v Wong* [2015] QCAT 439 at [84]; *Medical Board of Australia v Duck* [2017] WASAT 28 at [33], [34]; *Medical Board of Australia v Alkazali* [2017] VCAT 286 at [74].

¹⁰ *Medical Board of Australia v Cukier* [2017] VCAT 109; *Field (supra)* at [36].

¹¹ *Chen v Health Care Complaints Commission* [2017] NSWCA 186 at [21]. Uncertainly as to what may happen in the future may support a decision to cancel registration.

¹² Referencing *McBride v Walton* [1994] NSWCA 199 at [34].

- [34] In *Nursing and Midwifery Board of Australia v Morley* [2014] SAHPT 17 a nurse had obtained dishonestly about \$1,000 from a vulnerable patient, and had been convicted of defrauding Centrelink of about \$11,000, which had not been reported to the Board when applying to renew her registration. Because of the pattern of dishonesty the Tribunal cancelled her registration, and fixed a preclusion period of about three years from the date of the order, following the suspension of her registration for about two years.
- [35] There are cases where conviction of criminal offences has resulted in suspension rather than cancellation,¹³ but they involved less serious, or less persistent, dishonesty, or strong mitigating factors. On the other hand, in *Dizon* the criminal offences committed were more serious, and in *Sabo* the nurse had had, and presumably still had, a problem with drug abuse. In *Morley* the criminality was arguably more serious, particularly preying on a vulnerable patient. These decisions suggest a shorter period than five years out of the profession in the present case.
- [36] The applicant conceded that the period of suspension of the registration was relevant, but submitted that it was not the equivalent of a period after cancellation of registration, or indeed of a period of voluntary withdrawal from the profession. No authority was cited in support of this proposition. That does not seem to be the position adopted in most decisions from interstate, where the Tribunals determined an appropriate period out of the profession, and then deduct any prior actual or de facto suspension.¹⁴ The local decisions to the effect that prior periods out of the profession are relevant do not seem to make this distinction,¹⁵ and as presently advised I do regard it as the correct approach.
- [37] The applicant also referred to the decision of *Health Care Complaints Commission v Townsend* [2014] NSWCATOD 65, where an elderly GP who had persistently failed to comply with a condition imposed on his registration that he undertake a certain course had his registration cancelled because of this. That was a case where the practitioner persisted at the Tribunal hearing in submitting that the course was unnecessary and inappropriate for him.¹⁶ The cancellation appears to have been imposed in order to enforce compliance with conditions lawfully placed on his registration: [36], [48]. A disqualification period of one year was imposed: [49].
- [38] In *Health Care Complaints Commission v Caken* [2018] NSWCATOD 5 the practitioner had a drug problem, as a result of which he had had conditions placed on his registration. The Tribunal found that he had breached the conditions, been dishonest in dealings with the Medical Council, had not been frank with his treating practitioners and had not carried out relevant therapies, and that this showed a lack of commitment to dealing with his problems. The Tribunal regarded this conduct as

¹³ *Pharmacy Board of Australia v Arulogun* [2013] QCAT 685; *Pharmacy Board of Australia v Thomas* [2011] QCAT 637 (stole money from employer); *Health Ombudsman v MacDonald* [2016] QCAT 473 (nurse stole medication).

¹⁴ The exception is *Morley* (*supra*) where the Tribunal said that the practitioner was not entitled to credit for the prior suspension of about two years: [28]. That is inconsistent with the Queensland decisions.

¹⁵ *Pharmacy Board of Australia v Arulogun* (*supra*) at [37]; *Nursing and Midwifery Board of Australia v Tainton* [2014] QCAT 161 at [36]; *Psychology Board of Australia v GA* [2014] QCAT 409 at [38], [40], where the possibility that there may be a distinction in a particular case was recognised.

¹⁶ The practitioner was approaching retirement, only working part time and seeing only existing patients, mostly elderly. He also lacked computer skills, and the course was on-line only.

very serious [185] and cancelled his registration: [186]. A preclusion period of three years from the suspension of his registration was imposed.

[39] These two decisions support the cancellation of the registration of the respondent, but do not support a period of disqualification as long as the two years sought by the applicant, coming as it does on top of a suspension of registration for over three years. On the whole, I consider that a period out of the profession of four years is sufficient, running from the date, 19 May 2017, that the Pharmacy Council of New South Wales suspended his registration.

[40] Accordingly the decision of the Tribunal is that:

1. The respondent engaged in professional misconduct in respect of the matters set out in allegations 1, 3 and 4.
2. The respondent engaged in unprofessional conduct in respect of the matters set out in allegation 2.
3. The respondent is reprimanded.
4. The registration of the respondent is cancelled.
5. The respondent is disqualified from applying for registration until 20 May 2021.
6. The parties bear their own costs of the proceeding.