

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Health Ombudsman v Lo* [2020] QCAT 198

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

v

YU-CHIEH LO
(respondent)

APPLICATION NO/S: OCR228-19

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 6 May 2020 (*ex tempore*)

HEARING DATE: 6 May 2020

HEARD AT: Brisbane

DECISION OF: Judicial Member Robertson

ORDERS:

- 1. Pursuant to s 113(1) of the *Health Ombudsman Act 2013 (Qld)*, because of his conduct, the respondent poses a serious risk to persons.**
- 2. Pursuant to s 113(4)(b) of the *Health Ombudsman Act 2013 (Qld)*, the respondent is permanently restricted from providing any health service to female patients, paid or otherwise, in a clinical or non-clinical capacity.**
- 3. The interim prohibition order issued by the Health Ombudsman on the 21st of August 2019 is set aside pursuant to s 73(2)(a)(ii) of the *Health Ombudsman Act 2013 (Qld)*.**
- 4. The Tribunal makes no order as to costs.**

CATCHWORDS: PROFESSIONS AND TRADES – HEALTH CARE PROFESSIONALS – OTHER HEALTH CARE PROFESSIONALS – where the respondent was an unregistered health care professional – where the respondent provided massage therapy – where the applicant instituted disciplinary proceedings against the respondent – where the respondent has been convicted guilty of his own plea of guilty – whether the Tribunal should make an order permanently prohibiting the respondent from providing any health service

Queensland Civil and Administrative Tribunal Act 2009 s
66

Health Ombudsman v Kirk [2019] QCAT 301

Health Ombudsman v MacBean [2019] QCAT 300

Health Ombudsman v Newman [2019] QCAT 397

APPEARANCES &
REPRESENTATION:

Applicant: D Dupree of the Health Ombudsman

Respondent: Appeared on his own behalf

REASONS FOR DECISION

- [1] On the 29th of June 2019, the Director (the applicant) filed a referral to the Tribunal seeking prohibition orders against the respondent, Yu-Chieh Lo (the respondent). The respondent was a massage therapist practicing in the western suburbs of Brisbane in April 2018. It is common ground, therefore, that he was a health service provider and health practitioner pursuant to s 8(a)(ii) of the *Health Ombudsman Act 2013* (the HO Act) and a health care worker as defined in the National Code of Conduct for Health Care Workers (Queensland). The applicant alleges that, as a consequence of admitted criminal conducted committed against a female patient during a massage on the 20th of April 2018, along with the breach of an interim prohibition order, the respondent poses a serious risk to persons on a number of grounds which are set out in an attachment to the referral.
- [2] On the 18th of October 2019, the parties filed a statement of agreed facts. On the 29th of August 2019, the Deputy President of the Tribunal, his Honour Judge Allen QC, made a non-publication order pursuant to s 66(1) of the *Queensland Civil and Administrative Tribunal Act 2009*, prohibiting publication of any document, evidence, and order/reasons given by the Tribunal to the extent that it could identify or lead to the identification of the complainant female patient, which order will continue after today.
- [3] In summary, the inappropriate conduct which led initially to an interim prohibition order being issued by the Health Ombudsman on the 2nd of May 2018, occurred during a remedial massage of the complainant female on the 20th of April 2018 when only she and the respondent were present in a massage room. He inappropriately massaged her buttocks and breasts and close to her vagina and then sucked her nipple. Contrary to the order made on the 2nd of May 2018 which was served on the respondent, he continued to provide health services by way of massage to female patients for a considerable period.
- [4] On the 21st of April 2018, the respondent was charged with one count of sexual assault. On that day, the complainant had made a formal statement to police and she engaged in a pretext recorded telephone conversation with the respondent, in which he made clear admissions and apologised to her. He was not aware that police were recording the conversation. On the 5th of September 2018, he was represented by a solicitor and pleaded guilty to one count of sexual assault in the Magistrates Court. He was sentenced to a term of six months imprisonment, suspended immediately for

an operational period of 18 months. As the magistrate noted, the complainant had suffered significant adverse impacts as a result of the assault. There was no reason advanced to the Court to explain the respondent's behaviour, for example, a psychological report or any other evidence of that kind, but his conduct clearly involved acting out his sexual interest in a very vulnerable person in his care.

- [5] The respondent was served with the interim prohibition order on the 4th of May 2018, but, on numerous dates between the 5th of May 2018 and the 30th of November 2018, he breached the interim prohibition order by providing massage services to multiple female patients.
- [6] The respondent filed a statement in response to the referral on the 20th of September 2019. He apologised for breaching the interim protection order, but, essentially, his reasons advanced relate to the financial hardship and emotional impacts to himself and his family as a result of the criminal prosecution arising from his own actions.
- [7] His statement filed for the purposes of today's proceedings on the 6th of November 2019, similarly concentrates on the consequences to himself and his family arising out of his unlawful behaviour and subsequent conviction. He does, however, expressly state that he regrets his behaviour towards the complainant woman.

The Issues to be Decided by the Tribunal

- [8] The Act gives the Tribunal jurisdiction to hear the referral and to make orders in its original jurisdiction.
- [9] These proceedings were commenced on the 23rd of June 2019. As a result of amendments to the HO Act which commenced on the 1st of March 2020 with the commencement of the Health Transparency Act 2019, division 4 of part 10, which relates to the jurisdiction of a Tribunal to deal with referrals of this kind under the HO Act was repealed, which included s 113 which is specifically called up by the referral application. However, as a result of the transitional proceedings in the HO Act, and in particular s 320G (2):

The Tribunal may deal, or continue to deal, with the matter under this Act as in force before the commencement as if the *Health Transparency Act 2019*, Part 6, Division 2 had not been enacted.

- [10] Pursuant to the now repealed s 113(1) of the HO Act, the first issue to be decided by the Tribunal is whether, because of the respondent's "conduct", he "poses a serious risk to persons". Section 113(2) relevantly provided that:

The serious risk posed to a person by a health practitioner may be a serious risk of harm caused by the practitioner –

(c) engaging in a sexual...relationship with the person...

- [11] In deciding whether the respondent poses a serious risk, the Tribunal must have regard to the fact that these proceedings are protective and not punitive in nature, and that the protection of the health and safety of the public will be the paramount consideration. The applicant carries the onus of proof and the standard is the civil standard with the degree of satisfaction varied according to the gravity of the facts to be proved.

[12] The term “serious risk” has been considered in a number of decisions of the Tribunal. The term is not defined in the Act. In *Health Ombudsman v Kirk* [2019] QCAT 301, his Honour Judge Allen QC wrote (at [14]):

The term, “serious risk”, is not defined in the HO Act, the National Law or the Acts Interpretation Act 1954. The term therefore takes its ordinary meaning in its statutory context. The word, “serious”, is defined in the Macquarie Dictionary as:

“Of grave aspect; weighty or important; giving cause for apprehension; critical; to be considered as an extreme example of its kind.”

[13] Kirk involved sexual assaults on four patients by a hypno-psychotherapist. In *Health Ombudsman v MacBean* [2019] QCAT 300, the respondent, a massage therapist with a mental disorder, sexually assaulted a number of patients which included one count of rape for which he was sentenced to six years imprisonment. A number of his victims were children. These are objectively much more serious cases than the present case.

[14] It can be accepted that these decisions, and the decision of *Health Ombudsman v Newman* [2019] QCAT 397, are authority for the proposition that to determine if a “serious risk” exists, the Tribunal (on the evidence in the case before it) should consider the nature of the risk, the likelihood of the risk eventuating, and the seriousness of the consequences if the risk eventuates.

[15] The present case is not a case involving multiple victims and there is no evidence at all that the respondent poses any risk to male patients. However, in relation to this particular issue, it is important to take into account that the sexual misconduct was sustained, at a time when the complainant was vulnerable and confused and anxious about the respondent’s misconduct which escalated until she told him to stop.

[16] s 113(3) of the HO Act (now repealed) provided that in deciding whether the respondent poses a “serious risk”, the Tribunal may:

...have regard to a prescribed conduct document under section 288.

[17] Both the “*Australian Charter of Healthcare Rights*” published by the Australian Commission on Safety and Quality in Healthcare, and the COAG Health Council “*National Code of Conduct for Health Care Workers (Queensland)*” are prescribed conduct documents for the purposes of s 288.

[18] The National Code of Conduct requires, *inter alia*, that a health care worker must provide health services in a safe and ethical manner.

[19] The Charter includes, *inter alia*, the requirements that:

- (a) People have a right to receive safe and high-quality health care that meets national standards;
- (b) Be cared for in an environment that is safe and makes them feel safe; and
- (c) Be treated as an individual and with dignity and respect.

[20] In assessing the likelihood of the risk eventuating, the Tribunal takes into account that there is no evidence before the Tribunal which may explain, (without excusing) the conduct; and although the respondent has expressed some level of remorse and regret; his responses tend to focus on the effect on himself and his

family, and, to that extent, lack insight which may be in some part due to the way in which he has expressed himself in that document. However, his primary focus seems to be on the obviously significant effects on him. There is no evidence before the Tribunal of any steps taken by him to ameliorate the risk of similar behaviour in the future. There is no evidence, for instance, of professional counselling or psychological assistance and rehabilitation, nor of further education and/or training.

- [21] This is not to shift the onus of proving that he does not pose a serious risk to patients in the future to the respondent. The lack of evidence about counselling, and similar treatment, and the low level of insight displayed, particularly to the harm caused to the complainant, places the respondent's criminal offending in its proper context, and it is this context that is important in deciding whether the applicant has satisfied the onus on it. It is also relevant that the respondent is not a health service provider and practitioner who has to be registered so, in the future, would not be subject to the oversight of a registration body which may have powers to impose conditions on any future registration. I am satisfied that on the material before the Tribunal, the respondent poses a serious risk to persons.

Appropriate Orders to be Made

- [22] Given the nature of the risk in the particular circumstances here involving an unregistered practitioner, it is important to keep in mind, that the paramount principle that is directed at protecting the public from the serious risk posed by the respondent, is not supported by the legal requirement that requires that a health practitioner be registered. In such a case, the Tribunal can derive some comfort from the reality that in seeking to be registered, the practitioner would have to be satisfy the relevant registering authority that he or she no longer poses a serious risk to persons.
- [23] In considering the appropriate order to be made, I take into account the following matters, namely whether any restrictions on practice could be imposed which would ameliorate the serious risk posed by the respondent, such as the conditions imposed by the interim protection order (*Health Ombudsman v Macbean* [2019] QCAT 300 at [18]; whether there is any material available which would permit a prohibition for a finite rather than a permanent prohibition (ibid); whether the risk could be ameliorated by the passage of time, and if so, how much time (*Kirk* at [20]); and whether there is evidence of remorse.
- [24] The applicant has referred me to a number of comparable decisions in its submission which I have considered.
- [25] The conduct here was serious involving criminal conduct and a serious breach of the patient's trust at a time when she was extremely vulnerable. It caused actual harm to her which required her to seek medical help. His serious breaches of the IPO indicate a lack of understanding and insight into the significance of such an order. He pleaded guilty at an early stage and he has expressed remorse albeit in an equivocal way.
- [26] The material before the Tribunal is such that I am not reasonably satisfied that the respondent would not engage in similar conduct towards female patients in the future. There is simply no evidence, apart from qualified expressions of remorse, that he would not present as a serious risk in the foreseeable future.

[27] The orders that the Tribunal make are as follows:

1. Pursuant to s 113(1) of the *Health Ombudsman Act 2013* (Qld), because of his conduct, the respondent poses a serious risk to persons.
2. Pursuant to s 113(4)(b) of the *Health Ombudsman Act 2013* (Qld), the respondent is permanently restricted from providing any health service to female patients, paid or otherwise, in a clinical or non-clinical capacity.
3. The interim prohibition order issued by the Health Ombudsman on the 21st of August 2019 is set aside pursuant to s 73(2)(a)(ii) of the *Health Ombudsman Act 2013* (Qld).
4. The Tribunal makes no order as to costs.