QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Health Ombudsman v Barham* [2020] QCAT 201
PARTIES:	**DIRECTOR OF PROCEEDINGS ON BEHALF OF THE HEALTH OMBUDSMAN** (applicant) **v** **JOSEPH BARHAM** (respondent)
APPLICATION NO/S:	OCR127-19 (*ex tempore*)
MATTER TYPE:	Occupational regulation matters
DELIVERED ON:	27 April 2020
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	Judicial Member McGill SC, Assisted by: Mr B Muller Dr G Neilson Mr P Zimon
ORDERS:	**1. the Tribunal decides that the respondent has behaved in the way of constituted professional misconduct** **2. the Tribunal reprimands the respondent** **3. the respondent's application is dismissed** **4. the parties bear their own costs of this proceeding.**
CATCHWORDS:	PROFESSIONS AND TRADES – HEALTH CARE PROFESSIONALS – PHARMACEUTICAL CHEMISTS – DISCIPLINARY PROCEEDINGS – MISCONDUCT IN PROFESSIONAL RESPECT – where the respondent was a pharmacist – where disciplinary proceedings were instituted against the respondent in relation to the theft of a quantity of medication – where the respondent concedes that the conduct is professional misconduct - where the parties have provided joint submissions – whether the sanction proposed is appropriate – whether the Tribunal should make a non-publication order *Queensland Civil and Administrative Tribunal Act* 2009, section 66 *Health Practitioner Regulation National Law* (QLD) 2009 s 5

Health Ombudsman Act 2013 (Qld) s 107,

Cutbush v Team Maree Property Service [2010] QCATA 89
Health Ombudsman v NLM [2019] QCAT 366
Health Ombudsman v DeCelis [2019] QCAT 140
J v L & A Services Pty Ltd (No 2) [1994] 2 Qd R 10
Legal Services Commission v XBV [2018] QCAT 332
Medical Board of Australia v Waldron [2017] QCAT 443
Pharmacy Board of Australia v Christie [2016] QCAT 291
Pharmacy Board of Australia v Dougherty [2014] SAHPT 6
Psychology Board of Australia v GA [2014] QCAT 409

REPRESENTATION:

Applicant:	Director of Proceeding on behalf of the Health Ombudsman
Respondent:	Self-represented
APPEARANCES:	This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld)

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. Under s 126 of that Act, I constitute the Tribunal. I am sitting with assessors, Mr Muller, Dr Neilson and Mr Zimon, in accordance with the Act, s 126. Their function is to advise me in relation to questions of fact, s 127. The respondent was, at the relevant time, a registered pharmacist and hence a registered health practitioner for the purposes of the Health Practitioner Regulation National Law (QLD).

[2] The applicant alleges that the respondent engaged in professional misconduct, in that while registered and employed as a pharmacist he stole a quantity of medication from the stock of the pharmacy. This occurred on 26 October 2017. 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 grounds alleged and that the conduct in question amounts to professional misconduct. The parties have provided written submissions for the Tribunal. The hearing proceeded on the papers, in accordance with the *Queensland Civil and Administrative Tribunal Act* 2009, s 32.

[3] The Tribunal accepts the facts set out in the agreed statement of facts. They may be summarised as follows. The respondent was born in 1987 and is now 33. He was first registered as a pharmacist in January 2016. In October 2017, he was employed as a locum pharmacist of a pharmacy in a provincial city. While there, he stole 100 Rivotril tablets which had been returned to the pharmacy as unused medication. These are a benzodiazepine. Another pharmacist noted the discrepancy in the prescription drugs at the pharmacy and detected the theft by reviewing security

television footage. The next day, she reported the matter to the police. As a result, the respondent was charged with stealing as a servant. He pleaded guilty, was released on probation for 12 months and ordered to perform 100 hours community service. No criminal history was alleged.

[4] Shortly after the theft was detected, the respondent surrendered his registration and has not subsequently sought registration as a pharmacist. The respondent has said that at the time of the offence he was seeing a psychiatrist for depression, although there is no reference to this in the records of a GP he had seen the provincial city. The respondent said that his actions have shown that he is not a suitable candidate to hold registration as a pharmacist and would accept any period of disqualification the Tribunal imposed. He willingly cooperated in both the criminal proceedings and in this matter.

[5] At the time of the criminal proceeding, the magistrate was told that he was then working as a fitter mechanic and had previously trained as an electrician, so he could return to that trade. It appears unlikely that the respondent will ever return to pharmacy. 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

[6] profession. This case is an example of dishonesty in carrying out his responsibilities in the pharmacy, to obtain unprescribed medication, which was a serious breach of trust on his part. 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.

[7] I have been referred to a number of decisions of this and another Tribunal where such conduct has been characterised in that way. In *Health Ombudsman v DeCelis* [2019] QCAT 140, the respondent, a pharmacist, obtained cocaine for his own use by ordering it from his employer – for his employer's pharmacy without any legitimate justification and altering records to cover his tracks. This occurred on a number of occasions over seven months and stopped when the respondent disclosed his conduct, quit his job and sought treatment. He did not disclose to the board that he was charged with offences, but did not renew his registration as a pharmacist, so that he had not been registered for over three years, a factor the Tribunal considered important. A finding of professional misconduct was made and the respondent was reprimanded.

[8] In *Pharmacy Board of Australia v Christie* [2016] QCAT 291, a finding of professional misconduct was made when a pharmacist had, on a number of occasions over a number of years, obtained various controlled, restricted and addictive drugs, including from his employer, by dishonest means, such as creating fictitious transactions. He had had a longstanding problem with the misuse of prescription and other drugs, and has allowed his registration to lapse. That respondent had already been dealt with in a criminal court and had obtained employment in a different field. He was reprimanded, disqualified from applying for registration for a period of three years, and ordered to pay the costs of the board, fixed at $12,000.

[9] In *Pharmacy Board of Australia v Dougherty* [2014] SAHPT 6, the respondent stole 84 tablets of dexamphetamine sulphate, property of his employer, over a period of close to two years. At the time, he had a drug problem which he had been feeding,

in part, in this way. At the time of the hearing, he was undertaking drug rehabilitation. He was reprimanded and disqualified from applying for registration for a backdated period of two years. The applicant concedes that this was a more serious case. Indeed, all of these cases have the more serious feature of involving conduct over a period of time. The fact that the respondent has not been registered or practising for almost two and a-half years is a relevant factor, as indicated in DeCelis. See also *Psychology Board of Australia v GA* [2014] QCAT 409, at [39].

[10] The applicant has submitted that if the respondent were to apply for a registration in the future, AHPRA would be in a position to assess and manage him prior to returning to practice. I accept that, in a context where it may be some time before there is any attempt to obtain registration, if it ever happens, protection of the public does not require the Tribunal to attempt any assessment now of what the respondent's position might be at that time. Given the circumstances of the offending here and the insight and remorse shown by the respondent, I do not consider that any further period out of the profession is necessarily required and accept the submission that no period of disqualification should be imposed. The appropriate sanction, therefore, is that the respondent should be reprimanded.

[11] The respondent has sought a non-publication order for his name, on the ground that his spouse works in the healthcare industry and he knows a number of her work colleagues and supervisors through work functions and socially. His concern is that this may impact on her career progression. He does not claim [indistinct] that her physical or mental health or safety may be endangered as a result, although any publicity may be stressful to her if it leads to concern about the risk of such harm occurring. The *Queensland Civil and Administrative Tribunal Act* 2009, s 66(2), authorises a non-publication order if the Tribunal considers it necessary, having regard to five specific matters, one of which is:

> (e) for any other reason in the interests of justice.

[12] I appreciate that the starting point is that the Tribunal operates in public and the power to conduct all or part of a hearing in private should be strictly regulated. See *Legal Services Commission v XBV* [2018] QCAT 332, at [26], where the Honourable P. Lyons QC pointed out that the Tribunal had a broader power to constrain the open-court principle that is available to courts generally. That case concerned a barrister who had failed to notice in his brief a document fundamentally inconsistent with the client's instructions and had failed to appreciate the significance of a legal point raised by the matter.

[13] A non-publication order was made in circumstances where there was evidence that the respondent had been receiving treatment from a psychiatrist and a psychologist for a major depressive disorder and there was a risk of suicide. Ultimately, in that case, an order was made, but under another Act and on the basis that that provision gave a wider discretion than that in the QCAT Act. Reference was made to the decision of *J v L & A Services Pty Ltd (No 2)* [1994] 2 Qd R 10, where the open-court principle was discussed. Under that principle, as applied in court – it was said, at page 45, that:

> Information may not be withheld from the public merely to save a party or witness from loss of privacy, embarrassment, distress, financial harm, or "other collateral disadvantage"…

[14] In *Medical Board of Australia v Waldron* [2017] QCAT 443, Sheridan DCJ noted that the discretion is to be exercised only if it was "necessary" and only where the circumstances came within one of the categories nominated. The fifth category, although expressed in broad terms, was to be interpreted as subject to that limitation. Her Honour referred to a number of authorities, most of which dealt with the open-court principle in the context of a court. A limited approach to s 62(2)(e) was consistent with the approach adopted by the then president of the Tribunal, A. Wilson J, in *Cutbush v Team Maree Property Service* [2010] QCATA 89, at [7]. His Honour noted that the approach in s 66 was underpinned by the tradition of open justice in courts and continued:

> [9] Open justice requires that nothing should be done to discourage the fair and accurate reporting of what takes place in the courtroom, unless there is some material before the court to show that it is reasonably necessary to prohibit the publication. The onus is on the applicant [for the order] to show special circumstances justifying the making of the order.
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> [10] Where the publication concerns identification of parties or persons affected by proceedings, the mere fact that the publication may produce "embarrassment or unfortunate financial effects" is generally not a sufficient reason to prohibit publication… [Citations omitted].

[15] In that case, the fact that the information may have made it more difficult for the applicant to obtain a tenancy of other property in the future was not regarded as a sufficient ground for a non-publication order, even though – in the event he had succeeded in his appeal against an eviction order. In *Health Ombudsman v NLM* [2019] QCAT 366, Sheridan DCJ made a non-publication order in a matter which involved an impairment of the practitioner, which was closely bound up with the relevant misconduct, although it was not an impairment matter where there is a special statutory provision for confidentiality. That is not the case here.

[16] It is apparent from the cases that in the past the Tribunal has been reluctant to make a non-publication order, at least in the absence of clear evidence of real harm if one is not made. I can sympathise with the respondent and his wife and agree there is a risk that people will talk. But in the light of the authorities in this area, I do not consider the evidence justifies a non-publication order in this case. The respondent's application is, therefore, dismissed. In all of the circumstances, taking into account the content of the aggrieved's statement of facts and the joint submissions, and with the benefit of the advice of the assessors, I accept that what the applicant proposes is an appropriate sanction to impose, in the circumstances of this case.

[17] The orders of the Tribunal are, therefore,

1. the Tribunal decides that the respondent has behaved in the way of constituted professional misconduct
2. the Tribunal reprimands the respondent
3. the respondent's application is dismissed
4. the parties bear their own costs of this proceeding.