QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Health Ombudsman v Kong* [2020] QCAT 281
PARTIES:	**DIRECTOR OF PROCEEDINGS ON BEHALF OF THE HEALTH OMBUDSMAN** (applicant) **v** **COLIN KONG** (respondent)
APPLICATION NO/S:	OCR266-19
MATTER TYPE:	Occupational regulation matters
DATE OF DECISION:	15 July 2020
DATE OF REASONS:	4 August 2020
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	Judicial Member J Robertson Assisted by: Professor Roger Dooley Ms Katarina Fritzon Mrs Fiona Petty
ORDERS:	**1. Pursuant to s 107(2)(b)(iii) of the *Health Ombudsman Act* 2013 (Qld), the respondent has engaged in professional misconduct;** **2. Pursuant to s 107(3)(a) of the *Health Ombudsman Act* 2013 (Qld), the respondent is reprimanded;** **3. Pursuant to s 107(3)(b) of the *Health Ombudsman Act* 2013 (Qld), the following conditions marked as "A" and attached to this order are imposed on the respondent's registration; and** **4. Each party bear their own costs.**
CATCHWORDS:	PROFESSIONS AND TRADES – HEALTH CARE PROFESSIONALS – PSYCHOLOGISTS – where respondent engaged in fraud – where respondent admitted professional misconduct – whether the respondent should have conditions placed on his registration *Criminal Code Act* 1995 (Cth) s 134, s 135 *Health Ombudsman Act* 2013 (Qld) s 107

Health Practitioner National Law 2009 (Queensland)

Health Ombudsman v Hardy [2018] QCAT 416
Health Ombudsman v Mutasa [2019] QCAT 315
Medical Board of Australia v Dolar [2012] QCAT 271
Medical Board of Australia v Jansz [2011] VCAT 1026
Nursing and Midwifery Board of Australia v Armstrong [2018] QCAT 382
Pharmacy Board of Australia v Hopkinson (Review and Regulation) [2018] VCAT 982
Psychology Board of Australia v Nguyen (Occupational and Business Regulation) [2011] VCAT 2437

REPRESENTATION:

Applicant:	Director of Proceedings 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] These disciplinary proceedings were referred to the Tribunal by the applicant on 31 July 2019 pursuant to ss 103(1) (a) and 104 of the *Health Ombudsman Act* 2013 (the Act).

[2] At all relevant times, the respondent was registered under the *Health Practitioner National Law* 2009 (Qld) (the National Law), as a psychologist with the Psychology Board (the Board); under the National Law as a Chinese Medicine Practitioner with the Chinese Medicine Board of Australia; a health service provider within the meaning of s 8(a) (i) of the Act, being a health practitioner under the National Law; and subject to the registration standards, codes and guidelines developed by the Board as to what constitutes appropriate professional conduct.

[3] In hearing and deciding the matter, the Tribunal sits in its original jurisdiction pursuant to ss 9(2)(a) and 10(1)(b) of the *Queensland Civil and Administrative Tribunal Act* 2009 (the QCAT Act).

[4] The primary guiding principle of the Act is that the health and safety of the public is paramount.[1]

The conduct

[5] The conduct at the heart of these proceedings is not in dispute. The referral contains 2 allegations of fact.

[6] Allegation 1 relates to the respondent's appearance in the Richlands Magistrates Court on 27 August 2018 when he was legally represented by solicitor and pleaded guilty to 8 discrete offences, namely seven counts of obtaining financial advantage for himself pursuant to s 135.2(1) of the *Criminal Code Act* 1995 (Cth) (the Code)

[1]Section 4(1) of the Act

and one count of obtaining a financial advantage by deception pursuant to s 134.2(1) of the Code.

[7] In summary, the respondent practiced as a psychologist from rented rooms in Sunnybank on a number of days each week. As part of his practice he provided bulk-billed counselling services to patients under mental health plans for patients referred to him by general practitioners. He did all his own patient billing, using the Medicare Easyclaim system using an EFTPOS terminal at his rooms to process refunds for counselling services provided to patients.

[8] On various dates from 17 May 2013 to 13 August 2015, he submitted claims to Medicare in respect of 5 patients for counselling services that he had not provided. In relation to 2 of the patients, they were in fact not in Australia when he claimed to have provided counselling to them. In relation to one patient, because the respondent had falsely claimed for 5 sessions that had not been provided, he was unable to take advantage of the bulk billing with another practitioner.

[9] In all, a total of $5,172.80 was obtained by fraudulent means.

[10] The respondent was sentenced to 3 months imprisonment suspended immediately upon giving a recognizance in the sum of $1,000 conditioned that he be of good behaviour for a period of 3 years. Convictions were recorded. By the time of the court hearing, all funds had been repaid to Medicare.

[11] Allegation 2 relates to the failure of the respondent, contrary to ss 130(1) and 130(3)(a)(i) of the National Law to notify the Board within 7 days that on 24 May 2018, he had been charged with the 8 offences. It is common ground that he did not, but that he had consulted a solicitor for the first time on 4 June i.e. outside the 7-day period referred to in the National Law, and it was not until 10 August that notification was given. It appears that the respondent's solicitor was away for a number of weeks in that period and his solicitors have supplied the Office of the Health Ombudsman with an explanation in relation to the delay to which I will refer later.[2]

Characterisation of Conduct

[12] The applicant submits that the admitted conduct in allegation 1 amounts to professional misconduct as defined in s 5 of the National Law. The respondent is not legally represented in these proceedings. In his submission filed 2 May 2020, he accepts that his conduct is "very unprofessional behaviour".

[13] "Professional misconduct" is defined in s 5 as including:

> Unprofessional conduct by a 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.

[14] It is common ground that the respondent has been a registered psychologist with the Board since 9 December 2008. He has continued to practice until this day and his registration is current to 30 November 2020.

[15] In *Health Ombudsman v Mutasa*,[3] the Deputy President of QCAT his Honour Judge Allen QC wrote:

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2 Letter McGinness and Associates, dated 22 May 2019 at page 40 of Hearing Brief (HB).

4 [2019] QCAT 315 at [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.

[16] The relevant registration standards, Codes or guidelines promulgated by the Board as to appropriate professional standards and ethics for the profession are made relevant to the characterisation of the conduct by s 41 of the National Law.

[17] I accept the applicant's submission that the respondent's criminal conduct breaches a number of the Code of Ethics General Principles namely, that the welfare of client and the public, and the standing of the profession, take precedence over a psychologist's self-interest;[4] psychologists should act with probity and honesty in their conduct;[5] and psychologists are honest in their financial dealings;[6] to name just a few.

[18] In my opinion, the conduct is very serious. It involved protracted and deliberate dishonesty over a substantial period of time, and I infer that it was because of tip offs from other sources that the respondent's dishonesty was discovered. It is fraud that is very difficult to detect. The Medicare System is the bulwark of Australia's health system. It depends substantially on the honesty of health practitioners to operate effectively. Dishonesty of this kind is apt to bring the profession into dispute and is an impost ultimately on the whole community of taxpayers. The respondent's conduct involved a serious breach of trust and it did have negative consequences to at least one of his patients.

[19] The applicant has referred the Tribunal to a number of decisions in support of its submission that the conduct set out in allegation 1 amounts to professional misconduct.

[20] In *Pharmacy Board of Australia v Hopkinson (Review and Regulation)*,[7] the respondent pharmacist had defrauded the Pharmaceutical Benefits Scheme of $22,418.99. The Tribunal noted that the conduct involved serious criminal offences that were not isolated and were deliberate. Although the amount defrauded here is substantially less, the same observations could be made about the respondent's conduct.

[21] The applicant bears the onus of proving that the conduct amounts to professional misconduct. The standard is the civil standard governed by the principle set out in *Briginshaw v Briginshaw*.[8]

[22] I am satisfied that the conduct set out in allegation 1 amounts to professional misconduct.

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5 Principle B: Propriety.
6 Principle C: Integrity.
7 General Principle C.6.1.
8 [2018] VCAT 982.
8 (1938) 60 CLR 336 at [361].

Failure to notify

[23] As indicated earlier, it does appear that after getting legal advice and some further delay some of which was not due to the respondent, he did notify on 10 August 2018 which was beyond the seven day period from 24 May when he was served with the summons containing the 8 offences; however the breach of s 130 is clearly established. It is not clear that in not notifying he was acting recklessly or cynically,[9] rather it appears he simply did not understand his professional obligations and his lawyers did not act with alacrity in any event. I think the appropriate course is to follow the approach taken by the Tribunal in *Health Ombudsman v Hardy* [2018] QCAT 416 and regard the failure to notify as secondary to the criminal conduct, and treat it as an aggravation of the totality of the conduct rather than to make a separate finding in relation to allegation 2. Fairly, that is the approach contended for by the applicant.

Sanction

[24] Proceedings of this nature are protective in nature and not punitive.[10]

[25] *Medical Board of Australia v Jansz*,[11] is often cited as authority for a number of general propositions that are relevant to the issue of sanction. The relevant principles are set out in the applicant's submission[12] and I accept them. Importantly, as was observed in *Jansz*, the determination of disciplinary proceedings should in no sense be punitive, and "must not be framed in such a way or be constituted in such a way, or be so harsh as in reality to be punitive or retributive".[13]

[26] I have already referred to the seriousness of the conduct above. It is clearly relevant to the type of sanction to be imposed. It is clearly relevant to such issues as protection of the public, maintaining proper professional standards in the profession, general deterrence and, to a much lesser extent given the time that has elapsed since the offending conduct and now, personal deterrence.

[27] The personal circumstances of the respondent are also relevant. A psychologist's report was provided to the Magistrate and a copy is before the Tribunal. Like his Honour, I do not attribute much weight to the report. On the basis of one consultation, and only on the self-reporting of the respondent, he was diagnosed retrospectively with having suffered from a general anxiety disorder during the period of the offending. The consultation was in August 2018 and the offending period was from May 2013 to August 2015. There is no contemporary evidence e.g. from the respondent's general practitioner (if he had one), nor was the respondent's wife interviewed. It can be accepted that the respondent was very busy during this period both personally and professionally but there is no recent evidence of any steps taken by him to address the anxiety disorder apart from some changes in his practice and not bulk-billing patients.

[28] It is not disputed that he is both a Mandarin and Cantonese speaker and, as such, would be invaluable to patients from China who have migrated to Australia or are

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9 See *Nursing and Midwifery Board of Australia v Armstrong* [2018] QCAT 382.
10 *Medical Board of Australia v Dolar* [2012] QCAT 271 at [30].
11 [2011] VCAT 1026.
12 *Jansz* at [49].
13 *Jansz* at [366].

here under some form of resident visa. It is not disputed that most of his clients are Chinese and that many speak very little English.

[29] It is also relevant that he has continued to practice since the offending was brought to the attention of the regulators, and there have been no notifications during that period.

[30] He pleaded guilty to the charges and repaid Medicare before he appeared before the Magistrate. He has co-operated with these proceedings to the extent of joining in an agreed statement of facts, and I do not place too much weight on his qualified suggestion that his conduct did not amount to the more serious professional misconduct.

[31] The applicant seeks orders that he be sanctioned and suspended from practice for 3-6 months, and that when he resumes practice conditions as set out in the Schedule of Conditions,[14] be attached to his registration.

[32] It is marginally relevant that the respondent's registration as a Chinese Medical Practitioner has one previous notification, which involved a failure to advise the relevant body when he applied for renewal of his registration in 2016,that he had completed all required registration standards when an audit revealed he had not completed the full 20 hours of CPE required. In his submission, the respondent contends that this was the product of a misunderstanding and that he has completed the required professional development.

[33] The respondent has shown some insight into the serious nature of his conduct and has expressed remorse, but I agree with the applicant that:

(a) there is no independent evidence that he has undertaken any education or training on ethical practice and his professional obligations; and

(b) his expressions of remorse and insight primarily focus on the consequences to himself and his family.

[34] The applicant has referred the Tribunal to a number of decisions as guidance and in support of its primary submission as to sanction.

[35] The most relevant in my opinion, is *Psychology Board of Australia v Nguyen (Occupational and Business Regulation)*.[15]

[36] In that case, the respondent, a registered psychologist, defrauded two Victorian Statutory Agencies of over $64,000 over a period of in excess of 3 years in respect of 640 consultations that never took place. She pleaded guilty and was sentenced to a combination of orders including a community correction order. She had underlying health issues, and, by the time of the disciplinary proceedings she had addressed a number of these issues and had employed a supervisor to oversee her practice and was no longer involved in the billing side of the practice.

[37] The Tribunal took into account when deciding the sanction, that the respondent was one of the few Vietnamese speaking psychologists in Victoria with 90% of her clients Vietnamese and that she provided an important service to that community which could not easily be replaced. The Tribunal suspended her registration for 3

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14 Attached to the applicant's submission and containing 22 conditions.

15 [2011] VCAT 2437.

months, cautioned and reprimanded her, and imposed conditions which included practice supervision and further education.

[38] That case was objectively much more serious than the present, but the practitioner had done more than the respondent to address the issues behind her professional misconduct.

[39] I have also considered *Hopkinson*, to which reference is made earlier in these reasons. In my opinion it is a more serious case and does not have the feature common to this matter and *Nguyen* of the specialist language skills.

[40] In my opinion, the proper balance designed to protect the public in this case can be achieved by not suspending the respondent's registration, but rather imposing a reprimand (often referred to as a significant sanction for a health practitioner), and imposing the conditions set out in the Schedule. In this regard, I am fortified by the support of the assessors whose assistance I gratefully acknowledge.

[41] Therefore, the Tribunal orders as follows:

1. Pursuant to s 107(2)(b)(iii) of the *Health Ombudsman Act* 2013 (Qld), the respondent has engaged in professional misconduct;
2. Pursuant to s 107(3)(a) of the *Health Ombudsman Act* 2013 (Qld), the respondent is reprimanded;
3. Pursuant to s 107(3)(b) of the *Health Ombudsman Act* 2013 (Qld), the following conditions marked as "A" and attached to this order are imposed on the respondent's registration; and
4. Each party bear their own costs.