QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Medical Board of Australia v McCombe* [2020] QCAT 511
PARTIES:	**MEDICAL BOARD OF AUSTRALIA** (applicant) **v** **CRAIG MCCOMBE** (respondent)
APPLICATION NO/S:	OCR049-20
MATTER TYPE:	Occupational regulation matters
DELIVERED ON:	9 December 2020(*Ex Tempore*)
HEARING DATE:	11 November 2020
HEARD AT:	Brisbane
DECISION OF:	Judicial Member J Robertson Assisted by: Dr Bavahuna Manoharan Professor David Morgan OAM Mrs Gyl Stacey
ORDERS:	**1. The respondent has engaged in professional misconduct.** **2. The respondent is reprimanded.** **3. That conditions imposed on the respondent's registration be as per paragraphs 1 to 5 inclusive and 13 to 16 inclusive of the draft conditions proposed by the Board.** **4. Pursuant to section 196(3) of the National Law, the review period for the conditions be 12 months.** **5. That pursuant to section 127(3)(b) of the National Law, subdivision 2 applies to the conditions imposed.** **6. Each party to bear their own costs of the proceedings.**
CATCHWORDS:	PROFESSIONS AND TRADES – HEALTH CARE PROFESSIONALS – MEDICAL PRACTITIONERS – DISCIPLINARY PROCEEDINGS – PROFESSIONAL MISCONDUCT AND UNPROFESSIONAL CONDUCT – referral by applicant – whether inappropriate prescription of performance enhancing and mitigation medications

amounts to professional misconduct – where respondent remorseful and has actively demonstrated insight through educational programs

Health Practitioner Regulation National Law (Queensland) s 196
Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 32

Health Ombudsman v Dalziel [2017] QCAT 442
Health Ombudsman v Masamba [2019] QCAT 227
Health Ombudsman v Passmore [2020] QCAT 92
Medical Board of Australia v Grant [2012] QCAT 285
Medical Board of Australia v Martin [2013] QCAT 376
Medical Board of Australia v Tunbridge [2020] SACT 34
Wakelin v Psychology Board of Australia [2017] QCAT 89

APPEARANCES & REPRESENTATION:

Applicant: Clayton Utz

Respondent: Avant Law

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), with both parties given further opportunity to make submissions on sanction.

REASONS FOR DECISION

[1] The Medical Board of Australia (the Board) has referred this matter to the Tribunal pursuant to the *Health Practitioner Regulation National Law* (Queensland) (the National Law). At all material times the respondent was registered as a medical practitioner with the Board. He holds Bachelors of Medicine and Surgery from the University of Queensland awarded in 1996, and has been a fellow of the Royal College of General Practitioners since 2003.

[2] The parties, through experienced legal advisers, have essentially agreed as to the conduct referred to in the Board's amended referral filed on 24 June 2020, and how that conduct should be characterised under the National Law. The parties have also reached agreement to a significant degree in relation to sanction; the only departure being in relation to the length of any suspension of the respondent's registration;[1] and the number of conditions to be imposed on his registration. To the extent that the parties have agreed as to the relevant conduct, its characterisation, and sanction, it is accepted that the Tribunal would not depart from that agreed position unless it is clearly wrong, or in relation to sanction outside the proper disciplinary response in the circumstances of the particular case.[2]

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1 Section 196(2)(d) of the National Law.

2 *Health Ombudsman v Passmore* [2020] QCAT 92 at [30]; *Health Ombudsman v Masamba* [2019] QCAT 227 at [31]; *Medical Board of Australia v Martin* [2013] QCAT 376 [91]-[93].

[3] In this case, as will be apparent in the reasons, the Tribunal has decided (contrary to the submission of both parties) not to impose any suspension on the respondent's registration as part of the orders by way of sanction. The Tribunal, at the on the papers hearing on 11 November 2020, invited the parties to make further submissions in the light of the Tribunal's then preliminary intimation that it did not think that a suspension was necessary, essentially because of the quite exceptional steps taken by the respondent to address to the underlying causes of his admitted misconduct.

[4] Given that the Tribunal's jurisdiction is protective and not punitive – as Professor Morgan intimated to me and the other panel Members in our pre-hearing discussions – a short suspension, after such a long period of exceptional conduct and good practice, is not only apt to be punitive, but also it could unfairly alter the course of the respondent's rehabilitation which has been undertaken by him at his own expense and on his own initiative, and tends therefore to undermine the protective nature of the Tribunal's response. I respectfully agree with Professor Morgan and the other assessors who agreed with his position.

[5] In addition, in my opinion, a short period of suspension, in the quite exceptional circumstances of this case, would have the tendency to discourage other health practitioners from diligently addressing the underlying causes of their behaviour, when misconduct is proved, which is contrary to the principle of general deterrence. Quite reasonably, the Board's solicitor sought time to take instructions from their client and the hearing was adjourned until today to enable them to do that. They have advised the Tribunal that they do not wish to add to their submissions already filed. On 11 November 2020, the respondent's solicitor, not surprisingly, informed the Tribunal that it had no further submissions to make.

The Relevant Conduct

[6] There are two allegations in the amended referral which are interrelated. The first relates to the inappropriate prescribing of performance enhancing and mitigation medications relating to body building to nine patients (seven male, two female; aged between 21 and 38 years) over a period of 7.5 years. In relation to the relevant consultations with these patients, allegation 2 relates to inappropriate clinical record keeping and documentation.

[7] An analysis of the particulars set out in the amended application accepted by the respondent, is instructive as to the issue of frequency of such behaviour both generally and in relation to particular patients. Predominantly, the inappropriate prescribing occurred in the years 2016 to 2018. In respect of one patient,[3] there was a prescription for Arimidex in early 2011. The next inappropriate prescription for that patient was in 2017. Arimidex is ordinarily prescribed as a treatment for breast cancer, but is known to be taken by bodybuilders to reduce the side effects of anabolic steroids. The drug lowers estrogen levels in the body. In relation to another patient,[4] there were two prescriptions for Tamoxifen in 2012 and 2015, which is another breast cancer medication which is used by bodybuilders to inhibit estrogen and increase testosterone.

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3 Amended Application 4(g)(i), Tab 1 Hearing Brief (HB).

4 Amended Application 4(g)(i) and (ii) HB.

[8] Although the Tribunal does not have the initial letter of complaint to the respondent dated 13 December 2018, we do have his lawyer's response, dated 17 December 2018.[5] It is clear that at that stage, the Australian Health Practitioner Regulation Agency (AHPRA) was investigating complaints in relation to two patients only. At that first opportunity, although the respondent did not refer to the remaining patient, he made what I regard as full and frank admissions of misconduct by stating in his response which he signed:

> I acknowledge that in the period leading up to the receipt of AHPRA's correspondence, I had engaged in inappropriate prescribing practices over a period of years, by prescribing medications to patients for bodybuilding purposes.

[9] AHPRA engaged Associate Professor Alistair Vickery to provide expert opinion evidence both in relation to the respondent's prescribing practices and also his record keeping. As Doctor Vickery notes in his first report dated 25 May 2019,[6] the respondent's clinical records did record that the patients were bodybuilders, and that most indicate that the patients were at the time illegally using illegally-obtained muscle enhancing agent.

[10] In his first response, and since, the respondent, although accepting that his conduct was inappropriate, has maintained that he was attempting by his prescribing as he did to assist abstinence by alleviating symptoms using pharmacological intervention. Associate Professor Vickery opines (and his opinion is not disputed by the respondent):

> Doctor McCombe, however, did not provide sufficient clinical record suggesting he was providing such a rationale and his CV does not demonstrate sufficient expertise to provide a competent withdrawal regime. Further, these patients treated by Doctor McCombe were prescribed these agents for more than 12 months without reduction in dosage, although the clinical notes reflect that Doctor McCombe was encouraging abstinence…
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> Although there is a clinical indication for a prescription of such medications, Doctor McCombe did not provide sufficient clinical record, follow up or demonstrated expertise to prescribe such medication to the patients listed.

Characterisation of the Conduct

[11] The Board has the responsibility of proving professional misconduct and/or unprofessional conduct to the standard prescribed in *Briginshaw v Briginshaw*.[7] The admissions made by the respondent from early on in the investigation by the regulator, and his acceptance of Associate Professor Vickery's opinion, and his acceptance of the proper characterisation of the conduct through his referral response filed on his behalf by his experienced lawyers, are all relevant to the Tribunal's decision in this regard.

[12] The Code of Conduct for Doctors in Australia[8] is admissible as evidence of what constitutes appropriate professional conduct or practice by the health profession.[9] By

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5 Tab 3 HB, Page 21.
6 Tab 3 HB, Page 39.
7 (1938) 60 CLR 336.
8 Tab 3 HB, Page 84.
9 Section 41 of the National Law.

his own admissions, the respondent's conduct breached a number of the sections of that Code.

[13] The respondents' lawyers have helpfully gathered for the Tribunal's assistance cases involving inappropriate prescribing of anabolic steroids and performance enhancing and masking medications from this and other Australian jurisdictions.

[14] In the opinion of the Tribunal, *Medical Board of Australia v Grant* [2012] QCAT 285 is probably the most comparable case, although the sanction imposed there is not one now available to the Tribunal. In a practical sense, it did not involve any period of actual suspension. It was an unusual case in which the Tribunal departed from the joint approach of both parties maintained throughout, both as to characterisation and sanctions.

[15] Doctor Grant had practiced as a GP (and also a member of the College) since 1985. In my opinion his conduct was more serious than the conduct of the respondent here as there were 14 patients involved; 11 were prescribed steroids in circumstances in which Doctor Grant was relying on bodybuilding magazines for professional guidance, rather than sources of professional guidance; and accepted as appropriate by experts in the field; and knew that the treatment had no therapeutic purpose, and that it would have been know that he was a doctor willing to prescribe steroids for a non-therapeutic purpose. The period of misconduct was also longer (nine years), and Doctor Grant made no effort at all to discourage patients from using these dangerous drugs, whereas the respondent, as his records indicate, did attempt to discourage a number of them. At one point, a pharmacist intervened in an attempt to stop Doctor Grant's inappropriate prescribing, but this was not effective. Doctor Grant cooperated fully with the regulator and the disciplinary process. He was found to have engaged in professional misconduct.

[16] Clearly the conduct admitted here, either in relation to ground 1 on its own, or when viewed globally in relation to ground 1 and 2, is conduct that is unprofessional and substantially below the standard reasonably expected of a registered health practitioner of an equivalent level of training or experience. It follows that the Tribunal finds that the respondent has behaved in a manner that constitutes professional misconduct.

Sanction

[17] The purpose of these proceedings is protective and not punitive. The guiding principle is that the health and safety of the public is paramount. It is appropriately accepted by the Board that the respondent is deeply remorseful, and, by his own conduct since first being contacted by the regulator, has taken significant steps to address the underlying causes of his misconduct, and has shown that he has developed considerable insight.

[18] At his own expense, he engaged Associate Professor Harold Jacobs, an accepted expert in the field of general practitioner education and training, and an accredited surveyor of Australian general practices since 1998, during which time he has visited and/or audited over 780 practices. Dr Jacobs conducted a number of audits of the respondent's practice on a random basis.

[19] Doctor Jacobs has provided three reports; 8 April 2020 (audit conducted that day) and covering the period 23 March 2020 to 28 March 2020, selected at random; 14 July 2020 (covering a period 6 July 2020 to 10 July 2020); and 11 August 2020, which involved four hour long case discussion sessions with the respondent. These

reports are progressively very supportive, indicating the respondent has appropriately reflected on his prescribing patterns and practices and record keeping, and indicates significant insight into the causes of his professional misconduct.

[20] He has also at his own expense undertaken an education plan, "Appropriate prescribing for GPs", (with a specific focus on steroid prescribing), with Doctor Wendy McIntosh from Davaar Consultancy Training and Development, who the Board acknowledges as a highly respected expert in this field. Doctor McIntosh has provided two reports dated 15 April 2020, and 2 August 2020 which satisfy the Tribunal that the respondent has gained commendable understanding of prescribing practices and appropriate record keeping, and of the relevantly applicable provisions of the Conduct Codes relating to ethical professional behaviour.

[21] The respondent has undertaken the following further education:

(a) December 2018; eight separate modules as part of a risk education plan formulated by his professional indemnity insurance (Avant) addressing the following issues:

(i) communications strategies for challenging patient behaviours;

(ii) managing unrealistic patient expectations;

(iii) prescribing: principles and practices – Avant online;

(iv) webinar: prescribing perils;

(v) Avant: identifying drug seekers and doctor shopping behaviours;

(vi) warning for doctors prescribing compounded peptides;

(vii) off-label prescribing; and

(viii) reflective writing.

(b) March/April 2020; 10 hours of education undertaken with Davaar Consulting (to which earlier reference is made).

[22] The Board's contention for a six-month period of suspension is predicated on an argument that in cases like this, general deterrence is a significant principle in play in relation to the Tribunal's role of protecting the public by imposing a sanction that is apt to discourage other doctors from engaging in such conduct, and also is apt to uphold the high degree of public confidence in the medical profession which in itself is amenable to being undermined if sanctions are considered inappropriately merciful.

[23] The Tribunal agrees that the respondent's conduct was objectively serious. It did pose some minimal risk to the patients he was treating, although no actual harm is alleged. The period of 7.5 years has to be read down in light of previous observations in which the more relevant period is closer to three years because the earlier inappropriate prescribing was very isolated. The number of patients is clearly relevant; however, by far the greatest number of impugned acts of prescribing occurred in relation to four of those patients in the 2015 to 2018 period, with the major concentration being in the period 2016 to 2018.

[24] In support of its position both for a longer period of suspension and for additional conditions, the Board focusses on three decisions. The first is *Grant*, which the

Board submits is the most accurate comparable decision. For the reasons I have articulated earlier, I regard this as the most comparable case, but more serious (and significantly so) than this case.

[25] *Health Ombudsman v Dalziel* [2017] QCAT 442, involved a pharmacist who supplied two people over a two year period with Schedule 4 restricted drugs; predominantly steroids and associated agents without a prescription, with a retail value of approximately $8,500; and falsified records to suggest that the drugs were dispensed with a valid prescription. In this case, the Tribunal again departed from the joint position of the parties which involved a three-month suspension of the respondent's registration, a $15,000 fine, conditions and costs; by instead opting for a one-month suspension and conditions. I agree with the respondent that this case is not of much assistance however, as in effect, Mr Dalziel had unlawfully supplied Schedule 4 drugs and dishonestly falsified records. It is not alleged that the respondent in this case engaged in any dishonest or even unlawful conduct.

[26] The other case relied upon by the Board is *Medical Board of Australia v Tunbridge* [2020] SACT 34, which involved a doctor inappropriately providing steroids and masking medications for eight years, who had allowed his registration to lapse at the time of the Tribunal hearing. His misconduct involved 20 patients, and involved prescribing medications including at least one that was regarded professionally as experimental. Although he had participated in presenting an agreed statement of facts before the Tribunal, there was no evidence of insight or that he had done anything to satisfy the Tribunal that he could be trusted to practice in a safe manner. He was reprimanded and banned from applying for registration for a period of two years. In the opinion of the Tribunal, that case is also more serious than the present case.

[27] I agree with the respondent that although general deterrence is important, the factors in this case, including the exceptional efforts made by the respondent to demonstrate his remorse and insight, are very important, particularly when considering the protection of the public and any ongoing risk. In my opinion, all these factors can be balanced in this case by imposing a reprimand and imposing conditions which take into account the educational programs and auditing that the respondent has already undertaken.

[28] Given the actions taken already by the respondent, and the very positive opinions expressed by experts as to his understanding of proper practice, it is unnecessary in my opinion, in order to protect the public, to impose the supervision and audit conditions contended before the Board set out in 6-12 of the draft conditions annexed to the Board submissions document. It is also appropriate to make an order pursuant to section 127(3)(b) of the National Law applying subdivision 2 of the National Law to the conditions imposed by the Tribunal.

[29] The parties agree that a review period of 12 months should apply. At the end of that review period the Board should be in a position to consider whether the respondent has complied with those conditions and remove them without the parties needing to come back to the Tribunal. As noted in *Wakelin v Psychology Board of Australia* [2017] QCAT 89, it is a Board that monitors compliance with conditions, and it is the Board that is better placed than the Tribunal to conduct that review.

[30] In the circumstances the orders of the Tribunal are as follows:

1. The respondent has engaged in professional misconduct.

2. The respondent is reprimanded.

3. That conditions imposed on the respondent's registration be as per paragraphs 1 to 5 inclusive and 13 to 16 inclusive of the draft conditions proposed by the Board.

4. Pursuant to section 196(3) of the National Law, the review period for the conditions be 12 months.

5. That pursuant to section 127(3)(b) of the National Law, subdivision 2 applies to the conditions imposed.

6. Each party to bear their own costs of the proceedings.