

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Health Ombudsman v CSM* [2020] QCAT 55

PARTIES: **HEALTH OMBUDSMAN**
(applicant)

v

CSM
(respondent)

APPLICATION NO/S: OCR046-19

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 12 February 2020 (*ex tempore*)

HEARING DATE: 12 February 2020

HEARD AT: Brisbane

DECISION OF: Judge Allen QC, Deputy President
Assisted by:
Ms Amara Bains
Ms Mary Barnett
Mr Stephen Lewis

ORDERS:

- 1. Pursuant to s 107(2)(b)(ii) of the *Health Ombudsman Act 2013 (Qld)*, the Tribunal decides that the respondent has behaved in a way that constitutes professional misconduct.**
- 2. Pursuant to s 107(3)(a) of the *Health Ombudsman Act 2013 (Qld)*, the respondent is reprimanded.**
- 3. Each party must bear the party's own costs for the proceeding.**
- 4. Until further order, pursuant to s 66(1) of the *Queensland Civil and Administrative Tribunal Act 2009 (Qld)*, publication of:**
 - (a) the contents of a document or thing filed in or produced to the tribunal;**
 - (b) evidence given before the tribunal; and**
 - (c) any order made or reasons given by the tribunal,**

is prohibited to the extent that it could identify the respondent save as is necessary for the Office of the Health Ombudsman to provide information to the Australian Health Practitioner Regulation

Agency in the exercise of the Health Ombudsman's functions under the *Health Ombudsman Act 2013 (Qld)*.

CATCHWORDS: PROFESSIONS AND TRADES – HEALTH CARE PROFESSIONALS – NURSES – DISCIPLINARY PROCEEDINGS – where the respondent was an endorsed enrolled nurse – where the respondent stole drugs from her place of employment – where the respondent pleaded guilty to one count of stealing as a servant and one count of unlawful possession of restricted drugs – whether such conduct should be characterised as professional misconduct – what sanction should be imposed for professional misconduct – whether a non-publication order should be made prohibiting identification of the respondent

Health Ombudsman Act 2013 (Qld), s 103, s 104, s 107

Health Practitioner Regulation National Law (Queensland), s 5

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 66

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] The Director of Proceedings, on behalf of the Health Ombudsman, (“the applicant”) has referred these disciplinary proceedings against CSM (“the respondent”) to the Tribunal pursuant to s 103(1)(a) and s 104 of the *Health Ombudsman Act 2013 (Qld)*.
- [2] The applicant seeks a finding that the respondent has behaved in a way that constitutes professional misconduct and, by way of sanction, that the respondent be reprimanded.
- [3] The respondent has been served with the applicant’s referral, correspondence and supporting documentation but has not chosen to engage in these proceedings.
- [4] The respondent is a 30 year old former endorsed enrolled nurse. She held registration as an endorsed enrolled nurse from 2008 until 31 May 2018 when she failed to renew her registration. Her registration subsequently lapsed on 7 July

2018. The respondent has remained unregistered to date and has advised the Office of the Health Ombudsman she does not intend to return to any career in health care.
- [5] It should be noted that the involvement of the Office of the Health Ombudsman in this matter arose by way of the respondent self-notifying to that office on 30 May 2018.
- [6] On 29 May 2018 police executed a search warrant at the respondent's residence in relation to an allegation that vials of Fentanyl had been stolen from the hospital where the respondent was employed.
- [7] During the search of the respondent's residence police located syringes, needles, broken vials labelled Diazepam and Serenone, and unlabelled broken vials. A box of Toradol ampoules were labelled in another person's name. Four empty boxes of Tramadol were located in a kitchen bin.
- [8] During the police search the respondent admitted to taking the property from the storage cupboard at the hospital without permission.
- [9] There is no evidence that the respondent's conduct, in fact, deprived any patients of their treatment or pain management.
- [10] On 22 June 2018 the respondent appeared in the Magistrates Court and pleaded guilty to one count of stealing as a servant and one count of unlawful possession of restricted drugs. The respondent was sentenced to 10 months' probation with a condition for psychological and/or psychiatric treatment as directed. No convictions were recorded.
- [11] The applicant submits that the respondent's criminal offending amounts to professional misconduct as defined in s 5 of the *Health Practitioner Regulation National Law (Queensland)* ("National Law").
- [12] Such conduct clearly falls substantially below the standard reasonably expected of a registered enrolled nurse of the respondent's level of training and experience. It quite clearly falls within limbs (a) and (c) of the definition of "professional misconduct" in s 5 of the National Law. The Tribunal decides that the respondent has behaved in a way that constitutes professional misconduct.
- [13] With respect to the matter of sanction, the purposes of sanction are protective, not punitive. Protection of the public may include sending a message to members of the profession and members of the public that such conduct will not be tolerated. The finding of professional misconduct and a reprimand will serve such purpose in the circumstances of this case.
- [14] The applicant accepts that there are mitigating circumstances in this matter which mean that no further sanction by way of any preclusion from practice is appropriate.
- [15] At the time of the conduct, the respondent was suffering a significant mental illness. During the course of May 2018 she was referred by her general practitioner to a psychiatrist for management of a mood disorder after suffering depression, anxiety, hallucinations, trouble sleeping and poor appetite and having attempted suicide in February and May 2018.

- [16] During May 2018 the respondent attended an acute care team outpatient mental health clinic at a public hospital in relation to a depressive episode with psychosis and risk of strangulation and suicide. In May 2018 the respondent consulted with a psychiatrist who prescribed medication for treatment.
- [17] The applicant concedes that the respondent's non-engagement with these proceedings may, at least partly, be explicable because of ongoing mental health issues.
- [18] Further mitigating factors include the respondent's self-notification, referred to earlier, that she has already been precluded, as a consequence of her conduct, from the profession of nursing for a period of about 18 months, and her early pleas of guilty to the criminal offences. The respondent's subsequent engagement with the probation order was appropriate, with the respondent attending upon a psychiatrist and also receiving outpatient treatment from an alcohol and drug service.
- [19] In circumstances where the respondent is no longer registered, the protective purposes of sanction would not require any further preclusion from practice. If the respondent was, in the future, to apply for reregistration, she would be required to satisfy the Nursing and Midwifery Board of her fitness to practise prior to re-entering the profession. The Board would be in a position to properly manage any future risk that the respondent may pose through appropriate health assessments and the imposition of conditions.
- [20] In all the circumstances, the Tribunal accepts the submissions on behalf of the applicant that an appropriate order for sanction is one of a reprimand.
- [21] Ordinarily, the desired deterrent effect of a reprimand would be frustrated if the reprimand is accompanied by a non-publication order preventing publication of the identity of a practitioner. However, there are particular circumstances in this matter that lead the Tribunal to make orders pursuant to s 66 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ("QCAT Act") preventing publication of any matters that would identify the respondent.
- [22] The conduct the subject of the referral was inextricably linked with the circumstances of the respondent's mental illness. It was necessary, so as to put the conduct in context, that such medical issues were discussed in these reasons. There is no public interest in publication of the respondent's identity in circumstances where the conduct was related to the respondent's mental illness and she, very soon after the police search, self-notified to the Office of the Health Ombudsman. The interests of the justice do tend towards making an exception to the general rule favouring open justice.
- [23] Furthermore, the applicant has conceded that the respondent's non-engagement in these proceedings may be because of ongoing health issues. Given the material that is before the Tribunal as to the severity of the respondent's mental illness in 2018, including attempts at suicide, the Tribunal is concerned as to whether publication of the respondent's identity, whilst serving no obvious public interest, might impact adversely upon her mental health. In those circumstances, the Tribunal will make a non-publication order pursuant to s 66 of the QCAT Act.

[24] The applicant has not sought any order as to costs and that should be reflected in the orders of the Tribunal.

[25] Accordingly, the Tribunal orders as follows:

1. Pursuant to s 107(2)(b)(ii) of the *Health Ombudsman Act 2013* (Qld), the Tribunal decides that the respondent has behaved in a way that constitutes professional misconduct.
2. Pursuant to s 107(3)(a) of the *Health Ombudsman Act 2013* (Qld), the respondent is reprimanded.
3. Each party must bear the party's own costs for the proceeding.
4. Until further order, pursuant to s 66(1) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld), publication of:
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is prohibited to the extent that it could identify the respondent save as is necessary for the Office of the Health Ombudsman to provide information to the Australian Health Practitioner Regulation Agency in the exercise of the Health Ombudsman's functions under the *Health Ombudsman Act 2013* (Qld).