

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Health Ombudsman v Tu* [2020] QCAT 91

PARTIES: **HEALTH OMBUDSMAN**
(applicant)

v

DENNIS TU
(respondent)

APPLICATION NO/S: OCR097-19

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 19 February 2020 (*ex tempore*)

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Judge Allen QC, Deputy President
Assisted by:
Ms Mary Barnett,
Ms Jennifer Felton
Dr Anthony Tuckett

ORDERS:

- 1. In relation to Allegations 1, 2 and 4, pursuant to s 107(2)(b)(iii) of the *Health Ombudsman Act 2013 (Qld)*, the Tribunal decides that the respondent has behaved in a way that constitutes professional misconduct.**
- 2. In relation to Allegation 3, 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 unprofessional conduct.**
- 3. Pursuant to s 107(4)(a) of the *Health Ombudsman Act 2013 (Qld)*, the Tribunal disqualifies the respondent from applying for registration as a registered health practitioner for a period of two years.**
- 4. No order as to costs.**

CATCHWORDS: PROFESSIONS AND TRADES – HEALTH CARE PROFESSIONALS – NURSES – DISCIPLINARY PROCEEDINGS – where the respondent was a enrolled nurse – where the respondent committed criminal offences of stealing as a servant and possessing dangerous drugs – where the respondent pleaded guilty to the

offences in the Magistrates Court and the Supreme Court – whether such conduct should be characterised as professional misconduct – where the respondent contravened s 130 of the *Health Practitioner Regulation National Law* by failing to notify the Nursing & Midwifery Board within 7 days of relevant events – whether such conduct should be characterised as unprofessional conduct – what sanction should be imposed for professional misconduct and unprofessional conduct

Health Practitioner Regulation National Law
(Queensland), s 130

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

Health Ombudsman v Sabo [2019] QCAT 256

Nursing and Midwifery Board of Australia v Morey
[2017] QCAT 249

Health Care Complaints Commission v Ashford [2015]
NSW CATOD 15

Health Ombudsman v Henson [2020] QCAT 72

APPEARANCES & REPRESENTATION: 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 referral of a health service complaint against Dennis Tu (“the respondent”), pursuant to s 103(1)(a) and s 104 of the *Health Ombudsman Act 2013* (Qld) (“HO Act”), by the Director of Proceedings on behalf of the Health Ombudsman (“the applicant”).
- [2] The respondent is a 27-year-old former enrolled nurse. He was registered from October 2013 until 28 February 2019, when his registration lapsed upon his failure to apply for its renewal. The conduct the subject of the referral occurred between 2015 and 2018, when the respondent was aged between 22 and 25 years. The referral contains four “Allegations”.
- [3] Allegation 1 relates to the respondent’s conviction of criminal offences in the Magistrates Court on 5 May 2016. On that day the respondent pleaded guilty to three offences, namely, one count of possession of a dangerous drug between 29 October 2014 and 19 December 2014, one count of stealing as a servant on 25 July 2015, and one count of possessing a dangerous drug on 25 July 2015. The offences committed on 25 July 2015 related to the respondent stealing a vial of diazepam from the hospital where he was then working. The respondent was sentenced to 12 months’ probation and no convictions were recorded.

- [4] Allegation 2 is an alleged breach of s 130(3)(a)(ii) of the *Health Practitioner Regulation National Law* (Queensland). Pursuant to that provision, the respondent was required to notify the Nursing and Midwifery Board of Australia of the fact that he had been the subject of a finding of guilt for offences punishable by imprisonment within seven days of his court appearance on 5 May 2016. The respondent failed to provide such notice within the prescribed period, and did not disclose such matter when he submitted an application to renew his nursing registration on 31 May 2016.
- [5] Allegation 3 alleges misappropriation of hospital medication and equipment. The respondent was contracted through a nursing agency to work a night shift at a hospital over the night of 16 June to 17 June 2017. Observations of the respondent's behaviour by other staff led to the respondent's bag being searched and items located. The respondent, when questioned, admitted to stealing syringes and medication. The respondent later wrote a letter of apology to the nursing agency and resigned from his position.
- [6] Allegation 4 relates to the respondent's conviction in the Supreme Court of an offence of possession of a dangerous drug, namely, methylamphetamine, in a quantity exceeding two grams. The circumstances of that offence were somewhat unusual, in that the offence was brought to the attention of police when the respondent, undoubtedly under the influence of methylamphetamine, drove a motor vehicle erratically into the car park of the Capalaba Police Station, ran to the side entrance of the station, where he was met by police officers, and threw a clip seal bag containing 3.4 grams of methylamphetamine at the feet of the police officers. A search of the respondent's motor vehicle revealed two more clip seal bags, one of which contained 1.171 grams of methylamphetamine. The respondent was sentenced to 12 months imprisonment, with an immediate parole release order.
- [7] The applicant submits that the conduct the subject of Allegations 1, 2 and 4 should be characterised as professional misconduct. The applicant submits in relation to Allegation 3 that the respondent's failure to report his criminal convictions would normally constitute unprofessional conduct but that the Tribunal may adopt an approach whereby such conduct is treated secondary to the primary misconduct and as an aggravation of the totality of the conduct, which should be characterised as professional misconduct.
- [8] The respondent has not engaged with the Tribunal proceedings.
- [9] The Tribunal is satisfied that all the conduct the subject of Allegations 1 to 4 is established to the satisfaction of the Tribunal.
- [10] The Tribunal decides, in relation to Allegations 1, 2 and 4, that the respondent has behaved in a way that constitutes professional misconduct.
- [11] For the reasons expressed in *Health Ombudsman v Henson* [2020] QCAT 72, a separate finding of unprofessional conduct should be made in relation to Allegation 3. In relation to Allegation 3, the Tribunal decides that the practitioner has behaved in a way that constitutes unprofessional conduct.

- [12] With respect to the matter of sanction, the purposes of disciplinary proceedings and sanction are protective, not punitive, with the paramount consideration being the health and safety of the public. The protective purposes of sanction include maintenance of professional standards and public trust and confidence in the profession. Considerations of general and personal deterrence become relevant in that context.
- [13] The Office of the Health Ombudsman commenced an investigation into the respondent's conduct on 8 March 2018, following notification by police of the respondent having been charged with drug offences. On 9 March 2018 the Office of the Health Ombudsman referred the respondent to the Australian Health Practitioner Regulation Agency which commenced an investigation into the question of whether the respondent had an impairment.
- [14] On 27 March 2018 the Nursing and Midwifery Board of Australia suspended the respondent from practising as a nurse.
- [15] The respondent failed to engage with the regulatory agencies, including failing to attend health assessments. On 20 December 2018 the Nursing and Midwifery Board imposed a condition on the respondent's registration that he could not practise as a nurse, with such condition to be reviewed in six months. As mentioned earlier, the respondent's registration lapsed on 28 February 2019, following his failure to apply for renewal of his registration.
- [16] On 29 March 2019 the applicant filed the referral in the Tribunal. Despite having been served with the applicant's referral, correspondence and supporting documentation, the respondent has chosen not to engage in these proceedings.
- [17] The applicant acknowledges that the respondent displayed some initial insight and remorse by self-notification to the Office of the Health Ombudsman of the criminal charges the subject of Allegation 1, correspondence to his hospital managers, in which he admitted culpability and expressed his remorse, and by his cooperation with the administration of justice by timely pleas of guilty in the criminal proceedings. On the other hand, the respondent's failure to engage with regulatory authorities, including in the proceedings before the Tribunal, casts some doubt on his current insight into the responsibilities of professionals and the role played by regulatory bodies in upholding the standards of the profession and protecting the public.
- [18] The applicant has referred to decisions of *Health Ombudsman v Sabo* [2019] QCAT 256, *Nursing and Midwifery Board of Australia v Morey* [2017] QCAT 249, and *Health Care Complaints Commission v Ashford* [2015] NSW CATOD 15. The applicant submits that the respondent should be disqualified from applying for registration as a health practitioner for a period of two years, after taking into account the circumstances that the respondent does not appear to have had any employment as a nurse since June 2017, and was suspended from practice for a period of 11 months prior to his registration lapsing upon non-renewal.
- [19] The respondent's misconduct was serious and has the potential to undermine public confidence in the profession. Maintenance of professional standards and public

confidence in the profession requires an order for sanction that adequately expresses the denunciation of the Tribunal for such behaviour. In those circumstances, the Tribunal accepts the submission on behalf of the applicant that such a period of further preclusion from practice is required to meet the protective purposes of sanction.

[20] The applicant does not seek any order for costs, and that should be reflected in the orders of the Tribunal.

[21] Accordingly, the Tribunal orders:

1. In relation to Allegations 1, 2 and 4, pursuant to s 107(2)(b)(iii) of the *Health Ombudsman Act 2013* (Qld), the Tribunal decides that the respondent has behaved in a way that constitutes professional misconduct.
2. In relation to Allegation 3, 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 unprofessional conduct.
3. Pursuant to s 107(4)(a) of the *Health Ombudsman Act 2013* (Qld), the Tribunal disqualifies the respondent from applying for registration as a registered health practitioner for a period of two years.
4. No order as to costs.