QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Health Ombudsman v Fletcher (No 2)* [2021] QCAT 241
PARTIES:	**DIRECTOR OF PROCEEDINGS ON BEHALF OF THE HEALTH OMBUDSMAN** (applicant) **v** **BELINDA LEANNE FLETCHER** (respondent)
APPLICATION NO/S:	OCR317-18
MATTER TYPE:	Occupational regulation matters
DELIVERED ON:	19 July 2021
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	Judicial Member D J McGill SC Assisted by: Ms Laura Dyer Dr Kim Forrester Mr Paul Murdoch
ORDERS:	**Order that the respondent pay part of the costs of the applicant of and incidental to this proceeding, fixed in the sum of $5,000, such sum to be paid within twenty-eight days from the date of this decision.**
CATCHWORDS:	ADMINISTRATIVE LAW – ADMINISTRATIVE TRIBUNALS – QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL – COSTS – regulation of health service providers – referral of disciplinary proceeding - application resisted but successful – approach to costs – whether the interests of justice require an order for costs – whether aspects of respondent's resistance unreasonable – order for fixed, limited costs made. *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) s 102 *Health Ombudsman v Antley* [2016] QCAT 472 *Health Ombudsman v Raynor (No 2)* [2021] QCAT 128 *Marzini v Health Ombudsman (No 4)* [2020] QCAT 365 *Medical Board of Australia v Panda* [2019] WASAT 104 *Tamawood Ltd v Paans* [2005] 2 Qd R 101

APPEARANCES &
REPRESENTATION:

Applicant:	A R Forbes of Turks Legal
Respondent:	S Robb, instructed by Robert & Kane
	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 was a referral by the applicant of disciplinary proceedings against the respondent under the *Health Ombudsman Act* 2013 s 103(1)(a), s 104. The respondent was at the relevant time a registered nurse, and the applicant alleged that the respondent engaged in professional misconduct in certain respects. On 19 January 2021 the Tribunal found that, in a number of respects, the conduct of the respondent amounted collectively to professional misconduct: [2021] QCAT 4. The respondent was reprimanded, her registration as a registered nurse was cancelled, and she was disqualified from applying for registration as a health practitioner for a period of twelve months from the date of the decision. Subsequently directions were given for submissions on costs.

[2] The question of costs in this matter is governed by the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ("the QCAT Act") s 100, s 102. Under s 100, the starting point is that there be no order for costs, but there is power in an appropriate case for the Tribunal to depart from that position. The test for when an order for costs can be made is set out in s 102(1): "If the tribunal considers the interests of justice require it to make the order." I considered the meaning and operation of this test in *Marzini v Health Ombudsman (No 4)* [2020] QCAT 365, and adhere to the views I expressed in that decision. In particular, I stated that the default position, that there be no order for costs, should not be too readily departed from, because of the use in that subsection of the word "require". That is reinforced by the terms of the heading to s 100, that that will be the usual order.[1]

[3] I also expressed agreement with the proposition that the fact that there is a right to legal representation in a proceeding about disciplinary action against a person, which this case is, brought into play some of the factors mentioned by Keane JA in *Tamawood Ltd v Paans* [2005] 2 Qd R 101.[2] I also agreed with the analysis by the Hon J B Thomas QC of the factors relevant to the interests of justice in disciplinary matters in *Health Ombudsman v Antley* [2016] QCAT 472, which related to a disciplinary referral where an order was made against the practitioner. Finally, I said that I considered that the reference to the absence of a finding of unreasonableness in *Medical Board of Australia v Wong* [2017] QCA 42 at [35] should be understood in the context of the particular issue under consideration at that point in the judgment, and not as a general statement as to the operation of the test in s 102(1).

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1 This is part of the Act: *Acts Interpretation Act* 1954 s 14(2).

2 The respondent relied in submissions on the passage at [33] of his Honour's judgment.

Submissions and analysis

[4] The applicant seeks its costs of and incidental to the proceeding, on the District Court scale. The applicant relied on the fact that, under the QCAT Act s 43(2)(b)(ii), the parties had a right to legal representation, and that, in view of the serious nature of the allegations, it was reasonable for the parties to be legally represented. This was a disciplinary proceeding under the *Health Ombudsman Act* 2013 (Qld), since it was a proceeding for which QCAT had jurisdiction under s 94(1) or (2) of that Act,[3] and hence disciplinary action under the QCAT Act. The Tribunal was dealing with a matter referred to it by the Director of Proceedings under s 103 of the former Act, since one of the matters for which jurisdiction is conferred on the Tribunal by s 94 is a proceeding referred to it by the Director of Proceedings under s 103.

[5] The respondent submitted that the usual position should apply, that there be no order as to costs, and that the interests of justice did not require another order. The respondent had not acted in a way in relation to the proceeding that unnecessarily disadvantaged the applicant, and in the proceeding had largely agreed to the factual allegations made against her, so that there were only three disputed factual allegations, two of which the Tribunal did not accept were established. The respondent disputed the characterisation of some of the things that had occurred in the course of bringing the referral to a hearing, and submitted that she had suffered some financial compromise as a result of her suspension.

[6] The applicant submitted that there were significant public policy considerations rising from the applicant's statutory obligations, particularly to protect the health and safety of the public, to promote competent practice, to promote high standards of health service delivery and to maintain public confidence. Reference was made to a passage from the decision in *Medical Board of Australia v Panda* [2019] WASAT 104 at [119]. I discussed this passage recently, in *Health Ombudsman v Raynor (No 2)* [2021] QCAT 128 at [7] – [9], where I explained that I agreed with the approach of the Hon J B Thomas QC in *Health Ombudsman v Antley* [2016] QCAT 472. I adhere to that view.

[7] One mater of relevance here about the statutory position of the applicant is that, in the case of a disciplinary mater such as this, it is necessary for the applicant to refer the matter to the Tribunal in order for the Tribunal to make orders such as those made in this matter. That in turn depends on the Tribunal being satisfied that it is appropriate to do so, which is the case even if the respondent appears and agrees to the decision sought by the applicant. That distinguishes the case from the ordinary situation in litigation between parties, where the unsuccessful party can, by doing the right thing, avoid the incurring of costs by the other party, as I explained in *Raynor (No 2)* (*supra*) at [11]. This would apply to much of the costs incurred by the applicant in this matter.

[8] The applicant also submitted that its referral was justified or vindicated by the findings of the Tribunal. That is so, although as I said in *Raynor (No 2)* (*supra*) at [12], I do not consider that the mere fact that a respondent to such an application puts the applicant to proof, tests the evidence of the applicant, or argues that the

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3 *Health Ombudsman Act* 2013 (Qld) Schedule 1 (Dictionary).

order should not be made brings into play the proposition in *Antley* (*supra*) at [76];[4] that passage referred to an unmeritorious defence, and needless complication. There were however aspects of that in this matter, since I found that the respondent had given false evidence to the Tribunal, in her explanation for her actions.

[9] Initially there was limited cooperation from the respondent in the investigation by the applicant, and the respondent when questioned claimed privilege on a wide basis. As well, the respondent did not put in evidence by affidavit or in chief her version of events, a matter I commented on in the earlier decision. By the time of the hearing however the respondent had agreed to many of factual maters alleged by the applicant and had made an admission of professional misconduct, and cross-examination of most of the witnesses was quite limited. At one stage the respondent was objecting to the admissibility of the surveillance video footage but that was not pursued at the hearing. On the other hand, the respondent was given opportunities to reconsider her position, and did not take them up to any great extent.[5] The hearing occupied two days, and I expect it is reasonable to conclude that it would probably have finished in one day if not opposed; it may have run into two days anyway if defended in a way which did not involve giving false evidence.

[10] The respondent was entitled to claim privilege, and cannot be adversely affected by the fact that she did so. Counsel for the respondent in submissions on costs stressed the extent of the cooperation that did occur, and that by the time the matter came to the hearing most of the facts alleged by the applicant in its statement of facts had been agreed, and there is force in that. She also pointed out that the respondent's amended response was filed in response to an amended referral filed by the applicant on 28 February 2020. She also noted that some of the applicant's allegations against the respondent were not sustained at the hearing. As to a foreshadowed objection to the evidence of Ms Vale, that was on the basis that the applicant had not disclosed all relevant documents concerning that witness. There was no objection to the admissibility of the video evidence; rather the respondent sought to limit the amount of the extensive volume of raw footage available which went into evidence, and agreed to that which was ultimately tendered. The respondent submitted that she did not rely on an unmeritorious defence, but I do not accept that submission, in view of the finding that the respondent gave false evidence to the Tribunal, in an apparent attempt to minimise the seriousness of her conduct.

[11] Turning to the matters referred to in the QCAT Act s 102(3), as I have indicated there was little in the way of acting to unnecessarily disadvantage the applicant. I interpret that as acting inappropriately in a way that causes extra trouble and expense for the applicant, rather than just failing to be more cooperative. I have already dealt with the nature of the dispute; there was some factual complexity, but otherwise it was largely just a matter of working out what had happened. As to the relative strength of the claims of the parties, it should have been apparent before the hearing that the applicant had a relatively strong case, much of which had been admitted. I deal with the financial circumstances of the respondent later; the applicant is funded by public funds, and to some extent from registration fees of practitioners.

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4 See also *Council of the Queensland Law Society Inc v Roche* [2003] QCA 469 at [38].

5 As appears from the correspondence exhibited to the affidavit of Forbes sworn 11 March 2021. Further correspondence is exhibited to the affidavit of Simpson affirmed 26 May 2021.

[12] The applicant submitted that it was relevant that the respondent was supported by her union in her legal defence, which enabled her to be legally represented. She was entitled to be legally represented, and the mere fact that she had legal assistance as a benefit of union membership does not seem to me to be a relevant consideration. There is no evidence that the union will meet any order for costs made against her, and I cannot assume that it will. Had that been the situation, it would have diminished the significance of her personal financial position.

[13] Traditionally in courts costs are awarded without consideration of the financial position of the person ordered to pay.[6] The QCAT Act by s 102(3)(d) departed from that position, as discussed in *Antley* (*supra*), and I respectfully agree with what was said there. Because of the substantial legal costs involved in proceedings these days, that can be a significant factor in exercising the discretion under s 102, particularly in the case of a respondent who has been unable to work as a result. In the present case the registration of the respondent was suspended not long after the incident in October 2016, and was cancelled by the Tribunal, with a preclusion period imposed. That had an adverse effect on her employment which she lost in August 2017, and thereafter her earnings. She then obtained casual work as a support worker, and her financial position suffered for a period of almost eighteen months. Copies of her tax assessments were put in evidence and show that, although there was a decline in the 2017 financial year, and a further decline in 2019, her position improved from February, and in 2020 her taxable income had largely recovered.

[14] The respondent said that she owned with her estranged husband four properties in a provincial area, all of which are mortgaged. He is living in one of them, and she in another while two are rented out. She has to carry most of the mortgage payments, because of his limited income. She also owns herself another property, which is also mortgaged and tenanted. A property settlement has not yet occurred. Overall, her circumstances seem to be reasonably comfortable, and the sort of order I have in mind will not be a hardship to her.

[15] The respondent submitted that the decision in *Raynor (No 2)* (*supra*) was distinguishable, as she had made substantial concessions, and had not challenged her suspension over four years. That is so, although there was no finding that Mr Raynor had given false evidence to the Tribunal.

[16] Overall I consider that the relevant circumstances in this matter are such that the interests of justice do require that the respondent make some contribution to the applicant's costs of the proceeding, although limited to the costs of the second day of the hearing. The QCAT Act s 107(1) encourages the Tribunal to fix costs when an order is made, and in view of that, and because it is a contribution, I will fix the costs, in a way which takes into account relevant factors. The applicant was represented by independent lawyers, and at the hearing by a solicitor advocate. In all the circumstances, I fix the respondent's contribution at $5,000.

[17] I therefore order that the respondent pay part of the costs of the applicant of and incidental to this proceeding, fixed in the sum of $5,000, such sum to be paid within twenty-eight days from the date of this decision.

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6 Dal Pont, Law of Costs (4th Ed 2018) para 8.30.