

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Health Ombudsman v Horton* [2021] QCAT 95

PARTIES: **HEALTH OMBUDSMAN**
(applicant)

v

SCOTT ALEXANDER DAVID HORTON
(respondent)

APPLICATION NO/S: OCR211-19

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 26 March 2021

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Judge Allen QC, Deputy President

ORDERS:

- 1. Pursuant to section 113(1) of the *Health Ombudsman Act 2013 (Qld)*, the Tribunal decides that, because of his conduct, the respondent poses a serious risk to persons.**
- 2. Pursuant to section 113(4)(a) of the *Health Ombudsman Act 2013 (Qld)*, the respondent is permanently prohibited from providing any health service.**
- 3. Pursuant to section 73(2)(a)(ii) of the *Health Ombudsman Act 2013 (Qld)*, the Tribunal sets aside the decision on 23 August 2018 to issue an interim prohibition order.**
- 4. Each party must bear the party's own costs for the proceeding.**

CATCHWORDS: PROFESSION AND TRADES – HEALTH CARE PROFESSIONALS – OTHER HEALTH CARE PROFESSIONALS – where the respondent was an unregistered health worker employed as an assistant in nursing at a nursing home – where the respondent stole sums of money from a patient – where the respondent was sentenced to imprisonment for offences of dishonesty – where the respondent has a criminal history of offences of dishonesty – whether the respondent poses a serious risk to persons – whether the Tribunal should make a prohibition order

Health Ombudsman Act 2013 (Qld), s 8, s 68, s 73, s 103, s

104, s 113, s 320G
Queensland Civil and Administrative Tribunal Act 2009
 (Qld), s 100

REPRESENTATION:

Applicant: The 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

Introduction

- [1] The Director of Proceedings on behalf of the Health Ombudsman (applicant) has referred a health service complaint against Scott Alexander David Horton (respondent) to the Tribunal pursuant to sections 103(1)(a) and 104 of the *Health Ombudsman Act 2013* (Qld) (*HO Act*). At all relevant times, the respondent was an unregistered health practitioner. The applicant seeks that the Tribunal decide, pursuant to section 113(1) of the *HO Act*,¹ that because of the respondent's conduct, he presents a serious risk to persons and that the Tribunal make a prohibition order pursuant to section 113(4) of the *HO Act*.

The applicant and his conduct

- [2] The respondent is aged in his mid-40's.
- [3] The respondent completed a Certificate 3 in Indigenous Community Services and Primary Health Care at a TAFE college in 2001.
- [4] The respondent has a criminal history, mainly for offences of dishonesty, dating from 1997 through to at least late 2018. Since that time, he has been charged with further offences of dishonesty.
- [5] The conduct the subject of the referral occurred in 2017 when the respondent was employed as an assistant in nursing at a nursing home. In his role as an assistant in nursing, the respondent had permission to enter the rooms of residents of the nursing home but was prohibited from doing so if the rooms were empty.
- [6] On an unknown date between 26 September 2017 and 6 October 2017, the respondent entered the empty room of a then 82 year old resident of the nursing home without permission. He used a key belonging to his employer to unlock a bedside drawer. He removed \$100 cash from a purse inside a handbag in the drawer before returning the purse and handbag, locking the drawer and exiting the room.
- [7] On an unknown date between 25 October 2017 and 30 October 2017, the respondent stole \$65 cash from the resident by the same means.

¹ Now repealed, but still applicable to these proceedings because of the transitional provisions in section 320G of the *HO Act*.

- [8] Following a complaint by the resident and with the permission of the resident and the manager of the nursing home, police installed a covert camera in the room.
- [9] On 31 October 2017, the respondent stole \$40 cash and, on 7 November 2017, stole another \$40 cash from the resident by the same means as earlier occasions. .
- [10] On 10 November 2017, the respondent was arrested and charged by police with four offences of entering a dwelling and stealing money in the dwelling, contrary to section 419(4) of the Criminal Code. The respondent entered pleas of guilty to those four charges and charges of failing to appear and possession of dangerous drugs in the Magistrates Court on 5 November 2018 and was sentenced to 12 months imprisonment for the offences of entering a dwelling and stealing money in the dwelling. He was released on parole the same day.

Immediate registration action

- [11] On 24 January 2018, the applicant decided to impose an interim prohibition order on the respondent pursuant to section 68 of the *HO Act*, prohibiting the respondent from providing any health services. The Office of the Health Ombudsman was unable to locate the respondent to serve the order and it never came into effect.
- [12] On 23 August 2018, after receiving information as to the respondent’s residential address, the applicant decided to impose an interim prohibition order on the respondent pursuant to section 68 of the *HO Act*, prohibiting the respondent from providing any health services.
- [13] It will be necessary for the decision to issue the interim prohibition order to be set aside pursuant to 73(2)(a)(ii) of the *HO Act*.²

Tribunal proceedings

- [14] In the referral filed on 26 June 2019, the applicant particularised the respondent’s conduct as described earlier and sought a prohibition order pursuant to section 113 of the *HO Act*.
- [15] By a response signed by the respondent and dated 9 November 2019, the respondent admitted all the allegations in the referral and stated that he wanted the Tribunal to make a “full prohibition order” and that he no longer wished “to continue this line of work”.
- [16] By a response signed by the respondent and dated 8 December 2019, the respondent admitted all the allegations in the referral and stated that he wanted the Tribunal to make an order of “full prohibition to work in the nursing industry” and stated that he didn’t “want to do this anymore”.
- [17] The respondent has not chosen to engage further in the proceedings and did not seek to be heard by the Tribunal at the hearing of the matter.

Legislation

- [18] In his employment as an assistant in nursing, the respondent provided a “health service” within the meaning of section 7 of the *HO Act* and was thus a “health service provider” as defined in section 8(a)(ii) of the *HO Act*. The respondent was

² Subsequently amended but applicable in pre-amendments terms because of the transitional provisions in section 320G of the *HO Act*.

not a registered health practitioner and thus the applicable powers of the Tribunal are to be found in the repealed Part 10, Division 4 of the *HO Act*, in particular, section 113.

[19] Section 113(1) of the *HO Act* provides as follows:

QCAT must decide if, because of the health practitioner's health, conduct or performance, the practitioner poses a serious risk to persons.

[20] Section 113(2) of the *HO Act* provides a non-exhaustive list of the types of conduct which may constitute a serious risk, including "financially exploiting the person".

[21] Section 113(4) provides as follows:

If QCAT decides the practitioner poses a serious risk to persons, it may make an order (a *prohibition order*)—

- (a) prohibiting the practitioner, either permanently or for a stated period, from providing any health service or a stated health service; or
- (b) imposing stated restrictions on the provision of any health service, or a stated health service, by the practitioner.

A serious risk?

[22] The term, "serious risk", is not statutorily defined. It takes its ordinary meaning in its statutory context. The word, "serious", is defined in the Macquarie Dictionary as:

of grave aspect; weighty or important; giving cause for apprehension; critical; to be considered as an extreme example of its kind.

[23] It is helpful to consider the following:

- (a) the nature of the risk;
- (b) the likelihood of it eventuating; and
- (c) the seriousness of the consequences if the risk eventuates.

[24] The nature of the risk is that the respondent, in providing care to a vulnerable person, might exploit his position of trust as a carer to the detriment of the person.

[25] It is difficult to assess the likelihood of that occurring if the respondent was to return to providing health care to vulnerable persons. However, his theft from the vulnerable resident was repeated and devious. The conduct and the respondent's criminal history demonstrate a persistent propensity towards dishonesty. That fundamental character flaw is incompatible with that required of a health care worker. I regard the defects of character revealed by the respondent's past behaviour so significant as to establish a continuing risk.

[26] Conduct such as that the subject of the referral not only hurts vulnerable persons financially but has the potential to seriously affect such a person's confidence and feelings of personal security. The seriousness of the consequences to another person if the risk eventuated weigh in favour of the finding of a serious risk.

[27] In all the circumstances, the Tribunal decides that, because of his conduct, the respondent poses a serious risk to persons.

A prohibition order?

- [28] In these circumstances, the Tribunal should exercise the discretion to make a prohibition order pursuant to section 113(4) of the *HO Act*.
- [29] There is no basis for finding that the risk presented by the respondent will have reduced to an acceptable level after the passage of a period of time. Accordingly, any prohibition should be permanent. There is no basis for concluding that imposition of restrictions pursuant to section 113(4)(b) would properly address such risk. I have considered whether the respondent should be prohibited from providing a stated health service or services: for example, aged care services. That would not protect all vulnerable patients potentially at risk. In all the circumstances, I have concluded that a permanent prohibition on provision of any health service is appropriate. I note that the respondent did not oppose an order in those terms.

General deterrence

- [30] Given my conclusion that the respondent himself presents a serious risk requiring a prohibition order, I have not found it necessary to rule on the applicant's submission that considerations of general deterrence, that is, the deterrence of other unregistered practitioners, supported the making of a prohibition order. Given that the matter was heard on the papers and without submissions from a contradictor, this is not an appropriate case to decide whether such considerations are relevant to section 113 of the *HO Act*.

Costs

- [31] The applicant did not seek costs and the orders of the Tribunal will confirm that the default position as to costs pursuant to s 100 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) applies.