

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Health Ombudsman v Zuyderwyk* [2019] QCAT 74

PARTIES: **HEALTH OMBUDSMAN**
(applicant)
v
MICHAEL DOMINICUS ZUYDERWYK
(respondent)

APPLICATION NO/S: OCR054-18

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 1 April 2019

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Judge Allen QC, Deputy President

Assisted by:
Dr G Neilson
Mr A Petrie
Mr D Lyons

- ORDERS:
1. 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. Pursuant to s 107(3)(a) of the *Health Ombudsman Act 2013 (Qld)*, the respondent is reprimanded.
 3. Pursuant to s 107(3)(b) of *Health Ombudsman Act 2013 (Qld)*, the following conditions are imposed on the practitioner's registration:
 - (a) The respondent must undergo a period of mentoring for not less than two hours per month for 12 months.
 - (b) The mentoring must be face to face and focus on ethical dispensing and decision-making.
 - (c) The respondent must nominate a mentor for approval by the Pharmacy Board of Australia, who must be a pharmacist practicing in an accredited pharmacy and senior to the practitioner in age and experience. The mentor must provide a report in writing to the board every three months and on completion

of the mentoring period.

(d) The respondent must complete an accredited course on appropriate dispensing of medicines within 12 months. The course must be nominated by the respondent and approved by the board. At the completion of the course the respondent must submit to the board documentary evidence certifying his completion of it.

(e) The respondent is to be responsible for paying all costs associated with compliance of these conditions.

4. Each party bear their own costs of the proceedings.

CATCHWORDS:

PROFESSIONS AND TRADES – HEALTH CARE PROFESSIONALS – PHARMACEUTICAL CHEMISTS – DISCIPLINARY PROCEEDINGS – MISCONDUCT IN PROFESSIONAL RESPECT - where the respondent is a pharmacist – where disciplinary proceedings were instituted against the respondent for providing schedule 4 drugs without a lawful prescription and creating false dispensing records – where the drugs were provided to members of the respondent’s family and the respondent himself – where the schedule 4 drugs provided were not of the type which are prone to abuse – where the respondent has fully cooperated with the proceedings – where the respondent concedes that the conduct is professional misconduct – where the conduct falls at the lower end of the range of seriousness of professional misconduct – where the parties have provided joint submissions – whether the sanction proposed is appropriate

Health (Drugs and Poisons) Regulation 1996, s 216
Health Ombudsman Act 2013 (Qld), s 103, s 107
Health Practitioner Regulation National Law Act 2009 (Qld), s 5, s 14

Health Ombudsman v Dalziel [2017] QCAT 442
Merrilyn Walton v Graham Edwin Parry [1996] NSWPB 1
Merrilyn Walton v Roger Arthur Keirle [1991] NSWPB 6
Medical Board of Australia v Martin [2013] QCAT 376
Psychology Board of Australia v Cameron [2015] QCAT 227

REPRESENTATION:

Applicant: Director of Proceedings, on behalf of the Health Ombudsman

Respondent: Chris Sheath & Associates

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 respondent is an experienced registered pharmacist. The applicant has referred disciplinary proceedings against the respondent to the Tribunal alleging that the respondent provided schedule 4 restricted drugs to himself and two family members without prescriptions on fourteen occasions over a nine month period and, in the course of doing so, generated false dispensing records.
- [2] There is no real dispute between the parties as to the relevant facts, including the conduct alleged to constitute professional misconduct, its characterisation as professional misconduct and appropriate orders by way of sanction.
- [3] The respondent first obtained registration as a pharmacist in 1989. He commenced practicing as the principal of a pharmacy in 1995 and had 20 years' experience as a principal at the time the offending conduct occurred. The respondent had no prior complaints and has practiced without adverse incident in the period of more than three years following the conduct.
- [4] The applicant particularises the alleged professional misconduct in the terms of four "charges". Charge 1 alleges providing of schedule 4 restricted drugs by the respondent to a family member between 25 May 2015 and 3 January 2016. Charge 2 alleges providing of schedule 4 restricted drugs by the respondent to a family member between 11 July 2015 and 5 January 2016. Charge 3 alleges that the respondent provided schedule 4 restricted drugs to himself between 16 July 2015 and 27 November 2015. Each of the three charges alleges that providing was contrary to dispensing guidelines and contrary to the accepted professional standard which is that restricted drugs be provided by a pharmacist to a patient only on receipt of a valid prescription.. Each of the fourteen occasions of providing of drugs alleged in Charges 1, 2 and 3 are further particularised by way of the pharmacy prescription number recorded in the records of the respondent's pharmacy, the date of providing, the person to whom provided, the particular schedule 4 restricted drug and quantity of such. Charge 1 relates to four occasions of providing of schedule 4 drugs to a family member. Charge 2 relates to four occasions of providing of schedule 4 drugs to another family member. Charge 3 relates to six occasions of providing of schedule 4 drugs by the respondent to himself. All the particulars of Charges 1, 2 and 3 are admitted by the respondent.
- [5] It is important to note that all of the schedule 4 restricted drugs involved in the misconduct were of the nature of antibiotics, anti-viral medication and topical medicines usually prescribed for treating relatively minor ailments. It is not alleged that any of the drugs are particularly inherently dangerous or that the health of any person was in fact endangered or even potentially endangered by reason of the

- providing. None of the schedule 4 restricted drugs provided were drugs that are prone to abuse.
- [6] When interviewed by investigators from the Office of the Health Ombudsman, the respondent attributed his misconduct to “laziness” in failing to get doctor’s prescriptions. It seems the respondent was motivated by being able to avoid the inconvenience in the time required by, and perhaps the expense involved in, he and the family members attending doctor’s appointments to obtain the necessary prescriptions. No further illicit motive is suggested.
- [7] Charge 4 alleges that on dates between 15 June 2015 and 5 January 2016 the respondent generated false records in the computerised dispensing database of his pharmacy for the two family members and himself with respect to twelve of the fourteen providings constituting Charges 1, 2 and 3. The respondent admits such allegation and admits further particulars of the charge that:
- (a) The records generated were false because each of the entries recorded that the schedule 4 restricted drug was provided to a person in accordance with a prescription of a general practitioner but in fact no lawful prescription had been prescribed by the general practitioner.
 - (b) By making dispensing records that he knew to be false, the respondent contravened s 216 of the *Health (Drugs and Poisons) Regulation 1996* which provides that a person must not make an entry in a book or record required to be kept under Chapter 3 of the *Regulation* that the person knows is false, misleading or incomplete.
- [8] The respondent deposes by way of affidavit that he entered each of the medications in the pharmacy’s software database not only for stocktake purposes but primarily for the purpose of generating a label which described the correct manner for taking the medication so that his family member was made aware of the precise manner in which the medication should be taken. The respondent deposes that a consequence of the process was that the database entry was automatically pre-populated with the name of a common prescribing doctor for the particular patient and that on the occasions of the providing the respondent did not take any steps to change such information which then resulted in the name of a particular general practitioner being included in the database entry. The respondent denies intentionally choosing a particular doctor’s name to make it appear that that doctor had prescribed the particular medication and the applicant has not persisted with an allegation that the respondent knew the records were false because of that particular aspect of the entry. The respondent deposes that since the time of the misconduct he has changed the pharmacy software programme and database system so that the new system now requires the prescribing doctor’s details to be physically entered in the system.
- [9] This matter has been referred to the Tribunal pursuant to s 103 of the *Health Ombudsman Act 2013 (Qld)* (“*HO Act*”). Section 107 of the *HO Act* applies in relation to a matter referred to the Tribunal under s 103. Section 107(2) relevantly provides that the Tribunal may decide that “the practitioner has behaved in a way that constitutes unprofessional conduct” or “the practitioner has behaved in a way that constitutes professional misconduct”. The expressions “professional misconduct” and “unprofessional conduct” are defined in s 5 of the *Health Practitioner Regulation National Law Act 2009 (Qld)* (“National Law”).

- [10] The applicant has alleged in the referral that the respondent engaged in “professional misconduct” or in the alternative “unprofessional conduct”. To establish that the respondent engaged in professional misconduct, it is necessary to satisfy the Tribunal that the respondent’s conduct was “substantially below the standard reasonably expected of a registered health practitioner of an equivalent level of training or experience”. Unprofessional conduct, on the other hand, requires only proof of “professional conduct that is of a lesser standard than that which might reasonably be expected of the health practitioner by the public or the practitioner’s professional peers”. Whether the conduct was substantially below the standard reasonably expected of the respondent at the time may be assessed by reference to registration standards, codes or guidelines developed by a National Board.¹ The definition of professional misconduct extends to circumstances in which the practitioner is found to have engaged in more than one instance of unprofessional conduct which, when considered together, amount to conduct substantially below the required standard. For that reason, it is necessary to consider the course of conduct relating to charges 1 to 4 as a whole when determining whether it amounts to professional misconduct.
- [11] The applicant fairly concedes that the respondent’s conduct is close to the intersection of what might amount to professional misconduct or instead fall into the category of unprofessional conduct. However, the applicant contends that the Tribunal would find that the respondent has behaved in a way that constitutes professional misconduct for the following reasons. The requirement for a pharmacist to have a valid prescription before providing a schedule 4 drug is a central tenet of the profession. The primacy of that professional obligation is reflected in the relevant *Guidelines for dispensing of medicines* and the provisions of the *Health (Drugs and Poisons) Regulation 1996*. The provision of medications on fourteen occasions over a nine month period constituted a deliberate course of conduct exhibiting wilful disregard for one of the most fundamental requirements of the profession. Whilst not every failure by a pharmacist to ensure the existence of a valid prescription before supplying a medication would amount to professional misconduct – a mere mistake or oversight would not warrant such characterisation – the wilful and repeated disregard of the requirement by the respondent is such as to be properly characterised as professional misconduct. Furthermore, the creation of false records was a breach of a fundamental requirement of the profession.
- [12] The respondent does not contest that his conduct should be properly characterised as at the less serious end of professional misconduct, and expressly concedes that the duration and seriousness of the course of conduct is such as to be properly so characterised.
- [13] In considering the standard of conduct reasonably to be expected of the respondent it is relevant to again note that he is an experienced registered pharmacist with 20 years’ experience as the principal of a pharmacy.
- [14] The Tribunal accepts the submissions of both parties that the totality of the respondent’s conduct is such as to be properly characterised at the lower end of seriousness of professional misconduct, rather than merely unprofessional conduct. The Tribunal decides that the respondent has behaved in a way that constitutes professional misconduct.

¹ National Law, s 14.

- [15] That the respondent's conduct is to be characterised as falling at the lower end of seriousness of professional misconduct is relevant to the orders that should be made by way of sanction. This case is to be contrasted with cases where the drugs provided were drugs of abuse or of a kind used to manufacture illicit substances.
- [16] The respondent deposes, and the Tribunal accepts, that the last three years have been particularly difficult for the respondent because of the consequences of the investigation of his conduct. He suffered the embarrassment and stress of his pharmacy being closed for some hours whilst a search warrant was executed by investigators from the Office of the Health Ombudsman. He has continued to ruminate over his offending conduct and its potential consequences for him professionally and personally. He has suffered significant anxiety and stress which has taken a significant toll on his relationship with family members.
- [17] The respondent made full and frank admissions at an early stage of the investigation and has co-operated with the progress of the matter from that time onwards. The respondent has expressed remorse for his conduct and his insight is demonstrated by his willingness to undertake mentoring and further relevant education. The respondent has been otherwise blameless in the conduct of his profession.
- [18] The applicant has referred to the following comparative decisions:
- (a) *Health Ombudsman v Dalziel* [2017] QCAT 442;
 - (b) *Merrilyn Walton v Graham Edwin Parry* [1996] NSWPB 1; and
 - (c) *Merrilyn Walton v Roger Arthur Keirle* [1991] NSWPB 6.
- [19] Both parties submit that appropriate orders for sanction are that the respondent be reprimanded and that conditions be imposed on the respondent's registration requiring mentoring and further education.
- [20] The Tribunal ought not to depart from the proposed sanction agreement between the parties unless it falls outside a permissible range of orders for sanction.² A reprimand is not a trivial penalty and has the potential for serious adverse implications to a professional person.³ It is appropriate that there be a public denunciation of the respondent's conduct by way of a reprimand. The Tribunal finds that the proposed sanction is an appropriate one in all the circumstances.
- [21] Accordingly, the Tribunal orders:
1. 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. Pursuant to s 107(3)(a) of the *Health Ombudsman Act 2013* (Qld), the respondent is reprimanded.
 3. Pursuant to s 107(3)(b) of *Health Ombudsman Act 2013* (Qld), the following conditions are imposed on the practitioner's registration:

² *Medical Board of Australia v Martin* [2013] QCAT 376 at [91]-[93].

³ *Psychology Board of Australia v Cameron* [2015] 227 at [2].

- (a) The respondent must undergo a period of mentoring for not less than two hours per month for 12 months.
 - (b) The mentoring must be face to face and focus on ethical dispensing and decision-making.
 - (c) The respondent must nominate a mentor for approval by the Pharmacy Board of Australia, who must be a pharmacist practicing in an accredited pharmacy and senior to the practitioner in age and experience. The mentor must provide a report in writing to the board every three months and on completion of the mentoring period.
 - (d) The respondent must complete an accredited course on appropriate dispensing of medicines within 12 months. The course must be nominated by the respondent and approved by the board. At the completion of the course the respondent must submit to the board documentary evidence certifying his completion of it.
 - (e) The respondent is to be responsible for paying all costs associated with compliance of these conditions.
4. Each party bear their own costs of the proceedings.