QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Health Ombudsman v Agnola* [2019] QCAT 193
PARTIES:	**HEALTH OMBDUSMAN** (applicant) **v** **DANNY PAUL AGNOLA** (respondent)
APPLICATION NO/S:	OCR146-18
MATTER TYPE:	Occupational regulation matter
DELIVERED ON:	3 June 2019 (*ex tempore*)
HEARING DATE:	3 June 2019
HEARD AT:	Brisbane
DECISION OF:	Allen QC DCJ, Deputy President Assisted by: N Cawcutt E Musgrave P Zimon
ORDERS:	**1. The Tribunal decides, pursuant to s 107(2)(b)(iii) of the *Health Ombudsman Act 2013* (Qld), 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 bear their own costs.** **4. The application for a non-publication order is refused.**
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 in relation to the respondent taking from his place of employment and then consuming Ritalin – where the respondent has fully cooperated with proceedings – where the respondent concedes that the conduct is professional misconduct – where the parties have reached a joint position as to sanction – whether the sanction proposed is appropriate

PROFESSIONS AND TRADES – HEALTH CARE PROFESSIONALS – DISCPLINARY PROCEEDINGS – NON-PUBLICATION ORDERS – where the respondent applied for non-publication orders requiring that the Tribunal's reasons be de-identified – where the respondent submitted that the publication of his identity would have a more significant impact on him than other practitioners due to the nature of his current employment – where the applicant opposed the making of a non-publication order – whether the interests of justice require the making of a non-publication order

Health Ombudsman Act 2013 (Qld), s 103, s 104, s 107
Health Practitioner Regulation National Law (Qld), s 5
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 66

Health Ombudsman v Shemer (No 2) [2019] QCAT 54
Medical Board of Australia v Fitzgerald [2014] QCAT 425
Nursing and Midwifery Board of Australia v Faulkner [2017] QCAT 141
Nursing and Midwifery Board v Faulkner [2018] QCA 97
Psychology Board of Australia v Cook [2014] QCAT 162

APPEARANCES & REPRESENTATION:	
Applicant:	K Carter-Brown (sol) of the Office of the Health Ombudsman
Respondent:	TJ Flaherty instructed by Stoddart Legal

[1] The respondent was employed as a pharmacist when he dispensed a prescription for Ritalin tablets without authority and later stole those tablets and consumed some of them. As a consequence, the applicant has referred this matter to the Tribunal pursuant to ss 103(1)(a) and 104 of the *Health Ombudsman Act 2013* (Qld). The parties have reached agreement as to the facts of the matter, the characterisation of the conduct and orders by way of sanction and costs.

[2] The respondent obtained a Bachelor of Pharmacy degree in 2006 and worked as an employed pharmacist in various positions from 2008. Between November 2015 and November 2016, the respondent was employed as a casual pharmacist at a Brisbane pharmacy working one Sunday every four weeks.

[3] He was employed in that position on 20 November 2016 when, at 5pm, he dispensed a prescription for 100 Ritalin tablets, 10 milligrams, for a 10-year-old child. Neither the child nor his parent or guardian had requested that medication be dispensed. The medication was taken from the controlled drug safe and entered into the controlled drug register and the medication dispensed and placed in the pharmacy dispensary.

At 6.04pm, the respondent placed the medication into a green pharmacy paper bag, placed the bag into his own shopping bag and took the medication home for personal use. The time delay is significant in that the parties agree that it demonstrates that the initial dispensing was not for the purpose of theft but that the theft occurred as an afterthought.

[4] The respondent consumed 10 of the 100 tablets over the following three days, using two tablets on five occasions. Over the following few days, the respondent's employer became aware of the dispensing discrepancy and, on 28 November 2016, the respondent met with his employer and admitted his misconduct.

[5] The respondent said he had dispensed the medication to the child's father for use by his child, noticing that the prescription would expire at the end of November 2016. The respondent stated that he was trying to stay ahead of his work by processing the prescription but recalled that an acquaintance had mentioned he sometimes wished he could take a Ritalin to get everything done.

[6] At this time, the respondent had also been employed from November 2015 as a professional services pharmacist (primary healthcare) with the Pharmacy Guild of Australia. He told his employer that he had been getting up at 3.30am to get work associated with that employment done and that he took the Ritalin to cope with the pressures of work and life.

[7] He showed remorse and regret for his conduct and expressed concern as to how it would affect his registration. He was advised that he was dismissed as a pharmacist with the pharmacy. On 29 November 2016, the respondent returned the 90 unused Ritalin tablets to the pharmacy together with his keys to the pharmacy.

[8] On 3 April 2017, the respondent attended an interview with Office of Health Ombudsman investigators and made further admissions to his misconduct. He told investigators that, at the time, he was in an office job preparing a tender which was for a service for a pharmacy and that he took the Ritalin to stay awake and concentrate on his tender writing. He told investigators that he decided to stop taking the Ritalin because he had sent the tender through to management on the Wednesday and also felt disgusted and that he had no intention to take any more tablets or give any of the medication to other people.

[9] The parties agree and jointly submit that the respondent's conduct should be characterised as professional misconduct as defined in s 5 of the Health Practitioner Regulation National Law as unprofessional conduct that is substantially below the standard reasonably expected of a registered health practitioner of an equivalent level of training or experience.

[10] The Tribunal readily accepts those submissions. The unauthorised dispensation of schedule 8 drugs and personal use of such drugs is a breach of a central tenet of the pharmacy profession. It constitutes a serious breach of trust of the public and the respondent's employer. The Tribunal finds that the respondent has engaged in professional misconduct.

[11] Turning to the issue of sanction, disciplinary proceedings are protective, not punitive, in nature.[1] It is well-established that in the exercise of the protective jurisdiction it is appropriate for the Tribunal to take into account the maintenance of professional standards, the preservation of public confidence in the medical profession, and the need to deter the respondent and also other health practitioners from engaging in like conduct.[2]

[12] The respondent's insight and remorse are also relevant considerations for the Tribunal when considering appropriate orders for sanction. The parties submit, and the Tribunal accepts, that the respondent has demonstrated insight and remorse in making early and full and frank admissions to his conduct, both to his employer and investigators of the Office of the Health Ombudsman. He cooperated with investigations by his employer, the Office of the Health Ombudsman, and the Australian Health Practitioner Regulation Agency. He expressed his regret and remorse for his actions.

[13] He has also complied with conditions imposed on his registration by the Pharmacy Board of Australia. After the time of the misconduct, the respondent continued to be employed in his non-clinical role with the Pharmacy Guild of Australia, and subsequently in a non-clinical role with the Australian Digital Health Agency. Such employment was in compliance with conditions of approval of practice by the Board.

[14] He also successfully completed a six-month period of mentoring as required by those conditions and provided a self-reflection report to the satisfaction of the Board. He has attended treating practitioners as required by those conditions and been the subject of positive treating practitioner reports. The conditions will require urine and hair drug screening upon any return to clinical practice which would allay any concerns associated with any issues of drug use. It should be noted that drug testing at an early stage of investigations into this matter showed no drug use and that such conditions are merely precautionary rather than directed towards any demonstrated impairment.

[15] The parties jointly submit, and the Tribunal accepts, that other relevant considerations with respect to sanction are as follows:

(a) the respondent engaged in conduct that was a one-off occurrence and there is no indication that he suffered or suffers from any drug abuse disorder;

(b) the respondent had no notifications other than this matter;

(c) the respondent was dismissed from his employment by the pharmacy as a result of his conduct and, therefore, suffered real consequences as a result of his misconduct such that considerations of personal deterrence do not loom large;

(d) the respondent has not practised in a clinical role since the conduct; and

(e) as noted earlier, he has been compliant with the conditions imposed on his registration.

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1 *Clyne v NSW Bar Association* (1960) 104 CLR 116; *NSW Bar Association v Evatt* (1968) 117 CLR 177; *Medical Board of Australia v Dolar* [2012] QCAT 271, [30].

2 *Health Care Complaints Commission v King* [2013] NSWMT 9.

[16] The parties do not seek, in this case, for the Tribunal to impose any further conditions on the respondent's registration. The parties jointly submit that an appropriate sanction in this matter is the respondent be reprimanded. They cite cases, including the *Nursing and Midwifery Board of Australia v Faulkner* [2017] QCAT 141,[3] in submitting that a reprimand is not a trivial sanction and that a finding of professional misconduct, together with a reprimand, amounts to a public denunciation recorded on the public register and remaining on the register until the Board considers it no longer necessary or appropriate for that information to be recorded on the register.

[17] The parties jointly submit that the proposed orders will achieve the objectives of minimising the risk of recurrence, deterring other health practitioners from engaging in like conduct, maintaining public confidence in the profession, and reflect the serious public interest of ensuring that pharmacists adhere to the high standards of practice.

[18] The Tribunal ought not depart from a proposed sanction agreement between the parties unless it falls outside the permissible range for sanction for the conduct.[4] The Tribunal accepts that, in all the circumstances, the sanction jointly proposed by the parties falls within a permissible range of sanction for the conduct having regard to comparable cases in the jurisdiction. The Tribunal readily accepts that the most appropriate order for sanction in all the circumstances is an order by way of reprimand.

[19] Accordingly, the Tribunal orders:

1. The Tribunal decides, pursuant to s 107(2)(b)(iii) of the *Health Ombudsman Act 2013* (Qld), 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 bear their own costs.

[20] Following upon the making of orders 1, 2 and 3, counsel for the respondent made application for a non-publication order pursuant to s 66 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ("QCAT Act"), relying in particular upon s 66(2)(e) of the QCAT Act and submitting that it was in the interests of justice that an order be made such that the respondent's identity be the subject of non-publication.

[21] As noted earlier in the reasons, the respondent is currently employed in a non-clinical role with the Australian Digital Health Agency. The respondent, in the course of that employment, makes presentations on behalf of the Agency to pharmacy groups and other health practitioners. The respondent thus comes into contact with and under the scrutiny of other pharmacists and health practitioners much more often than a pharmacist employed in a clinical role in a pharmacy who, in contrast, would come into contact with other colleagues in that pharmacy, but primarily with members of the public.

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3 Considered on appeal in *Nursing and Midwifery Board v Faulkner* [2018] QCA 97.

4 *Medical Board of Australia v Fitzgerald* [2014] QCAT 425, [17].

[22] The respondent submits that, therefore, he would suffer the consequence of embarrassment of publication of his misconduct to a greater degree than most pharmacists because of the particular nature of his current employment. The respondent submits that he will therefore suffer extra-curial punishment such that any publication would have a punitive effect. The respondent also refers to the time that has elapsed since the conduct and the circumstances which led the Tribunal to find that considerations of personal deterrence have no great significance in this matter.

[23] The applicant strenuously opposes any non-publication order, submitting that any desired deterrent effect of the reprimand of the respondent would be substantially diminished by such an order and that the circumstances of the respondent are not such that it would be in the interests of justice to make such an order.

[24] Considerations relevant to the exercise of the discretion pursuant to s 66 of the QCAT Act have been set out by the Tribunal in *Health Ombudsman v Shemer (No 2)* [2019] QCAT 54 at paragraphs 4-8:

> "Section 66 of the Queensland Civil and Administrative Tribunal Act 2009 (Qld) ('QCAT Act') provides as follows:
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> > "(1) The tribunal may make an order prohibiting the publication of the following other than in the way and to the persons stated in the order—
> >
> > > (a) the contents of a document or other thing produced to the tribunal;
> > >
> > > (b) evidence given before the tribunal;
> > >
> > > (c) information that may enable a person who has appeared before the tribunal, or is affected by a proceeding, to be identified.
> >
> > (2) The tribunal may make an order under subsection (1) only if the tribunal considers the order is necessary—
> >
> > > (a) to avoid interfering with the proper administration of justice; or
> > >
> > > (b) to avoid endangering the physical or mental health or safety of a person; or
> > >
> > > (c) to avoid offending public decency or morality; or
> > >
> > > (d) to avoid the publication of confidential information or information whose publication would be contrary to the public interest; or
> > >
> > > (e) for any other reason in the interests of justice.
> >
> > (3) The tribunal may act under subsection (1) on the application of a party to the proceeding or on its own initiative. (4) The tribunal's power to act under subsection (1) is exercisable only by—
> >
> > > (a) the tribunal as constituted for the proceeding; or

> (b) if the tribunal has not been constituted for the proceeding—a legally qualified member or an adjudicator."

In *LSC v XBV* [2018] QCAT 332, Peter Lyons QC stated:

> "[26] Section 66 should be read with section 90 of the same Act. That section commences by identifying, as the primary rule, a requirement that a hearing of a proceeding be held in public. It then provides that the Tribunal may direct a hearing or part of a hearing be held in private, but only in circumstances similar to those specified in section 66, including where the Tribunal considers it necessary to make the order to avoid endangering the physical or mental health or safety of a person. As will become apparent, both sections give the Tribunal a broader power to constrain the operation of the open court principle than is available to courts generally by virtue of their inherent (or implied) jurisdiction."

The exercise of the discretion pursuant to s 66(1) of the Act is informed by the paramount principle of open justice:

> "Although there is a public interest in avoiding or minimising disadvantages to private citizens from public activities, paramount public interest in the open administration of justice, freedom of speech, a free media and an open society require the court proceedings to be open to the public and able to be reported and discussed publicly."[5]

> "… information may not be withheld from the public merely to save a party or witness from loss of privacy, embarrassment, distress, financial harm, or other 'collateral disadvantage'…"[6]

> "… an unfortunate incident of the open administration of justice is that embarrassing, damaging and even dangerous facts occasionally come to light. Such considerations have never been regarded as a reason for the closure of courts, or the issue of suppression orders and their various alternative forms."[7]

Section 66(2) of the *QCAT Act* provides for the circumstances in which a non-publication order may be made. The Tribunal may make an order "only if the Tribunal considers the order is necessary" to avoid one of the specified consequences or "is necessary… for any other reason in the interest of justice". The onus lies upon the party seeking the non-publication order to satisfy the Tribunal of its necessity.

In *Medical Board of Australia v Waldron* [2017] QCAT 443 at [81]-[82], Sheridan DCJ observed:

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5 *J v L&A Services Pty Ltd (No.2)* [1995] 2 Qd R 10 at 44.

6 Ibid, 45.

7 *John Fairfax Group Pty Ltd v Local Court of New South Wales* [1991] 26 NSWLR 131 at 142-143.

> "The wording of s 66(2) makes it plain that the discretion is not to be exercised lightly, and only if the Tribunal considers it necessary. The phrase "in the interests of justice", whilst not defined and generally considered to confer a broad discretion, must be interpreted subject to those limitations.
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> The discretion given to the Tribunal by s 66 has been described as being "underpinned by the principle of open justice which aims to ensure not only that court proceedings are fully exposed to public scrutiny, but also to maintain the integrity and independence of the courts." The onus is on the applicant to show special circumstances exist which justify the making of the order.""

[25] Further, the applicant refers to the reasons of the Honourable JB Thomas in *Psychology Board of Australia v Cook* [2014] QCAT 162 at [39] – [41], as follows:

> "The respondent sought an order under s 66(1) of the *Queensland Civil and Administrative Tribunal Act* 2009 "preventing publication of my details".
>
> She submitted that such publication might be seen by patients and undermine her professional relationship with them. She also contended that it would amount to a punitive measure going beyond the purpose of disciplinary proceedings, and contrary to the interests of the administration of justice.
>
> I reject those submissions. The criteria justifying such an order are exhaustively stated in section 66(2), and none of them is made out. The fear of exposure seems to be a strong deterrent factor in the maintenance of ethical standards by health professionals in cases of this kind, and to remove it, or weaken it, would not be desirable. It is neither in the public interest nor in the interests of justice that any order be made for suppression of the respondent's misconduct and the outcome of these proceedings."

[26] Those statements by the Tribunal in *Cook* are particularly apt in consideration of the respondent's submission that it would be in the interests of justice for a non-publication order to be made because publication would undermine his professional relationship with other health practitioners and thus amount to a punitive measure going beyond the purpose of disciplinary proceedings and thus contrary to the interests of justice. For the same reasons as the Tribunal in *Cook*, the Tribunal does not accept those submissions. The criteria justifying such an order are exhaustively stated in s 66(2) of the QCAT Act and none of them is made out in this case. The factor of deterrence in the maintenance of ethical standards by health practitioners that is sought by way of the order of reprimand would be removed or weakened by such an order, which would not be desirable. It is not in the public interest, nor in the interests of justice, that a non-publication order be made. The application for a non-publication order is refused.