

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Health Ombudsman v Field* [2019] QCAT 243

PARTIES: **HEALTH OMBUDSMAN**
(applicant)
v
DAVID WILLIAM FIELD
(respondent)

APPLICATION NO/S: OCR053-18

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 2 September 2019

HEARING DATE: 6 November 2018

HEARD AT: Brisbane

DECISION OF: Judge Sheridan

Assisted by:

Ms N Alexander
Mr M Halliday
Mr S Lewis

- ORDERS:
1. Pursuant to s 107(2)(b)(iii) of the *Health Ombudsman Act 2013* (Qld), Mr Field has behaved in a way that constitutes professional misconduct.
 2. Pursuant to s 107(3)(e) of the *Health Ombudsman Act 2013* (Qld), Mr Field's registration is cancelled, effective from the date hereof.
 3. Pursuant to s 107(4)(a) of the *Health Ombudsman Act 2013* (Qld), Mr Field is disqualified from applying for registration for a period of one year, from the date hereof.
 4. There be no order as to costs.

CATCHWORDS: PROFESSIONS AND TRADES – HEALTH CARE PROFESSIONALS – NURSES – DISCIPLINARY PROCEEDINGS - where the practitioner was charged and convicted of criminal offences – where the practitioner failed to disclose the charges and convictions to the Nursing and Midwifery Board of Australia –where the practitioner declined to participate in the referral

proceedings - whether the registration of the practitioner should be cancelled – whether a period of disqualification from re-applying should be imposed

Criminal Code 1889 (Qld) s 75

Explosives Act 1999 (Qld) s 11

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

Health Practitioner Regulation National Law

(Queensland) s 5, s 130, s 222

Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 92, s 93

Weapons Act 1990 (Qld) s 50, s 58

Clyne v New South Wales Bar Association (1960) 104

CLR 186, cited

Ex parte Tziniolis; Re Medical Practitioners' Act (1966)

67 SR (NSW) 448, cited

Health Care Complaints Commission v King [2013]

NSWMT 9, cited

Health Ombudsman v Antley [2016] QCAT 472, cited

McBride v Walton [1994] NSWCA 199, cited

Medical Board of Australia v Dolar [2012] QCAT 271,

cited

Medical Board of Australia v Feeney [2012] QCAT 330

Medical Board of Australia v Moodley, [2014] QCAT

476, cited

New South Wales Bar Association v Evatt (1968) HCA

20, cited

Nursing and Midwifery Board of Australia v Seijbel-

Chocmingkwan [2015] QCAT 283, cited

Ooi v Medical Board of Queensland [1997] 2 Qd R 176,

cited.

APPEARANCES & REPRESENTATION:

Applicant: Mr M Price of the Office of the Health Ombudsman

Respondent: No appearance

REASONS FOR DECISION

The Referral

- [1] The current proceedings arise out of disciplinary matters referred to the tribunal on behalf of the Health Ombudsman against the respondent, Mr Field, pursuant to s 103(1)(a) and s 104 of the *Health Ombudsman Act 2013 (Qld) (HO Act)*. The referral was filed on 28 February 2018.
- [2] QCAT is the responsible tribunal with jurisdiction to hear and decide the matter in accordance with s 104 of the HO Act.

- [3] There are two charges the subject of the referral. The charges arise from Mr Field having been convicted of offences under the *Explosives Act 1999* (Qld), *Weapons Act 1990* (Qld) and *Criminal Code 1899* (Qld). Those offences resulted from a domestic dispute between Mr Field and his wife, which lead to a consensual search of Mr Field's house by Queensland Police Service Officers.
- [4] The two charges can be summarised as follows:
- (a) **Charge 1** – On 8 March 2016 in the Maryborough Magistrates Court Mr Field was convicted, on his own pleas of guilty, of the following offences:
- (i) 1 x possess unauthorised and prohibited explosives (s 11(1) of the *Explosives Act 1999* (Qld));
 - (ii) 1 x unlawful possession of weapons category A/B/M (s 50(1)(c)(iii) of the *Weapons Act 1990* (Qld));
 - (iii) 1 x threatening violence – discharge firearms or other act; (s 75(1)(b) of the *Criminal Code 1899* (Qld)); and
 - (iv) 1 x dangerous conduct with weapon (s 58(2) of the *Weapons Act 1990* (Qld)).
- (b) **Charge 2** – Contrary to s 130 of the *Health Practitioner Regulation National Law (Queensland)* (**National Law**), Mr Field failed to notify the Nursing and Midwifery Board of Australia (**Board**) within seven days that:
- (i) he had been charged on 11 February 2016 with the following offences punishable by 12 months imprisonment or more:
 - A. 2 x unlawful possession of weapons category D/H/R (s 50(1)(c)(i) of the *Weapons Act 1990* (Qld));
 - B. 1 x threatening violence – discharge firearms or other act (s 75(1)(b) of the *Criminal Code 1899* (Qld)); and
 - C. 1 x dangerous conduct with weapon (s 58(2) of the *Weapons Act 1990* (Qld));
 - (ii) he had been suspended by his employer, the Wide Bay Hospital and Health Service (**WBHHS**), on 15 February 2016;
 - (iii) he had been convicted, on 8 March 2016, of the offences outlined in Charge 1; and
 - (iv) his employment at WBHHS was terminated on 14 April 2016.
- [5] The applicant alleges in the referral that as a result of the charges, Mr Field has engaged in professional misconduct, or in the alternative, unprofessional conduct, as those terms are defined in the National Law.
- [6] Mr Field has filed no response to the referral, no sworn evidence and no submissions. At a directions hearing held on 4 May 2018, Mr Field advised the Tribunal over the phone that he did not wish to be involved in the proceedings, before himself terminating the call. There has not been any agreed statement of facts in the matter. Directions were made for the service of all material to be relied upon at the hearing on Mr Field, at his last known place of residence.
- [7] The matter proceeded before the Tribunal by way of affidavit evidence filed on behalf of the Health Ombudsman together with submissions as to facts and sanction.
- [8] A Notice of Hearing was served on Mr Field as required by s 92 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (**QCAT Act**). There was no

appearance by Mr Field at the hearing and the hearing was heard in his absence pursuant to s 93 of the QCAT Act.

Relevant circumstances

- [9] Mr Field was first registered as a Registered Nurse on 5 December 2002.
- [10] At the relevant time, Mr Field was employed by WBHHS and was working as a Clinical Nurse in the Medical/Surgical and Palliative Care Unit at Maryborough Hospital. He had held this position since 18 March 2008.

Offending Conduct

- [11] Mr Field's criminal offending arises out of a single incident on the evening of 10 February 2016 at his home in Maryborough. He was 55 years old at the time of the offending, with no criminal history. By reference to his police record of interview, the submissions at the sentencing hearing and submissions made in correspondence to his employer and the Ombudsman,¹ Mr Field had been drinking heavily that day. Mr Field admitted to having "about 12 beers" whilst out and to having a few more cans at home. His wife had also been drinking. The couple got into a verbal argument about a new tattoo Mr Field had gotten that day. The argument escalated. Mr Field says he "had enough because my wife wouldn't stop so I stupidly grabbed my replica firearm to scare her." He says that is the one he pointed at her. He says "the one she knew doesn't work."
- [12] The argument continued, with Mr Field's wife raising the topic of his home made firearm and making comments that the home made firearm would be non-operational due to Mr Field having made it himself. Mr Field says he placed a .22 bullet in the chamber of the home made firearm, pointed the gun outside towards the ground and pulled the trigger. Mr Field says to his surprise it worked. The bullet struck the metal gate causing damage.
- [13] There was a dispute at sentence as to the particulars of what occurred. The prosecutor submitted that following his discharging of the home made firearm, Mr Field placed this firearm against his wife's head and pulled the trigger. His wife heard the weapon click, but no projectile was discharged. Defence counsel for Mr Field disputed that the home made firearm was placed against his wife's head, contending that it was only the replica weapon. Defence counsel submitted that nothing turned on this point. The comments made by the learned magistrate at sentence did not identify the basis he proceeded on.
- [14] Queensland Police Service had attended the Maryborough address immediately following the dispute, arriving around 6:30 PM. Mr Field's wife had contacted police. With her help, police had located the replica firearm. When speaking to police, Mr Field initially denied that there were any weapons at the dwelling, however, when challenged admitted that there were. Mr Field told police they would have to "tear the house down" to find the weapons, as he would not tell them where they were located. Police conducted a consensual search of the house and located the home made rifle underneath a mattress in a bedroom. A plastic box containing

¹ Transcript of Interview, Maryborough Watch House, 2 February 2016, Exhibit OHO005172 to the affidavit of Emma Armstrong sworn 28 September 2018; Transcript of sentence, Maryborough Magistrates Court, 8 March 2016, page 4, Exhibit OHO005199 to affidavit of Emma Armstrong sworn 28 September 2018; Submissions dated 13 April 2016.

approximately 70 rounds of .22 calibre ammunition was also located, as well as a further piece of identical ammunition in a separate location. Mr Field did not state or give any reason for his possession of the firearms or ammunition.

- [15] Mr Field was arrested and transported to the Maryborough Watch House that evening. He participated in an electronic record of interview with QPS on 11 February 2016 and made full admissions to discharging the firearm and placing the replica handgun against his wife's head. Mr Field denied placing the sawn off rifle against his wife's head and pulling the trigger. He was charged and remanded in custody for 26 days before being sentenced.
- [16] On 8 March 2016 at the Maryborough Magistrates Court Mr Field pleaded guilty to, and was convicted of, the following offences:
- (a) 1 x possess unauthorised and prohibited explosives (s 11(1) of the *Explosives Act 1999* (Qld));
 - (b) 1 x unlawful possession of weapons category A/B/M (s 50(1)(c)(iii) of the *Weapons Act 1990* (Qld));
 - (c) 1 x threatening violence – discharge firearms or other act, domestic violence offence (s 75(1)(b) of the *Criminal Code 1899* (Qld)); and
 - (d) 1 x dangerous conduct with weapon (s 58(2) of the *Weapons Act 1990* (Qld)).

[17] In respect of the offences of threatening violence and dangerous conduct with weapon, Mr Field was sentenced to probation for 12 months. In respect of the other two charges, he was convicted but not further punished. No convictions were recorded for any of the four offences.

[18] Mr Field did not notify the Board, as required by s 130 of the National Law, of the fact that he had been charged and convicted of the criminal offences nor that his employment had been suspended and then terminated.

Action of the WBHHS

- [19] The Chief Executive at WBHHS, Mr Field's employer at the time, was notified of the charges on or about 15 February 2016 by a senior nurse in Bundaberg who had become aware of the charges.
- [20] By a letter dated 15 February 2016, Mr Field was notified that his employment at WBHHS had been immediately suspended on full pay.
- [21] Mr Field responded to the notification by letter dated 19 February 2016. In that letter, Mr Field stated that he would only be admitting to two out of the six charges. He said he would know more after court. Mr Field admitted to having a drinking problem and said, "...that was the main contributing factor for all of these recent allegations." He said, "...my recent conduct is quite out of character."
- [22] His employer responded by letter dated 4 March 2016 giving Mr Field a further opportunity to respond. No further information was provided by Mr Field. On 14 April 2016, Mr Field was notified that his employment at WBHHS had been terminated with immediate effect.

Action by the Health Ombudsman

- [23] On 15 February 2016, the Health Ombudsman was also notified of the charges against Mr Field.
- [24] On 26 February 2016, Mr Field was notified by the Health Ombudsman of the taking of immediate action to suspend his registration with an opportunity given to make submissions in relation to that decision.
- [25] Mr Field provided submissions to the Ombudsman in a letter dated 13 April 2016. In his submission, he gave a detailed account of his offending conduct and maintained “it was a one off stupid drunken thing”. He stated that he does not pose a risk to anyone, he has been punished enough and asks “could you please show me some compassion and not suspend my registration.”
- [26] The Health Ombudsman confirmed the suspension of his registration by a letter dated 18 July 2016. His registration status remains suspended.

Categorisation of conduct

- [27] The primary offending conduct is the convictions forming the basis of the particulars of charge 1 of the referral.
- [28] The Health Ombudsman submits Mr Field’s conduct amounts to professional misconduct as defined under s 5 of the National Law. The referral alleged that the conduct fell within sub-paragraphs (a) and/or (c) of the definition.
- [29] Section 5 of the National Law, so far as relevant, provides:
- (a) unprofessional conduct by the practitioner that amounts to conduct that is substantially below the standard reasonably expected of a registered health practitioner of an equivalent level of training or experience; and ...
 - (c) conduct of the practitioner, whether occurring in connection with the practice of the health practitioner’s profession or not, that is inconsistent with the practitioner being a fit and proper person to hold registration in the profession.
- [30] The focus of the Health Ombudsman’s submissions, particularly their oral submissions, was that Mr Field’s criminal conduct, accepting it occurred in his personal life, was inconsistent with him being a fit and proper person to hold registration as a registered nurse.
- [31] In considering the offending giving rise to the criminal charges, the comments made by the Tribunal in *Nursing and Midwifery Board of Australia v Seijbel-Chocmingkwan* are particularly apposite; namely “the conduct is incompatible with the characteristics, attributes, and ethical standards required in such profession.”²
- [32] There can be no doubt that the conduct was incompatible. It involved violence in a domestic setting, the making and use of a handmade gun, the firing of a sawn off rifle and the possession of ammunition in circumstances of an admitted drinking problem. The conduct plainly satisfies the definition of “professional misconduct”.

² [2015] QCAT 283, [8].

- [33] The failures to notify, the subject of charge 2, are secondary to the original misconduct in charge 1. Whilst a failure to report may justify a finding of unprofessional conduct on its own, it is appropriately treated as an aggravation to the totality of the conduct that has to be considered.³ The totality of the conduct clearly falls within the definition of “professional misconduct”.

Sanction

- [34] Having found Mr Field’s conduct amounts to professional misconduct, the Tribunal must decide the appropriate sanction to be imposed in accordance with s 107 of the HO Act.
- [35] The Health Ombudsman ultimately submitted that the appropriate sanction was cancellation of Mr Field’s registration with a disqualification of one to two years. These submissions followed initial submissions by the Health Ombudsman seeking an order of suspension for a period of one to two years, but not cancellation of registration.
- [36] In considering the appropriate sanction, the question is to be determined on the basis of whether a practitioner is a fit and proper person to hold registration as at the date of hearing. The Health Ombudsman referred to the decision of *McBride v Walton* where President Kirby identified the following factors as being relevant for determination of fitness and propriety:
- (a) Whether the misconduct can be satisfactorily explained as an error of judgment rather than a defect of character;
 - (b) The intrinsic seriousness of the misconduct qua fitness to practise medicine;
 - (c) Whether the misconduct should be viewed as an isolated episode and hence atypical or uncharacteristic of the practitioner’s normal qualities of character;
 - (d) The motivation which may have given rise to the proven episode of misconduct;
 - (e) The underlying qualities of character shown by previous and other conduct; and
 - (f) Whether the practitioner’s conduct post the proven episode of misconduct demonstrates that public and professional confidence may be reposed to him to uphold and observe the high standards of moral rectitude required of a medical practitioner.⁴
- [37] In addressing the factors identified, the Health Ombudsman said that although Mr Field has no previous history of violence, his criminal offending should not be considered as an error of judgment and isolated episode. It was said that his unauthorised possession of the firearms and ammunition and the creation of firearms are representative of Mr Field’s underlying qualities of character.
- [38] The Health Ombudsman submitted that while the conduct did not occur in Mr Field’s capacity as a registered nurse, the seriousness of the offending is self-evident and arguably demonstrates that he has a violent and unpredictable character that can arise

³ *Health Ombudsman v Antley* [2016] QCAT 472, [31].

⁴ [1994] NSWCA 199, 34.

- in the event of a dispute. The conduct led to his wife, who had been with Mr Field for twelve years, to become fearful of him and to leave their marriage.
- [39] In his record of interview and in the subsequent correspondence to his employer and the Health Ombudsman, Mr Field offered no explanation for his ownership of firearms and ammunition nor his motivation for having created his own firearm. His expressed motivation for holding a firearm to his wife's head in an attempt to scare her is very concerning.
- [40] Mr Field filed no submissions in the matter before the Tribunal. However, in evidence before the Tribunal there were two letters written by Mr Field to his employer; first in response to a request for further information relating to the notice of suspension of employment and then in response to the notice of termination of employment. In that correspondence, Mr Field spoke of having been "punished enough"⁵ and of having "already been punished".⁶ It is clear by reference to the letters, that the reference to punishment was a reference to the criminal proceeding.
- [41] This Tribunal's function is distinct to the court's role in the criminal justice system; it is enquiring into a practitioner's conduct as a member of the nursing profession. That Mr Field had been dealt with in the criminal justice system for his criminal offending does not now preclude him from being dealt with for that conduct as a member of the nursing profession.
- [42] The primary purpose of disciplinary proceedings, as distinct from any criminal proceedings, is protective, not punitive.⁷ In the exercise of its protective jurisdiction, the Tribunal must consider issues of personal and general deterrence, the maintenance of professional standards and the maintenance of public confidence in the profession.⁸
- [43] Central to the determination of sanction must be an assessment of the ongoing risk posed by the practitioner and the likelihood of the practitioner reoffending. On the facts here, evidence of insight, remorse and rehabilitation will be critical.
- [44] The Health Ombudsman submitted that Mr Field's conduct post his offending demonstrates a lack of insight into his criminal offending and a lack of remorse for his actions.
- [45] While Mr Field did cooperate with police by participating in an electronic record of interview and made admissions in relation to his criminal charges, the Health Ombudsman said that his conduct in the lead up to that point and a number of his responses in the interview with police were concerning.
- [46] In support of its submissions as to lack of insight and remorse, the Health Ombudsman referred to letters between Mr Field and his employer and Mr Field and the Health Ombudsman. It was said that of particular concern was the admission by

⁵ Letter from David Field to Leon Atkinson-MacEwan dated 13 April 2016, exhibit OHO001599 to the affidavit of Robert Mulhern sworn 15 June 2018.

⁶ Letter from David Field to Tracy Carlson undated, exhibit OHO001590 to the affidavit of Robert Mulhern sworn 15 June 2018.

⁷ See, for example, *Clyne v New South Wales Bar Association* (1960) 104 CLR 186; *New South Wales Bar Association v Evatt* [1968] HCA 20; *Medical Board of Australia v Dolar* [2012] QCAT 271, [30].

⁸ *Health Care Complaints Commission v King* [2013] NSWMT 9, [27]; *Ooi v Medical Board of Queensland* [1997] 2 Qd R 176, 177.

Mr Field in the letters to him having a drinking problem. In the letter to his employer dated 19 February 2016, he stated:

I have a drinking problem and that was the main contributing factor for all of these recent allegations. I know I am suspended from duty but please could I still receive pay? This money will go towards my rehabilitation for my drinking problem.

[47] In his letter to the Health Ombudsman dated 13 April 2016, Mr Field stated that he had reduced his alcohol consumption to nothing and said that, “he will not be making anymore home made firearms ever”. He referred to his conduct being “a one-off stupid drunken thing that happened”. Those statements are at odds with the admissions made to his employer regarding having a drinking problem and needing money to participate in rehabilitation programs.

[48] It was said that Mr Field’s comments about the offending being out of character cannot be found to be true, considering that the possession of the ammunition and firearm was an ongoing practice and not a one-off event.

[49] The Tribunal commented in *Ex parte Tziniolis; Re Medical Practitioners’ Act*:

Reformations of character and of behaviour can doubtless occur but their occurrence is not the usual but the exceptional thing. One cannot assume that a change has occurred merely because some years have gone by and it has not been proved that anything of a discreditable kind has occurred. If a man has exhibited serious deficiencies in his standards of conduct and his attitudes, it must require clear proof to show that some years later he has established himself as a different man.⁹

[50] In *Medical Board of Australia v Moodley*, the tribunal considered it was appropriate to cancel the registration of Dr Moodley concluding that “There is no evidence at all before the tribunal which would, in any way, satisfy it that Dr Moodley is a person who ought continue to hold registration as a medical practitioner in Queensland. There is no evidence of any insight or remorse in respect of his conduct.”¹⁰

[51] There is limited evidence before the Tribunal as to any reformation of character post-offending. The Tribunal has no evidence of any steps taken by Mr Field to address his underlying drinking problem. His unwillingness to engage in the referral process demonstrates a lack of understanding of the responsibilities of professionals and the role played by professional bodies in upholding the standards of a profession.

[52] On the basis of the offending conduct and the very limited evidence of insight and remorse, the Tribunal is of the view that Mr Field is not a fit and proper person to hold registration as a registered nurse. Given the Tribunal’s finding, it is undoubtedly appropriate that Mr Field’s registration appears in the public national register, maintained by the Board pursuant to s 222 of the National Law, as cancelled. Accordingly, to ensure that his registration appears in the register as such, the Tribunal will order that his registration be cancelled.

[53] The Health Ombudsman submits that if his registration was cancelled, it would be appropriate to impose a period of disqualification for the time period that a suspension

⁹ (1966) 67 SR (NSW) 448 at 461.

¹⁰ [2014] QCAT 476, [24]

may have been imposed. The Health Ombudsman submits that a disqualification period of one to two years would be appropriate.

- [54] By the date of hearing, Mr Field's registration had been suspended for a period of two and a half years; it has now been suspended for three years. A further disqualification period of one year, having regard to the authorities to which the Tribunal was referred and guided by the assessors, is considered appropriate. Particular reliance was placed on the decision in *Nursing v Midwifery Board of Australia v Feeney*¹¹ with the Health Ombudsman submitting that a disqualification period provides time for Mr Field to rehabilitate himself and also addresses deterrence.
- [55] If at the end of that period Mr Field wishes to re-apply for registration, the Board will have the opportunity to consider whether Mr Field is a fit and proper person to hold registration at that time. The Board will be best placed to determine any issues including any recency of practice requirements.

Costs

- [56] The Health Ombudsman did not seek its costs to the proceedings. To confirm that no application for costs was made, it is appropriate the Tribunal make a formal order that there be no order as to costs.

Decision

- [57] Accordingly, it is the decision of the Tribunal that:
1. Pursuant to s 107(2)(b)(iii) of the *Health Ombudsman Act 2013* (Qld), Mr Field has behaved in a way that constitutes professional misconduct
 2. Pursuant to s 107(3)(e) of the *Health Ombudsman Act 2013* (Qld), Mr Field's registration is cancelled, effective from the date hereof.
 3. Pursuant to s 107(4)(a) of the *Health Ombudsman Act 2013* (Qld), Mr Field is disqualified from applying for registration for a period of one year, from the date hereof.
 4. There be no order as to costs.

¹¹ [2012] QCAT 330.