JURISDICTION	**:**	STATE ADMINISTRATIVE TRIBUNAL
ACT	**:**	LEGAL PROFESSION ACT 2008 (WA)
CITATION	**:**	LEGAL SERVICES AND COMPLAINTS COMMITTEE and KHOSA [2023] WASAT 90 (S)
MEMBER	**:**	JUDGE H JACKSON, DEPUTY PRESIDENT MR D AITKEN, SENIOR MEMBER MR R POVEY, MEMBER
HEARD	**:**	15 DECEMBER 2023
DELIVERED	**:**	28 MARCH 2024
PUBLISHED	**:**	28 MARCH 2024
FILE NO/S	**:**	VR 159 of 2017
BETWEEN	**:**	LEGAL SERVICES AND COMPLAINTS COMMITTEE Applicant AND MANRAJ SINGH KHOSA Respondent

Catchwords:

Vocational regulation - Legal practitioners - Professional misconduct - Unfitness to practise - Disgraceful or dishonourable conduct - Penalty and costs order - Report to Supreme Court with recommendation that name of practitioner be removed from local roll of practitioners - Order that practitioner pay applicant's costs

Legislation:

Legal Profession Act 2008 (WA), s 403, s 438, s 438(2), s 438(2)(a), s 438(4)(b), s 439, s 441
State Administrative Tribunal Act 2004 (WA), s 87(2)

Result:

The Tribunal to make and transmit a report to the Supreme Court (full bench) with a recommendation that the name of the practitioner be removed from the roll of persons admitted to the legal profession under the *Legal Profession Act 2008* (WA)
The practitioner to pay the applicant's costs fixed at $197,053.05

Category: B

Representation:

Counsel:

Applicant	:	Mr C Beetham
Respondent	:	In Person (by video)

Solicitors:

Applicant	:	Legal Services and Complaints Committee
Respondent	:	N/A

Case(s) referred to in decision(s):

A Solicitor v Council of the Law Society of New South Wales [2004] HCA 1; (2004) 216 CLR 253
Fidock v Legal Profession Complaints Committee [2013] WASCA 108
Gandini v Legal Profession Complaints Committee [2013] WASCA 168(S)
Khosa v Legal Profession Complaints Committee [2017] WASCA 192
Khosa v Legal Profession Complaints Committee [2017] WASCA 192 (S)
Khosa v Legal Profession Complaints Committee [2021] WASCA 34
Khosa v Legal Profession Complaints Committee [2021] WASCA 64
Khosa v Legal Professional Complaints Committee [2017] WASCA 192
Legal Profession Complaints Committee and in de Braekt [2012] WASAT 58(S)
Legal Profession Complaints Committee and Khosa [2015] WASAT 107

Legal Profession Complaints Committee and Khosa [2015] WASAT 107(S)
Legal Profession Complaints Committee and Khosa [2023] WASAT 90
Legal Profession Complaints Committee and Lawson [2021] WASAT 152(S)
Legal Profession Complaints Committee and Lee-Steere [2010] WASAT 189
Legal Profession Complaints Committee and Metaxas [2021] WASAT 82(S)
Legal Services and Complaints Committee and Lawson [2021] WASAT 152(S)
Medical Board of Western Australian and Roberman [2005] WASAT 81(S)
Quinlivan v Legal Profession Complaints Committee [2012] WASCA 263(S)
Vogt v Legal Practitioners Complaints Committee [2009] WASCA 202
Vogt v Legal Profession Complaints Committee [2009] WASCA 20
Western Australian Planning Commission v Questdale Holdings Pty Ltd [2016] WASCA 32
Young v Legal Profession Complaints Committee [2022] WASCA 52

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1. On 5 October 2023, we published our reasons for decision in this matter (**Primary Reasons**).[1]

2. These reasons are supplemental to the Primary Reasons and should be read together with them.

3. In the Primary Reasons, we made findings of professional misconduct pursuant to s 438 of the *Legal Profession Act 2008* (WA) (**LP Act**) in relation to each of three grounds against the respondent, Manraj Singh Khosa (**practitioner**). We concluded by stating that we would hear from the parties as to the orders to be made to reflect those findings and as to the programming of a hearing as to penalty and to costs.

4. A directions hearing was held on 20 October 2023 for that purpose. Consistent with his approach as described in the Primary Reasons,[2] the practitioner did not attend.

5. Rather, on the previous day, he sent by email to Judge Jackson's Associate a letter signed by him and his wife, Ms Ruba, which alleged, amongst other things, that the proceedings were an 'arbitrary process that is a continuance (*sic*) of a significant and blatant miscarriage of justice … given that the reasons for decision are profoundly erroneous, biased, in bad faith and are the result of a miscarriage of justice'. As that letter amounts, in part, to a complaint about the manner in which the hearing was conducted, it was referred to the President as head of jurisdiction to deal with. We have not had regard to that letter in reaching our views as to penalty, or costs.

6. Orders were made at the directions hearing on 20 October 2023 which:

   (a) attached draft orders intended to reflect the findings made in the Primary Reasons and which invited the parties to make submissions in that regard. The practitioner did not make any such submissions.

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[1] ***Legal Profession Complaints Committee and Khosa*** [2023] WASAT 90 (**Primary Reasons**).
[2] Primary Reasons at [88] - [92], [107] - [111] and [132].

(b) programmed the matter for hearing as to penalty and costs including for the parties to provide their unavailable dates. The practitioner did not provide his unavailable dates for the hearing.

7. On 26 October 2023 orders were made as to the findings of professional misconduct and the matter was listed for hearing as to penalty and costs on 15 December 2023.

8. The 20 October 2023 orders provided for the practitioner to file and serve his written submissions on penalty and costs, together with any supporting evidence, by no later than 1 December 2023. He filed neither submissions nor evidence by that date.

9. At 8.00 am, on 15 December 2023, the morning of the hearing as to penalty and costs, the practitioner filed written submissions. He also attended the hearing, by video-conference.

10. Having regard to the Primary Reasons as well as to the written and oral submissions of the parties, we have determined that:

(a) the appropriate penalty to be imposed is an order that the Tribunal make and transmit a report to the full bench of the Supreme Court with a recommendation that the practitioner's name be removed from the roll of practitioners; and

(b) the practitioner is to pay the applicant's costs fixed in the sum of $197,053.05.

<u>Restatement of our findings as to the practitioner's conduct</u>

11. It is convenient to restate our findings that the practitioner engaged in professional misconduct in relation to each of three grounds.

12. As to ground one, we found that the practitioner:

(a) failed to pay any of four invoices, and part of a fifth invoice, (**October Invoice**) issued by counsel (**Mr B**);[3]

(b) made payments from funds held in trust for invoices issued by his own law firm, Angove Law, in preference to paying Mr B his outstanding fees;[4]

[3] Primary Reasons at [179].
[4] Primary Reasons at [195].

(c) following part payment of the October Invoice, falsely and misleadingly represented to Mr B that he had sufficient funds to pay the balance of that invoice, that full payment had not been made due to the bank's daily payment limit, and that the balance would be paid the following week.[5]

13. We found that the conduct the subject of ground one, when viewed as a whole, was:

(a) conduct that falls substantially short of the standard of professional conduct observed by members of the legal profession of good repute and competence; and

(b) conduct that would be reasonably regarded as disgraceful or dishonourable to practitioners of good repute and competence; and

(c) conduct that was sufficiently serious to warrant a conclusion that the practitioner is not a fit and proper person to engage in legal practice.[6]

14. As to ground two, we found that the practitioner:

(a) at a meeting with the Legal Practice Board of WA (**LPBWA**), represented that Angove Law was solvent, when that representation was false and he knew it to be false;[7]

(b) in completing forms provided to the LPBWA as to the closure of Angove Law and the establishment of a new firm (Law on Newcastle – **LoN**), represented that LoN was *not* taking over the practice of Angove Law, when that representation was false and he knew it to be false;[8]

(c) determined to avoid the debt owed to Mr B by 'deriving' LoN from Angove;[9] and

(d) made the false representations to the LPBWA described at sub-para (a) and (b) above as part of his attempt to avoid the debt owed to Mr B by 'deriving' LoN from Angove.[10]

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[5] Primary Reasons at [213] - [215].
[6] Primary Reasons at [233] and [240].
[7] Primary Reasons at [271].
[8] Primary Reasons at [303].
[9] Primary Reasons at [320].
[10] Primary Reasons at [333].

15. We found that the conduct the subject of ground two, when viewed as a whole, was:

(a) conduct that falls substantially short of the standard of professional conduct observed by members of the legal profession of good repute and competence; and

(b) conduct that would be reasonably regarded as disgraceful or dishonourable to practitioners of good repute and competence; and

(c) conduct that was sufficiently serious to warrant a conclusion that the practitioner is not a fit and proper person to engage in legal practice.[11]

16. As to ground three, we found that the practitioner failed, without reasonable excuse, to respond to various requests and demands for information and documents from the applicant. Ground three contained five sub-grounds, each of which concerned particular request/s and/or demand/s over a particular period of time. In each case, we found the allegations made out.[12] In relation to the fifth sub-ground, we also found that the practitioner had obstructed the exercise of the powers of the applicant's investigator.[13]

17. We found that the conduct the subject of ground three, when viewed as a whole, was conduct that:

(a) falls substantially short of the standard of professional conduct observed by members of the legal profession of good repute and competence; and

(b) would be reasonably regarded as disgraceful or dishonourable to practitioners of good repute and competence.

18. However, in the absence of an element of dishonesty, we did not find that the conduct was such as to warrant a conclusion that the practitioner is not a fit and proper person to engage in legal practice.[14] It is useful to clarify here that our finding as to dishonesty ought not to be seen as one of general import. That is, the finding does not represent a statement of general principle that dishonesty is necessary for a

[11] Primary Reasons at [345].
[12] Primary Reasons at [386], [407], [427], [445] and [455].
[13] Primary Reasons at [465].
[14] Primary Reasons at [476] - [477].

finding that a practitioner is not a fit and proper person to engage in legal practice. Clearly, there will be instances where, for example, incompetent, but not dishonest, conduct is such as to warrant such a finding.[15] That was not, however, the case here.

Relevant legal principles as to penalty

19. For the reasons set out in paragraphs 134 and 135 of the Primary Reasons, the relevant provisions of the LP Act have ongoing operation in relation to this matter, notwithstanding its repeal on and from 1 July 2022.

20. Section 438(2) of the LP Act provides that the Tribunal may, after it has completed a hearing in relation to a referral under Part 13 of the LP Act in respect of an Australian legal practitioner, either make and transmit a report to the full bench of the Supreme Court on its finding that the practitioner is guilty of, amongst other things, professional misconduct or make any one or more of the orders specified in s 439, s 403 and s 441.

21. Amongst other things, s 439 of the LP Act permits the Tribunal to order that a local practising certificate be suspended for a specified period of time or cancelled, to make an order publicly reprimanding the practitioner, and to make an order that certain specified conditions be imposed on the practitioner's practising certificate.

22. The principles to be applied in determining the appropriate disciplinary sanction are well established and were not the subject of dispute. They were set out by the Court of Appeal in ***Khosa***[16] and summarised by the Tribunal in ***Lawson***[17] as follows:

> (a) The Tribunal's jurisdiction in this regard is not to be exercised for the purpose of punishing the relevant practitioner but, rather, for the protection of the public and the maintenance of the reputation and standards of the legal profession;
>
> (b) The protection of the public includes both general deterrence of other practitioners who might otherwise be tempted to engage in the relevant conduct as well as deterrence personal to the relevant practitioner;
>
> (c) Where the Tribunal concludes that a practitioner is presently unfit to practise, a choice is presented between the alternatives

[15] See, for example, ***Fidock v Legal Profession Complaints Committee*** [2013] WASCA 108 at [102].
[16] ***Khosa v Legal Professional Complaints Committee*** [2017] WASCA 192 at [188] - [192].
[17] ***Legal Services and Complaints Committee and Lawson*** [2021] WASAT 152(S) at [29].

of suspension and striking off. An order for suspension in those circumstances may only be made on the basis that, at the termination of the period of suspension, the practitioner will no longer be unfit to practise because, at that time, the practitioner's name will still be on the roll of practitioners and they may resume practise;

(d) Suspension is a serious form of discipline which is usually imposed to discipline the legal practitioner, who has committed an act of unprofessional conduct but who, in the opinion of the Tribunal, at the end of the period of suspension, will be a fit and proper person to practise law;

(e) In the context of suspension, present unfitness to practise may be understood to include a serious breach of professional obligations reflecting, to a significant degree, upon the practitioner's fitness to practise;

(f) However, where the Tribunal finds that the practitioner's present unfitness to practise reveals or discloses that the practitioner, in fact, lacks the character and trustworthiness necessary to discharge his or her obligations of legal practice or the practitioner is permanently or indefinitely unfit to practise, striking off will ordinarily be the appropriate response rather than suspension;

(g) In seeking to understand the difference, it will be relevant to consider whether the practitioner appreciates or otherwise the impropriety of his or her conduct because a lack of appreciation of impropriety and a lack of insight increases the risk of recurrence of the improper conduct;

(h) Fitness to practise for the purpose of penalty is to be determined at the time of the relevant hearing and not at the time of the misconduct.

23. In ***Lawson***,[18] the following passage from ***Metaxas***[19] was also repeated:

> In summary, where an order for removal from the roll is contemplated, the ultimate question is whether the impugned conduct of the practitioner and all of the surrounding circumstances demonstrates that the practitioner is not a fit and proper person to remain a member of the legal profession. Where the conduct of the practitioner indicates that they lack the qualities of honesty and integrity, striking off is likely to be the penalty because those character deficiencies are unlikely to be

[18] ***Lawson*** at [30].
[19] ***Legal Profession Complaints Committee and Metaxas*** [2021] WASAT 82(S) at [15].

remedied during a period of suspension. In contrast, suspension would generally be appropriate where:

(a) the Tribunal considers that although the practitioner has fallen below the high standards required of a practitioner, the circumstances are such that [the Tribunal is satisfied that] their current unfitness to practise will be overcome during a period of suspension; or

(b) although the practitioner is thought to be fit to practise, the seriousness of the practitioner's conduct [in this particular case] is such that the appropriate outcome is a period of suspension in order to protect the public, through general deterrence, and otherwise maintain the standards of the profession.

The position of the parties as to penalty

24. In short, the applicant seeks an order that the Tribunal make and transmit a report to the full bench of the Supreme Court with a recommendation that the practitioner's name be removed from the local roll of practitioners.

25. In particular, the applicant points to the findings of deliberately misleading conduct which, it submits, 'goes to the very heart of a practitioner's duty as an officer of the court and therefore to the proper administration of justice'.[20]

26. The applicant also submits that deliberately misleading the LPBWA should be seen in the same light as deliberately misleading the court (or Tribunal) given its role of regulating the profession.[21]

27. The applicant submits that the practitioner's conduct the subject of findings as to grounds one and two falls within the category of conduct that instantly demonstrates unfitness to practice in that those findings 'directly impugn [the practitioner's] integrity and honesty'. As a result, it submits that 'there is no prospect that the [practitioner] can command the personal confidence of clients, fellow practitioners and judges'.[22]

28. The findings as to ground three are also very serious, it submits, because although there is no dishonesty:

[20] Applicant's Submissions – Penalty and Costs, 8 November 2023, filed 10 November 2023 (**Applicant's Written Submissions**) at [12], citing ***Vogt v Legal Practitioners Complaints Committee*** [2009] WASCA 202 at [61].
[21] Applicant's Written Submissions at [13].
[22] Applicant's Written Submissions at [19], [21] and [22].

> … failings of this type have the capacity to compromise both the system of regulation for which the Board is responsible and to which practitioners are answerable and, ultimately, the protection of the public.

29. The applicant also submits that the practitioner 'has shown no insight and demonstrated no remorse' which, it is said, is evidenced by, amongst other things, his conduct of the proceedings, including his failure to appear at trial without a reasonable excuse.[23]

30. The applicant also relies upon the practitioner's prior disciplinary history, including his previous suspension for two months for the breach of a personal undertaking in 2017, which it characterises, correctly in our view, as 'not honest conduct'.[24]

31. Although the practitioner filed written submissions and attended the hearing, in fact he made no submissions as to penalty save to say that no penalty should be imposed because, in his view, our findings as to misconduct are unsafe and the applicant's conduct was inappropriate.[25]

32. The practitioner's written submissions:

(a) criticise the applicant, including in terms which allege dishonest conduct on its part,[26] delay,[27] and that it 'racially profiled' the practitioner and Ms Ruba;[28]

(b) are highly critical of the Tribunal and seek to re-agitate various applications, in ways sometimes inconsistent with our findings, made by him and his wife to vacate the hearing in March 2023;[29]

(c) seek to, in effect, relitigate the matters which were alleged by him but not pursued at the hearing in March 2023 because he did not attend.[30]

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[23] Applicant's Written Submissions at [24].
[24] Applicant's Written Submissions at [27] and [29].
[25] ts 4 - 6, 15 December 2023.
[26] The Respondent's Written Submissions for a hearing to be held on 15 December 2023 (**Respondent's Written Submissions**) at pages 2 and 9 - 10.
[27] Respondent's Written Submissions at page 3.
[28] Respondent's Written Submissions at page 4.
[29] Respondent's Written Submissions at page 7.
[30] Respondent's Written Submissions at pages 3 - 4 and 11.

33. The submissions critical of the Tribunal include various paragraphs under the heading 'Bias', which included that he and Ms Ruba had concluded that he 'was not [*sic* - would not?] receive a fair hearing' as a result of the 'bullying and intimidatory behaviour shown to Ms Ruba' in dealing with the applications to vacate.[31] They also include submissions that by proceeding in his absence with the substantive hearing, he was denied the opportunity to be heard.[32]

34. Such matters are, self-evidently, potential grounds for appeal, rather than submissions going to the appropriate penalty that should be imposed. So much was put to the practitioner during the penalty hearing, to which he responded by stating that he was considering an appeal and that 'this whole matter is crying out for an appeal'.[33]

35. However, given the criticism directed at the Tribunal, and particularly at the presiding member in three identified paragraphs, we enquired of the practitioner as to whether they constituted an application for, or provided the basis for an application for, recusal. By reply, the practitioner stated cryptically, that:

> It's just stating what has occurred. If it does give rise to recusal, so be it. If it gives rise to something else, then let's see where that goes. I haven't turned my mind to that.[34]

36. The practitioner did not otherwise pursue an application for recusal and the hearing proceeded.

37. We will not engage with the substance of the practitioner's submissions which allege, in effect, misconduct against the applicant and complain about the manner in which the hearing was conducted. They are for others to determine, if such matters are pursued. We set them out here to say no more than that the practitioner failed to take up the opportunity to put his case, just as he did in March last year at the substantive hearing.

Determination as to penalty

38. As indicated above, we have determined that the appropriate penalty is to order that the Tribunal make and transmit a report to the full bench of the Supreme Court with a recommendation that the name of the practitioner be removed from the local roll of practitioners.

[31] Respondent's Written Submissions at pages 8 - 9.
[32] Respondent's Written Submissions at page 10.
[33] ts 6, 15 December 2023.
[34] ts 3, 15 December 2023.

39. We are of that view having regard to the following matters.

40. First, as indicated above, we have made findings that, in relation to grounds one and two the practitioner engaged in conduct, including deliberately dishonest conduct, that is such as to warrant a conclusion that the practitioner is not a fit and proper person to engage in legal practice.

41. Of course, such a conclusion does not require us to make the same finding as to the appropriate penalty. Amongst other things, the question presently before us is whether the practitioner is currently (as at the time of determining penalty) unfit to practice,[35] whereas our previous findings concern conduct that occurred as long ago as 2013. Nonetheless, the findings plainly carry significant weight.

42. Secondly, and as noted in the immediately preceding paragraph, our findings as to grounds one and two involve findings of deliberate dishonesty; that is, findings that he knowingly misled counsel (ground one) and the LPBWA on three separate occasions (ground two).

43. As we held in relation to ground one:

> Integrity and honesty are essential characteristics expected of a practitioner, and accordingly the court [and this Tribunal] has generally taken a very serious approach when dealing with dishonesty by a practitioner.[36]
>
> Intentionally misleading anyone is a serious breach of the practitioner's professional duty.[37]

44. We also agree with the applicant's submission[38] that misleading the LPBWA should be seen in the same light as misleading the court. As was stated in ***Lee-Steere***,[39] the reputation of the profession depends to a large extent upon the power and the ability of the LPBWA (and the applicant) to effectively regulate the activities of legal practitioners. In ***Lee-Steere***, the Tribunal held that to ensure that the LPBWA and the applicant can achieve that purpose, practitioners are required to cooperate with the reasonable requests of their regulatory body 'with

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[35] ***A Solicitor v Council of the Law Society of New South Wales*** [2004] HCA 1; (2004) 216 CLR 253 at [21]; ***Khosa v Legal Profession Complaints Committee*** [2017] WASCA 192 at [195].
[36] ***Gandini v Legal Profession Complaints Committee*** [2013] WASCA 168(S) at [36]. (Citation in original).
[37] ***Vogt v Legal Profession Complaints Committee*** [2009] WASCA 202 at [61]. See also the passage in ***Metaxas*** reproduced at [23] above.
[38] Applicant's Written Submissions at [13].
[39] ***Legal Profession Complaints Committee and Lee-Steere*** [2010] WASAT 189 (***Lee-Steere)*** at [22] - [24].

alacrity and with complete honesty'.[40] Relevantly, in this regard, it also held that the duty owed to the LPBWA and to the applicant is 'not less than the duty owed by a practitioner to his or her client and to a Court or Tribunal'.[41]

45. Thirdly, and consistent with the immediately preceding paragraph, while the findings in relation to ground three do not involve dishonesty, they are nonetheless very grave indeed. Amongst other things, as noted above, our findings include that the practitioner 'obstructed the exercise' of powers of the applicant's investigator.[42]

46. But even without that particular finding, over a very lengthy period (several years - 2015, 2016 and 2018), and over five separate periods of time and in each case without reasonable excuse, the practitioner failed to meet his obligation to assist the regulator with its investigations.

47. The fourth matter is (as per the preceding paragraph) that the practitioner's conduct covers a very considerable period of time, stretching from the end of 2013, when he misled Mr B, through 2015 when he misled the LPBWA and sought to derive LoN from Angove Law and failed without a reasonable excuse to adequately respond to the LPBWA's requests for information and documents, through 2016 and 2018 when there were further failures to promptly provide information and documents, including his obstruction of powers of the investigator.

48. The fifth relevant matter is that the conduct the subject of ground two was dishonest conduct aimed at avoiding the practitioner's obligation to pay Counsel's fees; that is, he stood to benefit from the dishonest conduct at the expense of Mr B.

49. The preceding five relevant matters go to the seriousness of the offending. In our view, as should be apparent, we are of the view that it is very serious indeed. It covers both dishonest conduct and conduct that makes more difficult the job of the regulator. The dishonest conduct included conduct by which the practitioner sought to obtain a personal advantage. In the case of both types of conduct there are instances of the conduct in question over a period of years.

50. We turn now to circumstances personal to the practitioner.

[40] ***Lee-Steere*** at [24].
[41] ***Lee-Steere*** at [23].
[42] Primary Reasons at [464].

51. The sixth relevant matter is that the conduct the subject of ground two occurred soon after the imposition of a penalty of suspension of his practising certificate. The Tribunal imposed a penalty of six months suspension for the practitioner's breach of an undertaking on 16 May 2015.[43] On appeal, that suspension was stayed on 20 June 2015[44] and, later, reduced to two months.[45] The conduct the subject of ground two occurred either side of the grant of the stay: on 17 and 23 June and 9 July 2015.

52. That is, at the very time when the practitioner was being sanctioned for 'not honest' behaviour, he engaged in dishonest conduct; specifically the making of false representations to the LPBWA.

53. It is true that as at that time the practitioner was appealing the previous findings of misconduct, but it might fairly be said that the circumstances should have focused his attention on the need for scrupulous care to ensure all dealings were honest.

54. That he engaged in dishonest conduct at that time appears to us to be a factor that supports a finding that he is inherently unsuitable for practice.

55. Seventh, as should be apparent from immediately above, the practitioner does not have a clean record in relation to disciplinary action for dishonesty. In 2015, the Tribunal found that he knowingly breached a personal undertaking to another practitioner.[46]

56. Accordingly, even if the conduct the subject of grounds one to three could be viewed as a single course of conduct (and, in our view it cannot, given its duration, various forms of conduct and various forms in which it occurred), it cannot be said, as was said in 2015 by the Tribunal in relation to the breach of the undertaking, that the conduct represents 'an isolated act of misjudgement'.[47] Rather, in our view the practitioner has engaged in several instances of dishonest and otherwise inappropriate conduct over a lengthy period of time.

57. The eighth relevant matter is that the practitioner has shown no insight into, or remorse for, his conduct. While it has been said that the

[43] ***Legal Profession Complaints Committee and Khosa*** [2015] WASAT 107(S).
[44] ***Khosa v Legal Profession Complaints Committee*** [2017] WASCA 192 at [3].
[45] ***Khosa v Legal Profession Complaints Committee*** [2017] WASCA 192 (S) at [9].
[46] ***Legal Profession Complaints Committee and Khosa*** [2015] WASAT 107.
[47] ***Legal Profession Complaints Committee and Khosa*** [2015] WASAT 107 (S) at [29].

absence of remorse is not aggravating,[48] it is plainly relevant in determining the appropriate penalty.

58. As Murphy and Beech JJA held in ***Khosa*** at [193]:

> A failure on the part of the practitioner to appreciate the impropriety of his or her conduct may support a finding of unfitness to practise. A reason for this is that the lack of appreciation of impropriety and the lack of insight increases the risk of recurrence of the improper conduct.[49]

59. In our view, that is the situation that applies here. As we have previously noted, the practitioner's written submissions were silent as to the relevant penalty that should be imposed. Rather, for thirteen pages, he attacked the applicant (and Mr Musikanth SC, as his Honour then was, who appeared as Senior Counsel for the applicant), accusing it of a myriad of failings, as well as the Tribunal, and sought to relitigate various matters.

60. In other words, he failed to accept the findings previously made by us and blamed others for the situation he now finds himself in.

61. In our view, the current case very much falls within the class of cases anticipated by their Honours in the passage quoted above; the practitioner lacks the necessary appreciation of the impropriety of his conduct and lacks any insight into the central role played by him as the author of his own downfall.

62. We turn, then, to the question of deterrence.

63. In our view, all of the conduct the subject of our findings calls for appropriate sanction by way of general deterrence. That goes without saying (or, at least, it should) for dishonest conduct and dealings with the regulator. But it also goes for payment of counsel's fees. In this case, not only was Mr B not paid, but the practitioner preferred his own fees to those of counsel and he then engaged in dishonest conduct to avoid the liability to pay.

64. In our view, the conduct the subject of our findings must be condemned in the strongest terms to ensure that practitioners clearly understand the implications of such behaviour.

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[48] ***Khosa v Legal Profession Complaints Committee*** [2017] WASCA 192 at [58] (Buss P).
[49] Citations omitted.

65. Taking all of those matters into account, we are satisfied that the appropriate penalty is for an order that the Tribunal make and transmit a report on the finding to the full bench of the Supreme Court pursuant to s 438(2)(a) of the LP Act.

66. In short, the practitioner has been found guilty of several instances of dishonest behaviour, including making false representations to counsel and the LPBWA, some of which was designed to avoid his obligation to pay counsel's fees. He has also been found guilty of other conduct that had the effect of making it more difficult for the regulator to perform its statutory role. The conduct occurred over a lengthy period of time and in a number of different fora. When called to account for that behaviour, the practitioner failed to attend the hearing and, having been the subject of adverse findings, failed to accept responsibility for his conduct but, rather and amongst other things, has sought to blame others.

67. For those reasons we are satisfied, and we find, that the practitioner is currently unfit to practise. Furthermore, we are satisfied, and we find, that that would remain the case at the end of any period of suspension that we might otherwise consider appropriate.

68. So much follows from the duration of the conduct, the proximity of the conduct in time to his previous sanction, the fact that he has previously been found guilty of professional misconduct for 'not honest conduct' and the lack of insight and remorse for his wrongdoing.

69. That is, we are satisfied, and we find, that that the practitioner lacks the character and trustworthiness necessary to discharge the responsibilities of legal practice and is indefinitely (if not permanently) unfit to practise.

70. Accordingly, in our view (and we find) striking off rather than suspension is the appropriate response.

Costs

71. As noted above, the applicant seeks an order that the practitioner pay the applicant's costs of the proceeding fixed in the amount of $197,574.35.[50]

[50] The applicant originally sought the figure of $198,305.85: Applicant's Submissions at [41]. However, that sum included an estimate of costs incurred in preparing for and attending the hearing as to penalty and costs. In the event the sum charged by counsel was less than the estimated sum: Letter of the applicant filed 15 December 2023.

72. The relevant principles were recently set out in ***Lawson***,[51] where the Tribunal said:

> [60] The starting point in such an application is s 87 of the SAT Act, which states as follows:
>
> (1) Unless otherwise specified in this Act, the enabling Act, or an order of the Tribunal under this section, parties bear their own costs in a proceeding of the Tribunal.
>
> (2) Unless otherwise specified in the enabling Act, the Tribunal may make an order for the payment by a party of all or any of the costs of another party or of a person required to produce a document or other material on the application of the party under section 35.
>
> [61] As noted in ***Questdale***,[52] the effect of s 87(1) of the SAT Act is that each party in proceedings before the Tribunal is to bear its own costs, unless the Tribunal otherwise orders.
>
> [62] In ***Roberman***[53] the Tribunal said that although the award of costs is a matter of discretion to be exercised in the circumstances of each case, where a regulatory body is successful in bringing a complaint of misconduct which justifies disciplinary action by the Tribunal, there will usually be a strong case for the exercise of that discretion in favour of the regulatory body.[54] That is because, as the Tribunal said, such regulatory bodies:
>
> > perform a function which promotes the public interest, and usually with limited resources. The financial burden of bringing disciplinary action if the body had no capacity to recover some or all of its costs may be such as to provide a disincentive to bring disciplinary action, or when brought, to ensure that the allegations against the practitioner concerned are properly and thoroughly presented. It is in the public interest that such bodies have an expectation that, if the allegations are made out, the offending professional will meet or at least contribute to the costs incurred in bringing the application.[55]

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[51] ***Legal Profession Complaints Committee and Lawson*** [2021] WASAT 152(S) at [60] - [63].
[52] ***Western Australian Planning Commission v Questdale Holdings Pty Ltd*** [2016] WASCA 32 at [46] (per Murphy JA, Corboy J agreeing) and at [51]. (Citation in original).
[53] ***Medical Board of Western Australian and Roberman*** [2005] WASAT 81(S) (***Roberman***). (Citation in original).
[54] ***Quinlivan v Legal Profession Complaints Committee*** [2012] WASCA 263(S) (***Quinlivan***) at [10]. (Citation in original).
[55] ***Roberman*** at [30]. (Citation in original).

[63] As was noted in ***Quinlivan***, the observations of the Tribunal in ***Roberman*** have been cited with approval by the Court of Appeal several times. Most recently, in ***Young***[56] Buss P, (with whom Quinlan CJ and Beech JA relevantly agreed)[57] repeated the relevant passages of the Tribunal in ***Roberman*** and the Court of Appeal in ***Quinlivan*** and said:

> The proper exercise of the Tribunal's discretionary power under s 87(2) of the SAT Act to make an award of costs depends, of course, upon all the circumstances of the particular case. Ordinarily, as a matter of fact, the Tribunal will make an award of costs in favour of a regulatory body which is successful in bringing a complaint of misconduct in professional disciplinary proceedings. However, in each case, the discretionary power to make an award of costs must be exercised having regard to the circumstances of the particular case.

73. In this case, as it did (in effect) in ***Lawson***, the applicant submits that it would be 'fair and reasonable for the [practitioner] to pay the disbursements the applicant has incurred in prosecuting the application' in light of 'the findings made by the Tribunal concerning the [practitioner's] conduct and the public interest in pursuing that conduct by way of disciplinary proceedings'.[58]

74. The practitioner's written submissions do not address the subject of costs, save to refer to a previous application of the practitioner to have the evidence of the ink expert engaged by the applicant (Mr La Porte) dismissed.[59]

75. In our view, and we find, there was a public interest in the applicant bringing the complaints of misconduct against the practitioner. Further, as we have found above, the complaints have been found proven and in our, view justified the bringing of disciplinary action. Accordingly, we find that there is a 'strong case' for the exercise of the discretion to make an order for costs in favour of the applicant, and there are no grounds of which we are aware that militate against that conclusion.

76. As to quantum, we note that the applicant:

[56] ***Young v Legal Profession Complaints Committee*** [2022] WASCA 52 (***Young***) at [261]. (Citation in original).
[57] ***Young*** at [1]. (Citation in original).
[58] Applicant's Written Submissions at [36] - [37].
[59] Respondent's Written Submissions at page 12.

(a) does not seek any costs in respect of its own legal officer's time in relation to the matter; [60]

(b) seeks only its disbursements by way of:

(i) payments made to counsel and senior counsel;

(ii) fees paid to Mr La Porte as expert engaged to assess the veracity of Ms Ruba's claim that she made contemporaneous notes in her *Almanac* of the meeting with LPBWA on 17 June 2015, and associated costs;[61]

(iii) minor ancillary disbursements such as ASIC and bankruptcy searches; and

(iv) its costs in relation to the application filing fee and the costs of transcripts.

(c) seeks recovery of counsel's and senior counsel's fees at no more than Scale, including in circumstances where, for two invoices, counsel charged the applicant slightly higher than Scale;

77. As to counsel's (and senior counsel's) fees, the principles set out in ***in de Braekt***[62] provide for the Tribunal to determine the amount of work which was reasonable and necessary to properly prepare and present the case and then to apply, as a useful guide as to the maximum rates which might be allowed on a party/party basis, the relevant or daily rates specified in the relevant costs determination.

78. That task is more difficult here than in some cases, given the twists and turns taken by the matter over a period of more than six years (late 2017 to the end of 2023).

79. Consistent with its usual practice, the applicant has prepared a table setting out the relevant disbursements and attached the invoices of counsel and senior counsel. In our view, there is nothing in those invoices which suggests the need to do anything other than accept them.

80. As we have noted above, counsel's and senior counsel's fees claimed are at no more than Scale. We also note that, on two occasions, counsel discounted his fees somewhat.

[60] Applicant's Written Submissions at [40].
[61] Being courier fees to transport the *Almanac* to the United States.
[62] ***Legal Profession Complaints Committee and in de Braekt*** [2012] WASAT 58(S) (***in de Braekt***) at [53].

81. Further, having reviewed the invoices, and noting the difficulty associated with the considerable passage of time, we have reached the view that the time recorded by counsel and senior counsel for the preparation of and presentation of the applicant's case was, on the whole, reasonable. As we have noted, the practitioner made no submissions in this regard; he did not identify any particular work or time that he said was unreasonable.

82. As to Mr La Porte's fees, these too appear reasonable. They include the microscopic testing of the *Almanac* and the preparation of the report, the review of the report prepared by Mr Speckin (engaged by the practitioner), the preparation of a supplemental report, conferral with Mr Speckin, the preparation of a joint report, and preparation for the hearing.[63]

83. Of course, as we noted in the Primary Reasons, all of Mr La Porte's work was wasted as the practitioner failed to attend the hearing and, as a result, Ms Ruba was not called and her *Almanac* was not tendered into evidence. In our view, the practitioner ought to reimburse the applicant for Mr La Porte's costs and the associated costs of couriering the *Almanac* between Australia and the United States, where he is based.

84. The costs of obtaining ASIC and bankruptcy searches appear reasonable in the circumstances. The practitioner should reimburse the applicant for them.

85. As to the Tribunal's fees, the practitioner should be required to pay the applicant's costs as to the application fee ($465) and the hearing fee ($2,540). As to the costs of obtaining transcript:

(a) On 10 March 2021, the applicant made two applications for a copy of each of the transcripts of the hearings held on 29 July 2020, which was the day on which its application to uplift the *Almanac* for testing was heard. The President's decision was delivered in December 2020, which decision the practitioner then appealed. On 19 February 2021 the Court of Appeal dismissed the application for a stay of the President's decision.[64] The appeal itself was heard on 24 March 2021.[65] While the application for the transcript was expressed as being for the

[63] Applicant's Bundle - Penalty and Costs, 10 November 2023 at pages 155 - 160.
[64] ***Khosa v Legal Profession Complaints Committee*** [2021] WASCA 34.
[65] ***Khosa v Legal Profession Complaints Committee*** [2021] WASCA 64.

purposes of 'the Committee's records', it is reasonable to infer that it was obtained for the purposes of defending the appeal. In our view, the order for costs in this proceeding should ***not*** include the costs of obtaining a transcript for the purposes of the appeal, being a sum of $416.40.

(b) On 8 February 2023, the applicant sought a copy of the transcript of the hearing held on 15 February 2022, at which the President considered the practitioner's application to exclude the evidence of Mr La Porte, and on 21 June 2022, at which the President considered the programming of the hearing.

(i) The applicant has filed two invoices dated 14 February 2023, for $163.35 and $104.90 respectively.

(ii) Upon review, the transcript of 21 June 2022 appears to do no more than consider the programming of the matter for hearing. We are unable to ascertain what benefit or purpose the transcript may have provided for the preparation of the hearing seven months later and in our view the practitioner ought not to pay the applicant's costs in this regard.

(iii) On 15 February 2022, after hearing the argument on the matter, the President ordered that the application to exclude Mr La Porte's evidence be determined at the time of the substantive hearing which was, as at 8 February 2023, listed to commence a few weeks later, on 20 March 2023. We accept that, given the passage of time, it was appropriate for the applicant to obtain transcript ahead of the hearing to address that matter and the practitioner should pay the applicant's costs in that regard.

(c) On 22 March 2023, the applicant sought transcript of the substantive hearing. The application states that the transcript was sought for all four days of the originally listed hearing (20 - 24 March 2023). Two invoices appear to have been issued - one on 22 March 2023 and for 20 and 21 March 2023 ($2,524.70) being a deposit; and one on 13 April 2023 which was described as for 'final payment' ($357.10). The obtaining of the transcript of the hearing in order to properly prepare for closing submissions is entirely appropriate. The practitioner should therefore pay the applicant's costs of $2,524.70 plus $357.10 equalling $2,881.80.

86. Accordingly, an order should be made for the payment by the practitioner of the disbursements claimed by the applicant in the sum of $197,053.05.

Conclusion and Orders

87. For the above reasons, having completed a hearing in relation to a referral under Pt 13 of the LP Act, and being satisfied that the practitioner is guilty of professional misconduct, we are of the view that the appropriate course is to make and transmit a report on the finding and a recommendation that the name of the practitioner be removed from the local roll of practitioners, to the Supreme Court (full bench) pursuant to s 438(2)(a) and s 438(4)(b) of the LP Act.

88. We are also of the view, for the above reasons, that an order should be made requiring the practitioner to pay the costs of the applicant in the fixed sum of $197,053.05 within 30 days or such longer period as may be agreed between the parties.

89. It is for these reasons, the Tribunal makes the following orders.

Orders

The Tribunal Orders:

1. Pursuant to s 438(2)(a) and s 438(4)(a) and (b) of the *Legal Profession Act 2008* (WA), the Tribunal is to make and transmit a report on the findings of the Tribunal in these proceedings to the Supreme Court (full bench) with both a record of the evidence taken at the hearing and a recommendation that the name of the practitioner be removed from the roll of persons admitted to the legal profession under the *Legal Profession Act 2008* (WA).

2. Pursuant to s 87(2) of the *State Administrative Tribunal Act 2004* (WA), the practitioner is to pay the applicant's costs of the proceeding fixed in the amount of $197,053.05, such costs to be paid to the Legal Practice Board of Western Australia (Board) within 30 days or as otherwise agreed between the practitioner and the Board.

I certify that the preceding paragraph(s) comprise the reasons for decision of the State Administrative Tribunal.

PN
Associate to Judge Jackson

28 MARCH 2024