
JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : LEGAL PROFESSION ACT 2008 (WA)

CITATION : LEGAL SERVICES AND COMPLAINTS
COMMITTEE and ROBERTSON [2023] WASAT
127 (S)

MEMBER : PRESIDENT GLANCY
MR D AITKEN, SENIOR MEMBER
MR R POVEY, MEMBER

HEARD : 19 JUNE 2024

DELIVERED : 8 OCTOBER 2024

FILE NO/S : VR 46 of 2021

BETWEEN : LEGAL SERVICES AND COMPLAINTS
COMMITTEE
Applicant

AND

JOHN ANDREW ROBERTSON
Respondent

Catchwords:

Vocational regulation - Legal practitioner - Professional misconduct - Practitioner acted or purported to act or caused his firm to act or to purport to act as the solicitor of record in a proceeding when not authorised and when he had no instructions to do so - Practitioner acted dishonestly by knowingly providing false and misleading statements to another practitioner and in affidavits filed in the proceeding and in statements made to the Court - Penalty and costs - Where no insight or remorse shown the Tribunal cannot be satisfied that the Practitioner

would be fit to practise after a period of suspension - Report to Supreme Court (full bench) with recommendation that name of Practitioner be removed from roll of practitioners - Immediate suspension of practitioner's practising certificate - Order that Practitioner pay applicant's costs fixed at \$66,017.78

Legislation:

Legal Profession Act 2008 (WA), s 438(2)(a), s 438(2)(b), s 438(3)(a), s 438(4), s 439, s 440, s 441

Legal Profession Uniform Law Application Act 2022 (WA)

State Administrative Tribunal Act 2004 (WA), s 87

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)*

Practitioner's local practising certificate suspended until determination of the Supreme Court (full bench)

The practitioner to pay the applicant's costs fixed at \$66,017.78

Category: B

Representation:

Counsel:

Applicant : P Cahill SC and N Pope
Respondent : J Taylor SC and A Mossop

Solicitors:

Applicant : Legal Services and Complaints Committee
Respondent : Moray & Agnew Lawyers

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

Coe v New South Wales Bar Association [2000] NSWCA 13

Council of the Law Society of New South Wales v Winter (No 2) [2019] NSWCATOD 57

Council of the New South Wales Bar Association v Sahade [2007] NSWCA 145

Khosa v Legal Profession Complaints Committee [2017] WASCA 192

Legal Profession Complaints Committee and Bower [2017] WASAT 47 (S)

Legal Profession Complaints Committee and Chang [2019] WASAT 67 (S)

Legal Profession Complaints Committee and Fidock [2011] WASAT 78 (S)

Legal Profession Complaints Committee and Gandini [2011] WASAT 86 (S)

Legal Profession Complaints Committee and in de Braekt [2012] WASAT 58 (S)

Legal Profession Complaints Committee and Lawson [2021] WASAT 152 (S)

Legal Profession Complaints Committee and Oud [2018] WASAT 119 (S)

Legal Profession Complaints Committee and Rayney [No 2] [2018] WASAT 5 (S)

Legal Profession Complaints Committee and Staffa [2020] WASAT 58 (S)

Legal Profession Complaints Committee and Tang [2021] WASAT 117

Legal Profession Complaints Committee v Brickhill [2013] WASC 369

Legal Profession Complaints Committee v Love [2014] WASC 389

Legal Profession Complaints Committee v Mizen [2021] WASC 434

Legal Profession Complaints Committee v Segler [2014] WASC 159

Legal Profession Complaints Committee v Tolson [2020] WASC 158

Legal Profession Complaints Committee v Waters [2015] WASC 141

Legal Services and Complaints Committee and Barber [2015] WASAT 99 (S)

Legal Services and Complaints Committee and Bennett [2024] WASAT 28

Legal Services and Complaints Committee and Robertson [2023] WASAT 127

Medical Board of Western Australia and Roberman [2005] WASAT 81 (S)

New South Wales Bar Association v Sahade [2005] NSWADT 159

Paridis v Settlement Agents Supervisory Board [2007] WASCA 97

Vogt v Legal Practitioners Complaints Committee [2009] WASCA 202

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 On 19 December 2023, in *Legal Services and Complaints Committee and Robertson* [2023] WASAT 127 (**Reasons for Decision**), the Tribunal found that Mr Robertson (**Practitioner**), had engaged in six instances of professional misconduct. On 12 February 2024, we made orders consequent upon, and which reflected, those findings. This judgment deals with the issues of the penalty to be imposed as a result of the findings of professional misconduct, and the question of whether the Practitioner should be ordered to pay a portion of the Legal Services and Complaints Committee's (**Applicant**) costs of the proceedings.

Outcome

2 For the reasons set out below, we have concluded that:

1. the Tribunal will refer the Practitioner's conduct to the Supreme Court (full bench) in accordance with s 438(2)(a) of the *Legal Profession Act 2008* (WA) (**LP Act**), with a recommendation that the name of the Practitioner be removed from the roll of persons admitted to the legal profession under the LP Act;
2. the Practitioner's practising certificate should be suspended with immediate effect pending the determination of the Supreme Court (full bench); and
3. the Practitioner should pay a portion of the Applicant's costs of the proceedings fixed in the sum of \$66,017.78,¹ to be paid to the Legal Practice Board of Western Australia (**Board**) within 30 days of the date of the orders giving effect to this decision or as otherwise agreed between the Practitioner and the Board.

Summary of the misconduct findings

3 On 12 February 2024, the Tribunal made orders that the Practitioner has been found to have engaged in six instances of professional misconduct.

¹ ts 179, 19 June 2024. The Applicant originally sought an order for payment to the Legal Practice Board of Western Australia (**Board**) of \$72,299.34. At the hearing on 19 June 2023, the Applicant reduced the amount to \$66,017.78. The amount reduced was the GST component of the disbursement claimed. In making that deduction, the Applicant did not concede that it could not claim the GST.

4 The first involved acting or purporting to act, or causing his firm to act or purporting to act as the solicitor of record for a party to a Supreme Court action when he, and the firm, were not authorised to do so and had no instructions to do so (**Finding 1**).

5 The remaining five instances of professional misconduct involved the Practitioner acting dishonestly in that he:

1. prepared and sent an email to another practitioner on 18 July 2019, which the Practitioner knew contained misleading statements, and with the intention that the other practitioner be misled by those statements (**Finding 2**);
2. prepared and sent a letter to the Associate to Justice Archer of the Supreme Court on 22 July 2019, which the Practitioner knew contained misleading statements, and with the intention that the Court be misled by those statements (**Finding 3**);
3. swore and caused to be filed in the Supreme Court on 22 July 2019, an affidavit that he knew contained misleading statements, and with the intention that the Court would rely on those misleading statements (**Finding 4**);
4. prepared and sent a letter to another practitioner on 22 July 2019, which the Practitioner knew contained misleading statements, and with the intention that the other practitioner be misled by those statements (**Finding 5**); and
5. swore and caused to be filed in the Supreme Court on 5 August 2019, an affidavit that he knew contained misleading statements, and with the intention that the Court would rely on those misleading statements (**Finding 6**).

6 The reasons for those findings were set out in the Reasons for Decision. We do not repeat them here.

Applicable statute

7 Despite the commencement of the *Legal Profession Uniform Law Application Act 2022* (WA) by which the Legal Profession Uniform Law is applied from 1 July 2022, this matter is to be resolved pursuant to the provisions of the LP Act. The reasons why that is so were set out at [13] - [16] of the Reasons for Decision. We do not repeat them here.

Penalty options

8 The LP Act sets out the various orders which the Tribunal may make consequent upon a finding that a practitioner is guilty of unsatisfactory professional conduct or professional misconduct. Section 438(2)(a) permits the Tribunal to make and transmit a report to the Supreme Court (full bench) on the findings. Section 438(4) provides that, where appropriate, a report forwarded under s 438(2)(a) may include either or both of the following:

- (a) a record of the evidence taken at the hearing; and
- (b) a recommendation that the name of the practitioner be removed from the local roll.

9 Section 438(2)(b) also permits the Tribunal to make any one or more of the orders specified in s 439, s 440 and s 441 of the LP Act.

10 Among other things, s 439 of the LP Act permits the Tribunal to suspend a local practising certificate for a specified period of time or cancel it, and make an order publicly reprimanding the practitioner or, if there are special circumstances, to privately reprimand them.

Orders sought

11 The Applicant seeks the following orders:

1. pursuant to s 438(2)(a) and s 438(4)(b) of the LP Act, that the Tribunal 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 LP Act;
2. an order pursuant to s 438(3)(a) of the LP Act, that the Practitioner's local practising certificate be suspended pending the determination of the Supreme Court (full bench); and
3. an order pursuant to s 87(2) of the *State Administrative Tribunal Act 2004* (WA) (**SAT Act**), that the Practitioner pay the Applicant's costs of the proceedings fixed in the amount of \$66,017.78, such costs to be paid to the Board within 30 days, or as otherwise agreed between the Practitioner and the Board.

- 12 In contrast, the Practitioner submits that, in this case, it is open to the Tribunal to find that a period of suspension would be the appropriate penalty.

Relevant legal principles

- 13 The general principles relevant to determining an appropriate disciplinary sanction, including the circumstance where a conclusion is reached that a practitioner is presently unfit to practise, are well settled. They were set out by the Court of Appeal (Murphy and Beech JJA) in *Khosa v Legal Profession Complaints Committee*.²

- 14 Those principles can be summarised as follows:

- (a) the purpose of a disciplinary proceeding is the protection of the public and the maintenance of proper standards within the profession rather than the punishment of the practitioner;³
- (b) the protection of the public includes both personal deterrence and general deterrence;⁴
- (c) where the conclusion is reached that the practitioner is presently unfit to practice and the choice is between suspension and striking-off, the Tribunal must consider that the practitioner will be fit to practice after the proposed suspension period comes to an end before a term of suspension can be ordered;⁵
- (d) suspension is a serious form of discipline which is usually imposed where a practitioner has been found to have engaged in an act of unprofessional conduct, but where, in the opinion of the Tribunal the practitioner will be a fit and proper person to practise law after the suspension period is ended. 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;⁶
- (e) striking-off is likely to be the appropriate response when the circumstances of the conduct amounting to the current unfitness to practise demonstrate that the practitioner lacks the character

² *Khosa v Legal Profession Complaints Committee* [2017] WASCA 192 (*Khosa*) [188] - [195].

³ *Khosa* [188].

⁴ *Khosa* [189].

⁵ *Khosa* [191].

⁶ *Khosa* [191].

and trustworthiness necessary to fulfill the responsibilities of legal practice;⁷

- (f) a practitioner's failure to appreciate the impropriety of their conduct increases the risk of a recurrence of the improper conduct and may support a finding that the practitioner is unfit to practise;⁸ and
- (g) the Tribunal is to determine the appropriate penalty, including fitness to practise, at the time of the hearing rather than at the time of the conduct.⁹

15 The Court of Appeal expressly stated that the matters which they identified, and to which we have referred above, were not exhaustive.¹⁰

16 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 remedied during a period of suspension.

17 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 his or her 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 is such that the appropriate penalty to be imposed is a period of suspension in order to protect the public, through personal and general deterrence, and to maintain the high standards of the profession.

18 In considering the disciplinary sanction which is to be imposed in any particular case, there are several factors to which the Tribunal will have regard. They include:

⁷ *Khosa* [192].

⁸ *Khosa* [193].

⁹ *Khosa* [195].

¹⁰ *Khosa* [187].

1. the practitioner's disciplinary history;
2. the practitioner's personal circumstances, although the practitioner's personal circumstances cannot override the fundamental obligation of the Tribunal to provide appropriate protection of the public and in the maintenance of proper standards of legal practice;¹¹
3. whether the practitioner has any special skills to which the public would be denied access during a period of suspension or if the practitioner were to be struck off;
4. in the case of misleading conduct, whether the public, fellow practitioners and the court can place reliance on the word of the practitioner in the future;
5. whether the practitioner has demonstrated any insight into the conduct and remorse, because a practitioner who fails to understand the significance of their misconduct poses an ongoing risk of future misconduct;
6. the need for personal deterrence;
7. the need for general deterrence; and
8. whether or not the conduct was isolated.

19 Courts have taken a very serious approach when dealing with dishonesty of a practitioner.¹² This is because honest dealings are fundamental to the fitness to practise law.¹³

20 Conduct which undermines the trustworthiness of the practitioner or which suggests a lack of integrity or that the practitioner cannot be trusted to deal fairly within the system in which they practice is conduct which is most likely to result in a practitioner being struck-off.

21 Intentionally misleading a court has been described as 'a matter of the utmost seriousness'.¹⁴ This is because the administration of justice and public confidence in the system depends upon the assumption and expectation that practitioners will conduct themselves before the court with honesty and candour.

¹¹ *Legal Profession Complaints Committee v Love* [2014] WASC 389 [59] (Beech, Martin and Edelman JJ).

¹² *Legal Profession Complaints Committee v Brickhill* [2013] WASC 369 [21] and the cases cited therein.

¹³ *Council of the New South Wales Bar Association v Sahade* [2007] NSWCA 145 [59], citing *New South Wales Bar Association v Sahade* [2005] NSWADT 159 [83].

¹⁴ *Legal Profession Complaints Committee v Segler* [2014] WASC 159 [11] and [12]; and *Legal Profession Complaints Committee v Waters* [2015] WASC 141 [8].

22 The seriousness with which courts consider conduct involving the intentional swearing of a false affidavit which is filed in court proceedings is reflected in the comments of Mason P in ***Coe v New South Wales Bar Association***.¹⁵ In that case, the New South Wales Court of Appeal upheld a decision to strike-off a practitioner as a penalty following a finding that in proceedings in the Family Court of Australia, in which the practitioner was a party, he swore an affidavit which he knew to be false in a material particular. In his judgment, Mason P said:¹⁶

If (which I doubt) there are exceptional cases where a practitioner who knowingly swears a false affidavit that is filed in court could be regarded as fit to practise, this is not one of them.

23 In ***Vogt v Legal Practitioners Complaints Committee***,¹⁷ the Court of Appeal recognised that, although it does not follow that in every case where a practitioner has been found to have engaged in professional misconduct which involved deliberate misleading of a court the practitioner will be struck-off, a finding that a practitioner has intentionally misled a court raises serious questions as to the practitioner's fitness to practise and must attract a substantial penalty.¹⁸

Resolution

24 The Applicant submits that the misconduct involved in continuing to act or purporting to act in, or causing his firm to continue to act in, or to purport to act in, the Supreme Court action without instructions (i.e. after the Practitioner's client had been placed into external administration) is not, of itself, a matter which would require the Practitioner to be suspended or referred to the Supreme Court for strike-off. We agree.

25 However, the Applicant submits that given that the Practitioner has also been found to have engaged in numerous acts of professional misconduct, each of which involves a lack of honesty and candour with a fellow practitioner, or with the court, or in affidavits filed in the Supreme Court action, the Tribunal should impose a global penalty. The Applicant submits that the global penalty must be the referral of the Practitioner to the Supreme Court (full bench) with a recommendation that his name be removed from the roll of practitioners.

¹⁵ ***Coe v New South Wales Bar Association*** [2000] NSWCA 13 (*Coe*).

¹⁶ *Coe* [10] (Mason P).

¹⁷ ***Vogt v Legal Practitioners Complaints Committee*** [2009] WASCA 202 (*Vogt*).

¹⁸ *Vogt* [70].

26 The Practitioner submits that, in the unusual circumstances of this case, a penalty less than referral to the Supreme Court (full bench) with a recommendation for strike-off is appropriate. That said, it is important to note that the Practitioner does not accept the Tribunal's findings in relation to liability and, as is his right, has commenced an appeal in relation to those findings.

27 We are satisfied that this is an appropriate case for the imposition of a global penalty. Not only are the facts of this case so interwoven that a global penalty is appropriate but, in our view, the penalty for the conduct which comprised Finding 1 will undoubtedly be subsumed into the penalty for the more serious acts of dishonesty in Findings 2 - 6.

28 In determining the appropriate penalty, we take into account that the Practitioner has practised law for approximately 20 years and has an otherwise unblemished disciplinary history.

29 We also have regard to the reference provided by Mr Carmady, who is a co-director of the Practitioner's firm, Williams + Hughes (**Firm**). Mr Carmady's reference, dated 13 May 2024, states that he cannot reconcile the Tribunal's findings in relation to the Practitioner with the person he knows the Practitioner to be as a result of his working with him at the Firm since 2008. Mr Carmady also says that the Practitioner has never done anything that has caused Mr Carmady to question his integrity. He says that he believes that the Practitioner has, through his time in practice, made a valuable contribution to his clients and to the profession. We accept Mr Carmady's statements to be truthful and to be an accurate representation of his views of the Practitioner's character as a trustworthy and honest practitioner who has made a contribution to the profession through his work. We have taken into account those views in determining the appropriate penalty, although we do so acknowledging that people can make a poor, or unethical, choice for the first time.

30 The Tribunal may have regard to whether a practitioner has shown remorse and insight into their conduct in determining the penalty which ought to be imposed. This is, of course, because the risk to the public and to the administration of justice is diminished in cases where a practitioner acknowledges an error and is genuinely sorry for it.

31 In this case, the Practitioner refers to the fact that he has 'apologised, to the extent that he purported to act for the client company in the period between October 2017 and July 2019' when it was in

voluntary administration. It was submitted that the Tribunal may confidently infer that the Practitioner will remember the events that have given rise to this disciplinary proceeding and the law in relation to companies in external administration and that the conduct which was the subject of Finding 1 will not be repeated. Of the accuracy of that later submission, we have no doubt. However, the Practitioner maintained throughout the proceedings in the Tribunal that neither he, nor the Firm, acted for or purported to act for that company after it was placed into external administration and maintained that everything he did that indicated to the contrary was done in error. Accordingly, there is no evidence before us that indicates that the Practitioner actually accepts that he engaged in the misconduct which we have found was involved in Finding 1 and no real apology for that conduct has been offered for the misconduct. Therefore, we find that the Practitioner has not demonstrated any relevant insight or remorse for the professional misconduct comprised in Finding 1.

32 As to the misconduct which was the subject of Findings 2 - 6, we also find that no insight or remorse has been demonstrated by the Practitioner. Having defended the proceedings in the Tribunal and now appealing the Tribunal's findings, the Practitioner cannot be found to have shown any insight or remorse into his misconduct. Of course, none can be expected to be shown in that circumstance. While the lack of insight and remorse is not aggravating, it does mean that we cannot be satisfied that he is unlikely to repeat the conduct and increases the need to impose a sanction that will achieve personal deterrence and the protection of the public.

33 The Practitioner submits that there was no tangible gain sought to be obtained by the Practitioner through his conduct. We accept that is the case in relation to the misconduct in Finding 1. However, we found that the Practitioner's untruthful explanations for the conduct involved in Findings 2 - 6 were attempts to deflect criticism of that conduct and to resist an indemnity costs order which had been sought by the plaintiff in the Supreme Court action. In that sense, it can be said that he did seek to benefit from the conduct.

34 Contrary to the Practitioner's submission, we do not accept that the Practitioner's conduct as found in Findings 1 - 6 can be characterised as an isolated error of judgment. While it all arose in the context of one piece of litigation, and, for the most part, involved the Practitioner telling the same untrue version of events in multiple contexts, the false explanation for his conduct was repeated in affidavits filed in the court,

in his communications with the court and in his communications with the plaintiff on different occasions. In that sense, the conduct cannot be regarded as isolated or a 'one-off', even though it occurred in the course of just over a two-week period.

35 The fact that the circumstances of the Supreme Court action can be said to have been unusual, or even highly unusual, does not alter the character of the conduct involved in Findings 2 - 6, or the sanction to be imposed for those acts of professional misconduct. That both parties to the Supreme Court action appeared to overlook the effect on the conduct of the litigation of the company being placed into external administration can be taken into account in dealing with Finding 1. However, in our view, those circumstances do not explain or mitigate the seriousness of the dishonesty of the conduct involved in Findings 2 - 6.

36 The Practitioner submitted that the highly unusual circumstances of the case mean that this case is an inapt vehicle for general deterrence because it is likely that the disciplinary outcome in this case will be viewed in the unusual context in which it arose, which does not lend itself to general application. We do not accept that submission in so far as it relates to the misconduct in Findings 2 - 6. While the genesis of the proceeding was unusual and may not be repeated, it will not be uncommon for a practitioner to be criticised for their conduct by a fellow practitioner or the court and to be asked to give an account of that conduct. In such cases, there will frequently be a desire for a practitioner to give a good account of themselves so as to avoid criticism and a temptation to be untruthful about impugned conduct. In our view this case is, therefore, an appropriate vehicle by which to remind practitioners and the public of the high standards expected of members of the profession in their dealings with each other, and the courts.

37 The Practitioner's submissions refer to our finding at [35] of the Reasons for Decision that, at the time of the professional misconduct, he had a busy practice and was working long hours at the expense of his personal life. While we have regard to that fact, it mitigates very little. Long work hours are, regrettably, a very common feature of legal practice. While it may explain to some extent the overlooking of the effect of a company being placed into external administration, it does not explain a decision to repeatedly be untruthful about the fact that it was overlooked.

38 The Practitioner also submits that, in light of his previous disciplinary record, the circumstances in which the conduct occurred and the absence of any intention to effect personal gain or to cause detriment to any other person, there is no risk of him engaging in similar conduct in the future, such that we can find that there is no need for permanent protection of the public. We have already set out why we do not entirely accept the submissions made about the lack of personal gain from the conduct and the submissions about the circumstances in which the conduct occurred being unusual.

39 In determining the appropriate penalty, we have also had regard to the fact that the Practitioner was not a junior practitioner at the time of the conduct. He was admitted to practice in 2004 and has been a director of the Firm since 2014. Further, we also have regard to the fact that the Practitioner was not acting under direction or under pressure from any other practitioner. In our view, those facts do not aggravate the conduct but nor is any mitigation open to him as there may have been had those facts been different.

40 The Practitioner has referred to numerous cases which he says should provide us with assistance in determining the appropriate penalty to be imposed in this case. It is submitted that those cases involved objectively more serious conduct and yet resulted in a period of suspension rather than a referral for strike-off. Accordingly, the Practitioner submits that we need not find in this case that the appropriate penalty is referral for strike-off.

41 We have considered those cases. Without going into them in detail in these reasons, we do not find that they lead us to conclude that a penalty of less than referral for strike-off is appropriate. In some of the cases referred to by the Practitioner,¹⁹ the penalty was determined by the Tribunal with the consent of the parties after they had reached an agreement as to conduct and penalty. The agreement of the parties as to the conduct and how it was to be characterised reflects the fact that in those cases the relevant practitioner had insight into the conduct and remorse for it. They are two matters which, as we have already said, are features which are not present in this case. In some of the cases,²⁰ the professional misconduct was found to have been the result of gross

¹⁹ See for example *Legal Profession Complaints Committee and Bannerman* [2018] VR 236; *Legal Profession Complaints Committee and Muir* [2019] VR 142.

²⁰ *Legal Services and Complaints Committee and Bennett* [2024] WASAT 28; *Legal Profession Complaints Committee and Fidock* [2011] WASAT 78 (S); *Legal Profession Complaints Committee and Winkler* [2018] VR 231.

carelessness, carelessness or recklessness rather than the result of deliberate or intentional dishonesty on the part of the practitioner, thereby putting the conduct in a different category from that with which we are dealing in this matter. That too, is a significant difference from the present case. In another,²¹ in addition to the practitioner's insight and remorse, the practitioner's relative inexperience was taken into account as a factor relevant to determining penalty. Again, that factor is missing in the Practitioner's case. In another case to which we were referred for the purposes of comparison,²² the practitioner was engaged in valuable legal work including pro bono work in a regional community of which the public would be deprived if she were to be struck-off. In another case,²³ the penalty imposed for conduct which was characterised as unsatisfactory professional conduct and professional misconduct resulted in a penalty which was less even than suspension was imposed in circumstances where the Tribunal accepted that the practitioner had insight, was contrite and was of prior good character. In that case, much of the conduct was found to involve reckless carelessness rather than deliberate dishonesty (although the Tribunal did find his statements to a self-represented litigant were deliberately false). In that case, the practitioner assured the Tribunal his conduct resulted from being in a relationship with the client which was too close and clouded his professional judgment and assured the Tribunal he would not accept instructions from any person with whom he had a close relationship or any entity in which he had an interest again. In those circumstances, the Tribunal accepted that the practitioner was unlikely to behave in the same way again.

- 42 We accept that in some of the cases to which were referred by the Practitioner where the relevant practitioner was referred for strike-off, the practitioner's conduct and/or disciplinary history was worse than in this case.²⁴ However, the fact that one Practitioner's conduct and disciplinary history may be better than in some (and perhaps even all) of the other cases where the result has been referred for strike-off does

²¹ *Vogt*.

²² *Legal Services and Complaints Committee and Barber* [2015] WASAT 99 (S).

²³ *Council of the Law Society of New South Wales v Winter (No 2)* [2019] NSWCATOD 57.

²⁴ See for example *Legal Profession Complaints Committee and Staffa* [2020] WASAT 58 (S); *Legal Profession Complaints Committee and in de Braekt* [2012] WASAT 58 (S); *Legal Profession Complaints Committee and Lawson* [2021] WASAT 152 (S); *Legal Profession Complaints Committee and Mugliston* in VR 165 of 2019; *Legal Profession Complaints Committee and Tang* [2021] WASAT 117; *Legal Profession Complaints Committee and Chang* [2019] WASAT 67 (S); *Legal Profession Complaints Committee v Mizen* [2021] WASC 434; *Legal Profession Complaints Committee v Tolson* [2020] WASC 158; *Legal Profession Complaints Committee and Rayney [No 2]* [2018] WASAT 5 (S); *Legal Profession Complaints Committee and Bower* [2017] WASAT 47 (S); *Legal Profession Complaints Committee and Oud* [2018] WASAT 119 (S).

not mean that the penalty is not appropriate in this practitioner's case. That is, a disciplinary penalty is not determined by the ranking of cases but by determining whether, following a period of suspension, the Tribunal would be satisfied that a practitioner would again have the qualities of honesty and trustworthiness which are essential for the practice of the profession. As the Tribunal observed in *Legal Profession Complaints Committee and Gandini* at [22],²⁵ in reference to other cases in which practitioners have or have not been struck-off for having intentionally misled a court:

... the circumstances of each case differ and reference to this case law may be unhelpful. What one does derive from these cases is an uncompromising and justifiably severe approach to any conduct involving intentionally misleading a court, to be mitigated only by extenuating circumstances of varying degrees.

43 Bearing that caution in mind, and having considered the cases to which we have been referred, we find that in the circumstances of this case, which involves the repeated giving of untruthful explanations for his conduct, the Practitioner currently lacks the qualities of trustworthiness and honesty essential for the holding of a practising certificate. What we must ultimately decide then is whether we could be satisfied that at the end of a period of suspension, the Practitioner would be fit to return to legal practice.

44 In our view, there has been nothing advanced by the Practitioner that has satisfied us that after a period of suspension, he would have the essential quality of honesty which is required of a legal practitioner. While he is of course entitled to challenge our findings and is not to be punished for doing so, the Practitioner has been, as a result, unable to demonstrate any contrition for or insight into his conduct. Absent any remorse or insight, we are unable to be satisfied that the Practitioner has, or may regain, the essential qualities necessary for legal practice, which might enable us to find that a period of suspension is an appropriate penalty.

45 As a result, we have determined that the appropriate penalty to impose for all of the professional misconduct is to transmit a report to the Supreme Court (full bench) with both the record of the evidence taken at the hearing and a recommendation that the Practitioner's name be removed from the roll of persons admitted to the legal profession under the LP Act.

²⁵ *Legal Profession Complaints Committee and Gandini* [2011] WASAT 86 (S).

46 Ultimately the determination of whether the Practitioner is not a fit and proper person to be a legal practitioner is a matter for the Supreme Court (full bench) to be determined at the time of its decision.

Interim order for suspension

47 The Applicant submits that if we accept that the Practitioner is not fit to remain on the roll and that a report should be transmitted to the Supreme Court (full bench), it is appropriate for the Practitioner to be suspended from practice pursuant to s 438(3)(a) of the LP Act pending the Supreme Court's determination of the question of strike-off.

48 The Practitioner submits that the interim suspension of the Practitioner's practising certificate should not be ordered because the benefits of a successful appeal will be lost to him if the order is made. It was submitted that an order for interim suspension would do 'irreversible harm' to his practice.

49 The extent of any detriment will depend on factors including the arrangements put in place for the management of the practice during the period of suspension, the loyalty of the practitioner's clients and fellow directors of the Firm and the duration of any period of suspension. There was no evidence before us of the detriment that would be done by the making of an interim suspension order that would be irreversible if the Practitioner's appeal were to be successful. Nevertheless, we accept as a general proposition that any order for interim suspension will have a detrimental effect upon the Practitioner's practice.

50 However, despite the appeal being on foot, the Practitioner also submits that the appropriate penalty to be imposed is a period of suspension and has not argued that the suspension should not take place immediately. Those two positions seem to us to be inconsistent in respect of the effect of a period of suspension.

51 In those circumstances, having formed the view that the Practitioner was not fit to remain in practice, we find that he should be suspended from practising from the making of our orders.

Costs

52 The Applicant seeks an order that the Practitioner pay its costs in the sum of \$66,017.78.

53 The Practitioner did not seek to be heard in relation to the costs application.²⁶

The relevant legal principles

54 The issue of costs of proceedings in the Tribunal is dealt with in s 87 of the SAT Act. Section 87(1) provides that, unless otherwise specified in the SAT Act or the relevant enabling Act, or an order under the SAT Act, each party in proceedings in the Tribunal is to bear their own costs.

55 The general principles which apply in respect to the award of costs in the Tribunal were identified in *Legal Profession Complaints Committee and Chang*,²⁷ and have been referred to on numerous occasions. They are that:

1. the presumptive position is that parties bear their own costs;
2. despite the presumptive position, s 87(2) confers a wide discretion upon the Tribunal to make an order for the payment by one party of all or part of another party's costs;
3. the onus is on the party seeking an order for costs; and
4. when a costs application is made, the question to be determined by the Tribunal is, generally speaking, whether it is fair and reasonable that the costs order be made.

56 However, while the starting point is that the parties bear their own costs, in cases where proceedings are brought by a vocational regulatory authority against a practitioner, it is commonly the case that, where the action is successful the practitioner is ordered to pay the costs, or a portion of the costs, of the regulatory authority in bringing the proceedings. This is said to be because, for public interest reasons, there will usually be a strong case for the exercise of that discretion in favour of the regulatory body.²⁸

²⁶ Respondent's Submissions on Penalty and Costs dated 14 May 2024 at para 60.

²⁷ *Legal Profession Complaints Committee and Chang* [2019] WASAT 67 (S) (*Chang*) [127] - [129].

²⁸ *Medical Board of Western Australia and Roberman* [2005] WASAT 81 (S) [30], referred to with approval in *Paridis v Settlement Agents Supervisory Board* [2007] WASCA 97 [35] (read with [37] and [38]).

Resolution

57 The Applicant seeks an order that the Practitioner pay the disbursements incurred by the Applicant in bringing the disciplinary proceedings against the Practitioner. It does not seek an order in respect of any of its own in-house legal officers' costs and seeks only the costs of external counsel and of other disbursements.

58 The Applicant submits that it would be fair and reasonable that the Practitioner be ordered to pay the costs it seeks.

59 The Applicant provided the Tribunal with a schedule of counsel fees and disbursements which it says it incurred in bringing the proceeding. Those invoices total \$72,299.34 inclusive of GST.

60 Although the *Legal Profession (State Administrative Tribunal) Determinations (Determinations)* apply to fees between lawyer and client (in the absence of a written costs agreement), where the Tribunal makes an order for costs, the Determinations provide a useful guide to the maximum rates which might be allowed as party/party costs.²⁹

61 In this matter, the Applicant's Senior Counsel charged fees at significantly less than the maximum hourly rates for senior counsel of \$539 in Table A of the Schedule to the *Legal Profession (State Administrative Tribunal) Determination 2020* and \$550 in Table A of the Schedule to the *Legal Profession (State Administrative Tribunal) Determination 2022*. So too the hourly rate charged by counsel who prepared the particulars which had been requested by the Practitioner was less than the hourly rate applicable in Table A of the Schedule to the *Legal Profession (State Administrative Tribunal) Determination 2020*.

62 The Applicant also seeks costs of its Senior Counsel's estimate of fees for preparation for and attendance at the final hearing on penalty and costs. The estimated fees are at a rate which is also less than the relevant fee provided for in Schedule A to the *Legal Profession (State Administrative Tribunal) Determination 2022*.

63 Taking a broad brush approach to the issue of costs and having regard to the complexity of the matter, we are satisfied that the counsel fees already incurred and estimated to be incurred in the conduct of the penalty and costs portion of the proceeding are reasonable.

²⁹ *Legal Profession Complaints Committee and in de Braekt* [2012] WASAT 58 (S) [53]; *Chang* [126].

64 Apart from counsel fees, the other disbursements were the filing fees and the fee for issuing a summons to produce documents, and the fee for the obtaining of the transcript of the final hearing on 11 and 12 May 2023.

65 In the circumstances, we find that it is fair and reasonable that the Applicant, who was entirely successful in its application, should be entitled to costs in the amounts sought.

66 In this case, the Applicant has agreed to forgo the recovery of the GST component of the relevant fees.³⁰ It did so because the Practitioner had queried whether the Applicant was entitled to recover the GST component and the Applicant had been unable to resolve that issue before the penalty hearing. The Applicant stated that its approach in this case is not a concession that it not entitled to recover the GST component of fees nor an approach that they may take in other cases.

67 We will order that, pursuant to s 87(2) of the *State Administrative Tribunal Act 2004* (WA), the Practitioner pay to the Board a contribution towards the Applicant's costs of the proceedings fixed in the sum of \$66,017.78.

68 We will also order that the costs be paid within 30 days of the making of the orders disposing of this matter, or as otherwise agreed between the parties.

Orders

69 As a consequence of the findings which we have made above, we will make the following orders:

The Tribunal orders that:

1. Pursuant to s 438(2)(a) and s 438(2)(b) of the *Legal Profession Act 2008* (WA) (**LP Act**), the Tribunal is to make and transmit a report to the Supreme Court (full bench) with:
 - (a) a record of the evidence taken at the hearing; and
 - (b) a recommendation that the name of the Respondent be removed from the roll of practitioners.

³⁰ ts 179, 19 June 2024.

2. Pursuant to s 438(3)(a) of the LP Act, the Respondent's practising certificate is suspended with immediate effect pending the determination of the Supreme Court (full bench).
3. Pursuant to s 87(2) of the *State Administrative Tribunal Act 2004* (WA), the Respondent pay the Applicant's costs fixed in the sum of \$66,017.78, such costs to be paid to the Legal Practice Board of Western Australia within 30 days of this order or as otherwise agreed between the parties.

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

MS

Associate to the Hon Justice Glancy

8 OCTOBER 2024