[2008] WASAT 246

JURISDICTION	**:**	STATE ADMINISTRATIVE TRIBUNAL
STREAM	**:**	VOCATIONAL REGULATION
ACT	**:**	LEGAL PRACTICE ACT 2003 (WA)
CITATION	**:**	LEGAL PRACTITIONERS COMPLAINTS COMMITTEE and PEPE [2008] WASAT 246
MEMBER	**:**	JUDGE J CHANEY (ACTING PRESIDENT) MR M ODES QC (SENIOR SESSIONAL MEMBER) MS V O'TOOLE (SENIOR SESSIONAL MEMBER)
HEARD	**:**	26 SEPTEMBER 2008
DELIVERED	**:**	24 OCTOBER 2008
FILE NO/S	**:**	VR 129 of 2008
BETWEEN	**:**	LEGAL PRACTITIONERS COMPLAINTS COMMITTEE Applicant AND JOSEPHINE PEPE Respondent

Catchwords:

Legal practitioners - Disciplinary proceedings - Conviction of attempting to pervert the course of justice - Appropriate penalty

Legislation:

Criminal Code (WA), s 143
Legal Practice Act 2003 (WA), s 185(1), s 187
State Administrative Tribunal Act 2004 (WA), s 87(2)

Result:

Report transmitted to Supreme Court (Full Bench)

Category: B

Representation:

Counsel:

Applicant	:	Ms P Cahill
Respondent	:	Mr M Hall

Solicitors:

Applicant	:	Legal Practitioners Complaints Committee
Respondent	:	Hall & Hall Lawyers

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

A Solicitor v Council of the Law Society of New South Wales (2004) 216 CLR 253
Bar Association v Evatt (1968) 117 CLR 177
Law Society of South Australia v Rodda (2002) 83 SASR 541
Legal Practitioners Complaints Committee and Palumbo [2005] WASCA 129
State of Western Australia v Pepe [2008] WADC 97
Ziems v The Prothonotary of the Supreme Court of NSW (1957) 97 CLR 279

REASONS FOR DECISION OF THE TRIBUNAL:

Summary of Tribunal's decision

1 On 2 July 2008, Ms Josephine Pepe, a legal practitioner, was convicted in the District Court of Western Australia of attempting to pervert the course of justice by attempting by improper means to dissuade a potential witness in criminal proceedings from giving evidence. She was sentenced to 12 months' imprisonment suspended for a period of 12 months.

2 Following her conviction, the Legal Practitioners Complaints Committee brought disciplinary proceedings, based upon the conviction, in the State Administrative Tribunal. Ms Pepe accepted that the illegal conduct giving rise to the conviction amounted to unsatisfactory conduct for the purpose of the *Legal Practice Act 2003* (WA), and that proper cause for disciplinary action against her existed. The issue for the Tribunal was the appropriate penalty to be imposed in relation to the conduct.

3 The Legal Practitioners Complaints Committee argued that the character of the conviction struck at the heart of what is required of a legal practitioner, and that the Tribunal should transmit a report to the Supreme Court with a recommendation that Ms Pepe's name be struck from the roll of practitioners. Ms Pepe argued that while the offence was serious, the circumstances surrounding the offence were such that the appropriate penalty was a period of suspension from practice.

4 The Tribunal examined the facts and circumstances surrounding the conviction, but concluded that the nature of the conviction was so fundamentally inimical to the responsibilities of a legal practitioner that the only proper disposition was the transmission of a report to the Supreme Court.

The issue

5 On 15 August 2008, the Tribunal, differently constituted, made a finding under s 185 (1) of the *Legal Practice Act 2003* (WA) (LP Act) that Josephine Pepe, a legal practitioner, is guilty of unsatisfactory conduct by way of illegal conduct. The admission by Ms Pepe followed her conviction (by Fenbury DCJ sitting alone) in the District Court of attempting to pervert the course of justice, contrary to s 143 of the *Criminal Code* (WA). Ms Pepe had been found to have used improper

means to persuade a potential witness in criminal proceedings not to give evidence.

6 In light of that finding, the issue before the Tribunal is whether or not the Tribunal should make and transmit a report on the finding to the Supreme Court (Full Bench) or alternatively deal with the practitioner in one of the ways specified under s 187 of the LP Act.

The facts

7 The facts before the tribunal were not substantially in issue. They were helpfully set out in a statement of agreed facts lodged with the Tribunal by the parties. The agreed facts were as follows:

> 1. On 2 July 2008 the practitioner was convicted of the indictable offence under section 143 of the Criminal Code of Western Australia of attempting to pervert the course of justice.
>
> 2. The practitioner was found to have:
>
> (i) intended to persuade a potential witness in criminal proceedings not to give evidence, not as the exercise of a free decision made by him after reasoned argument but as a result of being pressurised by improper means;
>
> (ii) attempted by improper means to dissuade a potential witness in criminal proceedings from giving evidence.
>
> 3. The improper means employed by the practitioner were:
>
> (i) the practitioner tried to make the potential witness feel guilty in giving evidence;
>
> (ii) the practitioner tried to make the potential witness feel sorry for her and her partner;
>
> (iii) the practitioner tried to frighten the potential witness by saying he could be charged when there was no evidence she had any basis upon which to offer that view;
>
> (iv) the practitioner told the potential witness he would be likely to suffer personally if he were to give evidence.
>
> 4. On 3 July 2008 the practitioner voluntarily ceased practice.
>
> 5. On 11 August 2008 the practitioner was sentenced to 12 months imprisonment suspended for a period of 12 months.
>
> 6. The facts giving rise to the offence committed by the practitioner are set out below.

7. In 2006 the practitioner was in a relationship with a Mr J Murray ('Murray').

8. Murray and two others were indicated for conspiracy to commit an indictable offence, namely, with intent to cause bodily harm to one Ms K. Andersen, and in so doing cause Ms Anderson to miscarry her unborn child.

9. The conspiracy was alleged to have formed between 3 and 8 June 2004.

10. The practitioner represented Murray. For the trial the practitioner briefed senior counsel from Melbourne, Mr S Shirrefs SC.

11. The trial of the conspiracy count commenced in the District Court at Perth on 21 August 2006. The proceedings received a degree of publicity in the media on that day. Mr S O'Sullivan prosecuted. The trial was aborted the next day for various reasons and it was due to recommence on 23 August 2006.

12. Fitzgerald, a former policeman serving a sentence in Casuarina Prison for corruption saw media reports about the case.

13. Fitzgerald contacted police to say that he may have some useful information.

14. On 22 August police interview Fitzgerald at Casuarina Prison and he signed a statement that incriminated Murray.

15. The essence of Fitzgerald's statement was that he was a witness to conspiratorial conversation between Murray and his co-accused in which terminating a woman's pregnancy by violence was discussed.

16. Mr O'Sullivan obtained a copy of Fitzgerald's statement on the morning of 23 August 2006 and it is his recollection that a copy of the statement went to the practitioner and Mr S Shirrefs SC.

17. On 23 August 2006 it was disclosed to the practitioner that Fitzgerald had made a statement and may be a witness for the prosecution against Murray.

18. The practitioner then appreciated that if Fitzgerald was called to give and gave evidence, it would significantly incriminate Murray.

19. The practitioner was aware that Fitzgerald was a person she knew, being a current client of her legal practice.

20. The practitioner attempted to contact Fitzgerald on 23 August 2006 in Casuarina Prison but was unable to do so. Fitzgerald became

aware the practitioner was trying to contact him and he called her about 9.30am that day.

21. The practitioner had a telephone conversation with Fitzgerald on the morning of the 23 August 2006 (***the telephone conversation***).

22. At the commencement of the telephone conversation an unidentified voice asks the practitioner if she will receive the call and advises her that the conversation will be recorded. The telephone conversation was of about 5 minutes' duration.

23. During the telephone conversation the practitioner:

    (i) tells Fitzgerald 'there is nothing against us' referring to the case against Murray, absent Fitzgerald's statement;

    (ii) goes on to ask Fitzgerald 'can you change your mind';

    (iii) impresses upon Fitzgerald that in her view 'this' will not benefit him and will harm her;

    (iv) advices [*sic*] him in response to enquires [*sic*] about what he should do about his written statement that he could say 'Look I think I got the details wrong…' and 'I don't want to give evidence any more';

    (v) describes to Fitzgerald how difficult it will become for him in court, and in the media, and that if the matter was to proceed and he was to give evidence, that it will not reduce his sentence.

24. The trial did not proceed on 23 August 2006 as it was adjourned to enable police to make further enquiries about what Fitzgerald had said.

25. On 25 August 2006 Fitzgerald retracted his statement.

26. On 29 October 2007 the practitioner was charged with an indictable offence under section 143 of Criminal Code of Western Australia - Attempting to pervert the course of justice.

27. On 8 July 2008, by consent, the practitioner was suspended from practice pending enquiry and referral of the matter; namely the practitioner's conviction on 2 July 2008 of the indictable offence or until further order.

8 The practitioner asserted, for the purposes of the penalty hearing, two other facts which the Legal Practitioners Complaints Committee ('the Committee') did not agree, or alternatively suggested were irrelevant.

9 The first of those was that, upon being informed by Police on 22 August 2006 of Mr Fitzgerald's statement, Mr O'Sullivan had reservations about its veracity.

10 For reasons which we will explain, we consider that the Tribunal should have regard to the circumstances surrounding a conviction in determining the appropriate penalty. On that basis, we would not exclude the fact asserted by Ms Pepe on the basis of relevance. We are satisfied, on the materials before us, that Mr Sullivan did have reservations as to the accuracy of Mr Fitzgerald's statement. He accepted as much when he gave evidence at Ms Pepe's District Court trial [at T:32].

11 The second fact asserted by the practitioner but not accepted by the Committee was expressed as follows:

> On 23 August 2006 when it was disclosed to the practitioner that Fitzgerald had made a statement and may be a witness for the prosecution against Murray she did not believe the purported evidence of Fitzgerald nor did she believe that his evidence would survive cross examination but appreciated that if Fitzgerald was called to give and gave evidence, while it could incriminate Murray it would prevent the submission of no case to answer, a submission which the practitioner had prepared for Shirrefs SC.

12 The question of Ms Pepe's belief as to the falsity of Mr Fitzgerald's statement was considered by Fenbury DCJ in his reasons for decision. At [88]-[91], his Honour said:

> In my view, in saying what Ms Pepe did say to Fitzgerald, she was not merely approaching a witness she believed had made a false statement and, by giving advice, merely endeavouring to dissuade that witness from giving perjured or erroneous evidence.
>
> What Ms Pepe said was said with the intention of persuading Fitzgerald not to give evidence, not as the exercise of a free decision made by him after reasoned argument but as a result of being pressurised by improper means.
>
> There is nothing said in the phone call that suggests Ms Pepe believed by 9.30am on 23 August that Fitzgerald had made a false statement. As I have mentioned, there is no reference to the contents of the statement at all.
>
> Even if Ms Pepe did believe that, or suspect that, based as it was on the gist of Fitzgerald's statement given to her by telephone from Mr O'Sullivan that morning, that the statement or part of it was false, Ms Pepe attempted to dissuade Fitzgerald from giving evidence by improper means. She tried to make him feel guilty in giving evidence. She tried to make him feel sorry for her and her partner Murray. She tried to frighten him by saying

> he could be charged when there was no evidence she had any basis upon which to offer that view. She told him that he would be likely to suffer personally if he were to go through with it and give evidence in court.
>
> [See ***State of Western Australia v Pepe*** [2008] WADC 97].

13 Ms Pepe did not give evidence at her trial in the District Court. Amongst the papers contained in the Committee's Book of Documents before the Tribunal was, however, a proof of evidence setting out the evidence which Ms Pepe would have given had she elected to give evidence at her trial. Counsel for the Committee did not seek to challenge the contents of that statement. In the statement, Ms Pepe explains that Mr Murray was abusive and violent towards her during their relationship. He had accused her of an affair with the Counsel whom she briefed for Mr Murray's trial. When she heard of Fitzgerald's statement she said she was fearful that, because of that belief, Mr Murray would assume a conspiracy between her, Counsel, and Mr Fitzgerald to have him convicted, and that she 'would be severely dealt with'.

14 Ms Pepe also explains that she believed the statement that had been made by Mr Fitzgerald was false, and the reasons for that belief. While there is no evidence that at the time Ms Pepe had the telephone conversation with Ms Fitzgerald she had actually seen a copy of the statement, and Fenbury DCJ proceeded on the basis that she had not, it is apparent that Mr O'Sullivan had explained the substance of the statement to her in his telephone call to her on the morning of 23 August 2006. We are satisfied that Ms Pepe did not believe the truth of the material assertion in Ms Fitzgerald's statement at the time she had the conversation with him.

Principles

15 When dealing with allegations of unprofessional conduct, the Tribunal is required to act in the public interest, not with a view to punishment – ***Bar Association v Evatt*** (1968) 117 CLR 177 at 183 - 184.

16 Where an order for removal from the roll is contemplated, the ultimate issue is whether the practitioner is shown not to be a fit and proper person to be a legal practitioner; ***A Solicitor v Council of the Law Society of New South Wales*** (2004) 216 CLR 253 (***A Solicitor***) at [15].

17 In ***Law Society of South Australia v Rodda*** (2002) 83 SASR 541 (***Rodda***) at [546], when dealing with a legal practitioner who had been convicted of certain sexual offences, Doyle CJ discussed several

considerations arising following a conviction of a legal practitioner for a serious offence. He said at [26]-[30]:

> The offences in question do not reflect directly on Mr Rodda's capacity to act as a practitioner. They do not reveal any lack of competence, or any lack of understanding of the law.
>
> But the offences are of a kind that damage the ability of Mr Rodda to maintain the relationship with other members of the profession that is an essential aspect of being a practitioner. Other practitioners would not readily place trust and confidence in a practitioner who has committed such a serious offence. Another practitioner could not assume that Mr Rodda accepts the high standard of conduct which membership of the legal profession requires. In the words of Dixon CJ in his dissenting judgment in Ziems (at 285-286), Mr Rodda could not 'command the confidence and respect' of the Court or of his fellow practitioners.
>
> More significantly, the offences indicate that Mr Rodda lacks qualities that are essential for the conduct of legal practice. The offences involve a serious breach of the law, even though they might be regarded as impulsive and isolated. Mr Rodda took advantage of a vulnerable and immature young woman. That being so, Mr Rodda cannot be regarded as a person in whom clients, especially vulnerable persons, could place their complete trust. Nor could he command the respect of clients.
>
> There is another factor. The reputation and standing of the legal profession in the public eye are important. Public confidence and trust in the legal profession is important to the effective functioning of the profession. That confidence and trust rest in part on the reputation and standing of the profession. The public could not view with respect, and have complete confidence in, a person with such serious and recent convictions. Were the Court to continue to hold Mr Rodda out as a fit and proper person to remain a member of the profession, the standing of the profession as a whole would suffer. The public would rightly doubt the standards of a profession which permitted a person who has recently committed such serious offences to remain one of its members.
>
> In summary, Mr Rodda's offences damage his ability to maintain professional relationships with other members of the profession. They disclose character defects that affect his capacity and fitness to be a practitioner. The public could not be expected to put complete trust in him. The offences are of a nature and seriousness such that the public would rightly consider that a profession that occupies the position of the legal profession, and maintains the high standards that it does, could not properly continue to regard Mr Rodda as a member of the profession.

18 In ***Ziems v The Prothonotary of the Supreme Court of NSW*** (1957) 97 CLR 279 at [298], the High Court dealt with an appeal from a removal of a barrister's name from the roll following his conviction for

manslaughter arising from a motor vehicle accident. It concluded that the fact of conviction, and a sentence of imprisonment, are not by themselves conclusive as to whether the practitioner's name should be removed from the roll. The Court went beyond the fact of conviction and imprisonment to examine the particular circumstances of the offence on the basis that the ultimate question is whether the conduct has been such to show that the practitioner is unfit to remain a member of the profession. However, [at 298] Kitto J said:

> It is not difficult to see in some forms of conduct, or in convictions of some kinds of offences, instant demonstration of unfitness for the Bar. Conduct may show a defective character incompatible with membership of a self-respecting profession; or, short of that, it may show unfitness to be joined with the Bench and the Bar in the daily co-operation which the satisfactory working of the courts demand. A conviction may of its own force carry such a stigma that judges and members of the profession may be expected to find it too much for their self-respect to share with the person convicted the kind and degree of association which membership of the Bar entails. But it will be generally agreed that there are many kinds of conduct deserving of disapproval, and many kinds of convictions of breaches of the law, which do not spell unfitness for the Bar; and to draw the dividing line is by no means always an easy task.

19 Counsel for the Committee argued that a conviction of a legal practitioner of an offence of attempting to pervert the course of justice was in the category of the kind of offence which instantly demonstrates unfitness to remain a member of the profession. She argued that, by reason of that categorisation, it is not open to the Tribunal to have regard to the underlying circumstances of the offence in determining whether or not a report should be transmitted to the Supreme Court with the recommendation that the practitioner's name be struck from the roll.

20 An important distinction between a number of cases cited in argument (for example ***Rodda***, ***Ziems***, ***A Solicitor*** and ***Legal Practitioners Complaints Committee and Palumbo*** [2005] WASCA 129 (***Palumbo***)) and this case, is that, in this case, the conduct occurred in the course of Ms Pepe's legal practice.

21 While we consider that there is considerable merit in the submission that the character of the offence of which Ms Pepe has been convicted suggests immediately unfitness to practice, we do not consider that the Tribunal is required to decline to have any regard to the particular circumstances of the offence. The character of the offence, however, is such that very powerful mitigating circumstances would be required before an alternative disposition might be thought appropriate. It remains

necessary, however, to examine 'the whole position' - see ***A Solicitor*** at [19]-[20].

The practitioner's submissions

22 The practitioner contends that a recommendation for removal of her name from the roll is not necessary in all the circumstances, and that the need to maintain the integrity of the profession could be met by the imposition of a period of suspension from practice. She contends that the conviction arose from a momentary lapse in ten years of practice made when under great emotional stress. She believed the statement of Mr Fitzgerald to be false. The events occurred in the context of a difficult emotional time and a concern as to the personal consequences to her, given her violent relationship with Mr Murray, if Mr Fitzgerald were to give evidence. That proposition receives some support from a psychiatric report from Dr Raymond Wu in which Dr Wu expresses the opinion that Ms Pepe has underlying personality vulnerabilities and meets 'with difficulties in her personal and professional life due to her emotional state clouding her rational mind at times'.

23 Ms Pepe submits that, unlike in the case of ***Palumbo***, her conviction did not arise from some premeditated course designed to pervert the course of justice. Rather, it occurred in the context of an unexpected phone call lasting only approximately five minutes.

24 In Ms Pepe's written submissions, it is contended that Ms Pepe had a genuine concern for Mr Fitzgerald's position which, at least in part, motivated her actions.

25 A number of letters of reference from legal practitioners submitted to Fenbury DCJ were included in the papers before the Tribunal. Those letters attest to Ms Pepe's general honesty, professionalism, and diligence. They tend to support the proposition that the offence was an isolated event occurring at a time of significant emotional stress.

The appropriate disposition

26 In our view, the circumstances of the case do not outweigh the seriousness of the conviction so as to overcome the need to transmit a report to the Supreme Court to enable it to consider whether Ms Pepe's name should be removed from the roll of practitioners.

27 While the phone call from Mr Fitzgerald may not have been anticipated, it occurred as a result of Ms Pepe's own attempts to contact

Mr Fitzgerald, and after she had apparently spoken to his father about the statement.

28 Importantly, the conduct leading to the conviction occurred in the course of Ms Pepe's legal practice. The improper means which she employed were available to her, at least in part, by reason of her status as Mr Fitzgerald's solicitor in relation to other matters.

29 Mr Fitzgerald's statement had been made in the context of a criminal prosecution in respect of which Ms Pepe was acting as solicitor for Mr Murray.

30 The fact that Ms Pepe did not believe the truth of Mr Fitzgerald's statement is of only marginal significance. Had she sought to present a reasoned argument as to why his evidence would not be accepted, she would not have committed the offence. However, as Fenbury DCJ found, she did not do that but rather sought to persuade him by improper means.

31 Having listened to the recording of the telephone conversation, we do not accept that the statements made to Mr Fitzgerald were borne of a concern for Mr Fitzgerald.

32 The conviction, by its nature, and the facts underlying it, in our view severely damage the confidence which other practitioners, clients, or the public generally, could place in Ms Pepe.

33 As the Court observed in ***Palumbo***, at [26], the offence of perverting the course of justice strikes at the heart of justice. In ***Rodda***, at [28], the Court observed that a serious offence, even though it may be regarded as impulsive and isolated, may nevertheless destroy the respect demanded of legal practitioners. That is so in relation to the serious offence of which Ms Pepe was convicted. All of the consequences of a conviction discussed by Doyle CJ in ***Rodda*** are applicable to the offence for which Ms Pepe was convicted.

34 In all the circumstances, the Tribunal is of the view that a report should be transmitted to the Supreme Court to consider whether Ms Pepe's name should be removed from the roll of practitioners.

Orders

35 For the following reasons, the Tribunal orders:

1. A report be transmitted to the Supreme Court (Full Bench) with a recommendation that the practitioner

be struck off the roll of practitioners. The report is to be comprised of these reasons for decision. The Tribunal will also forward the exhibits from these proceedings with its report which include the written submissions of the parties.

2. Pursuant to s 87(2) of the *State of Administrative Act 2004* (WA), the practitioner pay the Committee's costs in an amount to be agreed, or if not agreed, to be determined by the Tribunal.

I certify that this and the preceding [35] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

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JUDGE J CHANEY, ACTING PRESIDENT