

JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

STREAM : VOCATIONAL REGULATION

ACT : LEGAL PRACTICE ACT 2003 (WA)

CITATION : LEGAL PRACTITIONERS COMPLAINTS
COMMITTEE and BENARI [2005] WASAT 213 (S)

MEMBER : JUSTICE M L BARKER (PRESIDENT)
MS D DEAN (MEMBER)
MR M ODES QC (SENIOR SESSIONAL MEMBER)

HEARD : 7 JUNE 2005

DELIVERED : 19 AUGUST 2005

**SUPPLEMENTARY
DECISION** : 14 OCTOBER 2005

FILE NO/S : VR 18 of 2004

BETWEEN : LEGAL PRACTITIONERS COMPLAINTS
COMMITTEE
Applicant

AND

JOHN CONNOR BENARI
Respondent

Catchwords:

Legal practice - Legal practitioner - Disciplinary proceedings - Practitioner guilty of neglect in course of practice - Unprofessional conduct in charging client fees - Penalty

Legislation:

State Administrative Tribunal Act 2004 (WA), s 9(b), s 87, s 87(1), s 87(2)

Result:

Practitioner guilty of neglect in the course of the practice of law and unprofessional conduct in charging his client; order as to costs and disbursements

Category: B

Representation:

Counsel:

Applicant : Ms KA Williams
Respondent : Mr MR Hall

Solicitors:

Applicant : Legal Practitioners Complaints Committee
Respondent : Benari & Co Solicitors

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

Citygate Properties Pty Ltd and City of Bunbury [2005] WASAT 53
Legal Practitioners Complaints Committee and Benari [2005] WASAT 213
Medical Board of Western Australia and Roberman [2005] WASAT 81(S)
Settlement Agents Supervisory Board and Kolaran Holdings Pty Ltd [2005]
WASAT 109(S)
Shark Bay Tuna Farms Pty Ltd and Executive Director, Department of Fisheries
(WA) [2005] WASAT 206

Case(s) also cited:

Nil

REASONS FOR DECISION OF THE TRIBUNAL:

Summary of Tribunal's decision

1 On 19 August 200, the Tribunal found Mr Benari (the practitioner)
guilty of two complaints of unprofessional conduct but not guilty on a
third.

2 On the finding that the practitioner was guilty of neglect in the
course of practice of the law, the Tribunal reprimanded the practitioner for
his conduct.

3 On the finding that the practitioner was guilty of unprofessional
conduct in overcharging his client, the Tribunal fined the practitioner
\$2000 to be paid within 28 days.

4 The Tribunal also ordered the practitioner to pay the Legal
Practitioners Complaints Committee's costs fixed at \$5000 within 28 days.

Introduction

5 On 19 August 2005, the Tribunal delivered its reserved decision in
relation to the professional disciplinary proceedings commenced by the
Complaints Committee against Mr Benari (the practitioner).

6 The Tribunal found that the practitioner was guilty on two
complaints made against him, but not guilty on the third: see ***Legal
Practitioners Complaints Committee and Benari*** [2005] WASAT 213.

7 The parties then made submissions concerning the appropriate
disciplinary outcome and the question of costs.

8 Counsel for the Complaints Committee submitted that a reprimand
and a fine would be appropriate and that costs should also be paid by the
practitioner.

9 Counsel for the practitioner acknowledged that a reprimand and a
fine would be appropriate but submitted that the fine should not be a
heavy one.

10 As to the question of costs, the Counsel for the practitioner suggested
that the Tribunal was a "cost free" jurisdiction and that no costs should be
awarded.

11 Counsel for the practitioner submitted in the alternative that in the
event that costs are awarded against the practitioner, the Tribunal should

take into account that the Complaints Committee only succeeded on two of the three complaints it made against the practitioner and that the Tribunal should consider that Senior Counsel, who represented the Complaints Committee at the hearing, was not really required for a hearing of this nature having regard to the lack of complexity of the matters in issue.

Disciplinary Outcome

12 The Tribunal considers that in relation to the first complaint on which the practitioner has been found guilty, namely failing to supervise his law clerk adequately, the practitioner should be reprimanded.

13 The Tribunal received evidence concerning the practitioner in the supervision of his law clerk. They meet weekly to discuss matters of concern. At those meetings the law clerk is expected to raise matters of concern to her in the administration of her files. The Tribunal was concerned about this practice because it appeared to reflect a practice by the practitioner to give his law clerk considerable autonomy in the taking of instructions and handling of files. It is this particular practice that the practitioner needs to remedy in the future.

14 It is not necessary from a disciplinary point of view for the Tribunal to do anything more than reprimand the practitioner in respect of this practice. The Tribunal is confident that having regard to the previous record and experience of the practitioner he will remedy this deficiency quickly and it will not occur again.

15 However, in relation to the finding by the Tribunal that the practitioner is guilty of overcharging, that is a more serious matter. Counsel for the practitioner said that the account was sent out at the time because the practitioner was "cross" with the client following the termination of his instructions in the particular circumstances in which this occurred. Nonetheless, to overcharge a client reflects poorly on any legal practitioner. Practitioners know they are in a special relationship of trust and confidence with their client and that extends to the relationship immediately after the instructions are terminated by a client. There can be no justification for taking advantage or attempting to take advantage of a client or former client by overcharging them. As we found in our earlier reasons for decision, there was no justification for "loading" the law clerk's time and effort with an additional amount on account of the practitioner's operation of his practice.

16 In the circumstances, the practitioner should be fined in respect of
this second finding and an amount of \$2000 seems appropriate.

Costs

17 As to the question of costs, this is a matter that the Tribunal has
reflected on recently in a number of decisions: see for example, *Shark
Bay Tuna Farms Pty Ltd and Executive Director, Department of
Fisheries (WA)* [2005] WASAT 206 at [28] - [36]; and *Citygate
Properties Pty Ltd and City of Bunbury* [2005] WASAT 53.

18 Under s 87(1) of the *State Administrative Tribunal Act 2004 (WA)*
the ordinary rule in the Tribunal is that costs will not be awarded.

19 However, under s 87(2) the Tribunal has a broad discretion to award
costs in appropriate circumstances.

20 In review proceedings in the Tribunal, costs will not ordinarily be
granted against the unsuccessful party. However, as s 87 provides, there
may be exceptions to that rule.

21 In original proceedings in the Tribunal's jurisdiction however the rule
varies.

22 Historically, disciplinary proceedings before the various vocational
regulatory bodies that were successfully concluded against an affected
person resulted in the affected person being ordered to pay costs.

23 The Tribunal considers that ordinarily in disciplinary proceedings in
the vocational regulation stream of the Tribunal, the person affected by
the proceedings, if they are unsuccessful, should be called upon to
contribute to the costs incurred by the vocational regulatory body that has
brought the disciplinary proceedings.

24 The reason for this is that vocational regulatory bodies, like the Legal
Practitioners Complaints Committee on this application, are set up by
statute as public bodies with a public duty to supervise vocational areas of
importance to the public. It is in the public interest that the vocational
regulatory body supervise conduct and, where appropriate, refer conduct
of concern to this Tribunal in disciplinary proceedings.

25 It follows that where disciplinary proceedings have been commenced
in the public interest by a vocational regulatory body and the vocational
regulatory body has been successful in the prosecution of those
proceedings, ordinarily the affected person should be ordered to

contribute to the costs of the proceedings incurred by the vocational regulatory body.

26 As to what the terms of the cost order should be is something that needs to be assessed in each case. In some cases there may be more than one complaint against an affected person and the vocational regulatory body may not have been successful on all counts. Some allowance needs to be made in those instances so that the affected person is not obliged to meet all of the costs incurred by the vocational regulatory body.

27 In other instances, there may be special matters that need to be taken into account by the Tribunal in deciding what a fair and reasonable costs order should be.

28 The Tribunal has now taken this approach in a number of cases, including *Medical Board of Western Australia and Roberman* [2005] WASAT 81(S) and *Settlement Agents Supervisory Board and Kolaran Holdings Pty Ltd* [2005] WASAT 109(S). In *Medical Board of Western Australia and Roberman* (*supra*) at [30] the Tribunal (Deputy President Judge Chaney, presiding member) observed:

"Section 87(2) gives the Tribunal the discretion to order the payment by a party of all or any of the costs of another party. Where a regulatory authority successfully brings a complaint of conduct which, if proved, justifies disciplinary action by the Tribunal, it will usually be a strong case for the exercise of that discretion in favour of the regulatory body. That is because such 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. The question of an award of costs is, of course, a matter of discretion to be exercised in the circumstances of each case."

29 The Tribunal concurs with the observations of the Tribunal in that regard.

30 In this case, the Tribunal considers that the practitioner should contribute to the costs incurred by the Complaints Committee in bringing these disciplinary proceedings. However, whereas the Committee have asked for a costs order in excess of \$10 000 to cover the costs of Senior Counsel and a disbursement of an airfare to bring a witness to Perth for the hearing, an appropriate amount by way of costs in this case would be \$5000, inclusive of the airfare disbursement referred to.

31 The Tribunal considers this lesser sum to be reasonable in the circumstances having regard to matters that were the subject of complaint, their relative complexity, the fact that the practitioner successfully defended the complaint that he constructively misrepresented his law clerk as a lawyer, and the Tribunal's concern that while the Complaints Committee were entitled to engage Senior Counsel, overall the proceedings probably did not justify the appearance of Senior Counsel, or at least the practitioner should not be obliged to meet Senior Counsel rates in satisfying a costs order against him.

32 However, we would also observe that in this case the practitioner took the approach that he would defend the complaints at hearing. This seems to have created an uncooperative environment between the practitioner and the Complaints Committee. As a result, there seems to be have been little opportunity for the parties to agree evidence and for certain witnesses not to be called at the hearing.

33 It will always be important in proceedings in the Tribunal for the parties take steps before a hearing to minimise their costs as far as possible. The Tribunal will be vigilant to cause steps to be taken that may result in the minimisation of costs by parties to proceedings. This is in conformity with that objective of the Tribunal set out in s 9(b) of the *State Administrative Tribunal Act 2004* (WA), to minimise the costs to the parties.

Orders

34 The Tribunal therefore makes the following final orders in these proceedings:

- (1) The Tribunal finds the practitioner guilty of neglect in the course of the practice of the law of the file of his client between in or around December 2001 and December 2003.
- (2) The Tribunal finds the practitioner guilty of unprofessional conduct in charging his client for the time spent by the

practitioner's clerk at the rate of \$240 per hour plus GST, which was grossly in excess of the amount he was permitted to charge.

- (3) The Tribunal finds the practitioner not guilty of unprofessional conduct by constructively misrepresenting by conducting his legal practice in such a way as to convey or permit to be conveyed the impression to his client that his clerk was a lawyer.
- (4) In respect of the finding of the Tribunal in Order 1, the practitioner is reprimanded for his conduct.
- (5) In respect of the finding in Order 2, the practitioner is fined \$2000 which the sum is to be paid within 28 days.
- (6) The practitioner is to pay on account of costs and disbursements of the proceedings the sum of \$5000 to the Legal Practitioners Complaints Committee within 28 days.

I certify that this and the preceding [34] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

JUSTICE M L BARKER, PRESIDENT