
JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : LEGAL PROFESSION ACT 2008 (WA)

CITATION : LEGAL PROFESSION COMPLAINTS
COMMITTEE and METAXAS [2021] WASAT 82 (S)

MEMBER : JUDGE K GLANCY, DEPUTY PRESIDENT
DR S WILLEY, SENIOR MEMBER
MS M CONNOR, MEMBER

HEARD : 21 DECEMBER 2021

DELIVERED : 31 MARCH 2022

FILE NO/S : VR 176 of 2019

BETWEEN : LEGAL PROFESSION COMPLAINTS
COMMITTEE
Applicant

AND

ARTHUR METAXAS
Respondent

Catchwords:

Unsatisfactory professional conduct - Legal practitioner commencing, serving, maintaining and prosecuting proceedings which were always doomed to fail - Penalty and costs - Reprimand and fine imposed and order to pay costs made

Legislation:

Commercial Arbitration Act 2012 (WA), s 11(3)(b), s 11(4), s 11(4)(c)
Legal Profession Act 2008 (WA), s 438(1), s 438(2), s 438(2)(b), s 439,

s 439(d), s 440, s 441, s 441(a)

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

Result:

Practitioner reprimanded and fine imposed

Category: B

Representation:

Counsel:

Applicant : Mr S Merrick
Respondent : Mr M McCusker QC

Solicitors:

Applicant : Legal Profession Complaints Committee
Respondent : Metaxas Legal

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

Khosa v Legal Profession Complaints Committee [2017] WASCA 192

Legal Profession Complaints Committee and A Legal Practitioner [2013]
WASAT 37 (S)

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

Legal Profession Complaints Committee v Detata [2012] WASCA 214

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

Legal Profession Complaints Committee and Forbes [2009] VR 164

Legal Profession Complaints Committee and Gregory [2017] VR 125

Legal Profession Complaints Committee and Joubert [2015] VR 148

Legal Profession Complaints Committee and Metaxas [2018] WASAT 28

Legal Profession Complaints Committee and Metaxas [2021] WASAT 82

Legal Profession Complaints Committee and Paiker [2009] VR 163

Legal Profession Complaints Committee and Wroughton [2013]
WASAT 191

Legal Profession Complaints Committee and Wroughton [2013]
WASAT 191 (S)

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

Metaxas v Legal Profession Complaints Committee [2020] WASCA 27

Mijatovic v Legal Practitioners Complaints Committee [2008]

WASCA 115

Western Australian Planning Commission v Questdale Holdings Pty Ltd

[2016] WASCA 32; (2016) LGERA 87

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction and outcome

- 1 On 14 June 2021, the Tribunal published its reasons for decision in *Legal Profession Complaints Committee and Metaxas* [2021] WASAT 82. In that decision, we found the practitioner had engaged in unsatisfactory professional conduct pursuant to s 438(1) of the *Legal Profession Act 2008* (WA) (**LP Act**). The nature of the conduct will be referred to later in these reasons.
- 2 Following a hearing in relation to penalty, which was held on 21 December 2021, we have determined that, for the reasons we have set out below, the appropriate penalty to be imposed is:
 1. the issuing of a public reprimand; and
 2. the imposition of a fine of \$24,000.
- 3 The applicant sought an order that the practitioner pay its costs fixed in the sum of \$13,816. The practitioner made no submissions in relation to the application for costs. For reasons we have briefly set out below, we consider it appropriate to make the order sought.
- 4 The practitioner has appealed our decision on liability. In his written submissions, the practitioner submitted that we should stay the commencement of any penalty we imposed pending the outcome of his appeal.¹ While the practitioner's senior counsel did not press that submission in his oral submissions, nor was it expressly abandoned. Therefore, for the sake of completeness, we have set out below our brief reasons for refusing to take that course.

Delay in determining penalty

- 5 As referred to above, our decision in relation to liability was published on 14 June 2021. The hearing on penalty took place in December 2021. The delay between hearings was the result of matters related to the practitioner. Those reasons included a period of ill health. While we are understanding as to the health issues faced by the practitioner, we wish to note that it is the Tribunal's expectation that parties who are unable to comply with its orders make an application for an extension of time even after the event rather than ignore its orders and leave it to

¹ Respondent's Submissions on Penalty dated 8 December 2021, para 86.

the Tribunal to make inquiries about the reason for and consequences of non-compliance.

Parties' positions on penalty

6 The applicant submits that the following penalty is appropriate in the practitioner's circumstances:

1. a period of six months suspension of the practitioner's local practising certificate to take effect 30 days after the publication of our reasons for imposing the penalty; and
2. an order publicly reprimanding the practitioner.

7 The practitioner submits that suspension is not an appropriate penalty in his particular circumstances. While the practitioner did not identify any penalty he considers would be appropriate, he submitted that the penalty should be no greater than that which was imposed in relation to his previous disciplinary matter where he was fined \$24,000 and reprimanded after a finding that he had engaged in professional misconduct.²

The nature of the practitioner's conduct

8 The practitioner submits that his failing in this matter was only the failure to make a final enquiry of the President of the Law Society to ascertain whether she had determined not to appoint, or to defer the appointment of, an arbitrator. He says that had that step been taken, he would have been entitled to commence the proceedings.³ We do not consider that submission is correct. Whether he would have been entitled to commence proceedings under s 11(4)(c) of the *Commercial Arbitration Act 2012* (WA) (**CA Act**) would have depended on the answer given by the President to the enquiry. An absolute refusal to appoint may have been able to be characterised as a failure of the dispute resolution process that had been agreed by the parties. Had the President indicated that she intended to appoint an arbitrator but would need additional time to do so, then given the request had been made on 9 April 2018, it would not necessarily be the case that the delay in the appointment of an arbitrator would constitute a failure of the process.

² *Metaxas v Legal Profession Complaints Committee* [2020] WASCA 27.

³ ts 15, 21 December 2021.

- 9 In any event, we did not find that the practitioner's failure was merely a failure to make an additional enquiry of the President. Nor did we characterise the failure, as the practitioner does, as simply an error in judgment as to whether the agreed arbitration had failed.⁴
- 10 We found that the practitioner deliberately commenced proceedings under s 11(3)(b) of the CA Act, a section that is enlivened when the parties have not agreed on a process for the appointment of an arbitrator rather than under s 11(4). The unsatisfactory professional conduct was not failing to make a final enquiry of the President of the Law Society; it was commencing and then maintaining a proceeding under s 11(3)(b) of the CA Act in circumstances where there was no factual basis for doing so because the parties had, in fact, agreed to an appointment process.

The disputed document

- 11 As we said above, we found that the practitioner commenced the proceeding in the Supreme Court by the filing of an originating summons seeking relief under s 11(3)(b) of the CA Act. The document by which the proceeding was commenced, and upon which the disciplinary proceeding was based, was included in the bundle of documents filed by the applicant on 24 June 2020 and was put to the practitioner in cross-examination by counsel for the applicant at the hearing. At no stage prior to the penalty phase of this proceeding did the practitioner assert that this was not the document he filed in the Supreme Court proceeding or even suggest that it may not have been. Yet, as part of the penalty phase of this matter, the practitioner claimed that he may, in fact, have filed a different document in the Supreme Court which referred to the action being brought under s 11(4) of the CA Act and that, therefore, the disciplinary proceedings were misconceived. When that issue was raised by the practitioner, the parties agreed that we should adjourn the penalty proceeding in order to allow enquiries to be made of the Registrar of the Supreme Court to see if she could assist in determining whether the document before the Tribunal was in fact the document by which the relevant Supreme Court proceeding has been commenced. After those enquiries were made, we were informed by the parties that the penalty proceeding should continue, presumably because the practitioner was unable to satisfy the applicant that the factual underpinning of the disciplinary action was erroneous. Nevertheless, in his written submissions,

⁴ Respondent's Submissions on Penalty dated 8 December 2021, para 85.

the practitioner asserted that the document shown to the practitioner in cross-examination is not the document he filed with the Court.⁵ He also submitted that he had intended to commence proceedings under s 11(4)(c) rather than s 11(3)(b) and that we 'will have observed that the practitioner was taken aback' when the document showing an application having been made under s 11(3)(b) was put to him in cross-examination.⁶

- 12 At the penalty hearing, senior counsel for the practitioner accepted that we must proceed to determine penalty on the basis of the finding that we made in relation to liability. He accepted, correctly in our view, that whether or not the relevant document was or was not that which had been filed in the Supreme Court was not a matter for this Tribunal to consider but a matter to be resolved on appeal if the assertion were to be maintained. However, we wish to record that, contrary to the practitioner's contention, we did not observe him to have been 'taken aback' when the document was put to him in cross-examination. In our observation, the practitioner made no attempt to convey, through his evidence or body language, any concern that the document upon which he was being cross-examined was not a copy of the document he had filed in the Supreme Court.

Penalty - legal principles

- 13 The LP Act sets out the various orders that the Tribunal may make consequent upon a finding that a practitioner is guilty of unsatisfactory professional conduct or professional misconduct. Section 438(2) permits the Tribunal to make a report and to transmit that report to the Supreme Court (full bench) on the findings or to make any one or more of the orders specified in s 439, s 440 and s 441 of the LP Act. Among 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 to cancel it, and to make an order publicly reprimanding the practitioner or, if there are special circumstances, to make an order privately reprimanding them.
- 14 The principles to be applied in determining the appropriate disciplinary sanction are well established. They were set out by the Court of Appeal in *Khosa v Legal Profession Complaints Committee* [2017] WASCA 192 at [188] - [195] (*Khosa*). Those principles are as follows:

⁵ Respondent's Submissions on Penalty dated 8 December 2021, para 31.

⁶ Respondent's Submissions on Penalty dated 8 December 2021, para 30.

- (a) The purpose of a disciplinary proceeding against a legal practitioner is the protection of the public and the maintenance of the reputation and standards of the profession rather than the punishment of the practitioner.
- (b) The protection of the public includes general deterrence of other practitioners who may be tempted to engage in similar conduct as well as personal deterrence.
- (c) Where the conclusion is reached that the practitioner is presently unfit to practise and the choice is between suspension and striking off, the Tribunal must consider that the practitioner will again be fit to practise after the proposed suspension period comes to an end before a term of suspension can be ordered. This is because, when a period of suspension is concluded, the practitioner's name will be on the roll of practitioners and the practitioner will be able to resume practice.
- (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 who, in the opinion of the Tribunal, 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.
- (e) Striking off is likely to be the appropriate response when the circumstances of the conduct amounting to the current unfitness to practice demonstrate that the practitioner lacks the character and trustworthiness necessary to discharge the responsibility of legal practice.
- (f) A failure to appreciate the impropriety of the practitioner's conduct may support a finding that the practitioner is unfit to practise. This is because the

failure to appreciate the impropriety increases the risk of a recurrence of the improper conduct.

- (g) Suspension may be an appropriate means of achieving the purpose of professional discipline even where the Tribunal does not conclude that the conduct in question indicates that the practitioner is not a fit and proper person. This is because a suspension entails a greater denunciatory and deterrent effect than a reprimand and a fine.
- (h) 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.

15 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. 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 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 is such that the appropriate outcome is a period of suspension in order to protect the public, through general deterrence, and maintain the standards of the profession.

16 The purpose of making penalty orders is to protect the public through the maintenance of proper standards within the profession. As such, the impact that a penalty may have upon a practitioner and personal hardship that may be occasioned to a practitioner by the imposition of a particular penalty are necessarily secondary considerations: *Legal Profession Complaints Committee v Detata* [2012] WASCA 214 at [47] and *Khosa* at [66] and [213].

Applicant's position on penalty

- 17 The applicant submits that, in general, a single finding of unsatisfactory professional conduct would warrant a reprimand and, subject to the nature of the conduct and any factors in mitigation, one or more of a low to mid-range fine, the imposition of relevant conditions on the practitioner's practising certificate and some remedial and/or supervisory order.⁷
- 18 However, the applicant submits that in this case, the suspension of the practitioner's practising certificate for a period of six months is appropriate given:⁸
- a. the nature of the conduct;
 - b. the nature and timing of the previous finding of professional misconduct against the practitioner;
 - c. the practitioner's lack of insight and remorse;
 - d. the practitioner's length of practice experience; and
 - e. our finding as to the honesty of the practitioner's evidence about crucial matters.

The practitioner's personal circumstances

- 19 Some details regarding the practitioner's professional history are set out in his written submissions.⁹ They should properly have been set out in an affidavit. Following our inquiry, we were informed by the applicant that it did not take issue with any of the practitioner's professional history as set out in the submissions. Accordingly, we accept the account given in that document by the practitioner.
- 20 On the basis of that information, the Tribunal makes the following relevant findings in respect of the practitioner's personal and professional circumstances:
1. The practitioner is 68 years of age.
 2. The practitioner completed a Bachelor of Laws at the University of Western Australia and was admitted to practice in December 1976.

⁷ Applicant's Submissions on Penalty and Costs dated 19 July 2021, para 4.

⁸ Applicant's Submissions on Penalty and Costs dated 19 July 2021, para 5.

⁹ Respondent's Submissions on Penalty dated 8 December 2021, paras 65-83.

3. The practitioner is currently in practice with his son, who was admitted in 2012. They employ one solicitor who was admitted in 2018.
4. The practitioner primarily practises in the area of commercial litigation.
5. The practitioner has, on occasions throughout his career, conducted litigation for no or reduced fee in order to assist those who would not otherwise have access to justice. His submissions detail his involvement in relation to four such matters.
6. The practitioner has made contributions to the community in various ways. His written submissions refer to his involvement as a member of the Board of Homeswest WA from 1987 to 1993, as a member of the Psychologists Registration Board from 1987 to 1994 and as the Law Society's nominee on Legal Aid WA for a period of two years and as a sponsor of the Fremantle Chamber Orchestra.

The Practitioner's prior disciplinary history

- 21 During his time in practice, the practitioner has had one prior disciplinary proceeding brought against him.¹⁰ The practitioner's written submissions assert that he had been found to have engaged in unsatisfactory professional misconduct in that matter.¹¹ In fact, as the practitioner's senior counsel conceded at the hearing on 21 December 2021, it resulted in a finding of professional misconduct.¹²
- 22 In that earlier disciplinary matter, the Tribunal found that his conduct of an application for leave to appeal and the appeal to the Court of Appeal:¹³

[S]ubstantially or consistently fell short of the standard of competence that a member of the public is entitled to expect of a reasonably competent legal practitioner because [the practitioner] failed to take all necessary steps to ensure that there was a proper factual basis for:

- (a) a proposed ground of appeal;

¹⁰ *Legal Profession Complaints Committee and Metaxas* [2018] WASAT 28.

¹¹ Respondent's Submissions on Penalty dated 8 December 2021, para 84.

¹² ts 22, 21 December 2021.

¹³ See *Metaxas v Legal Professional Complaints Committee* [2020] WASCA 27 at [6].

- (b) oral submissions made to the Court of Appeal in support of the application for leave to appeal and the appeal.

23 The factual background to that matter is set out in the judgment of Quinlan CJ and Pritchard JA in the Court of Appeal decision *Metaxas v Legal Profession Complaints Committee* [2020] WASCA 27.¹⁴ We do not propose to restate those facts. While the circumstances are clearly different in this case, having regard to the facts, it is apparent that both matters involved bringing proceedings without a proper basis upon which to do so.

24 In that matter, the Court of Appeal held that the imposition of a public reprimand, a fine of \$24,000 and an order requiring the practitioner undertake a specified advocacy skills workshop was an appropriate penalty for the professional misconduct. The Court of Appeal had regard to the following matters:

- a. The fact that while the practitioner had, over an extended period of time, failed to recognise his obligation and to remedy the failure, the conduct related to one matter.
- b. The fact that the practitioner had, at the time, an unblemished record and the conduct was a one-off.
- c. The assertion that he was not a risk to the public.
- d. The fact that the major aspect of the penalty was general deterrence which could be met by the combination of a fine at the higher end of the scale and the proposed advocacy course.

Should defence of the action be taken into account in determining penalty?

25 The practitioner submits that his stance at the liability hearing is to be disregarded in the determination of the appropriate penalty. The practitioner relied upon the following passage from *Legal Profession Complaints Committee and A Legal Practitioner* [2013] WASAT 37 (S) at [24] in support of that submission:

[I]n determining the appropriate penalty, care needs to be taken that the penalty reflects the matters with which the practitioner is charged and not other conduct including the defence of the action by the practitioner which is ultimately held to be unsuccessful: *Smith v New South Wales*

¹⁴ *Metaxas v Legal Profession Complaints Committee* [2020] WASCA 27 at [8] - [21].

Bar Association [1992] HCA 36; (1992) 176 CLR 256 (*Smith*) at 267 - 268 and 271 - 272.

- 26 The Tribunal's task is to impose a penalty that is commensurate with the seriousness of the impugned conduct and achieves the purpose of the disciplinary process. While a practitioner is entitled to defend the action brought against him by the applicant, we do not accept that the practitioner's defence of the action is to be entirely disregarded. Defence of an action might, depending on the particular circumstances, be demonstrative of a lack of insight or lack of remorse. Matters of that kind are undoubtedly relevant to penalty.

Relevance of cases that show other practitioners being criticised for persisting with 'hopeless cases' but not being referred to the LPCC

- 27 In his submissions, the practitioner referred to many cases where the presiding judicial officer had made some criticism of the conduct of the proceedings by one of the practitioners involved but which, the practitioner submitted, had not resulted in the relevant practitioner being referred by the judicial officer to the LPCC. That is, nothing had come of similar conduct engaged in by other practitioners on other occasions. The inference from those submissions seems to be that the conduct is not that uncommon and is not seen to be serious enough to warrant referral by the court on most occasions. At the hearing, the practitioner's senior counsel acknowledged that he was not making a big point from the reference to those cases.¹⁵
- 28 Three things should be said in relation to those cases. First, if it is the case that other practitioners have behaved in a similar way to that which we have found amounted to unsatisfactory professional conduct in this case, then that perhaps speaks to the need to impose a penalty that may deter others from such conduct.
- 29 Second, the conduct by one practitioner is not rendered less serious merely because others are not called to account for similar behaviour. The fact is that the practitioner's conduct was referred, and we have found that his conduct amounted to unsatisfactory professional conduct. The penalty to be imposed in respect of it should not be lessened because other practitioners have not been referred to the LPCC. The fact that others have not been referred does not necessarily speak to the seriousness of the conduct of this practitioner. There may be a

¹⁵ ts 27, 21 December 2021.

myriad of reasons why the other practitioners were not referred to the LPCC.

- 30 Third, each case needs to be dealt with on its merits and the cases referred to by the practitioner in support of the submission that the conduct was not particularly serious because others had gone unsanctioned for similar conduct were unhelpful in resolving the issue of penalty to be imposed in his case

Penalties imposed for similar conduct in other cases

- 31 The practitioner referred us to five cases where penalties had been imposed on other practitioners who, he submitted, had been held to have engaged in similar conduct.

- 32 Of those cases, four involved the Tribunal making orders to which the parties had consented.¹⁶ The fifth case was resolved following a hearing on liability and penalty.¹⁷

- 33 It is true that in the four cases where orders were agreed by the parties, the penalty was a reprimand and reasonably modest fine, however, each of those cases involved an acknowledgement by the practitioner of the nature of the conduct. In the fifth case, where the Tribunal made an order reprimanding the practitioner, it did so in circumstances where it did not have the option of suspending the practitioner's local practising certificate because the practitioner did not hold one at the time. In that case, the Tribunal said:¹⁸

In other circumstances, the Tribunal might conclude that a period of suspension could be an appropriate penalty for a finding of this nature. However, accepting that the Practitioner no longer holds a local practising certificate, this course of action is not open to us.

- 34 Accordingly, in that case, it was for the Legal Practice Board to determine, in the event that the practitioner concerned were ever to apply for a local practising certificate, conditions that it thought were needed to ensure the protection of the public and the maintenance of the reputation of the profession.

¹⁶ *Legal Profession Complaints Committee and Paiker* [2009] VR 163; *Legal Profession Complaints Committee and Forbes* [2009] VR 164; *Legal Profession Complaints Committee and Joubert* [2015] VR 148; *Legal Profession Complaints Committee and Gregory* [2017] VR 125.

¹⁷ *Legal Profession Complaints Committee and Wroughton* [2013] WASAT 191; *Legal Profession Complaints Committee and Wroughton* [2013] WASAT 191 (S).

¹⁸ *Legal Profession Complaints Committee and Wroughton* [2013] WASAT 191 (S) at [13].

35 In our view, those cases provide little support for the practitioner's position on penalty. It is axiomatic that each case needs to be determined having regard to its unique circumstances and the public policy behind the disciplinary process.

Application of the principles in this case

36 The practitioner submits that the conduct is not serious. There are several reasons why it is said that that is so.

37 First, the practitioner submits that the only failing was failing to contact the President of the Law Society before making the application to the Court. We have already explained why we do not accept that characterisation of the conduct.

38 Second, the practitioner submits that it is not serious because the practitioner's conduct 'can't possibly be said to have had some kind of effect, bad effect, on the community at large and certainly not his client'.¹⁹ We accept that the conduct did not have had a negative impact on his client. This is because we accept the practitioner's unchallenged statement that he paid the costs orders to be paid to the opposing party in the Supreme Court action and that he did not charge his client costs in relation to the application.²⁰ However, the obligation does not exist solely for the protection of a practitioner's client, and we reject the submission that the conduct had no impact upon the community. Bringing actions without any basis for doing so and persisting with them solely to endeavour to recover costs, wastes the valuable and scarce resources of the court and slows down access to justice to other deserving litigants. Those resources are provided by the community and squandering them does impact the community because they cannot then be deployed in other beneficial ways. Further, unnecessarily expending the community's resources in this way does have the potential to undermine the community's confidence in the legal system.

39 The actual conduct engaged in by the practitioner on this occasion (which was found to constitute unsatisfactory professional conduct) can be regarded as less serious than that for which the practitioner has previously been disciplined (which amounted to professional misconduct) when the conduct itself is compared in isolation. However, the circumstances of the conduct for which the practitioner is now to be disciplined are made more serious as a result of this being

¹⁹ ts 27-28, 21 December 2021.

²⁰ ts 48, 21 December 2021.

the second disciplinary finding made against the practitioner and because of the similarity of the conduct. Both of those matters suggest that the practitioner either failed to learn from his prior misconduct or was indifferent to the appropriate professional standards. Whichever of the two possibilities is the case, there is a need for a penalty that will protect the public by deterring him from behaving in a similar fashion again.

40 Additionally, while the practitioner was entitled to defend the proceedings, we find that his doing so demonstrates both a lack of insight and a lack of remorse. Those matters are relevant in disciplinary proceedings because they go to the likelihood that the conduct will be repeated.

41 We accept the applicant's submission that it is aggravating that the Tribunal's decision in the practitioner's earlier disciplinary proceeding was delivered on 26 April 2018, and the practitioner's conduct of the proceedings involved in this case occurred very shortly thereafter and included the filing of affidavits sworn on 1 and 2 May 2018 and a hearing before the then Chief Justice on 8 May 2018.²¹

42 Further, we have found that the practitioner did not give an entirely truthful account in his evidence.²² In the usual case, such a finding could not be taken into account in determining penalty. However, where:

- a. the allegations against the practitioner have been amended to complain of their dishonesty in relation to the evidence; or
- b. the way in which the proceedings have been conducted means that the practitioner was on notice that there was a risk of a finding of dishonest evidence being made and used in determining penalty, and the practitioner has had an adequate opportunity to deal with the prospect of such a finding,

then the Tribunal may have regard to that finding of dishonesty in determining the appropriate penalty.²³

²¹ Applicant's Submissions on Penalty and Costs dated 19 July 2019, para 15.

²² See *Legal Profession Complaints Committee and Metaxas* [2021] WASAT 82 at [22], [23] and [27].

²³ *Mijatovic v Legal Practitioners Complaints Committee* [2008] WASCA 115 at [284] (Beech AJA).

- 43 In this case, we accept the applicant's submission that we can be satisfied that the second of those two criteria has been met.²⁴ The practitioner was cross-examined in a way that put him on notice that his evidence in relation to his reasons for not making enquiries of the President before commencing the proceedings in the Supreme Court and the subsection under which he intended to commence the proceedings might not be believed. The closing submissions also put the practitioner on notice that his evidence might be rejected.²⁵ We also accept that the significance of those matters to the disciplinary proceedings was such that it would have been apparent to the practitioner and his senior counsel that an adverse finding about the practitioner's evidence in relation to those matters might arise for consideration in determining the appropriate penalty.²⁶
- 44 The practitioner has been in practice for more than 40 years. He has many years of experience in commercial litigation. As a result, he should be very well acquainted with his professional obligations and the reasons for them. Irrespective of how much pressure the practitioner may have been under to resolve the dispute for his client, and irrespective of whether he considered that the opposing legal practitioner was acting improperly in seeking to have the appointment of an arbitrator delayed, the practitioner ought to have known he could not act as he did. In our view, his long experience in commercial litigation makes that failure more serious.
- 45 We find that the practitioner's pro-bono activities and general community engagement mitigate the penalty to be imposed, but only to a small degree.
- 46 In this case, the protection of the public requires a penalty that achieves personal deterrence. This is because we have concluded that prior disciplinary action has not had that effect and also because we find that the practitioner lacks insight into his conduct and its seriousness.
- 47 General deterrence is also an important aspect of imposing a penalty in this case. It is important that other practitioners are deterred from acting contrary to their professional obligations in order to secure the protection of the public and the reputation of the profession.

²⁴ Applicant's Submissions on Penalty and Costs dated 19 July 2019, para 10.

²⁵ ts 33-39, 44-45, 64 and 66, 29 April 2021.

²⁶ *Mijatovic v Legal Practitioners Complaints Committee* [2008] WASCA 115 at [289] (Beech AJA).

48 We do not find, and nor was it submitted, that the practitioner's conduct demonstrates that he is permanently unfit to practise. Further, we do not conclude that the practitioner is presently unfit to practise. He has many years experience and only one other disciplinary finding. Having regard to the seriousness of the conduct involved, the circumstances in which the conduct occurred, and to factors to which we have referred above, we have come to the conclusion that the conduct on this occasion can be viewed as warranting a penalty equal to that imposed in relation to the earlier disciplinary matter. Accordingly, we find that the penalty to be imposed in this case is as follows:

1. a public reprimand; and
2. the payment of a fine in the sum of \$24,000.

Costs

49 The applicant has sought an order that the practitioner pay its costs in the sum of \$13,816 to the Legal Practice Board of Western Australia within 30 days or as otherwise agreed between the practitioner and the Board.

50 The practitioner indicated that he wished to make no submissions in relation to the issue of costs.

51 Costs are dealt with in s 87(1) and s 87(2) of the *State Administrative Tribunal Act 2004 (SAT Act)*. Those subsections provide 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.

52 While the Tribunal is generally regarded as a no costs or costs neutral jurisdiction, the question is whether it is fair and reasonable, having regard to the particular circumstances of the case, that a party should be reimbursed for the costs incurred.²⁷

²⁷ *Western Australian Planning Commission v Questdale Holdings Pty Ltd* [2016] WASCA 32; (2016) 213 LGERA 81 at [50] (Murphy JA).

- 53 Where a vocational regulatory body is successful in bringing proceedings for a complaint that justifies disciplinary action by the Tribunal, there will usually be a strong case for the exercise of discretion to award costs in favour of the regulatory body.²⁸ The reason for that is that regulatory bodies perform public functions which promote the public interest, usually with limited resources. An inability to recover its costs may act as a disincentive to a regulatory body bringing disciplinary action or ensuring that, when such action is brought, the allegations are properly and thoroughly presented.²⁹
- 54 In this case, having regard to the manner in which the proceeding was conducted and the findings made, we find that it is fair and reasonable for an order to be made that the practitioner reimburse the applicant for its costs.
- 55 Having regard to:
- a. the manner in which the matter proceeded;
 - b. the length of the hearing;
 - c. the fact that both parties were represented by senior counsel;
 - d. the fact that the applicant is seeking only to recover its disbursements and is not seeking costs of its own legal officer's time;³⁰
 - e. the fact that the applicant's senior counsel's hourly rate was considerably lower than the maximum hourly rate for senior counsel specified in Table A of the Schedule to the Legal Profession (State Administrative Tribunal) Determination 2018 and Table A of the Schedule to the Legal Profession (State Administrative Tribunal) Determination 2020;³¹
 - f. the fact that the practitioner, while not consenting, did not oppose the making of an order for costs or the sum sought; and

²⁸ *Medical Board of Western Australia and Roberman* [2005] WASAT 81 (S) at [30].

²⁹ *Medical Board of Western Australia and Roberman* [2005] WASAT 81 (S) at [30].

³⁰ Applicant's Submissions on Penalty and Costs dated 19 July 2021, para 25.

³¹ Which provides a useful guide to the maximum rates which might be allowed as party/party costs: *Legal Profession Complaints Committee and Chang* [2019] WASAT 67 (S) at [126] and *Legal Profession Complaints Committee and in de Braekt* [2012] WASAT 58 (S) at [53].

- g. the applicant's schedule of disbursements and the invoices provided in support of the order sought,

we find that an order requiring the payment of costs fixed at the agreed sum is fair and reasonable.

Stay of commencement of penalty

56 The practitioner submitted in writing that the penalty we impose should be stayed pending the outcome of the appeal commenced in relation to liability.³² That submission was not pressed by the practitioner's senior counsel but nor was it expressly abandoned. Therefore, we consider it necessary to deal with the request for a stay of our orders.

57 It is not for this Tribunal to stay its orders. In our view, we are entitled to, and should, proceed on the basis that our findings are correct. Although we have not concluded that the protection of the public and the maintenance of appropriate professional standards necessitates the suspension of the practitioner's practising certificate, in our view, it would undermine that objective to stay the penalty, particularly in circumstances where we are unaware of the ground of appeal and can make no assessment of the prospect of the practitioner succeeding on the appeal. Accordingly, any stay should be sought from the Court of Appeal.

Orders

58 Subject to hearing from the parties as to the form of the orders and the time for payment of the amounts ordered to be paid to the Legal Practice Board in order 4, we propose to make the following orders:

1. Pursuant to s 439(d) of the *Legal Profession Act 2008* (WA), the practitioner is publicly reprimanded.
2. The practitioner is to pay a fine of \$24,000 pursuant to s 438(2)(b) and s 441(a) of the *Legal Profession Act 2008* (WA).
3. The practitioner is to pay the Legal Profession Complaints Committee's costs fixed at \$13,816 pursuant to s 87(2) of the *State Administrative Tribunal Act 2004* (WA).

³² Respondent's Submissions on Penalty dated 8 December 2021, para 83.

4. The amounts specified in orders 2 and 3 are to be paid to the Legal Practice Board within 30 days of this order unless otherwise agreed between the practitioner and the Legal Practice Board.

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

MA
Associate to Judge Glancy

31 MARCH 2022