

JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

STREAM : VOCATIONAL REGULATION

ACT : LEGAL PRACTICE ACT 2003 (WA)

CITATION : LEGAL PRACTITIONERS COMPLAINTS
COMMITTEE and TOMLINSON [2005] WASAT 214
(S)

MEMBER : JUSTICE M L BARKER (PRESIDENT)
MR C RAYMOND (SENIOR MEMBER)
MR J MANSVELD (MEMBER)

HEARD : 22 JUNE 2005

DELIVERED : 19 AUGUST 2005

**SUPPLEMENTARY
DECISION** : 1 MARCH 2006

FILE NO/S : VR 5 of 2004

BETWEEN : LEGAL PRACTITIONERS COMPLAINTS
COMMITTEE
Applicant

AND

MICHAEL MURRAY TOMLINSON
Respondent

Catchwords:

Legal practice - Legal Practitioner - Professional disciplinary proceedings -
Conviction for "stalking" offence contrary to Criminal Code (WA) s 338E -
Finding of "unsatisfactory conduct" under Legal Practice Act 2003 (WA) -

Whether costs of the Legal Practitioners Complaints Committee should be awarded - If costs awarded, what amount is appropriate

Legislation:

Criminal Code (WA), s 338E

Legal Practice Act 2003(WA)

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

Result:

Practitioner to pay to the Legal Practitioners Complaints Committee the sum of \$8 477.31 on account of the Committee's costs of bringing and maintaining the proceedings.

The practitioner has 12 months to pay the full amount of the costs to the Committee.

Category: B

Representation:

Counsel:

Applicant : Ms Le Miere
Respondent : Mr M F Rynne

Solicitors:

Applicant : Legal Practitioners Complaints Committee
Respondent : Michael Rynne

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

Legal Practitioners Complaints Committee and Benari [2005] WASAT 213(S)
Legal Practitioners Complaints Committee and Tomlinson [2005] WASAT 214

Case(s) also cited:

Nil

REASONS FOR DECISION OF THE TRIBUNAL:

Summary of Tribunal's decision

1 In *Legal Practitioners Complaints Committee and Tomlinson* [2005] WASAT 214, the Tribunal found the practitioner guilty of unsatisfactory conduct and transmitted a report to the Supreme Court (full bench) under the *Legal Practice Act 2003* (WA) to enable that Court to determine whether the practitioner should be struck off the roll of practitioners or suspended for a period in excess of two years.

2 Following that finding, the Complaints Committee applied for costs in the proceedings. In issue on this application were two issues: whether the practitioner should pay the costs of the Complaints Committee and, if so, the amount of the costs that the practitioner should pay.

3 The Tribunal found that the practitioner was liable to pay the costs of bringing and maintaining the disciplinary proceedings against the practitioner and fixed the amount payable in the sum of \$8 477.31, being the amount claimed by the Complaints Committee. The practitioner was given 12 months to pay the full amount of the costs to the Committee.

The issue

4 The issues to which this decision relates are: (1) whether the practitioner should pay the costs of the Legal Practitioners Complaints Committee in bringing and maintaining disciplinary proceedings against him and, if so; (2) the amount of costs which the practitioner should pay.

5 The disciplinary proceedings resulted in the State Administrative Tribunal making a finding of unsatisfactory conduct against the practitioner and transmitting a report to the Supreme Court (full bench) under the *Legal Practice Act 2003* (WA) to enable that court to determine whether the practitioner should be struck off the roll of practitioners or suspended for a period in excess of two years: *Legal Practitioners Complaints Committee and Tomlinson* [2005] WASAT 214. When the Tribunal made its orders in those proceedings it granted the Complaints Committee liberty to apply in respect of the costs of the proceedings.

Contentions of the Complaints Committee

6 The Complaints Committee seeks an order that the practitioner pay the Committee's costs in the amount of \$8 477.31, made up of \$8 157.88 to cover senior counsel's fees plus \$319.43 to cover the cost of one-way

airfare from Perth to Port Hedland to enable the witness, Ms A, to give her evidence at the hearing. The two expenses have been vouched for.

7 Counsel for the Committee draws attention to s 87(2) of the *State Administrative Tribunal Act 2004* (WA) which gives the Tribunal the discretion to order payment by a party of all or any of the costs of another party. Counsel draws attention also to the decision of the Tribunal in *Legal Practitioners Complaints Committee and Benari* [2005] WASAT 213(S) where the Tribunal indicated that where disciplinary proceedings have been commenced in the public interest by a vocational regulatory body and that 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.

8 The Committee submits that these disciplinary proceedings fall within the ambit of the proceedings considered by the Tribunal in *Benari's* case as they were commenced in the public interest by the Complaints Committee, a vocational regulatory body, and the Complaints Committee was successful in its prosecution of the proceedings.

9 Counsel for the Committee say that in *Benari's* case the Tribunal indicated that the terms of the costs order need to be assessed in each case. In that case the Tribunal set out some matters which the Tribunal would take into consideration in deciding the terms of a costs order, including whether the vocational regulatory body had been successful on all counts, whether the relative complexity of the matters the subject of the complaint justify the appearance of senior counsel and whether the parties could have agreed the evidence of the witness in respect of the claim made for an airfare.

10 In the case of these proceedings, counsel submits the Complaints Committee was successful on all counts in the Tribunal as the reference was admitted by the practitioner. An alternative reference was not pursued by the Complaints Committee.

11 Counsel submits that although the reference was admitted by the practitioner, the Tribunal was called upon to consider the form of penalty to be imposed and this required a consideration of the clinical and forensic psychological evidence presented on behalf of the practitioner.

12 Counsel submits that due to the content of the report prepared by one of the practitioner's clinical psychologists both as to the facts surrounding the events which led to the stalking conviction and the effect and

significance the effects had on Ms A, the Complaints Committee considered it necessary to call Ms A concerning these matters. A witness statement was filed but no agreement could be reached with the practitioner which would have obviated the need for her to give evidence. At the time Ms A resided in Port Hedland and was able to use frequent flyer points to cover her air fare to Perth but was not able to do so for her return airfare.

13 It is submitted, on behalf of the Complaints Committee, that the issues considered by the Tribunal on penalty, particularly the psychological state of the practitioner, were sufficiently complex to require senior counsel's attendance.

14 In the alternative, it is submitted on behalf of the Complaints Committee that even if the Tribunal is of the view that senior counsel was not necessary, the full amount of senior counsel's fee should be allowed as senior counsel has charged at a rate of \$250 per hour, when under the Supreme Court Scale of Costs which came into operation on 1 July 2004, \$264 with GST per hour is the rate allowable for ordinary counsel.

15 Counsel for the Committee points out that there was one adjournment of the hearing of the matter, which was sought by the practitioner, in order to allow further evidence to be adduced on his behalf. It is submitted that the practitioner should pay the Complaints Committee's costs thrown away as a result of that adjournment, such costs forming part of senior counsel's bill.

16 In fact, the matter came before the Tribunal on seven occasions including numerous directions hearings.

Contentions of the practitioner

17 Counsel for the practitioner acknowledges that at a practical level the proceedings were concerned with the issue of penalty, namely, whether the appropriate penalty was the suspension of the practitioner for two years by the Tribunal or referral of the matter to the Supreme Court.

18 Counsel points out that the primary facts were agreed and the charge was not contested. However, a relevant issue was the practitioner's emotional health at the time of the offence. In proceedings before the Court of Petty Sessions for the offence of "stalking" the practitioner had tendered a report of Mr Bruce Beaton, Clinical and Forensic Psychologist.

19 At the initial hearing of the Tribunal the practitioner intended to rely on Mr Beaton's report. Mr Beaton was required for cross-examination by the Committee. Counsel says through no fault of the practitioner, Mr Beaton was unable to give evidence. Due to that scenario, the practitioner was required to obtain the services of another clinical psychologist.

20 Counsel for the practitioner says that Ms A was required for cross-examination not by reason of the substantive nature of the charge, but as the Committee wished to challenge some of the underlying facts forming Mr Beaton's conclusions. Her presentation as a witness for cross-examination was thus directed to the existence of facts concerning clinical findings rather than issues relating to the merit of the charge.

21 Counsel submits that the practitioner should not have to pay the costs of senior counsel for the Committee. Counsel says that while it is the Committee's right to brief whomever it chooses, the costs sought against a party should reflect a fee appropriate to the facts and circumstances of the case. The interplay between the offence of stalking and lawyerly standards has invited some notoriety in Western Australia, yet the practitioner's response to the charge was not of itself so significant as to warrant the engagement of senior counsel.

22 Counsel submits that counsel's fee should be assessed on a global basis proportionate to the matters at issue and that an appropriate award should be no more than \$3 000.

23 Counsel for the practitioner says that if costs are awarded against the practitioner, he will need time to pay as he presently has a net fortnightly income of \$1 223 and depending on the amount of the award may need somewhere between 6 and 12 months to pay.

Tribunal's consideration

24 The Tribunal accepts the substance of the contentions made on behalf of the Committee.

25 In vocational regulatory proceedings, such as these involving the discipline of a legal practitioner, where the vocational regulatory body has been obliged to bring proceedings – even if in the end only questions of penalty remain substantively an issue – it may be expected that ordinarily an award of costs will be made against the practitioner in respect of the proceedings. It is in the public interest that the vocational regulatory body brings and maintains proceedings until they are appropriately finalised.

Until the matter of penalty in a contentious proceeding has been resolved, it is appropriate for the proceedings to be maintained by the vocational regulatory body.

26 In these circumstances, it is true to say that in substance in these proceedings the issue of penalty was at stake. The question was whether the Tribunal should make final disciplinary orders or refer the matter to the Supreme Court. There were real issues concerning the psychological state of the practitioner and the Tribunal initially adjourned the proceedings, when first called on for hearing to enable the practitioner, through counsel, to obtain a further psychological assessment report because Mr Beaton - the psychologist originally consulted by the practitioner in connection with the Court of Petty Sessions proceedings - was no longer available to speak to that report earlier provided to the Court of Petty Sessions.

27 In part it may be said that this was due to no fault on the part of the practitioner. However, it was also not at all a problem attributable to the Complaints Committee. It became clear at the initial hearing that there were difficulties in the practitioner relying on Mr Beaton's report. It was limited in nature, there was a challenge to some of the factual matters stated in it, upon which opinions were based, and it was, in some respects, out of date. It was appropriate for the practitioner to obtain a current report designed to assist the Tribunal in its deliberations concerning the penalty in disciplinary proceedings and the hearing was adjourned for that reason.

28 In all of the circumstances the Tribunal is satisfied that the nature of the matters in issue justified the Complaints Committee briefing senior counsel to appear. In any event, Senior Counsel has charged at a reasonable rate having regard to the prevailing rate for junior counsel under the Supreme Court's scale.

29 In these circumstances the Tribunal will order that the practitioner pay the Committee's costs in the total sum of \$8 477.31.

30 In the circumstances described by counsel for the practitioner concerning the practitioner's capacity to pay, the practitioner should be allowed 12 months in which to repay the full amount of the costs. The practitioner should make arrangements with the Committee in this regard.

Conclusion and order

31 In these circumstances the Tribunal makes the following orders:

1. The practitioner pay to the Legal Practitioners Complaints Committee the sum of \$8 477.31 on account of the Committee's costs of the proceedings.
2. The practitioner has 12 months to pay the full amount of the costs to the Committee.

I certify that this and the preceding [31] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

JUSTICE M L BARKER, PRESIDENT