

**CITATION:** *Legal Services Commissioner v Budgen* [2016] QCAT 121

**PARTIES:** Legal Services Commissioner  
(Applicant/Appellant)  
v  
Rodney Richard Budgen  
(Respondent)

**APPLICATION NUMBER:** OCR362-12

**MATTER TYPE:** Occupational Regulation matters

**HEARING DATE:** On the papers

**HEARD AT:** Brisbane

**DECISION OF:** **Justice DG Thomas, President**  
Assisted by:  
**Ms Megan Mahon, Legal Panel Member**  
**Dr Margaret Steinberg, Lay Panel Member**

**DELIVERED ON:** 9 March 2016

**DELIVERED AT:** Brisbane

**ORDERS MADE:**

1. The respondent be publicly reprimanded
2. That the respondent not be issued with a practising certificate until he pays in full:
  - i. \$17, 252.20 to his former employee's superannuation account
  - ii. \$1,500.00 in costs to the Legal Services Commissioner
  - iii. The costs payable by the respondent pursuant to Order 3
3. The respondent is to pay the applicant's costs assessed on a standard basis, on the Supreme Court Scale under the *Uniform Civil Procedure Rules 1999 (Qld)* in the manner that the costs would be assessed were the matter in the Supreme Court of Queensland

**CATCHWORDS:** PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – PROFESSIONAL MISCONDUCT OR UNSATISFACTORY PROFESSIONAL CONDUCT – OTHER MATTERS – where the Tribunal ordered the respondent to pay superannuation and costs in application LPD004-07 – where the applicant charged the respondent with not complying with those orders – where a simultaneous application is being heard by the Tribunal – where the respondent offered an excuse for non-compliance – where circumstances beyond the respondent’s control occurred – where the applicant should have been notified of failure to comply – whether the respondent’s conduct amounts to professional misconduct or unsatisfactory conduct

*Legal Profession Act 2007 (Qld) ss 418, 420(1)(f), 456, 456(2)(e)*  
*Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 32*  
*Uniform Civil Procedure Rules 1999 (Qld)*

*Legal Services Commissioner v Budgen [2011] QCAT 223*  
*Legal Services Commissioner v Kellahan [2016] QCAT (unreported) delivered 1 February 2016*  
*Legal Services Commission v Petschler [2015] QCAT 284*

## **APPEARANCES and REPRESENTATION (if any):**

This matter was heard and determined on the papers pursuant to section 32 of the *Queensland Civil and Administrative Tribunal Act 2009 (Qld)* ('QCAT Act').

## **REASONS FOR DECISION**

### **The Charge**

- [1] On 24 May 2011, in application LPD004-07, the Tribunal ordered Mr Rodney Budgen to pay \$17,252.20 to a former employee’s superannuation account, and costs of the Legal Services Commissioner ('the LSC') in the amount of \$1,500.00.
- [2] In the present proceedings, the LSC charges Mr Budgen with failure to comply with each of those monetary orders, and alleges that his non-compliance constitutes professional misconduct or unsatisfactory

professional conduct, within the meaning of section 420(1)(f) of the *Legal Profession Act 2007* (Qld) ('the Act').

## Discussion

- [3] In so far as is relevant, section 420(1)(f) of the Act, provides that a practitioner's failure to comply with an order of a disciplinary body made under the Act is conduct capable of constituting unsatisfactory professional conduct or professional misconduct.
- [4] The respondent, for his part, says that he is financially incapable of complying with the subject orders, and that he is not guilty of misconduct as he has a reasonable excuse for his non-compliance.
- [5] It appears that the only reported case on section 420(1)(f) is *Legal Services Commission v Petschler*,<sup>1</sup> ('Petschler') which involved several other and, in some instances, more serious charges. Petschler is of little assistance here, as in that case the respondent admitted culpable non-compliance, and it was therefore unnecessary for the Tribunal to examine the elements of that offence.
- [6] A similar provision in the law of New South Wales is, at present, free from judicial authority. The same appears to be the case in Victoria.
- [7] The Tribunal recently considered the application of section 420(1)(f) of the Act in *Legal Services Commissioner v Kellahan*<sup>2</sup> ('Kellahan').
- [8] In the circumstances of that case, the Tribunal was satisfied that there existed a reasonable explanation for the conduct where circumstances occurred which were unexpected, not able to be predicted, and completely out of the control of the respondent.
- [9] In that case, as was the position with respect to Mr Budgen, the parties in the earlier proceedings had made joint submissions to the Tribunal.
- [10] As was pointed out in Kellahan, the outcome would have been different had there been any suggestion that the respondent had made the earlier submissions concerning sanction, and undertaken an obligation with respect to payment of the amount reflected in the decision of the Tribunal, at a time when he was aware, or suspected, that he may not be able to comply with the orders made. In that case, the respondent swore that, at the time the orders were made, he genuinely believed and expected that the payment of such orders could be sourced from a third party. This was unchallenged by the Commissioner.
- [11] In the circumstances of this case, the Commissioner submits that Mr Budgen had no reasonable excuse as, at the relevant time surrounding the order being made, he was aware that he would be unable to make the payments required.

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<sup>1</sup> [2015] QCAT 284.

<sup>2</sup> [2016] QCAT (unreported) delivered 1 February 2016.

- [12] The Commissioner refers to the submissions filed on behalf of the respondent on 15 August 2013, where the respondent submits “at the time that the orders were made, the respondent was, and still is, impecunious.”<sup>3</sup>
- [13] In the context of the orders which were made by the Tribunal on 24 May 2011, it is clear that the joint submissions were influential to the way in which the Tribunal approached the matter. As was said by Justice Alan Wilson at paragraph [25]:
- “it is those factors which explain the Commissioner’s acceptance of a joint submission that Mr Budgen’s conduct does not demonstrate unfitness to practice, and that an appropriate penalty would involve a public reprimand, and order that he pay the outstanding superannuation; and, that he pay the Commissioner’s costs”.<sup>4</sup>
- [14] In his affidavit sworn 27 September 2013, Mr Budgen said, “at the time the orders were made however, I was hopeful I would be able to satisfy payment of the amounts ordered”.<sup>5</sup>
- [15] Subsequently, following a preliminary “on the papers” hearing, the parties were allowed the opportunity to make further submissions and provide additional evidence in relation to a number of matters, which included the question of compliance with the earlier order.
- [16] In an affidavit sworn 9 March 2015, Mr Budgen stated the following:
- “8. ...As stated in paragraph 7 of my affidavit sworn 27 September 2013, at the time the orders were made I was hopeful I would be able to satisfy payment of the amounts ordered.
9. At the time that orders were made against me, I had good intentions of making the payments and complying with the orders however my financial situation worsened after the orders were made. The primary factor which contributed towards my financial decline was that Family Court orders were made against me arising out of my divorce from my wife. I made a concerted effort to continue working after these orders were made however after my divorce settled, I owned no real property and as the result of the global financial crisis I was unable to successfully borrow any money from any financial institutions. Due to the outstanding debts I have, I am still unable to borrow any money from financial institutions.”<sup>6</sup>
- [17] In Mr Budgen’s affidavit sworn 9 March 2015, he sets out details of his income and expenses and deposes to the fact that no surplus funds are

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<sup>3</sup> Submissions on behalf of the respondent filed 15 August 2013, paragraph 5, referred to in the supplementary submissions on behalf of the applicant filed 24 March 2015, paragraph 10.

<sup>4</sup> *Legal Services Commissioner v Budgen* [2011] QCAT 223.

<sup>5</sup> Affidavit of Rodney Richard Budgen sworn 27 September 2013, paragraph 7.

<sup>6</sup> Affidavit of Rodney Richard Budgen sworn 9 March 2015, paragraphs 8, 9.

available from his income after payment of day to day expenses such as rental, telephone account, power bill and general cost of living.<sup>7</sup>

- [18] Mr Budgen also deposes to a debt to the Commonwealth Bank of Australia - Pioneer Credit, in the sum of \$115,000.00 and to overdue amounts owing to the child support agency of \$5,745.72 as at that date.<sup>8</sup>
- [19] As to that position, Mr Budgen submits that he has a reasonable excuse for failing to comply with the orders. He submits that he had good intentions of making the payments and complying with the orders however his financial situation worsened due to circumstances beyond his control.
- [20] He submits that whilst he has failed to pay the amounts ordered by the Tribunal, his inability to pay was not borne out of a deliberate refusal to comply with the orders of the Tribunal, rather, after the orders were made it became impossible and remains impossible for him to comply with the orders.<sup>9</sup>
- [21] The Commissioner has not sought to cross examine the respondent in relation to the contents of either of his affidavits, and so his evidence remains unchallenged and is the best, (in fact the only) evidence available as to that aspect.
- [22] In those circumstances, the Tribunal finds that Mr Budgen did have the intention to comply with the orders of the Tribunal and that events which occurred after the order was made which were unexpected and outside his control meant that he was unable to do so.
- [23] The LSC also submits that Mr Budgen has not placed before the Tribunal any evidence of his financial circumstances in the form of proper financial statements or records or other material which reflects his financial position at the time the orders were made or thereafter. The Commissioner submits that in the absence of such evidence, the Tribunal cannot be properly satisfied that the respondent had reasonable excuse for not complying with the Tribunal's orders.<sup>10</sup>
- [24] The thrust of the submission made by the Commissioner is correct. However, Mr Budgen did provide details in both affidavits<sup>11</sup> which related to bank balance, rent payments, child support payments and debts owing to the child support agency. In addition, he has provided evidence in relation to his intentions, which was not challenged by the LSC.
- [25] The Commissioner also submits that Mr Budgen made no attempt to contact the Commissioner in relation to compliance with the order. The order was made on 24 May 2011, and Mr Budgen apparently made no contact with either the Commissioner or the complainant (for whose

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<sup>7</sup> Affidavit of Rodney Richard Budgen sworn 9 March 2015, paragraphs 12-14.

<sup>8</sup> Ibid, paragraph 15.

<sup>9</sup> Submissions on behalf of the respondent filed 11 March 2015, paragraph 7.

<sup>10</sup> Submissions on behalf of the applicant filed 24 March 2015, paragraph 13.

<sup>11</sup> Affidavit of Rodney Richard Budgen sworn 27 September 2013 and 9 March 2015.

benefit the order was made) after it became obvious that he could not comply. The Commissioner communicated with Mr Budgen in November 2011, by email and letter with no response being received.<sup>12</sup>

- [26] An officer of the Commission contacted Mr Budgen by telephone in January 2012. Mr Budgen said that he would call the following week to discuss the matter, but never did so.<sup>13</sup>
- [27] Ultimately, Mr Budgen's lawyers wrote to the Commission on 6 June 2012 in response to an email sent to them by the Commission on 19 April 2012. By that letter Mr Budgen informed the Commissioner that he was "entirely impecunious and had no present or foreseeable capacity to discharge his financial obligations under the order".<sup>14</sup>
- [28] In circumstances where Mr Budgen made and filed in the Tribunal, agreed joint submissions, and those joint submissions were clearly influential in relation to the order which was made, Mr Budgen should have contacted the Legal Services Commissioner, and the person to whom the monies were to be paid to explain the failure to comply, when his circumstances changed materially, so he was no longer able to comply with the order made (based upon those joint submissions).
- [29] The fact that he did not do this represented a departure from the standard which is expected of an Australian legal practitioner. It was a failure concerning one particular matter, not a consistent or repeated failure to reach the expected standard.
- [30] In those circumstances, Mr Budgen's failure in that respect was conduct which amounted to unsatisfactory professional conduct as that term is used in section 418 of the Act.

## **Sanction**

- [31] Upon a finding that an Australian legal practitioner has engaged in unsatisfactory professional conduct, the Tribunal may make any order it thinks fit including one or more of the orders set out in section 456 of the Act.
- [32] When considering the question of sanction, it is well established that the aim of the sanction is not to punish the practitioner but to protect the public. In terms of protection of the public, it is also well recognised that one aspect is to deter practitioners from being involved in similar conduct in the future.
- [33] The Commissioner made submissions in relation to this matter and also in relation to OCR153-11 which involved other issues. In the context of both matters, the Commissioner submitted that the appropriate order should be

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<sup>12</sup> Affidavit of Scott Andrew McLean sworn 13 September 2013, exhibit SAM1, page 20, 21.

<sup>13</sup> Ibid, exhibit SAM1, page 22.

<sup>14</sup> Affidavit of Scott Andrew McLean sworn 13 September 2013, exhibit SAM1, page 25.

that the practitioner's name be removed from the local Roll of Practitioners.

- [34] In relation to this particular charge, the respondent submitted that due to the reasons for the respondent's inability to pay the amounts ordered by the Tribunal, a sanction of a public reprimand only should be imposed in accordance with section 456(2)(e) of the Act. Alternatively, it was submitted that a penalty might be imposed which prevents Mr Budgen from being issued with a Practising Certificate in the future unless, and until, payment of the amounts ordered by the Tribunal are made.
- [35] In relation to the other matter, submissions are yet to be made by the parties regarding sanction.
- [36] It is noted that Mr Budgen is not the holder of a current practising certificate and so cannot provide legal services on behalf of clients.
- [37] Considering only the conduct which is the subject of this complaint, the Tribunal believes that the requirements for public protection and the principle of general deterrence can be satisfied by the order that he be publicly reprimanded and that limitations be placed on his ability to obtain a practising certificate in the future.

### **Costs**

- [38] Upon a finding of unsatisfactory professional conduct, the Tribunal must make an order requiring the respondent to pay costs, including the costs of the Commissioner, unless the Tribunal is satisfied that exceptional circumstances exist.<sup>15</sup>
- [39] In this case, the Tribunal does not believe any exceptional circumstances exist.
- [40] It is ordered that Mr Budgen pay the Commissioner's costs assessed on a standard basis pursuant to the Supreme Court Scale of Costs.

### **Order**

- [41] In the circumstances, the Tribunal orders that:
1. The respondent be publicly reprimanded.
  2. That the respondent not be issued with a practising certificate until he pays in full:
    - i) \$17, 252.20 to his former employee's superannuation account and
    - ii) \$1,500.00 in costs to the Legal Services Commissioner.

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<sup>15</sup> *Legal Profession Act 2007 (Qld)*, s 462(1).

- iii) The costs payable by the respondent pursuant to Order 3.
3. The respondent is to pay the applicant's costs assessed on a standard basis, on the Supreme Court Scale under the *Uniform Civil Procedure Rules* 1999 (Qld) in the manner that the costs would be assessed were the matter in the Supreme Court of Queensland.