

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Legal Services Commissioner v Pene* [2021] QCAT 299

PARTIES: **LEGAL SERVICES COMMISSIONER**
(applicant)

v

EDWARD RATAHI PENE
(respondent)

APPLICATION NO/S: OCR315-20

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 23 September 2021

HEARING DATE: 27 August 2021

HEARD AT: Brisbane

DECISION OF: Justice Daubney, President
Assisted by:
Dr Julian Lamont
Mr Ross Perrett

- ORDERS:
- 1. In respect of Charge 4, there is a finding that the Respondent engaged in professional misconduct.**
 - 2. In respect of each of Charges 2, 3 and 5, there is a finding that the Respondent engaged in unsatisfactory professional conduct.**
 - 3. It is ordered that a local practising certificate not be granted to the Respondent before the end of the period of three (3) years from 1 July 2019.**
 - 4. After the expiration of the said three-year period, the Respondent is prohibited from applying for, or obtaining, a principal practising certificate for two (2) years after being granted an employee level practising certificate.**
 - 5. At the time of first applying for an employee level practising certificate after the expiration of the said three-year period, the Respondent must:**
 - (a) provide evidence of successful completion of the Queensland Law Society's remedial trust account and ethics courses (or equivalent at the time) having been completed within twelve (12) months prior to the application; and**

(b) include a copy of these Reasons with his application.

6. The Respondent shall pay the Applicant's standard costs of and incidental to this discipline application, such costs to be assessed as if this were a proceeding before the Supreme Court of Queensland.

CATCHWORDS:

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT – GENERALLY – where respondent was a sole practitioner and principal of a law practice – where respondent failed to submit external examiner's reports by required dates – where respondent failed to lodge final external examiner's report – where respondent engaged in legal practice when not entitled – where respondent had been told by regulatory body numerous times to cease practising – where respondent failed to comply with these requests – where respondent faced financial and family stressors at the time – whether the respondent's conduct ought be characterised as professional misconduct or unsatisfactory professional conduct – whether the respondent is permitted to apply or obtain a practising certificate

Legal Profession Act 2007 (Qld), s 21, s 24, s 274, s 276, s 418, s 456, s 462

Legal Services Commissioner v De Fraine [2015] QCAT 292

Legal Services Commissioner v Warren [2017] QCAT 158

APPEARANCES & REPRESENTATION:

Applicant: R Taylor (counsel) i/b Legal Services Commissioner

Respondent: P Lyons (solicitor) i/b FC Lawyers

REASONS FOR DECISION

[1] On 13 October 2020, the Applicant, the Legal Services Commissioner, filed in the Tribunal a discipline application under the *Legal Profession Act 2007* (Qld) ("LPA") against the Respondent, Edward Ratahi Pene. That discipline application contains five charges against the Respondent. Charge 1 was subsequently withdrawn. The Respondent admitted the substance of the remaining charges, namely:

- (a) Charge 2 – failing to submit external examiner's report by the required date;
- (b) Charge 3 – failing to submit external examiner's report by the required date;
- (c) Charge 4 – engaging in legal practice when not entitled; and

- (d) Charge 5 – failure to lodge a final external examiner’s report.
- [2] In his response filed on 20 November 2020, the Respondent largely admitted the particulars of these charges. In any event, on 10 March 2021, the parties filed a statement of agreed facts, which sets out in detail the factual circumstances underpinning each of the charges. It is sufficient to describe the circumstances of each charge relatively briefly by reference to the matters set out in that statement of agreed facts.
- [3] The Respondent was admitted as a legal practitioner in Queensland in January 2008. He has no disciplinary history in Queensland. In March 2017, he commenced practice as a sole practitioner under the name “Pene Legal”. He held a principal level practising certificate which expired on 1 July 2019. For the purposes of the practice, he also operated a trust account.
- [4] In relation to Charge 2, it is uncontentious that, as the principal and sole practitioner of Pene Legal, the Respondent was required to submit an external examiner’s report for the 12-month period ending on 31 March 2018 to the Queensland Law Society (“QLS”) within 60 days of 31 March 2018, unless he had a reasonable excuse for not doing so.¹ Despite receiving reminders from the QLS, the Respondent did not submit the external examiner’s report until 8 August 2019, more than 14 months after it was due.
- [5] Similarly, in respect of Charge 3, the Respondent was required to submit an external examiner’s report for the 12-month period ending on 31 March 2019 to the QLS within 60 days of 31 March 2019. Despite reminders from the QLS, the Respondent never submitted that external examiner’s report to the QLS. On 10 June 2020, the Respondent advised the Applicant that this external examiner’s report had been compiled by the external auditor, but he could not afford to pay for its release from the auditor.
- [6] On 28 May 2019, the Respondent applied to the QLS for a renewal of his principal level practising certificate but failed to pay the prescribed fees. His application was therefore invalid. His practising certificate expired at the end of 30 June 2019, and no new practising certificate was issued by the QLS.
- [7] In respect of Charge 5, on 15 August 2019 receivers were appointed to wind up Pene Legal, and the Respondent was provided with a notice of this appointment. On 16 August 2019, the QLS advised the Respondent that he was responsible for lodging an examination report for the period 1 April 2019 to 14 August 2019; that being the period during which Pene Legal was still operating prior to the appointment of receivers.
- [8] The Respondent, however, never submitted this final external examiner’s report to the QLS, and thereby contravened the requirements of s 276(3) of the LPA.
- [9] It is common ground between the parties that the conduct under each of Charges 2, 3 and 5 ought be characterised as “unsatisfactory professional conduct”, within the meaning of that term in s 418 of the LPA. The Tribunal agrees with that assessment. There is no doubt, as will be discussed later, that the Respondent was suffering financial distress at these relevant times and was unable to afford to pay for timely completion of these external examiner’s reports. The statutory obligation on

¹ LPA, s 274(1).

practitioners who maintain trust accounts to file these reports is, however, an important aspect of maintaining high standards and protecting the interests of consumers in respect of funds lodged with legal practitioners in trust.

- [10] In each case, the conduct of the Respondent fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner, and it is appropriate, in the circumstances of this case, to make a finding under each of these charges that the Respondent engaged in unsatisfactory professional conduct.
- [11] More serious, however, was the Respondent's conduct under Charge 4.
- [12] As already noted, the Respondent's practising certificate expired at the end of 30 June 2019. On 1 July 2019, the QLS wrote to the Respondent advising that:
- (a) he did not hold a practising certificate;
 - (b) he was required to cease practising immediately; and
 - (c) engaging in legal practice without a practising certificate amounts to a contravention of s 24 of the LPA.
- [13] On 23 July 2019, the QLS sent another letter to the Respondent, in which it again advised him that he did not hold a practising certificate and was required to cease practising. On that same day, the Respondent replied to the QLS in an email in which he:
- (a) said he was "confused" and thought that his practising certificate was "under review" while a QLS investigation into overdue audit reports was underway;
 - (b) said he was awaiting the finalisation of that investigation before paying the necessary fees; and
 - (c) asked for guidance on what further steps to take.
- [14] On 29 July 2019, Mr Smiley of the QLS sent an email to the Respondent advising, amongst other things, that he would have to apply for a new practising certificate.
- [15] On 31 July 2019, the Respondent and representatives of the QLS engaged in an exchange of emails in which the Respondent advised that he intended to close his practice and practise "in house". Ms Oldham of the QLS advised the Respondent of the fees which were payable for an employee level practising certificate. The Respondent then forwarded to the QLS an application for a practising certificate. On 31 July 2019, the Respondent was contacted by the QLS in relation to the fees payable for a new practising certificate. In response, by an email dated 2 August 2019, the Respondent said:
- (a) he only wanted to apply for an employee level practising certificate;
 - (b) he still had two conveyancing files which were open and awaiting settlement, which he expected to occur by 19 August 2019;
 - (c) once settlement had been completed on those conveyancing files, he would "immediately close the practice"; and

- (d) he did not have the funds to pay for a principal level certificate and indemnity insurance as well, but he needed to complete these two files and then move on to working for someone else.
- [16] On 5 August 2019, the QLS sent a further letter to the Respondent noting that:
- (a) he had previously been informed that he no longer held a practising certificate and was to cease practising immediately;
 - (b) his email of 31 July 2019 made it clear that he was continuing to practise as the principal of Pene Legal without a practising certificate or requisite insurance;
 - (c) he was required to transfer the practice's remaining files and regulated property to another firm by 8 August 2019, or a receiver may be appointed under the LPA;
 - (d) he can practise as an employee of another legal practice, subject to the status of his application for a practising certificate being disclosed to the principal of that practice, but he could not continue to practise as a principal of a law practice; and
 - (e) the QLS would consider whether he is a fit and proper person to hold an employee practising certificate.
- [17] On 5 August 2019, the Respondent had a discussion with a staff member of the QLS, in which:
- (a) the Respondent confirmed that he had received the letter of 5 August 2019;
 - (b) the Respondent asked if there was any way he could continue working on the conveyancing files;
 - (c) the Respondent was advised by that staff member that it was unlawful for him to continue practising as a principal; and
 - (d) the QLS staff member advised the Respondent that he would have to either transfer the files to another legal practice or find employment with another legal practice, in which case he could continue working on the files in accordance with s 24(3) of the LPA, and he was required to do either option by 8 August 2019.
- [18] On 8 August 2019, the QLS sent a letter to the Respondent advising him that the QLS would commence the process of appointing a receiver to Pene Legal. It also noted that the Respondent had been advised on 23 July 2019 to cease practising immediately, and that his email of 31 July 2019 made it clear that he had not done so.
- [19] On 15 August 2019, the QLS appointed a receiver to Pene Legal.
- [20] In the course of conducting the receivership, the receiver uncovered documents which demonstrated that the Respondent had engaged in legal practice by acting in at least one conveyance. These documents included correspondence from mid-July to mid-August 2019 in which it was clear that the Respondent was personally continuing to act for the purchaser of a particular property at Collingwood Park. As will be apparent from the above narrative, the Respondent did not hold a practising certificate at that time.

- [21] In response to enquiries made by the Applicant, on 10 June 2020 the Respondent explained that:
- (a) he thought that his practising certificate was merely “under review” pending an investigation into Pene Legal’s reporting obligations, however was advised by the QLS that “these were separate issues and that I needed to apply for a new practising certificate”;
 - (b) he was advised that he needed a “principal certificate to continue on ... but was advised to immediately stop practising and hand over any files to another firm”;
 - (c) he began seeking out firms to take carriage of his remaining two conveyancing files, but was unable to find any principals willing to do so;
 - (d) he was left with “no other option” because the two conveyancing files “were for family friends of which I did not want to handover their files to just anyone”, and were “nearing settlement that required immediate action on critical conditions”; and
 - (e) on 12 August 2019, he contacted the remaining clients and told them that they needed to seek other legal representation.
- [22] Charge 4 particularises that, between 12 July 2019 and 16 August 2019, the Respondent engaged in legal practice when he was not an Australian legal practitioner, contrary to s 24 of the LPA. The Respondent has expressly admitted this charge.
- [23] The Respondent has also admitted that his conduct in that regard ought be characterised as professional misconduct. That is an appropriate concession, in the circumstances.
- [24] The legislative provisions relating to the grant and renewal of practising certificates are contained in chapter 2 of the LPA. The provisions in that chapter expressly seek to achieve the main purposes of the LPA by providing, amongst other things, that “legal practice is engaged in only by persons who are properly qualified and hold a current practising certificate”.² There can be no doubt that, by practising without a practising certificate, as he did, the Respondent seriously violated his legal and ethical responsibilities, and this amounted to professional misconduct.³
- [25] The gravity of the Respondent’s conduct was exacerbated by the fact that he was repeatedly told by the QLS, in no uncertain terms, that he had to stop practising immediately. Rather than doing so, the Respondent continued practising for a month by attending to the conveyancing matters, while simultaneously engaging with the QLS about the fact that he did not hold a practising certificate. The objective seriousness of the Respondent’s conduct is exacerbated by the fact that, by practising without a practising certificate, the Respondent exposed his clients to risk because he did not hold valid professional indemnity insurance.
- [26] On any view, the Respondent’s conduct in continuing to practise without a practising certificate ought be viewed as professional misconduct, and the Tribunal so finds.

² LPA, s 21(1)(a).

³ *Legal Services Commissioner v De Fraine* [2015] QCAT 292.

- [27] Particularly for the purposes of considering the appropriate sanction, the Respondent relied on an affidavit sworn by him on 6 August 2021, in which he sought to explain his personal circumstances at the time of the charged conduct. The Respondent recounted in some detail his personal history. He was born, and grew up in, New Zealand. As a child, he became a member of the Church of Jesus Christ of Latter-day Saints and, after school, engaged in overseas missions on behalf of that church. Ultimately, he returned home to New Zealand and then, in 1997, moved to Sydney where he worked initially as a labourer in the building industry. He was married in 1998. He and his wife now have seven children.
- [28] In 2000, the Respondent and his wife decided to leave Sydney and move to Queensland. Between 2000 and 2007 he worked in various jobs. He also attended Bond University and graduated with a Bachelor of Laws in 2007. He then completed the Postgraduate Diploma in Legal Practice. In January 2008, he was admitted as a solicitor of the Supreme Court of Queensland. For some years he then worked as an employed solicitor in various law firms. He completed the Practice Management course in 2014 and started his own practice under the name “Precise Legal”. He described it as a “small commercial and property law firm”. He conducted this practice from his home. A series of close family illnesses then impacted on the Respondent’s capacity to practice on his own account – he needed to support his family and look for employment as a solicitor. In May 2016, he started work as an employed solicitor with a firm in Brisbane. He was working long hours and unfortunately, in his personal life, he was having a number of family difficulties. In early 2017, he ceased work as an employed solicitor, and decided to again open his own practice working from home, to give him more time to attend to his family matters.
- [29] He says that this new practice, Pene Legal, started well. His capacity to attend to developing this practice, however, was adversely affected by a number of medical conditions from which the Respondent suffered, which caused him significant pain and required him to take medication. These ongoing health conditions made it difficult for him to function physically, and it affected his ability to work in his practice. He would have to take frequent days off to rest and recover which meant he could not adequately build his business as he had hoped. He described his practice in 2018-19 as being “drips and drabs of clients, enough to keep the business going, but not sufficient to make a profit or a decent living”. He was not earning sufficient income to pay all of the bills of the practice and also to support his family. This ultimately led to the situation that he was simply unable to pay for the completion of the external audit reports.
- [30] In his affidavit, the Respondent again asserted, as he had previously to the Applicant, that it was his understanding at the time that his status was under review due to the “audit report issue” and that a decision about his practising certificate would be made when the issue was completed.
- [31] This protestation by the Respondent does not sit well with the undisputed facts of him having repeatedly been told by the QLS to cease practising immediately after his practising certificate expired.
- [32] In the course of argument before this Tribunal, the Respondent’s legal representative was pressed on the fact that the Respondent had repeatedly been told, in clear terms, to stop practising immediately. It was conceded that the Respondent did understand this direction that had been given to him. The highest the Respondent’s representative

could put the matter was that the Respondent's judgment, or ability to make judgments at the time, were clouded by other factors that were confronting him. These were said to include a possible misguided loyalty to his closely associated family members to do the two conveyancing matters. The Tribunal also infers from all of the material that the Respondent's judgment may have been clouded by financial and family pressures. In any event, it was expressly accepted on his behalf that the Respondent had received a clear direction from the QLS that he should not have been practising.

- [33] In his affidavit, the Respondent says that after he was told to immediately stop practising and hand over all files to another firm, he was happy to follow these instructions but did not know how to hand over files to another firm as he had never experienced this previously in his career. He said they did not teach this in the Practice Management course when he did it in 2014. He said that after he was advised by the QLS that he had until 8 August 2019 to hand the files over, he immediately contacted some colleagues in other practices and asked whether they would take on the files or whether they would employ him to complete the files. None of them were prepared to do so which, the Respondent said in his affidavit, left him "with no other option".
- [34] In relation to his current circumstances, the Respondent is now employed outside of the legal profession. Whilst he says in his affidavit that he is unsure if he will ever seek employment in the legal services industry again, he goes on to say that he would like one day to apply for a legal role with his current employer (a bank), if that became available, because it would significantly increase his income and help him support his family. The Respondent also describes his ongoing role and leadership position within his church.
- [35] Exhibited to the Respondent's affidavit are a couple of general references. It is apparent, however, that the authors of those references were unaware of the circumstances for which those references were to be used, i.e. the current disciplinary proceedings. Accordingly, the Tribunal can place little weight on them.
- [36] In assessing the proper sanction to be imposed in the present case, it must be recalled that this disciplinary jurisdiction is protective of the public, not punitive against the practitioner.
- [37] That being said, there can be no doubt that the Respondent's conduct in practising without a practising certificate, even for the relatively short period involved here, and in relation to only two files, was a serious breach of fundamental professional obligations. As was canvassed in argument, the Respondent ought not have needed to have been told by the QLS to stop practising immediately. He should have known, without being told, that he had to stop practising immediately. The most generous interpretation for the Respondent is that his judgment was clouded by external factors to such a degree as to impact on his capacity to make sound judgment.
- [38] Apart from the objective gravity of the Respondent's conduct in continuing to practise without a practising certificate, it is also appropriate for this Tribunal to consider the question of general deterrence associated with the imposition of an appropriate sanction. The legislative requirement for legal practitioners to hold current practising certificates in order to practice is important for the protection of clients and the public generally, and as a means of maintaining appropriately high professional standards. A flouting of those protective legislative provisions is a serious matter, and lawyers need to understand that a failure to observe the requirement to hold a practising certificate will be met by serious consequences.

- [39] In the circumstances of this case, it is to the Respondent's credit that he has fully accepted the particulars of the charges, and expressed deep remorse and contrition. These are relevant matters for consideration when fixing the appropriate sanction.⁴
- [40] On the other hand, the Respondent's conduct in continuing to practise in the face of express statements by the QLS demonstrated a degree of persistence which reflects on his capacity to make sound judgments.
- [41] The Respondent's failure to file the audit reports can be explained, but not excused, by his financial circumstances at the time. The seriousness of that conduct is, however, significantly overborne by the gravity of his conduct in persisting in practice without a practising certificate.
- [42] Whilst the particular circumstances of this case do not compel a finding that the Respondent is permanently unfit to practice, the Tribunal is nevertheless of the view that the gravity of his conduct and the need to ensure protection of the public interest is such as to warrant the imposition of a significant period of effective suspension from practice.
- [43] Noting that the Respondent has not held a practising certificate since the close of 30 June 2019, the Tribunal considers it appropriate to make an order under s 456(2)(c) of the LPA that a local practising certificate not be granted to the Respondent before the end of three years from 1 July 2019.
- [44] Given the nature of his offending conduct, the Tribunal also considers it appropriate and in the public interest that he be required to complete the Ethics and Trust Account remedial courses conducted by the QLS before applying for any new practising certificate. If the Respondent does seek to return to legal practice in due course, he should also be required to be engaged as an employed solicitor for at least two years before being able to apply for a principal practising certificate.
- [45] Finally, it has not been suggested that this Tribunal ought not make the costs order mandated by s 462(1) of the LPA.
- [46] Accordingly, the Tribunal orders as follows:
1. In respect of Charge 4, there is a finding that the Respondent engaged in professional misconduct.
 2. In respect of each of Charges 2, 3 and 5, there is a finding that the Respondent engaged in unsatisfactory professional conduct.
 3. It is ordered that a local practising certificate not be granted to the Respondent before the end of the period of three (3) years from 1 July 2019.
 4. After the expiration of the said three-year period, the Respondent is prohibited from applying for, or obtaining, a principal practising certificate for two (2) years after being granted an employee level practising certificate.
 5. At the time of first applying for an employee level practising certificate after the expiration of the said three-year period, the Respondent must:
 - (a) provide evidence of successful completion of the Queensland Law Society's remedial trust account and ethics courses (or equivalent at the

⁴ *Legal Services Commissioner v Warren* [2017] QCAT 158.

time) having been completed within twelve (12) months prior to the application; and

(b) include a copy of these Reasons with his application.

6. The Respondent shall pay the Applicant's standard costs of and incidental to this discipline application, such costs to be assessed as if this were a proceeding before the Supreme Court of Queensland.