

**JURISDICTION** : STATE ADMINISTRATIVE TRIBUNAL

**ACT** : LEGAL PROFESSION ACT 2008 (WA)

**CITATION** : LEGAL PROFESSION COMPLAINTS  
COMMITTEE and AMSDEN [2014] WASAT 57 (S)

**MEMBER** : JUDGE D R PARRY (DEPUTY PRESIDENT)  
MR H DEMBO (SENIOR SESSIONAL MEMBER)  
MS K KEMP (SESSIONAL MEMBER)

**HEARD** : 22 JULY 2014

**DELIVERED** : 29 JULY 2014

**FILE NO/S** : VR 156 of 2013

**BETWEEN** : LEGAL PROFESSION COMPLAINTS  
COMMITTEE  
Applicant

AND

CHARLENE SHEILA AMSDEN  
Respondent

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*Catchwords:*

Vocational regulation - Legal practitioners - Professional misconduct - Penalty - Practitioner demanded payment and threatened and commenced proceeding for payment by owner of other unit in practitioner's strata complex of legal fees and disbursements incurred by practitioner in seeking removal of air conditioner from external wall of other owner's strata unit - Making demand for payment where there is no liability to make payment - Threat to commence and commencement of legal proceeding lacking any legal foundation - Abuse of process - Breach of *Legal Profession Conduct Rules 2010* (WA) - Diminishing public confidence in the administration of justice - Bringing the legal profession into disrepute - Attempting to further practitioner's interests by unfair means

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*Legislation:*

*Legal Profession Act 2008* (WA), s 403, s 438(2), s 439, s 439(b), s 439(c)(i), s 440, s 441, s 441(a), s 441(m)

*Legal Profession Conduct Rules 2010* (WA), r 6(2)(b), r 6(2)(c), r 16(1), r 18(1)

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

*Result:*

Practitioner reprimanded

Practitioner ordered to pay a fine of \$5,000 to Legal Practice Board

Practitioner ordered to pay Legal Profession Complaints Committee's costs in terms of disbursements in the amount of \$20,339.40

*Summary of Tribunal's decision:*

The Tribunal previously found that the respondent practitioner engaged in professional misconduct by making a demand for payment from Mr A and Ms A of an amount of \$2,022, when they were under no existing liability to pay that amount, and in commencing and prosecuting court proceedings for payment of that amount, when the practitioner had no cause of action, the proceeding lacked any legal foundation and was therefore an abuse of process.

The Tribunal required the parties to file written submissions in relation to penalty and costs and conducted a hearing at which the parties made further oral submissions. The practitioner ceased legal practice between the conduct hearing and the penalty hearing.

The Tribunal determined that the appropriate disciplinary consequence of the practitioner's misconduct is for her to be reprimanded and ordered to pay a fine of \$5,000 to the Legal Practice Board. The practitioner was also ordered to pay the Legal Profession Complaints Committee's costs of the proceeding in the amount of \$20,339.40.

*Category:* B

**Representation:**

*Counsel:*

Applicant : Ms KF Banks-Smith SC with Ms PE Le Miere  
Respondent : In person

*Solicitors:*

Applicant : Law Complaints Officer  
Respondent : N/A

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

Barbaro v The Queen [2014] HCA 2; (2014) 88 ALJR 372; (2014) 305 ALR 323

Chamberlain v The Law Society of the Australian Capital Territory (1993) 43 FCR 148; (1993) 118 ALR 54

Legal Practitioners Complaints Committee v Lashansky [2007] WASC 211

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

Legal Profession Complaints Committee and Amsden [2013] WASAT 201

Legal Profession Complaints Committee and Amsden [2014] WASAT 57

Legal Profession Complaints Committee and in de Braekt

[2012] WASAT 58 (S); (2012) 80 SR (WA) 194

Legal Profession Complaints Committee v Detata [2012] WASCA 214

Re Maraj (a Legal Practitioner) (1995) 15 WAR 12

**REASONS FOR DECISION OF THE TRIBUNAL:**

***Background and submissions***

1 On 22 May 2014, we found that, between December 2011 and June 2012, the respondent practitioner engaged in professional misconduct, within the meaning of s 403 and s 438 of *Legal Profession Act 2008* (WA) (LP Act), in that her conduct in demanding payment from Mr A and Ms A of an amount of \$2,022 (when they were under no existing liability to pay that amount) and in commencing and prosecuting a minor case claim against Mr A and Ms A in the Magistrates Court of Western Australia (Civil Jurisdiction) at Perth for payment of the amount of \$2,022 (when the practitioner had no cause of action, the proceeding lacked any legal foundation and was therefore an abuse of the Court's process):

- a) would reasonably be regarded as disgraceful or dishonourable by practitioners of good repute and competence; and
- b) comprised a breach of r 6(2)(b) and r 6(2)(c), r 16(1) and r 18(1) of the *Legal Profession Conduct Rules 2010* (WA) (Conduct Rules): see ***Legal Profession Complaints Committee and Amsden*** [2014] WASAT 57 (conduct reasons).

2 We found that the practitioner's conduct involved '... the breach of duties of fairness to Mr A and Ms A not to demand payment from them when they had no existing liability to make payment and not to bring legal proceedings against them when she had no founding cause of action, and the breach of a duty of propriety to the Court not to commence and prosecute proceedings which involve an abuse of process' (conduct reasons at [49]).

3 We found that the practitioner's conduct was 'grossly unfair to Mr A and Ms A and wasted valuable court time and resources' (conduct reasons at [49]). Moreover, we found that the practitioner's demand and proceeding was 'clearly intended to apply inappropriate and improper pressure on Mr A and Ms A to pay the amount of \$2,022' (conduct reasons at [50]). We also found that the practitioner's conduct was 'prejudicial to, and diminished public confidence in, the administration of justice, and had the effect of bringing the legal profession into disrepute' (conduct reasons at [54]).

4 We made orders requiring the applicant Legal Profession Complaints Committee (Committee) and the practitioner to file and exchange written submissions in relation to penalty and costs and enabling the practitioner to file character references. The parties each filed written submissions and made further oral submissions at the hearing in relation to penalty and costs on 22 July 2014. The practitioner did not file any character references, stating in her written submissions that 'I am unable to provide a reference who is prepared to be subject to cross-examination in an open court'. In her oral submissions, the practitioner put the reason for not providing any character references differently. In her oral submissions, the practitioner said that she made a decision that she did not wish to expose people to cross-examination and to being named in a published decision of the Tribunal.

5 Following the decision of the High Court of Australia in *Barbaro v The Queen* [2014] HCA 2; (2014) 88 ALJR 372; (2014) 305 ALR 323 in relation to the prohibition upon a prosecutor in making submissions in respect of penalty in a criminal law context (see *Legal Profession Complaints Committee and A Legal Practitioner* [2013] WASAT 37 (S) at [7] - [17]), the Committee has not submitted a view as to the specific result which should be reached or the bounds of the range of penalties which might be imposed on the practitioner. The Committee submits that the penalty in this case should reflect the severity of the misconduct, the particular findings of the Tribunal in the conduct reasons, the impact on Mr A and Ms A of having been subjected to a demand which they had no obligation to pay and court proceedings which had no foundation, and 'the seeming lack of any appreciation by the practitioner of the significance of her wrongdoing', that is, the practitioner's lack of remorse and insight. The Committee does not suggest that the practitioner's professional misconduct is at the highest (that is, worst) end of conduct comprising misconduct and does not suggest that a suspension from legal practice would be appropriate. The Committee notes that the practitioner has not been subject to any prior findings of an adverse disciplinary nature during a legal career of almost 30 years. While the Committee does not submit the specific result which should be reached in relation to penalty, it contends that, in order to meet the intent of protection of the public and the maintenance of the reputation and standards of the legal profession, a reprimand and a substantial fine should be imposed. The Committee also seeks an order for the payment by the practitioner of its costs in terms of disbursements of the proceeding in the amount of \$20,339.40.

6 In her written and oral submissions, the practitioner does not submit that any particular penalty should or should not be imposed. She has

referred to aspects of her professional background and contribution to the legal profession and to the community. She also makes submissions in relation to the Tribunal's findings of professional misconduct and the Committee's submissions on penalty in which she seeks, in effect, to reargue matters determined in the Tribunal's conduct reasons.

- 7 The practitioner advised that she ceased practising law on 27 June 2014, does not currently hold a practising certificate and does not intend to return to legal practice. She says that she has spent a great deal of money (indeed, exceeding her income from 12 months of legal practice) in retaining counsel and solicitors in this proceeding (who represented her from September 2013 until prior to the conduct hearing) and that she has had her name and conduct publicly disclosed in the conduct reasons and in the Tribunal's determination of preliminary issues raised by her in *Legal Profession Complaints Committee and Amsden* [2013] WASAT 201. The practitioner made no submissions in relation to the Committee's application that she should be ordered to pay the Committee's costs of the proceeding or in relation to the amount of costs sought by the Committee.

### *Appropriate penalty*

- 8 It is well recognised that the principal objects of disciplinary proceedings in relation to legal practitioners are the protection of the public in their dealings with lawyers, the maintenance of proper standards in the legal profession, and the protection of the reputation of the legal profession: *Re Maraj (a Legal Practitioner)* (1995) 15 WAR 12 at 24 and 25. The objects of vocational disciplinary proceedings do not include punishment of the practitioner. The penalty imposed should reflect the nature, seriousness and content of the findings of misconduct and all relevant circumstances of the case, including mitigating factors. A relevant consideration in relation to penalty is whether the practitioner has demonstrated insight into his or her wrongdoing: *Legal Practitioners Complaints Committee v Lashansky* [2007] WASC 211 at [35]. The penalty should also be sufficient to act as a specific deterrent to the practitioner and a general deterrent to other members of the profession from acting in the same or a similar way.

- 9 Under s 438(2) of the LP Act, having determined that the practitioner is guilty of professional misconduct, the Tribunal may make and transmit a report on the finding to the Supreme Court (full bench) or make any one or more of the orders specified in s 439, s 440 and s 441 of the LP Act. These provisions enable the Tribunal to impose a wide range of penalties

where appropriate. These include, relevantly, an order that a local practising certificate not be granted to the practitioner before the end of a specified period (s 439(b)), an order that specified conditions be imposed on the practitioner's practising certificate to be granted under the LP Act (s 439(c)(i)), an order publicly reprimanding the practitioner or, if there are special circumstances, privately reprimanding the practitioner (s 439(d)), an order that the practitioner pay a fine of a specified amount not exceeding \$25,000 to the Legal Practice Board (Board) (s 441(a)) and an order that the practitioner not apply for a local practising certificate before the end of a specified period (s 441(m)).

10 In our view, the protection of the public, the maintenance of proper standards, and the maintenance of the reputation of the legal profession require that the practitioner be publicly reprimanded and ordered to pay a substantial fine to the Board. A reprimand is 'a serious matter' (*Chamberlain v The Law Society of the Australian Capital Territory* (1993) 43 FCR 148; (1993) 118 ALR 54 at 157; 62), although it is at the lower edge of the range of penalties available to the Tribunal (*Legal Profession Complaints Committee v Detata* [2012] WASCA 214 at [42]). In our view, a fine of \$5,000 is also warranted. We have arrived at this view having regard to the following considerations.

11 First, the practitioner engaged in serious professional misconduct. Indeed, as we found at [49] of the conduct reasons, the practitioner's conduct in demanding payment of the amount of \$2,022 from Mr A and Ms A, when they were under no existing liability to pay that amount, and in commencing and prosecuting the Magistrates Court proceeding, in circumstances where she had no cause of action, the proceeding lacked any legal foundation and was therefore an abuse of the Court's process, 'would reasonably be regarded as disgraceful or dishonourable by practitioners of good repute and competence'.

12 Secondly, as we also found at [49] of the conduct reasons, the practitioner's conduct was 'grossly unfair to Mr A and Ms A and wasted valuable court time and resources'.

13 Thirdly, as we found at [50] of the conduct reasons, the letter of demand and the Magistrates Court proceeding was 'clearly intended to apply inappropriate and improper pressure on Mr A and Ms A to pay the amount of \$2,022'. Indeed, as we noted at [51] of the conduct reasons, Mr A made an offer of settlement, even though he had no obligation to pay the amount sought or any part of it.

14 Fourthly, the practitioner's conduct involved a breach of r 6(2)(b), r 6(2)(c), r 16(1) and r 18(1) of the Conduct Rules and, in the circumstances of this case, the breach of those Conduct Rules was found to be sufficiently serious to constitute professional misconduct under the LP Act: conduct reasons at [52] - [58]. As Professor GE Dal Pont observes in *Lawyers' Professional Responsibility* (Law Book Co, 5<sup>th</sup> ed, 2013) at [1.125], professional rules such as the Conduct Rules 'serve as a standard of conduct in disciplinary proceedings, as a guide for action in a specific case, and as a demonstration of the profession's commitment to integrity and public service.' Significantly, as we found at [54] of the conduct reasons, the practitioner's conduct was 'prejudicial to, and diminished public confidence in, the administration of justice, and had the effect of bringing the legal profession into disrepute', contrary to r 6(2)(b) and r 6(2)(c) of the Conduct Rules, including because:

[T]he practitioner's conduct gives rise to an apprehension that legal practitioners are willing to make demands and issue court proceedings in circumstances where it cannot be justified[.]

15 Fifthly, both in the manner in which she conducted herself in the conduct hearing and in making her submissions on penalty, the practitioner has demonstrated a complete lack of insight in relation to her misconduct. She does not seem to appreciate that such conduct by a legal practitioner, even in a private dispute or private litigation, is wrong, unfair and unacceptable.

16 Although the practitioner, in effect, conceded (after she received legal advice in September 2013) that Mr A and Ms A had no existing liability to pay the amount demanded by her and that the Magistrates Court proceeding lacked any legal foundation (conduct reasons at [2]), she nevertheless sought to 'defend' the matter through a one-and-a-half-day hearing, raising so-called 'questions of law' (see conduct reasons at [83]) which we found were 'misconceived' (conduct reasons at [85]), without merit (see conduct reasons at [86]) or 'scandalous, without foundation and relevantly misconceived' (conduct reasons at [87]).

17 In her penalty submissions, the practitioner sought to blame Mr A and Ms A for 'the chain of events resulting in SAT's findings against me'. She also continued to criticise the Committee for the manner in which it conducted the proceeding. In her penalty submissions, the practitioner also sought, in effect, to reagitate matters determined in the conduct reasons. For example, she continued to argue that the Butcher Paull & Calder letter was 'professionally sourced legal advice' that she could rely

on in making the demand and bringing the proceeding against Mr A and Ms A. She also persisted with allegations against the Committee which we have found to be 'scandalous, without foundation and relevantly misconceived' (conduct reasons at [87]).

18           Moreover, there has been no demonstration of remorse or contrition by the practitioner. At no time has the practitioner sought to offer any apology to Mr A and Ms A for having demanded payment of the sum of \$2,022, when they were under no existing liability to pay that amount, and for having subjected them to six months of litigation when the proceeding lacked any legal foundation. Nor has she sought to offer any apology for having engaged in an abuse of the Court's process and thereby wasted its valuable time and resources.

19           Finally, in light of the seriousness and significance of the foregoing considerations, had it not been for certain factors mitigating penalty, a more substantial fine than \$5,000 would have been imposed. The factors mitigating penalty are that the practitioner has no prior disciplinary record throughout a legal career spanning almost 30 years, that she has made positive contributions to the legal profession (through making presentations and presenting lectures in various courses, membership of professional committees, participating as a duty lawyer and mentoring junior practitioners), that she has made a positive contribution to the community (by providing her services to the Official Visitors to certain mental health facilities and by serving on a hospital Ethics Committee), and that her legal career has focussed on representing disadvantaged people in their dealings with the criminal justice system including, at times, when she was in private practice, without any fee.

20           We do not consider the fact that the practitioner has incurred expense in defending the proceeding or that her name and conduct has been disclosed in the earlier decisions of the Tribunal as mitigating factors warranting a reduction in penalty. There is no evidence that the practitioner cannot afford to pay a fine of \$5,000 and the costs sought by the Committee. The publication of the earlier reasons (and these reasons) is a consequence of the practitioner's misconduct and, to an extent, her own decisions in this proceeding.

21           As we noted earlier, the practitioner has not filed any character references. As conceded by senior counsel for the Committee, the absence of character references is a neutral matter. We have not taken the absence of any character references into account in determining the appropriate penalty.

**Costs**

22 The Committee seeks an order for the payment by the practitioner of counsel's fees of \$20,024.40 and the application filing fee of \$315, totalling \$20,339.40. Although Ms Banks-Smith was appointed as senior counsel during the course of the proceeding, she has charged for all work at the rate for counsel (not senior counsel) of \$297 per hour (inclusive of GST) and \$2,970 per day (inclusive of GST) stated in the *Legal Practitioners (State Administrative Tribunal) Determination 2012 (WA) (Determination)*.

23 The Tribunal's established practice in relation to the exercise of its discretion as to costs under s 87(2) of the *State Administrative Tribunal Act 2004 (WA) (SAT Act)* in vocational disciplinary proceedings was summarised in *Legal Profession Complaints Committee and in de Braekt [2012] WASAT 58 (S); (2012) 80 SR (WA) 194 (in de Braekt)* at [51]. As we noted earlier, the practitioner made no submissions in relation to the Committee's application for costs. There is no reason why, in the circumstances of this case, the Tribunal should depart from its usual practice in relation to costs in vocational disciplinary proceedings. An order for costs in favour of the Committee should therefore be made. The Tribunal's practice in relation to the assessment of costs was summarised in *in de Braekt* at [53]. The work carried out by Ms Banks-Smith and the time spent by her in relation to that work was reasonable and necessary to properly prepare and present the case, which included preliminary issues raised by the practitioner, a mediation, the conduct hearing and the penalty hearing. Having regard to the Determination as a guide as to the maximum rate which might be allowed, the hourly and daily rate charged by Ms Banks-Smith was reasonable.

24 The practitioner should therefore pay the Committee its costs in terms of disbursements of the proceeding in the amount of \$20,339.40.

**Conclusion**

25 The appropriate disciplinary consequence of the practitioner's professional misconduct in the circumstances of this case is for the practitioner to be reprimanded and to pay a fine of \$5,000 to the Board.

26 The practitioner should also pay the Committee's costs of the proceeding in terms of disbursements in the amount of \$20,339.40.

*Orders*

27

The Tribunal makes the following orders:

1. Pursuant to s 439(d) of the *Legal Profession Act 2008* (WA), the practitioner is reprimanded.
2. Pursuant to s 441(a) of the *Legal Profession Act 2008* (WA), the practitioner must pay a fine of \$5,000 to the Legal Practice Board by 27 August 2014 or within such further period as agreed by the Legal Practice Board.
3. Pursuant to s 87(2) of the *State Administrative Tribunal Act 2004* (WA), the respondent must pay to the applicant its costs of the proceeding in terms of disbursements in the amount of \$20,339.40 by 27 August 2014 or within such further period as agreed by the applicant.

I certify that this and the preceding [27] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

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**JUDGE D R PARRY, DEPUTY PRESIDENT**