

# ACT CIVIL & ADMINISTRATIVE TRIBUNAL

**COUNCIL OF THE LAW SOCIETY OF THE ACT v LEGAL PRACTITIONER 201707 (John Nicholl) (Occupational Discipline) [2018] ACAT 56**

**OR 17/2017**

**Catchwords:** **OCCUPATIONAL DISCIPLINE** – legal practitioner – consent orders – finding of professional misconduct – public reprimand

**Legislation cited:** *ACT Civil and Administrative Tribunal Act 2008* s 55  
*Legal Profession Act 2006* s 223, 413, 419

**Cases cited:** *Legal Services Commissioner v Nikolaidis (No 3)* [2005] NSWADT 200  
*Council of the Law Society of New South Wales v Dalla* [2011] NSWADT 130  
*The Law Society of the ACT v Legal Practitioner NI* [2016] ACAT 36

**Tribunal:** Senior Member G Lunney SC

**Date of Orders:** 4 December 2017

**Date of Reasons for Decision:** 18 May 2018

AUSTRALIAN CAPITAL TERRITORY )  
CIVIL & ADMINISTRATIVE TRIBUNAL ) OR 7/2017

BETWEEN:

**COUNCIL OF THE LAW SOCIETY OF THE ACT**  
Applicant

AND:

**LEGAL PRACTITIONER 201707**  
Respondent

**TRIBUNAL:** Senior Member G Lunney SC

**DATE:** 4 December 2017

### **ORDER**

Upon find that the respondent has engaged in professional misconduct as particularised in the Application, the Tribunal makes the following orders:-

1. Pursuant to subsection 425(3)(e) of the *Legal Profession Act 2006*, (the Act), the respondent shall be publicly reprimanded.
2. The following conditions shall be imposed on the respondent's practising certificate:
  - 2.1. The respondent shall retain a certified accountant chosen, or approved, by the Law Society to provide monthly compliance reports to the Law Society regarding payment of the superannuation guarantee (noting that the obligation to pay superannuation arises quarterly, which is not altered by this condition).

- 2.2. The reports provided under Order 2.1 must reasonably satisfy the Law Society that the respondent is, and remains, compliant with the statutory obligations regarding the obligation to pay superannuation quarterly in accordance with the superannuation guarantee.
- 2.3. The accountant appointed under Order 2.1 will be retained for a period of not less than 12 months from the date of these orders.
- 2.4. The respondent shall be responsible for the fees and costs of the accountant.
3. Pursuant to subsection 425(5)(a) of the Act, the respondent shall pay a fine of \$20,000.00 to the applicant on or before a date to be agreed by the parties, and, in any event, no later than 30 June 2018.
4. In default of either or both of Orders 2 and 3, the respondent's practising certificate shall be immediately suspended until he complies with the Orders.
5. Pursuant to subsections 433(1) and (5) of the Act, the respondent shall pay the applicant's costs as agreed and, if not agreed, calculated on a solicitor own-client basis in accordance with the ACT Supreme Court scale in a sum to be agreed, and if not agreed, the costs are to be assessed by a costs specialist, namely Legal Cost, and the respondent is to pay 90% of the costs so assessed plus disbursements in full.

.....*Signed*.....  
Senior Member G Lunney SC

## REASONS FOR DECISION

1. This is an application<sup>1</sup> that has been brought by the Council of the Law Society of the ACT (the **Council**) seeking orders pursuant to section 419 of the *Legal Profession Act 2006* (**the Act**).<sup>2</sup> This section provides that the relevant Council for an Australian legal practitioner may apply to the ACT Civil and Administrative Tribunal (**ACAT**) for an order in relation to a complaint against the practitioner. In this case the complaint was made by the Council after inquiries were conducted. It is of some significance in this case and consistent with later behaviour that the practitioner cooperated in those inquiries.
2. Section 55 of the *ACT Civil and Administrative Tribunal Act 2008* (**ACAT Act**) provides that if the parties to an application reach agreement about the terms of a tribunal decision and the tribunal is satisfied that an order or decision in, or consistent with the agreed terms would be within the powers of the tribunal and would be appropriate for the tribunal to make, it may make a decision in accordance with the agreement.
3. The application refers in paragraph 3 to the Commonwealth *Superannuation Guarantee Act 1992* and sets out in brief terms the obligations required of persons who take superannuation contributions from their employees.<sup>3</sup> The relevant conduct which is complained and refers to various breaches of those obligations by the practitioner.<sup>4</sup> This conduct is specified in more detail in paragraphs 17 and 18 of the application for disciplinary action. The Council asserts at [19] that this constitutes professional misconduct and seek orders from the Tribunal under section 425 of the Act.
4. The parties' joint submission sets out the background of the application and repeats a lot of the information from the application. Paragraph 10 states:<sup>5</sup>

---

<sup>1</sup> This respondent was previously anonymised and named as Legal Practitioner 201707 pursuant to section 423A of the *Legal Profession Act 2006*. As the appeal period has ended, the practitioner has now been identified in the citation of this decision.

<sup>2</sup> Application for disciplinary action dated 31 May 2017

<sup>3</sup> Application for disciplinary action dated 31 May 2017 at [3] and [4]

<sup>4</sup> set out at pages 3, 4 and 5 of the application and later from paragraph 8 onwards

<sup>5</sup> Joint Submission dated 30 November 2017

*The respondent accepts that the conduct referred to in paragraphs 8 and 9 in each case constitutes professional misconduct within the meaning of section 387(1) of the Act and professional misconduct at common law.*

5. The parties' joint submission then goes on to set out proposed orders. Paragraph 4 set out the reasons for the proposed penalties and paragraph 12 sets out a number of facts that impact on the appropriate disciplinary orders.
6. The first part of those submissions deals with the nature of the misconduct and that refers to a number of authorities, and it is also significant that the first of those authorities that are referred to is a decision of Senior Member P Spender in *The Law Society of the ACT v Legal Practitioner N1* [2016] ACAT 36 (the **N1 case**). This case is the reported decision in earlier proceedings involving the present practitioner. The authorities that are set out in the joint submission are also mostly referred to by the Senior Member in the course of her decision.<sup>6</sup> That decision is referred to in paragraph 14 of the joint submission. The submission reads:

*As this tribunal held in Council of the Law Society of the ACT v Legal Practitioner N1 (Occupational Discipline) [2016] ACAT 36 (N1), the authorities are clear that personal or non-practice conduct, including the failure to carry out fiscal responsibilities, and more specifically the failure to pay superannuation contributions to employees can amount to professional misconduct at common law if the conduct is such that it will reasonably be regarded as disgraceful or dishonourable by professional colleagues of good repute and competency and is otherwise capable of bringing the legal profession into disrepute...*

7. The N1 case is also referred to in the joint submission at paragraphs 47 and 48, paragraph 48 reads:

*As noted the misconduct in this case being the delay to make quarterly superannuation payments and the failure to lodge superannuation guarantee charge statements was repeated over two years. Although it is delay as distinct from non payment in N1 it is nevertheless a continuing serious breach. It is also relevant that the first delay in this application occurred while the respondent was before the ACAT in N1. He failed to disclose that fact during the N1 case.*

8. Paragraph 62 further states:

---

<sup>6</sup> *The Law Society of the ACT v Legal Practitioner N1* [2016] ACAT 36

*When the respondent was making submissions and giving assurances to the tribunal in N1 he was not aware that he was late (by about 8 days) in meeting his current superannuation obligations for the July/September 2014 quarter...<sup>7</sup>*

9. After dealing with the nature of the misconduct, the joint submission refers to the frequency of the misconduct and any prior findings of misconduct. There is a reference in paragraph 49 to a section 413 summary disposal of a complaint relating to breach of an undertaking when the respondent received a public reprimand and a fine. Then in 2013 in circumstances explained by Mr Buxton in this hearing, orders were made on application in ACAT by consent upon a finding of unsatisfactory professional conduct. That included a failure to supervise and breach of section 223(1) of the Act. Then there was the previous case of *N1* which resulted in a public reprimand, a fine and a direction to undertake a course in ethics and an order that the practitioner pay the Society's costs.<sup>8</sup> In the joint submission there is a quote from Riley's Solicitors Manual to the effect that in the usual case persistent misconduct, especially where it evidences dishonesty, but also if it involves recklessness, neglect or other professional behaviour will be visited with an order denying fitness to practice.<sup>9</sup>
10. That course is not proposed in the suggested orders. The submission refers to cumulative effect and there is a categorisation by the applicant that the present misconduct is not at the most serious end of a notional continuum of default.<sup>10</sup> This section of the submission also contains an examination of 35 relevant authorities, which I won't refer to in detail except to refer briefly to the case of *Legal Services Commissioner v Nikolaidis (No 3)* [2005] NSWADT 200 (**Nikolaidis**). In this case a solicitor having previously been reprimanded for failing to properly respond to a cost assessor's notice for further documents and particulars under section 207 of the Legal Profession Act, was after a subsequent similar failure, both reprimanded and fined. The tribunal so ordered because in its view a prior reprimand by itself did not prevent this further transgression by the practitioner.

---

<sup>7</sup> Joint submission dated 30 November 2017 at [62]

<sup>8</sup> *Council of the Law Society of the ACT v Legal Practitioner N1* [2016] ACAT 36 at [51]

<sup>9</sup> Joint submission dated 30 November 2017 at [52]

<sup>10</sup> Joint submission dated 30 November 2017 at [55]

11. The submission continues then at paragraph 59:<sup>11</sup>

*The parties submit that the facts in those cases as found constituted more egregious and prolonged misconduct than obtains here. They concerned, variously, issues of competence, dishonesty and trust account irregularities. The misconduct here is essentially delay. Ultimately, the respondent was eventually able to meet his liabilities. The conduct does not relate to dishonesty [or] lack [of] competence in practice.*

12. Other matters that are referred to in the submissions relate to the practitioner's professional experience. He's been practising for more than 25 years and has held an unrestricted certificate for over 20 years. As to attitude, the submission asserts that the respondent has been cooperative and the evidence that has been submitted certainly indicates that. He has at the outset admitted the wrongdoing. He has expressed his remorse and embarrassment regarding the July/September 2014 delay in particular and to the delays generally. There is then a reference to the lawyer's appreciation of wrongdoing which I have referred to previously and it's apparent to me that the practitioner is remorseful and also embarrassed at the conduct that led to the application being filed.
13. Finally, it would appear that there has been no financial loss by any person. Paragraph 64 of the submission reads:

*The employees were progressively paid their superannuation during the relevant period, (during 2014 to 2016). They have also been paid 10 % interest on any outstanding superannuation following the issuing of the Superannuation Guarantee Assessments by the ATO. (totalling some \$33,000 (including the interest component)) has been paid. This brings all of the contribution entitlements (including penalty interest) to the employees up to date such that no loss has been suffered...*

14. It was submitted in response to a question by me that there was repayment, as it were, spontaneously of the delayed amounts within the periods that were specified or set out in the application pages 3 through to 5. My findings therefore are that the present conduct involves delay in receipt of entitlements and it is not at the most serious end of a notional continuum of default. It did not involve dishonesty; no lack of professional competence was related to it; no one is likely to have been affected financially by it with the exception of the delayed receipt of funds for which compensation has been made; the practitioner has

---

<sup>11</sup> Joint submission dated 30 November 2017 at [59]

demonstrated remorse not only by admitting the conduct and its effect but also by cooperating in the inquiries that have been conducted by the applicant. He has also shown cooperation in jointly proposing the penalties that have been suggested. Although it does not excuse the conduct in any fashion, his affidavit does disclose external financial and personal pressures that existed at the time of the conduct. The concurrent nature of the present conduct between 2014 and 2016 with the previous proceedings and the period during which Professor Spender had reserved her decision is of concern. No doubt it had been of concern to the members of the Council and its advisors.

15. Included in the list of authorities is the case of *Council of the Law Society of New South Wales v Dalla* [2011] NSWADT 130. I refer to paragraphs 19 and 20 of the decision in that case.

*19. The tribunal's decision in Council of the New South Wales Bar Association v. Butland NSW ADT (2009) 177 provides useful guidance as to the matters to be taken into account in deciding whether to make consent orders proposed in an instrument of consent filed under this section.*

*20. An important principle stated in that case by the tribunal is that, where the parties have jointly proposed an order or orders by way of penalty it will not be useful to investigate whether the Tribunal would have arrived at that precise outcome in the absence of agreement. The question is whether that outcome in the tribunal's opinion is appropriate in the circumstances of the case. In answering this question, the tribunal should not reject the agreed outcome simply because it would have been inclined to make some other order or orders. The outcome proposed will be appropriate if it is 'within the permissible range'.*

16. During the course of the oral submissions at the hearing Mr Buxton suggested to the tribunal that it would be appropriate for the tribunal to give due weight to the views of the Council as expressed or disclosed in the Council's support of the presented scheme of penalties. I agree with that submission. The Council of the Law Society is composed of elected representatives of the ACT legal community. I understand there is a wide representation in the Council and it contains many senior practitioners. It has extensive disciplinary powers and functions under the Legal Profession Act. It therefore, in my view, has a wide experience in this area of occupational discipline and due regard should be given to that corporate knowledge and its experience in this area.

17. The proposed orders have the support that body, the Council, after its due consideration. On the authority of *Dalla* and Senior Member Spender's decision in *NI*, my task is to assess whether those proposed orders are within the permissible range of penalty, and if the proposed penalty is within range, and assuming there is no other reason not to do so, to confirm the proposed orders. It is my view the proposed orders are within range. I'm also satisfied in accordance with section 55 of the ACAT Act that the proposed orders are within the powers of the tribunal and that it is appropriate for the tribunal to make the orders.
18. The Tribunal makes the orders proposed in the joint submission.

.....  
Senior Member G Lunney SC