ACT CIVIL & ADMINISTRATIVE TRIBUNAL

COUNCIL OF THE LAW SOCIETY OF THE ACT V LEGAL PRACTITIONER N1 (Occupational Discipline) [2016] ACAT 36

OR 14/2014

Catchwords: **OCCUPATIONAL DISCIPLINE – LEGAL PRACTITIONER –** professional misconduct – personal conduct that is sufficiently closely connected to actual practice – failure to pay superannuation entitlements to employees

Legislation cited: *ACT Civil and Administrative Tribunal Act 2008* ss 55
Legal Profession Act 2006 ss 413, 433, 425, 427
Superannuation Guarantee (Administration) Act 1992 (Cth) ss 7, 46

Cases cited:
Council of the New South Wales Bar Association v Butland [2009] NSWADT 177
Council of the Law Society (NSW) v Dalla [2011] NSWADT 130
Council of the Law Society (NSW) v Delpopolo [2014] NSWCATOD 55
Council of the Law Society (NSW) v Koffel [2010] NSWADT 149
Law Society of New South Wales v Bouzanis [2006] NSWADT 55
Law Society of New South Wales v Gillroy [2010] NSWADT 232
Law Society of New South Wales v Vosnakis [2007] NSWADT 42
Myers v Elman [1940] AC 282
New South Wales Bar Association v Cummins [2001] NSWCA 284
Re A Solicitor [1960] VR 617

Tribunal: Senior Member P Spender

Date of Orders: 6 May 2016
Date of Reasons for Decision: 6 May 2016

AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL) OR 14/2014

BETWEEN:

COUNCIL OF THE LAW SOCIETY OF THE ACT
Applicant

AND:

LEGAL PRACTITIONER N1
Respondent

TRIBUNAL: Senior Member P Spender

DATE: 6 May 2016

ORDER

Upon finding that the respondent has engaged in professional misconduct the Tribunal makes the following orders:

1. The respondent be publicly reprimanded pursuant to subsection 425(3)(e) of the *Legal Profession Act 2006* (Legal Profession Act).

2. The respondent undertake and complete a course approved by the applicant in ethics and another course in practice management within 12 months pursuant to subsection 425(5)(b) of the Legal Profession Act.

3. The respondent be issued with a fine of $7,000 pursuant to subsection 425(5)(a) of the Legal Profession Act to be paid by 30 June 2016.

4. The respondent pay the applicant's costs in a sum to be agreed or assessed pursuant to subsection 433(1) of the Legal Profession Act.

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General President L Crebbin
For and on behalf of
Senior Member P Spender

REASONS FOR DECISION

Introduction

1. The reasons below explain why the Tribunal has made the orders set out above.

2. The Tribunal is satisfied that the respondent has engaged in professional misconduct pursuant to section 425 of the *Legal Profession Act 2006* (**Legal Profession Act**) and has concluded that he be publicly reprimanded, undertake and complete a course approved by the applicant in ethics and another course in practice management within 12 months, be issued with a fine of $7000 and pay the applicant's costs in the sum to be agreed or assessed.

3. The Tribunal has concluded that the orders proposed by the parties are within the Tribunal's power and appropriate for the Tribunal to make pursuant to section 55 of the *ACT Civil and Administrative Tribunal Act 2008* (**ACAT Act**). The joint submission by the parties is set out below. It includes a statement of facts, submissions about the characterisation of the conduct and matters in mitigation, a discussion of the respondent's antecedents and a proposed penalty.

4. In the reasons below, a reference to 'ACAT' or 'tribunal' refers to the ACT Civil and Administrative Tribunal or another relevant tribunal generally, whereas 'Tribunal' refers to the current member.

JOINT SUBMISSION BY THE PARTIES

Statement of Facts

5. The respondent is and was at all material times an Australian Legal Practitioner and a principal of the firm carrying on a practice under the name and style of N & Co, an incorporated legal practice, and was the holder of an unrestricted practising certificate issued by the Law Society of the Australian Capital Territory. The respondent was at all material times the sole director of the incorporated legal entity, N & Co Pty Ltd (**the Company**). The respondent assumed ultimate responsibility for all of the Company's statutory and contractual obligations.

6. In or around September 2009 R commenced employment with the Company as a legal practitioner. R was continuously employed by the Company until April 2012.

7. Upon his departure from the firm R became aware that, apart from two occasions, he had not been paid any of his superannuation entitlements pursuant to the *Superannuation Guarantee (Administration) Act 1992* (Cth) (the **SGA Act**). Under the SGA Act an employer is obliged during the term of the employment to contribute a prescribed percentage to a designated superannuation fund for each employee. Pursuant to section 46 of the SGA Act the amount is to be calculated quarterly and must be paid at least four times a year. The cut-off date for payment is on the 28th day of the month immediately following the completion of the respective quarter.

8. Where a superannuation contribution payment is delayed, that is made for any quarter after the 28th day of the month following, an employer has a superannuation guarantee shortfall and is obliged to lodge a superannuation guarantee statement for the quarter on or before the 28th day of the second month immediately following the respective quarter. In consequence the Superannuation Commissioner determines in accordance with the terms of the SGA Act a Superannuation Guarantee Charge constituting the shortfall, an interest component and an administration component.

9. By letter dated 26 June 2012 R wrote to the respondent advising of the apparent non-payment and requested him to provide records of the superannuation payments made to his nominated fund. The respondent did not respond to R's letter.

10. By letter dated 12 July 2012 R requested the Australian Taxation Office (the **ATO**) to investigate the conduct of the respondent in not, apart from two occasions, paying any of his superannuation entitlements pursuant to the SGA Act. In consequence of that request, the ATO provided the respondent with a Notice of Audit on 18 October 2012.

11. The ATO audit instigated by R's complaint to them revealed a shortfall in superannuation guarantee payments to various staff of the Company for the period 2009 to 2012. The ATO issued to the respondent a Superannuation Guarantee Charge Assessment for the amount of $135,854.31 which included an additional amount of interest in the sum of $29,394.28 and the ATO

administration fee of $2,740.00 under Part 7 of the SGA Act. Payment in full was effected on 1 July 2013.

12. During the period 2009 to 2012 the respondent had made some superannuation payments to his staff in the amount of $56,510.40, constituting approximately 35% of his statutory obligations.

13. Following the ATO's inquiries, all of R's superannuation entitlements plus compensatory interest was paid to him in the sum of $28,816.29.

14. From mid 2010 the respondent advised some of the staff of the cash flow problems and the non-payment of superannuation. R was not so advised.

15. During the period 2009 to 2012 the respondent provided R and other affected employees with fortnightly payslips noting the superannuation sums that were due to be paid under the SGA Act.

Characterisation of the Conduct

16. The conduct of the respondent described above relates primarily to his personal conduct, as the principal of the firm and director of the Company, rather than his professional conduct in that it concerns his dealings with his employees rather than the conduct of his practice and the provision of legal services generally.

17. 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 would 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.[1]

18. There have been a number of decisions concerning prolonged avoidance, and at times evasion, of personal taxation obligations by members of the profession, both barristers and solicitors. In such cases the tribunals have not hesitated to

[1] see *Myers v Elman* [1940] AC 282 per Viscount Maugham at pp 288-289 and *Re A Solicitor* [1960] VR 617 at p 620 per Dean J for the common law definition of professional misconduct

characterise such conduct as professional misconduct leading to removal from the roll in the most serious cases.

19. In almost all cases concerning breaches of fiscal obligations concerning staff the courts and tribunals, where they have found the practitioner guilty, have characterised such as professional misconduct rather than unsatisfactory professional conduct. Both types of conduct as defined under the Legal Profession Act are not exhaustive. It is the applicant's primary submission that unsatisfactory professional conduct as defined is more generally limited to conduct in respect to the provision of legal services. The definition of professional misconduct is more broadly cast. As Mason P said in *New South Wales Bar Association v Cummins* at [56]:

> *There is authority in favour of extending the terminology 'professional misconduct' to acts not occurring directly in the course of professional practice. That is not to say that any form of personal conduct may be regarded as professional misconduct. The authorities appear to me to suggest two kinds of relationships that justify applying the terminology in this broader way. First, acts may be sufficiently closely connected with actual practice, albeit not occurring in the course of such practice. Secondly, conduct outside the course of practice may manifest the presence or absence of qualities which are incompatible with, or essential for, the conduct of practice. In this second case, the terminology of 'professional misconduct' overlaps with and, usually it is not necessary to distinguish it from the terminology of 'good fame and character' or 'fit and proper person'.*[2]

20. The respondent's conduct here is closely connected with his practice in that it concerns his fiscal responsibilities to his employees, but it is not conduct occurring in the course of such practice in the sense of provision of legal services. It is not contended by the applicant that his conduct brings into question his fitness for practice.

21. There is a decision precisely on point to the matter at hand, being the decision of the New South Wales Administrative Decisions Tribunal (ADT) in *Law Society of New South Wakes v Bouzanis*.[3] In that case the solicitor failed to make the appropriate superannuation contributions required by law for an

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[2] [2001] NSWCA 284
[3] [2006] NSWADT 55

employee for the period 21 March 2000 to 13 August 2003. The superannuation was paid on 12 March 2004 after receiving correspondence from solicitors acting for the employee and the intervention of the Law Society. This constituted a sufficiently serious abrogation of his fiscal responsibilities in the practice of law to warrant a finding that he was guilty of professional misconduct. It is noted that that period is somewhat similar to the period concerning the respondent. Mr Bouzanis was publically reprimanded and fined $10,000.

22. In a more serious instance, in the matter of *Law Society of NSW v Vosnakis*,[4] the solicitor's failure to meet the statutory requirements for his employee's superannuation between 1996 and 2005 and his own taxation, coupled with the multiple occasions where he had carelessly dealt with client funds inconsistently with statutory requirements leads to a decision to remove him from the roll.

23. The *Law Society of New South Wales v Gillroy*[5] is a less serious instance. The two respondents were the solicitors and directors of an incorporated legal practice. Due to a significant deterioration in the financial situation of their practice, they ceased to draw income for themselves from the funds of the practice and they deferred making their statutory payments of group tax, GST and superannuation contributions. At an early stage, they commenced negotiations with the ATO in relation to their failure to make these payments on time. They also notified their employees that they were not paying superannuation contributions. Their evidence was that they believed these measures to be preferable to terminating the employment of some of their staff. Taking these matters into account, together with a finding that the conduct of the respondents involved 'no dishonesty and no breach of obligations to the Court', while finding that both respondents were guilty of professional misconduct, the ADT ordered that the first respondent be publically reprimanded and attend courses on practice management and ethics and that his practice be subject to mentoring. The tribunal imposed a reprimand on the second respondent on the basis that she had been quick to acknowledge the nature of her breach of professional obligations and expressed contrition.

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[4] [2007] NSWADT 42
[5] [2010] NSWADT 232

24. In *Council of the Law Society (NSW) v Koffel*[6] the tribunal considered whether the failure to pay superannuation for 33 employees for the period July 2005 to July 2007 in the sum of $123,998.97 constituted professional misconduct. The tribunal considered the reason for the non-payment, which was largely caused by financial difficulties experienced by a major client. Importantly, the respondent accepted his fiscal/revenue responsibilities and took steps to sell the matrimonial home (notwithstanding that it was in fact in his wife's name) and other personal assets to reduce the firm's debts.

25. Relevantly, the tribunal noted at [48] that:

> *the mere fact of a failure to pay superannuation guarantee contributions on time does not, of itself, constitute professional misconduct. It is the circumstances surrounding the failure, the consequences of the failure, and the actions subsequently taken by the solicitor, that determine whether the conduct constitutes professional misconduct.*

26. The tribunal ultimately dismissed the application and stated at [55] that:

> *this is a case where, clearly on the evidence, the practitioner has done all that he believed he reasonably could to ultimately discharge his statutory obligations to pay the superannuation guarantee levies in respect of his employees. This is so notwithstanding the fact that his employees were employed by two proprietary corporations - the practitioner himself personally assumed those obligations in the two Deeds of Company Arrangements (to which we have made reference above) and has discharged those personal obligations.*

27. In the decision of *Council of the Law Society of New South Wales v Dalla*[7] the respondent solicitor failed to pay his employees' superannuation contribution entitlements between 30 June 2002 and 21 April 2006. The respondent's evidence was that the employee never advised on her choice of fund and, in any event, he disputed her entitlement on the basis that she was an independent contractor. The tribunal found that the respondent had engaged in professional misconduct and made orders proposed in an Instrument of Consent between the parties and publically reprimanded the respondent and ordered him to pay the costs of the Council of the Law Society.

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6 [2010] NSWADT 149
7 [2011] NSWADT 130

28. The recent decision of *Law Society of New South Wales v Delpopolo*[8] considered the non-payment of superannuation for a number of employees for the period June 2008 to March 2011 totalling $125,000. The respondent was the principal of an incorporated legal practice which at its maximum employed 14 staff including the respondent. Notwithstanding that the respondent had significant cash flow problems, lent the practice $19,500 of her own funds, borrowed $50,000 from her parents, took appropriate steps to recover fees owing from clients, held regular meetings with staff to inform them of the problems experienced and the non-payment of superannuation and gave her evidence in an open and frank manner, the failure was a sufficiently serious abrogation of the respondent's financial responsibilities to warrant a finding by the tribunal that she was guilty of professional misconduct. In particular, the tribunal was not persuaded that the respondent did 'all that she could reasonably do to satisfy the statutory obligations'. The tribunal considered that the respondent could have sold her home and should not have expanded the practice by employing staff, and doing so risked the entitlements of her employees. The tribunal ordered that the respondent be publically reprimanded, pay the costs of the applicant and undertake a course in practice management.

29. The parties agree that the respondent:

    (a) issued payslips on a continuous basis to R disclosing the amount of superannuation payments that the Company was obliged to pay thereby causing him to reasonably infer that his superannuation entitlements were paid, or would be paid, quarterly in accordance with the SGA Act;
    (b) did not inform R that for most of the relevant period no superannuation payments were made;
    (c) did not at any stage inform R of the reasons for the non-payment;
    (d) did not respond to queries by R as to why no superannuation had been paid;
    (e) issued payslips to some of the other employees disclosing the amount of superannuation payments that were required to be paid thereby causing them to reasonably infer that their superannuation entitlements were paid, or would be paid quarterly, in accordance with the SGA Act;

[8] [2014] NSWCATOD 55

(f) did not inform some of the other employees of the non-payment or the reasons for same.

30. The parties further agree that such conduct was knowingly engaged in over an extended period of three years in circumstances where on the respondent's own admission there were significant financial difficulties experienced by the law practice thereby placing those employees at potential risk of loss.

31. In light of the above cases the parties submit that such conduct referred to in the preceding two paragraphs:

(a) constitutes personal conduct on the part of the respondent which could reasonably be regarded as dishonourable by his professional colleagues of good repute and competency; and which

(b) could repose in such colleagues a lack of confidence in the respondent's ability to discharge his professional or ethical responsibilities; and

(c) is otherwise capable of bringing the legal profession into disrepute.

32. The parties agree that the conduct referred to above is personal conduct sufficiently closely connected with actual practice and which can fairly be characterised as professional misconduct.

33. The parties agree that although conduct of this nature constitutes professional misconduct it is at the lower end of the scale.

Matters in Mitigation

34. For the at least some of the period the respondent had spoken to some of his staff, including solicitors, advising of his personal financial difficulties and assuring that they would not suffer any loss.

35. The respondent says that he was concerned about the potential impact on his practice and given his strained relationship with R, erred on the side of safety in the belief that advising R of the non-payment may cause unrest within the office and assuming that he could and would make the superannuation guarantee payments in time.

36. The non-payment was due to financial incapacity and during the relevant period the sum of $56,510.40 was paid by way of superannuation contributions.

37. The respondent suffered financial difficulties both due to a matrimonial break down in 2005 and significant cash flow difficulties with his firm during the period 2009 to 2012 where debtors increased caused partly by delayed reserve judgments from both the ACT Supreme Court and the Family Court.

38. The respondent had been advised by his accountant that the legal practice was always solvent and that the delay of payment of superannuation entitlements and creditors arose through delay in converting work in progress and debtors into cash.

39. The respondent has taken the following steps to better ensure prudent financial management of his practice to avoid any recurrence of non-payment of his fiscal responsibilities:

    (a) negotiated an increased overdraft facility with his banker to provide greater cash flow variability;
    (b) instructed an accountant to review internal office processes and procedure;
    (c) employed an external consultant to manage debt and debt collection;
    (d) taken steps to change the mix of work within the practice and arrange pre-payment of anticipated costs to be held in trust; and
    (e) enrolled in a one day seminar in practice management.

40. The respondent communicated with R during the period June 2013 to September 2013 regarding the non-payment.

41. The respondent is apologetic, remorseful and embarrassed by his conduct.

42. The applicant acknowledges that the respondent's full and frank admission of his wrongdoing ought to be given weight by the Tribunal.

43. The respondent's willingness to concede to the charges as pleaded was made almost immediately upon receipt of the sealed application. The respondent has been wholly cooperative with the applicant and the applicant's solicitors.

44. The parties accept that the respondent's plea will save considerable time and expense both for the applicant and the Tribunal and avoid the need for preparing affidavits of employees and calling witnesses on behalf of the applicant.

Antecedents

45. The respondent was the subject of a complaint received by the applicant on 3 August 2011 alleging a breach of an undertaking provided in a family law matter involving property. The applicant concluded that there was a reasonable likelihood of a finding being made by the tribunal that the respondent would be guilty of unsatisfactory professional conduct and exercised its discretion pursuant to section 413 of the Legal Profession Act to summarily conclude the matter on the basis that he was guilty of unsatisfactory professional conduct. The applicant issued the respondent with:

    (a) a public reprimand pursuant to subsection 413(2)(b) of the Legal Profession Act; and
    (b) a fine of $1,500 pursuant to subsection 413(3) of the Legal Profession Act.

46. The respondent was the subject of a of a complaint received by the applicant on 25 January 2013 concerning the failure to supervise an employed junior practitioner, failure to ensure the junior practitioner carried out the client's instructions, failure to complete instructions upon being advised that the junior practitioner had failed to complete the instructions, withdrawing funds from trust without authority, withdrawing funds from trust without providing the service and failure to give the client opportunity to object before withdrawing funds from trust. Following an application to the Tribunal under section 419 of the Legal Profession Act, the application was settled by consent on the basis that the respondent was guilty of unsatisfactory professional conduct. The Tribunal made the following orders by consent:

    (a) the respondent be issued with a public reprimand pursuant to subsection 425(3)(e) of the Legal Profession Act; and
    (b) the respondent pay a fine of $5,000 pursuant to subsection 425(5)(a) of the Legal Profession Act.

Proposed Penalty

47. In all the circumstances, the applicant contends that the professional misconduct complained of is at the lower end of the spectrum and seeks with the agreement of the respondent orders that:

    (a) the respondent be publicly reprimanded pursuant to subsection 425(3)(e) of the Legal Profession Act;
    (b) the respondent undertake and complete a course approved by the applicant in ethics and another course in practice management within 12 months pursuant to subsection 425(5)(b) of the Legal Profession Act;
    (c) the respondent be issued with a fine of $7,000 pursuant to subsection 425(5)(a) of the Legal Profession Act; and
    (d) the respondent pay the applicant's costs in a sum to be agreed or assessed pursuant to subsection 433(1) of the Legal Profession Act.

REASONS FOR THE DECISION

48. As stated above, in making orders pursuant to section 55 of the ACAT Act, the Tribunal must be satisfied that the proposed orders would be within the Tribunal's power and that orders in the agreed terms would be appropriate for the Tribunal to make.

49. The Tribunal's power to make the orders is derived from section 425 of the Legal Profession Act. This provision states as follows:

> ***425 ACAT orders—Australian legal practitioners***
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> *(1) If, after the ACAT has finished considering an application under this part in relation to an Australian legal practitioner, the ACAT is satisfied that the practitioner is guilty of unsatisfactory professional conduct or professional misconduct, the ACAT may—*
>
> *(a) make 1 or more of the orders mentioned in subsections (3) to (5); or*
>
> *(b) any other order it considers appropriate.*

50. Section 425(5) of the Legal Profession Act states that the Tribunal may make the following orders in relation to the Australian legal practitioner, inter-alia:

> *(5) The ACAT may make the following orders in relation to the Australian legal practitioner:*
>
> *(a) an order that the practitioner pay a fine of a stated amount of not more than the amount mentioned in section 427;*

(b) an order that the practitioner undertake and complete a stated course of further legal education;

51. The amount that may be imposed by way of fine under section 427 of the Legal Profession Act is $75,000 for a finding of professional misconduct.[9]

52. The Tribunal must order the practitioner to pay costs of the applicant if the Tribunal finds that the practitioner is guilty of professional misconduct, unless the Tribunal is satisfied that exceptional circumstances exist. No submissions have been made about exceptional circumstances in this case.

53. The Tribunal adopts the parties' submission that the impugned conduct is personal conduct that is sufficiently closely connected to actual practice so as to be fairly characterised as professional misconduct. The conduct of the respondent in failing to lodge his employees' superannuation entitlements relates primarily to his personal conduct as a principal of the firm and a director of the Company because he was dealing with employees rather than providing legal services. Nevertheless the authorities are clear that personal or non-practice conduct can amount to professional misconduct if the conduct is such that it would 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.[10]

54. The parties referred the Tribunal to several decisions at general law where prolonged avoidance of personal taxation obligations have been found by the tribunals to constitute professional misconduct. The Tribunal notes the definition of professional misconduct stated by Mason P in *New South Wales Bar Association v Cummins*[11] (as quoted above) and agrees with the parties' submission that the conduct here is closely connected with the respondent's practice in that it concerns his fiscal responsibilities to his employees but it is not conduct occurring in the course of practice in the sense of the provision of legal services. Notably, the applicant did not contend that the conduct brings into question the respondent's fitness for practice.

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[9] Section 427(1)(b) *Legal Profession Act 2006*
[10] *Myers v Elman* [1940] AC 282; *Re A Solicitor* [1960]
[11] [2001] NSWCA 284 at [56]

55. The Tribunal must consider whether it is 'appropriate' for it to make the orders recommended by the parties in the joint submission. In doing so, the Tribunal notes the guidance provided by the ADT in *Council of the New South Wales Bar Association v Butland*[12] and quoted by a differently constituted ADT in the *Council of the Law Society of New South Wales v Dalla*[13] regarding the matters that are to be taken into account in deciding whether to make the consent orders proposed by the parties in the agreed facts and joint submission.

> *An important principle stated in* [Butland] *by the tribunal is that where parties have jointly proposed an order or orders by way of penalty, it will not be useful to investigate whether the tribunal would 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*".[14]

56. So the question for the present Tribunal is to determine whether the proposed outcome is within the permissible range. The Tribunal has concluded that it is.

Consideration of the Relevant Case Law

57. The Tribunal has considered the case law referred to in the joint submission regarding the characterisation of the conduct. The joint submission contended that there is a decision precisely on point to the matter at hand, being the decision of the ADT in *Law Society of New South Wales v Bouzanis (Bouzanis*).[15] As stated above, in that case the solicitor failed to make the appropriate contributions for a period of three years. This is comparable to the period that the respondent failed to make the appropriate payments i.e. from 2009 to 2012. Mr Bouzanis was found to be guilty of professional misconduct and was publicly reprimanded and fined $10,000. The Tribunal notes that the fine imposed in *Bouzanis* was higher than the $7000 fine proposed by the parties in this case. The Tribunal notes and agrees with the comments made by Mr Blain on behalf of the respondent that he would urge against adopting an

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[12] [2009] NSWADT 177 at [29] – [31], [33] and [35]
[13] [2011] NSWADT 130
[14] [2011] NSWADT 130 at [20]
[15] [2006] NSWADT 55

approach which involves "some sort of mathematical progression"[16] when determining the appropriate fine. The question is whether the *Bouzanis* case requires the imposition of a higher fine. The *Bouzanis* case does have some unusual elements. For example, Member Dyster wrote a dissenting opinion on the basis that he considered that the Law Society mistook the nature of the respondent's offence, underestimated its gravity and presented the tribunal with an inadequate set of recommended orders.[17] Member Dyster considered that the tribunal should have adjourned the matter with a direction to the Law Society to consider its information. The majority of the panel in *Bouzanis* also commented that the "Law Society may have significantly underestimated the seriousness of the events giving rise to these proceedings."[18]

58. *Bouzanis* is distinguishable on the facts from the present matter in some respects. For example, the practitioner in *Bouzanis* did not make the payment until after he received correspondence from solicitors acting for the employee and the Law Society had intervened. The decision also mentions that a creditor's petition had been filed by the ATO by the time of the disciplinary hearing for the sum of $260,000.[19]

59. In the present case the practitioner acted after the ATO had provided him with a notice of audit on 18 October 2012. Importantly, the practitioner did not respond to the letters from R dated 26 June 2012 which advised the respondent of the apparent non-payment and requested the respondent to provide R with the records of the superannuation made to his nominated fund. The evidence was that the respondent communicated with R during the period June 2013 to September 2013 regarding the non-payment and payment was made in full by July 2013. As stated above, the ATO issued to the respondent a Superannuation Guarantee Charge Assessment for the amount of $135,854.31 which included an additional amount of interest in the sum of $29,394.28 and the ATO administration fee of $2,740.00.

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[16] Transcript of proceedings 13 November 2014 at page 23, lines 35 – 37
[17] *Bouzanis* at [27]
[18] *Bouzanis* at [25]
[19] *Bouzanis* at [19]

60. The respondent gave evidence in an open and frank manner. He testified that he suffered considerable financial difficulties during the relevant period when his debtors increased partly due to a delay in reserved judgments from both the ACT Supreme Court and the Family Court. During this time he was restrained in securing bank finance because of reduced equity in his property brought about by an earlier matrimonial settlement. A report was provided by the respondent's accountant which indicated that the firm had suffered a significant cash flow problem and there was a consequent delay in converting work in progress and debtors into cash, which led to a delay in payment of superannuation entitlements and creditors.[20] However, at all relevant times the business was solvent.

61. In relation to the communications with staff, the respondent testified that he dug his "head into the sand" and was "dealing with things as they exploded."[21] The practitioner indicated that he had discussed the failure to pay the superannuation payments with some members of staff, including solicitors, advising them of his financial difficulties and assuring them that they would not suffer loss. He conceded that he only spoke to small number of the total number of staff, possibly four employees out of an average of 15–17 staff during the relevant period.[22] He advised that he informed some employees and not others because he was "embarrassed by the situation" and

> *didn't want to encourage chaos and have everybody or the business fail". … I was in a position where things [were] very very tight. We try to pay them as best as we can when we are expecting X amount of money or some particular case will come through. But I'm a bit snookered in terms of raising money*.[23]

62. However, he emphasised that during the period when the superannuation was not paid no staff were terminated or made redundant.[24] He expressed a concern about maintaining the jobs of his employees.

63. He said in evidence that he would tell people about the superannuation payments on a need-to-know basis because he did not want to create panic nor

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[20] Exhibit R2
[21] Transcript of Proceedings 13 November 2014 at page 20 lines 29 to 31
[22] Affidavit of N1 dated 11 November 2014 at [2], [5]
[23] Transcript of proceedings 13 November 2014 page 11 lines 32 – 39
[24] Affidavit of N1 dated 11 November 2014 at [5]

did he want to it to be known through the general legal community that all was not well in his business.[25]

64. When asked why he did not respond to R's first letter about the superannuation entitlement, he indicated that he and R did not have a good relationship. He thought that if R was informed that R would:

> *(a) tell everyone in the business through emails and (b) tell everyone around the legal profession and that would have disastrous effects and even be more embarrassing*.[26]

65. Another case that the Tribunal must consider is the *Law Society of New South Wales v Koffel (Koffel).*[27] In that case the tribunal considered the main reason for the non-payment of the superannuation employees was the financial difficulties experienced by a major client of the practitioner. The tribunal ultimately dismissed the application stating that they considered that the practitioner had done all that he reasonably could to discharge his obligations to pay the superannuation guarantees.

66. The evidence discussed above indicates that the present practitioner did not do all that he reasonably could to satisfy his statutory obligations, that is to pay the superannuation entitlements, but he has adequately explained why the situation arose and this is a matter that the Tribunal can take into account by way of mitigation after making a finding of professional misconduct.

67. The other comparable case is *Law Society of New South Wales v Gillroy*[28] where there were two practitioners who suffered a significant deterioration in their financial situation and therefore deferred making their statutory payments of tax including superannuation contributions. At an early stage they commenced negotiations with the ATO regarding their failure to make the payments and notified their employees that they were not making superannuation contributions. The tribunal ordered that the first respondent be publicly reprimanded and attend courses on practice management and ethics and that his practice be subject to mentoring. The tribunal considered that the original

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[25] Transcript of proceedings dated 13 November 2014 at page 11 at lines 40 – 44
[26] Transcript of proceedings dated 13 November 2014 page 12 at lines 24 – 29
[27] [2010] NSWADT 149
[28] [2010] NSWADT 232

evidence of contrition by this practitioner was "vague"[29] but it was later established in cross-examination. The tribunal imposed a reprimand to the second respondent on the basis that he had been quick to acknowledge the nature of a breach of personal obligations and express contrition.

68. Similarly in *Law Society of New South Wales v Delpopolo*[30] the non-payment of superannuation was for a similar period of three years from 2008 to 2011 and the firm was of a comparable size to the present one. In that case the practitioner had informed staff and held meetings during 2010 – 2011 to keep them informed of the cash flow problems and advised them that superannuation had not been paid. However, applying *Koffel*, the tribunal was not persuaded that the respondent "had done all that she reasonably could to satisfy the statutory obligations of the employer to pay the superannuation guarantee levies" because, inter alia, she had expanded the practice by employing staff and by doing so risked the entitlements of her employees.[31]

Consideration of the antecedents

69. The Tribunal notes that the respondent has two antecedents. The first complaint was received by the applicant on 3 August 2011 alleging a breach of an undertaking provided in a family law matter involving property. In the second antecedent the respondent was the subject of a complaint received by the applicant on 25 January 2013 concerning his failure to supervise an employed junior practitioner. The tribunal made orders by consent where the respondent was issued with a public reprimand and a fine of $5000.

70. The first complaint was summarily disposed of by the Law Society in 2011. At this point the respondent had been two years into the non-payment of superannuation. The second complaint arose after the respondent had paid the relevant superannuation payments of $135,854.31, interest in the sum of $29,394.28, and administration fees in the amount of $2740.

71. On behalf of the applicant Mr Buxton argued that the antecedents were both matters that involved concurrent conduct so they are not antecedents in the true

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[29] *Gillroy* at [34]
[30] [2014] NSWCATOD 55
[31] *Delpopolo* at [47]

sense. It was argued that the first antecedent was concurrent behaviour which was not dealt with until after the repayments had been made. The second 'antecedent' was after the relevant events. Mr Blain on behalf of the respondent urged the Tribunal to give less weight to the antecedents because the respondent had not been "brought to book" by the earlier transgressions.

72. In so far as an analysis of a practitioner's antecedents is relevant because people are supposed to take account of previous conduct in order to inform their future conduct, the Tribunal accepts the proposition put by the parties. However, antecedents also have a wider function which is a broad assessment of the practitioner's conduct in the light of the Tribunal's obligation to protect the public. In that respect, the obligation of an employer to secure employees' superannuation entitlements is a very important obligation. It is a fundamentally important responsibility that employers undertake.

73. The Tribunal accepts that the conduct involved in the antecedents at least partly occurred concurrently with the present matter. Tribunal therefore gives some weight to the antecedents but less weight than would be required if the practitioner was aware of the complaints and relevant conduct prior to the commission of the acts which form the subject of the current proceedings.

Conclusion

74. The Tribunal is comfortably satisfied that the respondent engaged in professional conduct by failing over a period of three years to pay the superannuation entitlements of his employees. The Tribunal considers that the penalty proposed by the parties is within the permissible range and agrees with the analysis provided in the joint submission. Applying the authorities discussed above to the present matter, the Tribunal concludes the following:

    (a) The practitioner was quick to acknowledge the charges as pleaded and has been wholly cooperative with the applicant (*Gillroy*).
    (b) The respondent is contrite (*Gillroy*).
    (c) The respondent gave evidence in an open and frank manner (*Delpopolo*).
    (d) The respondent did not do all that he reasonably could to satisfy his statutory obligations (*Koffel*) therefore the imposition of a fine is appropriate. Although he found himself in a very difficult financial

situation he was not sufficiently frank about the superannuation payments with his employees. He gave an explanation for this which included a concern about maintaining his employees' jobs, his strained relationship with R and his concern about the consternation that might ensue if information about the firm's financial circumstances was disseminated.

(e) The appropriate fine is $7000 which is less than the $10,000 applied in *Bouzanis*. However there are some relevant factual differences between the present case and *Bouzanis* which the Tribunal has discussed above. Overall, the Tribunal considers that the fine of $7000 is within the permissible range.

75. The Tribunal is satisfied that the proposed orders set out in the joint submission are within the Tribunal's power and appropriate for the Tribunal to make. The relevant orders are made accordingly.

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General President L Crebbin
For and on behalf of
Senior Member P Spender

HEARING DETAILS

FILE NUMBER:	OR14/14
PARTIES, APPLICANT:	Council of the Law Society of the ACT
PARTIES, RESPONDENT:	N1
SOLICITORS FOR APPLICANT	Mr Buxton, Dibbs Barker
SOLICITORS FOR RESPONDENT	Mr Blain, Porters Lawyers
HEARING DATES:	3 October 2014 31 October 2014 13 November 2014
TRIBUNAL MEMBERS:	Professor P Spender