QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Legal Services Commissioner v Redmond* [2018] QCAT 231
PARTIES:	**LEGAL SERVICES COMMISSIONER** (applicant) **v** **WILLIAM HANRON REDMOND** (respondent)
APPLICATION NO/S:	OCR056-17
MATTER TYPE:	Occupational regulation matters
DELIVERED ON:	17 July 2018
HEARING DATE:	9 May 2018
HEARD AT:	Brisbane
DECISION OF:	Hon Peter Lyons QC, Judicial Member Assisted by: Mr Scott Anderson Mr Keith Revell
ORDERS:	**1. The application is dismissed.** **2. Any party applying for an order for costs is to file and serve submissions in support of the application within seven days of the publication of these reasons; and the other party is to file and serve submissions in reply within a further period of seven days.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT – OTHER MATTERS – where respondent allegedly failed to meet financial obligations in regards to an employed solicitor – whether professional misconduct – whether conduct happened in connection with the practice of law – whether conduct 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 – whether conduct involved a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence *Legal Profession Act* 2007 (Qld), s 5(1), s 28, s 418, s 419, s 452, s 656C,

[3] Between 1 September 2001 and 1 November 2009, the respondent was a principal of the law practice known as Redmond van der Graaff. From 1 November 2009 to 8 April 2013 the respondent was the principal of a legal practice known as Redmond + Redmond (Trading Co Pty Ltd). Between 9 April 2013 and 18 March 2015, the respondent was the principal of the law practice known as Redmond (Red Lawyers Pty Ltd). He is now the managing director of Redmond + Redmond Lawyers.

Unmet obligations

[4] Between August 2006 and 18 March 2015, Mr Raymond Murphy was a solicitor employed by the practices just referred to. The respondent terminated Mr Murphy's employment at the end of that period.

[5] Between 1 July 2009 and 18 March 2015, superannuation contributions payable in respect of Mr Murphy totalling $13,570.75 were not paid. These amounts were payable under the *Superannuation Guarantee (Administration) Act* 1992 (Cth) ('*SGA Act*').

[6] Between 1 July 2007 and 18 March 2015, Mr Murphy was not paid the full amount due to him as wages, the shortfall being $6,060.45.

[7] On the termination of his employment, Mr Murphy became entitled to the sum of $37,846.14 representing 24 weeks of annual leave which he had not taken. By the same date, Mr Murphy had accrued 7.46 weeks of long service leave, with the consequence that, on termination, he became entitled to the sum of $11,763.82. These amounts were not paid at that time.

[8] Each of these unmet obligations provides the foundation for each of the four charges made in the discipline application brought against the respondent.

Respondent's explanation

[9] The respondent has provided an affidavit relating to the non-payment of these sums. He said that from 2007 onwards, he was personally involved in a multitude of litigious matters, resulting in his experiencing increased financial pressures. Mr Murphy was aware of these pressures, as he had the day to day conduct of a number of the respondent's personal litigation files.

[10] The respondent gave evidence that, when he changed firms in 2009, Mr Murphy came to his new firm on substantially the same terms as those for his employment with the previous firm, and was fully cognisant of the respondent's financial position and the pending litigation. Mr Murphy was, in the period 2009 to 2013, fully supportive of the respondent during his financial struggles, and in some weeks, offered to forego wages to allow the respondent to pay junior staff.

[11] After Mr Murphy filed his complaint with the applicant on 15 September 2015, it was necessary to clarify what was owing to Mr Murphy, which made it necessary to obtain expert evidence. The clarification has resulted in an amendment of the application (by the omission of an allegation that the respondent failed to pay Mr Murphy a further sum of $6,623.07 for annual leave loading).

[12] The respondent provided further information about his financial difficulties. He said that, in 2007, his net worth was of the order of $4 million. He had acquired

and it has not been suggested that the evidence should not be accepted. Accordingly, this application should be determined on the basis of it.

Legislation relating to Tribunal proceedings

[22] Section 452 of the LP Act authorises the Commissioner to make an application, called a discipline application, to this Tribunal for an order against a Queensland solicitor in relation to a complaint. Section 453 requires the Tribunal to hear and decide each allegation made in the application. Section 456 confers on the Tribunal the power to make orders on the completion of a hearing, if it is satisfied that the respondent has engaged in unsatisfactory professional conduct or professional misconduct.

[23] Under s 656C of the LP Act, the Tribunal may act on an allegation if satisfied of it on the balance of probabilities, but the degree of satisfaction required will vary according to the consequences of the finding for the respondent.

[24] By s 28 of the QCAT Act, the Tribunal is required to act fairly and according to the substantial merits of the case. It must observe the rules of natural justice. However, it is not bound by the rules of evidence, and may inform itself in any way that it considers appropriate.

Tests for the assessment of the respondent's conduct

[25] The LP Act contains statutory definitions relevant to the allegations against the respondent. Thus s 418 of the Act provides:

> ***Unsatisfactory professional conduct*** includes conduct of an Australian legal practitioner happening in connection with the practice of law that falls 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.

[26] Section 419 of the same Act provides that:

> (1) ***Professional misconduct*** includes:
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> (a) unsatisfactory professional conduct of an Australian legal practitioner, if the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence...

[27] Because these definitions are inclusive, and because these (or similar) expressions were in common use before the LP Act was enacted, common law tests for the assessment of such conduct remain relevant. In *Adamson v Queensland Law Society Inc,*[1] Thomas J said, with respect to professional misconduct:

> ...the test to be applied is whether the conduct violates or falls short of, to a substantial degree, the standard of professional conduct observed or approved by members of the profession of good repute and competency.

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1 (1990) 1 Qd R 498, 507.

competent legal practitioner, tested by reference to the ordinary meaning of the statutory language.

[33] It is convenient at this point to say something about Mr Murphy's attitude to the unmet obligations during the period of his employment. The evidence shows that he continued to work in the employment of the firms associated with the respondent, knowing the respondent's financial difficulties, and he demonstrated some willingness to accommodate them. That is consistent with the fact that, in the period between 2007 and 2015, wages totalling a little over $6,000 were unpaid. An available inference is that, until the termination of his employment, Mr Murphy was prepared to accept the extent to which Mr Redmond met his financial obligations in respect of Mr Murphy, having regard to the circumstances in which Mr Redmond found himself. The inference is more readily available in respect of wages than in respect of superannuation contributions, as the former would be directly paid to Mr Murphy. It is not relevant to the entitlement to payment for accrued annual leave, and the entitlement for long service leave, which only accrued on the termination of Mr Murphy's employment. This consideration is not necessary for the conclusion which has been reached on the basis of the statutory language; though it may well be relevant if a different view were taken of the reference to the expected standard of competence and diligence in the statutory definition. It would also be relevant if the applicant had relied on the *Allinson* test.

[34] Subsequent to the hearing, further submissions were sought from the parties on the question whether the respondent's conduct in respect of charges 1 and 2 involved a consistent failure to reach or keep a reasonable standard of competence and diligence. These charges were selected because, at the hearing, Counsel for the applicant appeared to accept that the obligations the subject of charges 3 and 4 arose at a time when the respondent did not have the means to meet them; and accordingly his failure to meet them did not relate to competence and diligence.

[35] The respondent's further submissions accepted that past cases revealed an established pattern of tribunals characterising the failure to meet such obligations as professional misconduct. That was consistent with the position taken in his earlier submissions, though he stated that the characterisation of the conduct is ultimately a matter for the Tribunal. The further submissions referred to *Law Society of New South Wales v Bouzanis*[3] and *Legal Services Commissioner v Budgen*.[4]

[36] The applicant's further submissions adopted, without addition, the respondent's further submissions. That is consistent with the position taken by the applicant in his submissions at the hearing. In the earlier submissions, the applicant contended that comparable cases, identified in the submissions and relating principally to a failure to comply with superannuation obligations, demonstrated that disciplinary bodies took a dim view of a practitioner's failure to pay employee entitlements; and it was submitted that this led to a finding that the present respondent was guilty of professional misconduct. It is therefore necessary to review the cases to which the parties have referred.

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3 [2006] NSWADT 55.

4 [2011] QCAT 223.

payment of tax, 'may constitute professional misconduct'.[8] However, the Tribunal went on to qualify that statement by saying that that is so if the conduct involves a substantial or consistent failure to reach or keep a reasonable standard of competence and diligence, or the misconduct violates or falls short, to a substantial degree, of the standard of professional conduct observed or approved by members of the profession of good repute and competency. Significantly, the qualification demonstrates that a failure to meet important social fiscal responsibilities does not automatically constitute professional misconduct. The decision is not supportive of the applicant's contention.

[41] The applicant's earlier submissions referred to *Legal Services Commissioner v Hope*.[9] There, the solicitor had failed, over a period of about 18 months, to pay superannuation contributions in respect of three employees, in a total amount of approximately $10,000. The Tribunal found this to be unsatisfactory professional conduct, a finding which the applicant sought to distinguish. The charges alleged that payment of the contributions was required by the SGA Act. In accepting a joint submission that the conduct should be characterised as unsatisfactory professional conduct, the Tribunal observed that the 'conduct may, in terms of s 420 of the *Legal Profession Act* 2007, constitute either unsatisfactory professional conduct, or professional misconduct,'[10] (later relying on s 419 for the conclusion that professional misconduct was the more serious of the two types). It noted that in each case, the definition in s 420 included conduct 'consisting of a contravention of relevant law'. Unfortunately, the Tribunal's attention was not directed to the precise terms of the section, which referred to 'a contravention of a relevant law' (emphasis added), a relevant law being defined to mean specified statutes, not including the SGA Act. The finding in *Hope* does not provide a proper basis for making a finding that the respondent's conduct amounted to professional misconduct or unsatisfactory professional conduct.

[42] It is convenient at this point to consider the schedule of cases provided by the applicant. In *Law Society of New South Wales v Vosnakis*,[11] the solicitor had failed to pay superannuation contributions for four employees for varying periods of up to 9 years. He was also guilty of other, arguably more serious, misconduct. He admitted the allegations made against him, and offered no explanation. The Tribunal concluded, without discussion, that his failure to pay moneys due for employee superannuation contributions, PAYG tax, and GST, constituted professional misconduct. This decision represents a finding of fact, and is of no real assistance in the present case.

[43] In *Law Society of New South Wales v Gillroy*,[12] two solicitors were the directors of a company that conducted a legal practice. The practice had failed to pay Group Tax (withheld PAYG tax), employee superannuation contributions, and GST. The total amount was $213,852.81, of which $34,101.81 was for superannuation contributions. They admitted they were guilty of professional misconduct. They gave evidence of the financial difficulties experienced by the practice, and their

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8 Ibid [20].
9 [2010] QCAT 184.
10 Ibid [8].
11 [2007] NSWADT 42.
12 [2010] NSWADT 232

reasonable standard of competence and diligence, and to fall within the *Allinson* test.[22] There was no reference to any explanation from the practitioner for this failure. Nor was there any discussion which explained the finding relating to competence and diligence; though it might be noted that a similar finding was made in respect of a failure to remit PAYE deductions and GST totally $853,048.

[48] The complainant in *Law Society of New South Wales v Delpopolo* was employed as a secretary/paralegal by the practice conducted by the respondent through a company.[23] Superannuation contributions for the first period of employment (approximately six months) were not paid until about two months after the end of that period, and superannuation contributions for the balance of the employment (a little more than two years) were not paid in full, the total reaching $11,115, before a sum of $6,000 was paid about 10 months after the employment ended. It was accepted that the failure to pay arose from a lack of resources flowing from the poor financial performance of the legal practice.[24] Nevertheless it was found '[c]onsistently with the authorities referred to' that the failure was 'a sufficiently serious abrogation of (the practitioner's) financial responsibilities in the practise of law to warrant a finding by the Tribunal that she is guilty of professional misconduct'. There is no further explanation of the finding, and the test applied is not identified. A significant feature of the case is that the practitioner attempted to expand the practice and she employed other people at a time when she failed to meet the obligation to pay superannuation contributions for the complainant. It may be regarded as one of the stronger sources of support for the applicant's position.

[49] In *Council of the Law Society of NSW v Kingston*,[25] the practitioner had failed to pay superannuation entitlements and PAYG tax. The totals fluctuated; but the Deputy Commissioner of Taxation obtained judgement against the practitioner in a sum of $315,536.21, including $47,203.61 for superannuation contributions. Subsequently, the liability for unpaid superannuation entitlements increased to $103,350.01. At about the same time it appeared that the practitioner's assets exceeded his liabilities by about $1 million. Although he made some attempt to do so, he had not sold his home or either of his branch offices. The practitioner admitted that his conduct amounted to professional misconduct. The Tribunal so found. It accepted a submission that it could not be said that it had been shown that the practitioner did what he believed he could reasonably do in all the financial circumstances to meet his revenue responsibilities (when he became aware of the defaults).[26] It also concluded that the conduct would be 'reasonably regarded as disgraceful or dishonourable by professional brethren of good repute and competency'.[27] These conclusions, and the facts otherwise, distinguish that case from the present case.

[50] In *Council of the Law Society of the ACT v Legal Practitioner N1*,[28] the practitioner had made superannuation payments for staff of $56,510.40, constituting only

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22 *Allinson v General Council for Medical Education and Registration* [1894] 1 AB 750; see [2014] NSWCATOD 49 [120]-[121].

23 [2014] NSWCATOD 55.

24 Ibid [47].

25 [2014] NSW CATOD 21.

26 Ibid [33].

27 Ibid [37].

28 [2016] ACAT 36.

[55] The following orders should be made:

(a) The application is dismissed;

(b) Any party applying for an order for costs is to file and serve submissions in support of the application within seven days of the publication of these reasons; and the other party is to file and serve submissions in reply within a further period of seven days.