

CITATION: *Legal Services Commissioner v Budgen* [2011] QCAT 223

PARTIES: Legal Services Commissioner
(Applicant)
v
Rodney Richard Budgen
(Respondent)

APPLICATION NUMBER: LPD004-07

MATTER TYPE: Occupational regulation matters

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: **Justice Alan Wilson, President**
Assisted by:
Mr Matthew Woods
(Practitioner Panel Member)
Dr Susan Dann
(Lay Panel Member)

DELIVERED ON: 24 May 2011

DELIVERED AT: Brisbane

ORDERS MADE:

- 1. That the respondent, Rodney Richard Budgen, be publicly reprimanded;**
- 2. That he pay superannuation in the amount of \$17,252.20 on behalf of Alison Joy Protheroe to the superannuation fund, Sunsuper (Member no 900764643); and**
- 3. That he pay the applicant's costs fixed at \$1,500.**

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – PROFESSIONAL MISCONDUCT OR UNSATISFACTORY PROFESSIONAL CONDUCT – where the respondent was charged with alleged failure to comply with a statutory obligation to make superannuation payments on behalf of an employee, and four counts of allegedly failing to comply with written notices from the Commissioner – where a joint submission was received from the Commissioner

and the respondent – where it is accepted that counts 2-5 are categorised as professional misconduct – whether the respondent’s alleged failure to make superannuation payments constituted unsatisfactory professional conduct or professional misconduct

Legal Profession Act 2007, ss 418, 419, 423, 452
Legal Profession Act 2004
Queensland Law Society Act 1952
Queensland Civil and Administrative Tribunal Act 2009

Law Society of New South Wales v Bouzanis
 [2006] NSWADT 55, cited
Legal Services Commissioner v Hewlett [208]
 LPT 3, cited
Legal Services Commissioner v Hope [2010]
 QCAT 184, cited

APPEARANCES and REPRESENTATION (if any):

This matter was heard and determined on the papers, pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (QCAT Act). A joint submission was received from the Legal Services Commissioner and Mr Budgen.

REASONS FOR DECISION

- [1] Mr Budgen was admitted as a solicitor in 1991. He is now 47. He practices on his own behalf as Budgen Lawyers at Brendale. He is an *Australian lawyer* within the definition of that term in the *Legal Profession Act 2007* (LPA).
- [2] In late 2007 the Commissioner brought what the LPA calls a *Discipline Application* under s 452 against Mr Budgen. It contained five charges: an allegation of a failure to comply with the statutory obligation to make superannuation payments on behalf of an employee, and four counts of allegedly failing to comply with written notices from the Commissioner.¹
- [3] After the matter came to QCAT in late 2009 it was ordered that the parties attend a compulsory conference before the Deputy President, her Honour Judge Kingham. Prior to that conference, Mr Budgen had admitted all the factual allegations particularised in the charges and, at the conference, he and the Commissioner agreed that he would file an affidavit outlining his personal and financial circumstances and any matters he wished to put forward in mitigation of his conduct, and the parties would then file joint submissions, whereafter this Tribunal would deal with the matter on the papers.
- [4] All those things occurred and the Tribunal convened on 9 March 2011 to consider the matter.

¹ That is, notices issued under s 269(3) of the LPA.

- [5] Under the LPA there are two levels of misconduct for the purposes of these disciplinary proceedings. The first is *unsatisfactory professional conduct* which is defined in s 418 to include conduct which 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.
- [6] Under s 419 the more serious count, *professional misconduct*, includes unsatisfactory professional conduct involving a substantial or consistent failure to reach or keep a reasonable standard of competence and diligence; and, conduct which might justify a finding that the practitioner is not a fit and proper person to engage in legal practice.
- [7] Some of the offending here occurred when previous legislation, the *Legal Profession Act 2004* (LPA 2004), was in effect but, under s 423 of the LPA, Chapter 4 of the later Act applies to the conduct of an Australian legal practitioner whether before or after the commencement of the section.
- [8] The Commissioner contends, and Mr Budgen accepts, that counts 2-5 (relating to a failure to comply with notices) constitute professional misconduct. Mr Budgen's failure to comply with notices from the Commissioner within 14 days creates offences which are automatically categorised as *professional misconduct*.²
- [9] The only point continuing in issue between the parties is whether or not the first charge (failing to make superannuation payments) should be categorised as unsatisfactory professional conduct, or professional misconduct.
- [10] The failure occurred over a long period – between 1997 and 2005 – and involved a failure to make superannuation contributions of \$17,252 for an employee who worked as a conveyancing clerk, and secretary, in Mr Budgen's practice.
- [11] In *Legal Services Commissioner v Hope* [2010] QCAT 184 the solicitor had failed to pay superannuation contributions for three employees over a 19 month period. It was accepted that his offending occurred over a relatively short period of time during a long legal career; that it happened at a time when the practitioner had had significant health problems leading to a deterioration of his financial position; and, that he had cooperated fully with the Commissioner and taken steps to rectify the financial loss suffered by the employees. In those circumstances the Tribunal categorised the conduct as unsatisfactory professional conduct.
- [12] In *Law Society of New South Wales v Bouzanis* [2006] NSWADT 55, the solicitor failed to make superannuation payments for an employee over a period of three years and the unpaid amount was a little under \$10,000. The Administrative Decisions Tribunal held that the failure of the practitioner was a '*...serious abrogation of his fiscal responsibilities in the practice of law*'. He was found guilty of professional misconduct, publicly reprimanded, and ordered to pay a fine.

² LPA 2004, s 269(4); LPA, s 443(4).

- [13] Here, Mr Budgen's misconduct occurred over a much longer period, and involved a significantly larger amount, than in *Bouzanis*.
- [14] In his affidavit Mr Budgen says that in the relevant period an entity called the Budgen Family Trust supplied services, including staff, to his legal practice; that he was not the trustee; and, that the trustee at the time '*...formed an intention of not dealing with the issue...*'.
- [15] Later paragraphs in his affidavit suggest his ex-wife may have been the trustee, but that is not clear. It is also said that some problems associated with his practice or a partnership or other difficulties may have contributed to the non-payment, at least in later periods around 2004 or 2005, but just how that might have occurred is unclear.
- [16] On the face of Mr Budgen's affidavit his only relevant response appears to be that he was not the trustee of the entity which should have made the superannuation contribution payments.
- [17] Although his affidavit also speaks of matrimonial problems and difficulties with depression requiring medical treatment, those things do not appear to have been operating against him in the period to which count one relates – 1997 to 2005.
- [18] Mr Budgen's affidavit does not, otherwise, describe the financial structure of his practice at the time in detail, but it may safely be assumed that non-payment of an employee's superannuation contributions involved at least an indirect financial benefit to him; and, that he was always in a position to check, and ensure, that these contributions were being paid in the proper amounts and on time.
- [19] Those assumptions arise logically from his full admission of the terms of the first charge against him (that is, the failure to comply with a statutory obligation to make superannuation payments on behalf of his employee).³
- [20] Recent decisions of this, and similar tribunals show that a practitioner's failure to meet important social fiscal responsibilities, like the payment of tax, may constitute professional misconduct if (in the words of section 419(1)(a) of the LPA) that 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 of, to a substantial degree, the standard of professional conduct observed or approved by members of the profession of good repute and competency.⁴
- [21] As the Chief Justice observed in *LSC v Hewlett* [208] LPT 3 at [21], a practitioner's capacity and commitment to uphold the law and ensure its due application will be thrown into question whether the practitioner is personally guilty of a substantial contravention of the law, knowingly and deliberately, and for personal financial advancement.

³ Statement of Respondent filed 6 June 2008.

⁴ *Adamson v Queensland Law Society Incorporated* [1991] Qd R 498 at 507.

- [22] The Tribunal accepts that the practitioner's conduct here, continuing over more than eight years and involving a substantial sum which has not to date been paid, should be categorised as professional misconduct.
- [23] The practitioner's failure to comply with notices after 2007 has occurred, as the practitioner swears and the Commissioner accepts, in circumstances where he has been affected by a marriage breakdown and a depressive illness. Mr Budgen says that problems of this kind actually commenced in 2005, when his mother became ill and his marriage deteriorated significantly, and they explain how and why he failed to respond to the four notices which have led to each of the subsequent charges.
- [24] His affidavit, which is unchallenged (save in respect of Mr Budgen's claim that count one should not be categorised as professional misconduct) paints a sad picture of both personal and professional decline from and after 2005 including, at the present time, attempts by the practitioner to maintain his sole practice while seeking employment and attempting, too, to support his three children.
- [25] It is those factors which explain the Commissioner's acceptance of a joint submission that Mr Budgen's conduct does not demonstrate unfitness to practice, and that an appropriate penalty would involve a public reprimand, an order that he pay the outstanding superannuation; and, that he pay the Commissioner's costs.
- [26] The Tribunal accepts that penalties in these cases are not imposed as punishment, but rather in the interests of protecting the community from unsuitable practitioners.⁵ The principal offending ceased six years ago. Counts 2-5 involve convictions for professional misconduct, but in circumstances where that misconduct may be said to have been ameliorated by the practitioner's acceptance of the charges against him, and his cooperation with the Commissioner, the Court and this Tribunal.
- [27] The first charge also involves offending that falls into the more serious category – professional misconduct – but, again, it ceased some years ago and in the absence of any evidence of re-offending or anything to suggest a risk of that kind, the Tribunal accepts that a public reprimand is a sufficient sanction.
- [28] It will be ordered that, on each count, the practitioner's conduct constitutes professional misconduct under s 419 of the LPA; that on each charge he be publicly reprimanded; that, in respect of charge one he be ordered to pay superannuation in the amount of \$17,252.20 on behalf of Alison Joy Protheroe to the superannuation fund, Sunsuper (Member no 900764643) pursuant to section 456(1) of the LPA; and that he also pay the Commissioner's costs, fixed in the amount of \$1,500.⁶

⁵ *Legal Services Commissioner v Madden* [2008] QCA 301.

⁶ LPA, s 462(5)(a).