JURISDICTION	**:**	STATE ADMINISTRATIVE TRIBUNAL
ACT	**:**	LEGAL PROFESSION ACT 2008 (WA) STATE ADMINISTRATIVE TRIBUNAL ACT 2004 (WA)
CITATION	**:**	LEGAL SERVICES AND COMPLAINTS COMMITTEE and McCARDLE [No 2] [2023] WASAT 131 (S)
MEMBER	**:**	PRESIDENT PRITCHARD MR D AITKEN, SENIOR MEMBER MR R POVEY, MEMBER
HEARD	**:**	24 APRIL 2024
DELIVERED	**:**	24 APRIL 2024
PUBLISHED	**:**	6 MAY 2024
FILE NO/S	**:**	VR 133 of 2019
BETWEEN	**:**	LEGAL SERVICES AND COMPLAINTS COMMITTEE Applicant AND ROXANNE MAREE McCARDLE Respondent

Catchwords:

Vocational regulation – Legal practitioners – Professional misconduct – Practitioner's conduct such as to justify finding that she was not a fit and proper person to engage in legal practice – Penalty for professional misconduct –

Practitioner not the holder of a current practising certificate – Practitioner admitted to practice interstate – Tribunal's powers in respect of practitioners admitted to practice interstate – Whether orders should be made recommending the practitioner not be permitted to obtain a practising certificate or recommending practitioner be removed from interstate roll – Section 440 of the *Legal Profession Act 2008* (WA) – No remorse – Recommendation that the name of the practitioner be removed from interstate roll, namely South Australian Roll of Practitioners – Costs – Respondent to pay applicant's costs

Legislation:

Legal Practitioners Act 1981 (SA), s 82(6)(v), s 89(5)
Legal Profession Act 2008 (WA), s 403, s 438, s 438(2), s 438(2)(b), s 439, s 440, s 440(a), s 440(c), s 441, s 446(2)
Legal Profession Conduct Rules 2010 (WA), Pt 13, r 6(2)(b), r 6(2)(c), r 34(1), r 34(2)
Legal Profession Uniform Law (Victoria), s 299(1)
State Administrative Tribunal Act 2004 (WA), s 87(2)

Result:

The Tribunal recommends the respondent's name be removed from an interstate roll, being the Roll of Practitioners maintained in South Australia

The practitioner to pay the applicant's costs fixed at $55,384

Category: B

Representation:

Counsel:

Applicant	:	Mr C Bailey with Ms N Mulvaney
Respondent	:	No appearance

Solicitors:

Applicant	:	Legal Services Complaints Committee
Respondent	:	No appearance

Cases referred to in decision(s):

Khosa v Legal Professional Complaints Committee [2017] WASCA 192
Legal Profession Complaints Committee and A Legal Practitioner [2013] WASAT 37 (S)
Legal Profession Complaints Committee and McCardle [2020] WASAT 51
Legal Profession Complaints Committee and McCardle [No 2] [2023] WASAT 131
Legal Profession Complaints Committee and Metaxas [2021] WASAT 82 (S)
Legal Services and Complaints Committee and Lawson [2021] WASAT 152 (S)
Marvelle Investments Pty Ltd and Argyle Holdings Pty Ltd [2010] WASAT 125 (S)
Medical Board of Australia and Costley [2013] WASAT 2
Medical Board of Western Australia v Roberman [2005] WASAT 81 (S); (2005) 39 SR (WA) 47
Panegyres v Medical Board of Australia [2020] WASCA 58
Paradis v Settlement Agents Supervisory Board [2007] WASCA 97; (2007) 33 WAR 361
Perth Central Holdings Pty Ltd and Doric Constructions Pty Ltd [2008] WASAT 302
Rae and Prima Homes Nominees Pty Ltd [2020] WASAT 24
Western Australian Planning Commission v Questdale Holdings Pty Ltd [2016] WASCA 32
Young v Legal Profession Complaints Committee [2022] WASCA 52

REASONS FOR DECISION OF THE TRIBUNAL:

(These reasons were delivered contemporaneously and have been edited from the transcript to correct grammatical errors or infelicity of expression)

Introduction

1 On 22 December 2023, we delivered to the parties our reasons for decision in this matter (**Primary Reasons**).[1] The parties were provided with a copy of those reasons in full, and on 5 February 2024 we published a redacted copy of the Primary Reasons.

2 These reasons are supplemental to the Primary Reasons and should be read together with them. The same abbreviations have been used.

3 In the Primary Reasons, we made findings of professional misconduct pursuant to s 438 of the *Legal Profession Act 2008* (WA) (**LP Act**) in relation to each of the three grounds alleged against the respondent. We made orders to enable us to hear from the parties as to the precise terms of the orders which should be made to reflect those findings, and as to the programming of a hearing as to penalty and costs.

4 On 23 February 2024, we made final orders concerning our findings of professional misconduct against the respondent (**Orders**). On the same date, we made programming orders for the filing of submissions and evidence in respect of penalty and costs, and for the listing of a hearing to determine what penalty should be imposed and what, if any, order should be made in respect of any application for costs.

5 The respondent did not comply with the orders for the filing of submissions on penalty and costs within the time required by the Tribunal. However, on 8 February 2024, and in the afternoon and evening of 23 April 2024, she sent emails comprising submissions to the Tribunal. The applicant objects to the receipt of those submissions which were filed out of time and dealt with matters other than the penalty and costs. However, as there is no prejudice to the applicant, we have received the respondent's submissions. In summary, her position is: first, that the Tribunal does not have jurisdiction to determine this proceeding; secondly, that the proceeding is an abuse of

[1] ***Legal Profession Complaints Committee and McCardle [No 2]*** [2023] WASAT 131 (**Primary Reasons**).

process; and thirdly, that the Tribunal's findings as to professional misconduct were erroneous and/or not supported by the evidence.

6 We will return to the issue of jurisdiction later in these reasons. As to the second and third of the matters raised by the respondent, those are matters she is at liberty to pursue in an appeal court if she so wishes. It is not appropriate for us to make any comment about them.

7 The respondent has not attended today, nor has she responded to the Tribunal's attempts this morning, at the commencement of the hearing, to contact her to give her a final opportunity to attend. In her email last evening the respondent indicated she would not attend. We are satisfied that she has been given notice of this hearing, that having chosen not to attend herself she has not arranged for a legal practitioner to attend on her behalf and, in those circumstances, that it is appropriate that we proceed, notwithstanding her absence.

8 The applicant seeks orders:

1. Pursuant to s 438(2)(b) and s 440(a)[2] of the *Legal Profession Act 2008* (WA) (**LP Act**) that the Tribunal recommends the respondent's name be removed from an interstate roll, being the Roll of Practitioners maintained in South Australia; and

2. Pursuant to s 87(2) of the *State Administrative Tribunal Act 2004* (WA) the respondent pay the applicant's costs fixed in the sum of $55,384 with such costs to be paid to the applicant within 30 days or as otherwise agreed between the parties.

---

[2] Section 440 of the LP Act relevantly provides:

> The State Administrative Tribunal may, under section 438(2)(b), make any one or more of the following orders —
>
> (a) an order recommending that the name of the practitioner be removed from an interstate roll;
>
> (b) an order recommending that the practitioner's interstate practising certificate be suspended for a specified period or cancelled;
>
> (c) an order recommending that an interstate practising certificate not be granted to the practitioner before the end of a specified period;
>
> (d) an order recommending that —
>
> (i) specified conditions be imposed on the practitioner's interstate practising certificate, or existing conditions be amended; and
>
> (ii) the conditions be imposed or amended for a specified time; and
>
> (iii) the conditions specify the time (if any) after which the practitioner may apply to the Tribunal for the conditions to be amended or removed.

9 Having regard to the Primary Reasons and to the parties' submissions, and for the reasons which follow, we have determined that the orders sought by the applicant should be made.

Jurisdiction

10 At the outset, we should address the respondent's contention that the Tribunal does not have jurisdiction to deal with this proceeding. Her argument was the same as that which she has previously advanced, namely that the Application falls within federal jurisdiction. For the reasons set out in the Primary Reasons,[3] we remain of the view that the jurisdictional argument advanced by the respondent is incapable, on its face, of legal argument. We are satisfied that the Tribunal has jurisdiction to deal with the Application.

Evidence relied upon by the applicant in relation to penalty

11 The applicant relied on the affidavit of Ayesha Emily D'Souza affirmed 11 March 2024. Ms D'Souza's affidavit dealt with three things.

12 **First**, she annexed copies of invoices of senior counsel relevant to the applicant's application for costs.

13 **Secondly**, attached to Ms D'Souza's affidavit was a letter from the Law Society of South Australia which confirmed that, as at 27 February 2024, the respondent remained on the South Australian Roll of Practitioners.

14 **Thirdly**, Ms D'Souza attached documents indicating the outcome of enquiries she had made about disciplinary findings in relation to the respondent, including information about proceedings involving the Victorian Legal Services Commissioner and the Legal Profession Conduct Commissioner (South Australia) (**SA Commissioner**).

15 In summary, the practitioner's disciplinary history, apart from the present findings, is as follows:

(a) On 2 November 2015, this Tribunal found that on 9 September 2014 the practitioner had engaged in unsatisfactory professional conduct within the meaning of s 402 and s 438 of the LP Act, in that in the course of acting for a client in care and protection proceedings commenced by the Department for Child Protection and Family Support (**DCP**) regarding the client's

[3] **Primary Reasons** at [78] – [88].

three children, the practitioner's conduct fell short, to a substantial degree, of the standard of professional conduct observed, or approved of, by members of the legal profession of good repute and competence, in that the practitioner prepared and sent a letter of complaint to the DCP about the client's DCP case worker when the practitioner was recklessly indifferent as to whether there were reasonable grounds for those allegations in the complaint, and in respect of one of the allegations, it was not relevant to the complaint, and was made with the sole intention of impugning the character and personal and professional integrity of the case worker. The respondent was reprimanded and ordered to pay a fine in the sum of $2,000 together with costs;

(b) On 30 November 2016, the Victorian Legal Services Commissioner found the respondent had engaged in unsatisfactory professional conduct, pursuant to s 299(1) of the *Legal Profession Uniform Law* (Vic) in that on 26 April 2016, the respondent had applied to renew her employee practising certificate for the following year and failed to disclose adverse disciplinary findings relating to her legal practice in Western Australia and unresolved complaints made to the Office of the Legal Commissioner in South Australia. The respondent was reprimanded for that conduct (**Victorian Decision**);

(c) On 3 June 2022, the Legal Practitioners Disciplinary Tribunal of South Australia (**SA Tribunal**), by a majority, found the respondent guilty of two counts of unsatisfactory professional conduct pursuant to the *Legal Practitioners Act 1981* (SA) (**SA LP Act**) in that she failed to adequately respond to two notices issued by the SA Commissioner, which required her to provide information in relation to an investigation of a complaint. However, of greater concern to all of the members of the SA Tribunal was the respondent's behaviour in the course of that proceeding, which included:

- her refusal to accept the SA Tribunal's ruling as to jurisdiction;
- the fact that she made allegations to the effect that it was unlawful for the proceedings to continue and that the SA Tribunal members and the SA Commissioner were engaging in misconduct;

- maladministration and (if reasons were published) defamation;
- that she focused on what she perceived to be her unfair treatment by the SA Commissioner;
- that she filed submissions which were prolix, repetitive, confused, misconceived and irrelevant;
- that she showed no understanding of how to go about gathering and presenting evidence; and
- that she accused the SA Commissioner of being dishonest in proceedings in the Supreme Court and of having engaged in corrupt behaviour.

Having regard to her conduct, the SA Tribunal was not confident that the practitioner could properly and competently represent clients. The SA Tribunal recommended that disciplinary proceedings be issued in the Supreme Court against the practitioner pursuant to s 82(6)(v) of the SA LP Act, because it concluded that, quite independently of its finding of unsatisfactory professional conduct, the practitioner was not a fit and proper person to practise law. No application has yet been filed in the South Australian Supreme Court pending the outcome of the present proceedings. Under s 89(5) of the SA LP Act, the Supreme Court is entitled (but not bound) to accept and act on the SA Tribunal's findings without any further enquiry.

16 In her submission of 23 April 2024, the practitioner submitted that:

> … a search in April 2024 has revealed that there is no disciplinary action recorded in the records publicly available in South Australia, Victoria or Queensland and this is despite the [Commissioner in South Australia] having commenced and finalised proceedings in its Legal Practitioners Disciplinary Tribunal around 2022/2023 …

17 We note that according to the documents attached to Ms D'Souza's affidavit, the Victorian Decision is available publicly on AustLII. It is not clear whether the decision of the SA Tribunal has been published. In any event, the respondent was a party to each of those proceedings and so must have been aware of them.

18 Further, the respondent made no reference to the Western Australian proceedings in this Tribunal in 2015 in which she participated and agreed to consent orders.

19 The respondent's submissions with respect to her disciplinary history are, at the least, inaccurate and potentially misleading as to her disciplinary history. Her failure to acknowledge that history is concerning.

Summary of our findings as to professional misconduct and assessment of the seriousness of the conduct, the subject of those findings

20 The Orders set out our findings that the respondent was guilty of professional misconduct in three respects. It is convenient to set out those Orders here.

> 1. The respondent is guilty of professional misconduct within the meaning of s 403 of the *Legal Profession Act 2008* (WA), in that the respondent's conduct:
>
> (a) would reasonably be regarded as disgraceful or dishonourable by practitioners of good repute and competence;
>
> (b) demonstrates that she is not a fit and proper person to engage in legal practice; and
>
> (c) contravened rules 6(2)(b) and 6(2)(c) of the Legal Profession Conduct Rules 2010 (WA);
>
> by, during the period from March 2013 to March 2017:
>
> (d) maintaining an application for a Violence Restraining Order in the Magistrates Court of Western Australia, which application was later ordered to be permanently stayed;
>
> (e) commencing and maintaining an appeal in the District Court of Western Australia from the decision referred to in (d) above, which appeal was dismissed;
>
> (f) commencing and maintaining an appeal from the decision referred to in (e) above to the Court of Appeal, which appeal was dismissed;
>
> (g) commencing and maintaining an application for special leave to the High Court of Australia from the decision referred to in (f) above, which application was refused;

(h) commencing and maintaining an application in the Magistrates Court of Western Australia to set aside the decision referred to in (d) above and to seek other orders, which application was dismissed;

(i) commencing and maintaining a further appeal to the District Court of Western Australia from the decision referred to in (h) above, which appeal was dismissed;

in circumstances where:

(j) the maintenance of the application referred to in (d) above, and the commencement and maintenance of the applications or appeals referred to in (e) to (i) above was each an abuse of process; and

(k) individually and collectively, the conduct referred to in (d) to (i) above was conduct which would diminish public confidence in the administration of justice and which may bring the profession into disrepute.

2. The respondent is guilty of professional misconduct within the meaning of s 403 of the *Legal Profession Act 2008* (WA), in that the respondent's conduct:

(a) would reasonably be regarded as disgraceful or dishonourable by practitioners of good repute and competence;

(b) demonstrates that she is not a fit and proper person to engage in legal practice; and

(c) contravened rules 6(2)(b) and 6(2)(c) of the *Legal Profession Conduct Rules 2010* (WA);

by:

(d) between around May 2013 to September 2014, making applications in the course of proceedings in a court, for the disqualification of the presiding judge (Disqualification Application), and to restrain the legal representatives of the opposing party from acting for that party, and by commencing and maintaining an appeal in an appeal court from the decision to dismiss the Disqualification Application, where each of the applications and the appeal:

(i) lacked any or any proper or reasonable basis;

(ii) was an abuse of process; and

(iii) had the potential to diminish public confidence in the administration of justice and to bring the profession into disrepute;

(e) in the course of court proceedings, made oral statements or sent written communications to the court on 31 July 2013, 28 August 2013, 12 February 2015 and 27 March 2015 which were discourteous, intemperate and scandalous; and

(f) in the course of court proceedings on 31 July 2013 misread from transcript in a manner which had the potential to mislead the court, in circumstances where the respondent was recklessly indifferent to whether her misreading of the transcript had the potential to mislead and whether the court would be misled.

3. The respondent is guilty of professional misconduct within the meaning of s 403 of the *Legal Profession Act 2008* (WA) by swearing and filing an affidavit on 5 July 2013 in a court which contained a false statement, in circumstances where the respondent was recklessly indifferent to whether the statement was false and whether the court would be misled by it, and by subsequently failing to correct the statement, which conduct:

(a) would reasonably be regarded as disgraceful or dishonourable by practitioners of good repute and competence;

(b) demonstrates that she is not a fit and proper person to engage in legal practice; and

(c) contravened rules 6(2)(b), 6(2)(c) and rule 34(1) of the *Legal Profession Conduct Rules 2010* (WA).

21 As is apparent on the face of the Orders, and as was explained in the Primary Reasons, each of the findings of professional misconduct in Grounds 1 and 2 was based on a number of instances of conduct which individually, as well as collectively, constituted professional misconduct.[4]

22 It can be seen that the nature of the conduct encompassed by Grounds 1, 2 and 3 comprised:

(a) nine instances, in proceedings in different courts, of either maintaining, or commencing and maintaining, applications or appeals which were an abuse of process;

[4] **Primary Reasons** at [280] – [282], [288], [408] – [409], [417], [419], [421].

(b) a number of instances on various dates on which the respondent made submissions or communicated with a court in a manner which was discourteous, intemperate and scandalous;

(c) misreading from a transcript in a manner which had the potential to mislead the appeal court, in circumstances where the respondent was recklessly indifferent to that possibility; and

(d) swearing and filing an affidavit that was false in a material respect, namely that the respondent deposed that the presiding judge made a comment in respect of the practitioner's submissions when the true position was that the presiding judge did not make that comment, and that the respondent was recklessly indifferent as to whether the affidavit was false and as to whether the appeal court would be misled by it.

23 The individual instances of conduct, the subject of each of the grounds, were, individually, serious or very serious instances of professional misconduct. Taken collectively, the practitioner's conduct overall was extremely serious professional misconduct.

Relevant principles as to penalty

24 For the reasons we set out in the Primary Reasons, the relevant provisions of the LP Act have ongoing operation in relation to this matter, notwithstanding its repeal on and from 1 July 2022.[5]

25 Section 438(2) of the LP Act provides that the Tribunal may, after it has completed a hearing in relation to a referral under Part 13 of the LP Act, in respect of an Australian legal practitioner, either make and transmit a report to the full bench of the Supreme Court on its finding that the practitioner is guilty of, amongst other things, professional misconduct, or make any one or more of the orders specified in s 403, s 439, s 440 and s 441 of the LP Act.

26 In this case, the respondent was first admitted to practice in South Australia, and we found that at the date of the last hearing her name remained on the South Australian Roll of Practitioners.[6] Section 440 of the LP Act permits the Tribunal, under s 438(2)(b), to make orders including, amongst other things, an order recommending that the name of a practitioner be removed from an interstate roll.

[5] **Primary Reasons** at [60] – [75].
[6] **Primary Reasons** at [51].

27 The relevant principles to be applied in determining the appropriate disciplinary sanction in this case are well established. They were set out by the Court of Appeal in ***Khosa***[7] and summarised by the Tribunal in ***Lawson***[8] as follows:

> (a) The Tribunal's jurisdiction in this regard is not to be exercised for the purpose of punishing the relevant practitioner but, rather, for the protection of the public and the maintenance of the reputation and standards of the legal profession;
>
> (b) The protection of the public includes both general deterrence of other practitioners who might otherwise be tempted to engage in the relevant conduct as well as deterrence personal to the relevant practitioner;
>
> (c) Where the Tribunal concludes that a practitioner is presently unfit to practise, a choice is presented between the alternatives of suspension and striking off. An order for suspension in those circumstances may only be made on the basis that, at the termination of the period of suspension, the practitioner will no longer be unfit to practise because, at that time, the practitioner's name will still be on the roll of practitioners and they may resume practise;
>
> (d) Suspension is a serious form of discipline which is usually imposed to discipline the legal practitioner, who has committed an act of unprofessional conduct but who, in the opinion of the Tribunal, at the end of the period of suspension, will be a fit and proper person to practise law;
>
> (e) In the context of suspension, present unfitness to practise may be understood to include a serious breach of professional obligations reflecting, to a significant degree, upon the practitioner's fitness to practise;
>
> (f) However, where the Tribunal finds that the practitioner's present unfitness to practise reveals or discloses that the practitioner, in fact, lacks the character and trustworthiness necessary to discharge his or her obligations of legal practice or the practitioner is permanently or indefinitely unfit to practise, striking off will ordinarily be the appropriate response rather than suspension;
>
> (g) In seeking to understand the difference, it will be relevant to consider whether the practitioner appreciates or otherwise the impropriety of his or her conduct because a lack of appreciation

[7] ***Khosa v Legal Professional Complaints Committee*** [2017] WASCA 192 at [188] – [192].
[8] ***Legal Services and Complaints Committee and Lawson*** [2021] WASAT 152 (S) at [29].

of impropriety and a lack of insight increases the risk of recurrence of the improper conduct;

(h) Fitness to practise for the purpose of penalty is to be determined at the time of the relevant hearing and not at the time of the misconduct.

28 In ***Metaxas***[9] the Tribunal observed:

> In summary, where an order for removal from the roll is contemplated, the ultimate question is whether the impugned conduct of the practitioner and all of the surrounding circumstances demonstrates that the practitioner is not a fit and proper person to remain a member of the legal profession. Where the conduct of the practitioner indicates that they lack the qualities of honesty and integrity, striking off is likely to be the penalty because those character deficiencies are unlikely to be remedied during a period of suspension. In contrast, suspension would generally be appropriate where:
>
> (a) the Tribunal considers that although the practitioner has fallen below the high standards required of a practitioner, the circumstances are such that [the Tribunal is satisfied that] their current unfitness to practise will be overcome during a period of suspension; or
>
> (b) although the practitioner is thought to be fit to practise, the seriousness of the practitioner's conduct [in this particular case] is such that the appropriate outcome is a period of suspension in order to protect the public, through general deterrence, and otherwise maintain the standards of the profession.

Disposition

The nature of the conduct

29 As we have observed, the individual instances of the conduct the subject of Grounds 1, 2 and 3 were, individually, serious or very serious instances of professional misconduct. Taken collectively, the practitioner's conduct overall constituted extremely serious professional misconduct. As our findings make clear, the respondent's conduct was such as to justify a finding that she was not a fit and proper person to engage in legal practice.

30 Ground 1 was concerned with six instances of either maintaining, or commencing and maintaining, applications or appeals which were an abuse of process. The conduct the subject of Ground 2 encompassed a

[9] ***Legal Profession Complaints Committee and Metaxas*** [2021] WASAT 82 (S) at [15].

further three instances of the respondent commencing applications or appeals, each of which had no proper basis, and thereby constituted an abuse of process, and was conduct which would be regarded as disgraceful or dishonourable to practitioners of good repute and competence. Furthermore, as explained in our reasons, in so far as the conduct the subject of Ground 1 was concerned, on the majority of occasions, the respondent had been told by the relevant court that the proceedings were, in effect, an abuse of process and that an alternative proper course of action was available to her to address her grievance, and yet she nevertheless continued to commence and maintain subsequent applications or appeals.[10]

31 Each of those instances of conduct was demonstrative of a failure to appreciate and observe the most fundamental standards expected of practitioners, namely their duties to the courts not to pursue baseless proceedings, and thereby to waste the time and resources of the courts, and their duties of fairness to other parties not to pursue baseless proceedings so as to unnecessarily cause inconvenience and costs to those other parties.[11]

32 We found that each of those instances of maintaining, or commencing and maintaining, applications or appeals which were an abuse of process was, individually and collectively, conduct which would reasonably be regarded as disgraceful or dishonourable by practitioners of good repute and competence. We also found that such conduct, when engaged in by a practitioner acting on their own behalf in litigation, gives rise to an apprehension that legal practitioners are willing to pursue court proceedings where such proceedings could not be justified, and to do so in their own self-interest, and that conduct of that kind diminishes public confidence in the administration of justice and may have the effect of bringing the profession into disrepute.[12] We found that such conduct, individually, as well as collectively, was conduct which constituted a breach of rule 6(2)(b) and rule 6(2)(c) of the Conduct Rules, in that it was prejudicial to, or would diminish public confidence in, the administration of justice and have the effect of bringing the profession into disrepute.[13] Finally, we found that a practitioner who was willing to engage in multiple instances of such conduct was someone who could not command the personal confidence of their clients, fellow practitioners, or judges, and consequently that

[10] **Primary Reasons** at [216], [232], [237], [250].
[11] **Primary Reasons** at [280], [408] – [409].
[12] **Primary Reasons** at [281].
[13] **Primary Reasons** at [288] and [409].

the conduct justified a finding that the respondent was not a fit and proper person to engage in legal practice.[14]

33 Ground 2 also encompassed a number of instances, on various dates, on which the respondent made submissions or communicated with the court in a manner which was discourteous, intemperate and scandalous. The practitioner's conduct on each of those dates was appalling. We found that that conduct was conduct which would be regarded as disgraceful or dishonourable to practitioners of good repute and competence.[15] We also found that that conduct was a breach of rule 6(2)(b) and rule 6(2)(c) of the Conduct Rules because it conveyed a lack of respect for the court and the justice system more broadly, which necessarily had the potential to diminish public confidence in the administration of justice and to bring the profession into disrepute.[16] And we found that the practitioner's conduct on those occasions, on the various dates, individually and collectively, was such as to justify a finding that she was not a fit and proper person to engage in legal practice, because her conduct was fundamentally at odds with what is expected of legal practitioners, and that consequently practitioners, clients and the courts could not have the confidence in the respondent which is essential for fitness to practice.[17]

34 The other conduct the subject of Ground 2 encompassed an instance of conduct in which the respondent misread from transcript in a manner which had the potential to mislead the appeal court, and that she did so with reckless indifference. We found that the respondent's conduct in not accurately reading from the transcripts and being recklessly indifferent to the potential that she would mislead the appeal court, was conduct which was not different in nature to implying a false state of affairs or creating a misleading impression, each of which constitutes a breach of a practitioner's paramount duty of honesty to the court.[18] We found that the respondent's conduct constituted conduct which would be regarded as disgraceful or dishonourable to practitioners of good repute and competence.[19] We also found that that conduct was a breach of rule 6(2)(b) and rule 6(2)(c) of the Conduct Rules because to mislead a court in that way necessarily has the

[14] **Primary Reasons** at [283], [408] – [409].
[15] **Primary Reasons** at [419].
[16] **Primary Reasons** at [419].
[17] **Primary Reasons** at [421].
[18] **Primary Reasons** at [416].
[19] **Primary Reasons** at [417].

potential to diminish public confidence in the administration of justice and to bring the profession into disrepute.[20]

35 The conduct the subject of Ground 3 was that practitioner swore and filed an affidavit that was false in a material respect, namely that the respondent deposed that the presiding judge made a comment in respect of the practitioner's submissions when the true position was that the presiding judge did not make that comment. We found that the respondent was recklessly indifferent as to whether the affidavit was false and as to whether the appeal court would be misled by it.[21] We found that the respondent's conduct in relation to the affidavit would be regarded as disgraceful or dishonourable to practitioners of good repute and competence. We found that the practitioner breached rule 34(1) of the Conduct Rules in that she recklessly misled the appeal court, and that she failed to correct her evidence when it became apparent that the affidavit was false, and thereby breached rule 34(2) of the Conduct Rules. We also found that the respondent's conduct constituted a breach of rule 6(2)(b) and rule 6(2)(c) of the Conduct Rules because the conduct was liable to undermine public confidence in the integrity and honesty of legal practitioners, which necessarily has the potential to diminish public confidence in the administration of justice and to bring the profession into disrepute.

36 We found that the nature of that conduct was fundamentally at odds with the paramount duty of honesty and candour which a legal practitioner owes to the court, and consequently we were unable to see how the respondent could command the confidence of practitioners, clients and the courts which is essential to engage in legal practice. We found that the practitioner's conduct was such as to justify a finding that she is not a fit and proper person to engage in legal practice.

37 We explained in the Primary Reasons our reasons for all of our conclusions that the practitioner's conduct would be regarded as disgraceful or dishonourable to practitioners of good repute and competence, constituted a breach of the Conduct Rules, and was such as to justify a finding that she is not a fit and proper person to engage in legal practice. It is not necessary to repeat those reasons here.

38 Professional misconduct occasioned by misleading a court in submissions or by swearing a false affidavit, in particular, constitutes so serious a breach of the fundamental duties of a practitioner as to be

[20] **Primary Reasons** at [417].
[21] **Primary Reasons** at [428].

incompatible with the continued privilege of engaging in legal practice. In those respects alone, and all the more so in conjunction with the other serious instances of conduct amounting to professional misconduct, the practitioner's conduct demands a penalty that protects the public and maintains the standards of the profession by preventing the practitioner from being able to engage in legal practice. In the circumstances of this case, where the practitioner does not hold a practising certificate, that amounts to a question whether the Tribunal should make an order under s 440(a) or s 440(c) of the LP Act.

A global penalty is appropriate

39 In circumstances, as here, where the penalty called for is a strike off, it is appropriate to approach the question of penalty on a global basis so as to impose a penalty for the respondent's professional misconduct as a whole.[22]

What penalty is appropriate

40 The question then is whether the appropriate penalty in this case is an order under s 440(a) or s 440(c) of the LP Act. However, the conduct involved is of such seriousness as to leave us in no doubt that the appropriate penalty is to recommend that the respondent be struck off. We have reached that conclusion for the following reasons.

41 **First**, the conduct the subject of these proceedings was not some isolated incident. There is nothing to suggest that the conduct was attributable to some personal circumstance on the practitioner's part which represented an anomaly from her usual behaviour. On the contrary, the conduct the subject of our findings of professional misconduct involved multiple instances of conduct, each of which, in and of themselves, constituted serious professional misconduct and which occurred over a period of four years from 2013 to 2017.

42 **Secondly**, the respondent's conduct involved multiple departures from the most fundamental duties of a practitioner and of the essential qualities for legal practice, namely fairness, honesty and candour, and integrity. The conduct is indicative of a fundamental lack of understanding of the standards of behaviour expected of a legal practitioner and a lack of respect for the courts. It must be doubted whether a person who engaged in such conduct over a sustained period has the personal qualities essential to legal practice. That conduct, on

[22] ***Legal Profession Complaints Committee and A Legal Practitioner*** [2013] WASAT 37 (S) at [18] and [19].

so many occasions, over four years, strongly supports the conclusion we reached that the respondent is not a fit and proper person to engage in legal practice. Absent some evidence of a significant change in attitude or behaviour, so as to suggest that there is some prospect of rehabilitation, we are unable to see any basis on which to conclude that the respondent is now a fit and proper person, so that if she were merely precluded from being granted a practising certificate for a specified period that she might be fit to resume practice after that time period.

43 **Thirdly**, while we acknowledge that the conduct the subject of our findings took place over five years ago, and in some instances up to a decade ago, the respondent's disciplinary history supports the conclusion that she has continued to engage in conduct of a similar nature.

44 The summary of the respondent's disciplinary history to which we have already referred is sufficient to disclose that both the conduct the subject of the finding of this Tribunal in 2015, and the conduct which caused the SA Tribunal to recommend a report be made to the South Australian Supreme Court, bears some similarity to some of the conduct the subject of the present proceedings. What that other disciplinary conduct thus demonstrates is a continuing inclination on the respondent's part – and in the case of the SA Tribunal proceedings, up to as recently as 2021 – to engage in conduct which is incompatible with the standards expected of a practitioner. The continuation of such conduct is indicative of an unwillingness to meet the standards of conduct expected of a legal practitioner or of an inability to appreciate or understand what those standards are, and why they are important to the operation of the legal profession and to our justice system.

45 We accept the applicant's submission that the practitioner's disciplinary history, and in particular the finding by the SA Tribunal that the respondent is not fit and proper to practise law as a result of her conduct in the course of those proceedings, are highly relevant to whether this Tribunal could be satisfied that the respondent could be deemed fit to practise again, if precluded from doing so for a period. The applicant submitted, and we accept, that this Tribunal could not be so satisfied.

46 **Fourthly**, the respondent has expressed no remorse whatsoever for her conduct. Nor has she offered any explanation for her conduct. To the extent that she has participated in this penalty stage of the proceedings, solely by sending emails and/or submissions, her conduct

suggests she has no remorse. That is because she has continued to claim that the Tribunal does not have jurisdiction to deal with the Application, despite that question having been determined, first in 2020 by the President,[23] and affirmed by us in the Primary Reasons, and despite the fact that the respondent has not commenced an appeal against the Orders.

47 The respondent has chosen not to engage with the Tribunal's findings as to her conduct, relevant to the determination of penalty. We should mention here that in her communication to the Tribunal, by email dated 23 April 2024 at 7.06 pm, the practitioner indicated that she would not attend the penalty hearing today 'unless ordered to do so by [the Tribunal and that] ordering attendance of the parties and or their lawyers is the normal order if a court or a tribunal or a commission has any jurisdiction to do so'. We have made no order requiring the attendance of the respondent at either the primary hearing or at this penalty hearing. It is entirely up to the respondent, as it is for all practitioners who are the subject of disciplinary proceedings, whether they wish to attend and participate in those proceedings. The Tribunal has, however, made clear at all times, that the practitioner may attend the hearings by video-conference or telephone. The fact that the practitioner has chosen not to participate, other than by sending emails and submissions by email, reflects a continuing unwillingness on her part to accept her professional failings and thus no prospect of rehabilitation if she were precluded from being granted a practising certificate for a time.

48 Finally, there is no evidence of any other matter of mitigation which the Tribunal could take into account to ameliorate our assessment of the seriousness of the conduct, or of the penalty necessary to protect the public and to maintain the standards of the profession.

49 Taking all of these considerations into account, we are left in no doubt whatsoever that this is a case in which the only appropriate penalty is to recommend that the respondent be struck off the roll of practitioners in South Australia.

Costs

50 The applicant seeks an order for costs in the amount of $55,384.

[23] ***Legal Profession Complaints Committee and McCardle [2020]*** WASAT 51 at [4] – [35].

Principles in relation to costs

51 As we have already observed, the Costs Application was made pursuant to s 87(2) of the SAT Act.

52 The starting point in relation to any application for costs in the Tribunal is that, subject to any contrary provision in an enabling Act, the parties to proceedings bear their own costs unless the Tribunal orders otherwise.[24] However, the Tribunal has a discretion to order a party to pay all or any of the costs of another party.[25]

53 The legal rationale for an order for costs under s 87(2) is that the order is not to punish the person against whom the order is made, but to compensate or reimburse the person in whose favour it is made. Accordingly, even in the statutory context where the presumptive position is that no costs will be ordered, generally speaking the question is whether, in the particular circumstances of the case, it is fair and reasonable that a party should be reimbursed for the costs it incurred. The onus is on the party seeking an order in its favour.[26]

54 The Tribunal's discretion in relation to the award of costs is a wide one. Nevertheless, it is exercised judiciously and not capriciously.

55 In vocational regulatory proceedings, where a regulatory body is successful in obtaining relief for misconduct or unprofessional unsatisfactory conduct by a respondent, it is common (if not ordinarily the case) for the Tribunal to order that the respondent pay all or some of the costs of the regulatory body.[27] That approach reflects the public policy that regulatory bodies perform functions which promote the public interest, usually with limited resources, and the concern that the financial burden of bringing disciplinary action, if the regulatory body has no capacity to recover some or all of its costs, might act as a disincentive to bring such disciplinary action, or to ensure that all allegations against a practitioner are properly and thoroughly presented.[28]

---

[24] SAT Act, s 87(1).
[25] SAT Act, s 87(2).
[26] ***Western Australian Planning Commission v Questdale Holdings Pty Ltd*** [2016] WASCA 32 at [51] (Murphy JA and Corboy J agreeing); see also ***Young v Legal Profession Complaints Committee*** [2022] WASCA 52 (***Young***) at [259].
[27] ***Young*** at [261] (Buss P); ***Medical Board of Western Australia v Roberman*** [2005] WASAT 81 (S); (2005) 39 SR (WA) 47 (***Roberman***) at [30], referred to with approval in ***Paradis v Settlement Agents Supervisory Board*** [2007] WASCA 97; (2007) 33 WAR 361 at [35].
[28] ***Roberman*** at [30].

56 In assessing costs, the Tribunal takes a 'robust and broad-brush approach' and bases its determination on what reasonable allowance should be made for the work necessarily done to bring the proceedings to a conclusion.[29]

57 An assessment of costs should be approached in a broad fashion and should not descend into an inquiry into small items of expenditure.[30]

58 Although the assessment of costs involves a relatively broad and robust approach, the Tribunal must be satisfied that the costs claimed are reasonable and necessary.[31] The Tribunal must also be satisfied that the costs claimed are not excessive.[32] Any costs awarded must be compensatory and not punitive in nature.[33]

59 Furthermore, the Tribunal must explain why an award of costs is reasonable and, if so, in what amount.[34]

Disposition

60 In respect of the costs up to and including the hearing on 5 May 2022, the applicant limits its claim for costs to disbursements only (comprising Senior Counsel's fees and the Tribunal's filing fee). The total amount of Senior Counsel's fees was $49,686. That amounts to approximately 92 hours charged at $539 per hour which was the applicable scale rate for Senior Counsel. Although its case was wholly documentary, the number of documents, and the many separate proceedings which had to be traversed and understood meant that this case was more factually complex than might otherwise have been expected. In those circumstances, we consider the number of hours of work claimed (which itself was written down by Senior Counsel) was entirely reasonable, as was the scale rate at which it was charged.

61 By the time the Tribunal delivered the Primary Reasons, the Senior Counsel previously engaged by the applicant had been appointed to the Supreme Court, and the applicant elected not to brief new (external) counsel. Rather, the remaining counsel work was undertaken by Mr Bailey, a solicitor employed by the applicant. He appeared at the hearings concerned with the Orders, undertook the preparation of

[29] ***Medical Board of Australia and Costley*** [2013] WASAT 2 at [66].
[30] ***Perth Central Holdings Pty Ltd and Doric Constructions Pty Ltd*** [2008] WASAT 302 at [67].
[31] ***Marvelle Investments Pty Ltd and Argyle Holdings Pty Ltd*** [2010] WASAT 125 (S) (***Marvelle***) at [48] – [49].
[32] ***Rae and Prima Homes Nominees Pty Ltd*** [2020] WASAT 24 at [69].
[33] SAT Act, s 87(3).
[34] ***Panegyres v Medical Board of Australia*** [2020] WASCA 58 at [393]; ***Marvelle*** at [48] – [49].

submissions for the penalty and costs hearing, and attended at this hearing. We consider that the applicant should be granted costs in respect of Mr Bailey's legal work. That is entirely reasonable.

62 The applicant seeks that the Tribunal fix a reasonable amount for Mr Bailey's work which it says amounted to approximately 12 hours of work. At the applicable scale rate of $429 per hour, that amounts to $5,148. We think that the amount of time spent, and the rate which the applicant seeks be applied, are entirely reasonable.

63 We are satisfied that an award of costs in the sum of $55,384 is fair, reasonable and appropriate.

Orders

The Tribunal orders:

1. Pursuant to s 438(2)(b) and s 440(a) of the *Legal Profession Act 2008* (WA), the Tribunal recommends the respondent's name be removed from an interstate roll, being the Roll of Practitioners maintained in South Australia.

2. Pursuant to s 87(2) of the *State Administrative Tribunal Act 2004* (WA) the respondent pay the applicant's costs fixed in the sum of $55,384 with such costs to be paid to the applicant within 30 days or as otherwise agreed between the parties.

3. Notwithstanding Order 3 of the orders made on 22 December 2023, the applicant may disclose an unredacted copy of the Tribunal's reasons delivered on 22 December 2023 to any person or body in accordance with s 446(2) of the *Legal Profession Act 2008* (WA) and those persons or bodies may use or disclose the reasons for the purpose of carrying out their regulatory functions.

I certify that the preceding paragraph(s) comprise the reasons for decision of the State Administrative Tribunal.

PM
Associate to the Honourable Justice Pritchard

6 MAY 2024