

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Legal Services Commissioner v Bentley (No 2)* [2020]
QCAT 78

PARTIES: **LEGAL SERVICES COMMISSIONER**
(applicant)

v

ZEKE DAVID BENTLEY
(respondent)

APPLICATION NO/S: OCR225-18

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 3 April 2020

HEARING DATE: 24 March 2020

HEARD AT: Brisbane

DECISION OF: Hon Peter Lyons QC, Judicial Member

ORDERS:

- 1. Within 7 days, the applicant is to send to each complainant a copy of the following documents:**
 - (a) The amended discipline application filed 17 May 2019;**
 - (b) Statement of Agreed Facts filed 14 October 2019;**
 - (c) Outline of Submissions on behalf of the Applicant filed 13 March 2020;**
 - (d) Outline of Submissions on behalf of the Respondent filed 23 March 2020; and**
 - (e) A copy of these reasons.**
- 2. The matter be listed for a telephone directions hearing, with the parties and the complainants or their legal representatives to attend by telephone or some other suitable means of remote communication, not earlier than 14 days after the publication of these reasons to the parties.**
- 3. Any party, and any complainant, has liberty to apply for a variation of these directions on three days' notice.**

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS –
COMPLAINTS AND DISCIPLINE – DISCIPLINARY

PROCEEDINGS – QUEENSLAND – PROCEEDINGS IN TRIBUNALS – where a complainant has filed a Notice of Intention to Claim Compensation – where another complainant has shown an intention to claim compensation – where the complainants are not parties to the disciplinary application – where the Tribunal proposed the making of a direction giving the complainants an opportunity to be heard in relation to findings to be made about the respondent’s conduct – where the Legal Services Commissioner opposed this proposal on the basis that complainants have no right to be heard until a finding of unsatisfactory professional conduct or professional misconduct is made by the Tribunal – where s 656B of the *Legal Profession Act 2007* (Qld) permits complainants to appear at the hearing of a discipline application in relation to those aspects of the hearing that relate to a request for a compensation order – whether matters relating to findings to be made about the respondent’s conduct are ‘aspects of the hearing that relate’ to a request for a compensation order – whether the complainants should be given an opportunity to be heard in relation to the findings to be made about the respondent’s conduct

Legal Profession Act 2007 (Qld) s 429, s 452, s 453, s 456, s 457, s 464, s 465, s 656A, s 656B

Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 28, s 29, s 39, s 41, s 42, s 62

Legal Services Commissioner v McHenry (No 2) [2020] QCAT 50

APPEARANCES & REPRESENTATION:

Applicant: M Nicholson, instructed by Legal Services Commission

Respondent: J D Batch QC, instructed by Irish Bentley Lawyers

REASONS FOR DECISION

- [1] A teleconference directions hearing was conducted on 24 March 2020, with a view to avoiding an oral hearing attended by the parties or their legal representatives in person, if possible. A contentious issue emerged relating to the future conduct of the matter.
- [2] There are two complainants for the discipline application. One, Mr Ian Van der Woude, has filed a Notice of Intention to Claim Compensation. I have been informed that the other, Mid-Brisbane Rivers Irrigators Inc., has given to the applicant a Notice of Intention to Claim Compensation.
- [3] At the directions hearing, I indicated that I was considering giving a direction that any complainant actively pursuing a compensation order be given the opportunity to

be heard in relation to findings to be made about the respondent's conduct. The applicant opposed such a direction and indicated that she would consider an appeal against it. Hence these reasons.

Status of complainants

- [4] The term 'complainant' is not defined in the *Legal Profession Act 2007* (Qld) ('*LP Act*'). It is used in its ordinary sense, to mean a person who has made a complaint (in the context of the *LP Act*, that being a complaint under s 429).
- [5] The position of a complainant in relation to conduct by a legal practitioner which is unsatisfactory professional conduct or professional misconduct is given statutory recognition by the *LP Act*, though in a rather unusual way.¹ In particular, a complainant may have the benefit of a compensation order, which the complainant may file in the Supreme Court; the order may then be enforced.²
- [6] The power to make a compensation order in favour of a complainant is conferred on the Tribunal by s 456(1) and (4)(b) of the *LP Act*. It is conditioned on the Tribunal being satisfied, after it has completed a hearing of a discipline application in relation to a complaint or an investigation matter against an Australian legal practitioner, that the practitioner has engaged in unsatisfactory professional conduct or professional misconduct. The following provisions are relevant:

453 Hearings

The disciplinary body must hear and decide each allegation stated in the discipline application.

...

456 Decisions of tribunal about an Australian legal practitioner

- (1) If, after the tribunal has completed a hearing of a discipline application in relation to a complaint or an investigation matter against an Australian legal practitioner, the tribunal is satisfied that the practitioner has engaged in unsatisfactory professional conduct or professional misconduct, the tribunal may make any order as it thinks fit, including any 1 or more of the orders stated in this section.

...

- (4) The tribunal may, under this subsection, make 1 or more of the following—

- (a) an order that the Australian legal practitioner pay a penalty of a stated amount, not more than \$100,000;
- (b) a compensation order;

...

- (5) To remove any doubt, it is declared that the tribunal may make any number of orders mentioned in any or all of subsections (2), (3) and (4).

...

464 Meaning of *compensation order*

¹ A number of matters relating to the position of a complainant in relation to a discipline application were discussed in *Legal Services Commissioner v McHenry (No 2)* [2020] QCAT 50.

² See *Legal Profession Act 2007* (Qld) s 457 ('*LP Act*').

A **compensation order** is 1 or more of the following–

- (a) an order that a law practice can not recover or must repay the whole or a stated part of the amount that the law practice charged a complainant for stated legal services;
- (b) an order discharging a lien possessed by a law practice in relation to a stated document or class of documents;
- (c) an order that a law practice carry out stated work for a stated person without a fee or for a stated fee;
- (d) an order that a law practice pay to a complainant an amount by way of compensation for pecuniary loss suffered because of conduct that has been found to be–
 - (i) unsatisfactory professional conduct or professional misconduct of an Australian legal practitioner involved in the relevant practice; or
 - (ii) misconduct of a law practice employee in relation to the relevant practice.

...

465 Compensation order relating to pecuniary loss

- (1) Unless the parties agree, a compensation order that is the type of order mentioned in section 464(d) must not be made unless the disciplinary body making the order is satisfied–
 - (a) if there is a complainant in relation to the discipline application–that the complainant has suffered pecuniary loss because of the conduct concerned; and
 - (b) that it is in the interests of justice that an order of that type be made.
- (2) Also, a compensation order of the type mentioned in section 464(d) for a pecuniary loss for which the relevant complainant has received or is entitled to receive either of the following must not be made–
 - (a) compensation under an order that has been made by a court;
 - (b) compensation from the fidelity fund, or a fund of another jurisdiction under a corresponding law of that jurisdiction, if a claim for payment from the fidelity fund or other fund has been made or decided.

[7] It is apparent from ss 464 and 465 that, notwithstanding what a complainant has raised by way of complaint about a legal practitioner, the only conduct which can provide the basis for a compensation order is conduct which the Tribunal is satisfied is unsatisfactory professional conduct or professional misconduct, after the Tribunal has completed the hearing of a discipline application.

[8] Under s 452 of the *LP Act*, proceedings before the Tribunal are commenced by an application (the ‘discipline application’) made by the Legal Services Commissioner. The only provision for the hearing of a discipline application is that found in s 453. The *LP Act* does not identify the parties to such an application. Subject to any modification found in an Act such as the *LP Act*, the Tribunal’s practices and procedures are as provided for in the *Queensland Civil and Administrative Tribunal*

Act 2009 (Qld) (*'QCAT Act'*).³ Section 39 of that Act identifies as parties to the proceeding the applicant, and a person in relation to whom a decision of the Tribunal is sought by the applicant; an intervener under s 41; a person joined as a party under s 42; and someone an Act such as the *LP Act* states is a party to the proceeding. Obviously, s 39 has the effect that the Commissioner and the respondent are parties to the discipline application.

[9] Section 42 of the *QCAT Act* includes the following:

- (1) The tribunal may make an order joining a person as a party to a proceeding if the tribunal considers that—
 - (a) the person should be bound by or have the benefit of a decision of the tribunal in the proceeding; or
 - (b) the person's interests may be affected by the proceeding; or
 - (c) for another reason, it is desirable that the person be joined as a party to the proceeding.

[10] As mentioned, s 456 of the *LP Act* provides that, on completion of the hearing of a discipline application, the Tribunal may make certain orders, including a compensation order.

[11] Section 656B of the *LP Act* provides as follows:

656B Entitlement to appear at hearing

The complainant for a discipline application before the tribunal is entitled to appear at the hearing of the application in relation to—

- (a) those aspects of the hearing that relate to a request by the complainant for a compensation order; and
- (b) other aspects of the hearing, but only if the tribunal gives leave to the complainant to appear in relation to them.

[12] The right conferred on a complainant by s 656B is limited, and somewhat unusual. The section, notably, does not make a complainant a party to the discipline application, and accordingly does not satisfy s 39(e) of the *QCAT Act*. Nor does it give a complainant the status of an applicant for an order. Each complainant has the right to appear at any hearing of a discipline application, but only on those aspects of the hearing relating to a request for a compensation order. Although s 656B does not expressly permit a complainant to be heard or otherwise actively participate in the hearing,⁴ that is the likely intent of the provision. There is no apparent purpose served by the provision if it were given a more limited meaning; in most cases, the only person likely to advance a positive case in support of a compensation order is a complainant.

Position of the parties

[13] The Commissioner opposed the making of the direction, contending that a complainant has no right to be heard until the Tribunal has found that the legal practitioner's conduct is unsatisfactory professional conduct or professional misconduct. It is only after such a finding that a complainant has any right to be

³ See *Queensland Civil and Administrative Tribunal Act 2009 (Qld)* ss 6–7 (*'QCAT Act'*).

⁴ Cf, for example, *LP Act* s 14(4).

heard. Accordingly, a direction of the kind proposed would be beyond the Tribunal's power.

- [14] The respondent took a relatively neutral position, but indicated that he did not wish any complainant to be denied its rights.

Tribunal's conduct of proceedings

- [15] 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. It must act with as little formality and technicality and with as much speed as the requirements of the *QCAT Act*, and (in the present case) the *LP Act*, permit.
- [16] By s 29 of the *QCAT Act*, the Tribunal must take all reasonable steps to ensure that each party to a proceeding understands the practices and procedures of the Tribunal, the nature of the assertions made in the proceeding, and the legal implications of the assertions. While the provisions of s 29 refer to a party, it is difficult to think that they do not extend to a complainant in relation to its right to be heard under s 656B of the *LP Act*.
- [17] The Tribunal has a broad power to make directions under s 62 of the *QCAT Act*, including of its own motion.⁵

Consideration

- [18] It is apparent from the language of s 456(1) of the *LP Act* that the power to make orders of the kind specified in the section arises only after the Tribunal 'has completed the hearing of a discipline application'. It is at that point that the Tribunal has the power to make a compensation order, just as it has the power to make other orders under s 456. No other hearing is expressly recognised by the legislation. In other words, the legislation envisages the completion of the hearing of the discipline application, followed by the Tribunal reaching satisfaction about the conduct of the respondent, in turn followed by the making of orders.
- [19] Under s 656A of the *LP Act*, the provisions of Part 7.4A apply for a proceeding before the Tribunal for a discipline application. Those provisions include s 656B. That section confers on a 'complainant for a discipline application' a limited entitlement to appear 'at the hearing of the application'. The legislation does not envisage a further hearing after the completion of the hearing of the discipline application, with complainants having a right limited to that further hearing. It is clear from the language of s 656B that a complainant's right to appear, is a right to appear at the hearing of a discipline application (though restricted as stated in that section). That strongly suggests, when the language of s 456 is considered, a right to appear at the hearing before it is completed, and before findings are made about the respondent's conduct.
- [20] The intent of the proposed direction is to give the complainants an opportunity to assert a right to be heard in relation to the findings to be made about the respondent's conduct. There has been no suggestion that neither is a 'complainant for [the] discipline application'. They are named in the charges particularised in the application. It is at least arguable that matters relating to findings to be made about the respondent's conduct are 'aspects of the hearing that relate' to their requests for compensation. That is because, as said earlier, the scope of those findings is

⁵ See *QCAT Act* s 62(6).

decisive when considering what conduct may lead to a compensation order. It is therefore at least arguable that they have an entitlement ‘to appear at the hearing of the [discipline] application’.

- [21] A question arises whether the Tribunal should make the proposed direction on its own motion. It is concerned that, in breach of s 28 of the *QCAT Act*, it might deny natural justice to the complainants if it proceeded to make findings about the respondent without giving them the opportunity to seek some limited form of participation in the hearing. The *QCAT Act* appears to require the Tribunal to be somewhat pro-active in related areas: see s 42(1) and (3), and note also s 29(1). In the circumstances, it is considered appropriate to make an order which would have the effect that they are given an opportunity to seek to be heard before the hearing is concluded and findings are made about the respondent’s conduct.
- [22] The direction proposed related to the giving of notice to the complainants, in a way that would permit them to assert a right to be heard about findings of misconduct against the respondent. On reflection, it seems more appropriate to direct the giving of notice of some documents filed in this application, and for a directions hearing.

Conclusion

- [23] The Tribunal directs as follows:
1. Within 7 days, the applicant is to send to each complainant a copy of the following documents:
 - (a) The amended discipline application filed 17 May 2019;
 - (b) Statement of Agreed Facts filed 14 October 2019;
 - (c) Outline of Submissions on behalf of the Applicant filed 13 March 2020;
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