VOCATIONAL REGULATION

DECISIONS BULLETIN

for the period 1 October 2009 - 31 December 2009

This Bulletin contains summaries of all written reasons for decisions published by the Tribunal in the Vocational Regulation stream for the period 1 October 2009 - 31 December 2009. The full text of decisions and reasons can be found on the Tribunal's website at www.sat.justice.wa.gov.au. If you would like the monthly bulletin emailed to you directly, please enter your email address and details at our subscription page.

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BUILDERS' REGISTRATION ACT 1939 (WA)

PLANT AND BUILDERS' REGISTRATION BOARD OF WESTERN AUSTRALIA [2009] WASAT 210
26 OCTOBER 2009
JUSTICE J A CHANEY (PRESIDENT)

Reinstatement of cancelled builder's registration - Power of Tribunal to reinstate builder's registration previously cancelled by Builders' Registration Board - Interpretation to be given to s 13(2) of the Building Registration Act 1939 (WA)

The parties sought orders from this Tribunal to reinstate the applicant's builders' registration which had been previously cancelled by the Builders' Registration Board of Western Australia prior to the commencement of this Tribunal on 1 January 2005.

The decision involved consideration of the decision in Vallelonga and Builders' Registration Board of Western Australia [2005] WASAT 327. The Tribunal noted that, in that matter, consideration had not been given to the effect of s 167(4)(e) of the State Administrative Tribunal Act 2004 (WA), which enabled the Builders' Registration Board of Western Australia's former order cancelling the applicant's registration to be treated as an order made by this Tribunal. The Tribunal concluded that the Vallelonga decision should not be construed as authority for the proposition that jurisdiction under s 13(2) of
the Builders' Registration Act 1939 was limited to cases where the original suspension or cancellation had been imposed by the Tribunal. It held that jurisdiction also existed to consider reinstatement of a builder whose registration was cancelled or suspended by the Board before the Tribunal assumed jurisdiction to hear disciplinary proceedings against builders.

As a result, the Tribunal concluded that to the extent that the decision in Vallelonga suggested otherwise, it should not be followed.

The Tribunal therefore reinstated the applicant builder's cancelled registration pursuant to the provisions of s 13(2) of the Builders' Registration Act 1939.

ARMITAGE AND BUILDERS' REGISTRATION BOARD OF WESTERN AUSTRALIA
[2009] WASAT 234
26 NOVEMBER 2009
DR B DE VILLIERS (MEMBER), MR P MITTONETTE (SESSIONAL MEMBER),
MR H BURKETT (SESSIONAL MEMBER)

Registration as builder - Practical experience in the work of a builder - Experience as supervisor of constructing steel frames and roof trusses - Experience as estimator and scheduler - Does the experience of an estimator and scheduler comply with the statutory requirements of 'practical experience in the work of a builder' or as 'supervisor of building work' to be registered as a builder - If the experience of estimator is 'practical', how much should be credited or must the total experience be credited - Does the experience gained in manufacturing of steel frames and roof trusses comply with the statutory requirements of 'practical experience in the work of a builder' or as 'supervisor of building work' to be registered as a builder - If the experience of manufacturing steel frames and roof trusses is 'practical', how much should be credited or must the total experience be credited - Must the practical experience in the work of builder be gained on site or can it also be gained off site

Mr Armitage sought review of a decision of the Builders' Registration Board of Western Australia to refuse to recognise all or part of his experience as an estimator and scheduler, as well as a manufacturer of steel frames and roof trusses, as 'practical experience in the work of a builder' or as 'supervisor of building work' for the purposes of registration as a builder pursuant to s 10(1)(b)(iv)(I) of the Builders' Registration Act 1939 (WA).

Mr Armitage contended that he had approximately 39 months' experience as an estimator and scheduler and about 59 months' experience as a manufacturer of steel frames and roof trusses. He further said that he had either supervised or assembled many steel frames on site, and that if those periods were added, he satisfied the requirements of the Builders' Registration Act 1939. He should therefore, due to his practical and supervisory experience, coupled with the academic qualifications, be accredited with sufficient time to comply with the statutory requirements of seven years.

Mr Armitage further contended that once it was found by the Tribunal that the experience, for example, of an estimator, was in the work of a builder, the Tribunal had no discretion to 'cap' the maximum time that was credited. According to Mr Armitage, if an activity is found to be in the work of a builder, then the entire period that was spent in that profession must be credited.

The Builders' Registration Board of Western Australia opposed the application on grounds that neither Mr Armitage's work experience as a scheduler and estimator, nor as a manufacturer, constituted practical experience in the work of a builder or supervisor of building work as required by s 10(1)(b)(iv)(I) of the Builders' Registration Act 1939. The Builders' Registration Board of Western Australia did acknowledge that some of his work as an estimator and scheduler may be recognised, but not more than a total period of 12 - 13 months at the most.
The Board contended that the Tribunal could 'cap' the maximum period recognised on the basis that the work of an estimator and scheduler was not so intimately part of the work of a builder that the entire period should be recognised.

The Tribunal found that part of Mr Armitage's knowledge and experience as scheduler and estimator constituted relevant but limited 'practical experience … in the work of a builder'. The Tribunal accredited the total period of applicable, practical experience to the work of a builder to 10 months. The Tribunal further found that none of the experience of Mr Armitage as a manufacturer of steel frames and roof trusses fell within the practical experience of work of a builder.

The Tribunal further found that Mr Armitage's role in the construction and/or oversight of erection of the steel frames did not qualify him for credit as a 'supervisor of building work' as required by s 10(1)(b)(iv)(I) of the Builders' Registration Act 1939. The Tribunal was of the view that his involvement with site work was limited; he gave some advice and provided guidance that may be akin to that of an inspector, but not at the level that would equate with those of a supervisor. Mr Armitage therefore did not have the level of involvement, control or management over the erection of the frames that would qualify his involvement in site work as 'supervision of building work' for the purposes of s 10(1)(b)(iv)(I) of the Builders' Registration Act 1939.

The application for review was therefore unsuccessful, although the Tribunal recognised 10 months of practical experience in the work of a builder as far as the estimating and scheduling duties were concerned. The decision of the Builders' Registration Board of Western Australia to refuse Mr Armitage's registration was affirmed, since the total years of experience accredited amounted to less than the seven years required by s 10(1)(b)(iv)(I) of the Builders' Registration Act 1939.

LEGAL PRACTICE ACT 2003 (WA)

LEGAL PRACTITIONERS COMPLAINTS COMMITTEE AND BACHMANN [2009] WASAT 120 (S)
26 OCTOBER 2009
JUSTICE J A CHANEY (PRESIDENT), JUDGE J ECKERT (DEPUTY PRESIDENT), MR M ANDERSON (SENIOR SESSIONAL MEMBER)

Referral to Supreme Court (full bench) - Recommendation that practitioner be struck off the Roll of Practitioners - Unsatisfactory conduct - False misrepresentations to clients - Interim suspension from practice - Costs order

On 23 June 2009, the Tribunal delivered its decision and written reasons in these proceedings. It found the practitioner guilty of unsatisfactory conduct under the Legal Practice Act 2003 (WA).

The hearing of these proceedings was delayed on numerous occasions through the conduct of the practitioner. She was advised by the Tribunal that her conduct could be taken into account if the Tribunal was required to make findings on penalty, which the Tribunal did.

The Tribunal found that the practitioner had knowingly made false representations to clients. She had lied to them and she lied to the Tribunal. The practitioner fabricated a complex and, at times, incredible story in a bid to explain her conduct. The excuses she gave were inherently implausible and it was inevitable that her conduct would ultimately be exposed.

The findings made by the Tribunal were extremely serious. She deliberately misrepresented to her clients the work she said she had undertaken. She then invoiced them for it and in one case instituted recovery proceedings and caveated property.
The Tribunal found that the practitioner's conduct was so serious that it fell substantially short of the standard of professional conduct observed or approved by members of the legal profession of good repute and competence.

The Tribunal also found that the practitioner had lied to it when giving her evidence and in her conduct throughout the proceedings.

Accordingly, the Tribunal ordered that a report be transmitted to the Supreme Court (full bench) in respect of the conduct of the practitioner with a recommendation that the practitioner's name be struck off the Roll of Practitioners.

LEGAL PRACTITIONERS COMPLAINTS COMMITTEE AND PAPAMIHAIL
[2009] WASAT 239
3 DECEMBER 2009
JUSTICE J A CHANEY (PRESIDENT), MR J MANSVELD (MEMBER), MR M ODES QC (SENIOR SESSIONAL MEMBER)

Legal practitioner - Allegation of unsatisfactory conduct or professional misconduct - Whether practitioner knowingly or recklessly misrepresented terms of court order - Weight to be given to expert evidence as to the proper construction of a court order - Whether practitioner's construction arguable

The Legal Practitioners Complaints Committee brought proceedings alleging that a legal practitioner, Mr George Papamihail, was guilty of unsatisfactory professional conduct or professional misconduct. The allegations were that he wrote two letters in which he knowingly or recklessly misrepresented the terms and effects of family court orders. The letters were written to the school at which the practitioner's client's children attended.

During the hearing, the Tribunal ruled that the practitioner had no case to answer in relation to the first letter.

The Tribunal heard expert evidence from two experienced family lawyers whose opinions agreed that the practitioner's construction of the orders was wrong but differed as to whether it was reasonably arguable. It also heard from the practitioner who vehemently maintained that when he wrote the letters, he believed that what he wrote reflected the effect of the orders.

The Tribunal, while expressing reservations as to the value of expert opinions on questions of law, determined that it could not be said that the practitioner's construction of the orders was unarguable even though it was incorrect. On reaching that conclusion, the Tribunal had regard to the background to the proceedings against which the practitioner formed his opinion. It accepted that the practitioner did not knowingly misrepresent the order and decided that, given that the construction of the orders adopted by the practitioner was arguable, the letters could not be said to have been written recklessly. Accordingly, it dismissed the complaint.

LEGAL PROFESSION ACT 2008 (WA)

LEGAL PRACTITIONERS COMPLAINTS COMMITTEE AND SEGLER
[2009] WASAT 205
21 OCTOBER 2009
JUSTICE JA CHANEY (PRESIDENT), JUDGE J PRITCHARD (DEPUTY PRESIDENT), MR J MANSVELD (MEMBER)

Legal practitioners - Transitional provisions - Professional misconduct - Unsatisfactory professional conduct - Encouraging client to breach the law - Part 13 Legal Profession Act 2008 (WA)

The Legal Practitioners Complaints Committee contended that a legal practitioner, Mr Martin Lee Segler, had advised a client that he could carry out building projects,
despite being unregistered as a builder, and prior to the grant of a stay of a decision and orders of the District Court in an appeal against the client's deregistration. The Committee contended that Mr Segler thereby encouraged his client to breach s 4 of the Builders' Registration Act 1939 (WA). The Legal Practitioners Complaints Committee also contended that upon being asked by the Committee to provide his response to a complaint against him in relation to that conduct, Mr Segler gave a response that was deliberately misleading. The evidence on which the Legal Practitioners Complaints Committee relied was a letter from Mr Segler to the Legal Practitioners Complaints Committee in which he stated that the circumstances relating to the complaint against him had been referred to the Corruption and Crime Commission, when in fact no such complaint had been made. The Legal Practitioners Complaints Committee submitted that these two instances of conduct amounted to unsatisfactory conduct pursuant to the Legal Practice Act 2003 (WA) and/or professional misconduct and unsatisfactory professional conduct pursuant to the Legal Profession Act 2008 (WA).

The conduct the subject of the allegations occurred between 2006 and 2007. The Tribunal first looked at the applicable statutory regime. Having regard to s 607(2) of the Legal Profession Act 2008, the Tribunal found that the Legal Profession Act 2008 applied to the conduct. The appropriate course was for the Committee's application to be dealt with as a complaint alleging conduct in contravention of that Act. Therefore, the issues for the Tribunal were whether Mr Segler's conduct constituted a contravention of s 402 and s 403 of the Legal Profession Act 2008.

The Tribunal considered the application of s 403 and found that s 403(a) and s 403(b) were discrete examples of professional misconduct. The Tribunal found that Mr Segler ought to have known that his advice would lead his client to act in such a way that he would breach the Builders' Registration Act 1939. The Tribunal was of the view that Mr Segler's conduct in relation to this first ground of the Legal Practitioners Complaints Committee's application amounted to professional misconduct as defined in s 403(a) of the Legal Profession Act 2008.

In relation to the second ground of the Legal Practitioners Complaints Committee's application, the Tribunal found Mr Segler had deliberately misled the Committee. The Tribunal found that this 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, and hence found Mr Segler guilty of unsatisfactory professional conduct pursuant to s 402 of the Legal Profession Act 2008.

RESTIFO AND LEGAL PROFESSION COMPLAINTS COMMITTEE [2009] WASAT 242
11 DECEMBER 2009
JUSTICE J A CHANEY (PRESIDENT), MS D DEAN (MEMBER), MR M ODES QC (SENIOR SESSIONAL MEMBER)

Legal profession - Allegation of settling action without instructions - Complaint dismissed by Legal Profession Complaints Committee - Whether reasonable likelihood practitioner will be found guilty by State Administrative Tribunal of unsatisfactory professional conduct or professional misconduct - Application for review of decision dismissing complaint - Approach to be taken to review - Obligation of practitioner to pursue settlement

Ms Frances Restifo was represented by a solicitor, Mr Paul Williams, a principal of Williams & Co, in relation to litigation brought against her by Concorde International Travel Pty Ltd in the District Court of Western Australia. The matter was due to go to trial on 25 February 2008. On the afternoon of 22 February 2008, Mr Williams agreed a settlement of the action on the basis that the plaintiff would discontinue its action against Ms Restifo and her husband, with each party bearing its own costs. Accordingly, the trial did not proceed.
Subsequently, Ms Restifo made a complaint to the Legal Profession Complaints Committee that Mr Williams had settled the matter without her instructions. The Committee investigated the complaint, and determined that there was no reasonable likelihood that the Tribunal would make a finding against the practitioner of unsatisfactory professional conduct or professional misconduct. Accordingly, it dismissed the complaint. Ms Restifo sought a review of that decision by the Tribunal.

The Tribunal conducted a hearing as to whether there was a reasonable likelihood of the practitioner being found guilty of unsatisfactory professional conduct. It heard evidence from the complainant, three witnesses called by her, and the practitioner. It concluded that the complaint was not supported by the evidence, and concluded that the practitioner did have instructions to make the settlement proposal which was ultimately accepted. Accordingly, the Tribunal concluded that the decision of the Legal Profession Complaints Committee should be affirmed.

VETERINARY SURGEONS ACT 1960 (WA)

THE VETERINARY SURGEONS' BOARD OF WESTERN AUSTRALIA AND LUCAS
[2009] WASAT 214
30 OCTOBER 2009
MS J HAWKINS (MEMBER), MR J JORDAN (MEMBER), DR A VIGANO (SENIOR SESSIONAL MEMBER)

Allegation of unprofessional conduct against principal of veterinary clinic where instructions to euthanise a dog not carried out - Principal not scheduled to carry out euthanasia - Questions by staff to principal concerning possible re-homing - Principal's instructions not carried out - Whether principal remained ultimately responsible for failure to euthanise - Turns on facts

Dr Lucas, a veterinary surgeon, was the sole principal of a veterinary clinic. The case concerns a dog, Abbey, that was brought to Dr Lucas' clinic to be euthanised. Dr Lucas was not the veterinary surgeon scheduled to see Abbey. His only involvement with Abbey was to answer a question, whilst scrubbing for surgery, as to whether Abbey could be re-homed rather than euthanised. He advised his staff that re-homing could only occur after Abbey's owner agreed, and if those instructions were not obtained, Abbey was to be euthanised the next day. Dr Lucas had no further involvement with Abbey and was away from the clinic the next day. Contrary to Dr Lucas' advice, and whilst he was away from the clinic, his staff did not euthanise Abbey. Due to a bizarre combination of errors, and without further contact from Abbey's owner, Dr Lucas' staff caused Abbey to be re-homed without her owner's consent. At the time of hearing, the Tribunal understood Abbey was alive and well.

The Veterinary Surgeons' Board of Western Australia alleges that Dr Lucas was guilty of unprofessional conduct in respect to the failure to euthanise Abbey or to ensure that his staff obtained further instructions from Abbey's owner in respect to re-homing.

The case concerned Dr Lucas' responsibility in respect to the instructions to euthanise Abbey. The Tribunal considered despite the case concerning euthanasia, due to Dr Lucas' limited involvement, he was not guilty of unprofessional conduct. The Tribunal considered that Dr Lucas fulfilled his limited responsibility in properly instructing his staff that Abbey was to be euthanised unless instructions to re-home were obtained from Abbey's owner. Thereafter, he was entitled to assume that the normal practice of creating a clinical record for Abbey had been followed and that his instructions would be noted upon that record and carried out by his staff, which included experienced veterinarians.

The case turns on its facts. The Tribunal did not consider that Dr Lucas had acted unprofessionally. The application was therefore dismissed.