



Judgment Summary
Supreme Court
New South Wales
Court of Appeal

The Council of the New South Wales Bar Association v EFA [2021] NSWCA
339

Bathurst CJ, Leeming JA, Simpson AJA

The Court of Appeal has unanimously dismissed an appeal by the Council of the NSW Bar Association against the finding of unsatisfactory professional conduct made by the NSW Civil and Administrative Tribunal against EFA, a barrister. The Court has also dismissed the barrister's challenge to the finding as to the words he said, and has continued in place a non-disclosure order concerning the identity of the barrister, albeit in narrower terms than had been sought.

On 21 July 2017, a dinner was held to mark the conclusion of a conference of barristers' clerks. The dinner was attended (in addition to barristers' clerks) by barristers and other invited guests. The barristers in attendance at the dinner included the respondent, a male friend of the respondent known as A, a clerk W and an assistant clerk H. H was not known to the respondent.

Just before 11pm, the respondent approached a table at which A and H were seated. The respondent engaged A in a ritualised greeting which, in part, parodied oral sex. The respondent then moved closer to H, stood behind her, and placed his left hand on the back of her head. The Council alleged that the respondent took hold of the back of H's head, moved her head "to and from his crotch area" and said the words "suck my dick". The respondent denied these allegations. These events were recorded in their entirety from two different angles on two closed circuit television cameras, neither of which was equipped with audio recording capabilities.

By application filed in the NSW Civil and Administrative Tribunal on 3 December 2019, the appellant Council sought a finding that, by virtue of his conduct towards H at the dinner, the respondent was guilty of unsatisfactory professional conduct within the meaning of s 296 of the *Legal Profession Uniform Law* (NSW), professional misconduct within the meaning of s 297 and/or at common law; consequential orders under s 302 and an order that the respondent pay the Council's costs of the proceedings.

By Stage 1 decision made on 4 March 2021, the Tribunal found that the respondent's conduct did not amount to professional misconduct, either at common law or under statute, but instead amounted to unsatisfactory professional conduct. In reaching this conclusion, the Tribunal found that the respondent had not placed his right hand near his crotch area whilst standing behind H, that he had not guided her head towards his crotch, but that he had said the words

“suck my dick” to H. The Tribunal placed significant reliance upon a close examination of the CCTV footage, in addition to H’s immediate complaint to W, in making these findings of fact.

By Stage 2 decision, delivered on 18 June 2021, the Tribunal formally reprimanded the respondent under 299(1)(b) of the Uniform Law, and ordered that he pay the Council’s costs. The Tribunal declined to impose a fine on the respondent, or to order that he undertake a course of counselling.

The Council appealed against both of the Tribunal’s decisions. In respect of the Stage 1 decision, it sought an order that the respondent’s conduct at the dinner constituted professional misconduct at common law and/or pursuant to ss 297 and 298 of the Uniform Law. In respect of the Stage 2 decision, and in addition to the formal reprimand, the Council sought an order that the respondent pay a fine, and undertake a course of counselling.

The respondent filed a Notice of Contention challenging the Tribunal’s finding that he said to H the words “suck my dick”.

The Court of Appeal dismissed EFA’s notice of contention. Having undertaken a close examination of the CCTV footage, the Court was satisfied that the respondent made the offensive remark to H as alleged by the Council. There was simply no explanation for H’s immediate distress and complaint to W other than that it was an accurate reflection of what the respondent said to her.

The Court of Appeal dismissed the Council’s appeal. The Court noted that as “poorly judged, vulgar and inappropriate” as the Tribunal correctly found the respondent’s conduct to be, the Tribunal did not err in finding that it was not conduct that would justify a finding of unfitness on the part of the respondent. In relation to the appropriate orders, the Court found that saying the words “suck my dick” elevated the respondent’s conduct into a dimension warranting severe condemnation beyond merely a formal reprimand. However, given the significant financial penalty already levelled against the respondent by his insurer, the imposition of a fine was not necessary in light of the protective (and not punitive) objective of disciplinary orders. As abhorrent as the respondent’s conduct was, rightly warranting condemnation, on the evidence before the Tribunal it represented an isolated instance of departure from accepted societal and professional norms of conduct. In considering the penalty issue, the conduct needed to be seen in proportion to what it had already cost the respondent in personal, emotional and financial terms. The evidence was that the barrister’s practice had suffered and that his annual insurance premiums had increased by more than \$60,000.

The Court of Appeal continued in place non-publication orders as to the identity of EFA. The Court relied on the psychological and psychiatric evidence concerning EFA’s mental health and the impact publication of his identity would have. The Court also relied on the erroneous reporting of the proceedings in the Tribunal by a number of media outlets, which conveyed that EFA had pushed the complainant’s head towards the table or his crotch, and made no mention of the fact that the Tribunal had expressly rejected that allegation.