

**CITATION:** *Legal Services Commissioner v Hinschen*  
[2015] QCAT 122

**PARTIES:** Legal Services Commissioner  
(Applicant/Appellant)  
v  
Gail Susan Hinschen  
(Respondent)

**APPLICATION NUMBER:** OCR283-13

**MATTER TYPE:** Occupational regulation matters

**HEARING DATE:** On the papers

**HEARD AT:** Brisbane

**DECISION OF:** **Justice D Thomas, President**

Assisted by:  
**Ms Megan Mahon**  
**(Practitioner Panel Member)**  
**Ms Julie Cork**  
**(Lay Panel Member)**

**DELIVERED ON:** 22 April 2015

**DELIVERED AT:** Brisbane

**ORDERS MADE:**

- 1. The Respondent is to be publically reprimanded.**
- 2. The Respondent is to pay a pecuniary penalty of \$1,500 within two months of the date of this order.**
- 3. The Respondent is to pay the Applicant's costs, fixed in the sum of \$2,000.00, within eight months of the date of this order.**

**CATCHWORDS:** PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – PROFESSIONAL MISCONDUCT OR UNSATISFACTORY PROFESSIONAL CONDUCT – where the respondent was charged with failing to reach or keep a reasonable standard of competence or diligence with regard to the conduct of a client's matter –

where the respondent was charged with breaching section 443(3) of the *Legal Profession Act 2007* (Qld) – whether the respondent’s conduct constituted unsatisfactory professional conduct or professional misconduct

*Legal Profession Act 2007* (Qld), ss 418, 419, 437, 443(1)(a)(i), 443(3), 462(5)  
*Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 32

*Adamson v Queensland Law Society Incorporated* [1990] 1 Qd R 498  
*Legal Services Commissioner v Bussa* [2005] LPT 005  
*Legal Services Commissioner v Madden (No 2)* [2008] QCA 301  
*Legal Services Commissioner v Smith* [2011] QCAT 126

## **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* (Qld) (QCAT Act).

## **REASONS FOR DECISION**

### **Charges**

- [1] The Commissioner has brought two charges against Ms Gail Hinschen and asserts that the charges constitute professional misconduct and/or unsatisfactory professional conduct:

#### *Charge 1 – competence and diligence*

Between 15 November 2011 and 28 February 2012 Ms Hinschen’s conduct of a family law litigation matter on behalf of her client involved a failure or a substantial failure to reach or keep a reasonable standard of competence or diligence.

#### *Charge 2 – breach of s 443(3) of the Legal Profession Act 2007 (Qld)*

Ms Hinschen failed to comply with a written notice issued on 4 July 2012 by the Legal Services Commissioner pursuant to s 443(3) of the *Legal Profession Act 2007* (Qld) (the Act).

### **Background**

- [2] The following facts were not in dispute.
- [3] Ms Hinschen was retained by her client to act in a matrimonial property dispute.

- [4] An order was made by the Family Court of Australia requiring exchange of offers within 28 days of the order.
- [5] An offer was made by the client's husband in or around 7 December 2011 via Ms Hinschen which was open for acceptance for 14 days. Ms Hinschen did not provide this offer to her client at any time nor advise her that the offer had been made.
- [6] On or around 11 January 2012, the client's husband made a further offer via Ms Hinschen, again open for a period of 14 days. Ms Hinschen did not provide this offer to her client at any time nor advise her that the offer had been made.
- [7] On or around 5 March 2012, Ms Hinschen's client requested the return of her file. Ms Hinschen did not provide the file to her client nor did she claim any lien over the file.
- [8] On 9 March 2012, Ms Hinschen's client complained to the Legal Services Commission about Ms Hinschen's conduct.
- [9] By letter dated 19 March 2012, the Legal Services Commission wrote to Ms Hinschen, pursuant to s 437 of the Act, requesting her explanation in response to the complaint by no later than 13 April 2012.
- [10] Ms Hinschen did not provide a response to the letter of 19 March 2012.
- [11] By way of letter dated 30 April 2012, the Legal Services Commission required Ms Hinschen, pursuant to s 443(1)(a)(i) of the Act, to provide an explanation in response to the complaint by 11 May 2012.
- [12] Ms Hinschen did not provide any explanation within the required time.
- [13] By letter dated 4 July 2012, the Legal Services Commissioner gave to Ms Hinschen written notice, pursuant to s 443(3) of the Act, that if her failure to comply with the Commissioner's requirement continued for a further 14 days she may be dealt with for professional misconduct.
- [14] Ms Hinschen provided a response dated 2 August 2012, which was received by the Legal Services Commissioner on 6 August 2012. On 6 August 2012, Ms Hinschen also provided the client file to the Legal Services Commission.

## **Issues**

- [15] The issues which arise are:
  - a) Does the conduct of Ms Hinschen amount to unsatisfactory professional conduct or professional misconduct?
  - b) If Ms Hinschen's conduct does amount to unprofessional conduct or professional misconduct, what is the appropriate order?

## Unsatisfactory professional conduct or professional misconduct

- [16] Unsatisfactory professional conduct includes conduct of an Australian legal practitioner, happening in connection with the practice of law, that 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.<sup>1</sup>
- [17] Professional misconduct includes:
- a) unsatisfactory professional conduct if the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence, and
  - b) conduct which would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.<sup>2</sup>
- [18] In considering the question of professional misconduct in the case of *Adamson v Queensland Law Society Incorporated*, Thomas J formulated the test as follows:<sup>3</sup>
- The test to be applied is whether the conduct 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.
- [19] Whether conduct amounts to unsatisfactory professional conduct or professional misconduct is a matter of degree and is a question which must be determined based upon the facts of the individual case.
- [20] Neglect and delay bring the legal profession into disrepute. Neglect of a client's affairs and associated delay is capable of satisfying the definitions of either unsatisfactory professional conduct or professional misconduct. A legal practitioner should only accept instructions to the extent that the practitioner reasonably expects to be able to attend to the work with reasonable promptness.<sup>4</sup>
- [21] Of course, mistakes and temporary overload situations do occur, but these take time to become a permanent or a longer term pattern. The practitioner can take steps to reorganise so that such neglect and delay ceases.
- [22] In the circumstances of this case, the actions of Ms Hinschen went beyond delay as Ms Hinschen failed to communicate important offers to her client. The client was denied the opportunity, at the time, to consider those offers to settle the matrimonial proceedings. Ms Hinschen also failed, after requests, to deliver her file to the client so that the client was left in the position of having to deal with the settlement of the matrimonial proceedings without the benefit of the file.

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<sup>1</sup> *Legal Profession Act 2007* (Qld) s 418.

<sup>2</sup> *Ibid* s 419.

<sup>3</sup> [1990] 1 Qd R 498 at 508.

<sup>4</sup> *Legal Services Commissioner v Smith* [2011] QCAT 126 at [9].

- [23] The Legal Services Commissioner referred to the authorities of *Legal Services Commissioner v Smith*<sup>5</sup> and also *Legal Services Commissioner v Busa*<sup>6</sup>.
- [24] In *Legal Services Commissioner v Smith* there were three charges involving delays in the conduct of matters for three separate clients. The delays were over a number of years. Wilson J found that the practitioner's conduct properly satisfied the definition of unsatisfactory professional conduct.
- [25] In the matter of *Legal Services Commissioner v Busa*, the delay was over a period of more than 10 years and the result was that the client was unable to pursue a personal injuries claim. De Jersey CJ held that, in those circumstances, the conduct of the respondent took on the character of professional misconduct.
- [26] Ms Hinschen's conduct was not as serious as the conduct considered in the case of *Legal Services Commissioner v Busa*, but it goes beyond the occasional delay which might be caused by temporary overload situations. It is 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 practitioner. The conduct is unsatisfactory professional conduct as is contemplated by s 418 of the Act.
- [27] In this case, Ms Hinschen did not comply with the notice within the prescribed period. Ms Hinschen agrees that her conduct, in that respect, is deemed to be professional misconduct.<sup>7</sup>
- [28] It is appropriate that such conduct be deemed to be professional misconduct. It is a practitioner's duty to respond promptly when matters are raised by the Legal Services Commission.
- [29] Charge 2 relates to failure to comply with a notice. Section 443(4) of the Act provides that the practitioner is taken to have committed professional misconduct where the failure to comply with a notice continues for a period of 14 days, unless the practitioner has a reasonable excuse for not complying with the requirement within the 14 day period.

## Penalty

- [30] The primary objective of imposing a penalty is to protect the public and not to punish the practitioner. In terms of protection of the public, principles of general and personal deterrence are relevant.
- [31] In considering the appropriate order, regard must be had primarily to the protection of the public and the maintenance of proper professional standards.<sup>8</sup>

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<sup>5</sup> [2011] QCAT 126.

<sup>6</sup> [2005] LPT 005.

<sup>7</sup> Submissions on behalf of the respondent, dated 4 July 2014, [11].

[32] In relation to the question of penalty, the Legal Services Commissioner points to the following factors in favour of Ms Hinschen:<sup>9</sup>

- Ms Hinschen has not been the subject of other disciplinary matters before the Tribunal.
- There is no allegation of dishonesty.
- Ms Hinschen appears to demonstrate remorse at her conduct.
- The conduct appears to have been “one off”.

[33] Ms Hinschen adds to those factors that:

- Ms Hinschen forewent fees owed in the amount of \$700.00.
- Ms Hinschen is no longer in practice for herself.<sup>10</sup>

[34] Ms Hinschen seems to have gained some insight from this experience, pointing to the desirability of seeking help at an earlier time in periods of emotional adversity and trauma, to put her in an emotional state to have better dealt with misfiling of the offer to settle and responding to correspondence from her client and the Legal Services Commissioner.

[35] The Legal Services Commissioner has pointed to the fact that in the case of *Legal Services Commissioner v Smith, Wilson J* ordered that the practitioner be publicly reprimanded and pay a fine of \$2,000.00, and submits that those sanctions are appropriate in this case.

[36] In circumstances where the incident was clearly “one off”, when Ms Hinschen no longer practises in her own right, where there is no allegation of dishonesty and Ms Hinschen seems to be genuinely remorseful and to have learnt from the experience, the following orders are appropriate:

- a) That Ms Hinschen be publically reprimanded.
- b) That a pecuniary penalty of \$1,500 be imposed, such sum to be paid within two months of the date of this order.

### **Costs**

[37] The Legal Services Commissioner has sought an order for costs, fixed in the amount of \$2,000, pursuant to s 462(5) of the Act.

[38] Ms Hinschen indicates that she accepts the submission of the Legal Services Commissioner as to costs,<sup>11</sup> and seeks time of not less than 6 months to pay those costs.<sup>12</sup>

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<sup>8</sup> *Legal Services Commissioner v Madden (No 2)* [2008] QCA 301.

<sup>9</sup> Submissions on behalf of the applicant, dated 15 May 2014, page 8, [2].

<sup>10</sup> Submissions on behalf of the respondent, dated 4 July 2014, [9].

<sup>11</sup> *Ibid* [13].

<sup>12</sup> *Ibid* [14].

- [39] In the circumstances, the Tribunal orders that Ms Hinschen pay the Legal Services Commissioner's costs, fixed in the sum of \$2,000.00, such sum to be paid within 8 months of the date of this order.