

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Legal Services Commissioner v Harrington* [2021] QCAT
267

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

v

MICHELLE CHERIE HARRINGTON
(respondent)

APPLICATION NO/S: OCR308-20

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 23 August 2021

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Justice Daubney, President

Assisted by:

Ms Annette Bradfield

Dr Margaret Steinberg AM

- ORDERS:
- 1. In respect of each of Charges 1, 2, 3, 6 and 7, there is a finding that the Respondent engaged in professional misconduct.**
 - 2. In respect of each of Charges 4 and 5, there is a finding that the Respondent engaged in unsatisfactory professional conduct.**
 - 3. The Respondent is publicly reprimanded.**
 - 4. The Respondent is prohibited from applying for, or obtaining, a principal level practising certificate for two (2) years after being granted an employee level practising certificate.**
 - 5. The Respondent's next application for an employee level practising certificate must include a copy of these reasons, and:**
 - (a) evidence of successful completion of the Queensland Law Society's Remedial Trust Account and Ethics courses (or equivalent at the time), having been completed within twelve (12) months prior to the application; and**

- (b) a report from the Respondent's treating psychologist confirming that the Respondent is in a therapeutic treating relationship, such report to be obtained within six (6) months prior to the application.
6. Practising certificates issued to the Respondent for the three (3) years following her next application for a practising certificate must contain the condition that the Respondent maintain a therapeutic treating relationship with a suitably trained psychologist and require the Respondent to provide evidence of that relationship annually upon application for renewal of the practising certificate.
7. The Respondent shall pay the Applicant's standard costs of and incidental to this discipline application, such costs to be assessed as if this were a proceeding before the Supreme Court of Queensland.

CATCHWORDS:

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT – TRUST MONEY – where respondent failed to properly manage firm's trust account over several years – where respondent failed to have trust accounts externally examined – where respondent failed to comply with s 443 *Legal Profession Act 2007* (Qld) notices – where respondent breached conditions of practising certificate – where respondent has demonstrated insight and remorse into offending – where respondent had personal health issues at the time of the offending – whether the Tribunal should impose a public reprimand – whether the Tribunal should make a non-publication order

Legal Profession Act 2007 (Qld), s 58, s 268, s 418, s 419, s 443, s 462, s 544

Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 66.

Legal Services Commissioner v Bui [2018] QCAT 424
Legal Services Commissioner v Johnston [2015] QCAT 480

APPEARANCES &
REPRESENTATION:

Applicant: P Prasad i/b Legal Services Commissioner
 Respondent: Self-represented

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld)

REASONS FOR DECISION

- [1] By this discipline application under the *Legal Profession Act 2007* (Qld) (“LPA”) the Applicant, the Legal Services Commissioner, has brought seven charges of professional misconduct or unsatisfactory professional conduct against the Respondent, Michelle Cherie Harrington.
- [2] The Respondent was admitted as a legal practitioner in the Australian Capital Territory on 16 February 2007. During the periods 1 July 2010 to 30 June 2011, and 20 December 2012 to 16 February 2014, the Respondent held an employee level practising certificate and was employed as a solicitor at various law firms.
- [3] Between 17 February 2014 and 13 March 2019, the Respondent held a principal level practising certificate as a solicitor and was the only principal and sole legal practitioner director of an incorporated legal practice, Harrington Legal Pty Ltd (“Harrington Legal”).
- [4] On 14 March 2019, the Queensland Law Society (“QLS”) cancelled the Respondent’s practising certificate. The Respondent has not practised since that time. In her response to the discipline application, the Respondent says that she has no intention of returning to legal practice.
- [5] The Applicant has filed affidavits which prove the factual foundations of the charges to the requisite standard. The parties also filed in the Tribunal a Statement of Agreed Facts. Notably, both by her response and her subscription to the Statement of Agreed Facts, the Respondent has effectively admitted the various charges. Whilst she has put on material in explanation and mitigation, she has accepted the charges from an early point. This degree of cooperation in the matter stands to her credit.
- [6] In the circumstances, it is sufficient to deal with the various charges briefly and by reference to the matters set out in the Statement of Agreed Facts.

The charges

- [7] Charge 1 alleges a failure of competence and diligence with respect to the management of Harrington Legal’s trust account.
- [8] On 6 February 2017, the QLS issued a report in relation to Harrington Legal’s trust account for the period 10 September 2015 to 31 December 2016. The report indicated eleven instances or areas of activity in which the trust account had not been properly maintained during the period 10 September 2015 to 31 December 2016. That conduct ranged from instances of failures to issue trust account receipts in a timely fashion, to failures to conduct proper trust account reconciliations.
- [9] Then, on 31 October 2017, the QLS issued another report in relation to the firm’s trust account. This was for the period 24 January 2017 to 26 September 2017. The report indicated seven areas in which the trust account had not been properly maintained.
- [10] On 15 and 16 May 2018, the QLS conducted an inspection of the firm’s trust records and performed a reconciliation for the period 28 September 2017 to 30 April 2018. The purpose of the inspection was to verify whether the matters previously reported

- on had been rectified. The investigator was unable to form an opinion in relation to some areas due to the law firm's failure to provide requested material, including a number of files, invoices, trust account authorities and costs agreements. This failure to provide requested material was a contravention of s 544(4) of the LPA.
- [11] Despite the investigator's limited ability to form an opinion in relation to a number of areas as a consequence of the failure to provide material, the investigator concluded that there were still some ten instances of failure to maintain the trust account in accordance with the legislative provisions and good accounting practices.
- [12] By the Statement of Agreed Facts, it is admitted that the cumulative effect of the Respondent's conduct under this charge amounts to unsatisfactory professional conduct or professional misconduct.
- [13] Charge 2 alleges a failure by the Respondent to comply with a requirement under s 443(1) of the LPA, and Charge 3 is a consequential failure to comply with a Notice issued under s 443(3).
- [14] In April 2018, the Applicant received a complaint from a solicitor concerning outstanding agent fees owed by the Respondent. On 29 June 2018, the Applicant wrote to the Respondent asking for a full explanation of her alleged conduct. The Respondent did not respond. On 8 August 2018, the Applicant then wrote to the Respondent noting her failure to respond, and advising that, pursuant to s 443(1)(a)(i) of the LPA, the Applicant required an explanation to be provided by 29 August 2018. The Respondent did not respond within that time frame. It is admitted that she thereby failed to comply with s 443(1).
- [15] As a consequence of that failure, the Applicant then, on 6 September 2018, gave the Respondent formal notice pursuant to s 443(3) that she may be dealt with for professional misconduct if she failed to comply with the notice by 20 September 2018. The Respondent did not respond to the notice by that date. In October 2018, she wrote to the Applicant seeking an extension of time to respond. She was granted an extension to 6 November 2018, but she did not provide a response by that date.
- [16] Despite subsequent correspondence, and extensions granted by the Applicant, the Respondent did not provide any meaningful response to the Applicant until 26 June 2020. Even that response, however, did not address the substance of the original investigation. The Respondent apologised for "not responding when previously asked", describing her conduct as an "oversight" due to family health issues.
- [17] It is admitted that the Respondent failed to comply with the notice given on 6 September 2018 pursuant to s 443(3) of the LPA. It is also admitted that she has provided no reasonable excuse for that conduct, and is taken to have engaged in professional misconduct pursuant to s 443(4)(a) of the LPA.
- [18] Charge 4 alleges breach by the Respondent of a condition of her practising certificate.
- [19] On 7 September 2017, the Executive Committee of the Council of the QLS ("the Committee") resolved to apply two conditions to the Respondent's practising certificate. One of those was that the Respondent must, at her own expense, complete and pass the ethics referral course by 7 May 2018, and the practice management course by 7 December 2018.
- [20] The Respondent breached this condition by:

- (a) completing, but failing to pay for, the ethics referral course; and
 - (b) completing and paying for, but failing to submit an assessment for, the practice management course.
- [21] The Respondent admits that her failure to comply with this condition was a breach of s 58 of the LPA.
- [22] Charge 5 alleges a failure by the Respondent to have the law practice's trust records externally examined.
- [23] It is not in issue that, despite reminders and an overdue notice, the Respondent failed to have Harrington Legal's trust records examined by an external examiner. This was a contravention of s 268(1) of the LPA.
- [24] Charge 6 alleges a failure to comply with a requirement issued under s 443(1) of the LPA, and Charge 7 is the consequential failure to comply with a notice issued under s 443(3).
- [25] On 20 December 2018, the Applicant advised the Respondent about a complaint having been received about her conduct. The Respondent was requested to provide the Applicant with a full explanation by 25 January 2019. In the absence of a response, on 29 January 2019 the Applicant sent a letter requiring her explanation, pursuant to s 443(1)(a)(i). The Respondent did not respond to the letter of 29 January 2019 by the stipulated date of 12 February 2019, or at all.
- [26] Then, on 13 February 2019, the Applicant sent the Respondent a notice pursuant to s 443(3) of the LPA requiring her to provide an explanation by 27 February 2019.
- [27] The Respondent sent the Applicant an email on 13 February 2019 offering her sincere apologies and indicating that she had just returned to work after being stuck in Townsville during the recent flooding. She assured the Applicant she would attend to the response by the end of the week. The Respondent did not, however, respond by 27 February 2019. Eventually, on 9 March 2020, the Respondent provided a response giving a full explanation of her conduct. The outcome of that was that the Applicant dismissed the complaint.
- [28] Despite that ultimate outcome of the complaint, it is not in issue that the Respondent failed to comply with the notice which had been given on 13 February 2019 pursuant to s 443(3) of the LPA, and she had provided no reasonable excuse. On that basis, she must be taken to have engaged in professional misconduct pursuant to s 443(4)(a) of the LPA.
- [29] The Tribunal formally finds that each of the charges against the Respondent is proved.

Characterisation of the conduct

- [30] The Applicant submits that the conduct under each of Charges 1, 2, 3, 6 and 7 should be characterised as professional misconduct, and that the conduct under each of Charges 4 and 5 should be seen as unsatisfactory professional misconduct.
- [31] In relation to the characterisation of conduct within those categories, ss 418 and 419 of the LPA provide:

418 Meaning of *unsatisfactory professional conduct*

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.

419 Meaning of professional misconduct

- (1) Professional misconduct includes—
- (a) unsatisfactory professional conduct of an Australian legal practitioner, if the conduct involves a substantial or consistent failure to reach or keep a reasonable standard of competence and diligence; and
 - (b) conduct of an Australian legal practitioner, whether happening in connection with the practice of law or happening otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.
- (2) For finding that an Australian legal practitioner is not a fit and proper person to engage in legal practice as mentioned in subsection (1), regard may be had to the suitability matters that would be considered if the practitioner were an Applicant for admission to the legal profession under this Act or for the grant or renewal of a local practising certificate.

[32] As already noted, the Respondent has admitted that the conduct under each of Charge 3 and Charge 7 ought be characterised as professional misconduct. Those concessions are appropriate, given the clear terms of s 443(4)(a) of the LPA in circumstances where, as here, the Respondent did not have a reasonable excuse for her failures to comply.

[33] The Tribunal also considers that there should be findings of professional misconduct on Charges 2 and 6. It can be accepted that at the time of the breaches the Respondent was distracted by significant events occurring in her personal and professional life. The fact of those distractions, however, do not provide an excuse for a failure to respond to requests for information from the professional regulatory bodies. In *Legal Services Commissioner v Bui*,¹ this Tribunal said:

It has been noted previously in this Tribunal that solicitors need to understand that correspondence to them from either or both of the LSC or the QLS is a serious business and demands response. Solicitors cannot simply think that matters are going to go away and leave them alone; they will not. The Respondent's conduct in the present case strikes at the heart of his professionalism and, in the view of the Tribunal, demonstrates a clear disregard of his obligations under the LPA. In those circumstances the Tribunal is satisfied that charge two is made out and finds that the appropriate characterisation in respect of the conduct referred to in charge two is that of professional misconduct.

[34] Similarly, the conduct of the present Respondent under each of Charges 2 and 6 showed a clear disregard of her obligations under the LPA to respond to inquiries from

¹ [2018] QCAT 424, [19].

the regulatory bodies. It is appropriate for each instance of this conduct to be characterised as professional misconduct.

- [35] Charge 1, concerning a failure over an extended period to maintain reasonable standards of competence and diligence in the management of the Harrington Legal trust account, is a matter of considerable seriousness and concern.
- [36] On the agreed material before the Tribunal, the Respondent's failure was substantial and consistent over several years. As the principal and sole legal practitioner of Harrington Legal, the Respondent was responsible for the management of the trust account. It is axiomatic that trust accounts need to be impeccably maintained. The legislative requirements and relevant accounting standards exist to assure protection of the interests of those who have entrusted their money into the hands of a legal practitioner, for whatever reason. Compliance with the prudential requirements concerning trust moneys is fundamental to the duty of a solicitor in the conduct of legal practice.²
- [37] The Respondent's conduct under Charge 1 involved failures which were both substantial and consistent to reach, or keep, a reasonable standard of competence or diligence. There will, accordingly, be a finding of professional misconduct under Charge 1.
- [38] In relation to Charge 4, it is true that the Respondent failed to comply completely with the relevant condition on her practising certificate. The failure to comply was not, however, so egregious as to warrant characterisation as professional misconduct. Accordingly, under Charge 4 there will be a finding of unsatisfactory professional conduct.
- [39] Similarly, in respect of Charge 5, the Respondent's failure to have the trust records externally examined should be regarded as conduct which 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 should be characterised as unsatisfactory professional conduct.
- [40] Accordingly, there will be the following findings:
- (a) on each of Charges 1, 2, 3, 6 and 7, the Respondent engaged in professional misconduct; and
 - (b) in respect of each of Charges 4 and 5, the Respondent engaged in unsatisfactory professional conduct.

Sanction

- [41] In her response to the discipline application, the Respondent explained that during the period in question she was going through significant and serious personal issues and illness that impacted greatly on her functionality. She says that she was suffering from severe stress, anxiety and depression which contributed directly to her ability to concentrate and function in general.

² *Legal Services Commissioner v Johnston* [2015] QCAT 480, [35].

- [42] In her response to each of the charges, the Respondent elaborates further on these conditions, including by detailing particular instances of illness which significantly affected her during specific periods of time.
- [43] It is, however, to the Respondent's credit that she accepted the allegations made against her, and repeatedly expressed remorse and contrition for having failed to observe her obligations as a solicitor.
- [44] In support of the Respondent's explanation concerning illness and other stressful factors, she has attached to her response a letter from her treating psychologist, Mr Tony Weightman. This letter is more in the nature of a reference, rather than an expert report. Be that as it may, the letter contains extensive detail of significant issues which occurred in the life of the Respondent and members of her close family during the period in question. It is not necessary to recount the details of those stressful incidents. The Tribunal accepts that there were very significant issues occurring in the Respondent's life during the period in question, and that these matters undoubtedly distracted her from attending diligently to the requirements of practice management.
- [45] The Applicant does not contend that the Respondent is not a fit and proper person to engage in legal practice. Nor, on the material put before the Tribunal, would such a conclusion be warranted.
- [46] Rather, it is clear on all of the material that the Respondent sought to fulfil the duties and obligations of both a sole practitioner and a practice manager. In her response, for example, the Respondent recognises that she tried to manage her own trust account but, in hindsight, she should have employed an accountant to attend to that role. She says that she was experiencing financial hardship and "thought unwisely that [she] could do it all on [her] own".
- [47] The Respondent has said that she has no intention of returning to legal practice. It appears from the material that in 2020 she embarked on a fresh career in another industry. According to her psychologist, this new career has brought stability to the Respondent's life and she is attending to her own mental health needs.
- [48] It is trite to observe that this disciplinary jurisdiction is not punitive of the practitioner, but protective of the public. In particular, the Tribunal needs to have regard to the protection of the public, including by the maintenance of proper professional standards.
- [49] In the view of the Tribunal, the conduct of this Respondent, regarded as a whole, was sufficiently serious to warrant a public reprimand. The proper regulation of trust accounts is a serious matter for the protection of clients and members of the public, and contravention of the proper standards of maintenance of trust accounts carries serious consequences. It is important for the profession to understand that the Tribunal regards failures to observe proper maintenance of trust account records seriously. Similarly, the Tribunal takes a serious view of practitioners who fail to respond properly to the regulatory authorities.
- [50] Beyond that, the Tribunal accepts the Applicant's submission that it would be appropriate, for the protection of the public, for there to be conditions imposed on the issuing of any further practising certificate to the Respondent. It will be appropriate, in the first instance, for her to undertake two years of practice at an employee level before obtaining a principal practising certificate. She should also complete the QLS remedial trust account and ethics courses. Given the personal circumstances which

contributed to her breaches, it will also be appropriate to impose conditions requiring her to produce evidence of maintaining her psychological treatment.

- [51] In her response, the Respondent asked that the Tribunal make a non-publication order. The only basis for making that request is a concern that the Respondent's past health issues may have an impact on her present employment if published publicly. That concern is not, however, sufficient to warrant making a non-publication order under s 66 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld). And in any event, there is a clear public interest in the circumstances of the Respondent's contraventions, and the orders to be made by this Tribunal, being publicly available.
- [52] Finally, no argument is advanced as to why the costs order mandated by s 462(1) of the LPA ought not be made.

Conclusion

- [53] For the reasons set out above, the Tribunal makes the following orders:
1. In respect of each of Charges 1, 2, 3, 6 and 7, there is a finding that the Respondent engaged in professional misconduct.
 2. In respect of each of Charges 4 and 5, there is a finding that the Respondent engaged in unsatisfactory professional conduct.
 3. The Respondent is publicly reprimanded.
 4. The Respondent is prohibited from applying for, or obtaining, a principal level practising certificate for two (2) years after being granted an employee level practising certificate.
 5. The Respondent's next application for an employee level practising certificate must include a copy of these reasons, and:
 - (a) evidence of successful completion of the Queensland Law Society's Remedial Trust Account and Ethics courses (or equivalent at the time), having been completed within twelve (12) months prior to the application; and
 - (b) a report from the Respondent's treating psychologist confirming that the Respondent is in a therapeutic treating relationship, such report to be obtained within six (6) months prior to the application.
 6. Practising certificates issued to the Respondent for the three (3) years following her next application for a practising certificate must contain the condition that the Respondent maintain a therapeutic treating relationship with a suitably trained psychologist and require the Respondent to provide evidence of that relationship annually upon application for renewal of the practising certificate.
 7. The Respondent shall pay the Applicant's standard costs of and incidental to this discipline application, such costs to be assessed as if this were a proceeding before the Supreme Court of Queensland.