

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Legal Services Commissioner v Hadley* [2020] QCAT 509

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

v

DAVID WAYNE HADLEY
(respondent)

APPLICATION NO/S: OCR140-19

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 26 November 2020 (*ex tempore*)

HEARING DATE: 26 November 2020

HEARD AT: Brisbane

DECISION OF: Justice Daubney, President

Assisted by:

Mr Geoffrey Sinclair, Legal Panel Member
Dr Margaret Steinberg AM, Lay Panel Member

- ORDERS:
1. **The respondent is publicly reprimanded.**
 2. **The respondent is prohibited from applying for or obtaining a certificate to practise as a principal for two years after being granted an employee-level practising certificate.**
 3. **The respondent's application for an employee-level practising certificate must include a copy of the Tribunal's 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 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 6 months prior to the application.**
 4. **Practising certificates issued to the respondent for the three years following his 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.

- 5. 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.**
- 6. The complainant who filed the Notice of Intention to Seek Compensation Order on about 25 November 2019 shall advise the Tribunal and the respondent as to whether the complainant wishes to pursue that Notice by 4:00pm on 17 December 2020.**
- 7. If the complainant advises that the complainant wishes to pursue a compensation order, then the matter will be listed for directions on a date to be advised by the Tribunal.**

CATCHWORDS:

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT – TRUST MONEY – where the respondent failed to account for money held in trust in breach of s 259 of the *Legal Profession Act 2007* (Qld) (“LPA”) – where the respondent failed to lodge an external examiner’s report for the incorporated legal practice of which he was the legal practitioner director – where the applicant issued and served on the respondent two notices pursuant to s 443(3) of the LPA – where the respondent did not respond to either notice – where the applicant has now brought four charges against the respondent – where the respondent has made full admissions in respect of the conduct – where the parties have agreed on the characterisation of the conduct under each charge – whether the conduct underpinning each charge amounts to professional misconduct or unsatisfactory professional conduct

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – QUEENSLAND – ORDERS – where the respondent has made frank admissions and expressed remorse for his conduct – where the respondent has provided evidence of certain stresses, psychological sequela and decompensations – where the respondent acknowledges the need for ongoing psychological treatment – whether the Tribunal should impose a public

reprimand – whether there is a public benefit in the imposition of a fine – whether further sanctions and orders are necessary to facilitate the respondent’s possible return to legal practice

Legal Profession Act 2007 (Qld) s 259, s 443, s 462

Baker v Legal Services Commissioner [2006] 2 Qd R 249

Legal Services Commissioner v Bone [2014] QCA 179

Legal Services Commissioner v Bui [2018] QCAT 424

**APPEARANCES &
REPRESENTATION:**

Applicant: P Prasad, solicitor for the Legal Services Commission

Respondent: C DoRozario, solicitor for Potts Lawyers

REASONS FOR DECISION

- [1] By this discipline application under the *Legal Profession Act 2007 (Qld)* (“*LPA*”) the applicant, the Legal Services Commissioner, has brought four charges against the respondent, David Wayne Hadley. Charge 1 is that between 28 December 2016 and 23 May 2017, the respondent failed to account for money held in trust as required by s 259 of the *LPA*. Charges 2 and 4 arise out of failures in May and July 2018 respectively to respond to written notices issued by the applicant pursuant to s 443(3) of the *LPA*. Charge 3 arises out of the respondent’s failure to lodge an external examiner’s report for the financial period ending 31 March 2017. The circumstances giving rise to these charges are not in issue. The respondent has made full admissions in respect of the conduct.
- [2] The facts and circumstances on which the Tribunal is to proceed have been agreed between the parties and are set out comprehensively in a Statement of Agreed Facts filed in the Tribunal on 17 August 2020. There is a non-publication order in place with respect to certain salient features concerning the background to this matter. For present purposes, however, it is unnecessary to delve into the detail of the factual background. It is sufficient to note that the respondent, who was admitted as a solicitor on 3 February 2014, practised for some years as an employed solicitor before attaining a principal-level practising certificate in March 2016. From that time, he practised in various capacities as a principal, either as the sole-practitioner principal of a firm or as the legal practitioner director of an incorporated legal practice.
- [3] In November 2019, the Queensland Law Society refused to renew the respondent’s practising certificate, and his practising certificate has not been renewed since that time. Obviously, he has not been in practice since then. At the time of the subject conduct, the respondent was engaged in legal practice, operating the firm known as Local Legal Lawyers and Essen Lawyers respectively. He has no previous adverse findings by a disciplinary body.
- [4] In relation to Charge 1, the respondent was retained by a particular client in late-2014, who became the complainant for these matters. He was retained to undertake particular work for this client and, to that end, the client deposited various amounts of money in the respondent’s trust account; clearly enough, on account of costs and fees to be incurred by the respondent on behalf of the complainant.

- [5] Several invoices were issued to the complainant but there remained – notionally, at least – a balance held in the respondent’s trust account on behalf of the complainant. The complainant, on numerous occasions, asked for the return of the balance of funds held in trust on behalf of the complainant. Despite those requests, the respondent failed to pay all or deliver up to the complainant the balance of the trust money. The total of the balance which the respondent failed to refund to the complainant amounted to \$18,773.13.
- [6] As already noted, the respondent has made full admissions concerning his failure to refund those monies. By way of explanation, he has said that those monies were expended on various matters associated with the work he was retained to perform on behalf of the complainant.
- [7] Unfortunately, there was no express authorisation for those items of expenditure, nor was there any paperwork to back up the fact of that expenditure having been incurred. The respondent has frankly admitted that his attention to detail with respect to the accounting for those monies was far from perfect. He has expressed remorse for the inconvenience suffered by the complainant as a result of his sloppy attention to what otherwise are very stringent requirements to account for monies held in trust.
- [8] There has been no refund from the trust account to the complainant. It is, however, relevant to note that the Fidelity Fund has paid out the \$18,773.13 to the complainant and, on the material before the Tribunal, it appears that the Law Society has commenced proceedings in the Magistrates Court against the respondent to recover those monies. The respondent has deposed to the effect that those proceedings are effectively stayed at the moment, pending the outcome of this discipline application, and that he proposes to enter into a payment arrangement with the Law Society to satisfy that claim.
- [9] In respect of Charge 2, it is sufficient to note that in November 2017, the complainant made a complaint to the applicant in respect of the respondent’s conduct. In January 2018, the applicant asked the respondent to provide an explanation, but he failed to respond. Subsequently, in February 2018, the applicant wrote again to the respondent, giving him an extension of time within which to respond. The respondent failed to respond by the extended time. Further accommodations were made to extend the time for the respondent to respond but, again, he did not do so.
- [10] Finally, in March 2018, the then Acting Legal Services Commissioner issued to the respondent a notice under s 443(1)(a)(i) of the *LPA*, requiring a response by 18 April 2018. The respondent did not respond to that notice. Then, on 27 April 2018, the then-Acting Legal Services Commissioner issued the respondent with a notice pursuant to s 443(3) of the *LPA*, and advised the respondent that he may be dealt with for professional misconduct if he failed to comply with that notice. Again, the respondent failed to comply with that notice and did not provide any explanation for his failure.
- [11] Charge 4 is similarly a circumstance of failure to respond to a s 443 notice, which was issued by the then-Acting Legal Services Commissioner to the respondent on 8 March 2018. The respondent did not respond to that notice and, on 18 June 2018, the then Acting Legal Services Commissioner again gave the respondent a notice under s 443(3), saying that the respondent may be dealt with for professional misconduct if he failed to comply with the response requirements for a further 14 days. The respondent did not comply with the notice and did not provide any explanation for his failure.

- [12] Charge 3 concerns the admitted fact that the respondent failed to lodge an external examiner's report between March 2016 and June 2017. The respondent, as has already been noted, held a principal-level practising certificate and was a legal practitioner director of Local Legal Lawyers, an incorporated legal practice. He failed to lodge an external examiner's report for the period ending 31 March 2017 with respect to Local Legal Lawyers.
- [13] As is apparent from that summary, the facts which have been admitted as between the parties make out each of the charges which have been brought against the respondent. The most serious of those, of course, is the charge of failing to account for trust money.
- [14] It is relevant to note the respondent's professional and personal background which, again, is detailed at some length in the material before the Tribunal. Prior to embarking on his career in legal practice, the respondent served as a police officer. In the course of his duties as a police officer, the respondent was exposed to a number of very stressful situations, including one which involved false allegations being made against the respondent of improper conduct and an abortive investigation from which he was subsequently exonerated of the serious allegations that had been made against him in the course of his duty. There is no doubt that the respondent suffered psychological sequela as a consequence of those experiences, and those sequela, amongst other things, impacted on his mood and capacity to function.
- [15] The particular matter for which the respondent was engaged to act on behalf of this particular client was also, it must be said, a very stressful matter. It was out of the course of the usual sorts of legal work that the respondent had otherwise undertaken after commencing in legal practice. It must be said that one of the reasons he took the job on was because of particular life experience and contacts that he had due to previous experience, which may have given him particular insights to be able to undertake this particular job.
- [16] That being said, by any objective measure, simply taking on this job on behalf of the complainant itself carried very significant stresses. The respondent has recognised all of that in his material. Importantly, the respondent has, since his practising certificate was taken away from him, recognised the need to engage appropriately with mental health professionals to improve his wellbeing and his capacity to cope in legal practice. I will return to that matter when I come to the question of sanction.
- [17] I have mentioned those matters of the respondent's background in acting in this matter to summarise his explanation for how it is that he came to commit what was clearly a flagrant breach of a matter which is fundamental to all who engage in a solicitor's practice; that is, the need to safeguard monies that are deposited in trust.
- [18] The parties have agreed that it is appropriate to characterise the conduct under Charge 1 as professional misconduct. The Tribunal agrees.
- [19] Despite the explanation, it remains a fact that one of the fundamental duties owed by a solicitor to a client is to safeguard that which has been entrusted by the client to the solicitor. That obviously extends to money which has been put in the care of the solicitor by the client, and a breach of that obligation is a fundamental breach of a base duty owed by a solicitor to a client. Accordingly, on Charge 1 there will be a finding that the respondent engaged in professional misconduct.

- [20] Each of Charges 2 and 4 is also serious, and again the parties have agreed that the respondent's conduct under each of those should be characterised as professional misconduct. Once again, the Tribunal agrees.
- [21] On previous occasions, this Tribunal has commented on the fact that it is a fundamental incident of a legal practitioner's right to practise that the practitioner cooperate fully with the regulatory authorities and respond in a timely fashion to notices, and particularly statutory notices, that are issued to the practitioner. To paraphrase an observation from a previous decision of this Tribunal, practitioners cannot think that if they ignore the notice, it is going to go away and leave them alone.¹ That simply does not happen. Indeed, ignoring the notice only makes matters worse for the practitioner.
- [22] Again, the respondent's material explains the unfortunate psychological decompensation which the respondent was suffering at the time he received these notices. Whilst the psychology may provide an explanation for the fact that he did not provide the necessary responses, they cannot provide an excuse. There will be a finding of professional misconduct in respect of each of Charges 2 and 4.
- [23] In relation to Charge 3, the respondent should obviously have lodged an external examiner's report for his firm. Again, those are probative matters which are designed to provide a safeguard for the public to ensure that solicitors are operating their firms appropriately and responsibly. By failing to lodge an external examiner's report, the respondent engaged in conduct that 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.
- [24] The parties are agreed that the conduct in respect of that charge should be characterised as unsatisfactory professional conduct, and the Tribunal agrees with that characterisation. There will be a finding of unsatisfactory professional conduct in respect of Charge 3.
- [25] Turning then to the question of sanction, it is not suggested that the respondent is not today a fit and proper person to practise law. Nor is it suggested that this Tribunal should countenance a finding that he is probably permanently unfit for practice. The object of these proceedings, as has often been said, is protective of the public and not punitive of the practitioner. It seems to the Tribunal that it is appropriate for there to be a public reprimand of the respondent.
- [26] A public reprimand is in itself a serious matter. It serves as a permanent mark on the respondent's record of having engaged in this professional misconduct and unsatisfactory professional conduct, and satisfies the object of general deterrence by making clear to the profession and the public that serious breaches, such as failure to deal with trust account monies, can have permanent consequences for one's professional career.
- [27] It is to the credit of the respondent that he has offered insight into his need for ongoing psychological therapy. So much is clear not only from the material that he has filed on his own behalf, but also from the terms of the proposed orders, which have largely been agreed between the parties with some minor variations. Those variations were

¹ See *Legal Services Commissioner v Bui* [2018] QCAT 424, [19].

discussed in the course of argument, and ultimately the parties reached what might effectively be called something close to a common position.

- [28] One significant point of difference between the parties that remained was the question as to whether the respondent should be fined. In view of the other conditions which are going to be imposed on the respondent's return to practice by way of the orders which this Tribunal will be making, the Tribunal is not inclined in the circumstances of this case to impose a fine. The Tribunal does not see that there would be any public benefit from the imposition of a fine. On the contrary, it is clear that the imposition of a fine would simply create a further financial burden on the respondent, in what are undoubtedly straitened financial times for him.
- [29] In that regard, the Tribunal notes, without descending into detail, that since his practising certificate was removed, the respondent has been working in his wife's business. That business has been significantly impacted, as have many other small businesses, by the pandemic of the last eight months, such that the respondent, like many others, has had to rely on the receipt of the JobKeeper allowance simply to keep him and his family afloat. In these circumstances, the Tribunal does not see that there is much public benefit, if any, in the imposition of a fine.
- [30] What is of more concern for the public benefit is to ensure that proper scaffolding is put in place to ensure, as best one can, that any return by the respondent to legal practice is done in a controlled and appropriately supervised way. In that regard, the Tribunal has had regard to the report of Dr Aslund, who has undertaken quite a number of treatment sessions with the respondent. At the time of the respondent's initial appointment with Dr Aslund, the respondent's reported symptoms met the diagnostic criteria for a major depressive disorder with anxious distress. Since then, the respondent has been participating in cognitive behavioural therapy with Dr Aslund. It is encouraging that Dr Aslund reports that the respondent had engaged in and responded well to therapy, and his clinical opinion was that the major depressive disorder was now in partial remission. Dr Aslund expressed hope for full remission within the relatively near future on the basis, of course, of there being no ongoing symptoms of depressive episodes.
- [31] The Tribunal has also today received a reference from one of the respondent's professional colleagues, who speaks highly of the respondent's honesty and integrity in their joint dealings. The referee is aware of the charges brought against the respondent and notes the respondent's deep remorse. This person also comments on the fact of the respondent having received professional counselling, and says that he can see that this has had a positive effect on the respondent. He has offered his personal and professional support to the process of returning the respondent to practice.
- [32] As already noted, the respondent has filed an affidavit in which he sets out the relevant background to the circumstances which led to his offending conduct. Importantly, the affidavit contains frank and appropriate expressions of remorse, and what are obviously genuine apologies, not just to the complainant but also to the Legal Services Commission and this Tribunal for the circumstances which have led to today's hearing.
- [33] As mentioned before, the view of the Tribunal is that it is important to ensure that any return by the respondent to legal practice is done with appropriate support. To achieve that, the Tribunal has formed the view that when the respondent next applies for a practising certificate, he will be limited to applying for an employee-level practising

certificate, and that he will then effectively need to do at least two years under supervision as an employee before being able to apply for a principal-level practising certificate.

- [34] Legal practice, particularly as a sole practitioner or in a small firm, is a very, very stressful business. The Tribunal is well aware of that. As I keep on saying, it is important for the respondent's wellbeing and for the interests of the public to ensure that if he does ultimately seek to move from being an employee-level solicitor to a principal-level solicitor, that he has the full tool box of skills and supports available to him to take on that level of responsibility. So as I say, the Tribunal has reached the view that if he applies for a practising certificate, he will need to spend at least two years at the employee level before being able to apply for a principal-level practising certificate.
- [35] The respondent has also appropriately offered – and it is completely appropriate in the circumstances – for him to complete the Queensland Law Society's remedial trust account and ethics courses before again applying for a practising certificate. It will also be appropriate, given his acknowledgment of the need for ongoing mental health assistance, for the respondent to provide up-to-date reports from his treating psychologist for the foreseeable future at the time he is applying for his practising certificates. The Tribunal will pronounce orders to give effect to that regime.
- [36] There are a couple of other matters to mention. The complainant still has pending before this Tribunal a Notice of Intention to Seek Compensation Order. That may now be moot as a consequence of the complainant having been paid out by the Fidelity Fund in the circumstances described earlier. However, for completeness the Tribunal will make directions to facilitate the Tribunal obtaining information from the complainant as to whether the complainant wishes to pursue the Notice.
- [37] Finally, there is the question of costs. No exceptional circumstances exist in this case, and accordingly the Tribunal is bound by s 462(1) to order the respondent to pay the applicant's costs of the discipline application.
- [38] The respondent sought to have excluded from that costs order the costs associated with obtaining the non-publication order. That, however, is not a permissible course of action. The Court of Appeal has made it plain in cases such as *Legal Services Commissioner v Bone*² and *Baker v Legal Services Commissioner*³ that the Tribunal does not have a discretion under s 462(1) to make differential orders with respect to costs, and that costs in that subsection means all the costs of the discipline application.
- [39] There will be the following orders:
1. The respondent is publicly reprimanded;
 2. The respondent is prohibited from applying for or obtaining a certificate to practise as a principal for two years after being granted an employee-level practising certificate;
 3. The respondent's application for an employee-level practising certificate must include a copy of the Tribunal's reasons and:

² [2014] QCA 179.

³ [2006] 2 Qd R 249.

- (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 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 6 months prior to the application;
4. Practising certificates issued to the respondent for the three years following his 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;
5. 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;
6. The complainant who filed the Notice of Intention to Seek Compensation Order on about 25 November 2019 shall advise the Tribunal and the respondent as to whether the complainant wishes to pursue that Notice by 4:00pm on 17 December 2020; and
7. If the complainant advises that the complainant wishes to pursue a compensation order, then the matter will be listed for directions on a date to be advised by the Tribunal.