[2008] WASAT 116

JURISDICTION	**:**	STATE ADMINISTRATIVE TRIBUNAL
STREAM	**:**	VOCATIONAL REGULATION
ACT	**:**	LEGAL PRACTICE ACT 2003 (WA)
CITATION	**:**	LEGAL PRACTITIONERS COMPLAINTS COMMITTEE and RICHARDSON [2008] WASAT 116
MEMBER	**:**	JUSTICE M L BARKER (PRESIDENT) MS D DEAN (MEMBER) MR M ODES QC (SENIOR SESSIONAL MEMBER)
HEARD	**:**	1 MAY 2008
DELIVERED	**:**	21 MAY 2008
FILE NO/S	**:**	VR 181 of 2007 VR 182 of 2007
BETWEEN	**:**	LEGAL PRACTITIONERS COMPLAINTS COMMITTEE Applicant AND BARRY MICHAEL RICHARDSON Respondent

Catchwords:

Vocational regulation - Legal practitioner - Monies received on account of costs without undertaking any significant work - Monies not deposited in trust accounts - Failure to respond to request for information and summons from law complaints officer - Penalty

Legislation:

Legal Practice Act 2003 (WA), s 198(1)
Legal Practitioners Act 1893 (WA), s 34

Result:

Practitioner is suspended for two years
Practitioner undertakes not to practise law upon expiration of suspension
Practitioner pay the Committee's costs fixed in the sum of $4,000

Category: B

Representation:

Counsel:

Applicant	:	Mr J McGrath
Respondent	:	Mr J Staude

Solicitors:

Applicant	:	Legal Practitioners Complaints Committee
Respondent	:	Self-represented

Case(s) referred to in decision(s):

Nil

REASONS FOR DECISION OF THE TRIBUNAL:

Summary of Tribunal's decision

1 The Legal Practice Complaints Committee commenced two disciplinary actions against a legal practitioner, Barry Michael Richardson. In the first, the Committee alleged the practitioner was guilty of illegal conduct or unprofessional conduct in that he converted to his own use sums of money totalling $1150 received on account of costs from his client without undertaking any significant work on his client's behalf, and failed to deposit any of those moneys to the credit of the trust account. In the second, the Committee alleged unsatisfactory conduct by unprofessional conduct by failing to respond to a request for information from the law complaints officer and a further summons to produce documents. The practitioner admitted the allegations.

2 The Tribunal held that the appropriate penalty to be imposed was a suspension from practice for a period of two years. The Tribunal did not consider it was necessary to refer the matter of penalty to the full bench of the Supreme Court with a recommendation that he be permanently disbarred or suspended for a period in excess of two years.

Orders made 1 May 2008

3 On 1 May 2008, the Tribunal, after considering written and oral submissions made by counsel for the Committee and the practitioner, decided that it was appropriate to suspend the practitioner for two years, without imposing an additional fine, and to make an order for costs.

4 The Tribunal provided oral reasons for this decision and indicated that written reasons based on the transcript would be given in due course. These are those written reasons.

Issue

5 The issue the subject of this decision is whether the practitioner, having admitted the misconduct alleged against him, should be:

- the subject of a referral to the full bench of the Supreme Court with a recommendation that he be permanently disbarred, as contended by the Legal Practice Complaints Committee (Committee), or alternatively be the subject of a period of suspension, as contended for by the practitioner;

- fined in addition to the above penalty; and
- ordered to pay the costs of the Committee.

Decision

6 The Tribunal has decided that in the particular circumstances of this case it is prepared to exercise the disciplinary powers available to it without referring this matter to the full bench of the Supreme Court for determination. The ultimate order will be that the practitioner is suspended for the maximum period open to the Tribunal, namely two years.

7 We will not impose a fine because of the demonstrated incapacity of the practitioner to pay. We think it would be otiose in the circumstances to impose a fine. In other circumstances, however, we may well have imposed a fine as well as an order for suspension.

8 Costs will also be ordered in the agreed amount.

9 We also wish to make it clear that the orders we make are made in the special circumstances of the case where the practitioner, through counsel, has made it clear that he will not practise law again and has given an undertaking to that effect.

10 The position here is that the practitioner is charged with two main offences of a disciplinary nature. He admits these, subject to what we will say about the proper characterisation of the conduct in due course.

Allegations in VR 181 of 2007

11 In VR 181 of 2007 the Committee alleges:

- first, that between November 2002 and May 2003 the practitioner, Barry Michael Richardson, was guilty of illegal conduct or, alternatively, unprofessional conduct by converting to his own use three sums of money totalling $1150 received on account of costs from his client without undertaking any significant work on his client's behalf; and
- secondly, related to that, between those same dates the practitioner was guilty of illegal conduct or, alternatively, unprofessional conduct by failing to deposit any of those

moneys to the credit of the trust account as required by s 34 of the *Legal Practitioners Act 1893* (WA).

12 Now, it goes without saying that if the first allegation is made out the second follows. Of course, the reason why the practice rules and the legal requirements for putting money into trust accounts exist is to prevent the conduct complained of in the first allegation from occurring. If you put money into a trust account you limit the opportunity to misappropriate those funds.

13 In the response, both in writing and orally, the practitioner accepts the allegations made against him; in particular, in the written outline of submissions provided by Mr Staude on behalf of the practitioner. In paragraph 2 it said that the practitioner admits that he:

(a) did receive these moneys;

(b) did not deposit them to the credit of the trust account; and

(c) appropriated the moneys without performing significant work.

14 The words "converted the moneys to his own use" are not used in this admission but the Tribunal does not think it is intended by Mr Staude on behalf of the practitioner to be particularly careful or subtle or the like in respect of the matter. The facts disclose that the moneys not having been put into the trust account were used by the practitioner for his own ends, and whilst he may have had a general intent - we will come back to that - to do the work, the simple fact is that, at the relevant times, particularly in relation to the receipt of two sums of the $250 and the $700 ($950) there was no work done in respect of it. In the language of the law the practitioner converted those funds to his own use as alleged.

15 What is said by the practitioner through counsel is that he in effect did not have a grand design whereby he was trying, to put it colloquially, to fleece a client who he thought was able to be fleeced to his own ends. The Committee on the other hand through counsel properly point out that there was no work apparently being planned. The practitioner was acting on earlier, general instructions to pursue an insurance company to recover the sum of $6000 which the client believed he was entitled to.

16 Nothing was done and nothing was being done by the practitioner at the times the $250 and the $700 were requested on account of costs. The Committee points to the fact that cash was handed over by the client and

on the last occasion when the $700 was paid it was handed over outside the office of the firm in a street. All in all the Tribunal finds that the circumstances in which the requests were made, particularly the $250 request and the $700 request, were quite unsatisfactory.

17 We are not asked and it is not appropriate in disciplinary proceedings for us to have to resolve questions of whether the practitioner committed a criminal offence. It is not an allegation as such. On the evidence before us we are not able to say, ultimately, what the particular intentions of the practitioner were, although as we have indicated we think his conduct was quite unsatisfactory.

18 He had not done the work. It is hard to know what he was actually planning to do. He does not seem on any of the evidence before us to have had an action plan. He did not seek any guidance from his principal to the extent that he might have been expected to. He seems to have lost any recollection of receiving the funds from the client. He has never been prepared to admit that he received them although he is not now denying that he did, and we find that he did.

19 He did not do the work and he did not refund the moneys. All in all it is, as we have put it, an unsatisfactory state of affairs.

Allegations in VR 182 of 2007

20 The second set of proceedings in VR 182 of 2007 involves an allegation that in October 2005 the practitioner was guilty of unsatisfactory conduct by unprofessional conduct by failing to respond to a request for information from the law complaints officer and a further summons to produce documents issued pursuant to s 198(1) of the *Legal Practice Act 2003* (WA).

21 That is admitted. It is accepted that failure to assist those, such as the law complaints officer, investigating matters itself can be the subject of professional complaint. It is important that professionals such as legal practitioners assist in the resolution of complaints made because it helps to, apart from anything else, maintain professional standards and the maintenance of professional standards is crucial from a consumer protection point of view.

22 That complaint as noted is admitted.

Penalty

23 The question as to what is the appropriate penalty outcome has been the subject of detailed submissions, both in writing and orally and also we have had the benefit of a report from Dr Lawrence Blumberg, a consultant psychiatrist, which has helped confirm much of what has been said to us today by Mr Staude on behalf of the practitioner. We were additionally advised that in 2006 the practitioner was subject to a fine of $3000 and ordered to pay $1040 to a former client for failing to serve a bill of costs before deducting money from his trust account, and failing to respond to inquiries by the Committee.

24 It seems there was an element of overcharging in that case as well and there was also suspension from practice for one year. Those earlier proceedings, which involved events after the events the subject of these proceedings, were determined before the events the subject of these proceedings were known, so the Tribunal and the other parties involved in that proceeding were unaware of these current events.

25 The circumstances, the background and the mental health of the practitioner have all been raised with us for consideration and we take all of that into account.

26 The psychiatric diagnosis is summed up by Dr Blumberg in his report of 7 December 2007 in these terms: "Mr Richardson fulfils the DSM-IV-TR criteria of a Major Depressive Disorder. He described a 'low, sinking mood' with insomnia, amotivation, decreased energy, fatigue and suicidal ideation. His mental state examination confirmed a despondent man and was consistent with the history provided."

27 We will not read further from this report. The psychiatrist is not able to say what the practitioner's mental state was at the time of the particular disciplinary offences we have to consider here but we think it fair to say from the whole of the history provided in that report, from what Mr Staude has said on behalf of the practitioner, and the other information contained in the written submissions of Mr Staude, that the practitioner seems at many material times, including at the time of these disciplinary offences, to have suffered from depression. There is no reason to think that the analysis provided by Dr Blumberg late last year was all that significantly different from the position when these disciplinary offences occurred.

28 All this leads us to the view that there are very good reasons to consider that the practitioner, generally speaking, is not fit to practise law.

It is possible for a Tribunal in our position to come to that view for various reasons. Sometimes people, without suffering any mental health difficulties demonstrate through their conduct that they do not understand ethical considerations or they are simply incompetent at an intellectual or practical level and the public would be at risk if they were allowed to continue in practice at all, or except on very stringent conditions.

29 The Committee's case here really is that the acts of misappropriation are sufficiently significant to demonstrate a complete lack of appreciation by the practitioner of his ethical duties and it is not a failure that can be remedied simply by imposing a fine or simply by suspending the practitioner for a short period of time and that the only way to assure the public that professional standards mean what we say they mean is to say, "You can never practise law again."

30 In the end we think that to make a recommendation to the Supreme Court full bench that we think they should consider disbarring the practitioner permanently is a disproportionate response to the wrongdoing revealed here, particularly when the wrongdoing revealed is assessed in the light of the personal, and particularly the health, circumstances of the practitioner and, as we have said earlier, taking into account the fact that the practitioner himself recognises that he should not practise law again.

31 We as a Tribunal think that, whilst these proceedings were not set up to inquire into the general competency of the practitioner to practise, that such an inquiry if held would likely reveal that the public would have little confidence in the practitioner practising competently. So we think the practitioner has shown good insight into his own capacity to indicate to his counsel that he will never practice again and has been prepared to give that undertaking which we note is on the record.

32 The result is that we think a proportionate response to what has happened here, in the particular circumstances of this case, is a set of orders along the lines we have already foreshadowed, namely that a period of suspension for two years should be imposed. That indicates to the profession and the public, in these particular circumstances, that the conduct complained of requires very considerable censure. To say to someone, "You cannot practice for two years where on the face of it you have misappropriated $950" is, we think, a very considerable censure; but we think it is appropriate.

33 Misappropriating money in circumstances like those here shows a basic disregard for standards of honesty that are fundamental to the

relationship that every lawyer must have with their client. It presumptively raises the question in every case why there should not be a very significant penalty - striking off or suspension. We think, as we say, for the reasons given that a suspension of two years is appropriate.

34 We gave some contemplation to imposing a fine as well but in the circumstances of the practitioner, where he does not earn income separately from the receipt of a Commonwealth pension, there does not seem to be any point in doing so. It is purely for that reason that we do not impose a fine.

35 It is appropriate that costs be ordered. The vocational body here has had to, in the public interest, bring and maintain these proceedings. It will be for the Committee and the practitioner to work out how those costs are to be repaid over time but it is certainly appropriate that the burden should be borne by the practitioner.

Conclusion and orders

36 The Tribunal finds and orders as follows:

A. In respect of VR 181 of 2007 the Tribunal finds that:

(i) between November 2002 and May 2003 the practitioner Barry Michael Richardson was guilty of unprofessional conduct by converting to his own use two sums of money, totalling $950, received on account of costs from his client without having undertaken any significant work on behalf of the client; and

(ii) the practitioner is guilty of unprofessional conduct by failing to deposit any of three sums of money totalling $1150 received from the client into the trust account as required by s 34 of the *Legal Practitioners Act 1893* (WA).

B. In respect of VR 182 of 2007 the Tribunal finds that:

(i) the practitioner is guilty of unsatisfactory conduct by unprofessional conduct by failing to respond to a request for information from the Law Complaints Officer and by failing to respond to a summons to produce documents issued pursuant to s 198(1) of the *Legal Practice Act 2003* (WA).

37 In respect of the findings made on both counts in VR 181 of 2007 and in VR 182 of 2007, it is ordered that:

1. The practitioner is suspended from practice as a legal practitioner for a period of two years commencing on the date of this order.

2. The Tribunal notes that the practitioner undertakes not to practise law again and will not apply for a certificate to practise law in Western Australia or elsewhere on the expiration of the suspension.

3. The practitioner is to pay the Committee's costs of the proceedings fixed in the sum of $4000.

I certify that this and the preceding [37] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

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JUSTICE M L BARKER, PRESIDENT