

JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

STREAM : VOCATIONAL REGULATION

ACT : LEGAL PROFESSION ACT 2008 (WA)

CITATION : LEGAL PROFESSION COMPLAINTS
COMMITTEE and JOHNSTON [2013] WASAT 159

MEMBER : JUDGE D R PARRY (DEPUTY PRESIDENT)
MR J MANSVELD (SENIOR MEMBER)
MS J WALL (SESSIONAL MEMBER)

HEARD : 10 SEPTEMBER 2013

DELIVERED : 10 SEPTEMBER 2013

PUBLISHED : 25 SEPTEMBER 2013

FILE NO/S : VR 79 of 2012

BETWEEN : LEGAL PROFESSION COMPLAINTS
COMMITTEE
Applicant

AND

JULIA JOHNSTON
Respondent

Catchwords:

Legal practitioner - Disciplinary proceedings - Unsatisfactory professional conduct - Failing to make enquiries - Disclosing confidential information - Proposed consent orders - Whether penalty appropriate - Compensation order

Legislation:

Legal Profession Act 2008 (WA), s 425, s 435, s 438(1), s 438(2), s 439, s 439(d), s 440, s 441, s 448(2), s 448(5), s 449(1)
State Administrative Tribunal Act 2004 (WA), s 87(2)

Result:

Legal practitioner reprimanded and ordered to pay the applicant's costs and disbursements of the proceeding

Summary of Tribunal's decision:

The Tribunal made consent orders finding that Ms Julia Johnston, a legal practitioner, engaged in unsatisfactory professional conduct when acting as an independent children's lawyer in proceedings in the Family Court of Western Australia by failing to make enquiries which were appropriate for her to make and by disclosing confidential information about the father to the child's school.

At the hearing in relation to penalty and costs, the Legal Profession Complaints Committee and the practitioner agreed that the appropriate penalty for the unsatisfactory professional conduct is a reprimand and that the practitioner should be ordered to pay the Committee's costs in the amount of \$2,500. The father attended the hearing by telephone and sought a compensation order against the practitioner.

The Tribunal determined that a reprimand is a reasonable and appropriate penalty to achieve the objects of disciplinary proceedings in the particular circumstances of the case. The Tribunal also determined that the father did not suffer any loss as a result of the practitioner's unsatisfactory professional conduct and that a compensation order could not therefore be made.

Category: B

Representation:

Counsel:

Applicant : Ms PE Le Miere
Respondent : Ms WF Gillan

Solicitors:

Applicant : Law Complaints Officer
Respondent : N/A

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

Legal Profession Complaints Committee and Love [2011] WASAT 13
Re Maraj (A Legal Practitioner) (1995) 15 WAR 12

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 The Legal Profession Complaints Committee, which we will refer to as the Committee, has alleged that there is proper cause for disciplinary action against Ms Julia Johnston, a legal practitioner, who we will refer to as the practitioner, pursuant to s 438(1) of the *Legal Profession Act 2008* (WA), which we will refer to as the LP Act.

2 On 22 August 2013, the Tribunal made consent orders filed by the parties. The Tribunal ordered as follows:

Being satisfied by reason of the practitioner's admission that proper cause exists for disciplinary action against the practitioner, and in order to give effect to the agreed terms of settlement of the proceedings, it is on 22 August 2013 ordered pursuant to s 56(1) of the *State Administrative Tribunal Act 2004* (WA) that:

1. That the practitioner, JULIA JOHNSTON (practitioner), between about 30 July 2008 and 1 August 2008 engaged in unsatisfactory professional conduct when acting as independent children's lawyer (ICL) in child custody proceedings between Mr T and Ms R in the Family Court of Western Australia (Proceedings), by failing to make enquiries which were appropriate for her to make in view of the submissions made by Mr T and the remarks of the magistrate, before proceeding to make submissions to that Court concerning the best interests of the relevant child.
2. The practitioner, on 2 September 2008 and 3 September 2008, engaged in unsatisfactory professional conduct, by making statements about Mr T's mental health to a member of staff at J's school which were based on information that had been provided to her in her role as ICL, and was confidential to the parties.

3 The Tribunal also, by consent, otherwise dismissed the grounds of the application, ordered the practitioner to file and serve written submissions in relation to penalty and any supporting material in relation to penalty and costs, and directed that the matter be otherwise adjourned to the scheduled hearing of the proceeding on 10 September 2013.

Agreed facts

4 The consent orders made by the Tribunal on 22 August 2013 recounted the following agreed facts between the parties.

1. At all material times, the practitioner was an Australian legal practitioner within the meaning of the *Legal Profession Act 2008* (WA).
2. J was born in December 2000, the child of Ms R and Mr T. Ms R and Mr T ended their relationship in February 2001.
3. In or around September 2002, Ms R commenced proceedings against Mr T in the Family Court of Western Australia (Court), for the purpose of determining issues between Ms R and Mr T in relation to J (issues).
4. In or around October 2002, the Court appointed the practitioner as independent children's lawyer (ICL), to represent J's interests in the proceedings to determine the issues pursuant to s 68LA(2) of the *Family Law Act 1975* (Cth).
5. In about 2003, the issues were resolved by agreement, and J went to live with his father Mr T. The proceedings were adjourned and the practitioner's appointment and grant of legal aid in respect of that appointment came to an end.
6. On or about 25 July 2008, Mr T was charged with serious sexual offences, which charges came to the attention of the Court on or about 30 July 2008.
7. On 30 July 2008, at an interlocutory hearing in the Court (30 July 2008 Hearing) the practitioner appeared, as a friend of the Court, to assist the Court and the parties.
8. Shortly after the 30 July 2008 Hearing, the Court again appointed the practitioner as ICL for J in the Proceedings and the practitioner obtained a grant of legal aid for that purpose.
9. At the 30 July 2008 Hearing Mr T made submissions to the effect that he wished the practitioner to make enquiries of a detective M M who he said visited his home and would say that Mr T posed no risk to J.
10. Magistrate M remarked that that was something the practitioner would want to follow up.
11. There were also submissions made by counsel for Ms R that enquires should be made of the police officer who had preferred the charges.
12. On 31 July 2008, the practitioner spoke to Detective Senior Constable Bell (Detective Bell), then a detective at the Cannington Police Station, who had preferred the charges about the charges against Mr T and about whether he posed a risk to J. She did not contact M M.

13. During her telephone conversation with Detective Bell on 31 July 2008, Detective Bell told her a number of things about Mr T, including that Mr T had said he had been diagnosed with schizophrenia.
14. J was, by the end of August 2008, enrolled in a new school and the Principal of and teachers at J's school became aware that there were orders made by the Court that regulated Mr T's contact with J.
15. On 2 September 2008, Mr T telephoned the school to ask whether he could attend the school to drop off J's bicycle. Following that request, an unknown member of staff at J's school telephoned the practitioner, told her of Mr T's request and said that she/he was "... not sure of the legalities ..." of Mr T attending the school. In response to that enquiry, the practitioner told the staff member a number of things including that Mr T had a history of mental illness.
16. On 3 September 2008, during a further telephone conversation which she had with an unknown member of staff at J's school on that day, the practitioner said among other things that Mr T had a history of long term mental illness.

Issue for determination

5 The parties have ultimately, in effect, proposed consent orders in relation to penalty and costs. The penalty agreed between the parties is that the practitioner be reprimanded. The parties also agree that the practitioner be ordered to pay the Committee its costs of the proceeding assessed in the amount of \$2,500. Given that there is, in effect, an application by the parties for the making of consent orders as to penalty, the issue for determination by the Tribunal would usually be whether the proposed penalty falls within 'an appropriate range of potential outcomes given the nature of the conduct admitted by the practitioner' (*Legal Profession Complaints Committee and Love* [2011] WASAT 13 at [14]), having regard to the objects of disciplinary proceedings and the circumstances of the case. The objects of disciplinary proceedings are threefold: firstly, the protection of the public dealing with lawyers; secondly, the maintenance of proper standards in the legal profession; and thirdly, the maintenance of the reputation of the legal profession: *Re Maraj (A Legal Practitioner)* (1995) 15 WAR 12 at 24 and 25 (Malcolm CJ).

6 However, the circumstances of this case are somewhat unusual, because Mr T successfully sought review by the Tribunal in an earlier proceeding under s 435 of the LP Act of the Committee's original decision to dismiss elements of Mr T's complaints about the practitioner under

s 425 of the LP Act, and because Mr T has been invited to make submissions in relation to compensation in this proceeding. The elements of Mr T's complaints about the practitioner, in respect of which Mr T was successful in the earlier proceeding, are now in substance the subject of the referral in this proceeding. Mr T was unsuccessful in seeking review by the Tribunal in the earlier proceeding of the Committee's decision to dismiss several other complaints that he made about the practitioner under s 425 of the LP Act. Section 425 of the LP Act relevantly enables the Committee to dismiss a complaint about a legal practitioner, if the Committee is satisfied that there is no reasonable likelihood that the practitioner would be found guilty by the Tribunal of either unsatisfactory professional conduct or professional misconduct.

- 7 Mr T attended the hearing today by telephone. Although Mr T is not a party to these proceedings, in the circumstances of this case, given that he successfully sought review of the decision of the Committee to dismiss elements of his complaint about the practitioner which are now the subject of this proceeding, we consider it is appropriate to determine the issue of penalty as though it were a contested issue. The issue for determination by the Tribunal is therefore what is the appropriate and reasonable penalty to achieve the objects of disciplinary proceedings referred to earlier, having regard to the findings of unsatisfactory professional conduct and the circumstances, including mitigating circumstances, of the case.

Statutory framework in relation to penalty

- 8 Section 438(2) of the LP Act provides that if the Tribunal is satisfied that a practitioner is guilty of unsatisfactory professional conduct, it may transmit a report on the finding to the Supreme Court (full bench) or make any one or more of the orders specified in s 439, s 440 and s 441 of the LP Act. Section 439 enables the Tribunal to make orders:
- (a) suspending or cancelling the practitioner's practising certificate for a specified period;
 - (b) that a practising certificate not be granted to the practitioner for a specified period;
 - (c) that conditions be imposed on the practitioner's practising certificate; and
 - (d) publicly or in special circumstances privately reprimanding the practitioner.

9 Section 440 relates to interstate practice and is not relevant. Section 441 enables the Tribunal to make a wide variety of orders including a fine of up to \$25,000, a requirement for further education, and 'a compensation order'.

What is the appropriate disciplinary consequence of the findings of unsatisfactory professional conduct?

10 We find that a reprimand is a reasonable and appropriate penalty to achieve the objects of disciplinary proceedings in the particular circumstances of the case. A reprimand is a serious penalty and is proportionate to the unsatisfactory professional conduct and the circumstances of the case. We have come to this conclusion for the following eight reasons.

11 First, although the practitioner failed to make enquiries of Detective M M, as suggested by Mr T, and as endorsed by the Magistrate, M M was an officer in a different area, and was not the officer with carriage of the charges against Mr T.

12 Secondly, the practitioner made enquiries of the officer with carriage of the charges against Mr T. The officer gave the practitioner particulars of the alleged offence, and of the complainant's statement to police. The officer told the practitioner that the complainant was a 14 year old girl, who said that she performed oral sex on Mr T. The officer told the practitioner that the complainant's 11 year old intellectually disabled brother was at Mr T's house playing with J on a computer game while the offence took place, and that there was marijuana in Mr T's house. The officer told the practitioner that Mr T said that he smoked marijuana to sleep and to self-medicate for schizophrenia. The officer expressed the view to the practitioner that it would be dangerous for J to remain or to return to Mr T's house.

13 Thirdly, the practitioner was in court on 30 July 2008 as a friend of the court, and she made the enquiries she thought necessary in the short time available before the matter came back before the court two days later.

14 Fourthly, the practitioner's disclosure of the confidential information about Mr T's mental health, while wrong as she acknowledged in her correspondence with the Committee, was well motivated by concerns for the welfare of J and for others at the school.

15 Fifthly, the practitioner is a senior practitioner with over 30 years' experience and without any disciplinary record. In a character reference provided to the Legal Practice Board, a senior family law consultant at the Legal Aid Commission said the following:

Ms Johnston is highly regarded by the legal profession and by Legal Aid as a competent and highly experienced independent children's lawyer. Due to her experience she is one of the few private practitioners who we ask to take on complex ICL matters. Having worked closely with Ms Johnston for many years I am aware of the skill and understanding she brings to these difficult matters. Ms Johnston is a valued and well-recognised member of the profession and she is often called upon to assist less experienced practitioners.

16 Sixthly, for the past 10 years, the practitioner has accepted instructions from the Legal Aid Commission as an independent children's lawyer in family law matters and as a separate representative in care and protection proceedings in the Children's Court. She has been involved in approximately five hundred cases in these roles. Given that the practitioner is the principal of a firm employing four solicitors, that her work as an ICL and as a separate representative is paid at Legal Aid rates, and that these cases often involve complexity and difficult circumstances, the practitioner has demonstrated a commendable commitment to the welfare and protection of children. That is to her considerable credit.

17 Seventhly, the practitioner has also demonstrated a considerable commitment to the wellbeing of the legal profession and of the community over many years by serving on the committees of various professional associations and a charitable trust, of which she was the chairperson for seven years. The chief executive officer of the organisation associated with the trust described the practitioner's contribution as 'invaluable'. The trust and organisation benefits children who are at risk and their families. As a consequence of her community work, the practitioner has been runner up in the Law Society Community Service Awards.

18 Finally, the practitioner has acknowledged and has demonstrated insight in relation to her unsatisfactory professional conduct. Indeed, she essentially conceded the allegations which are now the subject of the Tribunal's findings in her correspondence with the Committee. She is, we find, remorseful, and has apologised for not having lived up to the standards of the legal profession. This also is to her credit.

Compensation

19 Mr T sought a compensation order against the practitioner. Mr T initially said that he has suffered a financial loss of \$50,000, and later said that it was a loss of \$60,000. \$30,000 of the \$60,000 is, Mr T said, in respect of one hundred supervised visits between Mr T and J at \$300 per visit between February 2009 and September 2010. The remaining \$30,000 is apparently an estimate by Mr T of his lost wages in representing himself in what he said were forty seven court appearances. Although Mr T said that the disclosure of confidential information about his mental health to J's school was 'degrading' and a 'personal attack' by the practitioner on him, he did not claim, if any such claim could be made under the LP Act, loss for any damage to his reputation.

20 Section 448(1) of the LP Act states that a 'compensation order' is an order to compensate an aggrieved person 'for loss suffered because of conduct of an Australian legal practitioner that is the subject of a complaint by that person or is investigated by the Complaints Committee of its own initiative'. Section 448(2) of the LP Act states that a compensation order consists of one or more of three types, including relevantly in para (c), 'an order that the practitioner pay to the aggrieved person, by way of monetary compensation for the loss, a specified amount'. Section 448(5) of the LP Act limits any compensation order that the Tribunal may impose to \$25,000 unless the aggrieved person and the practitioner both consent to the order.

21 Section 449(1) of the LP Act states as follows:

Unless the aggrieved person and the Australian legal practitioner concerned agree, a compensation order is not to be made unless the Complaints Committee or State Administrative Tribunal is satisfied -

- (a) that the aggrieved person has suffered loss because of the conduct concerned; and
- (b) that it is in the interests of justice that the order be made.

22 Ms PE Le Miere, who appeared on behalf of the Committee, and Ms WF Gillan, who appeared on behalf of the practitioner, both submitted that the compensation order sought by Mr T is beyond the scope of the legislation. We agree. Mr T has not suffered the loss he claims compensation for because of the conduct concerned.

23 In relation to the failure to contact M M, it is significant that when the matter returned to the Court for a case assessment conference on

1 August 2008, neither Mr T nor his counsel who represented him referred to M M or to the request that M M be contacted before any orders were made, even after the practitioner referred to what she had been told by the officer with carriage of the prosecution.

24 More significantly, the issue of access between Mr T and J, including the need for supervised access at Mr T's expense, had been largely agreed between the hearing on 30 July 2008 and the hearing on 1 August 2008. The family consultant said to the Court at the outset of the hearing on 1 August 2008 that Mr T and Ms R had agreed, without any admissions, to J residing with Ms R and having supervised and telephone access with Mr T, with the only thing not agreed being the details of the contact. The parties' counsel agreed that this was the case, and there was in fact ultimately no disagreement about the details of contact which was to include supervised contact at Mr T's expense.

25 Therefore, Mr T relevantly suffered no loss as a result of the practitioner's conduct in failing to contact M M. The supervised contact and its costs occurred because of the order made by the Court, to which Mr T consented.

26 Mr T submitted that the Tribunal should infer that the supervised contact occurred because of the negative attitude formed by the practitioner about Mr T because of her failure to contact M M. Mr T said that M M was impressed with Mr T's ability to take care of his son. However, the transcript of the hearing on 1 August 2008 before the Court does not reveal any negative attitude by the practitioner to Mr T, and reveals that the dominant factor leading to the making of the order was the joint position of the parties announced by the family consultant at the outset of the hearing. The family consultant said that Mr T had no concerns with J living with his mother and having supervised contact with Mr T. Mr T's counsel confirmed this, and said that Mr T found it 'reassuring' that there was an independent children's lawyer and the Department for Child Protection present at the hearing.

27 In relation to the disclosure of confidential information as to Mr T's mental health to J's school, Mr T did not present any argument that could possibly connect that conduct with the losses he claimed. We are therefore not satisfied that Mr T has suffered any loss because of the conduct concerned.

28 Consequently, the Tribunal does not have power to make the compensation order sought by Mr T.

Orders

29

For these reasons, we make the following orders:

1. Pursuant to s 439(d) of the *Legal Profession Act 2008* (WA) the practitioner is reprimanded.
2. Pursuant to s 87(2) of the *State Administrative Tribunal Act 2004* (WA) the practitioner must within 28 days pay to the applicant the applicant's costs and disbursements of the proceeding assessed in the sum of \$2,500.

I certify that this and the preceding [29] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

JUDGE D R PARRY, DEPUTY PRESIDENT