

Legal Profession Board of Tasmania

Medium Neutral Citation:	Complainant v Practitioner [2017] LPBT 54
Considered :	30 October 2017
Determination date:	31 October 2017
Jurisdiction:	Legal Profession Board, Tasmania
Before:	Mr K Pitt QC (Chairman) Mr G Jones (Legal Member) Mr A Mihal (Legal Member) Mr D Lewis (Legal Member) Ms J Paxton (Lay Member) Mr P Dane (Lay Member)
Determination:	The complaint is dismissed pursuant to section 433(1)(a) of the <i>Legal Profession Act 2007</i> on the basis it is misconceived and lacking in substance.
Catchwords:	PROFESSIONS AND TRADES- Lawyers- Complaints and Discipline- Professional misconduct and unsatisfactory professional conduct- Allegations of failure to provide adequate advice prior to commencement of proceedings
Legislation:	<i>Legal Profession Act (Tas) 2007 – s 433(1)(a)</i>
Category:	Determination
Parties:	(Complainant) (Practitioner)
FileNumber:	2017/54

REASONS FOR DETERMINATION

Background

1. This matter comes to the Board by way of a complaint received on 10 August 2017.
2. The Complainant is an Australian lawyer¹ and the Director of a company ('the company'). The company terminated the employment contract of an employee, Ms W, in late June 2017. The grounds for termination were that the position was redundant. An offer of a termination payment to Ms W was formalised by way of a Deed effective shortly thereafter, by which she released the company from all liability in connection with her employment.
3. Ms W was working in a part time role and pregnant at the time of the termination.
4. In early July 2017 Ms W contacted the Practitioner by phone and sought advice with respect to her termination of employment and the Deed.
5. Having taken instructions, around mid July 2017 the Practitioner forwarded a letter of demand to the company asserting that Ms W had executed the Deed under duress. The company engaged solicitors to act on its behalf. The company's solicitors wrote to the Practitioner that day advising that they were seeking instructions with respect to her letter of a few days prior.
6. The company's solicitors made a substantive response to the Practitioner in the early afternoon a week later. Later that day, the Practitioner filed an application seeking to challenge the termination of employment ('the application') with the Fair Work Commission ('FWC').
7. The application was never served on the company's solicitors and was ultimately withdrawn by Ms W.

The Complaint

8. The Complaint alleges the Practitioner:
 - 1) Failed to provide adequate advice to her client, Ms W, with respect to a Deed of Release and inappropriately commenced proceedings, in circumstances where:
 - a. The Practitioner was provided with a copy of the Deed;
 - b. Proceedings were filed by the Practitioner on behalf of her client;

¹ The Complainant's company profile says he is a 'Legal Practitioner of the Supreme Court of NSW'. He does not hold a current practising certificate in NSW.

- c. The Practitioner subsequently advised the Complainant's solicitors around late July 2017 that she had not received 'proper' instructions from her client and that her client did not understand the terms of the Deed;
- d. The proceedings were never served on the Complainant or his solicitor;
- e. The proceedings have since been withdrawn.

As a result of the Practitioner's failure to provide that advice, the Complainant has unnecessarily incurred \$4,804.25 in legal fees.

Relevant legislation and the law

- 9. The Practitioner is an Australian legal practitioner within the meaning of s 6 of the *Legal Profession Act 2007* ('the Act').
- 10. The Practitioner has made submissions to the Board, and the Board has had regard to those submissions in addition to the material supplied by the complainant.
- 11. Unsatisfactory professional conduct for the purposes of the Act includes conduct of an Australian legal practitioner occurring 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.
- 12. In this matter, the Complainant is aggrieved because the company has been put to expense regarding the termination of Ms W and had to defend allegations put to it in circumstances where Ms W had entered into a Deed, instructed her lawyer to issue proceedings, and then ultimately withdrew the action.
- 13. A practitioner's primary obligation is to act in accordance with the instructions of their client subject to that obligation not extending to acting illegally or assisting a client in an illegal purpose. The obligation can be overridden by a lawyer's obligation to a Court and to the administration of justice.
- 14. The Practitioner had 21 days to file any application with the FWC from the date of termination, so that to protect her client's right the application had to be filed by a specified date in July.
- 15. The Practitioner had advised the company's solicitors that she was lodging the application to protect her client's legitimate interests while clarifying instructions, and requested they take no action while she was doing so. The application was never served, and was subsequently withdrawn in a timely way, and the company agreed not to pursue its costs,

16. It is not inappropriate for a practitioner to assist their client in their (lawful) instructions to make an application to a Commission or a Court, or to ensure any application is lodged within time. Legal practitioners owe their clients a duty to take every legitimate course available to pursue those interests, subject to the paramount duty to the administration of justice and their duty to act with honesty and courtesy to their opponents.
17. Having regard to the above facts the Board considers that the Practitioner has acted appropriately, and is not guilty of conduct falling 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.
18. It follows that the complaint must be dismissed as misconceived or lacking in substance.

DETERMINATION

The complaint is dismissed pursuant to section 433(1)(a) of the Act on the basis it is misconceived and lacking in substance.

Legal Profession Board of Tasmania

Per: 

Chairperson

Please note that within 21 days after the date of this determination the complainant or the legal practitioner, the subject of the complaint may apply to the Disciplinary Tribunal or Supreme Court to have this matter heard by the Disciplinary Tribunal or Supreme Court and may make an application to the Disciplinary Tribunal or Supreme Court to stay the determination pending the finalisation of such an application.

Please be aware that an application made to either the Disciplinary Tribunal or Supreme Court may, in the event that application is unsuccessful, result in a costs order against you. Accordingly, it is recommended that independent legal advice is sought prior to making such an application.

Any application to the Disciplinary Tribunal must be in accordance with the form prescribed under the Legal Profession (Disciplinary Tribunal) Rules 2010 (see <http://www.lpbt.com.au/policy-and-guidelines/>).

The contact details of the relevant bodies are as follows:

Disciplinary Tribunal Secretary Mrs Maria Dwyer, Ogilvie Jennings: 6272 6860

Supreme Court, General Enquiries: 1300 664 608