

Legal Profession Board of Tasmania

Medium Neutral Citation: **Complainant v A Practitioner [2018]**
LPBT 79

Considered / Heard: **26 November 2018**

Determination date: **28 November 2018**

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 H Francis (Lay member)

Determination: The complaint is dismissed pursuant to section 433(1)(a) of the *Legal Profession Act 2007* 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 inappropriate comments made within earshot of complainant by opposing lawyer- allegations of misleading court.**

Legislation: *Legal Profession Act* (Tas) 2007 section 433(1)(a)

Category: Determination

Parties: (Complainant)
(Practitioner)

FileNumber: 2018/79

REASONS FOR DETERMINATION

Background

1. This matter comes to the Board by way of a complaint received on 4 July 2018.
2. The Practitioner's client, Mr B is the Complainant's former partner.
3. The Complainant applied for a restraint order against Mr B.
4. In June 2018, the Practitioner was at the Magistrates Court for other matters, with a junior lawyer, and noticed that his client was on the court list with respect to the Complainant's application for a restraint order.
5. The Practitioner called Mr B and sought instructions to appear and seek an adjournment.
6. Prior to the application being called on, the Practitioner sought a copy of the Magistrates Court file. The Practitioner noted that the affidavit of service of the application had not been completed.
7. The application was called on and the Practitioner appeared for Mr B. The Complainant was self-represented.
8. The application was adjourned until July 2018.
9. When the application was next heard in July 2018, the Practitioner requested that the application proceed to mediation.
10. Neither the Practitioner nor the Complainant advised the Magistrate that Mr B had been charged with assault.
11. The request for the application to proceed to mediation was granted by the Magistrate.
12. The above facts were undisputed, and the Board finds those facts.

The Complaint

13. The Complaint alleges the Practitioner:
 - A. Whilst at the Magistrates Court in June 2018, the Practitioner made inappropriate comments with respect to the restraining order that the Complainant served on the Practitioner's client in circumstances where the Complainant was within earshot of the Practitioner's conversation;
 - B. In July 2018, failed to inform the Magistrate that the Practitioner's client was on bail for assaulting the Complainant when the Practitioner asked that the matter be mediated.
14. The Board has considered submissions from each of the parties and the relevant supporting documentation.

Relevant legislation and the law

15. The Practitioner is an Australian legal practitioner within the meaning of s 6 of the *Legal Profession Act 2007* ('the Act').

16. Section 420 of the Act defines unsatisfactory professional conduct:

unsatisfactory professional conduct 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.

17. Section 421 of the Act defines professional misconduct:

professional misconduct includes –

(a) *unsatisfactory professional conduct of an Australian legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and*

(b) *conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring 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.*

18. In accordance with s 433(1)(a) of the Act, the Board must dismiss a complaint if the complaint is in the opinion of the Board vexatious, misconceived, frivolous or lacking in substance.

Consideration

19. The Complainant has articulated in her complaint that she feels her safety has been compromised by the manner in which her application has been dealt with by the court, and further, that actions of the Practitioner as set out above, have shown a lack of compassion and contributed to her feeling unsafe.

20. The Practitioner has denied making any inappropriate comments in June 2018 about the application, although he has confirmed he discussed it with the junior lawyer prior to it being called on before the Magistrate.

21. The Board is not required to make a finding of fact as to whether the words alleged were said, because even if they were, the words could not be described as so grossly offensive, nor so discourteous that they could result in a finding of unsatisfactory professional conduct or professional misconduct.

22. To the extent the complaint is concerned with raising issues about Mr B with the Magistrate, and particularly that he was on bail for assault, the orders for mediation were made by the Magistrate. Practitioners owe a duty to the court and to their clients, but they are not obliged to assist self-represented litigants to run their case. The Complainant was able to raise the assault issue with the Court, but did not do so.
23. It follows that the complaint must be dismissed.

DETERMINATION

The Complaint is summarily dismissed pursuant to section 433(1)(a) of the *Legal Profession Act 2007* as 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