QCAT

Queensland Civil and Administrative Tribunal

CITATION:	*Legal Services Commissioner v Winning* [2017] QCAT 150
PARTIES:	Legal Services Commissioner (Applicant) v Douglas John Winning (Respondent)
APPLICATION NUMBER:	OCR246-13
MATTER TYPE:	Occupational regulation matters
HEARING DATE:	5 May 2016
HEARD AT:	Brisbane
DECISION OF:	**Justice DG Thomas, President** Assisted by: **Mr Ken Horsley (Legal panel member)** **Dr Margaret Steinberg AM (Lay panel member)**
DELIVERED ON:	25 May 2017
DELIVERED AT:	Brisbane
ORDERS MADE:	**1. The respondent is to pay the applicant's costs fixed at $71,532.37.**
CATCHWORDS:	COSTS – ASSESSMENT OF COSTS – where respondent found guilty of professional misconduct – where Tribunal must make an order requiring the practitioner to pay costs unless the Tribunal is satisfied that exceptional circumstances exist – where respondent refers to four offers made prior to hearing – where respondent alleged offers would have put in place a regime so ordered by the Tribunal – whether content of offers disclose necessary features of the order made by the Tribunal – whether rejection of the offers by applicant amounts to exceptional circumstances – whether respondent should pay fixed costs as previously assessed

Legal Profession Act 2007 (Qld) ss 456, 462
Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 107(1)

Legal Services Commissioner v Bone [2014] QCA 179
Legal Services Commissioner v Sing (No 2) [2007] LPT 005
Legal Services Commissioner v Winning [2015] QCAT 510

APPEARANCES:

APPLICANT: Mr J Bell QC for the Legal Services Commissioner

RESPONDENT: Mr A Morris QC for Mr Winning

REASONS FOR DECISION

[1] The Tribunal found that the conduct of Mr Winning amounted to professional misconduct.[1]

[2] The Tribunal ordered that the parties file submissions in relation to costs.[2]

[3] Pursuant to section 462 *Legal Profession Act* 2007 (Qld) ('LPA'), upon a finding of professional misconduct, the Tribunal must make an order requiring the practitioner to pay costs unless the Tribunal is satisfied that exceptional circumstances exist.

[4] The respondent submits that there are exceptional circumstances. The respondent refers to three offers, namely offers made on 14 January 2013, 26 April 2013 and 12 August 2013. In addition to those three offers, the respondent refers to a further offer made on 24 September 2014.

[5] Essentially, the respondent submits that he offered to meet with the applicant and put in place a regime which, in the respondent's submission, was equivalent to the regime ultimately ordered by the Tribunal. Mr Winning submits that the applicant responded to the initial offers by saying that an order would be sought that the respondent's name be removed from the roll of solicitors.

[6] As to the offer on 24 September, Mr Winning submits that all facts he could recall, or were recorded on tape, or in the transcript, were admitted. As to the balance, he took the reasonable stance of saying that he could not recall.

[7] By analogy with other types of civil proceedings, the respondent submitted that the offer being made amounted to a situation where the

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1 *Legal Services Commissioner v Winning* [2015] QCAT 510 at [11]-[13].
2 Ibid, at [54].

Commissioner "has rejected and then not beaten the respondent's offer(s) to settle".

[8] In written submissions, Mr Winning initially drew attention to the fact that the four charges first laid against him were reduced to two charges as a further relevant circumstance. However, this argument was abandoned at an oral hearing.

[9] Mr Morris QC, on behalf of Mr Winning, submitted that:

a) The duty to protect the public is central to the existence of the Legal Services Commissioner and his role and, in undertaking that duty, it was for the Commissioner to exercise his own independent and responsible judgment.

b) The Commissioner should "be grasping with both hands" an opportunity to work with the respondent to arrive at a regime which would prevent the conduct recurring.

c) Whilst some "bad people" come before the Tribunal in its disciplinary jurisdiction "he's not one of them". Mr Winning's case was one of a personality disorder or condition which caused him to behave in a way which was not acceptable to the profession but "is not reflective of malice, bad faith or badness in any other sense".[3]

d) The function of the legislation being to protect the community from all categories of offender: the bad offender, the incompetent offender, the troubled offender and it doesn't necessarily follow that the same penalties or the same cost regime should apply to every such case.[4]

e) The case is special and unusual in the circumstances that the respondent was not a bad man, not a person being punished for dishonesty or for corruption, or for some other sort of deliberate misbehaviour, but a practitioner who has, as a result of his personality disorder, done the wrong thing and expressed a desire to work with the Commission and, from the outset, and at repeated intervals, indicated his willingness to enter into such a regime only to be told by the Commission that the only acceptable solution was that the respondent's name be removed from the roll.[5]

f) The Commissioner failed to adopt an accountable approach to the use of public funds by attempting to preserve those funds in the way of arriving at an outcome which would protect the public without the need for a complete investigation and for the conduct of a complete prosecution.[6]

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3 Transcript of Hearing, 5 May 2016, T1-14, ll 34-38.
4 Ibid, T1-14, ll 40-44.
5 Ibid, T1-19, ll 30-37.
6 Ibid, T1-20, ll 9-12.

g) The Tribunal should not encourage the Commissioner to adopt this course.[7]

h) Realistically, a costs order would be appropriate but it should be limited to the amount of costs up to the time of the first offer made on 14 January 2013.[8]

[10] The Commissioner submits that:

a) Disciplinary proceedings are not civil proceedings.[9] Morrison JA described disciplinary proceedings as "akin to criminal proceedings, although not requiring the same standard of proof".[10] The rules of offers in relation to civil proceedings do not apply.

b) The "offers to settle" referred to by the respondent are more properly characterised as submissions to discontinue the investigation and/or the disciplinary proceedings.

c) During the course of the matter, the respondent made a number of submissions and offers in the nature of submissions which are "routinely made by respondents in the course of the applicant's investigations and disciplinary proceedings".

d) As to the matter of principle, the approach taken by the practitioner was to make an offer on a without prejudice basis, whilst at the same time, on an open basis, continuing vigorously to dispute the matter, which conduct continued up until the change in approach shortly prior to the hearing. When the Commissioner became aware of the change in approach shortly prior to, and at, the hearing, the orders sought by the Commissioner were no longer that the respondent's name be removed from the roll.

e) The respondent's submissions focus too much on the conduct of the Commissioner whereas, for the purpose of the determination of sanction, the approach should be to focus on the conduct of the practitioner, in particular whether the practitioner acted in an open way showing remorse and understanding.

f) As a point of principle, the Tribunal should not encourage practitioners to "negotiate behind the scenes but keep the case on board".

Disposition

[11] The overriding consideration for the Tribunal in dealing with misconduct is the protection of the public, which includes the public interest in ensuring

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7 Transcript of Hearing, 5 May 2016, T1-20, L 14.
8 Ibid, T1-20, ll 20-30.
9 *Legal Services Commissioner v Bone* [2014] QCA 179.
10 Ibid at [47].

that legal practitioners are aware of the requirements to which they must adhere.

[12] In relation to offers to compromise, the proceedings are not civil proceedings where an unaccepted offer, judged against the final outcome, must lead to costs consequences. This is demonstrated in the provisions of section 462(1) LPA, which requires that an order for costs will be made against the practitioner unless there are exceptional circumstances. It is equally demonstrated in the provisions of section 462(4) LPA, which provide that, as a general rule, even where no finding as to misconduct is made, the practitioner will not have the benefit of an order of costs unless special circumstances are found to exist.

[13] The approaches embodied in the legislation recognise the public interest that must motivate the Commissioner in approaching the Tribunal.[11]

[14] In considering the appropriate sanction, the Tribunal must have regard to the protection of the public, and will, therefore, be influenced by the factors which would give the Tribunal more confidence that the orders made would be more likely to achieve that objective.

[15] If the protection of the public can be achieved without ordering the removal of the practitioner's name from the local roll, then this is the appropriate course to follow.

[16] This was the approach taken by the Tribunal in Mr Winning's case. It was also the approach taken by the Commissioner at the hearing.

[17] In terms of a sanction which involves supervision and mentoring to influence the conduct of practitioners in the future, the way in which the practitioner approaches the proceedings and the practitioner's acceptance and understanding of the nature of conduct and especially the fact that it is not acceptable, are of paramount importance. This seems obvious – if the practitioner does not accept that the conduct was unacceptable (for example by continuing to deny the effect of the charges) then the supervision and mentoring process has less likelihood of being successful and, as a result, the public will not be protected.

[18] Where there is continued denial, even in the face of a proposal regarding supervision and mentoring, the Commissioner may justifiably be of the view that there are not strong prospects of protecting the public and in those circumstances, may justifiably consider that more serious orders may be necessary to protect the public.

[19] The other aspect of the protection of the public is the maintenance of standards in the profession and ensuring that practitioners fully understand that the relevant conduct (which is found to be professional

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11 *Legal Services Commissioner v Sing (No 2)* [2007] LPT 005.

misconduct) is unacceptable. Frequently, this is achieved by a public reprimand, and sometimes the imposition of a pecuniary fine.

[20] These considerations were relevant in the current circumstances.

[21] The respondent submitted that the function of the legislation being to protect the community from all categories of offender: the bad offender, the incompetent offender, the troubled offender and it doesn't necessarily follow that the same penalties or the same cost regime should apply to every such case.

[22] That submission is correct in relation to the sanctions. The sanctions do depend on the nature of the conduct.

[23] As to the costs, the LPA deals with the position in section 462. In the event that the Tribunal makes a finding of unsatisfactory professional conduct or professional misconduct, the order as to costs will vary only to the extent that exceptional circumstances are found to exist.

[24] The respondent has referred to four letters as being offers which are relevant to the question of whether exceptional circumstances exist so that the usual order made with respect to costs (that the respondent pay the Commissioner's costs as contemplated by section 462(1) LPA) should not be made.

[25] It is necessary to examine those offers against the background of the general principles regarding sanction just outlined.

[26] The first letter referred to is dated 14 January 2013. The contents of this letter do not demonstrate an appreciation by the practitioner that the conduct was unacceptable. He denies making any inappropriate comment as to His Honour Judge Searles and concedes only "some of his conduct" was inappropriate.

[27] Essential ingredients necessary to give an adequate level of confidence that an arrangement could be made which would protect the interests of the public are missing from this letter and, indeed, the language is to the contrary.

[28] The Commissioner's response to that letter (dated 15 January 2013) was to describe the offer to put a regime in place as "a promising prospect", to record that any proposals put forward "will be considered in the public interest" and to conclude that "any proposals put forward of your client's own volition will demonstrate insight and reflection on the part of your client". Those comments were appropriate in the circumstances.

[29] The next letter to which reference is made is the letter dated 26 April 2013. Again, the communication lacks the necessary appreciation by the practitioner that the conduct is unacceptable. The practitioner records that he "does not accept Mr Boyle's account", has no recollection of using other words and notes that one of the witnesses is not willing to provide a

statement. This approach had changed by the time of the hearing. The respondent again concedes only that there were “some short comings in his behaviour”.

[30] The letter concludes by submitting that the Commissioner should take no further action in the matter. This is a far cry from the position which was taken at the hearing.

[31] The third letter to which reference was made is the letter dated 12 August 2013. This letter was forwarded after draft particulars of charge had been sent by the Commissioner to the respondent.

[32] The respondent does not admit a number of the comments, namely those particularised in 1.2(r), 1.2(t) and, essentially, the particulars set out in 1.2(r) and 1.2(t). It is suggested these comments do not appear in the transcript and that the respondent had no recollection of using them.

[33] These matters came to be accepted by the respondent at the hearing.

[34] The respondent maintains that his comments should be looked at in the context of the history of the matter, and when this is done “there is no basis upon which the respondent should be prosecuted on draft charge 1”.

[35] As to charges 2, 3 & 4, the letter concludes (separately) “there is no basis upon which you should prosecute my client”.

[36] Under the heading “possible proceedings”, the letter asserts that there is no case which should properly be pursued against Mr Winning. As to the conduct, the letter records that Mr Winning accepts “some of his conduct” was inappropriate, and then submits that it is not in the public interest to prosecute Mr Winning. A number of reasons for this conclusion are set out.

[37] One of the reasons includes that the respondent would like to work with the Commissioner in order to put in place a regime that will not see a recurrence of behaviour, which is the subject of the complaint.

[38] No detail is provided and the indication is made against the previous observations, which do not demonstrate a sufficient level of appreciation by Mr Winning that his conduct was unacceptable.

[39] The respondent finally refers to the letter dated 24 September 2014.

[40] In this letter, the respondent refers to receiving counselling, his previous acknowledgement of remorse for his actions and says that he has gained insight into his condition and the distress and embarrassment that his actions have caused, and that he has brought the profession into disrepute.

[41] A series of offers are set out in the letter, which do not include the full extent of the offers finally made and orders made by the Tribunal.

Importantly, there was no proposal as to public reprimand, and the periods of mentoring and medical assistance were limited. There was also some confusion, as is evidenced by the response dated 23 October 2014 from the Commissioner, as to whether the respondent accepted all the charges – specific reference was made to the conduct charged at 1.2(b)(ii) and 1.2(b)(iv).

[42] These matters were ultimately accepted by the respondent just prior to the hearing.

[43] In the earlier three of those communications, it is clear that the practitioner did not accept the extent of misconduct which is evidenced in the charges and so a fundamental ingredient for a regime involving counselling and mentoring was not present.

[44] As to the fourth letter in September 2014, again, the extent to which the practitioner accepted the nature of all the conduct remained in doubt (as was evidenced by the October letter from the Commissioner) and in any event, the letter did not deal with the public reprimand, which was important in sending a message to the profession that the conduct is unacceptable.

[45] Having regard to the contents of the letters:

a) The ultimate outcome was not a position where, as the respondent puts it, “the Commissioner has rejected and therefore not beaten “the offer to settle”.

b) Bearing in mind the objective which was to protect the public, the response by the Commissioner was not an exceptional circumstance.

[46] The respondent submitted that if the respondent were ordered to pay the assessed costs at $70,000, the respondent would file for bankruptcy which would “trigger an investigation into whether he is a fit and proper person to be a solicitor”. He submitted that this would be an unfair outcome as it would exceed any fine that the respondent would have been ordered to pay.

[47] The respondent’s personal financial circumstances are not relevant to the consideration of whether exceptional circumstances exist.

[48] The respondent’s submissions, in referring to the level of costs as compared with the level of fine, confuse those matters.

[49] Under section 456 LPA, if a finding of professional misconduct is made, the Tribunal may make any order it thinks fit including one or more of the orders outlined in that section.

[50] One of the orders outlined is “an order that the Australian legal practitioner pay a penalty of a stated amount, not more than $100,000”.[12]

[51] Unrelated to the order which might be made under section 456, the LPA deals with the imposition of the order for costs in section 462. The costs order against the respondent flows from the provisions of section 462 LPA, and is not influenced by the level of fine which is imposed.

[52] Having found that no exceptional circumstances exist, the Tribunal must, pursuant to section 463(1) LPA make an order that the respondent pay the Commissioner’s costs.

[53] Where possible, the Tribunal should aim to fix costs.[13] As to the quantum of costs, Mr Morris QC indicated to the Tribunal that the respondent accepts the figure advanced by the Commissioner and does not seek an assessment. Mr Morris QC submitted that a lump sum figure would be appropriate.

[54] As to the figure, Mr Cooper, the solicitor acting on behalf of the respondent, deposed to the fact that he estimated the Commissioner’s costs, calculated on a standard basis on the Supreme Court Scale would be “in the order of $70,000”. Mr Cooper exhibited a copy of an assessment obtained by the Legal Services Commissioner from Mr Ryan, costs consultant. The amount of that assessment is $71,532.37.

[55] The Legal Services Commissioner seeks an order for costs be fixed in that sum and the respondent accepts the figure advanced.

[56] On that basis, the Tribunal orders that the respondent pay the applicant’s costs fixed at $71,532.37.

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12 LPA s 456(4)(a).

13 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) s 107(1).