COURT: SUPREME COURT OF TASMANIA

CITATION: *Legal Profession Board of Tasmania v Barclay* [2022] TASSC 14

PARTIES: LEGAL PROFESSION BOARD OF TASMANIA
v
BARCLAY, David James

FILE NO: 2356/2021

DELIVERED ON: 23 February 2022

DELIVERED AT: Hobart

HEARING DATE: 23 February 2022

JUDGMENT OF: Brett J

CATCHWORDS:

Professions and Trades – Lawyers – Complaints and discipline – Disciplinary proceedings – Tasmania – Professional misconduct constituted by gross delay – Carriage of matter for 24 years – Matter not progressed and no communication with client – Otherwise unblemished record of professional conduct – Respondent no longer practising as a lawyer at time of disciplinary proceedings – Order that respondent be reprimanded.

Legal Profession Board of Tasmania v Lester [2021] TASSC 41, referred to.

Legal Profession Act 2007 (Tas), ss 5, 422, 486.

Aust Dig Professions and Trades [1274]

REPRESENTATION:

***Counsel*:**

Applicant: K Cuthbertson

Respondent: In Person

Solicitors:

Applicant: Tremayne, Fay, Rheinberger

Judgment Number: [2022] TASSC 14

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Serial No 14/2022
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LEGAL PROFESSION BOARD OF TASMANIA v DAVID JAMES BARCLAY

REASONS FOR JUDGMENT

BRETT J
23 February 2022

1 The Legal Profession Board of Tasmania (the Board) has made application to this Court pursuant to s 486 of the *Legal Profession Act* 2007 (the Act) to hear and determine a complaint made against the respondent in respect of his conduct as a legal practitioner. The complaint was received by the Board on 14 August 2019.

2 The respondent was admitted as a barrister and solicitor of the Supreme Court of Tasmania on 7 September 1987. He is therefore an Australian lawyer within the meaning of s 5 of the Act. He held a local practising certificate between at least 1992 and 16 December 2016. He was the principal of a law firm in Devonport between 1995 and 31 December 2003, and thereafter worked as an employed legal practitioner for a Hobart law firm. He ceased practice on 16 December when he was appointed as the President of the Industrial Commission. He still holds that position and has not renewed his practising certificate.

3 The complainant is a former client of the respondent. She suffered personal injury as a result of complications during her birth on 29 November 1989. Her parents engaged the Devonport law firm, with whom the respondent was then employed, in respect of a claim for damages in respect of those injuries. The respondent assumed carriage of this case in mid-1992 when he was an employee of that firm. He retained carriage of it continuously until ceasing practice in December 2016.

4 The complaint alleged delay and neglect on the part of the respondent. It is apparent from the evidence, and not disputed by the respondent, that he had done little to progress the case during the 24 year period that he had carriage of it. A brief summary of progress in the case is as follows:

(a) The action was commenced in 1992 by a writ which claimed damages for negligence and/or breach of duty from the doctor and the Health Board responsible for the hospital involved in the complainant's birth. The respondent filed an amended statement of claim in September 1993. The pleadings seem to have been closed upon the filing of a defence in July 1994.

(b) A number of medical reports were obtained and served on the defendants' lawyer in the period up to May 1994. There were intermittent discussions and correspondence between the respondent and the defendants' lawyer concerning the possibility of settlement over ensuing years. However, nothing at all was done to progress the case between 1996 and 2001. In 2001, there was correspondence between the respondent and the defendants' lawyer in respect of the need to obtain leave from the court before a further step in the action could be taken. This had become necessary because of the preceding delay. The defendants agreed not to oppose a grant of leave if particulars of injury, loss and damage were provided by a specific date. The respondent obtained some further medical reports and, on 23 October 2001, he filed and served particulars of injury, loss and damage. A further medical report was provided soon after and there was some further discussion between the parties with respect to the possibility of a settlement conference. The defendants obtained their own medical reports, but despite the discussion, a conference did not occur.

(c) Progress, such as it was, slowed considerably after the respondent commenced employment with the Hobart law firm at the beginning of 1994. Counsel for the Board summarised the position as follows:

"In summary, the only positive steps taken by the Respondent in respect of the matter in the period between 31 July 2003 to December 2016 were to:

(a) Seek updated information from the complainant's General Practitioner;

(b) File notices of intention to proceed in 2005 and 2010;

(c) Liaise with the DPP in 2010 about the future progress of the matter;

(d) Meet with the (complainant's mother) and the complainant (the clients) in October 2013."

5 Between 2010 and 2016, the complainant and her mother made numerous attempts by email and telephone to contact the respondent and seek information as to the progress of the matter. There was an ongoing failure on the part of the respondent to respond to these enquiries, and to provide the complainant with any information concerning the case. It seems that the respondent did little if anything to progress the claim during those years.

6 After the respondent ceased legal practice, the case was taken over by an experienced personal injuries practitioner from another firm. The respondent facilitated the transfer of the file to the new lawyers. The claim was resolved by settlement in 2019.

7 The respondent does not contest this history. In submissions to me, he accepted that the delay was significant and reiterated matters raised by him in his response to the complaint. These are summarised in the submissions of the Board's counsel as follows:

"a The respondent accepted his conduct of the personal injuries matter was affected by delay;

b He accepted he had no adequate explanation for delay once the complainant turned 18, which occurred in November 2007;

c He explained that he was at a loss to be able to explain the delays after 2007 and that he was profoundly embarrassed;

d He noted the complaint was the only strike against him in a career of some 30 years;

e He was prepared to accept the conduct amount to unsatisfactory professional conduct but not professional misconduct as it related to one matter, he had not been subject to any other complaint of delay, no other complaint against him had proceeded to investigation and the delay not prevented the complainant from being successful."

8 With respect to the characterisation of the matter, the respondent submitted to me that he "does not oppose the orders sought that the conduct amounts to professional misconduct".

9 The respondent's concession is appropriate. There is no question in my mind that his conduct, taken as a whole, constitutes professional misconduct. Delay and neglect will always constitute conduct capable of amounting to either unsatisfactory professional conduct or professional misconduct. This is so under the general law, but is also a consequence of s 422 of the Act which prescribes conduct consisting of a contravention of the Act, the regulations or the legal profession rules as conduct capable of constituting unsatisfactory professional conduct or professional misconduct. The respondent was obliged under rules in place during the period relevant to this complaint to do his best to complete a client's business in a competent manner and within a reasonable time.

10 The question of whether the delay or neglect in any particular case amounts to professional misconduct as opposed to unsatisfactory professional conduct is ultimately a matter of judgment having regard to the definitions set out in ss 420 and 421 of the Act. Those definitions, insofar as they are relevant, are as follows:

"***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.

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".

11 Although the matter was not the subject of extensive argument before me, I think it is clear that these statutory definitions provide the relevant basis upon which the Court must characterise the practitioner's conduct. It is clear, in my view, that the definitions are intended to replace any notions of what amounts to unsatisfactory professional conduct or professional misconduct, formulated under the common law and statutory schemes which are no longer in effect. Under the legislative definitions, the first step is to determine whether the conduct amounts to unsatisfactory professional conduct. This involves an evaluative assessment of the conduct, measured against the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner. The second step is to determine whether the unsatisfactory professional conduct amounts to professional misconduct. In making this determination, an assessment must be made as to whether the conduct involved a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence. It is the finding that the relevant failure has been substantial or consistent which is critical to this determination. A further observation which can be made about the legislative scheme incorporated into this legislation is that the standard of competence and diligence required of a legal practitioner is to be evaluated on the basis of what a reasonable member of the public would be entitled to expect of the practitioner. I think that this results in an important shift of emphasis away from the formulation which preceded this legislation, which depended upon what practitioners of good repute and competency would reasonably consider to be conduct which could be described as disgraceful or dishonourable. See for example, *A Legal Practitioner v Law Society of Tasmania* [2005] TASSC 28, 13 Tas R 448. This change of emphasis in favour of the expectation of a reasonable member of the public, as opposed to other practitioners, is, in my view, entirely consistent with the primary purpose of disciplinary proceedings, which is the "protection of the public, the preservation of the reputation of the legal profession and the proper administration of justice". See my comments at [41] of *Legal Profession Board of Tasmania v Lester* [2021] TASSC 41. Of course, conduct which falls within those earlier definitions may also inform this Court's exercise of its inherent jurisdiction, which is preserved by s 510 of the Act, but this is in addition to the statutory definitions, and not instead of them, see *Legal Profession Board of Tasmania v Kitto* [2019] TASSC 39, 31 Tas R 91, per Blow CJ at [12].

12 In this case, I am satisfied that the respondent's conduct falls squarely within the definition of professional misconduct. It is accepted that the relevant conduct is confined only to this case, but the length of the delay and the persistent failure to take any meaningful action over that period can only result in a finding that the conduct "involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence". The respondent is at a loss to explain the delay, but he does not suggest that it occurred because of factors such as an unsustainable workload or personal pressures. The fact that this was an exceptional case in the respondent's history of practice would suggest that he was capable of attending to this matter in a timely and competent manner if he chose to do so. It is also relevant to this consideration that the respondent's failure to maintain a reasonable standard of competence and diligence not only related to the conduct of the case but also involved lengthy and persistent failure to communicate with and respond to enquiries from, or on behalf of, the complainant. The respondent must have appreciated the effect that such failure was likely to have on his client. The distress, anxiety and frustration arising from the ongoing delay and failure to communicate was highlighted by the complainant's mother in a submission to the Board on behalf of the complainant on 11 December 2019.

13 In the proceedings before me the respondent did not persist with the submission that I should find as a fact that the relevant delay and neglect relates only to the period after the complainant turned 18. This was an appropriate position for him to take. As I have already noted, in his initial response to the complaint, the respondent did not contest unreasonable delay after the complainant reached this age, but says that before then, it was reasonable for him not to finalise the case in order to allow time for the full development of the complainant's condition, so as to ensure that the assessment of damages was as accurate as possible. I have no doubt that initially this was a reasonable and appropriate consideration, and has relevance when assessing the overall conduct of the case by the respondent. However, it is somewhat artificial to separate out any particular period and characterise it as a period of delay or otherwise. This Court's task is to assess on an overall basis and taking into account all relevant circumstances whether the practitioner's conduct "involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence". As I have already noted, little was done during the period prior to 2007 to advance the claim. Much could have been achieved in that period to put the case in a state of preparation so that when the appropriate time came, the matter could be resolved promptly and efficiently. This is not what happened and nothing is to be gained by characterising various periods as either delay or not delay.

14 Taking all of the evidence into account, I find that the respondent has been guilty of professional misconduct in respect of his conduct of this matter.

15 Both the Board and the respondent agree that a reprimand is the appropriate sanction. Counsel for the Board submits that this sanction responds to the protective purpose of these proceedings. Counsel submits that the reprimand "is to be regarded as a significant admonition of a practitioner's conduct and 'has the effect of identifying standards, the establishment and maintenance of which protects the public'." (Dal Pont *Lawyers Professional Responsibility* at 23.110).

16 The respondent points out that apart from this case, he has an unblemished professional history in that he "has had no other disciplinary matters proceed to investigation in some thirty years of practice all of which was in litigation". He also makes a valid point that he no longer practices as a lawyer, and is unlikely to return again to professional practice.

17 I am satisfied that, in the circumstances of this case, a reprimand is the appropriate response to the finding of professional misconduct. In doing so, I am heavily influenced by the respondent's otherwise unblemished record of professional conduct over many years, and his appropriate and co-operative response to these proceedings. Were it not for these considerations, the nature of the conduct, in my view, would have warranted a more punitive response.

18 I make an order reprimanding the respondent.