

In the Matter of Robert Arthur Allen

Case Number: SCT/104
Date of Hearing: 26 November 2003
Appearing Before: Ms C C Endicott (Chairperson/Practitioner Member)
Mr P Short (Practitioner Member)
Dr J Lamont (Lay Member)
In Attendance: Mr J W Broadley (Clerk)
Penalty: Struck off

Charges

1. Between 1 July 2000 and 13 March 2002, in breach of s38 of *Queensland Law Society Act 1952* ('Act'), the Solicitor practised as a solicitor without having first obtained from the Secretary of Queensland Law Society Incorporated ('Society'), a certificate entitling him to so practise.

Particulars

- (a) At the material times the Solicitor provided services to W&C.
 - (b) During that time the Solicitor practised as a solicitor and was obliged, pursuant to s38 of the *Queensland Law Society Act 1952*, (the Act) to hold a Practising Certificate from the Secretary of Queensland Law Society Incorporated entitling him to practise as a solicitor.
 - (c) Between 1 July 2000 and 13 March 2002, in breach of s38 of the Act, the solicitor practised as a solicitor without a Practising Certificate.
2. By letter to the Society dated 25 January 2002, the Solicitor knowingly falsely represented to the Society that the nature of the services he performed at W&C was other than the services of a practising solicitor.

Particulars

- (a) At all material times, the Solicitor provided services to W&C.
 - (b) On 30 June 2000 the Solicitor's Practising Certificate for the year ended 30 June 2000 expired.
 - (c) From 1 July 2000 until 13 March 2002 the Solicitor did not obtain from the Secretary of Queensland Law Society Incorporated a Practising Certificate as required by s38 of the *Queensland Law Society Act 1952*.
 - (d) By letter dated 24 January 2002, being Exhibit 'A' hereto, the Society wrote to the Solicitor.
 - (e) By letter dated 25 January 2002, being Exhibit 'B' hereto, the Solicitor responded to the Society that he was employed by W&C through a service company and, through the service company, he provided the following services to W&C:
 - (i) telephone receptionist
 - (ii) front counter receptionist;
 - (iii) filing clerk;
 - (iv) research;
 - (v) photocopying;
 - (vi) collection and despatching of mail;
 - (vii) Justice of the Peace for the purpose of witnessing affidavits,without also disclosing that he also practised as a solicitor while working at W&C.
 - (f) At the time he wrote his letter of 25 January 2002, the Solicitor knew that he had been practising as a solicitor and that the representations as to the services he provided to W&C in that letter falsely represented the true nature and extent of the services he was providing to W&C.
3. On 20 September 2001, the Solicitor unlawfully assaulted one MN.

Particulars

- (a) At all material times the Solicitor worked at W&C ('Firm').
- (b) At all material times, one MN was employed by the Firm as an administrative assistant.
- (c) On 20 September 2001, at the office of the Firm, the Solicitor unlawfully assaulted MN by spitting in her face.
- (d) On 12 February 2002, the Solicitor was charged in the Magistrates Court Brisbane that he did, on 20 September 21, unlawfully assault the MN ('Charge').
- (e) Having pleaded not guilty to the Charge, the Solicitor was, on 12 March 2002, found guilty of the Charge (the conviction was not recorded) and fined \$500 or, in default of payment within one month, to be imprisoned for ten days.

Appearances

- (a) For the Council of the Queensland Law Society Incorporated:
Mr M J Burns of Counsel instructed by Messrs McCullough Robertson solicitors
- (b) For the Practitioner:
The Practitioner appeared in person

Findings and Orders

1. The Tribunal finds charges 1 and 2 proved and that those charges constitute professional misconduct.
2. The Tribunal finds charge 3 not proved.
3. The Tribunal finds the Practitioner guilty of professional misconduct.
4. The Tribunal orders that the name of the Practitioner be struck from the Roll of Solicitors of the Supreme Court of Queensland.
5. The Tribunal further orders that the Solicitor pay the costs of the Queensland Law Society Incorporated in relation to charges 1 and 2 together with the costs of the recorders and the Clerk such costs to be assessed by Monsour Legal Costs Pty Ltd.
6. The Tribunal further orders that the costs so ordered to be paid by the Solicitor be paid within six months of the assessment being provided to the Solicitor and the Queensland Law Society Incorporated.

Reasons

Charges

The practitioner has been charged with practising as a solicitor without a Practising Certificate between 1 July, 2000 and 13 March, 2002; with knowingly falsely representing to the Queensland Society that he performed services other than those performed as a practising solicitor, and with assaulting a female employee of W&C.

These charges are heard by this Tribunal following related charges heard in relation to PW which have been the subject of a decision by the Court of Appeal handed down in October this year. The Tribunal is bound by the law as found by the Court of Appeal.

As to charge 1, the evidence relied on by the Queensland Law Society is almost identical to the evidence led by the Society in PW's case. The evidence was essentially unchallenged by the practitioner, although he did raise some dispute about the Society's evidence in his affidavits.

The practitioner's evidence was tested by cross-examination and the Tribunal has had the opportunity to observe the demeanour of the practitioner during cross-examination.

The Tribunal finds that the practitioner was an untruthful and unreliable witness and the Tribunal prefers the evidence of the Society to the evidence of the practitioner wherever there is conflict in that evidence.

The Tribunal finds that the evidence established according to the *Brigginshaw* standard:

That the practitioner carried out the work of a solicitor between the period 1 July 2000 and 13 March 2002 in that he saw and advised clients; he prepared trust deeds; he attended a mediation and a settlement conference; he recommended tactics and activities in respect of legal issues; he prepared pleadings and affidavits and made appearances before the courts, including the High Court of Australia.

The practitioner submitted that the alleged fraudulent practices of W&C made it impossible for him to practise as a solicitor and that, as a matter of law, he could not be found to have practised as a solicitor in the context of these charges. The Tribunal rejects that submission.

The Tribunal does not accept that the matters raised by the practitioner absolved him from the obligation to obtain a Practising Certificate for the period in question.

The Tribunal finds that charge 1 has been proven and that the matters in that charge amount to professional misconduct and finds the practitioner guilty of professional misconduct.

The practitioner wrote a letter to the Queensland Law Society on 25 January 2002, the subject of charge 2. In that letter, he stated that his duties at W&C were being a telephone receptionist, a front counter receptionist, a filing clerk, carrying out research, carrying out photocopying, collating and dispatching mail, and witnessing affidavits as a Justice of the Peace.

He gave evidence in this Tribunal that he had authored between 200 to 300 affidavits and documents during his term of employment at W&C, including during the time that he did not hold a Practising Certificate between 1 July 2000 and 13 March 2002.

He could not explain why he failed to mention that he had prepared and authored documents and typed up documents as part of his duties when he sent his response to the Queensland Law Society, apart from saying that he thought that his response had mirrored a similar letter sent by W&C to the Society in which it had been disclosed that he had carried out duties of a typist.

The practitioner gave evidence that he did not reveal to the Queensland Law Society that he had appeared in court as a solicitor during the relevant period, as he had done so only on isolated occasions and he did not consider that he had to make disclosure for that reason. The practitioner must make full and frank disclosure to his professional regulator of issues relating to professional conduct when these are queried.

The Tribunal does not accept the practitioner's explanation as to why he failed to fully disclose that he had been regularly authoring documents and that he had appeared in courts when responding to the inquiries of the Queensland Law Society.

The Tribunal finds that the practitioner did knowingly, falsely make representations to the Queensland Law Society in his letter dated 25 January 2002, as charged.

The Tribunal finds that the conduct in charge 2 has been proven and that it constitutes professional misconduct. The Tribunal finds the practitioner guilty of professional misconduct.

The third charge relates to an incident of personal conduct that took place in the workplace. The Solicitor overheard a telephone conversation of MN, a person with whom the evidence shows he had a strained working relationship. An argument ensued and the practitioner was convicted by a Magistrate of assault. He had spat on MN.

The argument and assault took place in the office but not over a matter of business or professional activity. The assault was the act of spitting, which he said was to prevent having to repel MN physically. The Magistrate fined the practitioner \$500 and ordered no conviction be recorded.

This Tribunal is not satisfied that the assault occurred in connection with the professional practice of the practitioner and while occurring in the workplace, it could best be characterised as personal not professional conduct.

In addition, while the Tribunal does not condone the offence, it is not as serious as manslaughter, as in the *Ziem's case*, or systematic tax evasion of professional income, as in *Cummins case*, and does not, without more, manifest the presence or absence of qualities which are incompatible with, or essential for, the conduct of legal practice.

While the practitioner has been convicted of assault, this Tribunal is not satisfied that the identified conduct itself constitutes professional misconduct, unprofessional conduct or malpractice as charged in charge 3, so finds that charge 3 has not been proven.

Penalty

The Tribunal has found the practitioner guilty of professional misconduct in that he knowingly practised as a solicitor without a practising certificate and that he knowingly made false representations to the Queensland Law Society.

The practitioner, by his false representations, showed himself willing to lie about matters to protect himself when queries were raised by the Queensland Law Society. He was the person about whom the complaint had been made that he was practising without a practising certificate.

He had the duty to disclose fully and frankly to the Society all the relevant facts to enable the Society to investigate whether he should have had a practising certificate or not at the relevant time.

He has raised arguments in his material and in his submissions before this tribunal that could have been raised in his response to the Queensland Law Society in January 2002. Those arguments could have been used as some justification of his actions in 2002 and earlier. He did not choose to do this.

Instead, he created a fictitious version of events that he worked only in a clerical capacity and he maintained that fictitious version of events up to today's hearing, except when he had to resile or concede on cross-examination that he had made appearances in court as a solicitor and also that he had provided advice to S which could not be properly characterised as clerical work.

The Tribunal is prepared to accept that the state of the law may not have been clear as to what constitutes practising as a solicitor when the charges were originally laid by the Queensland Law Society. However, since that time, several events have taken place, including the handing down of a decision of the Court of Appeal in the matter of PW on 17 October 2003. After that date, there was no uncertainty as to the law.

The practitioner could have withdrawn his affidavits and could have substantially restructured his written submissions to reflect the findings on law made by the Court of Appeal and he could have changed or modified the statements he made in relation to his version of facts. He failed to do this. He maintained a version of the facts and argued a version of the law that were simply not maintainable.

The Tribunal has found the practitioner not to be a truthful or reliable witness.

The Tribunal considers that the matters alleged in charge 2, in particular, and the conduct of the practitioner in holding to a version of events up to the present day that was not maintainable, reflect badly on his fitness to practise as a solicitor and in fact establish an unfitness to practise as a solicitor.

The Tribunal is mindful that it made a similar finding about PW, but imposed a suspension rather than striking off PW's name from the roll of solicitors. The Tribunal in that case, however, made a finding of suspension on the basis that it was satisfied that PW would learn by his experiences and would be a fit and proper person to practise as a solicitor at the end of his period of suspension.

This practitioner has not shown by his conduct before this Tribunal that he has learned anything by his experiences following being charged by the Queensland Law Society and, on that basis, the Tribunal cannot be satisfied that, at the end of a period of suspension, he would be fit to practise.

This Tribunal has a duty to protect the public against practitioners who are unfit to practise and the Tribunal believes that the appropriate penalty in this case is to strike off the practitioner's name from the Roll of Solicitors in Queensland.