

Case Law update for prosecuting agencies

Legal Services Commissioner v Manz - Alleging Dishonesty in Disciplinary Proceedings

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A recent decision of the Queensland Civil and Administrative Tribunal has considered the Tribunal's power to find a respondent guilty of dishonest conduct in circumstances where dishonesty was not specifically pleaded in the charge.

The facts

*Legal Services Commissioner v Manz*¹ concerned disciplinary proceedings against a solicitor. The solicitor in question faced a charge that included an allegation that he “failed to be honest in all dealings in the course of the legal practice”. The Tribunal, constituted by former Justice Peter Lyons QC, queried whether a specific finding of dishonesty could be made in those circumstances. Both parties submitted that it could not. Mr Lyons QC went on to consider whether such a finding was open, and appropriate, in the circumstances.

The issues

It is well established that allegations of dishonesty and the like should be brought with specificity and clarity.² In short, if dishonesty is meant, it should be alleged directly. Likewise, allegations of untruthfulness are better framed as being *deliberately* or *knowingly* untruthful. That said, it has also been held that where the facts alleged sufficiently demonstrate that dishonesty is alleged, such a finding can sometimes be made.³

Lyons QC considered that there was “*plainly a difference between an allegation of misleading conduct, and an allegation that a person acted dishonestly*”. In particular, he said:

“The former refers only to the actions of a person and their effect, but not to the person's state of mind; whereas the latter involves an allegation that the person knew that what was being communicated was untrue. There is a real public

¹ [2019] QCAT 147

² *Walter v Council of Queensland Law Society Inc* (1988) 62ALJR 153. See also *Legal Services Commissioner v Madden* [2009] 1 Qd R 149

³ *Belmont Finance Corporation Pty Ltd v Williams Furniture Ltd & Ors.* [1979] CH 250 at 268, cited with approval in *Legal Services Commission v Madden (No. 2)* [2008] QCA 301 at [54].

interest in the identification of dishonesty and the making of appropriate orders to respond to it. ... there is good reason, therefore, to give consideration to the honesty of the respondent in relation to the conduct the subject of the charge. Not to do so would require the Tribunal to close its eyes to a matter of some seriousness, clearly raised by the evidence."

Ultimately Mr Lyons QC decided that it was open, and appropriate, for him to amend the charge.⁴ He did so by including a further particular within the charge that the respondent "engaged in conduct which was dishonest and/or ..." He noted that "the submission of the respondent that the public would be adequately protected, because the respondent has not subsequently engaged in any misconduct, ignores the fact that determinations and orders of the Tribunal are expected to have a salutary effect on other members of the profession, which itself has a protective effect. It is undesirable to create the impression that the Tribunal would ignore dishonesty by a practitioner, even if the parties are willing to do so."

In the absence of any evidence from the defendant (such as an affidavit) about (a) how the proceedings were 'unfair' (b) how the proceedings impact upon her or impede her from presenting her defence and (c) how an innocent person will be convicted because of the fault of the prosecution, the court found that 'There has not been a manipulation of the prosecution of the proceedings which imposes some exceptional burden additional to the burden necessarily imposed on the defendant.'⁵

Comments

This case emphasises the clarity and precision that is needed in alleging dishonesty in a disciplinary context – it is not a matter that should ever be left to inference or argument about the true nature of an allegation.

For further inquiries or assistance, please contact Glen Cranny, Managing Director, Gilshenan & Luton Legal Practice on 3361 0240 or gcranny@gnl.com.au

⁴ It is relevant too that the *Legal Profession Act 2007* contains a power for the Tribunal to vary a disciplinary application if satisfied that it is reasonable to do so, having regard to all the circumstances (s455).

⁵ At [43].