

Our Ref: RR: 71020574

27 May 2021

Private & Confidential

Mr P Horwath
20 Sanctuary Lane
BOORAL QLD 4655

BY EMAIL: peterhorwath03@gmail.com

Dear Mr Horwath

COMPLAINT AGAINST JOSHUA SPROULE

I refer to the Commission's previous correspondence and advise that I have now had an opportunity to consider your complaint.

Mr Joshua Sproule, Barrister was retained by Carswell & Company on your behalf to provide advice in relation to an industrial relations claim made against you and your company, Security 101 Pty Ltd, by a former employee, Mr Kurt Yelds.

Complaint

In essence, your complaint is that Mr Sproule was not supportive in your matter and that he hounded you to accept the terms set out in the settlement deed. You believe that Mr Sproule's advice was without support and that he dismissed the Fair Work Ombudsman's opinion and refused to use evidence which you believe was critical in reducing the quantum of Mr Yelds' claim.

As you are aware, Ms Rhonda Rouaen, Complaints Officer of this office was unable to complete an assessment of your complaint based on the information you provided. Ms Rouaen emailed you on 13 April 2021, pursuant to section 431 of the *Legal Profession Act 2007* (the Act) to obtain further and better particulars. You responded on 20 April 2021. Ms Rouaen sent a further email to you on 21 April 2021 requesting that you confirm her assessment of the complaint. You responded to Ms Rouaen on 29 April 2021 confirming her assessment of the complaint and you provided further documentation.

Please find below my consideration of your complaint.

Jurisdiction

At the outset, I must advise of the limits of my jurisdiction under the Act.

The regulatory scheme under Chapter 4 of the Act enables my office to investigate complaints about legal practitioners, law practice employees or unlawful operators. In particular, I may investigate complaints of professional misconduct or unsatisfactory professional conduct as defined in the Act.

Unsatisfactory professional conduct is limited to conduct by a practitioner which occurs in connection with the practice of law. That is, conduct which occurs during the course of work usually undertaken by legal practitioners.



Professional misconduct is defined more broadly and may include personal conduct by a practitioner which does not occur in connection with the practice of law, but only if that conduct is so serious that it demonstrates the practitioner is not a fit and proper person to continue as a member of the legal profession.

The Act is the governing legislation and the *Australian Solicitors Conduct Rules 2012* (ASCR) forms part of the obligations on legal practitioners. Conduct found to be in breach of the ASCR is capable of amounting to unsatisfactory professional conduct or professional misconduct as defined in the Act but it is not automatic^[1].

As you can appreciate, I have an obligation to make my decisions according to the provisions of the Act.

Analysis of Complaint

Mr Sproule was retained to advise on an unpaid wage claim under the *Fair Work Act 2009* before the Federal Circuit Court. Mr Yelds claimed he was employed as a Level 2 Security Officer under the *Security Services Industry Award 2010* from 25 August 2014 to 3 February 2019. Mr Yelds further claimed he was underpaid wages and superannuation either as Level 2 or Level 1 Security Officer. You assert that Mr Yelds falsified the run sheets to claim that he was working when he was not.

You dispute that Mr Yelds was employed as a Level 2 Security Officer but admit he was employed at Level 1 under the Award. You state that Mr Sproule was happy to say in his opinion that Mr Yelds was a Level 2 Security Officer and dismissed the Fair Work Ombudsman's opinion that he was a Level 1 Security Officer. You assert that the Fair Work Ombudsman deals with these issues all the time and therefore would know what they are talking about.

You assert that Mr Sproule recommended to Carswell & Company not to add flexible hours which were part of the workplace agreement (workbook), which included the hours employees take off and 'shift swaps'.

You asked Mr Sproule about the 'value of shift swaps' however, he did not think you should include them in your affidavit. Mr Sproule also advised you that it was not in your best interests to allege the run sheets were falsified as it would undermine your defence.

Mr Sproule addressed the issue of the run sheets and explained that they may expose you to a greater liability and that they were unlikely to result in a significant reduction in the quantum of Mr Yelds' claim.

On review of the brief, Mr Sproule advised that it was his strong advice to settle the proceedings. On review of Mr Sproule's email to Carswell & Company dated 21 May 2020, he advised that it was his opinion that a \$70,000.00 all-in inclusive of costs offer was eminently reasonable, and if you proceeded to trial you would struggle to do any better or you could end up in a worse position.

^[1] Section 420 of the Act

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Mr Sproule advised that you should accept the offer in accordance with his advice on 12 May 2020. You have expressed concerns that you felt Mr Sproule hounded you to accept the offer and settle. I appreciate that the process of negotiation is inherently stressful and that some degree of pressure on participants to settle is unfortunately a product of this process and the legal system.

A legal practitioner advises you to settle or not based on the strengths of your case, the risks you face if the case goes to hearing. There are obviously certain benefits and detriments to that position.

From the information provided, there is no evidence to suggest that Mr Sproule hounded you to accept the offer and settle.

I must advise that the Commission's role, as noted above, is to investigate conduct that may amount to unsatisfactory professional conduct or professional misconduct as defined in the Act. That role, however, does not extend to micro-managing all of a lawyer's interactions with their client, or to dictating to a lawyer how they should or should not conduct a case.

If Mr Sproule gave you incorrect advice that may equate to negligence then that must be determined by a civil court. That is not done through the legal profession disciplinary regime.

Generally, if a client is dissatisfied with the way in which their legal representative is progressing their matter, they are at liberty to withdraw their instructions, terminate the retainer and seek alternative advice.

While I accept that you were dissatisfied with the service received, I am not satisfied that there is sufficient evidence to show that the service provided was deficient to such a degree or extent that a disciplinary body would consider it to amount to unsatisfactory professional conduct under the Act.

Test

Section 432 (1) of the Act provides that a complaint may be dismissed for a number of reasons, including:

"(b) the complaint does not disclose conduct that the commissioner considers may be—

- (i) conduct to which this chapter applies; or*
- (ii) unsatisfactory professional conduct or professional misconduct of an Australian legal practitioner or misconduct of a law practice employee in relation to the relevant practice"*

Decision

For the reasons outlined above, your complaint does not disclose any conduct that I consider may amount to unsatisfactory professional conduct or professional misconduct by Mr Sproule.

Accordingly, pursuant to section 432(1)(b)(ii) of the Act, I have decided to dismiss your complaint and will close the Commission's file accordingly.

If you would like to discuss this decision or this complaint further, please contact Ms Rouaen in writing.

Yours sincerely



Megan Mahon
Legal Services Commissioner

Contact: Rhonda Rouaen
Email: lsc@lsc.qld.gov.au