

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

Decision No. [2010] NZLCDT 1

LCDT 024/09

IN THE MATTER

of the Lawyers and Conveyancers
Act 2006

MELANIE COXON

Applicant

AND

**NEW ZEALAND LAW
SOCIETY**

Respondent

CHAIR

Mr D J Mackenzie

MEMBERS OF TRIBUNAL

Mr J Clarke
Mr W Smith
Mr B M Stanaway
Mr O W Vaughan

HEARING at Auckland on 8 December 2009

APPEARANCES

Dr R E Harrison QC on behalf of the Applicant

Mr J R Billington QC and Mr P N Collins on behalf of the Respondent

DECISION ON APPLICATION

Introduction

[1] This is an application by Melanie Jane Coxon, of Auckland, Barrister, for an order consenting to her employment of Christopher Lloyd Harder, a former practitioner. Mr Harder was the subject of an order striking him off the role of barristers and solicitors of the High Court of New Zealand in February 2006.

[2] The application is made under the provisions of the Lawyers and Conveyancers Act 2006, which came into force on 1 August 2008.

[3] Under S 248 of that Act, a legal practitioner or incorporated law firm may apply to this Tribunal for consent to the employment of, inter alia, a person who has had his or her name struck off the roll of barristers and solicitors otherwise than at his or her own request.

[4] The New Zealand Law Society was given notice of the application, as required by S.248 (2)(a) Lawyers and Conveyancers Act 2006, and it elected to appear and be heard on the application. The Society did not support the application, nor did it oppose the application, but it raised some factual issues, cross-examined Ms Coxon and Mr Harder, and made submissions on legal matters.

Background

[5] There is some history to this application. Mr Harder has been working for Ms Coxon in her legal practice, with some periods of absence pursuing other matters, since shortly after the time of his striking off in 2006.

[6] Ms Coxon stated that she considered that there was no prohibition on her arrangements with Mr Harder under the Law Practitioners Act 1982, because the relevant section in that act appeared to control only employment by solicitors, not barristers.¹

[7] The Law Practitioners Act was repealed, with some savings not relevant for current purposes, when the Lawyers and Conveyancers Act 2006 ('the Act') came into force on 1 August 2008. The Act makes it a matter of misconduct for a practitioner or an incorporated law firm, without consent from this Tribunal or the High Court, to employ or to permit to act as a clerk or otherwise, in relation to the provision of legal services, a person who has been struck off the role.²

[8] The New Zealand Law Society became aware in April 2009 that Ms Coxon may have been employing Mr Harder in her practice, and made enquiry of Ms Coxon to ascertain the position.

¹ See paragraph 4 of Ms Coxon's affidavit of 13 October 2009.

² Section 7(2) of the Act

[9] In response to that enquiry, Ms Coxon advised the Society that she was employing Mr Harder “...as a clerk/personal assistant/office manager/advertising manager and IT person”. She also said that he was not employed as a lawyer, nor held out as a lawyer, and that Mr Harder did not provide any legal services as defined in the Act.³

[10] There was continuing correspondence between Ms Coxon and the New Zealand Law Society about this issue over the following months. Simply put, Ms Coxon’s position was that she had no need to seek consent under the Act to employ Mr Harder. She was of the view that he was not doing any work which involved the provision of legal services, and it was only if he was providing legal services that there would be a need for consent.

[11] The New Zealand Law Society took the view that the issue which dictated the need for consent was not the actual nature of Mr Harder’s work, but whether Mr Harder was employed by a practitioner.⁴ The Society advised Ms Coxon that it would not commence any complaints process regarding Mr Harder’s employment, to give Ms Coxon the opportunity to make an application for consent and avoid the risk of a disciplinary charge. We consider that to be an appropriate approach in the circumstances.

[12] Ms Coxon subsequently moved to make an application to this Tribunal under the provisions of S.248 of the Act, but she has maintained her position that Mr Harder’s employment does not breach the Act because the nature of his work is not caught by S.7(2). As a consequence she has described her application as “precautionary”.⁵

[13] There was some disagreement between the New Zealand Law Society and Ms Coxon as to whether Mr Harder’s employment should be terminated pending the outcome of the application under S.248 of the Act. This was based on the Law Society’s view that S.248 was the principal source of Ms Coxon’s obligation to seek consent. It considered that what Mr Harder actually did when working for Ms Coxon was not relevant – if he worked for Ms Coxon he needed consent, irrespective of his actual work activity, save for something clearly remote from her actual legal practice.⁶

[14] Ms Coxon’s position was that S.7(2) of the Act established her obligation in the matter, and that S.248 was merely procedural. Her view was that S.248 set out the processes to be followed in an application for consent to employ where the nature of Mr Harder’s actual work activity would fall foul of S.7(2) in the absence of consent.⁷

³ Letter of 29 April 2009 (third paragraph) from Ms Coxon to the New Zealand Law Society; exhibit “C” on the affidavit of John Livingston Marshall QC dated 12 November 2009.

⁴ Letter of 13 August 2009 (paragraph 3) from Glaister Ennor to Ms Coxon; exhibit “C” on Ms Coxon’s affidavit of 13 October 2009.

⁵ See paragraph 2(b)(ii) of that application, and Paragraph 2 of Ms Coxon’s affidavit of 13 October 2009.

⁶ Letter of 29 September 2009 (paragraphs 3 and 4) from Glaister Ennor to Dr R Harrison QC; exhibit “G” on Ms Coxon’s affidavit of 13 October 2009.

⁷ See letters of 16 September 2009 and 7 October 2009, from Dr R Harrison QC to Glaister Ennor; exhibits “F” and “H”, respectively, on Ms Coxon’s affidavit of 13 October 2009.

[15] In the event, Mr Harder’s employment has continued in the interim, pending the outcome of Ms Coxon’s “precautionary” application.

[16] The position adopted by the parties raises a preliminary issue for this Tribunal, as to how the Act is to operate in this situation. It was submitted for Ms Coxon that if Mr Harder’s work activity was not caught by S.7 (2) of the Act, consent was not necessary and the application was nugatory, or that a “declaratory” consent could be given to the application to clarify the position regarding Mr Harder’s employment. As a starting point, we have to consider whether there is a need for consent for Mr Harder to be employed in Ms Coxon’s practice.

The need for consent

[17] This is the first case involving an application under S.248 of the Act, so we shall spend some time discussing our view as to the way it operates.

[18] An examination of S.7 (2) of the Act assists the analysis. S.7(2) provides;

“A lawyer or an incorporated law firm is guilty of misconduct if, at a time when he or she or it is providing regulated services, and without the consent of the High Court or the Disciplinary Tribunal, the lawyer or incorporated law firm knowingly employs, or permits to act as a clerk or otherwise, in relation to the provision of regulated services, any person who, to the knowledge of the lawyer or incorporated law firm –

- (a) is under suspension from practice as a barrister or as a solicitor or as a conveyancing practitioner; or*
- (b) has had his or her name struck off the roll of barristers and solicitors of the High Court; or*
- (c) has had his or her registration as a conveyancing practitioner cancelled by an order made under this Act; or*
- (d) is disqualified, by an order made under section 242(1)(h), from employment in connection with a practitioner’s or incorporated firm’s practice.”*

[19] In the context of legal practice, “regulated services” in S.7(2) means legal services, which, in turn, means the carrying out of legal work for any other person⁸. “Legal work” is defined as including —

- (a) the reserved areas of work;*
- (b) advice in relation to any legal or equitable rights or obligations;*
- (c) the preparation or review of any document that—*
 - (i) creates, or provides evidence of, legal or equitable rights or obligations; or*
 - (ii) creates, varies, transfers, extinguishes, mortgages, or charges any legal or equitable title in any property;*
- (d) mediation, conciliation, or arbitration services;*
- (e) any work that is incidental to any of the work described in paragraphs (a) to (d)*

⁸ See the definition of “regulated services” and “legal services” in S.6 of the Act.

[20] The “reserved areas of work” referred to in sub-clause (a) of the definition of legal work means the work carried out by a person —

- (a) *in giving legal advice to any other person in relation to the direction or management of—*
 - (i) *any proceedings that the other person is considering bringing, or has decided to bring, before any New Zealand court or New Zealand tribunal; or*
 - (ii) *any proceedings before any New Zealand court or New Zealand tribunal to which the other person is a party or is likely to become a party; or*
- (b) *in appearing as an advocate for any other person before any New Zealand court or New Zealand tribunal; or*
- (c) *in representing any other person involved in any proceedings before any New Zealand court or New Zealand tribunal; or*
- (d) *in giving legal advice or in carrying out any other action that, by section 21F or the Property (Relationships) Act 1976 or by any provision or any other enactment, is required to be carried out by a lawyer*

[21] S.7 (2) of the Act refers to the provision of regulated services twice; first, the practitioner or incorporated firm has to be providing those services at the relevant time, and second, the proscribed person must be employed, or permitted to act, in relation to the provision of regulated services.

[22] In the context of the present case, the first reference to the provision of regulated services in S.7 (2) is clearly a reference to the provision of legal services by Ms Coxon herself, at a time when Mr Harder is in her employment. We note that provision of regulated services at the relevant time is a standard threshold matter for a number of misconduct and unsatisfactory conduct charges that may be made against lawyers under the Act.⁹ The requirement that there be provision of regulated services at the relevant time is not unique to a charge of misconduct under S.7 (2) of the Act.

[23] We consider the second reference to the provision of regulated services in S.7 (2) is a reference to the work done by Mr Harder in the course of his employment. That is, the work he does in the course of his employment must either itself constitute the provision of legal services¹⁰, or have a sufficient relationship to Ms Coxon’s provision of legal services, to bring S.7(2) into play. We do not consider that this second reference is a reference only to the fact of his employment at a time when Ms Coxon is providing regulated services. That meaning could have been achieved without inserting the reference to the provision of regulated services into the section a second time.

[24] S.7 (2) of the Act requires that there be a connection between Mr Harder’s work inputs and the provision of regulated services to give rise to a consent requirement. That gives meaning to the second reference to the provision of regulated

⁹ The principal exception is a serious charge reflecting on whether a practitioner is a fit and proper person, or otherwise unsuited to engage in legal practice, which need not be connected with the provision of regulated services – see S.7(1)(b)(ii) of the Act

¹⁰ So far as permitted for a non-lawyer – see the prohibition in S.24 and the limits in S.26 of the Act

services in the section. The issue of whether Ms Coxon requires consent to employ Mr Harder depends on the nature of his work activity in the course of Ms Coxon's employment. The issue that dictates whether or not consent is necessary is contained in S.7 (2) itself, not the provisions of S.248.

[25] S.248 provides (so far as relevant to this application) as follows:

- (1) *A practitioner or an incorporated firm may apply to the Disciplinary Tribunal for its consent to the employment by the practitioner or incorporated firm of a person who—*
 - (a) *.....*
 - (b) *has had his or her name struck off the roll otherwise than at his or her own request; or*
 - (c) *.....*
 - (d) *.....*
- (2) *The applicant must,—*
 - (a) *if a lawyer or an incorporated law firm, serve notice of the application on the New Zealand Law Society (which is to be entitled to appear and be heard on the application);*
 - (b) *.....*
- (3) *If the Disciplinary Tribunal is satisfied, on the application of a practitioner or an incorporated firm, that there is good reason why the person to whom the application relates should be employed, the Disciplinary Tribunal may, in its discretion, after taking into consideration the matters specified in subsection (4) and such other matters as it considers relevant, grant or refuse its consent to the employment of that person by that practitioner or incorporated firm.*
- (4) *The matters that the Disciplinary Tribunal must consider in relation to the proposed employment of the person to whom the application relates are as follows:*
 - (a) *the need to protect both the public and the standing of the profession:*
 - (b) *the seriousness of the proved offending of that person:*
 - (c) *any matter relevant to the honesty of that person:*
 - (d) *the work on which that person will be employed and the extent to which, and the manner in which, the carrying out of that work by that person will be supervised:*
 - (e) *the previous record, in relation to disciplinary matters, of that person:*
 - (f) *the relevance of the nature of the penalty imposed on that person by way of suspension, striking off, cancellation of registration, or disqualification.*
- (5) *Despite subsections (3) and (4), the Disciplinary Tribunal may take into account, but to a minor degree, the personal circumstances of the person to whom the application relates.*
- (6) *Consideration of the personal circumstances of the person to whom the application relates must always be subordinated to the need to protect both the public and the standing of the profession.*
- (7) *If the Disciplinary Tribunal grants its consent, it may do so on such terms and conditions as it thinks fit.*

[26] We do not agree with the proposition that S.248 of the Act creates a primary obligation itself. In our view, on its plain reading, it is a procedural section only, setting out processes and criteria¹¹ for dealing with applications seeking consent to employ.

[27] The reference to consent of this Tribunal contained in S.7 (2) of the Act, is a reference to a consent granted by this Tribunal under the process set out in S.248. The reference to High Court consent in S.7 (2) is a reference to the granting of consent by the High Court under its appellate function in S.253 of the Act. That specifically refers to rehearing an application made under S.248. This reinforces that S248 of the Act is of a procedural nature.

[28] We consider that in deciding whether or not any employment breaches S.7 (2) of the Act, the nub of the matter is an enquiry into the activity being undertaken by the person whose employment may be proscribed under that section. The need for consent is dictated by the work such persons are to undertake within that employment. Only certain activity is caught – activity that is in relation to the provision of regulated services. The mere fact of employment by a practitioner is not necessarily a breach of S.7 (2), and S.248 does not itself create an offence, being a procedural provision.

[29] Ms Coxon stated her view of Mr Harder’s role as not being in relation to the provision of regulated services, because he did not provide any legal services. We note that whether or not Mr Harder is to himself provide any regulated services is not the sole issue. Whether Mr Harder undertakes any work in relation to the provision of regulated services by Ms Coxon is also an issue to be considered.

[30] Ms Coxon’s evidence was that Mr Harder had not been employed to provide any legal services himself, and had not done so. If that is correct (and for reasons noted later we do not think it is), the test as to whether Mr Harder’s employment was in relation to the provision of regulated services by Ms Coxon will depend on whether there is a sufficient nexus between Mr Harder’s role and Ms Coxon’s provision of legal services.

[31] That nexus would, in our view, be sufficient where Mr Harder’s role facilitated any particular legal work product (other than contribution to content which would constitute the provision by him of a legal service), enabling Ms Coxon to provide the actual legal service in question.

[32] The evidence concerning work undertaken by Mr Harder demonstrated that his work activity was sufficient to invoke the operation of S.7 (2), both as the provider of some legal services, and as the provider of services to Ms Coxon in relation to her provision of legal services. In particular we note the matters in paragraphs 33 to 40 below.

[33] In Ms Coxon’s evidence,¹² she noted that Mr Harder carried out activities in her practice as follows;

¹¹ S248 (3) notes the process the Tribunal is to follow, and Ss 248(4), (5) and (6) set out criteria for the Tribunal to consider and note the weight to be given to certain matters.

¹² See paragraphs 11, 12, 13, 27, and 29 of Ms Coxon’s affidavit of 13 October 2009.

- 33.1 developing her internet based limited licence application practice;
- 33.2 providing advice to her, drawing on his experience as a criminal lawyer and problem solver;
- 33.3 creating a generic limited licence applicant questionnaire for her website clients;
- 33.4 taking clients to swear affidavits before a Registrar or an outside solicitor;
- 33.5 filing and serving limited licence applications, and affidavits in support.

[34] In regard to the provision of advice to Ms Coxon, said to arise from Mr Harder's experience as a criminal lawyer and problem solver, Ms Coxon stated that this was in "a personal advice/mentoring role" and that the advice/mentoring was not part of his employment nor was he remunerated for such work.¹³

[35] Where Mr Harder's employment is ongoing and continuous, it is artificial to attempt to separate part of his work activity in Ms Coxon's practice as not being in the course of his employment, and part of that work activity as being in the course of such employment. His activities cannot be realistically segmented in the way suggested. Accordingly we consider the provision of this advice as a provision of legal services by Mr Harder in the course of his employment by Ms Coxon. Analysis by him of the legal issues affecting a particular client's affairs, and the proffering of advice thereon to Ms Coxon, who then utilises and relies on that advice for the benefit of her client, must represent legal work under (e) of the definition of "legal work".¹⁴

[36] During examination Ms Coxon said that Mr Harder had spent "hundreds and hundreds of hours" developing her limited licence website in conjunction with professional website developers. She accepted that Mr Harder had a significant input into the template documentation placed on the site, and that she had had virtually no contact with the website developers, leaving it to Mr Harder. Consequently, she also accepted that Mr Harder was the architect of the material put up on the website as templates for clients to complete, to provide information to meet the legal requirements of limited licence applications, affidavits, and orders.

[37] Ms Coxon's evidence indicates both the provision of legal services by Mr Harder in the course of his employment in her practice¹⁵ as well as the provision of services which facilitated the provision of legal services by Ms Coxon.¹⁶

[38] Mr Harder himself noted, in his affidavit of 14 October 2009¹⁷ that;

¹³ Paragraph 13 of Ms Coxon's affidavit of 13 October 2009

¹⁴ See the definition of "legal work" noted at paragraph 19 above

¹⁵ See sub-paragraph 33,2 above

¹⁶ See sub-paragraphs 33.1, 33.3, 33.4, and 33.5, and paragraph 36

¹⁷ See paragraphs 5, 29, and 46 of Mr Harder's affidavit.

- 38.1 his current employment by Ms Coxon involved him working in her legal practice as her personal assistant, information technology person, advertising manager, and office manager (responsible for supervising her newly-employed clerk) working, on average, five and a half days per week;
- 38.2 with the assistance of a systems developer he took Ms Coxon's standard limited licence documents and had a template made up to enable preparation of the various documents required to a stage where Ms Coxon only had to make minor amendments to the necessary affidavits, order and application for each client;
- 38.3 he played no role with Ms Coxon's criminal practice except on occasion to point out pitfalls to her as a result of what he may have observed or overheard in the office from time to time;
- 38.4 he gave her "pearls of wisdom" to assist her with matters with which she may be dealing from time to time

[39] During examination Mr Harder said that he regularly updated Ms Coxon's computer system to audit the fifty plus files active at any time, ascertaining the state of proceedings (which are in Court, which are with the Police, and which are in the office and requiring attention from Ms Coxon).

[40] He noted that everyday he and another employee got ready for Ms Coxon the files she would need in Court. Files were also prepared for Ms Coxon for client interviews to occur that day. Mr Harder stated that he did not participate in the interviews, and did not actually draft or amend affidavits.

[41] Taking into account the nature and scope of activity undertaken by Mr Harder while an employee of Ms Coxon, we take the view that his evidence confirmed that he has provided some legal services.¹⁸ In addition, we consider other activities of Mr Harder, noted above,¹⁹ indicate that Mr Harder has been employed by Ms Coxon in relation to the provision by her of regulated services.

[42] It is not what Mr Harder is called or how his role is described that is important, nor what his employment agreement may or may not specify as his role or limits to his activity. What is important is what he actually does in the course of his employment by Ms Coxon.

[43] Ms Coxon's limited licence practice involves the provision by her of regulated services. Mr Harder is a critical part of Ms Coxon's limited licence practice, for which Ms Coxon uses the internet to deliver legal services to the public.

[44] Mr Harder has been instrumental in developing Ms Coxon's website and ensuring the legal content is workable, in that it delivers information from clients to Ms Coxon that enables completion of court applications, affidavits, and orders. Ms

¹⁸ See sub-paragraphs 38.3 and 38.4 above

¹⁹ See sub-paragraphs 38.1 and 38.2, and paragraphs 39 and 40 above.

Coxon acknowledged that apart from providing some initial precedents, all the work on the website had been undertaken by Mr Harder, using specialist assistance as required.

[45] Input in transforming legal precedent content into website templates and processes has come from Mr Harder, who worked for many hours on the project. Ms Coxon said she had virtually nothing to do with its actual development except for providing some precedents at the outset.

[46] The evidence of the activity undertaken by Mr Harder regarding Ms Coxon's website alone, is sufficient to demonstrate that what he has been doing in the course of his employment was in relation to the provision of regulated services. There has been significant contribution by Mr Harder, converting base legal precedents into a fact gathering virtual client interview process, by the development of web-based documents for completion on-line by clients. Without Mr Harder's inputs, as Ms Coxon herself noted, her practice could not provide the legal services she now offers via the internet. In addition, there are the other matters we have noted regarding the provision of regulated services involving Mr Harder.²⁰

[47] We note also that there are provisions in the Act which apply regulatory professional obligations to employees of a practitioner or incorporated firm, notwithstanding those employees are not themselves practitioners.²¹ By way of example, we consider that where, in the normal course of employment, such an employee has access to confidential information supplied by or obtained for a client, or has knowledge about particular client matters, that employee will assume a professional duty of confidentiality.

[48] Under S.242 (1)(h) of the Act, a non-practitioner employee may be the subject of an order barring him or her from employment by a practitioner or incorporated law firm. Such an employee is one of the proscribed persons in S.7 (2) who may not be employed in relation to the provision of legal services without consent obtained by an application made under S.248. Activity by a non-practitioner employee in a legal practice, which imposes practitioner equivalent standards on that employee in the course of his or her work, is likely to be an activity undertaken by the employee in relation to the provision of regulated services.

[49] The Act is concerned with controlling who may undertake activities associated with potential risk to public confidence in the provision of legal services, ensuring adequate standards are observed by those who supply those services, and protecting the standing of the profession given its role in the justice system.

[50] Persons working in a legal practice, whether practitioners or not, are subject to that regulatory control where such a person has sufficient connection with the provision of legal services to justify imposing that control, given the objectives of the Act.

²⁰ See references in paragraphs 37 and 41 above

²¹ See Ss. 11,14, 132, and 227(b) of the Act

[51] S.7 (2) of the Act is concerned with whether or not a person is working in relation to the provision of regulated services. Whether an employee works in relation to the provision of regulated services will be a question of fact and degree in each case, but work undertaken by an employee which carries with it responsibility to observe certain standards backed by the applicable regulatory controls, is likely to be within that scope. We consider that the nature of Mr Harder's work meant that he would have assumed some professional obligations in respect of that work, such as the requirement to observe a duty of confidentiality. The imposition of such a duty, supported by regulatory obligations applicable to Mr Harder under the Act, is confirmatory of him having a role in Ms Coxon's practice that is "in relation to the provision of regulated services".

[52] In summary, we consider that there was evidence that Mr Harder has himself provided regulated services. He has also facilitated Ms Coxon's provision of regulated services. The evidence also showed that Ms Coxon, in carrying on her practice, relied on Mr Harder undertaking such work to enable her to deliver her regulated services. We do not agree with Ms Coxon's position on the absence of a need for consent under the Act.

[53] Accordingly, if Ms Coxon wishes to continue the arrangements she has with Mr Harder to undertake the work he does in her practice, she needs consent under S248 of the Act, otherwise she runs the risk of being found to breach S.7 (2) of the Act as a result of her employment of Mr Harder.

Matters to be considered on the application

[54] Specific matters for this Tribunal to take into account in considering the application are set out in S.248 (4) of the Act. The Act's express purposes, as set out in S.3, are also reflected by S.248 (4). S.3 records these matters as the maintenance of public confidence in the provision of legal services, the protection of consumers of those services, and the standing of the legal profession as an important institution in this country's justice system. The criteria specifically noted in S.248 (4) of the Act are based on those set out in the decision of the High Court in *Sidney v Auckland District Law Society*.²²

[55] S.248 (3) of the Act notes a preliminary threshold matter for this Tribunal to evaluate, before moving to consider the specific criteria of S248 (4). The threshold matter is whether or not the applicant has shown good reason as to why Mr Harder should be employed.

[56] Good reason to employ:

- 56.1 Evidence was given of substantial growth in Ms Coxon's practice following implementation of her internet based legal service offering. That reflects the fulfilment of a public demand for legal services of this nature, including its lower cost, efficiency, and ease of access, characteristics shown by the evidence.

²² [1966] 1 NZLR 431 at 438 -439

- 56.2 Ms Coxon noted that at any one time she has 50 – 60 limited licence applications underway, and that her client base had grown by approximately 500% as a result of her internet based limited licence practice developed by Mr Harder. Ms Coxon also noted that as a result of her increased business she had been able to employ an additional employee, under a Work & Income New Zealand programme, aimed at getting unemployed people into work.
- 56.3 The evidence showed that Mr Harder has made a considerable contribution to Ms Coxon’s business enterprise. The increasing business Ms Coxon now has in her legal practice, and the novel features of her internet legal service relating to her limited licence application practice can, to a large extent, be attributed to Mr Harder’s drive, skill and work. Ms Coxon also noted that if Mr Harder was to stop providing his services, her practice would diminish, as she could not continue to offer her limited licence services to the public in the same way as she does now via the internet.
- 56.4 In the particular circumstances surrounding Mr Harder’s employment, and the uncertainty around the effect of S.7 (2), we did not consider it appropriate to exclude consideration of the evidence of the value Mr Harder had brought to Ms Coxon’s legal practice on the basis that it arose in the context of what might have been a breach of S.7 (2) of the Act. That may not be the case in future applications where good reason to employ involves activity that is found to breach applicable regulatory provisions.
- 56.5 We are satisfied on the evidence before us that there is a good reason for Ms Coxon to employ Mr Harder. We consider the relevant factors to be Mr Harder’s key role in enabling Ms Coxon to provide regulated services via the internet, and the fact that those services are meeting a public demand (as demonstrated by the substantial growth Ms Coxon has experienced in her practice) for low cost, easily accessed, and efficient, legal services.

[57] After considering whether there is good reason to employ, this Tribunal has to consider specific matters as set out in S248(4) of the Act. These are noted in paragraphs 58 – 62 below.

[58] The need to protect both the public and the standing of the profession:

- 58.1 Mr Harder’s disciplinary record is poor, to say the least, and it would be unacceptable to expose the public to the risk of further actions by Mr Harder that are of a similar character to those for which he has previously been disciplined. As Mr J Marshall QC noted in his affidavit, Mr Harder has demonstrated repetitive and persistent unprofessional behaviour in the past.²³

²³ Paragraph 1.5 of Mr Marshall’s affidavit dated 12 November 2009

- 58.2 We accept that Mr Harder is making an effort to deal with substance abuse issues that may have contributed to his behaviour, and has made good progress. Nevertheless, we do perceive a risk to the public if he was to recommence personally inter-acting with clients of Ms Coxon's practice. We reach this conclusion based on Mr Harder's extensive disciplinary history which extends over 21 years from 1985 to 2006 when he was struck off, and after taking into account his efforts towards rehabilitation, a process that is ongoing.
- 58.3 We are not satisfied by the evidence, short of significantly proscribing Mr Harder's work activity and client contact, that risks relating to protection of the public and the standing of the profession would be sufficiently mitigated were Mr Harder to be permitted by our consent to deal with the public in the context of his employment by Ms Coxon.
- 58.4 On that basis (and noting also that Ms Coxon has limited her application and Mr Harder has stated that he does not wish to undertake work that would involve him providing legal advice), we consider conditions limiting Mr Harder's activities to the business service work proposed by Ms Coxon, and restricting his client contact, will meet the concerns we note under this head.

[59] The seriousness of Mr Harder's proved offending, and matters relevant to his honesty

- 59.1 We have already made some comments on Mr Harder's offending, and deal further with this later in this decision.
- 59.2 In respect of his honesty, there were some matters relating to over-charging in his earlier disciplinary hearings, but the principal issue for Mr Harder has been behavioural. We do not see dishonesty as a risk when Mr Harder is working in Ms Coxon's practice. We have signalled our intention to deal with any behavioural risk by restricting Mr Harder's activity and exposure to Ms Coxon's clients.

[60] Work proposed and supervision:

- 60.1 We had some initial concern as to whether Mr Harder may have more of a controlling influence in Ms Coxon's practice than Ms Coxon acknowledged. In his affidavit Mr Harder noted numerous instances where he had been the instigator of a new approach to business or a development of key documentation on the internet. It became clear however, as the hearing progressed, that where Mr Harder drove such matters they were within the context of the work for which both he and Ms Coxon accepted he was responsible, principally relating to advertising, access for clients (website and 0800 number), and mechanisms for the delivery of Ms Coxon's legal work product via the internet.

- 60.2 We do not consider the evidence indicated that Mr Harder was the controlling mind of Ms Coxon's legal practice, nor that Mr Harder's proposed limited scope employment by Ms Coxon will allow him to effectively by-pass the restriction placed on his ability to engage in practice himself, following his striking off.
- 60.3 Mr Harder's work in relation to regulated services is proposed by Ms Coxon to be limited to what could be described as administrative and marketing services to her business enterprise. Given the particular nature of the internet service she provides to her clients, which does not involve Mr Harder in the client contact normally expected of a person involved in the provision of limited licence application services, we are satisfied under this head. Client contact and provision of legal services to individual clients is to be left to Ms Coxon, and Mr Harder is to have no such role.
- 60.4 During examination Mr Harder stated, in relation to the provision by him of legal advice, that he;
- 60.4.1 did not give legal advice if asked to do so by a client of Ms Coxon's, who may make initial contact via an 0800 number;
- 60.4.2 told such people he is not a lawyer and that he is not in a position to answer their question;
- 60.4.3 knew the boundaries and stayed well clear of giving legal advice;
- 60.4.4 did not want to jeopardise his employment or cause problems for Ms Coxon;
- .
- 60.5 The application and evidence indicates that consent is not sought for Mr Harder to be employed in a role that involves advisory or directive contact with clients. Mr Harder has stated under oath that he has no intention or desire to provide legal services, and Ms Coxon does not propose that he be permitted to do so. This assists our decision process, as any other scope of work and role would have presented a difficulty for Mr Harder when we evaluated the criteria set out in S248(4) of the Act.
- 60.6 While contractual arrangements and work practices can be put in place to govern employer/employee relationships, what actually happens is the key. We have some doubts that Ms Coxon would have an unfettered ability to effectively direct and exercise supervisory control over Mr Harder in any dealings he may have direct with her clients, as would normally be expected in an employer/employee situation.
- 60.7 Contrasting the demeanour of Ms Coxon and Mr Harder at the hearing of this application, Mr Harder appeared more assertive and

authoritative than Ms Coxon. Ms Coxon acknowledged that she looked up to Mr Harder, and considered him her mentor. Mr Harder said that he delivered oversight and guidance to Ms Coxon when he overheard things that were not, in his view, correct, and that he would give Ms Coxon “pearls of wisdom” where he thought it appropriate.

60.8 In our view these matters, as well as indicating activities which appear to amount to the provision of legal advice by Mr Harder, serve to highlight the difficult position as between Ms Coxon and Mr Harder, in respect of Ms Coxon’s ability to professionally control and supervise Mr Harder. The risk we perceive is compounded by the fact that Ms Coxon and Mr Harder have acknowledged that they are in a close personal relationship, which is also likely to adversely affect the situation of control and direction as between employer and employee.

60.9 Against this background, we consider the ability of Ms Coxon to successfully direct Mr Harder against his wishes if he began dealing directly with her clients, is likely to be constrained. That indicates a potential risk to the public, and the profession’s reputation, if Mr Harder was to be employed in a role that was anything other than the limited role now proposed by Ms Coxon.

60.10 We think it important that if Mr Harder is to work in Ms Coxon’s practice, it be on the basis that, whatever he is called and whatever his job description, his contact with clients of the practice is limited, and does not involve him providing any legal advice about their affairs, whether direct or via Ms Coxon.

60.11 Accordingly, any consent Ms Coxon may be granted to employ Mr Harder in relation to the provision of regulated services must guard against risks noted under this head by the imposition of appropriate conditions. We consider that the potential for risk to the public and the profession can be mitigated by such conditions. On the basis such conditions can be effectively imposed, we are satisfied regarding the matters considered under this paragraph.

[61] Disciplinary record:

61.1 There has been a pattern of behaviour over an extended period which causes us concern that any work Mr Harder may undertake for Ms Coxon must be of a nature and style that proscribes the likelihood that his mistakes of the past will be repeated. Limited client contact will be important in this regard, as noted.

[62] Relevance of penalty previously imposed:

62.1 Mr Harder was struck off in February 2006. We are of the view that this current employment application should in no way allow Mr Harder

to effectively avoid the prohibition on his practise of law arising from that striking off.

- 62.2 We note in Sidney²⁴ that the applicant was 18 months into a 3 year suspension. The Court stated that the applicant in that case²⁵ would be able to apply to re-enter practice at the end of the suspension, and that the issue of a practising certificate to permit that would probably occur in the absence of any fresh issue.
- 62.3 Here Mr Harder is facing the consequences of a striking off order made in 2006. The relevance of that penalty is such that in our view it is an indicator of limited re-entry by Mr Harder to the legal practice environment pursuant to any consent we may give in respect of Ms Coxon's application. Conditions we will specify in our order will reflect this factor.

Decision

[63] Ms Coxon has been employing Mr Harder in a role that requires consent under S248 of the Act. We are prepared to consent to her application to employ, but there must be a framework established which ensures the issues we have to consider under the Act, and which we have noted above, are satisfactorily addressed. There must be some confidence that the purposes of the legislation are not likely to be compromised by Ms Coxon employing Mr Harder.

[64] We see that framework as comprising prescribed limits on type and mode of work, and prohibitions on client contact. There was evidence before us that Mr Harder did undertake legal work in the course of his employment by Ms Coxon, and the terms and conditions of our consent require that to cease. There was also evidence of extended client contact when taking clients to swear affidavits, and client contact such as that is not to continue. We embody conditions that deal with these matters in our decision.

[65] We have already commented on our concerns over Ms Coxon's ability or wish to exercise professional control over and supervise Mr Harder if he dealt directly with clients of her practice. That is another reason we take the view that the role Mr Harder is to play in respect of Ms Coxon's practice should be quite limited in terms of contact with clients and the type of work undertaken.

[66] The approach we intend to take is that any consent we give to Ms Coxon employing Mr Harder will be subject to conditions that require his employment to be limited to his specialist business advisory role undertaken to date, that there should be no provision by Mr Harder, direct or indirect, of legal services, and that his contact with members of the public obtaining legal services from Ms Coxon should be limited.

²⁴ See paragraph 54 above

²⁵ Unlike S.248 of the Act, where the potential employer is the applicant, in Sidney the person seeking to be employed made the application.

[67] The New Zealand Law Society, in its submissions, proposed some terms and conditions which are not part of our decision, including that Mr Harder be precluded from arranging billing of Ms Coxon's clients, that he not hold himself out as a provider of legal services, and that his employment is not to be used as grounds for restoration to the roll at some future date.

[68] Dealing with each of those points;

- 68.1 we do not think it realistic to bar an office manager from dealing, as an administrator (which is what he will be in this regard), with the issuing of bills or receipting of Ms Coxon's practice fees. Many of Ms Coxon's fees are at a set level, notified to clients at the outset. We also note that there are regulatory controls which affect charging for regulatory services, to which Mr Harder will be subject under Ss 11 or 14 of the Act, quite apart from the responsibility Ms Coxon will bear;
- 68.2 the Act adequately covers holding out issues and similar (Ss21, 22, and 23);
- 68.3 we are of the view that if Mr Harder does apply for restoration to the roll at some future time (and we note his current view that he has no interest in doing so), then everything he has done in the period since his strike off, that is of some relevance to a restoration application, will be before the Tribunal. The Tribunal will give an issue such as his employment by Ms Coxon the weight it thinks appropriate, should that situation arise. There should be no mistake that consenting to this application by Ms Coxon has any value as support for a restoration application, simply because we grant the application to employ. We have approached Ms Coxon's application to employ Mr Harder quite differently from the manner in which a restoration application would be approached. Also, we have strictly limited Mr Harder's activities, and imposed conditions that indicate residual concerns this Tribunal has that would not sit well with an application for restoration.

[69] We agree with the Society regarding Ms Coxon accepting responsibility for Mr Harder's compliance, but note that she will have regulatory liability in any event if Mr Harder, in the course of his employment, steps outside the bounds of his consented activities.

[70] We also agree with the Society's suggested restriction on the provision of legal services by Mr Harder. This has been incorporated in our decision, which also reflects the applicant's position and Mr Harder's unequivocal statement that he had no desire or intention to be involved in giving legal advice. It also reflects our view that he should not be free to provide any legal services in the context of his work in Ms Coxon's practice, quite apart from the normal regulatory restrictions that limit him regarding such services.

Order Granting Consent

[71] This Tribunal grants its consent, on the terms and conditions set out in Schedule 1 to this decision, to Melanie Jane Coxon, of Auckland, Barrister, employing, in relation to her barrister's practice, Christopher Lloyd Harder of Auckland, a former practitioner. This consent shall become operative on satisfaction of the condition noted at paragraph 4 of Schedule 1.

Suppression

[72] The evidence in chief given orally before this Tribunal by Ms Coxon and Mr Harder prior to their respective cross-examinations, so far as it relates to the detail of their personal relationship, is permanently suppressed.

DATED at Wellington this 16th day of February 2010

D J Mackenzie
Deputy Chair
Lawyers and Conveyancers Disciplinary Tribunal

Schedule 1

The terms and conditions of consent are:

1. Mr Harder's activities in the course of his employment by Ms Coxon shall be limited to providing business support services to Ms Coxon's barrister's practice in the following roles;
 - (a) office management,
 - (b) secretarial services,
 - (c) systems management,
 - (d) information technology management,
 - (e) practice advertising and marketing.

Ms Coxon shall ensure that systems and procedures are in place to enable her to adequately exercise control and supervision of Mr Harder's activities in the course of his employment by her.

2. In the course of his employment by Ms Coxon, Mr Harder;
 - (a) may not provide, directly or indirectly, any legal services (as that term is defined in the Act) to Ms Coxon, to any of her clients, or to any member of the public; and,
 - (b) may not attend on (whether in person or by some other means) Ms Coxon's clients, or any person who is receiving or seeking any legal services from Ms Coxon.

Nothing in (a) of this paragraph shall prevent Mr Harder continuing his work on Ms Coxon's internet templates.

Nothing in (b) of this paragraph shall prevent Mr Harder from dealing with any person in a brief or perfunctory way, such as when greeting them on their arrival at Ms Coxon's premises, answering the telephone, or directing such persons to Ms Coxon's website or internet services.

3. Ms Coxon is to allow, and co-operate with, any investigation the Society may wish to undertake from time to time to review compliance with the terms and conditions of this consent.
4. Mr Harder is to provide a written undertaking to the New Zealand Law Society, in a form acceptable to the Society, undertaking;
 - (a) that he will comply with the applicable terms and conditions of the consent; and,
 - (b) that he will co-operate with the Society in respect of any investigation it may wish to undertake from time to time to review his compliance with the applicable terms and conditions of this consent.
5. Failure by Mr Harder to honour any material aspect of his undertaking shall constitute a breach of the terms and conditions of this consent.