NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2013] NZLCDT 28

LCDT 010/12

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**SOUTHLAND STANDARDS COMMITTEE**
	Applicant
AND	**W**
	Respondent

MEMBERS OF TRIBUNAL

Mr D Mackenzie (Chair)
Ms J Gray
Ms T Kennedy
Mr A Lamont
Mr S Maling

HEARING at INVERCARGILL on 24 June 2013

APPEARANCES

Mr P Collins, for the Standards Committee
Ms A Douglass, for the Respondent

NOTE THAT SUPPRESSION ORDERS HAVE BEEN MADE IN THIS MATTER – SEE PARAGRAPHS [40] AND [42]

RESERVED DECISION OF THE TRIBUNAL ON PENALTY AND COSTS, AND REASONS FOR SUPPRESSION

Introduction

[1] The respondent, who has been granted permanent suppression of name and identifying particulars, has admitted a charge of professional negligence or incompetence under s 241(c) Lawyers and Conveyancers Act 2006 ("LCA"). A second charge, of misconduct, was withdrawn by leave of the Tribunal on an application by the Standards Committee.

[2] After hearing submissions from the parties when the Tribunal convened on 24 June 2013, the Tribunal reserved its decision on penalty and costs. This determination now delivers the Tribunal's decisions on those matters. It also records the reasons for the Tribunal's decisions at the hearing in respect of the respondent's application for permanent name suppression, and the respondent's application for a private hearing, such latter application being declined for the reasons given at the time.

Background

[3] Section 241(c) LCA refers to professional negligence or incompetence in the following terms:

> "……negligence or incompetence in (the practitioner's) professional capacity, and that negligence or incompetence has been of such a degree or so frequent as to reflect on (the practitioner's) fitness to practise or as to bring (the practitioner's) profession into disrepute."

[4] The particulars specified in the charge of negligence or incompetence against the respondent noted the respondent's:

(a) Persistent failure to properly prepare in representing clients in criminal proceedings in the District Court;

(b) Failure to attend Court when required to be present to represent clients, without any explanation or legitimate excuse, and without making suitable alternative arrangements;

(c) Persistent lack of adequate knowledge of the law and procedure in criminal matters in which the respondent was representing clients, to the detriment of the respondent's clients; and,

(d) Persistent lack of response to the legitimate requirements of the respondent's clients, and to their family members, to an unacceptable degree.

[5] In support of its case the Standards Committee filed affidavits from various practitioners who had observed incidents of the conduct alleged against the respondent, from clients or family of clients concerned about the effects of the respondent's conduct, and from a Court Registrar who complained regarding instances of the respondent's failure to appear without adequate arrangements being in place to ensure proper representation of clients.

[6] As noted, the charge was admitted by the respondent, so following the respondent's admission before the Tribunal the matter proceeded as a penalty hearing, to decide appropriate sanction.

[7] The Tribunal accepted, having regard to both the respondent's admission and the unchallenged affidavit evidence from the Standards Committee witnesses, that there had been negligence or incompetence of a nature that was serious, and that it had occurred frequently. The degree of seriousness of the respondent's conduct, and its frequency, did reflect on the respondent's fitness to practise and it was of a nature that would adversely affect the reputation of the profession, in the Tribunal's view. Indeed, the Tribunal notes that in addition to admitting this charge, the respondent provided evidence which indicated that the respondent was considered by the

respondent's medical advisers as not fit to practise given the respondent's medical condition.[1]

Submissions

[8] For the Standards Committee, Mr Collins sought orders of suspension and censure. He noted the evidence of the various witnesses for the prosecution made it clear that it was appropriate that the respondent not be permitted to practise. The respondent had been shown to be lacking in basic legal skill and knowledge, had been unresponsive to client needs, had failed to attend Court when required, had been unprepared and disorganised on occasions, and had behaved in an unprofessional manner it was submitted.

[9] Mr Collins summarised the elements of the admitted charge, and the evidence in support, which were said to show repeat instances of negligence or incompetence which, either individually or collectively, were serious. It was submitted that this all reflected adversely on the practitioner's fitness to practise and also brought the profession into disrepute.

[10] As a consequence the Standards Committee considered the maximum period of suspension permitted under LCA should be considered[2], but submitted that some allowance should be made for the fact that the respondent had undertaken a voluntary surrender of practising certificate in early April 2011, and had not practised since that time. The Committee suggested suspension for a period expiring 36 months after the date on which the respondent's practising certificate had been voluntarily surrendered (ie suspension until early April 2014, a period of approximately 9 months from the time any such suspension order might be made).

[11] Suspension was inevitable having regard to the nature of the admitted conduct, it was submitted, and that suspension, together with censure, was a necessary regulatory response which would mark the proper disapproval of such conduct. Mr

[1] Medical reports of Dr du Fresne, a Consultant Psychiatrist, dated 10 February 2013 and 21 June 2013, and from Dr Johri, dated 20 June 2013.
[2] Section 242(1)(e) Lawyers and Conveyancers Act 2006 specifies 36 months as the maximum period of suspension to be applied.

Collins noted the need to ensure adequate protection of the public and the maintenance of public confidence in the legal profession. He also noted the fact that there had been some previous disciplinary findings against the respondent relating to matters similar in nature, although at the level of unsatisfactory conduct, and that the medical evidence indicated that the respondent was unfit to practise and likely to remain so for some time.

[12] It was also submitted for the Standards Committee that the respondent had, for an extended period prior to admitting the charge shortly before the hearing, demonstrated a lack of insight into the conduct the subject of the charge, tending to blame others for what had occurred, and denying any responsibility. The respondent had pursued some meritless arguments in opposition to the charge Mr Collins said, and these factors also supported the position of the Standards Committee on suspension and censure.

[13] While acknowledging that her client had admitted the charge, in these terms:

> "The respondent has admitted the charge of negligence or incompetence pursuant to s 241(c) Lawyers and Conveyancers Act 2006."[3]

Ms Douglass, for the respondent, said at the hearing that her client had admitted the charge on the basis that the admission was: as to incompetence, but not negligence; as to frequency of conduct from February to April 2011, but not seriousness of such conduct as envisaged by use of the phrase "of a degree" in s 241(c); and that it reflected on the respondent's fitness to practise, but did not bring the profession into disrepute.

[14] The submissions on behalf of the respondent stated that "*the allegation of repeat negligence is not supportable",*[4] which appeared to be based on whether there was a duty owed to some of the complainants, and whether a breach of that duty caused the complainants any harm. The suggestion was that the charge was supported only by evidence of repeat incompetence, not negligence, as there was no duty owed to some complainants.

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[3] Written submissions for the respondent dated 24 June 2013, paragraph 1.
[4] Ibid, paragraph 40.

[15] Miss Douglass also endeavoured to argue that the seriousness of the conduct, a matter needed to constitute an element of the charge[5], was missing when looking at the "degree" of each matter individually. She submitted that therefore the only telling factor in this charge was its repetition (the reference to "frequency" in the charge), because individually the acts of the respondent were not serious, only repetitive.

[16] The Tribunal was concerned that having admitted the charge as laid, the respondent appeared to be attempting to resile from what had been admitted. The respondent appeared to be claiming that there was no negligence, that the separate incidents of conduct were not serious, and that the conduct did not bring the profession into disrepute. When asked about this by the Tribunal, Ms Douglass confirmed that her client did not resile from the admission, and that the point was meant to reflect mitigating factors for the Tribunal to consider.

[17] A primary submission by Ms Douglass was that this matter reflected medical issues, and as a consequence the respondent's conduct indicated limited professional culpability. It was said that the respondent should be able to address the health issues faced and to eventually regain the confidence of the profession, and that a punitive approach should not be taken.

[18] For the respondent, Ms Douglass submitted that the respondent had made all reasonable endeavours to successfully practise, but that the respondent had failed because the working environment was hostile, there was no peer support, and the respondent felt bullied. The respondent suggested that the Law Society had failed in not ensuring there was follow up for the respondent at the time the respondent was required to undergo supervision and mentoring consequent on earlier disciplinary findings of unsatisfactory conduct. We record at this point that we do not consider the respondent has any proper basis for placing any blame on the Law Society for the conduct for which the respondent now appears.

[19] The respondent's psychological issues meant, said Ms Douglass, that the respondent had been vulnerable at the time of her conduct. The respondent's

[5] The reference in the charge to "degree" requiring an assessment of seriousness - *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401 at [41].

depression and anxiety affected the respondent's ability to practise effectively she said, particularly in what was considered by the respondent to be an hostile environment. Ms Douglass asked that the Tribunal take this context into account when considering sanction in response to the respondent's conduct.

[20] It was also suggested for the respondent that the opinions of the complainants should not be used by the Tribunal to assess the respondent's conduct, citing *W* [6]. In that case the Court had referred to the need to address matters objectively Ms Douglass submitted, and the witnesses were giving their subjective views.

[21] Ms Douglass also submitted that while the Tribunal should take into account the respondent's mental health in assessing culpability and sanction, it would be discrimination based on disability or health status if the Tribunal considered the respondent unfit to practise because of her mental illness.

[22] In respect of penalty the respondent also submitted that credit should be given for: the admission of the charge by the respondent; lack of intent; the conduct comprising a series of relatively minor transgressions which have been considered cumulatively; the respondent's health which also contributed to a claimed lack of insight into the respondent's conduct; voluntary surrender of the respondent's practising certificate; and the respondent's disciplinary history before this matter relating to only two unsatisfactory conduct charges being previously found against the respondent.

[23] The respondent sought, effectively, a discharge on the basis that no useful purpose would be served by imposing penalties and a record of "conviction". It was submitted that the respondent's professional and personal interests should be given weight over any public interest in the protective jurisdiction of the Tribunal.

[24] It was submitted for the respondent that suspension was not necessary to protect the public, as the respondent was not practising, had no practising certificate, and if to seek to re-enter practice would have to go through a vetting process with the Law Society.

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[6] Ibid at [45].

Discussion

[25] In respect of the submission for the respondent concerning an absence of duty to any complainant, this appeared to be aimed at distinguishing negligence from incompetence, justifying some different approach to sanction that may have applied to "negligence" as distinct from "incompetence". Such an approach does not give adequate recognition to the protective purposes and operation of the statutory regime dealing with legal professional discipline.

[26] Evidence was given that: the respondent's clients were not being adequately represented; the respondent's behaviour adversely affected the respondent's clients: and a Court Registrar was concerned at the respondent's failure to appear in Court to represent clients without making adequate arrangements.

[27] In those circumstances there is nothing in whether the conduct is described as negligence or incompetence. It is probably both, but however described it has failed the respondent's clients, and thereby failed to ensure one of the key purposes of LCA – the protection of consumers of legal services.[7]

[28] We do not see any value in attempting to distinguish whether it was negligence or incompetence, or to decide whether it was frequent but not serious. We are able to make an assessment of the conduct based on the unchallenged evidence. It is clearly conduct that amounts to negligence and incompetence, intent is not an issue in such matters, and it was also serious as well as frequent, despite the respondent's claim that it was only a matter of frequency with no single instance of conduct being serious. The argument mounted to distinguish the conduct in the way proposed by the respondent does not assist us in any evaluation of the admitted conduct having regard to Ms Douglass's stated objective of mitigation of penalty.

[29] The passage relied on by Ms Douglass in *W* [8] in support of her submission on the need for an objective assessment of the respondent's conduct, related to a discussion about how conduct (the giving of an undertaking in that case) should be

[7] Section 3(1)(b) Lawyers and Conveyancers Act 2006.
[8] Above, n 6.

considered as tending to bring the profession into disrepute. The Court in *W* was making the point that the subjective views of the practitioners giving or receiving the undertaking in that case were irrelevant. The test noted in *W* was whether reasonable members of the public, informed of all relevant circumstances, would view the conduct as tending to bring the profession into disrepute. It was to be an objective test taking into account the context of the conduct.

[30] We are not sure how that principle can be properly transformed into the basis for the submission by Ms Douglass that the negligence or incompetence alleged in the charges against the respondent was not supportive of the charges, because it was based on the subjective views of witnesses. The evidence relating to such matters was unchallenged, and the charge admitted, and we are satisfied that the evidence showed that the respondent was negligent and incompetent, frequently and to a serious degree, so the essential elements of the charge under s 241(c) LCA were shown to exist.

[31] Ms Douglass, for the respondent, also submitted that *W* required that we take into account the context in which the conduct occurred and in particular the affect on the respondent of alleged bullying and isolation.

[32] If that is a reference to the respondent's position in making a plea in mitigation regarding culpability and sanction, arising from the respondent's health issues, then that is a context the Tribunal does take into account, but we note that public protection and confidence in the profession are cornerstones of the disciplinary regime[9], and that is our prime focus.

[33] Similarly, it was claimed for the respondent that it would be discriminatory to sanction the respondent because of mental health issues affecting the respondent. We do not accept that submission. It is not discrimination on the grounds of mental health to find that it may have contributed to the conduct and to then move to ensure the purposes of the protective legislation provided by LCA are observed. It is the conduct which is important and which has to be addressed, not simply its cause.[10]

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[9] Section 3(1) Lawyers and Conveyancers Act 2006.

[10] See for example two cases drawn to the Tribunal's attention by Mr Collins - *Legal Services Commissioner v Long* (Legal Practice) [2012] VCAT 193, where suspension was considered appropriate notwithstanding that mental illness had contributed to the offending conduct; and *Legal Practitioners Conduct Board v Trueman*

[34] It was also suggested for the respondent that suspension would be a punitive response. While one of the effects of suspension is punitive, the over-riding purpose is public protection[11] and that is our approach in imposing the sanction we do in this case.

[35] A submission was made for the respondent that as the Law Society could control the respondent's re-entry to the profession, and as the respondent was not currently practising and had no practising certificate, suspension was not necessary. It would be inappropriate in our view for the Tribunal to decline to impose sanction simply on the basis that the Law Society could address issues arising in this case in due course, on any application for a practising certificate made by the respondent. Under the professional disciplinary regime established by LCA, the Tribunal has to respond to the charge admitted, and impose the sanction that it considers appropriate. It should not decline to take action on sanction simply on the basis that the respondent is not currently practising and that the Law Society might deal with the matter in another forum, at another time, in different circumstances, if an application for a practising certificate is ever made. That would not meet the Tribunal's obligation to ensure the protective purposes of LCA were met.

Determination

[36] In our view a period of suspension is appropriate to ensure the respondent does not practise for some time and to thereby protect the public. It is also an appropriate response given the damage to the profession's reputation that would arise in the mind of reasonable and properly informed members of the public regarding the respondent's acknowledged conduct, or if no action was taken in respect of that conduct. Suspension is not simply punitive. It is part of the protective response that may be undertaken in response to conduct that demands regulatory intervention to protect the public interest, as this case does.

[2003] SASC 58 where striking off proceeded notwithstanding that the conduct concerned was substantially attributable to a psychiatric condition.

[11] *Daniels v Complaints Committee 2 of Wellington District Law Society* [2011] 3 NZLR 850 [24] and [25].

[37] We do not consider censure appropriate for two reasons. First, suspension is a censure in itself, and should be recognised as such, although we recognise that it does not automatically prevent a separate censure being applied. Second, censure involves denunciation, and where mental illness has played a not insignificant part in the conduct, we consider that such denunciation of the respondent would not be appropriate notwithstanding the conduct resulting is serious and unacceptable. There has to be some recognition of the impact of the mental health issues outlined in the medical evidence, and in those circumstances we do not apply a censure.

[38] The respondent is legally aided, so costs are not sought by the Standards Committee having regard to s 45 Legal Services Act 2011. It does however seek an order that the respondent pay to the Law Society the costs it will incur under s 257 LCA.

[39] The Tribunal sees no difference in principle between an order for costs against the respondent to meet the costs of the Standards Committee regarding the investigation and hearing of charges, and an order against the respondent to reimburse the costs of the Law Society under s 257 which it must pay towards the costs of the Tribunal's hearing incurred by the Crown. In any event, the evidence made it clear that the respondent has no present ability to pay, having no significant assets, is suffering financial hardship, and realistically it would be a long time, if ever, before the respondent could reasonably be expected to have sufficient funds to make a payment of s 257 costs incurred by the Law Society. Such an order, even if allowed to remain unpaid for an extended period, would hang over the respondent, and would be punitive in the respondent's circumstances. It would also risk adversely affecting the respondent's recovery and rehabilitation, given the medical evidence. In those circumstances the Tribunal declines to make any order for costs.

Suppression

[40] The respondent was granted permanent suppression of name and identifying particulars at the hearing. The Tribunal appreciates the need for openness in proceedings, the right to report, and the importance of freedom of speech, but against that it has to balance the particular circumstances applicable to the respondent. The unchallenged medical evidence, from both the respondent's General Practitioner and a Consultant Psychiatrist, indicated clearly that publication of the respondent's name or identifying particulars would put her personal safety and wellness at risk. On balance, the Tribunal concluded that on this occasion the personal interests of the respondent outweighed the public interest in publication.

[41] The respondent's name as it appears in the order set out at paragraph [44] below is to be redacted in any published copy of this decision, other than in the copy provided to the respondent's counsel and as noted in paragraph [42] below.

[42] Limited publication of name and identifying particulars will occur pursuant the provisions of s 240(3) LCA, and as provided by paragraph [46] below, but otherwise the name and identifying particulars of the respondent are permanently suppressed. The Tribunal also suppresses the content of all of the medical reports provided to it by or on behalf of the respondent in this matter.

Private hearing

[43] The respondent's application for a private hearing was declined at the hearing. The Tribunal considered that suppression was sufficient to protect the respondent's interests in this case. As indicated at the hearing, the Tribunal would have been prepared to entertain an application for privacy at the time any evidence was being discussed regarding the respondent's sensitive family or medical history, where such matters were of a nature that the respondent's private interests may have outweighed the public interest in open proceedings. No third party attended the hearing in such circumstances which meant no such application was required.

Orders

[44] The respondent is suspended from practice as a barrister or as a solicitor, or as both, for a period of 12 months commencing on the date of this determination and expiring at the close of 3 July 2014. This period of suspension recognises that the respondent has already had some time out of practice following voluntary surrender of the respondent's practising certificate in 2011, but no attempt is made to formulate any particular credit for that period on some precise mathematical basis. A suspension of one year is sufficient to protect the public, in that it is a reasonable period for the respondent to seek to rehabilitate herself, and that rehabilitation is a matter that will be assessed at any proposed re-entry to the profession by the respondent.

Section 257 certification

[45] Costs under s 257 LCA are certified at $14,600.

Other matters

[46] If the applicant applies for a practising certificate to become available to the respondent after the expiry of the term of suspension imposed, a copy of the prosecution file and this determination should be made available to the committee of the Law Society dealing with such application. Because the suspension expires in one year, a shorter period than may have resulted if not for the voluntary surrender of practising certificate by the respondent in April 2011, the Tribunal is concerned that any Law Society committee dealing with any such application be fully aware of all matters that have arisen in this case, and thus has the opportunity to ensure all relevant matters are addressed as part of its decision making process on any such application for the respondent to effectively re-enter practice.

DATED at AUCKLAND this 4th day of July 2013

D J Mackenzie
Chair