NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2016] NZLCDT 29
LCDT 018/16

UNDER	the Lawyers and Conveyancers Act 2006
BETWEEN	**NATIONAL STANDARDS COMMITTEE** Applicant
AND	**KEITH IAN JEFFERIES** Practitioner

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr J Bishop
Mr W Chapman
Ms M Scholtens QC
Ms P Walker

HEARING at Wellington Tribunals Centre

DATE OF HEARING 22 September 2016

DATE OF DECISION 3 October 2016

COUNSEL

Mr P Davey for the Standards Committee
Mr R Lithgow QC for the Practitioner

DECISION OF THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL ON PENALTY

Introduction

[1] Mr Jefferies appeared before us for a penalty hearing, consequent on his acknowledgement of a charge that:

> He had been convicted of an offence punishable by imprisonment and which tended to bring his profession into disrepute.

[2] The key difference between the National Standards Committee who brought the charge, and Mr Jefferies' counsel, is over the necessity of suspension of Mr Jefferies from practice.

Background

[3] The starting point in assessing penalty is the seriousness of the conduct, so a brief background is required.

[4] Mr Jefferies was convicted of two counts of possession of methamphetamine (Class A); one of possession of bk-MDMA (Class C); and one charge of possession of utensils. The amounts in possession were of a residue nature only, but the search, which took place in July 2014, located both drugs and utensils in three places, the practitioner's home, car and workplace.

[5] Mr Jefferies claims he has no addiction and has been clean since this time. He provided a certificate from his therapist confirming his self referral, diligent attendance, clean drug testing and certifying that he did not have "an addictive personality" (although that term was not defined).

[6] Rather than maintain his right to silence during the search, Mr Jefferies, a lawyer who has acted in criminal matters for 30 years, told the police that items in the car belonged to someone else, said the same about those in his office and commented that other people visited his home. In other words he lied about the ownership or possession of the items.

[7] Mr Jefferies pleaded guilty in August of 2015, following a negotiation over the summary of facts. This was over a year after being charged. He was sentenced to total fines of $1,300, having sought a discharge without conviction. On appeal the sentence was upheld.

[8] Unsurprisingly Mr Jefferies' offending attracted considerable media attention.

Submissions on seriousness

[9] Mr Davey, on behalf of the National Standards Committee drew the Tribunal's attention to three cases where drug use had been considered, to emphasise that the Tribunal has taken the use of methamphetamine to be a serious matter. In the *Wootton*[1] matter, a practitioner who had been convicted of possession of methamphetamine and a pipe was suspended for a year. In the *Wootton* situation the practitioner had developed a serious addiction and had been out of practice for two years at the time of the hearing undertaking rehabilitation. Although the convictions are similar we accept that in that matter the practitioner was so seriously affected as to reflect on his fitness to practise, which is not the case in the present matter.

[10] It is accepted by the Standards Committee that the second matter, the *Thomson*[2] matter was a situation of more serious conduct, in that the practitioner was also a police prosecutor who had posted videos of himself using methamphetamine on social media. He accepted himself that he was not fit to practise and did not oppose being struck-off the roll.

[11] Finally the *Blair*[3] matter was again more serious than the present case because although cannabis was involved there was a sale to an undercover police officer. In that matter the practitioner was suspended for three years.

[12] We were then referred to cases involving serious alcohol abuse, namely *Ravelich*,[4] *Beacham,*[5] *Taffs*[6] and *Rohde.*[7]

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[1] *National Standards Committee v Wootton* [2013] NZLCDT 43.
[2] *Auckland Standards Committee 1 v Thomson* [2014] NZLCDT 38.
[3] *National Standards Committee v Blair* [2015] NZLCDT 9.
[4] *Auckland Standards Committee 1 v Ravelich* [2011] NZLCDT 11.
[5] *Hawke's Bay Lawyers Standards Committee v Beacham* [2012] NZLCDT 29.
[6] *Canterbury-Westland Standards Committee v Taffs* [2013] NZLCDT 13.

[13] Mr Lithgow QC, counsel for Mr Jefferies pointed out that although these latter cases referred to misuse of a legal drug, that they had all engaged the second limb of s 241(d), namely that they reflected on the practitioner's fitness to practise. It is accepted that all four of these cases involved patterns of addiction and therefore raised fitness issues. The penalties imposed in those cases reflect, to some extent, the steps taken by practitioners to address and deal with the addiction (or not, in the case of Ms Beacham).

[14] Mr Lithgow submits that the Tribunal ought to take its lead on the issue of seriousness, from the sentence imposed on the practitioner, or at least from the maximum available sentence. In this case the maximum was 12 months imprisonment. Whilst we accept that this must be a factor in determining seriousness we certainly do not see it as determinative, as previously stated in the *Murray*[8] case.

[15] We must also have regard to how the public might judge the seriousness of a criminal lawyer, who represents clients facing drug charges, succumbing to the use of a Class A drug in this way[9]. Assessment of such public perception is assisted by membership on the Tribunal of lay members, who Parliament intended to represent the public and consumers of legal services.

[16] In summary, we consider the offending to be of a serious nature, although not at the very high end, or such as would impact directly on clients.

Aggravating Features

[17] We consider that lying to the police in relation to a number of areas of the search to be an aggravating feature. Mr Jefferies could simply have relied on his right to silence, but he has made the situation worse by his actions. We also consider aggravating, the fact that the items were found in three places, indicating a more pervasive "habit" rather than an isolated incident.

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[7] *Auckland Standards Committee No. 5 v Rohde* [2016] NZLCDT 9.
[8] *Auckland Standards Committee No. 1 v Murray* [2014] NZLCDT 88 at [41].
[9] We engage the term "use" in a non-technical way, because the lawyer has never actually admitted to the "use" of drugs, or been charged with such.

Mitigating Factors

[18] The practitioner's guilty plea, albeit somewhat delayed in the criminal jurisdiction, for what seem to be reasonable grounds, as well as his acknowledgement of this charge, are factors which count in his favour.

[19] Furthermore, apart from one previous 'unsatisfactory conduct' finding this practitioner does not have a disciplinary history of significant concern. He has practised for approximately 30 years in an area of law which can be stressful and has not remunerated him at all well. He should certainly be given credit for serving the community in this way.

Deterrence

[20] There is a need for general deterrence in the marking of the profession's disapproval for the offending of this sort. In order to obtain the substances involved, it is axiomatic that the practitioner will have dealt with criminals. Perhaps this included his clients, he was not clear in this regard.

[21] We accept that this practitioner has vowed not to offend again in this manner, however we consider that the public would expect the Tribunal to send a strong message to the profession generally.

Discussion

[22] We consider there are two further decisions which guide us in determining whether this practitioner ought to be suspended or not. Firstly, *Daniels*[10] – in this decision a full bench of the High Court discussed the purposes of suspension, saying at para [22]:

> "It is well known that the Disciplinary Tribunal's penalty function does not have as its primary purposes punishment, although orders inevitably will have some such effect. The predominant purposes are to advance the public interest (which include "protection of the public"), to maintain professional standards, to impose sanctions on a practitioner for breach of his/her duties, and to provide scope for rehabilitation in appropriate cases. Tribunals are required to carefully consider alternatives to striking off a practitioner. If the purposes of imposing disciplinary sanctions can be achieved short of striking off then it is the lesser alternative that

[10] *Daniels v Complaints Committee No. 2 of the Wellington District Law Society* [2011] 3 NZLR 850, Gendall, MacKenzie, Miller JJ.

> should be adopted as the proportionate response. That is "the least restrictive outcome" principle applicable in criminal sentencing. …"

And later:[11]

> "A suspension is clearly punitive, but its purpose is more than simply punishment. Its primary purpose is to advance the public interest. That includes that of the community and the profession, by recognising that proper professional standards must be upheld, and ensuring there is deterrence, both specific for the practitioner, and in general for all practitioners. It is to ensure that only those who are fit, in the wider sense, to practise are given that privilege. Members of the public who entrust their personal affairs to legal practitioners are entitled to know that a professional disciplinary body will not treat lightly serious breaches of expected standards by a member of the profession."

[23] *Daniels*[12] was referred to in the second decision, that of *Davidson*[13]. That, like the present case is one where only the reputational limb of s 241(d) was under consideration. While the offending in that matter was of an entirely different nature (it involved offences under the Securities Act by a lawyer director of a public company), His Honour found, despite there being no question of fitness, that the censure that had been imposed by the Tribunal was not a sufficient penalty "… so as to maintain the public's confidence in the profession's discharge of its obligation to discipline its members".[14]

[24] In that matter the starting point in the criminal jurisdiction had been three and a half years imprisonment, this had been adjusted down to 18 months which had made home detention available. Nine months home detention was the sentence imposed on Mr Davidson. Thus the penalty imposed was of a far more serious and punitive nature than the fine imposed in the present case. His Honour Brown J made the point however:[15]

> "For the avoidance of doubt I record that the period of suspension imposed [of nine months] is not intended to be a temporal reflection of what happens to be the same period of home detention in the sentence imposed by Her Honour."

[25] We do not consider that any penalty short of suspension will reflect a proportionate response to this offending, having regard to the aggravating and mitigating features and having regard to the need for consistency with previous decisions of the Tribunal.

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[11] At paragraph [24].
[12] See note 9.
[13] *Davidson v Auckland Standards Committee No. 3* [2013] NZHC 2315, Brown J.
[14] At para [142].
[15] At para [144].

[26] We are aware that suspension of any kind will impose a financial burden upon Mr Jefferies. We take account of that and his age, 67 years, in imposing the shortest period of suspension which properly reflects the profession's disapproval of his conduct.

[27] We accept that as earlier indicated, this offending is at a lower level than any of the three previous drug offending disciplinary cases.

[28] We also note the practitioner's offer to undertake random testing as directed by the Law Society. We consider this is a proper and protective measure.

[29] We consider that a suspension of six months is the least restrictive intervention that we can make having regard to all of the factors in this case. We make the following orders:

Orders

1. The practitioner will be censured in the following terms:

   Mr Jefferies, your counsel has suggested that any censure should be addressed to you face to face in public court so that the public is made aware of the censure. The Tribunal recognises the practical difference between the concept of a public court and the actual involvement of the public in that forum. A more appropriate way to address a censure is in writing that will be published in outlets more accessible to the general public and to that part of the general public who are your professional colleagues and who, by your admitted wrongdoing you have tended to bring into disrepute.

   As a lawyer with statutory and ethical obligations to uphold the law, you have chosen deliberately to break the law. You say this was behaviour in the nature of "dabbling" in drugs, and brought about by the stress of overwork and is a never to be repeated aberration. The Tribunal accepts that assertion but despite that, your behaviour was behaviour that would not and should not be accepted by your professional colleagues and the public in general as the type of behaviour in which a lawyer should engage. The right to practise law is a privilege. With that privilege comes obligations. In breaching those obligations you have abused the privilege. That abuse must be marked by the Tribunal by way of a censure that will be recoded against your name and

be read by members of the public at large and your professional colleagues and will demonstrate that this Tribunal, on behalf of the legal profession will not allow such aberrant behaviour to be unmarked.

Mr Jefferies, you are censured accordingly.

2. The practitioner will be suspended from practice for 6 months commencing 10 October 2016.

3. The practitioner is to submit to random drug tests as directed by the Chief Executive of the New Zealand Law Society. We consider these ought to include a test before the lawyer resumes practise, and four further tests over the following two year period. The costs of such tests must be met by the practitioner.

4. The practitioner is to meet the costs of the Standards Committee in bringing the prosecution in the sum of $7,861.86.

5. The s 257 costs of the Tribunal are certified at $2,909.00 and are ordered against the New Zealand Law Society.

6. The practitioner is to reimburse in full the New Zealand Law Society for the s 257 costs.

DATED at AUCKLAND this 3rd day of October 2016

Judge D F Clarkson
Chair