**NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2017] NZLCDT 30
LCDT 013/16

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| **IN THE MATTER** | of the Lawyers and Conveyancers Act 2006 |
| **BETWEEN** | **NATIONAL STANDARDS COMMITTEE**<br>Applicant |
| **AND** | **JEANNE DENHAM**<br>Practitioner |

**CHAIR**
Judge D F Clarkson

**MEMBERS OF TRIBUNAL**

Mr S Grieve QC
Ms C Rowe
Ms S Sage
Mr W Smith

**HEARING** 29 September 2017

**HELD AT** Auckland District Court

**DATE OF DECISION** 7 November 2017

**COUNSEL**
Mr M Hodge for the Standards Committee
Mr W Pyke for the Practitioner

## REASONS FOR THE DECISION OF THE TRIBUNAL AS TO PENALTY

### *Introduction*

[1] This decision provides reasons for the penalty imposed, following the hearing of 29 September, upon Ms Denham who was found guilty of misconduct in her personal capacity. The full background to the charges found proven is set out in our decision of 25 May 2017.

[2] The National Standards Committee of the New Zealand Law Society ("the Committee") sought an order striking Ms Denham off the roll of barristers and solicitors (s 242(1)(c)).[1]

[3] Section 244 of the Act requires that for an order as to strike off to be made:

> "… at least 5 members of the Disciplinary Tribunal are present and vote in favour of the order and those members are either the only members present and voting at the sitting of the Disciplinary Tribunal or the division of the Disciplinary Tribunal or are a majority of the members present and voting at the sitting of the Disciplinary Tribunal or the division of the Disciplinary Tribunal."[2]

[4] In other words where, as was the case here, five members preside, there must be a unanimous decision to strike-off.

[5] Section 244 also prescribes that an order may not be made unless the Tribunal holds the opinion that:

> "… the practitioner is, by reason of his or her conduct, not a fit and proper person to be a practitioner."

[1] Lawyers and Conveyancers Act 2006 ("the Act").
[2] Section 244(2).

***Offending***

[6] The starting point in considering the penalty must always be the nature and seriousness of the misconduct itself.[3]

[7] In most cases of misconduct this will already have been assessed to a considerable extent in the liability determination process. In cases of "personal" misconduct this is even more so because s 7(1)(b)(ii) imposes what has been interpreted to be a higher threshold, namely it must be conduct which:

> "… would justify a finding that the lawyer … is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer …"

[8] In other words, the Tribunal has already found that, in the misconduct which occurred here, Ms Denham had behaved as a person who was not a fit and proper person to be a lawyer.

[9] However, as properly conceded by Mr Hodge for the Committee, a finding under s 7(1)(b)(ii) has not been taken to inevitably lead to strike-off.[4]

[10] While the inquiry at penalty stage is a broader one than at liability stage, we accept Mr Hodge's submission that where the fit and proper person inquiry is intrinsic to the actual offending, strike-off can reasonably be treated as a starting point.

[11] Mr Hodge emphasises that this is particularly so in this case, which involved the improper use of legal processes. Mr Hodge had reminded us that, in our liability decision we had accepted his submission that:

> "Lawyers occupy a privileged position as officers of the court. That position must never be abused for the purpose of waging personal vendettas. A practitioner who does so, whether knowingly or with a complete lack of insight and judgement, is not a fit and proper person to be a lawyer."

[12] We begin the assessment by finding this to be misconduct at the high end of the scale. The Censure included in this decision accurately reflects our condemnation of Ms Denham's conduct.

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[3] *Hart v Auckland Standards Committee 1* [2013] 3 NZLR 103.
[4] *Canterbury Westland Standards Committee v Horsley* [2014] NZLCDT 47.

***Mitigating Features?***

[13] As stated in our 25 May decision, one of the unusual aspects of this case is that although the period of her conduct which was found to have been a misuse of the criminal justice system was over three years, Ms Denham was only practising as a lawyer in a formal sense[5] for nine months of that period. Thus the period of misconduct was taken as being those nine months.

[14] Mr Hodge submits that for penalty purposes the overall course of conduct can be taken into account "when assessing her fitness and propriety". There is certainly authority for that proposition in *Daniels.*[6]

[15] Mr Hodge submitted:

> "That the former practitioner engaged in the sustained course of conduct that she did, over multiple years and without stopping to reassess the course she had chosen, tells heavily against her fitness and propriety."

[16] On behalf of Ms Denham, while Mr Pyke accepted the Committee's submissions as to the test for strike-off for misconduct, he pointed out that "lack of insight and remorse, or recognition of fault and resolution to change are relevant". Mr Pyke submitted that Ms Denham had demonstrated some insight in her recently filed affidavit. He submitted that whilst "the Tribunal has taken a critical view of aspects of Ms Denham's conduct", a suspension and censure would serve the statutory purposes.

[17] Mr Pyke reminded the Tribunal that penalty must be "proportionate and recognise that this is a first occasion for disciplinary action to be taken".

[18] Ms Denham's short history in the profession does not greatly assist her. While it is accepted this is the first disciplinary charge faced by her (in a total of nine months of practice) she does not have the long history of otherwise faithful service to the profession and clients as could be claimed in mitigation, for example by Mr Horsley.[7]

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[5] In that she held a current Practising Certificate.
[6] *Daniels v Complaints Committee 2 Wellington District Law Society* [2011] 3 NZLR 850.
[7] See above n 4.

[19] While Ms Denham has conducted her defence to these proceedings in a responsible manner, it will be noted from our May decision that we did not find her to be a credible or forthright witness. That is of considerable concern. Despite her filing a subsequent affidavit in which she says she has reflected on the Tribunal's criticisms and accepts the decision as to her conduct, her affidavit is still evasive of personal responsibility and most certainly lacks remorse for those who were harmed by her actions.

[20] Even putting to one side the harm done to the reputation of the profession (although that is obviously a primary consideration), the harm done to her former husband and to Kristin School was significant and she does not address it. It might be understandable that she would have difficulty expressing remorse towards her former husband given the breakdown in that relationship and that she has suffered significant financial consequences as a result of her actions, however her inability to at least apologise to the school, the then Chair of the Board, and Board Members is troubling.

[21] It is troubling because it forms part of an overall impression of Ms Denham of clinging to her own perception of victimhood in not only her personal relationship but in how the criminal process played out to her disadvantage.

[22] When addressing "Lack of insight and remorse" Mr Hodge quite fairly points out that:

> "The judgments of the District Court were damning and should have had a salutary effect on the former practitioner. It was clear from the former practitioner's evidence, however, that she is not sorry for her actions and does not take responsibility for what occurred. It was a striking feature of the former practitioner's evidence to the Tribunal that she sought to place responsibility for what occurred on her advisers and somehow regards herself as largely been a passive actor in what occurred …"

[23] We consider that is a submission which is well made.

[24] One of the unfortunate aspects of this case is that the professionals who have subsequently provided support to Ms Denham have unquestioningly accepted Ms Denham's (distorted) version of events.[8]

[8] The Tribunal received reports from her psychiatrist and her therapist respectively which were extraordinarily ill informed.

[25] This has undoubtedly made it even more difficult for Ms Denham to properly face, with clarity, her role in the events which have led her to this point.

[26] Mr Pyke submitted that we should have regard to the context for this practitioner which was "… one of extremely personal and emotionally charged matters, where her judgement was not assisted (by her lawyer)".

[27] We do not propose to comment on the advice received by this practitioner since it is she who is the focus of our deliberations, and her advisors have not had the opportunity of commenting on her suggestion that she was let down in some way.

[28] We do note that Ms Denham's suggestion that the public relations campaign was embarked on because she needed to somehow "get in first" to preserve her own reputation was found by us, and conceded by Mr Pyke in submissions, to have no factual basis.

[29] As we found in the liability decision, Ms Denham's decisions were her own professional responsibility and we cannot give much weight to these matters in mitigation.

[30] We do note that the practitioner had $140,000 costs awarded against her in relation to the criminal proceedings and as a consequence has foregone her share in relationship property and been declared bankrupt.

[31] Thus we find there are some mitigating features, namely the financial loss already suffered by her, her inexperience and her preparedness to cooperate with the disciplinary proceeding.

***Aggravating Features?***

[32] The Committee did not seek to advance any aggravating features, relying instead on the serious nature of the conduct itself.

***Precedents***

[33] We comment on two of the cases to which we were referred, namely *Poananga*[9] and *Horsley.*[10] The former case is not entirely on point because it relates to misconduct under the "professional" arm of s 7 but was put to us as a demonstration of where a practitioner had been struck off largely for issues that relate to lack of integrity and in particular at para [41] the Tribunal noted:

> "We consider the lack of integrity demonstrated by the misconduct in this matter, particularly when accompanied by failure to recognise it as such, means that strike off is the only proper response in order to protect the public and the reputation of the profession."

[34] In that matter there was the additional feature that the practitioner had sought to mislead a neuropsychologist in carrying out an assessment on her in an attempt to "… skew the results of her tests in order to assist her in (the) disciplinary proceedings." The offending in that matter which involved false declarations being provided to the Legal Services Agency and thus undermining the legal aid system and the confidence in lawyers was a particularly serious one and the dishonesty involved meant that strike-off was an inevitable consequence.

[35] We do not consider this matter to quite reach that level of seriousness.

[36] In *Horsley*,[11] the Tribunal found that conduct to be also at the high end of misconduct and aggravated by a misleading of the professional body and to a certain extent the Disciplinary Tribunal.

[37] However, Mr Horsley was not struck off because he had over 30 years of diligent professional practice to draw upon in mitigation of his offending.

***Decision***

[38] Disciplinary outcomes must of course be assessed on an individual basis in this matter. Whilst being unanimous as to the seriousness of the matter there was at least a minority view in the Tribunal that, having regard to the practitioner's lack of experience and the serious consequences already suffered by her as a result of her

[9] *National Standards Committee v Poananga* [2012] NZLCDT 12.
[10] See above n 4.
[11] See above n 4.

actions, that the least restrictive intervention we could impose ought not to be strike-off but the maximum term of suspension. In *Daniels*[12] the Tribunal is reminded to adopt this principle provided it can be done in the manner which does not diminish public confidence in the profession:

> "To maintain public confidence in the profession members of the public need to have a general understanding that the legal profession, and the Tribunal members that are set up to govern conduct, will not treat lightly serious breaches of standards."

[39] And of course we must remind ourselves of the dicta in *Bolton*:[13]

> "To maintain the reputation of the solicitors profession … and sustain public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled but denied readmission … otherwise the whole profession and the public as a whole, is injured. A profession's most valuable asset is its collective reputation and the confidence which that inspires."

[40] We also reminded ourselves of the purposes of the legislation, to protect the public and to "maintain public confidence in the provision of legal services".

[41] The Tribunal is unanimous in finding that suspension for the maximum term of three years is necessary to mark the Tribunal's and the profession's condemnation of a lawyer who misuses legal processes. We also consider this is a sufficiently long period for the practitioner to reflect on her conduct, and to protect the public.

[42] The Tribunal's censure to Ms Denham is as follows:

> **CENSURE**
>
> Ms Denham
>
> In May 2017 you were found guilty of misconduct as defined in s 7(1)(b)(ii) of the Act, your conduct being such as to demonstrate that you are not a fit and proper person or otherwise suited to engage in practice as a lawyer.
>
> You requested that your attendance be excused from your penalty hearing, where you were suspended from practice for three years. You avoided strike-off by a fine margin because the Tribunal was not unanimous about a penalty of strike-off, as is required under the Act.
>
> In your relentless pursuit of strategies played out in public to malign the reputation of Mr Clague and Kristin School, and your misguided private

[12] *Daniels* see above note 6 at [34].
[13] *Bolton v Law Society* [1994] 2 All ER 486 (CA) at 492.

prosecution which was found by the Court to be a misuse of the criminal justice system, you completely lost sight of your professional obligations as a lawyer.

Your actions demonstrated that you were so caught up in your sense of injury that you lost sight of what you were doing. That is a very dangerous characteristic in a lawyer. You not only showed very poor judgment, but you demonstrated a lack of respect for the court and the administration of justice. This reflects very poorly on you, and unfortunately tarnishes the legal profession as a whole.

It is troubling that in spite of the findings of the Court and this Tribunal, you have failed to demonstrate any meaningful remorse or insight about your behaviour.

You are censured accordingly.

***Orders***

1. The practitioner will be suspended from practice as a barrister and solicitor for a term of three years from 29 September 2017 (s 242(1)(e)).

2. The practitioner is censured in terms of para [42] above.

3. As the practitioner is legally aided there will be no order as to the Standards Committee costs.

4. Section 257 costs are ordered against the New Zealand Law Society in the sum of $12,450.00.

5. We direct that, should the practitioner apply for a practising certificate in the future, she is to reimburse at that stage the New Zealand Law Society a proportion of the s 257 costs; namely $5,000.00.

6. There will be an order suppressing the medical aspects of the professional reports filed in this matter.

**DATED** at AUCKLAND this 7th day of November 2017

Judge D F Clarkson
Chair