NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2018] NZLCDT 15

LCDT 014/17

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE 1** Applicant
AND	**RODNEY JAMES HOOKER** Respondent

CHAIR

Judge BJ Kendall (retired)

MEMBERS OF TRIBUNAL

Mr W Chapman

Mr S Grieve QC

Dr I McAndrew

Ms C Rowe

HEARING 7 and 8 March 2018

HELD AT Specialist Courts and Tribunals Centre, Auckland

DATE OF DECISION 3 May 2018

COUNSEL

Mr R McCoubrey and Ms N Copeland for the applicant

Mr J Billington QC and Mr J Zwi for the respondent

DECISION OF THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL CONCERNING CHARGE

[1] The respondent is charged with misconduct under s 7(1)(a)(i) of the Lawyers and Conveyancers Act 2006 (the Act), for engaging in conduct that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable. There are two alternative charges: serious negligence in terms of s 241(c) of the Act, and unsatisfactory conduct under s 12(1)(b) of the Act.

[2] Particulars of the charges are set out in full in Appendix 1 to this decision. The applicant did not pursue paragraph 19(e) of the Particulars.

[3] The applicant has summarised the respondent's alleged misconduct as being:

(a) Failing to query the status of a payment made by his client's former employer following the settlement of an employment dispute, despite the respondent knowing that the payment was outside the terms of the full and final settlement and that his client did not appear to be entitled to the payment.

(b) Advising his client that there was no wrongdoing in keeping the payment, and failing to follow the client's instructions to obtain a second opinion about the status of the payment, despite knowing the matters set out in (a) above.

(c) Applying the payment to outstanding legal fees owed by the client, despite knowing the matters set out in (a) above.

(d) Refusing to repay the payment following a demand by the former employers.

[4] The respondent denied the charge.

[5] The respondent by his counsel filed an application to strike out the charge on the ground that the evidence relied upon by the applicant was so deficient as not to disclose the commission of a disciplinary offence.

[6] The Tribunal heard argument on the application and subsequently declined to grant the application for reasons which will be apparent from this decision.

Background

[7] The respondent was acting as solicitor for [client] in an employment dispute that the [client] was having with his employer [employer] (Employer).

[8] In December 2013, [client] instructed the respondent to represent him at a mediation with his employer which was a private mediation and where the mediator offered his services free of charge.

[9] Prior to the mediation, the respondent prepared a document setting out the issues to be discussed which also set out 'possible solutions'. Under that heading there was a statement "[client] is placed on sabbatical leave from 1 February 2014. The academic grant of $45,000.00 is made available to him".

[10] The mediation took place on 20 December 2013 and resulted in an agreed settlement. A handwritten agreement was signed which included:

(a) That [employer] "pay invoice of Vallant Hooker in the sum of $50,000 + GST. Payment by 20/1/14".

(b) "[Employer] to pay total of $50,000 under s 123(1)(c)(i) being $10,000 for each of 5 personal grievance claims – Payment to VHP by 20/1/14".

(c) "Claims in ERA to be withdrawn by each party with no issue as to costs".

(d) "Settlement agreement to have mutual non-disparagement clause".

(e) “Fact and terms of settlement to be confidential”.

(f) “This to be in full & final settlement of all matters relating to [client]’ employment. This includes but is not limited to

(i) Claims before ERA

(ii) Claims raised with Privacy Commissioner or under Privacy Act

(iii) Any claims raised with Human Rights Commissioner or under HRA

(iv) Any other claims”.

[11] Payment of the agreed sum totalling $107,500 was made by [employer] into the trust account of the respondent on 16 January 2014 along with a further payment of $50,000 without an accompanying explanation.

[12] The respondent spoke to [client] by telephone on 29 January 2014 seeking his information as to why the additional payment had been made to him. [Client] response was that he regarded the money as payment of his costs while on sabbatical leave and that the payment was “correctly made”.

[13] The respondent, as instructed, applied the additional payment to the fees owed by [client] and retained the balance in his firm’s trust account.

[14] On 2 February 2014, [client] instructed the respondent by text message to reverse the credit to his firm and to hold the total sum on trust for the benefit of [employer].

[15] The respondent advised [client] on the same day that the payment could not be reversed. An invoice dated 6 March 2014 to [client] stated that the respondent had applied the additional payment to outstanding fees. The balance of the additional payment was paid to [client] personal bank account in March 2014.

[16] [Employer] solicitors wrote to the respondent on 16 September 2016 requiring repayment of the additional payment. The respondent refused to do so and that matter is now the subject of civil proceedings.

Issues

[17] We consider that the central issue to be decided is what responsibility the respondent had to his client in respect of advice about the consequences of retaining the additional payment where he, the respondent, was concerned about why the payment was made.

[18] The Tribunal has received voluminous material filed by the applicant and by the respondent. In the events that have happened, it has been unnecessary for it to consider that material in detail or to record the substance of it. The Tribunal has reached that conclusion for the reason that the respondent admitted in the final stages of his evidence that he gave [client] no advice on 29 January 2014 and that he should have followed up with advice about the consequences which could arise following the earlier instruction that the payment related to sabbatical expenses.[1]

[19] Mr Billington advised the Tribunal in his closing submissions that it was accepted that the respondent ought to have given advice and that he did not do so. He referred to the passage in *Cordery on Legal Services (9th edition)* where it reads:

> "While it is the duty of a solicitor to warn his client of the legal risks of a proposed transaction or to try and prevent useless litigation or to protect the client from the risk of being involved in litigation, it remains the right of the client, who at all material times remains the dominis litis, to choose ultimately how to proceed."

[20] The question then becomes what level of seriousness is to be attributed to the respondent's failure to advise his client.

[21] Mr Billington submitted that the charge of misconduct could not be sustained for the following reasons:

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[1] Notes of evidence at pages 117, 122, (line 30), 123.

(a) The respondent was not professionally entitled to query with [employer] the status of the additional payment and would have been in breach of his duty to his client had he done so.

(b) That the respondent had been fully instructed by his client [client] not to communicate with [employer].

(c) That the breach of the obligation to advise his client was not a breach of s 7 of the Act because the allegation carried the allegations of the need to communicate with external parties.

[22] Mr Billington further submitted that the respondent's failure was either a breach which is negligence under s 241 or unsatisfactory conduct under s 12. He submitted that negligence under s 241 had not been made out for the reason that the failure was not such as to reflect on the respondent's fitness to practise or as to bring the profession into disrepute. It was not conduct that was below the standard of care required of the ordinary solicitor.

[23] Mr Billington acknowledged that it was hard to resist the proposition that the respondent's failure qualified as unsatisfactory conduct under s 12.

[24] Mr McCoubrey, for the applicant, did not advance further argument that the respondent was under an obligation to enquire of [employer] about the status of the additional payment to [client] of $50,000. He submitted that the charge of misconduct was not "off the table". He submitted the following:

(a) The respondent did not advise [client] of the risks of retaining the money for his own purposes – in fact authorising the respondent to credit it to the respondent's fees – but went on to advise him that he had done nothing wrong.

(b) He informed [client] that nothing would come of the matter unless [employer] raised the matter.

(c) There was a continuing obligation on the respondent to give his client advice in circumstances where communication between the respondent and his client had been established by text and email.

(d) That the case is more serious than one simply of advice not given in that:

i. The respondent refused a clear instruction to reverse a payment by saying that it could not be done when that was not the case.

ii. The respondent had thus placed himself in a position of not being at arm's length with his client.

iii. The respondent had been at the mediation where final terms of settlement had been agreed in respect of all the claims of his client and were meant to be the last word.

iv. Given the circumstances, the respondent knew that the additional payment had to have been a mistake.

Decision

[25] The Tribunal considers that the following matters are relevant to an assessment of the respondent's conduct:

(a) The additional payment of $50,000 was received on the same day as the agreed settlement sum.

(b) It was coincidentally the same amount as the $50,000 sum agreed on in the settlement agreement at (b) in the handwritten agreement.

(c) It was more than the $45,000 relating to sabbatical expenses mentioned in the statement of issues prepared for the mediation.

(d) The respondent alerted himself and queried his client as to what the payment was about.

(e) The respondent acted on his client's information that the payment related to sabbatical expenses without further query.

(f) The respondent did not reverse the payment when instructed by his client to do so stating that it could not be reversed when in fact reversal could be done. He opted to retain that portion of the monies which he had applied to his fees.

(g) The client directed payment to his personal bank account of the balance of funds held by the respondent after being advised that the payment in respect of fees could not be reversed. That direction was not a change of instruction as was suggested by the respondent.

(h) The respondent's refusal to reverse the payment in respect of his fees invites the inference that the respondent was concerned to protect those fees.

(i) The respondent did not, at any point after receiving the additional payment to the credit of his client, give his client any advice about the risks of retaining the payment and, in particular, relating to payment by mistake.

(j) The respondent was aware that the additional payment could be a payment by mistake by reason of (a), (b), (c) and (d) above and by his statement to his client *"the matter only arises if we receive correspondence from [employer]. There is no wrongdoing on your part in our view".*

(k) The payment of sabbatical expenses is an incident of employment and would be paid through a salary payment directly to [client].

[26] The Tribunal finds that the respondent's failure to advise his client of the risks of retaining the additional payment without further enquiry and his action of subsequently applying the funds to his client's outstanding legal costs was serious to the degree that is was disgraceful and dishonourable.

[27] It accordingly finds that the charge of misconduct is proved.

Directions

1. The Standards Committee is to file submissions as to penalty within 14 days of the release of this decision.

2. The respondent is to file his submissions as to penalty within a further 14 days.

3. Counsel are to consult with the Tribunal Case Manager to allocate a half-day hearing to consider penalty.

4. The order for the interim non-publication of the respondent's name is to continue pending the hearing to consider penalty.

DATED at AUCKLAND this 3rd day of May 2018

BJ Kendall
Chairperson

Appendix 1

The particulars of the charge are as follows:

1 At all material times, the Practitioner was enrolled as a barrister and solicitor of the High Court of New Zealand and held a current practising certificate.

2 The Practitioner was the solicitor acting for [client] in respect of an employment dispute that [client] was having with his then employer, [employer] (**Employer**).

3 In December 2013, [client] agreed to the Practitioner representing him at a mediation before Professor Bill Hodge. At the time, [client] owed Vallant, Hooker & Partners (**VHP**) approximately $138,000 in fees for legal services in relation to the employment dispute.

4 Prior to the mediation, the Practitioner prepared a document setting out the list of issues to be discussed at the mediation. One of the issues to be discussed was the possibility of [employer] agreeing to pay for [client's] sabbatical costs, which were estimated to be in the vicinity of $45,000.

5 On 20 December 2013, the Practitioner represented [client] at the mediation. [Client] was not present during the mediation after initial introductions and waited in the Practitioner's office. The Practitioner and Professor Hodge went and spoke to [client] about various proposals made by [employer], including the possibility of [employer] paying for the costs of [client's] upcoming sabbatical.

6 The dispute was settled on 20 December 2013. The relevant terms of settlement agreed to included:

(a) That [employer] "pay [an] invoice of Vallant Hooker in the sum of $50,000 + GST payment by 20/1/14 [including GST the amount payable was therefore $57,500]";

(b) That [employer] pay a total sum of "$50,000 under s 123(1(c)(i)" of the Employment Relations Act 2000 (compensation for distress) for each of [client's] personal grievance claims with "payment to VHP by 20/1/14";

(c) That the "claims in [the] ERA…be withdrawn by each party with no issue as to costs";

(d) That the "facts and terms of settlement…be confidential" and that the settlement agreement have a "mutual disparagement clause"; and

(e) That the settlement agreement represent "full and final settlement of all matters relating to [client's] employment".

7 The total amount of money payable to [client] by [employer] under the settlement agreement was therefore $107,500. That [employer] would pay [client] sabbatical costs was not part of the terms of settlement signed by the parties. The Practitioner, having represented [client] during the mediation, would have known this. The settlement agreement was specified to be full and final settlement and [client] sabbatical costs were matters relating to his employment.

8 At approximately 12.02pm on 23 December 2013, the Practitioner sent a letter by email to [employer's] solicitors, Swarbrick Beck Mackinnon (**SBM**), enclosing a trust account deposit

slip for VHP. In the letter, the Practitioner referred to the successful mediation outcome and said that VHP awaited payment of the "agreed sum" into VHP's trust account on 20 January 2014. The letter attached an invoice of the same date seeking payment of the $107,500 owed by [employer]. The letter did not refer to sabbatical costs.

9 On 29 January 2014, the Practitioner contacted [client] by telephone to notify him that VHP had received $107,500 on 23 December 2013, the agreed settlement sum for distress and VHP's legal costs. The Practitioner also advised that [employer] had made an additional payment of $50,000 to VHP in [client's] name (**additional payment**) earlier in the week via SBM. VHP's trust account records show that the additional payment was made to VHP's trust account on 16 January 2014.

10 The additional payment made by [employer] was in fact a mistake resulting from a miscommunication between two of [employer's] internal teams, the Finance team and the People & Organisation team. [Employer] did not intend to make the additional payment to VHP.

11 At approximately 3.35pm on 30 January 2014, the Practitioner emailed [client] asking him to confirm the Practitioner's record of the 29 January conversation. The email stated that [employer] had provided no information about the additional payment and that the Practitioner asked for [client's] instructions about the payment. It stated that [client] regarded the additional payment as a payment of his costs while on sabbatical and that he regarded the payment as "correctly made". It further stated that [client] had instructed the Practitioner to pay the balance of the fees that he owed to VHP with the additional payment and to retain the remainder in VHP's trust account.

12 [Client] replied to the Practitioner's email at 4.28pm on 30 January 2014, and stated that the Practitioner's record of the discussion was "correct" and that the Practitioner had "advised the doctrine of legitimate expectation would apply". [Client] instructed the Practitioner to keep the remainder of the funds from the additional payment in VHP's trust account.

13 [Client] then sent a text message to the Practitioner on 2 February 2014 instructing the Practitioner to reverse the credit to VHP and to hold the total sum on trust for the benefit of [employer].

14 The Practitioner responded later that same day by text message that he had noted [client's] concern, but the payment could not be reversed. The Practitioner said he would speak to [client] the next day and advised [client] not to react.

15 On 3 February 2014, [client] sent the Practitioner an email stating that he was worried that keeping the additional payment amounted to "criminal intent". [Client] also indicated that he wanted to seek a second opinion about his entitlement to the additional payment from Philip Skelton QC.

16 The Practitioner responded by email later that day stating: "I think my email summed up our telephone conversation. Accordingly we have treated the money as per your instructions". The email further stated that issues with respect to the additional payment only arose if VHP received correspondence from [employer], and that "there is no wrongdoing on your part in our view".

17 An invoice dated 6 March 2014 to [client] stated that VHP had applied the additional payment to [client's] outstanding legal costs. The balance of the additional payment was paid to [client's] personal bank account before he left for sabbatical overseas in March 2014.

18 On 16 September 2016, [employer's] solicitors, Minter Ellison, wrote to VHP demanding repayment of the additional payment. Despite this, the Practitioner has refused to repay the $50,000.

19 The Practitioner's conduct set out above would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable, in that he:

(a) applied the additional payment to [client's] outstanding legal fees despite knowing that the additional payment was outside the terms of the full and final settlement and that [client] did not appear to be lawfully entitled to the additional payment; and/or

(b) advised [client] that there was no wrongdoing involved in [client] keeping the additional payment despite knowing of the matters in the above paragraph (a); and/or

(c) failed to query the status of the additional payment with [employer] despite knowing of the matters in the above paragraph (a); and/or

(d) failed to follow [client's] instructions to obtain a second opinion about the status of the additional payment and to hold the total sum on trust for the benefit of [employer], despite knowing of the matters in the above paragraph (a);

Or, alternatively:

Negligence or incompetence in his professional capacity of such a degree as to reflect on his fitness to practise or as to bring his profession into disrepute: s 241(1)(c) of the Act.

20 The Committee repeats paragraphs 1 to 21 above.

21 If the Practitioner's conduct as described at paragraph 21 above is not disgraceful or dishonourable, it amounts to negligence or incompetence in the Practitioner's professional capacity of such a degree as to reflect on his fitness to practise or as to bring the profession into disrepute.

Or, alternatively:

Unsatisfactory conduct within the meaning of s 12(b) of the Act.

22 The Committee repeats paragraphs 1 to 21 above.

23 If the Practitioner's conduct as described at paragraph 21 above is not disgraceful or dishonourable or so negligent or incompetent as to reflect on his fitness to practise or bring his profession into disrepute, it amounts to unsatisfactory conduct, in that it would be regarded by lawyers of good standing as being unacceptable.