NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2019] NZLCDT 31

LCDT 011/18 and 005/19

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE 2** Applicant
AND	**MURRAY LAWES** Practitioner

CHAIR

Judge DF Clarkson

MEMBERS

Ms N McMahon

Mr S Morris

Ms S Sage

Mr W Smith

DATE OF HEARING 1 October 2019

HELD AT Specialist Courts and Tribunals Centre, Auckland

DATE OF DECISION 14 October 2019

COUNSEL

Mr R Moon for the Standards Committee

Practitioner in person

DECISION OF THE TRIBUNAL
GIVING REASONS FOR ORDERS MADE ON 1 OCTOBER 2019

Introduction

[1] In its liability decision of 19 July 2019 the Tribunal found Mr Lawes guilty of two charges of misconduct. The first related to the management of his trust account. The second concerned his charging a fee to an estate which was found to be by the Tribunal not to be his client, and his refusal to refund the fee on the request of the estate's solicitors.

[2] The Tribunal received submissions from the Standards Committee and from the practitioner in relation to penalty and, after deliberating, made the orders which are set out at the end of this decision, including an order suspending the practitioner for three months.

[3] The reasons for the making of these orders were reserved and this decision provides those reasons.

Overview of Penalty Process

[4] It is well known that the purpose of penalty proceedings in the disciplinary jurisdiction is not primarily punitive but exists in order to advance the purposes of the legislation,[1] namely protection of the public in the broader sense, the upholding of professional standards and the consequent maintenance of public confidence in the legal profession.

[5] There are times when the penalty imposed must also reflect the need for rehabilitation, compensation or restitution, deterrence and denunciation.

[1] Lawyers and Conveyancers Act 2006 (the Act), s 3.

[6] The starting point in fixing penalty is the gravity of the misconduct and level of culpability of the practitioner. From that point aggravating and mitigating features are considered, as are similar cases, in order to provide predictability and consistency.

[7] Finally, it is necessary to make an overall assessment of the practitioner as to his or her fitness to continue practise as a lawyer.

Seriousness of Misconduct

[8] Counsel for the Standards Committee submitted that the conduct, regarded cumulatively could be seen as "*pushing towards the upper end of the misconduct spectrum*".

[9] Counsel supported that submission by reference to the fact that compliance with trust account regulations are "… *fundamental to the maintenance of public trust in the profession. A reckless disregard for any obligations of that kind must be regarded as serious* …".

[10] Further, counsel submitted that "*the practitioner has dealt with client monies (including deducting his fees) without client authority or any real understanding of why such conduct has led to the liability finding made against him*".

[11] While we note that the trust account breaches did not involve any dishonesty or put clients' funds at risk, we recorded in our July decision that "*cumulatively, we regard the breaches as demonstrating a reckless disregard of the relevant rules* …". We reached the conclusion about recklessness, as stated in that decision because of the apparent minimisation by the practitioner and failure to take to heart the two previous findings of unsatisfactory conduct against him in respect of previous reviews of his trust account. Although we note that the practitioner did modify some of his record keeping, he still did not have a trust account which was easily able to be seen by the Inspector as fully compliant. In addition to that there were a number of stale credit balances which have appeared repeatedly in each review of his trust account.

[12] Even by the date of the hearing of the penalty phase, some five months after the liability hearing, Mr Lawes had not completely cleared these balances and still had what he regarded as approximately 15 of the "most difficult" balances to sort out and return to the client or find some other means of achieving the nil balance by payment into the consolidated account.

[13] The second charge which related to the invoicing of an estate, against which another client of his was claiming, and in respect of which Mr Lawes failed to recognise the conflict and his lack of proper status in charging the estate, was also of serious concern.

[14] In his submissions to us Mr Lawes stated that he had always been very concerned to avoid conflicts of duties and the fact that he had so badly misjudged this situation was one of the factors in deciding to retire from practice.

[15] While his decision to cease practice, recognising as he did at the penalty hearing, that he really ought not to be practising any longer, was a taking of responsibility, it did not demonstrate to us an understanding of how he had crossed this particular line and what had led him into his error.

[16] Although we do not regard the conduct to be at the high end of misconduct, such as would exist with repeated serious negligence or, worse, dishonesty, two separate findings of misconduct are certainly a serious matter.

Aggravating Features

[17] It was submitted by the Standards Committee that aggravating features included:

(a) a lack of remorse;

(b) a lack of insight;

(c) the absence of a proposal to remedy the systemic failings in his trust account administration; and

(d) a previous disciplinary record.

[18] The first two features are better considered as going to the question of fitness for practice and as absent mitigating features, rather than aggravating features. As to the remedying of trust account failures, the practitioner submits that this is addressed by his winding up his practice and retiring as a lawyer.

[19] Counsel for the Standards Committee submitted that the Tribunal could not take "*genuine comfort from (Mr Lawes) assurances*" about the winding up of his practice.

[20] In May, at the liability hearing, Mr Lawes advised the Tribunal that he would not be renewing his practising certificate at the end of June because by then he would have wound down his practice. Mr Lawes has been unable to achieve this goal and as stated, is no further advanced in reducing his stale trust account balances, despite having not taken on new clients or new work (with one exception) since that time. Mr Lawes is currently attending University full time and he says that this has slowed his progress in winding up the practice and that reluctantly he was obliged to seek a renewal of his practising certificate.

[21] Mr Lawes indicated that he would hope to have achieved the goal of extracting himself from his practice by the end of October but might require a further eight weeks, due to his wife having been hospitalised, and that she was previously his clerical support.

[22] It is clear from the practitioner's submissions and his presentation to us at the hearing, that he has extreme difficulty in organising himself to the tasks remaining to extract himself from practice.

[23] We accept that this cannot be left to him to manage alone. However, we do not consider this to be properly considered under the heading of aggravating features.

[24] We consider the final aggravating feature listed by counsel, namely Mr Lawes' previous disciplinary record including sanctions for similar conduct, to be the only seriously aggravating feature to be considered.

[25] However, the previous disciplinary findings are a matter of serious concern and again, go to the overall assessment of penalty and fitness to practice. Although each trust account inspection has resulted in Mr Lawes somewhat modifying his trust account administration, overall there have not been sufficiently significant changes to give confidence that the previous sanctions of fines have been in any way effective in addressing his conduct.

Mitigating Features

[26] It is accepted by the Standards Committee that "*no client funds were unaccounted for and two of the trust account failings … may have been addressed*". The Standards Committee also concedes there has been no "*wilful breach or dishonesty* …".

[27] We consider it a further mitigating feature that Mr Lawes has at all times been responsive to and cooperative with the Tribunal process. He has represented himself in a polite and respectful manner.

[28] We also note Mr Lawes' description of his lack of respite from legal practice, described by him:

> "I have not had longer than one week a year away from my practice in the last 10 years … I have had only half a sick day in approximately 22 years of legal practice."

[29] This included a tragic period when the practitioner lost his daughter, yet was back at work to look after his clients' affairs after only a weekend.

[30] We consider that Mr Lawes' focus on his clients' concerns rather than prioritising matters of administration and his own wellbeing may well have contributed to his current failings.

[31] Finally, we note that his financial situation is quite precarious.

Similar Cases

[32] We consider the cases most closely resembling this one to be those of *Low*[2] and *Bogiatto.*[3] In those cases similar failings in trust account administration were apparent and each of the practitioners received a censure and fine. However, we accept counsel's submission that in those cases "… *considerable emphasis was placed on each practitioner's acceptance of their failings and the outside support obtained to remedy them*". This case was made more serious by the second finding of misconduct and the assessment of the practitioner's overall fitness to practise.

Is Suspension a Proportionate Response?

[33] We agree with Mr Lawes own assessment of his inability to continue in practice at the present time. He has clearly worked to the point of exhaustion where he appears unable to effectively advance the wind up of his practice unassisted. We note that he has chosen to embark on a university education with a view to becoming a primary school teacher. We commend him for taking the hard decision as to a new career direction.

[34] Having regard to the level of seriousness found and the aggravating and mitigating features set out above and to the comparison with similar cases, we consider that anything less than a suspension would not be a proportionate response in terms of the protection of the public. We consider that a lesser response than suspension would not leave the public with the impression that continued serious deficits in the conduct of a legal practice can occur without a strong response.

[35] We consider that an order that Mr Lawes not practise on his own account, should he decide to return to practice, will also have an element of public protection.

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[2] *Auckland Standards Committee 5 v Low* [2018] NZLCDT 7.
[3] *Auckland Standards Committee 2 v Bogiatto* [2018] NZLCDT 2.

[36] For the above reasons we made, on 1 October the following orders:

1. The practitioner is suspended for three months commencing from 8 October 2019, pursuant to s 242(1)(e) of the Act.

2. That Mr Lawes not practice on his own account pending further order of the Tribunal, pursuant to s 242(1)(g) of the Act.

3. Mr Lawes is to refund the $1,000 fee to the A Estate by 30 November 2019 or as such later date as the New Zealand Law Society may approve, pursuant to s 156(1)(f) and (g) and s 242(1)(a) of the Act.

4. Mr Lawes is to make compensation to the complainants for their legal costs, subject to an invoice being provided by their new counsel and approved by the Chair, pursuant to s 156(1)(d) and s 242(1)(a) of the Act.

5. The question of costs is reserved at this stage. The prosecution is to file invoices and a claim for costs and Mr Lawes is to have seven days to respond to that claim.

6. The Tribunal s 257 costs will be certified in due course and are to be paid by the New Zealand Law Society. The reserved costs order will also consider whether all or part of those will reimbursed by the practitioner.

DATED at AUCKLAND this 14th day of October 2019

Judge DF Clarkson
Chairperson