

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2019] NZLCDT 35

LCDT 010/19

IN THE MATTER

of the Lawyers and Conveyancers
Act 2006

BETWEEN

**CANTERBURY WESTLAND
STANDARDS COMMITTEE (No 1)**

Applicant

AND

PHILLIP NIGEL ALLAN

Respondent

CHAIR

Judge BJ Kendall (retired)

MEMBERS

Mr W Chapman

Mr S Morris

Ms G Phipps

Mr K Raureti

ON THE PAPERS

DATE OF DECISION 3 December 2019

COUNSEL

Mr J L S Shaw for the applicant

Mr G Knight for the respondent

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

[1] In our decision of 13 September 2019, we recorded our reasons for finding Mr Allan guilty of unsatisfactory conduct in respect of his failure to inform Legal Aid about difficulties with an assignment of costs claim and of failing to follow up a decision regarding costs in respect of that same matter. We record that Mr Allan admitted unsatisfactory conduct in respect of four other charges which, in summary, concerned his failures to respond in a timely way to requests from other practitioners and clients.

[2] The Standards Committee seeks the following penalties:

- (a) A censure.
- (b) An order pursuant to ss 242(1)(a) and 156(1)(l) of the Lawyers and Conveyancers Act 2006 (the Act) that Mr Allan undergo a period of six months supervision and mentoring by a senior practitioner to be approved by the Tribunal.
- (c) Payment of the Standards Committee's costs pursuant to s 249 of the Act amounting to \$16,761.20.
- (d) An order that Mr Allan refund to the Law Society the Tribunal's costs payable by the Law Society.

[3] Counsel for Mr Allan submits that censure is not appropriate in respect of charge 5 which relates to his failure to make a discreet enquiry about the progress of the costs decision and in not advising Legal Aid about the problem regarding the assignment.

[4] His submission is that the failures are at the lower end of the scale and that Mr Allan has instructed counsel at his own cost to resolve the problem regarding completion of the legal aid assignment.

[5] Counsel for Mr Allan also submits that he should not pay the Standards Committee's costs in respect of charges 1 and 7. As to charge 1, the submission is that the charge was dismissed. The Tribunal found that Mr Allan had acted responsibly and professionally for his client and that the complaint may have arisen out of the client's state of mind.

[6] As to charge 7, the submission is that this complaint did not fit the pattern of the other complaints. The allegation in this complaint was that Mr Allan misled a judge and wasted court time. Counsel complained that Mr Allan was not given the opportunity to respond to the complaint before it was laid with the Tribunal. Had that opportunity been given, the charge would not have been laid given that the Tribunal accepted Mr Allan's explanation and that the Standards Committee would also have done so.

[7] Mr Shaw for the Standards Committee refers to s 249(3) of the Act which provides that costs can be ordered against a practitioner even if a charge has not been proved. Mr Shaw drew attention to the Tribunal's regularly held view that costs should fall on the practitioner rather than on the profession as a whole. He also referred us to the position taken by the Tribunal that something more than mere failure to prove a charge is required before a decision is made declining to require a practitioner to pay the costs in respect of that charge.¹

[8] We find that Mr Allan should pay the Standards Committee's costs in respect of charge 1. We accept that the nature of the alleged conduct was similar to the other charges which he admitted albeit that we found that he adequately communicated with his client.

[9] We find that we should not require Mr Allan to pay costs in respect of charge 7. That charge detailed conduct that did not fit the pattern of the other charges. We accept the submission that, had Mr Allan been given the opportunity to explain his position, the charge would not have been laid. We therefore find that the Standards

¹ *Canterbury Westland Standards Committee 2 v Simes* [2012] NZLCDT 28 at [43].

Committee's costs should be reduced by one seventh rounded at \$2,400. The amount payable by Mr Allan will accordingly be fixed at \$14,361.20.

[10] Mr Allan has accepted that censure is an appropriate penalty in respect of the other charges 2, 3, 4 and 6. He also accepts that other penalties proposed in respect of supervision and costs are appropriate.

[11] We have considered, whether in all the circumstances, this is a matter requiring a censure. We have decided against doing so for the following reasons:

- (a) Mr Allan was experiencing mental health difficulties.
- (b) He responsibly recognised this and sought help from a mental health professional.
- (c) He spoke openly about his challenges and appears to have genuinely tried to manage his work and illness.
- (d) He has engaged the support and assistance of a senior colleague who has invited him to re-join him and a colleague in chambers.
- (e) He does not have any previous adverse disciplinary findings.
- (f) The unsatisfactory conduct complained of was at the lower end of the scale and can be explained by illness.

[12] The Tribunal accordingly makes the following orders:

1. An order pursuant to ss 242(1)(a) and 156(l) of the Act that Mr Allan undergo a period of six months supervision and mentoring by Mr Andrew McKenzie.
2. An order pursuant to s 156(l) of the Act that Mr Allan engage Mr Gary Knight to complete the Legal Aid assignment.

3. Mr Allan is to pay the costs of the Standards Committee which are fixed at \$14,361.20.
4. The Law Society are to pay the Tribunal costs which are certified in the sum of \$6,631.00.
5. Mr Allan is to refund to the Law Society the Tribunal's costs which are certified in the sum of \$6,631.00.

DATED at AUCKLAND this 3rd day of December 2019

BJ Kendall
Chairperson