NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2020] NZLCDT 10

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

Ms A Callinan

Mr S Grieve QC

Dr I McAndrew

Ms C Rowe

DATE OF HEARING 6 March 2020

HELD AT District Court, Auckland

DATE OF DECISION 18 March 2020

COUNSEL

Mr R McCoubrey for the applicant

Mr J Billington QC for the respondent

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

Introduction

[1] In our decision of 3 May 2018, we found Mr Hooker guilty of misconduct for engaging in disgraceful or dishonourable conduct under s 7(1)(a)(i) of the Lawyers and Conveyancers Act 2006 (the Act).[1]

[2] That finding was upheld by the High Court in the decision of Jagose J who made his own findings of fact having conducted an independent analysis as to whether misconduct was proved.[2]

[3] Mr Hooker's appeal to the Court of Appeal against the decision of Jagose J was dismissed. The Court observed that the finding of misconduct was open on the facts as found. It was satisfied that "*neither the Tribunal nor the High Court erred in law in making the finding of misconduct".*[3]

[4] Counsel for the Committee has sought the following penalty:

(a) An order suspending Mr Hooker from legal practice for 12 months.

(b) An order that Mr Hooker pay the Committee's costs.

(c) An order that Mr Hooker refund to the Law Society the hearing costs of the Tribunal that are payable by the Law Society.

(d) An order that Mr Hooker pay his former client compensation for emotional harm and distress.

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[1] *Auckland Standards Committee 1 v Hooker* [2018] NZLCDT 15.
[2] *J v Auckland Standards Committee 1* [2018] NZHC 2706.
[3] *J v Auckland Standards Committee 1* [2019] NZCA 614 at [40].

Submissions for the Committee

[5] Counsel has referred us to the relevant law relating to the purposes of imposing disciplinary sanctions and in particular to the now well-known summary of principles set out in *Daniels v Complaints Committee 2 of the Wellington District Law Society,*[4] which emphasised that "*if the purposes of imposing disciplinary sanction can be achieved short of striking off then it is the lesser alternative that should be adopted as the proportionate response".*

[6] In seeking a period of 12 months suspension, counsel submitted that the following factors should be considered. They were:

(a) Mr Hooker's failure to advise his client of the legal position following the receipt of an unexpected payment.

(b) His failure to respond adequately to the queries of his client regarding those funds.

(c) The inadequacy of his advice to his client to remain silent unless the payer of those funds raised the issue.

(d) That inadequacy was found by the High Court to amount to an abuse of the privileges of his registration as a legal practitioner and which put him in the position to receive funds on his client's trust account.[5]

(e) The finding that his failure to advise his client of the risks of retaining the funds was "at least reckless, if not wilful".[6]

(f) Mr Hooker's contention to his client that the application of part of the funds to payment of his legal fees was irreversible when, in fact, the correct position was that reversal could have been made with ease.[7]

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[4] *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850.
[5] See above n 2 at [43].
[6] See above n 2 at [43].
[7] See above n 2 at [43].

(g) That Mr Hooker's conduct was prompted by a concern to protect the fees paid by the client to his firm from the unexpected payment.

[7] The Committee further submitted that Mr Hooker's previous disciplinary history in respect of two matters tended to show that he had previously engaged in conduct which involved failing to provide a client with relevant information, and failing to act on the instructions of clients in relation to client funds.

[8] The first matter was in January 2016 where the Legal Complaints Review Officer (LCRO) upheld a decision of the Auckland Standards Committee 1 which found Mr Hooker guilty of unsatisfactory conduct for failing to advise his client about eligibility for legal aid in breach of r 9.5. His failure to lodge his client's legal aid application, despite his repeated assurances that he was going to do so was also found to constitute unsatisfactory conduct.

[9] The second matter occurred in December 2016. The LCRO found that Mr Hooker's failure to release client funds on request was unsatisfactory conduct leading to a breach of s 110(1)(b) of the Act. The clients wished to terminate their retainer with Mr Hooker and requested the return of funds held on trust. Mr Hooker did not do so, and the funds remained undisbursed for just under six years.

[10] The Committee submitted that a starting point of suspension was warranted because of:

(a) The nature of Mr Hooker's conduct and culpability.

(b) The need for individual and general deterrence.

(c) The need to ensure the protection of the public.

(d) The need to ensure the maintenance of high standards and public confidence in the profession.

(e) Mr Hooker's previous disciplinary history.

(f) His lack of remorse and insight into his conduct.

[11] Mr McCoubrey for the Committee said that it was open to the Tribunal to defer commencement of any period of suspension to take into account fixtures for cases that Mr Hooker has been committed to, thus avoiding inconvenience to those clients for whom hearings of cases have been allocated.

[12] As to compensation for Mr Hooker's client, Mr McCoubrey noted that s 156(1)(d) of the Act has been applied by the LCRO to make awards of compensation for emotional harm and suffering caused by a practitioner's conduct. See *AB & RJ v OC & BR.*[8] Reference was also made to the Tribunal's decision in *Auckland Standards Committee 5 v Clarke,*[9] which recognised the ability to award compensation for emotional distress. No award was made in that case.

Submissions for the respondent

[13] Mr Billington commenced his submissions on behalf of Mr Hooker by accepting that suspension was inevitably the staring point for consideration of penalty. He went on to submit that suspension should not be an inevitable consequence in Mr Hooker's present case.

[14] He made the following submissions in support of a penalty less than a period of suspension:

(a) Mr Hooker has been in practice for 36 years principally as a litigator representing clients with difficult cases notably immigration matters and also this very difficult case relating to the employment of his client.

(b) Mr Hooker has 35 years of voluntary legal service with the Citizens Advice Bureau; giving free legal advice since 1986 to prisoners at Paremoremo prison, and to social and religious groups of migrants.

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[8] *AB & RJ v OC & BR* LCRO 159/2014 (30 October 2017).

[9] *Auckland Standards Committee 5 v Clarke* [2013] NZLCDT 40.

(c) He has presently a number of cases scheduled for hearing in the District Court, High Court and the Court of Appeal of which 10 examples were given. He is also representing 15 victims of people trafficking where the Immigration Protection Tribunal has directed Immigration New Zealand to reconsider the applications of those people for residence visas.

(d) That Mr Hooker had during the hearing of these proceedings acknowledged through his counsel that it was "hard to resist" that he had engaged in unsatisfactory conduct.

(e) That Mr Hooker has no previous appearance before the Tribunal.

(f) That the prior disciplinary findings of the Standards Committee relied on by Mr McCoubrey to show that Mr Hooker has previously engaged in conduct which indicates a failure to give clients adequate information and to act on instructions, were findings of unsatisfactory conduct. The position taken by Mr Hooker was a matter of his judgment call with which the LCRO disagreed. There was no suggestion of dishonesty.

[15] Mr Billington referred to *Daniels* as being relevant to this matter. He emphasised that the Tribunal's penalty function is not primarily for punishment but to advance the public interest.

[16] His submission was that the public was not in need of protection from Mr Hooker by suspension. He relied on Mr Hooker's length of time in practice and his role as an advocate in all jurisdictions.

[17] His submission was that the only issue was whether Mr Hooker should be suspended because the findings made against him required suspension to demonstrate the concerns of the profession to maintain its standards.

[18] Mr Billington referred to seven decisions of the Tribunal namely, *Auckland Standards Committee 2 v Dangen,*[10] *Legal Complaints Review Officer v Morrison,*[11] *Auckland Standards Committee 1 v Latton,*[12] *Wellington Standards Committee 1 of the New Zealand Law Society v Lester,*[13] *Auckland Standards Committee 2 v Lawes,*[14] *Auckland Standards Committee 5 v Hong,*[15] *and Canterbury/Westland Standards Committee 3 v Johnson.*[16] In each of these decisions, a period of suspension was imposed. He submitted that it was notable that, in relation to each case, the practitioner engaged in conduct that was reckless in the case of *Lester* or dishonest in the case of the others. His submission was that Mr Hooker's conduct could be distinguished in that his conduct, while ignoring his legal obligations, was not found to be dishonest or alleged to be dishonest.

[19] Mr Billington submitted that the Tribunal should take into account to what extent suspension would interfere with the legitimate interests of Mr Hooker's clients. He referred to the decision of the Supreme Court of South Australia in *Mancini v Legal Practitioner's Conduct Law*.[17] That decision recognised that difficulties caused to clients by a suspension from practice is a relevant factor to be taken into account but if suspension was appropriate then those difficulties should not be a reason not to suspend.

[20] Mr Billington further submitted that there has been no loss to Mr Hooker's client having entered into a settlement with the employer which could be considered as full reparation which avoided any loss to his client which might arise out of the civil proceedings taken by the employer to recover the mistaken payment of $50,000.

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[10] *Auckland Standards Committee 2 v Dangen* [2019] NZLCDT 22.
[11] *Legal Complaints Review Officer v Morrison* [2018] NZLCDT 40.
[12] *Auckland Standards Committee 1 v Latton* [2017] NZLCDT 14.
[13] *Wellington Standards Committee 1 of the New Zealand Law Society v Lester* [2015] NZLCDT 23.
[14] *Auckland Standards Committee 2 v Lawes* [2019] NZLCDT 31.
[15] *Auckland Standards Committee 5 v Hong* [2019] NZLCDT 40.
[16] *Canterbury/Westland Standards Committee 3 v Johnson* [2018] NZLCDT 21, upheld in *Johnson v Canterbury/Westland Standards Committee 3* [2019] NZHC 619.
[17] *Mancini v Legal Practitioner's Conduct Law* [2014] SASCFC [19].

Discussion

[21] It has been accepted by both counsel that the starting point for consideration of penalty is a period of suspension. Mr McCoubrey's submission is that the appropriate period is 12 months notwithstanding the submissions that Mr Billington has made. Mr Billington's submission is that a starting point is three months suspension.

[22] We find that a starting point for consideration of penalty is suspension for a period of 12 months. Our reason for doing so is the finding of disgraceful or dishonourable conduct in which a significant feature was Mr Hooker's conduct of putting part of the mistaken payment to meet his client's fees and his contention to his client that payment back to the client was not reversible. That conduct was found to be "*at least reckless, if not wilful, to a sufficient degree as to constitute misconduct".*[18]

[23] Mr Billington has submitted that the following factors support a penalty less than suspension:

(a) Mr Hooker's long and successful career.

(b) The very powerful public interest component of his practice.

(c) The interests of his current clients and the public interest in attempting to meet the needs of those clients.

(d) The very short time over which the misconduct occurred.

(e) The lack of any finding of dishonesty on Mr Hooker's part.

(f) The lack of any financial imperative for the offending.

(g) That the cases referred to in his submissions show that suspension is not always an inevitable outcome.

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[18] See above n 2 at [43].

(h) Mr Hooker's written apology to the Tribunal in which he acknowledges his failings and that he should have reversed the money into his client's trust account.

Decision

[24] Notwithstanding the strong submissions that Mr Billington has made, we find that a period of suspension is the appropriate penalty to impose. Our reasons for doing so are the seriousness of the conduct leading to the finding of conduct that is disgraceful or dishonourable, and because of the need to ensure that both the public and practitioners are aware of the consequences of misconduct, and of the need to uphold the standards of the profession.

[25] We have considered the mitigating factors that Mr Billington has advanced on behalf of Mr Hooker and unanimously reach the conclusion that three months suspension is the appropriate penalty to impose.

[26] We further take into account the hearings that Mr Hooker has scheduled from now until June 2020 and therefore take into account the difficulties that might be caused to his clients if suspension is to take immediate effect. We direct that the period of suspension is to commence on 1 July 2020.

[27] The Committee submitted that this case is one in which an order should be made requiring Mr Hooker to pay his former client compensation for emotional harm and distress. That there is an ability to do so under s 156(1)(d) of the Act is recognised. (See paragraph [12] of this decision).

[28] Mr McCoubrey relies on the stress caused to Mr Hooker's former client by his failure to advise his client of the risks of retaining the additional payment and of the civil proceedings brought to recover that payment. He accepts that there is no direct evidence from the client about such impacts but submitted that stress and anxiety are inevitable consequences of the client having been named as a defendant in those proceedings.

[29] Mr Hooker's former client sent to the Tribunal a voluminous record of affidavits that related to the employment matters which were settled at mediation and which appear to have been filed in respect of the civil proceedings. They were not received for the reason that the Tribunal considered them to be irrelevant to its consideration of penalty.

[30] Mr Billington advised that Mr Hooker has settled the civil proceedings with the client's former employer without any obligation on the client. He submitted that the settlement which Mr Hooker made meets any consideration of compensation to the former client.

[31] The Tribunal agrees with that submission and declines to order the payment of any compensation.

[32] There has been no application before the Tribunal for permanent suppression of Mr Hooker's name. The interim order for suppression of name lapses accordingly.

[33] Mr Billington wishes to be heard on the question of costs. Costs are accordingly reserved. Mr Billington is to file his submissions on costs within 10 working days from the receipt of this decision. Mr McCoubrey is to reply within five working days thereafter. The Tribunal will consider the question on the papers unless either of counsel requests a hearing.

DATED at AUCKLAND this 18th day of March 2020

BJ Kendall
Chairperson