

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2020] NZLCDT 19

LCDT 026/19

IN THE MATTER

of the Lawyers and Conveyancers
Act 2006

BETWEEN

OTAGO STANDARDS COMMITTEE
Applicant

AND

RICHARD ZHAO
Practitioner

DEPUTY CHAIR

Judge JG Adams

MEMBERS

Mr G McKenzie

Ms M Noble

Ms M Scholtens QC

Ms S Stuart

DATE OF HEARING 2 July 2020

HELD AT Specialist Courts and Tribunals Centre, Auckland

DATE OF DECISION 6 July 2020

COUNSEL

Ms E Woolley for the Standards Committee

Mr C Morris for the Practitioner

REASONS FOR DECISION OF TRIBUNAL RE LIABILITY

[1] The Otago Standards Committee suggests that Mr Zhao failed to comply in a timely manner with a penalty order of the Tribunal that “The practitioner is to undertake the next available course as a trust account supervisor.” The Standards Committee charged him with misconduct (s 7(1)(a)(i) or (ii)), or unsatisfactory conduct (s 12(b) and/or s 12(c)) of the Lawyers and Conveyancers Act 2006 (Act).

[2] Mr Zhao says he complied, or complied substantially, with the order, and that his delays were explicable.

[3] Unanimously, we agree with Mr Zhao. After adjourning to consider the matter, we dismissed the charge. This decision gives our reasons. Essentially this decision is driven by findings of fact.

[4] The issues are:

1. What did the penalty order require?
2. Did Mr Zhao comply?
3. Does his compliance delay amount to misconduct or unsatisfactory conduct?

What did the penalty order require?

[5] The penalty order was made on 23 November 2016. It was one of five penalty orders after having earlier found Mr Zhao guilty of misconduct in relation to handling client money. In the other four penalty orders, he was censured, suspended from practice for four months, and ordered to pay costs to the Standards Committee and the New Zealand Law Society.

[6] The misconduct finding implied that Mr Zhao needed reminding about trust accounting obligations. The order to undertake a course as a trust account supervisor

was educative and remedial. In making the order, the Tribunal observed “He has indicated that he is willing to retake the next available trust account supervisor’s course ...” [para [49], Bundle p 52].

[7] The Tribunal decision of 23 November 2016 makes no mention that the CLE (Continuing Legal Education) arm of the New Zealand Law Society runs two different courses for trust account supervisors as required by regulation 19 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 (Regulations). One course, described in Schedule 1 to those Regulations, is there named “Trust Account Supervisor Course.” The other, described in Schedule 2 of those Regulations, is there named “Trust Account Supervisor Refresher Course”.

[8] In the view of this Tribunal, it seems that the 23 November Tribunal was unaware that there were two similar courses. And indeed, they are similar. Both consist of training in trust accounting, financial management, ethics, fraud and any other elements prescribed by the relevant society. [Schedule 1 cl 3; Schedule 2 cl 3].

[9] The curriculum for the first course, set out in Schedule 1, is designed for the practitioner who seeks certification to supervise a trust account. The course requires an observation report (about the practitioner’s own trust account). In addition to “training,” that course includes “examination or assessment.” [Schedule 1 cl 3(1).] The Schedule 2 course is designed as a comprehensive refresher for those who are already certificated.

[10] This distinction between the courses reflects in Regulation 19. Regulation 19(2) directs “Every practitioner who has not previously completed a course of training in accordance with Schedule 1 or 2 of these regulations ... must complete a course of training, and pass examinations and assessments, in accordance with Schedule 1 of these regulations...” The Schedule 1 course is designed for beginners. By contrast, reg 19(3) directs “Every practitioner who has previously completed a course of training in accordance with Schedule 1 or 2 of these regulations ... must complete the course prescribed in Schedule 2 of these regulations”.

[11] Mr Zhao had completed the first course in 2012. He held a valid certificate already. That certificate was not rendered invalid by his suspension even though he could not use it. Once he resumed practice, his certificate entitled him to supervise his trust account.

[12] The Standards Committee seems to have paid no regard to the fact that the relevant penalty order was unspecific in the face of the two options. Their witness, the Otago Legal Standards Officer, did not know any differences, let alone salient differences in Mr Zhao's context, between the respective curricula. The Legal Standards Officer had been present at deliberations and meetings of the Otago Standards Committee and could not recall if the committee had any discussion about differences between the courses. In the absence of positive evidence on this, and considering the course of this matter generally, we find on the balance of probabilities that the Standards Committee simply assumed that attendance at the Refresher (Schedule 2) course fell short and was therefore non-compliance with the relevant penalty order.

[13] Although there is no bar to a practitioner repeating the beginner's course, and we note that in the Regulations that course is referred to as "Trust Account Supervisor Course," in the absence of a specific order otherwise, and in the context of Mr Zhao, we find that the penalty order could be satisfied by undertaking the Refresher (Schedule 2) course. Regulation 19(3) seems congruent with that. Mr Zhao did not need teaching from the ground up. He needed to re-engage with his trust account obligations.

Did Mr Zhao comply?

[14] The New Zealand Law Society runs Trust Account Supervisor Courses at different times of the year, and in different centres. It seems that sometimes one course is offered and the other is not.

[15] Mr Zhao had volunteered to the Tribunal that he would undertake a course. Although he appealed the Tribunal's decision, and that decision was not available until

17 August 2017, he enrolled and paid for the April 2017 course. It happened to be a Schedule 1 course.

[16] On 19 April 2017 he emailed a Law Society officer, advising that he had studied the course workbook but was unable to attend the examination because he had high blood pressure associated with his diabetes. He asked if he could postpone the examination or attend the course on another date. In that email he mentioned “The purpose of me enrolling into the course is for refreshment only, as I am already a principal and a trust account supervisor for my own law firm.” Although Ms Woolley for the Standards Committee suggested this was misleading because it did not mention the penalty order, we find that it is a plain communication, simply seeking to defer an examination for health reasons. We do not consider it was remiss of Mr Zhao to omit mentioning that the purpose of his attending the course was to fulfil an order of this Tribunal. There was no reason for him to do that. The underlying purpose of the penalty order was broadly for “refreshment” of Mr Zhao’s former training in this regard. We accept that Mr Zhao did not use “refreshment” as a substitute for “Refresher.” We accept his evidence that he simply used it as a plain English word.

[17] Ms Loftus, Executive of NZLS Continuing Education responded on 27 April 2017, noting that Mr Zhao already had a certificate. She said “You therefore do not need to sit the exams and so you will not need to attend the full day.” She said she would transfer his registration to the 14 November 2017 course. This seems to us to have been a correct application of the CPD provisions of the Regulations to Mr Zhao’s circumstances.

[18] November 2017 came and went. Mr Zhao had not received any course pack from NZLS CLE but he was busy at work and omitted to follow it up immediately. But on 9 February 2018 he emailed Ms Loftus to discover why he had been overlooked. His email noted “I checked the next available course is on 19 April 2018 to be held at Pullman Hotel. Can you please transfer me...”. Ms Loftus responded the same day to say “I’m sorry I don’t know what happened either. You are now registered for the April course...”.

[19] It can be noted that on every occasion in this sequence, Mr Zhao has sought a suitable course. He could not complete the first for medical reasons but no-one else was urging him to remain in pursuit of his goal, as promised to the Tribunal, and as ordered by the Tribunal in response, to attend a suitable course.

[20] Mr Zhao attended the 19 April course in the morning for which he received a certificate for 2.5 hours for Continuing Professional Development. From his standpoint, he thought he had complied because he had read the course book materials, attended for instruction, but not stayed for examination because he did not require a duplicate certificate. On his evidence, when on 24 May 2018 he completed a declaration that he was a fit and proper person to practise, he believed he had already complied with the penalty order.

[21] On 6 August 2018, the Legal Standards Officer of Otago Standards Committee wrote to Mr Zhao, advising him that he had not complied with the penalty order. On 8 August 2018, he advised he had attended the course in April 2018.

[22] From that point, the Otago Standards Committee took the fixed approach that Mr Zhao had failed to comply because he had attended the “Refresher” course rather than “the Trust Account Supervisor Course.” (For example, NZLS letter 15 November 2018; Bundle p 81). Thereafter, the Standards Committee seemed to approach the matter on the basis, Mr Zhao was in default; that the default must have been wilful or reckless; that delays were part of his pattern of avoiding full compliance.

[23] Mr Zhao feels that his credibility with NZLS was damaged by his association with his former employer Mr Deliu, a practitioner who had many conflicts with NZLS concerning complaints. This Tribunal is sympathetic to his view. If it is not correct, one can understand why he would think so. The Otago Standards Committee seems not to have dealt with this matter in an open-minded way. For example, the Standards Committee pursued Mr Zhao accusingly, without analysing the salient differences between the courses, and which was the best fit. They failed to take a purposive approach. The Standards Committee failed to consider that the terms of the penalty order may not have been intended to nominate one of the two courses. The Standards Committee took it as if the words “trust account supervisor” was there used as

reference to a particular course. We do not know why the Standards Committee did not test the view of the NZLS CLE that under the Regulations Mr Zhao would be eligible to do the Refresher (Schedule 2) course. That view appears to the Tribunal to be correct. Surprisingly, there was no reference to the Regulations in the charge, the Standards Committee's evidence or in submissions before the Tribunal. As counsel for Mr Zhao pointed out, the relevance of the Regulations had been made plain to the Standards Committee by Mr Zhao's then counsel in his submission to the Committee.

[24] Moreover, the Standards Committee failed to acknowledge the several positive steps taken by Mr Zhao to discharge his obligation. Throughout, Mr Zhao was treated as a defaulter when there was a basis for taking a more generous view of his conduct. Taking their own interpretation as the only valid version, the Standards Committee suggested that, if there was any doubt about what might constitute compliance, it was up to Mr Zhao to come and ask them to stipulate what was required of him. This Tribunal observes these interactions with disquiet.

[25] Anxious to redeem himself, and to avoid causing his professional life more problems, Mr Zhao attempted to explain his actions. He also undertook a Schedule 1 course in order to comply with the Standards Committee requirements, even though he believed he had complied.

[26] In this case, we must rule on compliance. Although there is room for a different interpretation, we unanimously find that Mr Zhao's attendance at the morning of the April 2018 course, amounted to satisfactory compliance with the penalty order.

Does his compliance delay amount to misconduct or unsatisfactory conduct?

[27] Ms Woolley submitted that, if there was room for a different view from that taken by the Standards Committee, Mr Zhao should have approached NZLS to clarify the situation. The Committee felt his undertaking of any course was slow.

[28] That approach places the onus back on Mr Zhao. In our view, that interpretation is onerous and unfair, failing to acknowledge the clear record that he pursued undertaking a course. He cannot be faulted for his start time, applying months before

his appeal was resolved. He cannot be faulted for having to postpone for good medical reasons. He cannot be criticised for taking NZLS (CLE) advice that he should attend the Refresher course and need not sit an examination. Although he did not follow up from November 2017 until 7 February 2018, in our view, a busy practitioner at that time of year who has approached the matter with some persistence, should not be found wanting to the point of committing an offence, over those few weeks.

[29] We find nothing substantial in Mr Zhao's evidence in this chapter of his relations with the New Zealand Law Society to criticise him for. Moreover, in our view, he was wrongly forced to attend another course that he should not have been required to do.

Conclusion

[30] The charge, in any of its alternative formulations, is dismissed.

[31] As arranged with counsel at the conclusion of the hearing, any issue of costs shall be dealt with in accordance with the following directions. Mr Morris should file submissions on costs by 31 July 2020 and Ms Woolley shall file her submissions on costs by 14 August 2020. We anticipate the matter would thereafter be dealt with on the papers.

DATED at AUCKLAND this 6th day of July 2020

Judge JG Adams
Deputy Chair