NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2020] NZLCDT 30

LCDT 013/19

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**NATIONAL STANDARDS COMMITTEE 1** Applicant
AND	**JINYUE (PAUL) YOUNG** Practitioner

DEPUTY CHAIR

Judge JG Adams

MEMBERS

Mr S Hunter QC

Ms N McMahon

Ms M Noble

Ms S Stuart

DATE OF HEARING 2 September 2020

HELD AT Specialist Courts and Tribunals Centre, Auckland

DATE OF DECISION 25 September 2020

COUNSEL

Ms C Paterson for the Standards Committee

Mr J Young in Person

REASONS FOR DECISION OF TRIBUNAL RE PENALTY

[1] On 29 June 2020, the Tribunal found Mr Young guilty of two charges. Both arise from his dealings with one client. One charge concerned negligence or incompetence, the other concerned his attempts to dissuade his former client from pursuing the complaint.

[2] Although these charges arise in relation to only one client, and therefore may seem to stand on a narrow base, the National Standards Committee seeks that Mr Young be struck off the roll of barristers and solicitors. The Standards Committee takes this strong stance because, pointing to themes running through Mr Young's previous disciplinary record with the current charges, it submits a lesser penalty will not adequately ensure public protection and the maintenance of professional standards.

[3] Mr Young does not accept the Tribunal's finding of liability. The prospect of yet another disciplinary setback to his status and career in law hits him very hard.

[4] In the circumstances of this case, the Tribunal recognises the force of the Standards Committee's submission seeking strike-off, but this decision explains why we choose to apply a lesser penalty. Strike-off is the most severe response the Tribunal can order, a penalty that ends a practitioner's legal career, with reputational and financial consequences. It is a penalty that should only be applied when there is no proper alternative. The Tribunal is concerned that the bar for strike-off should not be set too low, even though we do hold concerns about Mr Young's fitness to practise.

[5] The Standards Committee also seeks an order requiring Mr Young to cancel his fees for the work undertaken for Mr Z, the complainant.

What are the relevant facts of Mr Young's disciplinary history?

[6] Mr Young is about 64 years of age. He studied law as a mature student and began his legal career as an employee in a suburban firm. We are not sure how closely his work was supervised. He does not have a current practising certificate.

[7] The first of the recent charges arose because Mr Young took instructions from a Chinese client concerning family law litigation, an area in which he had no relevant experience. The Tribunal found that he effectively concealed from his employer that he had taken on the client by, for example, interviewing the client at Mr Young's home.

[8] Although the letter of engagement signed by the client nominated the firm that employed Mr Young, only Mr Young knew about the client. Mr Young kept no proper file, his advice was incompetent, his drafting of documents inadequate, his representation of the client in court was woeful. In relation to property matters, Mr Young made grave errors. We found that he advised his client not to disclose to the court the existence of certain relevant bank accounts. A more detailed analysis of his shortcomings appears in our decision on liability.

[9] We did not accept Mr Young's stance that he had offered to serve the client by providing a limited service by which he meant that he would not read all the papers and would simply say whatever the client wanted him to say. There was no such rider on the letter of engagement but, in any case, we cannot accept the view that legal services as limited and incompetent as those performed by Mr Young could ever amount to acceptable professional standards.

[10] The Standards Committee submissions list aggravating features and shortcomings:

- Mr Z was hampered by his lack of facility with the English language. This added to his lay difficulties in managing the complexities of legal and other documents.

- Shortcomings in his method of providing affidavit evidence by a non-English speaker so the court could be satisfied about the accuracy of translation. There was no independent interpretation.

- Failure to file an application for interim distribution or evidence in support of such an application.

- Failure to properly advise the client on discovery obligations.

- Failure to cross-examine Mr Z's wife at a defended dissolution hearing which was fatal to any prospect of success.

[11] Although he was out of his depth, Mr Young failed to instruct a competent practitioner or obtain appropriate supervision. Our liability decision found his conduct was "…unprofessional, negligent and incompetent, and in each case [in terms of the particulars alleged in the charge], seriously so."[1] The level of his deficiencies demonstrated a "paucity of pertinent skills that reflects on his fitness to practise."[2]

[12] By attempting to persuade Mr Z and his new lawyers to withdraw the complaint, the Tribunal found he attempted to interfere in a "process which [his] professional obligations required him to respect."[3]

[13] Our liability decision considered Mr Young's professional deficiencies in relation to this client in some detail. When approaching the question of penalty, we were concerned to gauge his insight about those deficiencies as an indicator of future safety for clients, and how well might the public be protected were he to practise again. When asked what he might have done differently if he had the opportunity, Mr Young said he "would never take this case." His subsequent remarks suggest this was not reflective of insight into his own professional shortcomings, but more in response to the fact that he had consequently become embroiled in these disciplinary proceedings.

[14] Indeed, his remarks at the penalty hearing demonstrated a distinct lack of insight. He said he had rejected Mr Z as a client at first, attempting to refer him to four other lawyers. The submission implies that he still thinks he had no choice but to take Mr Z as a client. Given his lack of expertise and his concealing of the brief from his employer, his attitude discourages us from considering any prospect of his being

[1] Tribunal liability decision - *National Standards Committee 1 v Young* [2020] NZLCDT 20 at [44].
[2] Ibid at [57].
[3] Ibid at [77].

safely able to practise in the foreseeable future. Absent insight, he is unlikely to recognise safe from unsafe practices.

[15] Mr Young repeated, what he had advanced in the liability hearing, that Mr Z only made the complaint to avoid paying fees. We found this unsupported projection astonishing because Mr Z was never Mr Young's personal client, he was a client of Mr Young's employer, as clearly set out in the letter of engagement. When Mr Young's employer learned of this matter, the employer informed the New Zealand Law Society (NZLS) that the firm would not charge Mr Z because they were never aware they had such a client. To that, we might add that Mr Z did not receive legal services of net value, as Mr Young's attempts left him with problems to be resolved by his next lawyers.

[16] To our added surprise, Mr Young advised that he is currently pursuing Mr Z in the Disputes Tribunal for payment of fees. In correspondence with NZLS Mr Young had provided an estimate of charges. From his submissions at the penalty hearing we learned that he regards Mr Z as liable to pay that "bill." Mr Young appears to have taken his former employer's announcement that the firm would not charge as creating a gap in which he could charge in his personal capacity. His pursuit of Mr Z for payment of a "bill" fails to respect the fact that he was only an employee, that he had no claim against Mr Z as his personal client, and that his employer's decision about non-charging is not something he can question. Moreover, Mr Young's pursuit of Mr Z fails to acknowledge that his legal services were not truly worth a fee because of his incompetence and the resultant issues that Mr Z was left with.

[17] Mr Young also fails to appreciate that the penalty hearing relies upon the liability findings. In written material and in oral submissions, he revisited matters that had been ruled on in the liability hearing. For example, Mr Young stated at the penalty hearing that he believes the services he provided for Mr Z were of a good standard. He thought Mr Z got "a good result" from his work. He continued to claim he was falsely accused, that the claim only related to a sum of $106 he had "charged" for preparing his "bill," that Mr Z (contrary to our finding) does speak English, and that Mr Z was an immigration agent. These submissions are completely at odds with our liability decision. If Mr Young wished to challenge that decision, the proper course

was an appeal to the High Court. His inability to comprehend this important, fundamental structure, adds to our concern about his ability to recognise quite basic features of legal process, of which the disciplinary process is a straightforward example. That lack of understanding is one of the troubling features of both current charges.

[18] Mr Young's previous disciplinary history is an aggravating feature. We quote and adopt paragraphs [4.7] to [4.11] of the National Standards Committee submissions on this point:

> 4.7 The Practitioner has previously been found guilty of four charges by the Tribunal.[4] As a result, he was suspended from practice for 15 months.[5] The Practitioner sought and was granted leave to appeal to the High Court in respect of one aspect of charge one.[6] The Tribunal's findings and penalty decision were upheld on appeal.[7]
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> 4.8 The charges arose after the Practitioner's wife's company attempted to renege on a real estate transaction after settling. The Practitioner was involved in proceedings brought by the purchaser for breach of contract.
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> 4.9 The Tribunal's findings included:
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> (a) That the Practitioner had sworn a false affidavit in the proceedings confirming that he had discovered all the documents he was required to. It later transpired that there were further documents adverse to his case that had not been discovered. The Tribunal found that the Practitioner's omissions in this regard were the result of negligence or incompetence.
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> (b) One of the charges related to the Practitioner's conduct in threatening to use the Law Society complaints service for a collateral purpose.
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> (c) The Practitioner made serious allegations against the purchaser and her counsel without a clear evidential foundation for those allegations, including that they had fabricated evidence, misled the court and colluded with another solicitor. The Tribunal found this was a reckless breach of the Rules and that the Practitioner had

[4] Two charges at misconduct level, one charge of negligence and one at the level of unsatisfactory conduct. See *National Standards Committee v Young* [2017] NZLCDT 41.
[5] See *National Standards Committee v Young* [2018] NZLCDT 20. The Practitioner was also ordered to pay costs to the Committee and to the Law Society.
[6] Concerning whether falsely swearing an affidavit of documents was carried out while providing legal work for any other person within s 7(a) of the Act. See *Young v National Standards Committee* [2018] NZHC 3047.
[7] *Young v National Standards Committee* [2019] NZHC 2268.

no regard for his professional obligations in making those statements.[8]

4.10 Relevantly, the Tribunal held:

(a) "[T]he picture which emerges is one of incoherence, confusion and lack of understanding… of proper process";[9]

(b) "Insight appeared to be almost totally lacking in this practitioner… this lack of ability to understand the part he played in contributing to his difficulties" was something that "greatly concern[ed] the Tribunal";[10]

(c) That the Practitioner had, before the Court and subsequently before the Tribunal, had an inability to be shaken from certain ideas, "even after some lengthy discussion and engagement with members of the Tribunal at the hearing. Whether his approach is due to a personality trait or language difficulties, it is seriously problematic for a lawyer";[11]

(d) At the penalty stage, in respect of the Practitioner's overall fitness and conduct of proceedings, that while the Practitioner's "conduct was polite and respectful toward the Tribunal… we did hold considerable concerns, having observed [the Practitioner] conduct his own defence in these proceedings."[12] Further, that after engaging counsel who filed "succinct and cogent submissions on his behalf, [the Practitioner] had sufficient lack of understanding of the process that he subsequently filed his own submissions, some of which still sought to challenge the Tribunal's findings, and relitigate the matter".[13]

4.11 The conduct which is the subject of the present proceedings involves many of the same features of the previous disciplinary case against the Practitioner. The Committee submits that, when the Practitioner's previous disciplinary history is considered alongside the present conduct, it is clear that there is a risk of the Practitioner engaging in similar conduct in the future.

[19] Common themes between the former charges and the current charges include a casual practice concerning veracity of evidence, inappropriate interventions about complaints matters, and making serious allegations without a clear evidential foundation. The last feature has figured colourfully in the current proceeding at both liability and penalty stages. These include unsubstantiated allegations that the

[8] *National Standards Committee v Young* [2017] NZLCDT 41 at [113].
[9] Ibid at [79].
[10] *National Standards Committee v Young* [2018] NZLCDT 20 at [19].
[11] *National Standards Committee v Young* [2017] NZLCDT 41 at [102].
[12] *National Standards Committee v Young* [2018] NZLCDT 20 at [21].
[13] Ibid at [24].

Tribunal or the Standards Committee are racially biased, that Meredith Connell (who are merely counsel) have been pursuing a grudge against him arising from an unrelated historic matter, and allegations about Mr Z's subsequent lawyers. Mr Young's unsubstantiated attacks have been a concerning, constant feature of his advocacy, reflecting poorly on him.

[20] In this case, there are no mitigating factors.

How does this case compare with other precedents?

[21] In *Z v Dental Complaints Assessment Committee*[14] the majority of the Supreme Court stated:

> …the purpose of statutory disciplinary proceedings for various occupations is not to punish the practitioner for misbehaviour, although it may have that effect, but to ensure appropriate standards of conduct are maintained in the occupation concerned.

[22] The High Court, in *Auckland Standards Committee 1 v Fendall*[15] stated:

> The predominant purposes are to advance the public interest, which includes protection of the public, to maintain professional standards, to impose sanctions on a practitioner for breach of his or her duties, and to provide scope for rehabilitation in appropriate cases.

[23] In *Daniels v Complaints Committee 2 of the Wellington District Law Society*[16] a full bench of the High Court observed that:

> The public are entitled to scrutinise the manner in which a profession disciplines its members, because it is the profession with which the public must have confidence if it is to properly provide the necessary service. To maintain public confidence in the profession members of the public need to have a general understanding that the legal profession, and the Tribunal members that are set up to govern conduct, will not treat lightly serious breaches of standards.

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[14] *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 at [97].
[15] *Auckland Standards Committee 1 v Fendall* [2012] NZHC 1825, (2012) 21 PRNZ 279 at [36].
[16] *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850 (HC) at [34].

[24] When it comes to weighing aggravating and mitigating factors relevant to penalty, the full bench of the High Court in *Daniels*[17] observed:

> [28] It is not the case, on the conventional criminal sentencing principles, that defending proceedings with vigour and "pulling no punches", is an aggravating feature so as to increase any penalty to be imposed. The starting point is fixed according to the gravity of the misconduct, and culpability of the practitioner for the particular breach of standards. Thereafter, a balancing exercise is required to factor in mitigating circumstances and considerations of a practitioner. Obviously, matters of good character, reputation and absence of prior transgressions count in favour of the practitioner. So, too would acknowledgment of error, wrongdoing and expressions of remorse and contrition. For example, immediate acknowledgment of wrongdoing, apology to a complainant, genuine remorse, contrition, and acceptance of responsibility as a proper response to the Law Society inquiry, can be seen to be substantial mitigating matters and justify lenient penalties…
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> [29] On the other side of the coin, absence of remorse, failure to accept responsibility, showing no insight into misbehaviour, are matters which, whilst not aggravating, nevertheless may touch upon issues such as a person's fitness to practise and good character and otherwise.

[25] The principles applicable to a decision to strike a practitioner off the roll were summarised by a full bench of the High Court in *Dorbu v New Zealand Law Society*:[18]

> [35] The principles to be applied were not in issue before us, so we can briefly state some settled propositions. The question posed by the legislation is whether, by reason of his or her conduct, the person accused is not a fit and proper person to be a practitioner. Professional misconduct having been established, the overall question is whether the practitioner's conduct, viewed overall, warranted striking off. The Tribunal must consider both the risk of reoffending and the need to maintain the reputation and standards of the legal profession. It must also consider whether a lesser penalty will suffice. The Court recognises that the Tribunal is normally best placed to assess the seriousness of the practitioner's offending. Wilful and calculated dishonesty normally justifies striking off. So too does a practitioner's decision to knowingly swear a false affidavit. Finally, personal mitigating factors may play a less significant role than they do in sentencing.

[26] Strike-off is a common response to dishonesty.[19] But strike-off is not confined to cases involving dishonesty. The High Court made the following observations regarding when strike-off will be justified in *Hart v Auckland Standards Committee 1*:[20]

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[17] See above n 16.
[18] *Dorbu v New Zealand Law Society* [2012] NZAR 481 (HC) at [35].
[19] *Bolton v Law Society* [1994] 1 WLR 512 (EWCA Civ) at 518
[20] *Hart v Auckland Standards Committee 1* [2013] 3 NZLR 103 (HC).

> [185] As the Court noted in *Dorbu*, the ultimate issue in this context is whether the practitioner is not a fit and proper person to practise as a lawyer. Determination of that issue will always be a matter of assessment having regard to several factors.
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> [186] The nature and gravity of those charges that have been found proved will generally be important. They are likely to inform the decision to a significant degree because they may point to the fitness of the practitioner to remain in practice. In some cases these factors are determinative, because they will demonstrate conclusively that the practitioner is unfit to continue to practice as a lawyer. Charges involving proven or admitted dishonesty will generally fall within this category.
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> [187] In cases involving lesser forms of misconduct, the manner in which the practitioner has responded to the charges may also be a significant factor. Willingness to participate fully in the investigative process, and to acknowledge error or wrongdoing where it has been established, may demonstrate insight by the practitioner into the causes and effects of the wrongdoing. This, coupled with acceptance of responsibility for the misconduct, may indicate that a lesser penalty than striking off is sufficient to protect the public in the future.
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> [188] For the same reason, the practitioner's previous disciplinary history may also assume considerable importance. In some cases, the fact that a practitioner has not been guilty of wrongdoing in the past may suggest that the conduct giving rise to the present charges is unlikely to be repeated in the future. This, too, may indicate that a lesser penalty will be sufficient to protect the public.
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> [189] On the other hand, earlier misconduct of a similar type may demonstrate that the practitioner lacks insight into the causes and effects of such behaviour, suggesting an inability to correct it. This may indicate that striking off is the only effective means of ensuring protection of the public in the future.

[27] The conduct of a practitioner before the Disciplinary Tribunal itself may also properly be taken into account when considering the practitioner's fitness to continue in practice and penalty. In *Daniels*,[21] the High Court referred to this in the two paragraphs we have quoted at [24] above and continued:

> [30] If a practitioner engaged, for example, in disreputable correspondence with a complaints committee or disciplinary tribunal, or conducted himself in a belligerent way in which he responded to legitimate complaints made to a Law Society Complaints Committee, a tribunal may take a dim or adverse view of his overall behaviour.

[21] See above n 16.

[28] As is clear from the cases cited, the ultimate question when considering whether strike-off is the appropriate response is whether the practitioner, by reason of his or her conduct, is a fit and proper person to be a lawyer.

[29] Like the Standards Committee, the Tribunal notes that Mr Young's incompetence in this case was not isolated but was evident in every aspect of the case. The client was vulnerable by reason of language and cultural issues. Although aware of his lack of experience in the area, Mr Young chose to act for the client with disadvantageous results. His conduct shows a fundamental lack of understanding about his role and his professional obligations to his client and to the court.

[30] We have been assisted by comparing this case with *Otago Standards Committee v Claver.*[22] In that case there was a range of failures in relation to 14 clients. They were all criminal proceedings. The practitioner failed to properly advise clients; failed to meet with clients; failed to appear in scheduled court appearances; failed to go through disclosure with clients; failed to file written submissions; failed to properly prepare for hearings; failed to comply with penalty orders, made a false declaration.

[31] However, in *Claver*, the practitioner accepted responsibility, and was experiencing anxiety and depression at the relevant time. He took steps to mitigate the risks and to ensure protection of the public. In those circumstances, the Tribunal concluded that strike-off was not required.

[32] Comparing that with the present case, certain salient differences emerge. Mr Young shows no real insight and accepts no responsibility. Accordingly, he has been unable to mitigate risks and ensure protection of the public. Although Mr Young's current charges only involve one client, the range of deficiencies is comprehensive and there is no sign he would do better if able to practice in future.

[33] A point of difference in Mr Young's favour is that *Claver* involved 14 clients, Mr Young's involves only one. We are not attracted to Mr Young's simplistic submission that, because *Claver* involved 14 clients and had a 12-month suspension,

[22] *Otago Standards Committee v Claver* [2019] NZLCDT 8.

Mr Young's two charges should translate to a penalty of one month's suspension per charge. In fact, *Claver* involved only one charge (with 11 particulars). But it is the totality of the particular case and contextual features that suggest the appropriate penalty.

[34] As the Standards Committee points out, in *Claver*, there were strong personal mitigating features, not present here. Although Mr Young's failings relate to one client only, the Standards Committee submits that the nature and extent of those failings demonstrate a fundamental lack of competence and fitness to practise.

What penalty orders fit this case?

[35] Broadly, we accept the analysis of the Standards Committee that Mr Young's professional failings demonstrated from this one file are comprehensive, entrenched and there is no sign of his developing insight that would offer hope for a better performance. On the other hand, in a case where dishonesty is not a feature, we note that, even taking into account, his former disciplinary record, Mr Young's record falls short of the accumulation of wrongdoings such as that in a case like *Hart.* We also consider that our primary focus should be on the conduct that has led to the charges against Mr Young. Mr Young's conduct before the Tribunal is an aggravating factor but does not form the principal basis for our penalty decision.

[36] In our view, Mr Young currently lacks attributes necessary for him to be assessed as a fit and proper person to practice, even as an employee. We would be concerned about the risk to the public were he free to practice at the present time. Although he lacks insight, and has demonstrated wide-ranging deficiencies, on the limited basis of this one file we are not inclined to strike him off. In our view, a balanced, perhaps restrained, response, is to suspend him from practice for a lengthy period. It may be that, as he indicates to us, he will choose not to practise again. But if he does, he will need to satisfy the Practice Approval Committee of the New Zealand Law Society that he is a fit and proper person to practise.

[37] It may be thought that by choosing a long period of suspension we are effectively preventing Mr Young from practising in future. In our view a long period of suspension is more appropriate for these reasons. Firstly, on the basis of this one file

alone, it seems harsh to find that no lesser penalty will protect the public. Second, we must restrict the penalty to the necessary minimum. Third, we have regard to the precedent value of this decision. We prefer to reserve the most severe penalty for those cases where the gravity of particulars of the charge, or the accumulation of disciplinary failings, demonstrate that the most severe penalty must be applied.

[38] That is not to say that one charge alone may not warrant strike-out. But in this case, we can deal with the matter in a less severe manner. It leaves open an opportunity for Mr Young, if he is able, in time, to demonstrate he can practise safely. If not, the public will be adequately protected by our orders.

Orders

[39] Mr Young is suspended from practising as a barrister or solicitor for a period of two and a half years from the date of this decision.

[40] Mr Young is required to cancel all his fees for the work undertaken for Mr Z. Consequently he must withdraw the Disputes Tribunal claim he has brought against Mr Z.

[41] A copy of this decision will be sent forthwith to the Disputes Tribunal and to Mr Z.

[42] We do not require Mr Young to pay costs relating to the application for rehearing. We do not criticise Ms Paterson for the call she made in deciding not to trouble the Tribunal with what proved to be a non-issue. Nonetheless, absent the full information, it was not inappropriate for Mr Young to raise the matter. Although we were then satisfied, we do not think he should bear costs on that aspect.

[43] Mr Young is ordered to pay the costs of the Standards Committee in the sum of $36,394. This sum was notified on 27 August 2020 and therefore does not include any costs in regards to the application filed on 3 September 2020.

[44] The Tribunal s 257 costs certified in the sum of $7,550 are payable by the New Zealand Law Society.

[45] Mr Young is to reimburse the New Zealand Law Society for the Tribunal s 257 costs in the sum of $7,253. This sum does not include any costs in regards to the application filed on 3 September 2020.

DATED at AUCKLAND this 25th day of September 2020

Judge JG Adams
Deputy Chair