FINAL ORDER SUPPRESSING THE NAME AND ANY IDENTIFYING FEATURES OF THE PRACTITIONER AND ANY DETAILS OF HIS HEALTH, PURSUANT TO S 240 OF THE LAWYERS AND CONVEYANCERS ACT 2006

NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2020] NZLCDT 32

LCDT 001/18

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**CANTERBURY WESTLAND STANDARDS COMMITTEE No. 2** Applicant
AND	**A PRACTITIONER** Respondent

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr H Matthews

Ms G Phipps

Ms S Stuart

Ms L Taylor

DATE OF HEARING 23 July 2020

HELD AT Christchurch District Court

DATE OF DECISION 13 October 2020

REDACTED VERSION ISSUED 9 April 2021

COUNSEL

Mr H van Schreven for the Standards Committee

Respondent is Self-Represented

DECISION OF THE TRIBUNAL

Introduction

[1] This set of charges has had a protracted, and at times, challenging path to resolution. The original six charges were filed in January 2018. After a number of adjournments, granted because of the practitioner's health, or in order for criminal charges to be finally resolved, the matter came before the Tribunal on 23 July 2020.

[2] Although his job was made very difficult by the circumstances, counsel for the Standards Committee, Mr van Schreven, is to be commended for the sensitive and humane way with which he has been prepared to not only deal with the delays, but also to accommodate the changes in this practitioner as his [redacted] health improved. The practitioner was eventually able to participate in a productive dialogue with Mr van Schreven on behalf of the Standards Committee. This has meant that the proceedings have been able to be dealt with in a more effective manner and, more importantly without the loss of a competent practitioner, as had earlier been contemplated.

[3] As a result of the discussions, Charges 1 and 3 were withdrawn by leave. Charge 4 was admitted at the level of unsatisfactory conduct, which was accepted by the Tribunal. Charge 6 was admitted as misconduct, and accepted by the Tribunal as being at the lower level of that spectrum of conduct.

[4] That left Charges 2 and 5 to be determined by the Tribunal, the practitioner neither admitting nor denying those two charges.

[5] This is one of those rare cases where delay has proven therapeutic, and resolution has been worth the wait. The public has been protected, because the practitioner stepped away from practice while unwell, even requesting voluntary removal from the Roll in the early stages. And in the end, the career of a competent lawyer has been preserved.

[6] The approach to penalty has developed considerably over the two and a half years. As Mr van Schreven explained, what had been seen as an aggravating feature in 2018, namely the practitioner's lack of engagement and approach to this Standards Committee, meant that strike-off had been considered as a starting point for the penalty.

[7] By July 2020, due to significant improvements in the health of the practitioner the position of the Standards Committee was that such a drastic approach was no longer necessary, and restrictions on practice and a contribution to costs was now seen as a proportionate response. We reserved our decision on Charges 2 and 5, and in relation to penalty. There was also the issue of permanent name suppression, sought at the hearing by the practitioner and, given the unusual circumstances, the Standards Committee simply abides the Tribunal's decision on this point.

[8] Subsequent to the hearing, a message was received by the Tribunal that the parties were in negotiation about specific terms and restrictions to be imposed on the practitioner's future practice. The negotiation of these terms has undoubtedly been affected by the Lockdown and thus the delay in providing them to the Tribunal, and in turn the preparation of this decision.

Summary of Charges to be Considered

[9] Charges 1 and 3 were withdrawn by leave at the hearing. Charges 2 and 5 were neither admitted nor denied by the practitioner, who gave some brief evidence at the hearing concerning these matters. Charge 4, the practitioner admitted unsatisfactory conduct, which we understand was accepted by the Standards Committee. The practitioner admitted misconduct in respect of Charge 6.

[10] In addition to the practitioner's evidence at the hearing, and the evidence filed by the Standards Committee, upon which no cross-examination was sought, we had a very lengthy statement prepared in May 2020 by him. This statement described his personal background and career path, [redacted], the difficulties and inconsistencies, as he perceived them, in the approach of the Family Court to the proceedings following his marriage breakdown, and the realisation that he was suffering from [redacted], to the extent that he was simply unable to function.

[11] The nature of the practitioner's illness is supported by medical evidence and indeed has been observed by counsel and Tribunal members over the course of these proceedings.

[12] There are many cases where practitioners find disciplinary proceedings stressful, indeed it is axiomatic that such proceedings are of themselves stressful. Some practitioners seek to delay the proceedings, but the Tribunal often takes the view that it is in the interests of the practitioner, him or herself, as well as in the public interest and the interests of the profession, to dispose of the matter expeditiously, as is contemplated by the Lawyers and Conveyancers Act 2006 (LCA). This was, from the outset patently not one of those cases. The practitioner was simply too unwell for the charges to be dealt with swiftly.

Detail of Charges

[13] Given the relatively uncontentious nature of the hearing we propose to only briefly detail the nature and background of each of the remaining four charges under consideration.

Charge 2

[14] This arose out of the conduct of the practitioner in the Court Precincts when he was challenged by a security guard about his motorcycle helmet.

[15] It is common ground that, on the day in question, the practitioner was at Court not for professional purposes, but in relation to an appeal in the High Court relating to family matters. It is also accepted that having regard to the outcome of those proceedings the practitioner "… *would have been and likely presented as very distressed*…". On being asked for the completion of a form relating to the holding of his motorcycle helmet (which the practitioner says did not normally occur, given that he was known to the Court security staff), the practitioner reacted badly, crawling under a bollard tape to personally retrieve his helmet from a restricted entry area. He was argumentative and was threatened with arrest for breach of the peace. He was abusive to the Court security officer. He left without taking the helmet which was subsequently retrieved by a colleague who assisted to diffuse the situation.

[16] We note the context in which this occurred. By this time in May 2017, it was at the height of the disputes with the practitioner's former wife, who was consistently making allegations [redacted], in respect of which the practitioner faced prosecution (despite a number of Judges commenting on the questionable nature of the charges). In addition, the practitioner was also by this time clearly suffering from [redacted] and indeed, in the course of 2017, a trial was adjourned because [redacted].

[17] All lawyers are officers of the Court and furthermore, have obligations pursuant to s 4 of the LCA to uphold the rule of law and facilitate the administration of justice. As such they are required to model good behaviour in the Court Precincts and comply with any directions of Court security personnel. Security staff play an important part in ensuring the safety of all who use the court, including lawyers. The conduct towards them was disrespectful and unbecoming of a member of the legal profession.

[18] Clearly, on the occasion in question the practitioner fell below the expected standards but in the circumstances of his deteriorating health not such as, in our view, to constitute misconduct. We consider that he was guilty of unsatisfactory conduct, namely "*conduct unbecoming a lawyer*",[1] and as such conduct that would be regarded by lawyers of good standing as being unacceptable.

[19] We therefore make a finding of unsatisfactory conduct in respect of Charge 2.

Charge 4

[20] Charge 4 which was admitted by the practitioner at the level of unsatisfactory conduct, related to delay from late 2016 and early 2017 to fail to deliver a file which was sought to be uplifted by another practitioner. This is conduct at a level which would not normally be put before the Tribunal however, because of the practitioner's previous lack of cooperation with the Standards Committee and because of the other charges faced by him, has remained in this forum. The practitioner accepts, and we affirm as the appropriate level of liability, that his conduct fell below the "… *standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer* …".[2]

[1] Section 12(b)(i) of the LCA.
[2] Section 12(a) of the LCA.

[21] We accept that the level of culpability is, as admitted, that of unsatisfactory conduct.

Charge 5

[22] Charge 5 is the most serious of the charges before the Tribunal.

[23] While the facts of this charge are not really in dispute, the practitioner denies any intentional misrepresentation to the police. The incident occurred on 8 December 2016 and involved a visit by the practitioner to a client in the police cells at the District Court. The practitioner took with him a woman he claimed to the police was his assistant. When questioned about her identity the practitioner assured the police sergeant on duty that everything was "above board". The practitioner says that he did require the assistance of this person, who was the partner of his client, to take notes, which he saw as justifying his representation of the situation.

[24] However, taking a family member into Court cells could have had serious consequences. Indeed, the on-duty sergeant had pointed out to the practitioner at the time that there had been an unfortunate incident when a non-authorised person had been allowed into the cell area on a previous occasion.

[25] Even on the best view of this, if we accept the practitioner did not intentionally mislead the police, we still regard this to be at the level of misconduct as a reckless breach of s 4 obligations under the LCA. The practitioner, as a privileged person in this setting, had an obligation to be fully open with the police and ought to have appreciated that to fail to do so might significantly damage the relationship between the police and the profession. Not to pay attention to these duties, even unwittingly, is in our view a reckless breach of his professional obligations. For these reasons we found this charge proved at the level of misconduct, and, as earlier indicated the most serious of the charges faced by the practitioner. Members of the Tribunal can think of no situation where it would be appropriate for a lawyer, without disclosing the relationship, to facilitate family access to a person in custody through the channels of trust afforded to lawyers, bypassing processes that apply to members of the public.

Charge 6

[26] Misconduct is admitted under this charge by the practitioner and consists of him having been convicted of an offence punishable by imprisonment, namely possession of methamphetamine. He accepted that such a conviction tends to bring the profession in disrepute.

[27] In this instance the quantity was very small, and this was reflected in the sentencing notes of Her Honour Judge Bouchier in July 2017, in convicting him and fining him the sum of $350.

[28] We accept that this is misconduct at the lower levels of the spectrum.

Penalty

[29] In order to reflect the purposes of penalty in professional disciplinary matters, the Tribunal must have regard to the protection of the public, rehabilitation of the practitioner, maintenance of professional standards, deterrence of the practitioner and other practitioners from the conduct in question, and the "*least restrictive intervention, necessary to achieve those ends*".[3]

[30] We begin by assessing the seriousness of the four charges cumulatively and then consider aggravating and mitigating features.

Seriousness of the Offending

[31] Cumulatively, the Tribunal considers that the offending is serious, particularly Charge 5 which had the potential to seriously affect the reputation of the profession in relation to its interactions with the police.

Aggravating Features

[32] The Tribunal understands that these are the first disciplinary proceedings that have been brought against the practitioner and thus, there are no known aggravating features relating to either the practitioner or the offending.

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[3] *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850.

Mitigating Features

[33] Mr van Schreven has fairly pointed out that the practitioner has not practiced at any time since the charges were laid. Indeed, it is clear that at the time of the conduct that he was attempting to withdraw himself from practice because he had made a personal assessment that he was in no fit state to be continuing to work. Thus we take account of the fact that he has had a self-imposed and informal period of suspension from practice for over three years. Indeed, early in the proceedings the practitioner sought to have his name removed from the Roll of Barristers and Solicitors voluntarily but was refused consent to do so by the Practice Approval Committee.

[34] However, the strongest mitigating feature, and taken account of in the latest penalty submissions on behalf of the Standards Committee, are that having regard to the medical and other evidence presented by the practitioner that his offending:

> "… (which occurred over a relatively short and confined period of time) coincided with significant episodes of what [the practitioner] has fairly and frankly recognised and accepted as a severe [redacted] illness."

[35] Mr van Schreven goes on to submit:

> "That, of course, does not necessarily exonerate the conduct, but it does at least contextualise it and provide some background and explanation for what was happening at the time."

[36] Counsel is correct in observing that both he and the Tribunal have been able to:

> "… directly observe and form a judgment about the Practitioner's wellbeing over the period these matters have been before the Tribunal. Over that two-year period there have been significant and positive changes in the Practitioner's response to, and understanding of, the consequences arising from the Charges."

[37] While personal circumstances are not often strongly mitigatory in professional disciplinary proceedings, in this case the extraordinary difficulties experienced by the practitioner as a consequence of his marriage breakdown, including lengthy periods where he was unable to see his children, are inextricably bound up with his [illness]. A factor that impacted on him greatly, with justification as an officer of the Court, was his experiencing court processes and police powers being misused on more than one occasion and despite adverse comment from presiding judges.

[38] As his health has improved the practitioner has re-engaged with the New Zealand Law Society (NZLS) to attempt to discuss not only disposition of these charges but also ongoing practice restrictions which would properly reflect a proportionate outcome of these proceedings and serve to protect the public and the reputation of the profession in general. That is a strong mitigating feature also. He has essentially served a period of suspension and suffered the financial consequences of this.

[39] The parties have provided to the Tribunal a memorandum setting out the terms of such restrictions which are as follows:

For a period of three years from the date of hearing, the practitioner is only to practice as an employed barrister, or an employed barrister and solicitor, by and under the direct supervision (within the meaning of reg 18)[4] of another barrister or barrister and solicitor. He is to provide an undertaking to the NZLS to this effect. For clarity, the Tribunal approves the practitioner applying for a practising certificate before finding employment.

[40] The Tribunal has considered and is prepared to endorse these restrictions by way of an undertaking to the NZLS. We do so because we consider that the practitioner at this stage, with support, is fit to be on the Roll. The conditions reflect that he needs the support and structure of an employment situation and this will protect the public. We also consider that, while he has considerable insight into his illness, and indeed seems to have had so throughout, that he is not fully recovered. We say this because he was unable to provide written submissions although having been hopeful of being able to do so, and he was unable to read the Standards Committee's submissions because he was concerned that it might cause him distress. He was also still somewhat fragile in his presentation before the Tribunal.

[41] The Standards Committee does not seek further penalty orders, but seeks a contribution to costs. We do not consider a Censure to be appropriate, given the practitioner's [redacted] health when the offences occurred. His financial position is precarious and we do not consider a fine to be appropriate. Thus, we agree with the Standards Committee, that proportionate disposition of this matter resides in practice restrictions and a contribution to costs.

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[4] Lawyers and Conveyancers Act (Lawyers: Practice Rules) Regulations 2008.

Costs

[42] While we commend Mr van Schreven for prosecutorial fairness, we are somewhat puzzled by the Standards Committee decision to prosecute this practitioner who was clearly in the throes of [redacted], and who was showing insight, actively removing himself from practice and seeking to remove himself permanently by an application to have his name removed from the Roll. Consent to such a process would have avoided the costs of this prosecution and an enormous amount of stress caused by the process to the practitioner.

[43] The practitioner has increased costs to a certain extent by the numerous adjournments, but since these are largely the result of his illness we do not consider that justifies any adjustment. Two of the six charges have been dropped which would justify a discount and the practitioner is currently unemployed and his financial circumstances are consequently precarious.

[44] We consider in the overall circumstances a costs order of 20 per cent of the costs of the Standards Committee is justified. Similarly, we consider that the practitioner ought to only reimburse half the Tribunal, s 257 costs which have been incurred.

Name Suppression and Suppression of Reasons for Decision

[45] The practitioner has sought name suppression because of his [redacted] health and because of the interests of his [redacted] children. This decision has gone into some detail about the practitioner's health and we do consider that this is one of the unusual cases where the public interest in openness of proceedings is outweighed by the interests of the practitioner because of his health and in respect of his children's interests in [redacted]. The Standards Committee does not oppose the making of a suppression order in relation to the practitioner's name, identifying details, and all details of his health, and there will be an order accordingly.

Orders

1. There will be a Final Order suppressing the name and any identifying features of the practitioner and any details of his health, pursuant to s 240.

2. Restrictions on the practitioner's practice are made in terms of paragraph [39] of this decision, for three years from the date of hearing.

3. The practitioner is to contribute the sum of $5,544.15 towards the costs of the Standards Committee, pursuant to s 249.

4. The New Zealand Law Society are to pay the Tribunal s 257 costs of $16,940.

5. The practitioner is to reimburse the New Zealand Law Society 50 per cent of the s 257 costs, namely $8,470, pursuant to s 249.

DATED at AUCKLAND this 13th day of October 2020

Judge D F Clarkson
Chair