THE NAMES AND IDENTIFYING DETAILS OF THE COMPLAINANTS (INCLUDING K) ARE PERMANENTLY SUPPRESSED. THE NAMES OF ANONYMISED WITNESSES ARE SUPPRESSED PENDING FURTHER ORDER. ORDERS MADE PURSUANT TO S 240 OF THE LAWYERS AND CONVEYANCERS ACT 2006.

NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2021] NZLCDT 21

LCDT 022/20

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**NATIONAL STANDARDS COMMITTEE No. 1** Applicant
AND	**JAMES DESMOND GARDNER-HOPKINS** Practitioner

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Hon P Heath QC

Ms M Noble

Ms G Phipps

Prof D Scott

HEARING HELD AT Wellington District Court

DATE OF HEARING 17-21 May 2021

DATE OF ORIGINAL DECISION 22 June 2021

DATE OF REISSUED DECISION 24 June 2021

COUNSEL

Mr D La Hood and Mr T Bain for the Auckland Standards Committee

Mr J Long and Mr J Grimmer for the Practitioner

RESERVED DECISION OF THE TRIBUNAL ON LIABILITY

Introduction

[1] The events with which this decision is concerned took place five-and-a-half years ago, in December 2015, at two firm parties held by Russell McVeagh, Wellington branch.

[2] The practitioner whose conduct is in issue is Mr James Gardner-Hopkins. At the time, he was a partner based at the Wellington office of Russell McVeagh, and the leader of its Environmental Planning and Natural Resources Team (the EPNR Team). The charges concern two social events in December 2015.

[3] The first, was a Russell McVeagh Wellington Christmas party. All concerned understood that it was likely that those present would consume much alcohol. During this party five incidents of drunken behaviour involving tactile dancing and other physical contact occurred with four summer clerks. The second, was an EPNR Team party. At the relevant time the party was at Mr Gardner-Hopkins home. The one incident of intimate touching of a junior staff member which arises out of that second event is admitted by Mr Gardner-Hopkins, but the level of liability is at issue.

[4] The details of all of the incidents did not publicly emerge for almost three years, although there were almost immediate consequences for Mr Gardner-Hopkins who was required to leave the firm in early 2016, following the reporting of some of the incidents.

[5] In 2018 the complainants (who were law students at the time of the incidents) obtained legal advice and then made a complaint to the New Zealand Law Society (NZLS). When the allegations emerged into the public domain it led to an outpouring (in the midst of the “Me Too” movement) within and beyond the legal profession,

culminating in an independent review being undertaken at the request of Russell McVeagh[1] and a working group set up by the NZLS.[2]

[6] It is probably fair to say that these events, and the outcomes which followed the two reports of the inquiries, called out unacceptable behaviours and have led to significant changes in many work places in the legal profession.

[7] It is against that background that the Tribunal must carry out its different task[3] of weighing the evidence about six specific incidents and assessing whether the conduct complained of should be characterised as "professional" or "personal" in nature; we must also decide whether the conduct reaches the threshold of misconduct, or whether it is more appropriately viewed as the lesser, unsatisfactory conduct. Or indeed, where inappropriate touching is alleged, whether it was, as the practitioner maintains, in some instances, merely accidental.

Issues

[8] The specific legal and factual issues to be resolved are:

1. In respect of each charge, did the conduct fall within s 7(1)(a) or (b) of the Lawyers and Conveyancers Act 2006 (the Act)? In order words, can it be seen as falling within a "professional" or "personal" context?

2. If "professional" –

   (b) Would the conduct "… reasonably be regarded by lawyers of good standing as disgraceful or dishonourable …"? (s 7(1)(a)(i)); or

   (c) Did it represent "… a wilful or reckless contravention of any regulations or practice rules …"? (s 7(1)(a)(ii)).

[1] Report by The Hon Dame Margaret Bazley. March-June 2018.
[2] This working group which produced recommendations to the New Zealand Law Society in 2018 was headed by The Hon Dame Silvia Cartwright.
[3] That is different from the previous reviews which looked at firm wide and profession wide issues.

These questions will necessarily involve an assessment of whether the Tribunal is satisfied to the required standard that the touching was not accidental.

3. If "personal", would the conduct justify a finding that the lawyer "… was at the relevant time not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer"? (s 7(1)(b)(ii))?

   Again, the issue of whether the touching was accidental will need to be determined.

4. If neither 2 or 3 is answered affirmatively, was the conduct either:

   (a) If "professional"; such as "… would be regarded by lawyers of good standing as being unacceptable, including … conduct unbecoming a lawyer … or unprofessional conduct."? (s 12(b)); or

   (b) If "personal"; did it consist of a contravention of any "… regulations or practice rules … (not being a contravention that amounts to misconduct …)"? (s 12(c)). [4]

5. In the event that our determinations of Issues 1-3 are in error; (a) do we consider that the four admitted instances of unsatisfactory conduct, when viewed cumulatively, amount to misconduct, either as: (i) disgraceful or dishonourable conduct, or (ii) a reckless breach of regulations of practice rules? Or (b) if the remaining two charges are found as against the lawyer also, do the six charges cumulatively amount to misconduct in one of the manners stated above?

[4] It should be noted that by the end of the hearing the practitioner had admitted the first and last three of the incidents at this level of unsatisfactory conduct.

Background

[9] In order to understand the events which are under consideration, it is necessary to briefly background the complainants, the practitioner and the nature of the functions which were attended by them.

Summer Clerks

[10] Each of the four complainants who gave evidence to the Tribunal were summer clerks at Russell McVeagh, Wellington, in the summer of 2015 to 2016. Some were third-year law students and some fourth-year law students. Each of them was a Russell McVeagh scholar, which meant that during their university studies they received some funds towards the cost of their study and had a connection with the firm, in particular being able to attend the Friday night drinks ("Friday Fives") held by the firm. In this way they were able to make connections with the lawyers in the firm and in due course they would expect to be employed as summer clerks in their third or fourth years of study.

[11] The summer clerkship, particularly for the fourth-year students, was regarded by them as a "*three month long interview*" following which they were often offered graduate jobs with the firm.

[12] In this way, the firm recruited what it saw as the most promising young scholars in the law. The students were not only provided with some financial support but a connection, and possibly a future with what they regarded as one of the most prestigious firms in the country.

[13] The summer clerks were assigned to a particular team within the firm on what they called a "bi-partite basis", whereby they would be members of a primary team but would spend some time assisting in a second team during their clerkship.

[14] It is fair to say that all of the clerks regarded their status as Russell McVeagh scholars as a considerable honour and privilege and were very keen to make a favourable impression during the summer with the hope of future employment.

[15] One of the firm's traditions was that the summer clerks would perform a skit at the annual Christmas party, and 2015 was no exception to this tradition.

[16] The skit was obviously seen as a work duty and important because the clerks were able to allocate specific time during their working day for research and practice, recording this on their timesheets. Evidence given was that not all clerks were equally enthusiastic about performing in a skit, however all felt a sense of obligation to do so.

[17] As will be seen the skit took place well into the evening, after dinner and for this reason the four clerks told us that they held back from drinking much alcohol in order that they would be able to perform the skit successfully.

[18] The fifth clerk ("Ms K") who is the subject of Charge 6 is not a complainant in this matter and did not wish to participate in the proceedings. However, the practitioner has acknowledged the events which form part of the charge relating to her and gave evidence about it. There were also two witnesses at that function who personally observed part of the conduct, and thus it was not necessary for K's evidence to be put before us.

The Practitioner

[19] Mr Gardner-Hopkins provided the Tribunal with a lengthy statement in which he set out much about his background in some detail. It is not necessary to provide specific details, but he describes a childhood, and in particular teenage years which were not without difficulties. Perhaps the most relevant details, because, in hindsight he sees them as important, are the death of his father when Mr Gardner-Hopkins was only 14 and his return to New Zealand from England a matter of months later.

[20] As a half-Niuean and half-British young man, with an English accent he found he did not easily fit into "Kiwi culture". However, he excelled academically and as a result skipped the sixth form[5], and started at Auckland University at the age of 16. He had not intended to become a lawyer and indeed says that until he started at Russell McVeagh he did not think he had ever met a lawyer out of Law School.

[5] Year 12.

[21] At University, Mr Gardner-Hopkins describes there having been very few Pacific Island and Māori students in his classes and that again, he did not feel he fitted in well. When he began as a summer clerk at Russell McVeagh at the age of 20 he describes himself as "bright eyed and bushy tailed". He describes his impression of the firm not only as expecting very hard work, and being thrown in at the deep end, but also one with "bright lights" and "glitz and glamor". He says this was due to the fact that it was "… *a large firm, with big entertainment budgets, corporate dinners and functions, and client and firm parties*".

[22] He went on to describe a culture where partners or human resources managers routinely put credit cards down on the bar "*with no limits on drinks for clerks and staff*". He describes his first 24-hour shift as a summer clerk as not being regarded as particularly exceptional, but rather "… *celebrated as a welcome to the factory – you've earned your first badge of honour, the "all-nighter*"." We make it clear that, apart from the "work hard play hard" culture, which was a consistently expressed opinion in the evidence, and with the exception of the culture of the EPNR Team which we later address specifically, we make no definitive assessment of the firm's culture as a whole, because of the limited nature of the evidence in that regard, and the fact that it was not the focus of this inquiry. We add that the firm was not separately represented before the Tribunal and has had no opportunity to respond to specific evidence about broader cultural issues.

[23] Mr Gardner-Hopkins described himself as a "Russell McVeagh lifer", and after being offered a graduate position he remained at the firm until the events which led to the charges before this Tribunal. They were such that he had no option but to resign.

[24] Mr Gardner-Hopkins described himself as privileged to have been mentored by some senior resource management lawyers, but also described the other part of his experience with the firm where he was treated as "… *something of a poster boy for diversity at the time – literally, being promoted on promotional material, posters and the like*". While he regarded the mentoring he received in the law as exemplary, he did not consider that the modelling of personal lives was as positive. On reflection he was able to see that, given the absence of a father figure in his life, he modelled his conduct on some of his seniors in the firm and, in hindsight, sees that was not always positive.

[25] In 2009 he took up an opportunity to transfer from the Auckland office of Russell McVeagh to the Wellington office to set up an EPNR Team. It was also his "mission" to grow the firm's business into the South Island.

[26] At the end of 2009 he was made a partner at the age of 30 and was the youngest partner in the firm, and the only Pasifika partner.

[27] He had expected to continue to rely on the mentors in the firm who had assisted him up to that time, but due to partners leaving the firm to become Barristers or to take judicial appointment, Mr Gardner-Hopkins reported a loss of regular guidance, mentorship and modelling of behaviour from those people.

[28] Mr Gardner-Hopkins describes his perception of the culture of the firm, and in particular the client development side of it, which he said involved a great deal of entertaining, including heavy drinking. He believed that he was expected to be the "young, cool partner" and as such was also involved in the recruitment of law students to the scholarship programme which has been described.

[29] He says that he was expected to be out entertaining three or more evenings per week and that usually he would include members of his team in that. He was open in stating that "*alcohol was a constant feature of this entertainment*".

[30] Mr Gardner-Hopkins described how his team developed both a reputation for being very social and a close-knit culture where they would work long hours and socialise together. Mr Gardner-Hopkins also indicated that as time went on he found himself having to work away from the office frequently, both to develop his South Island work and, during 2015, as part of a team (including some from outside Russell McVeagh) who were representing a client involved in the litigation following the sinking of the ship *Rena* off the coast of Tauranga.

[31] Mr Gardner-Hopkins acknowledged that around 2014 or 2015 the EPNR Team became more "laddish". He says that although the team was initially comprised of more women than men, that changed over time and he did not see that there was any deliberate decision for that to occur, it simply was how things worked out.

[32] He described that even if there was a very “big night” for his team, particularly following times when he had been away and he went out and socialised with the EPNR Team on his return, it was always expected that everyone would turn up for work the next day and that seemed to be the attitude that was valued by the firm.

[33] At the time he thought that all of his team enjoyed this type of culture, but reflecting back he accepts that he might not have perceived that not all enjoyed the social aspect to the extent of others.

[34] It is clear from Mr Gardner-Hopkins’ account and contemporary notes, which formed part of the evidence of the firm’s then Chief Executive, Mr McDiarmid, that the firm began to have concerns about the level of Mr Gardner-Hopkins’ drinking, and related conduct in 2014.

[35] Mr Gardner-Hopkins accepts that the burden of responsibility he felt in establishing the EPNR Team in Wellington, particularly after one of the firms most senior partners moved to the Bar, were factors leading to him dealing with his stress by alcohol misuse. In 2014 the firm found a psychologist for Mr Gardner-Hopkins to see, but because of her reporting back obligations to the firm he did not feel that he was able to be as open with her as he might have wished and that this impeded progress in respect to the issues confronting him.

[36] 2015 was an extremely busy working year for the practitioner who was away from the office approximately half of the year. His marriage had also by this stage encountered significant difficulties and by the end of the year it was clear that the marriage was in quite serious trouble.

[37] It was against this background that he attended the Christmas party in 2015 that is the subject of Charges 1 to 5. He was frank in telling us that he set out to get drunk that night. The following Monday he hosted a staff team building party at his home. This event is the subject of Charge 6.

The Functions at Issue

[38] The Christmas party in 2015 took place offsite at a venue known as The Pier at Evans Bay. It was the firm’s tradition that people dressed up for this party, and in order

to “warm them up” for this, champagne and beer would be delivered to each of the teams in the office by about 3.30 or 4.00 pm on the day of the party. Therefore, the drinking began before they even set off. They then set off as a group walking to the boat which was to take them to the venue.

[39] The boat trip took about an hour-and-a-half during which there was further alcohol consumed, while it did a tour of Oriental Bay. The witnesses estimate that they would have arrived at the venue around 6.30 to 7.00 pm.

[40] Mr Gardner-Hopkins described his group as sculling half glasses of wine within the first half to one hour. In his role as the social partner, Mr Gardner-Hopkins would invite people to come and scull drinks with them. The dinner took some time to be served and the drinking continued throughout dinner, particularly by Mr Gardner-Hopkins, who said he would have drunk another bottle of wine during the meal, having consumed a good deal of alcohol prior to that.

[41] The first incident occurred before dinner and the later incidents during the post-skit time when people were on the dance floor. The fifth and final incident of the night occurred as people were waiting for taxis outside the venue.

[42] The following Monday the EPNR Team’s Christmas party was held. During the day the team was taken to the “Adrenalin Forest” for a team building type physical activity in what is an aerial obstacle course involving ropes and climbing, as we understand it. There was no alcohol at this point. However, then the team went to Mr Gardner-Hopkins house for a barbecue to follow, at which there was considerable drinking, particularly later in the evening when the whiskey began to be poured.

[43] There was an expectation that most, if not all team members of the firm, ought to attend the Christmas function, at which the summer clerks would perform a skit. Likewise, there was an expectation that EPNR Team members would attend the “Adrenaline Forest” event; its purpose was to build camaraderie within the team.

Incident 1 – Charge 1

[44] Ms A’s evidence was, in summary, that not long after arriving at the venue for the Christmas party and before the dinner, she was approached by Mr Gardner-

Hopkins when she was at the bar. He put his (right) arm[6] around her and took her somewhat aside from the bar to where she perceived there were no or few other people. He suggested they have a drink together. He had his arm around her waist and "… *kept going with his hand so that it was positioned between (her) hip and (her) pubic bone*", over the line of her underwear. Ms A experienced this as "intimate" and "invasive". She realised that Mr Gardner-Hopkins was drunk. He then released her hip and said, "*let's scull a drink together*", which she perceived to be an instruction.

[45] He then put his arm around her again and was, as she described it, "*nuzzling into the side of (her) face and neck with his head*" so that she thought he was trying to kiss her. She extricated herself from him and went outside.

[46] In evidence in chief, Mr Gardner-Hopkins said that he recalled the interaction with Ms A, although recalls putting his hand around her waist or shoulders. He denied any sexual intent. In cross-examination this was further explored with him and he conceded that his putting his hand around her waist was not an accident: "*The putting the arm around the waist and having my hand generally in that area was intentional but it wasn't done with a sexual motive*". That followed a comment that there was "… *a fine distinction between hip, side of hip, slightly front side of hip, the final location of the hand, if it was more pointing towards the pubic area, was accidental*".

[47] Mr Gardner-Hopkins accepted that Ms A was a summer clerk with whom he had never previously interacted. He further accepted that walking up to her, moving her away from the bar with his arm around her waist, no matter where specifically his hand was, was inappropriate.

[48] Mr Gardner-Hopkins denied attempting to kiss Ms A the young woman but said he may have been leaning into her to be heard over the loud music. The practitioner explains the difference between his recollection and that of Ms A as follows: "*It is a bit hazy however, mainly due to the passage of time, the alcohol I had consumed, and also because I just don't remember the interaction as being particularly remarkable. This is the case for most of my recollections about the firm Christmas party*".[7]

[6] She recalls him standing on her left side.
[7] Statement of practitioner, para [70].

Incident 2 – Charge 2

[49] The second incident occurred after the dinner, which was apparently served quite late. Little food had been served in advance of it, and there had been a good deal of drinking. Ms B says that Mr Gardner-Hopkins approached her on the dance floor where she was dancing with a group. He put his arm around her waist and pulled her away from the group and repeatedly leaned in and out so that his face came close to hers. She described how he had his hands on her waist and then began moving them upwards and downwards. She said it felt like he was trying to touch her breasts and that he did so at one stage. She described the touch as "… *brief and I think it was done so it could be masked as dancing*". At this point she extricated herself from the practitioner by wriggling away from him.

[50] Mr Gardner-Hopkins describes energetic dancing on the dance floor and that he needed to lean in to be heard. He suggested that any touching of her breast was entirely accidental. He did however admit to drunkenly touching her breast later in the evening (Incident 5).

Incident 3 – Charge 3

[51] Like the other summer clerks Ms C had restricted her alcohol intake in order to be able to perform in the summer clerks' skit after dinner. There was also a speech by the newest partner (Mr Hunt) and then amusing awards were handed out. Ms C described the award being given to Mr Gardner-Hopkins as being for people "… *coma-ing out at his house in previous years*".

[52] The incident involving Ms C, which also occurred after dinner when the dancing was happening, was that the practitioner approached her from behind and "*grabbed or caressed her bottom*". Ms C says his hands were moving as he held her bottom and at first she thought he might have mistaken her for someone else. Then he put his hands around her waist and was moving his hands around her waist. He moved his hands up until he was touching her right breast "*caressing it from below*". She says this went on for a few seconds. Nothing was said between them. She described it as being dark on the dance floor. Ms C says she moved right to the opposite end of the circle where she had been dancing so she was then facing where she had been standing when the practitioner was behind her. At this point she observed Ms D, who

was standing where she had previously been. She saw Mr Gardner-Hopkins grab Ms D's face and kiss her on the cheek "… *in a fun-loving, drunk-uncle kind of way*".[8]

[53] Not long after this incident the practitioner approached Ms C at the bar and told her, in a way she perceived as an instruction, to "*finish (her) drink*".

[54] Mr Gardner-Hopkins has no recollection of any of these events and says that any touching would have been accidental. He described that he would have been dancing, holding people from behind in a conga line. Mr Gardner-Hopkins said he might have been encouraging Ms C to finish her drink because the bar was about to close.

Incident 4 – Charge 4

[55] This also occurred later in the evening during the dancing. Ms D had been dancing for some 20-30 minutes when she was approached by Mr Gardner-Hopkins who was on her right. She describes him as putting his arm around her in a tight clasp and that she felt engulfed by his "*large physical presence*". She describes Mr Gardner-Hopkins hand as moving to her bottom where it stayed for several seconds. She described that his hand made a circular motion around her lower back and bottom area. She said that because she was turning her head when he kissed her, she did not know which part of her face the kiss was intended for. She was shocked that this happened with so many people around and felt that the kiss was not an innocent one because of where his hand was on her bottom. Shortly after this she went up to Ms B and said, "*I'm pretty sure JGH just tried to kiss me*".

[56] Ms C also observed the kiss as described above.

[57] The practitioner does not recall this incident with Ms D but denies any sexual intention with any touching that occurred.

[58] The practitioner also gave evidence about the lack of feeling in a part of his left hand which was put forward to support the proposition that he may not have been

[8] NOE 120. Ms D did not experience the kiss in such an innocuous way.

aware that he was touching someone inappropriately with this hand. We will refer to the evidence about the hand at a later stage.

Incident 5 – Charge 5

[59] There were three witnesses to this event which concerns Mr Gardner-Hopkins' conduct towards Ms B later in the evening. A small group was waiting for taxis outside the venue. Ms A would be described as sober, having consumed little alcohol during the evening, largely due to a health condition she suffered. Ms B had described herself as being on a scale of 1-10 at about a 5 or 6. Mr E, another summer clerk, recalled that he was not particularly drunk because he was intending to go on to a personal meeting that was important to him.

[60] Mr Gardner-Hopkins and the other partner with him were both highly intoxicated, Mr Gardner-Hopkins describes himself to be at the point of staggering and slurring in his speech.

[61] While standing waiting for the taxis, Ms B describes how the practitioner put his arm on her waist and pulled her so she was facing him. She had been wearing a white t-shirt and had red wine spilled on it. Both she, and Ms A who was observing, described how he traced the red wine stain on her top across to her breast with his hand and Ms B said he let it stay there asking her "*what happened here?*". Ms B and the others watching described themselves as feeling paralysed because they were so shocked at his conduct. She says he then tried to get into the taxi with her, asking her a number of times to go home with him or to go home with her or to go to a nightclub called El Horno, but sometimes known as "The Horn".[9]

[62] The practitioner denies trying to get Ms B to go with him. At the hearing he wondered whether she may have misheard him saying "let's go to the Horn" instead of "let's go home". He points out that his wife would have been at his home,[10] and that all he would have wanted was another drink. In supplementary questions put to Ms A and Ms B as to the possibility of misunderstanding, neither considered that fitted with the context at the time.

[9] Mr Gardner-Hopkins was refused entry into El Horno later in the evening, because he was too intoxicated.
[10] Notably his wife was at home during the admitted events of Charge 6.

[63] The practitioner describes himself as having a hazy memory of the incident, which came back to him after the complaint was described to him some years later. He states that his touching Ms B's top with the red wine stain was meant to be a joke, albeit a bad one.

[64] Another summer clerk, Mr E, described how uncomfortable he had felt about the way Mr Gardner-Hopkins "… *was inserting himself into her personal space including touching her in what I felt was a creepy way. That touching included contact with her breasts. I don't know if it was accidental but it being intentional seemed consistent with the fact that he was being sleezy towards (Ms B)*". And later, "… *there was some contact with parts of her that there shouldn't have been … specifically her breast and that my strong feeling was that something was happening that shouldn't have been happening*".

[65] He also commented "... *you know watching a man and a woman when somebody is being appropriate and when they're not being appropriate, we have almost an animal instinct for it and this was not – he was an inappropriate presence close to her. We're not talking about two friends with their arms around each other."*

[66] Ms A and Mr E managed to prevent Mr Gardner-Hopkins climbing into a cab with Ms B. Mr E put it this way, "*those of us who remained outside the taxi all felt that James shouldn't be around (Ms B) following his behaviour in the entrance to the venue and definitely should not be next to her in the back of a car*".

[67] On the workday following the party, Ms A also reported this incident to Ms Sewell, the Human Resources Officer in the Wellington office.

[68] The incident was obviously considered sufficiently significant for a group of the clerks to discuss it when they met at the "Old Bailey" in the week following the incident and prior to Christmas 2015.

Incident 6 – Charge 6

[69] The practitioner does not dispute the core events of this incident, part of which was witnessed by Mr Z and his brother-in-law Mr Y.

[70] As set out previously, in the background above, there was an EPNR Team activity followed by a barbecue at the practitioner's home. This was initially attended by some spouses/partners of the team members. Mr Gardner-Hopkins' wife was present in the earlier stages of the evening but at some point, retired to the top floor (of four) to go to bed.

[71] Mr Gardner-Hopkins' house where the function was held, had on its lowest floor, an indoor heated swimming pool and sauna. By the late hours of the party the numbers had dwindled and those present were using the pool and sauna facilities. They were also drinking whiskey for some time, described by Mr Gardner-Hopkins as "heavy pours".

[72] At some point while in the sauna together Mr Gardner-Hopkins and Ms K, who worked more closely with him, began what later the practitioner describes as "*kissing and intimate touching*". This was observed by Mr Z who says he was still in the sauna and says that he exclaimed something like "WTF" to express his dismay and then stormed off. Mr Gardner-Hopkins says he was not aware of this and at some stage during his ongoing actions with Ms K, wondered if Mr Z was still in the house.

[73] The intimacy was also observed by Mr Y, Mr Z's brother-in-law who had coincidentally just returned from overseas, and arrived at the party late, to catch up with Mr Z, and was therefore much less drunk than those already present. Mr Y said he observed the activity by looking through the window of the sauna and observing the practitioner and Ms K.

[74] Under cross-examination Mr Gardner-Hopkins was asked to detail exactly what had occurred with Ms K. He then provided the Tribunal with a much more detailed account, which it is not necessary to record. It is sufficient to say that this evidenced a prolonged and intimate interaction at a level that can fairly be described as only just short of sexual intercourse.

[75] The practitioner indicated that he had not wished to detail the conduct out of concern for the privacy of Ms K. The Standards Committee assert that the practitioner's attempt to minimise the conduct, which he has now accepted was at least at the level of unsatisfactory conduct, was for his own benefit.

[76] Mr Gardner-Hopkins was at pains to be precise that the kissing and sexual contact had been initiated by Ms K and, after some time, brought to an end by him saying "*we can't be doing this*" or "*we shouldn't be doing this*". He claimed that prior to the intimacy, Ms K had provided "heavy pours" of whiskey for him as a deliberate attempt to get him drunk.

[77] Mr Gardner-Hopkins says that Ms K then said that she was not feeling very well and asked if she could remain at the house overnight. Mr Gardner-Hopkins says that he acceded to that request. He retired to another room on the same floor.

[78] The next day Mr Gardner-Hopkins simply dressed and went to work and says he put his ear to the door of the room that Ms K was sleeping in and could hear her but did not speak with her until he saw her later in the day at the office. He says they were both somewhat embarrassed and that he said that they had got carried away and should put it behind them. Ms K agreed and they agreed not to tell anyone.

[79] The matter was not to rest there however, because Mr Z reported the incident to Human Resources at the firm because he thought it was so inappropriate that a partner and a summer clerk had had sexual contact. Ms Sewell, the Human Resources Officer reacted by saying, "… *aggh I have just had summer clerks in here talking about JGH at the Christmas party*".

[80] The Board Members of the firm were informed. When initially confronted Mr Gardner-Hopkins said that nothing had happened between him and Ms K. Subsequently he spoke with the Chief Executive, Mr McDiarmid. Mr McDiarmid produced detailed file notes, not challenged in any material way by the practitioner, of a conversation between himself and Mr Gardner-Hopkins on the topic on Tuesday 22 December 2015. Again Mr Gardner-Hopkins denied anything untoward had taken place. He simply acknowledged that "*it all looks really bad*" and that he ought not to have put himself in a position of being in a sauna alone with Ms K.

[81] In the course of that conversation with Mr McDiarmid, Mr McDiarmid referred to Ms K having a "*drinking problem/vulnerability*", to which Mr Gardner-Hopkins did not respond.

[82] On 13 January 2016 the practitioner socialised with members of his team including Ms K, ending up at the El Horno bar. High levels of intoxication were reached by those attending, including Mr Gardner-Hopkins. Mr Gardner-Hopkins described himself as avoiding Ms K's flirtatious approaches to him that evening.

[83] It is noteworthy that, having been told by Mr McDiarmid on 22 December 2015 that Ms K was regarded as vulnerable and/or having a drinking problem, the practitioner had so little judgement as to go out drinking with her, given the incident (Incident 6) which had occurred on 21 December between them.

[84] In January of 2016 the incident with Ms K was revisited by the Chief Executive and Board Members with Mr Gardner-Hopkins. This followed another incident having occurred which involved Ms K and another lawyer in the firm, this is not a matter before the Tribunal and not relevant to its considerations. Meetings were set up in early February with Mr Gardner-Hopkins at which point he admitted he had misled the Chief Executive and the senior partner concerning what had happened between himself and Ms K in December. He apologised and explained that it had been for her protection and had been agreed between them as the best way forward, to pretend that nothing had happened.

[85] Within a matter of days Mr Gardner-Hopkins was informed that his position as a partner in the firm was no longer tenable and it was agreed that he would resign and quickly depart the firm.

[86] His departure was announced to the rest of the firm (advance notice having been given to the summer clerks) in positive terms that Mr Gardner-Hopkins was going to the Bar and expressing in glowing terms his contribution to the firm. Until his departure Mr Gardner-Hopkins was present at the firm from time to time although did have a work-related absence overseas early in the year.

[87] The summer clerks described how difficult his presence at the firm was for them. They perceived that Mr Gardner-Hopkins' departure was announced in an artificially positive way.

Issues

Issue 1 – Does This Conduct Fall Within Professional or Personal Boundaries?

[88] In respect of each of the six incidents described above the practitioner faces a charge of misconduct which is framed in the alternative, depending on whether the Tribunal finds the particular conduct to fall within the professional or personal conduct boundaries. In respect of what we term as 'professional' conduct the definition of misconduct is contained in s 7(1)(a)(i) and (ii) which state:

> **7 Misconduct defined in relation to lawyer and incorporated law firm**
>
> (1) In this Act, **misconduct**, in relation to a lawyer or an incorporated law firm, —
>
> (a) means conduct of a lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct—
>
> (i) that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable; or
>
> (ii) that consists of a wilful or reckless contravention of any provision of this Act or of any regulations or practice rules made under this Act that apply to the lawyer or incorporated law firm or of any other Act relating to the provision of regulated services; or…

[89] In respect of what we refer to as 'personal conduct', misconduct is defined by s 7(b)(ii) which states:

> (b) includes—
>
> …
>
> (ii) conduct of the lawyer or incorporated law firm which is unconnected with the provision of regulated services by the lawyer or incorporated law firm but which would justify a finding that the lawyer or incorporated law firm is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer or an incorporated law firm.

[90] In addition to that, each charge is framed with the lesser alternative of unsatisfactory conduct, either pursuant to s 12(b) for professional conduct or s 12(c) for personal conduct:

> **12 Unsatisfactory conduct defined in relation to lawyers and incorporated law firms**
>
> …
>
> (b) conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that would be regarded by lawyers of good standing as being unacceptable including—
>
> (i) conduct unbecoming a lawyer or an incorporated law firm; or
>
> (ii) unprofessional conduct; or
>
> (c) conduct consisting of a contravention of this Act, or of any regulations or practice rules made under this Act that apply to the lawyer or incorporated law firm, or of any other Act relating to the provision of regulated services (not being a contravention that amounts to misconduct under section 7).

[91] Finally, there is an alternative Charge 7 which is a cumulative charge reflecting all of Incidents 1 to 6 with the same statutory alternatives set out above. We propose to set out our determination of where we see the conduct falling in this case, but then will make a finding in respect of each incident in respect of the alternative view of the conduct should we be wrong in our classification.

[92] The starting point in understanding where the line which is to be drawn between professional and personal conduct, is the statement of the Full Court in *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal*[11]. It was emphasised that the two definitions of misconduct contained in subsections (a) and (b) respectively of s 7(1) together, cover the full spectrum of misconduct. In other words, there is no gap.

[93] A number of decisions have affirmed s 7 is to be given a broad and purposive interpretation. In *Young v National Standards Committee*[12] Whata J said:

> An act directed at maintaining public confidence, consumer protection and recognising the standing of the profession should be construed in a way that is consistent with that direction … ".

[94] In this, His Honour was referring to s 3(1) of the Act which states:

> The purposes of this Act are—

[11] *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2015] 2 NZLR 606 at [102].
[12] *Young v National Standards Committee* [2019] NZHC 2268 at [58].

(a) to maintain public confidence in the provision of legal services….;

(b) to protect the consumers of legal services…..:

(c) to recognise the status of the legal profession….

[95] Section 7(1)(a) and (b) are not disjunctive and thus provide coverage of all conduct of a lawyer, personal or professional. The difference between them is that s 7(1)(b) carries a higher threshold to find misconduct, in that it involves an assessment that, at the time of the conduct, it reflected on the fitness or suitability of the lawyer to continue in practice.

[96] Counsel for Mr Gardner-Hopkins argues that s 7(1)(b) is the correct subsection for consideration of the practitioner's conduct in all six instances. He submits that the conduct captured will be professional where "*the practitioner is using all of his or her skills and knowledge as a lawyer, it will apply when the lawyer engages with court processes even if not for a client. At the margins might be other conduct intimately connected to the lawyer's ability to provide regulated legal services to the public*".

[97] Through counsel Mr Gardner-Hopkins properly acknowledged that:

> … There is a degree of connection between the allegations and his legal work at Russell McVeagh. The people attending both Christmas parties were mostly legal staff from the firm (although partners did attend the EPNR Christmas party). Both events seem to have been covered by the firm's entertainment budget. Transport to both events was provided or at least seems to have been paid for by the firm. The team Christmas function certainly started in work hours …

[98] In *Orlov* the Court held that conduct will only come under s 7(1)(b)(ii) (personal) if it is not the provision of regulated services and if it is "*unconnected with the provision of legal services*". The concept of "legal services" is linked to the provision of legal work for any person. We consider that embraces all aspects of a lawyer's work that is connected to the legal services actually supplied to the client. That includes interactions among partners, professional staff, and other employees of a firm that are designed to enhance inter-personal relationships and to build a competent and trustworthy team whose combined talents will ensure a high standard of professional services are rendered. On that basis, we accept the Standards Committee's submission that the firm-sponsored team building events in issue is *"conduct that occurred at a time when the practitioner was providing regulated services within the meaning of s 7(1)(a)* …". Put more simply (albeit with double negatives) – the conduct

is not unconnected with the provision of legal services. Therefore, it must be professional conduct.

[99] That finding is supported by Hinton J's observations in *Deliu.*[13] Her Honour interpreted the phrase "regulated services" broadly, including in it all activities "*incidental to legal work*".[14] We accept the submission of the Standards Committee that "*under that construction, conduct falls under s 7(1)(a) if it is legal work or incidental to legal work, otherwise it falls under s 7(1)(b)*".

[100] Against this framework we turn to consider the evidence. We heard a great deal about what was claimed to be the firm's culture of "*work hard-play hard*", and in particular about the culture of the EPNR team led by Mr Gardner-Hopkins.

[101] Some social occasions will clearly fall within a lawyer's "personal" life. But in this case, Mr Gardner-Hopkins has painted a picture of professional life where the culture of hard work and long hours meant the need for a work team to "bond", and where socialising out of work hours was an expected and encouraged practice.

[102] We also refer to the evidence of Mr Z:[15]

> I was quite close with JGH and (name suppressed), as we worked long hours together. In the Wellington E&P team there wasn't much distinction between work time and home time. For example, we would often go out for dinner together after work, have a drink, and then return to work and even have meetings at 10 pm.

[103] The evidence demonstrated that practice development, "rainmaking", and retention of valuable clients, meant that socialising with clients was a strong expectation as part of professional obligations, including to one's partners and to the firm as a whole. Such entertainment often included staff members.

[104] In that context, it would be wholly artificial for firm and team social occasions, such as those under examination, to be disconnected from the phrase "… *at a time when he or she is providing regulated services* …"

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[13] *Deliu v National Standards Committee* [2017] NZHC 2318.
[14] *Deliu* see note 13 at [59]-[62].
[15] BOD 66 at [7].

[105] The Christmas party was an event only open to members of the firm, paid for by the firm, there was nothing that disconnected the function from work with the function commencing with drinks at the office, and continuing on to transport to the venue. Preparations for the office skit were seen as so connected with the work of the firm that there was a code for recording preparation time. The skit was regarded as part of the staff duties of the summer clerks. The function included speeches by the partners and clearly was seen as playing an important part in the cohesion of the firm and consequently beneficially impacting on the way the members of the firm worked together to provide legal services.

[106] Similarly, the team party was "a team building" activity as was the socialising subsequent to the obstacle course. The team travelled to the venues together in a van and stayed together. The team building was a budgeted firm expense. Clearly the whole purpose of both events was to enable cohesion and loyalty in a work team (or within the firm generally) so as to enhance the provision of regulated services to clients. As such, we do not consider it can be regarded as conduct "*unconnected with the provision of regulated services*".

[107] These were not occasions which Mr Gardner-Hopkins attended as a private individual. Unlike a social occasion (such as a birthday) to which chosen guests will be invited, the firm and team functions were ones that he attended as a partner and a team leader, as part of his obligations as a lawyer working within a large firm which placed strong emphasis on personal relationships amongst staff and with clients. Likewise, invitations were based on membership of the firm, not an outside relationship.

[108] Thus, we find that the provisions of s 7(1)(a) are those against which we should assess the conduct under scrutiny. We do so for each incident in turn.

Standard of Proof

[109] The standard of proof is prescribed by s 241 as being on the balance of probabilities.

[110] The Tribunal recognises that where the allegations are serious, strong evidence is required to establish them.[16]

Issue 2 - Does the conduct reach the level of Misconduct under either head?

[111] As a preliminary matter, we accept the submission of the Standards Committee that in order to reach the standard of misconduct, the conduct need not be intentional or deliberate. As held in the *C* case:

> While intentional wrongdoing by a practitioner may well be sufficient to constitute professional misconduct, it is not a necessary ingredient of such conduct. The authorities … demonstrate that a range of conduct may amount to professional misconduct, from actual dishonesty through to serious negligence of a type that evidences an indifference to and an abuse of the privileges which accompany registration as a legal practitioner.[17]

[112] This Tribunal said in the *Deobhakta* case:[18]

> The essential feature of misconduct under s 7(1)(a) LCA[19] is that the conduct be of a nature that indicates a serious deficiency in observing normally accepted standards.

[113] Counsel for the Standards Committee also urged upon the Tribunal a broad interpretation of the terms "disgraceful or dishonourable" in order to meet the protective purposes of the Act.

[114] In terms of the second limb pleaded - intentional or reckless breach of rules, the Rules which are alleged to have been breached are:

Chapter 10
Professional Dealings

10 A lawyer must promote and maintain proper standards of professionalism in the lawyer's dealings.

[16] *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 at [105].
[17] *Complaints Committee No 1 of the Auckland District Law Society v C* [2008] 3 NZLR 105.
[18] *Waikato Bay of Plenty Standards Committee v Deobhakta* [2013] NZLCDT 55.
[19] Lawyers and Conveyancers Act 2006.

Chapter 12
Third Parties

> 12 A lawyer must, when acting in a professional capacity, conduct dealings with others, including self-represented persons, with integrity, respect, and courtesy.[20]

[115] Although we have found the two work functions to constitute professional ones so that both Rules might be available, we consider Rule 12 is the most apposite.

We now embark on our evaluation of the evidence as to each of the incidents on which the charges are based.

(i) Incident 1 – Charge 1

[116] In respect of Incident 1 we accept the evidence of Ms A. She was a careful, reflective and straightforward witness. She was sober on the night in question, whereas the practitioner was even by this early stage in the evening, by his own admission, well on the way to deliberate intoxication. The practitioner has accepted that his own memory might therefore be faulty and that the incident had not made a great impression on him (as opposed to Incident 6 which he said was "*burned in my mind*").

[117] We find it established that Mr Gardner-Hopkins, approached Ms A with no usual courtesies such as introducing himself, asking her name or in other ways treating her as a person and immediately embarked on physical invasion, to use the term used by Ms A, namely placing his hand below Ms A's hip, on or below her underwear line, he then instructed her to drink alcohol "scull the drink" and then nuzzled into her face. We find that this combination of conduct meets the test of either being regarded as disgraceful or dishonourable, or a reckless breach of Rule 12.

[118] A failure to turn one's mind to professional obligations has been regarded by the Tribunal as "reckless" in a number of previous decisions.[21]

[119] We consider that the "professional" aspect of Mr Gardner-Hopkins' failure to pay any (or adequate) attention to the type of behaviour required of him at a firm function

[20] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 ("Rules").
[21] *Zhao v Otago Standards Committee* [2017] NZHC 1971 where this was approved by the High Court. at para [5]; and *Auckland Standards Committee v Holmes* [2011] NZLCDT 31.

represents a clear failure. On the occasions in question Mr Gardner-Hopkins paid little or no regard to his professional obligations in respect of his interactions with others. In closing submissions his counsel properly acknowledged:

> The practitioner accepts that the concepts of respect and courtesy can encompass matters including personal space boundaries, foisting alcohol on others in an unwanted way, and unwanted contact with more intimate body regions. Even on the Practitioner's own account of events, his conduct at the firm Christmas party leaves much to be desired in this respect.

[120] Certainly, his stated intention to get drunk during the firm Christmas party is very concerning. As a partner he had an obligation to model appropriate behaviour for his junior staff and behave in a way fitting of a member of the profession which includes self-regulation to ensure propriety. In particular, he ought to have been aware of the obvious power imbalance between a partner and a junior staff member interacting at a social function. The seriousness of his poor choices on that evening is compounded when added to his acknowledgement that when drunk his behaviour was to have "no respect for personal boundaries".[22] For all of these reasons we have no hesitation in finding also that the alternative pathway to misconduct, namely reckless breach of the Rules, is proved.

(ii) Incident 2 – Charge 2

[121] In respect of this incident we also found Ms B to be a clear and credible witness. She made appropriate concessions such as that the touch of her breast was fleeting. Although she clearly felt violated, she did not embellish what occurred. The core of the action that we find proven is that the practitioner made no attempt to relate to her as a person, showed little to no respect for her, put his arm around her waist, pulled her away from her group, and facing towards her, repeatedly leaned in to put his mouth near her ear. Finally, he moved his hands up and down her body until one came into contact with her breast.

[122] Although Mr Gardner-Hopkins contends that this contact with the breast was accidental, he was clearly imposing himself within her personal space and, as a person who did not know her, or even her name, this was clearly unacceptable and inappropriate.

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[22] NOE 434.

[123] If dancing with a summer clerk in a manner which was so close as to be having his mouth by her ear and moving his hands up from her waist, is not disgraceful, it is certainly a reckless breach of Rule 12 as discussed in the previous incident.

(iii) Incident 3 – Charge 3

[124] Ms C was an equally persuasive and careful witness. She was clear that the touching of her bottom was not an inoffensive brushing or jostling, but that his hand continued to move on it, after the initial touch.[23] The touching did not stop there but after having both hands around Ms C's waist, one of Mr Gardner-Hopkins hands moved up under one of her breasts in a motion that she described as caressing.

[125] Once again, we consider that this amounts to misconduct, either as a disgraceful intrusion into Ms C's personal space and intimate touching of her body, or as a reckless breach of Rule 12 as already discussed in relation to the earlier incidents.

[126] The fact that the witness described her impressions of the contact as being "sinister" once she then witnessed Mr Gardner-Hopkins kissing Ms D, does not detract, in our view from her credibility and reliability. She did not inflate her claim by reason of later information (as was initially suggested by the practitioner). Rather she was confirmed that her initial feeling of unease was an accurate one.

(iv) Incident 4 – Charge 4

[127] We find this conduct also rises to the level of misconduct. The combination of Mr Gardner-Hopkins putting his arm around this witness in a tight clasp and moving his hand on her bottom for some five seconds and then kissing her on the cheek, represents the same intrusion and taking of liberties with her as with the other complainants. The fact that Ms D immediately complained about the kiss to Ms B supports her shock and confusion about what had happened. Furthermore, the kiss was witnessed by Ms C.

[128] The fact that the practitioner had just minutes before grabbed another summer clerk and behaved in a similar fashion reinforces the non-accidental nature of the

[23] NOE 134.

incident. We find the practitioner's conduct to be either disgraceful, or a reckless breach of Rule 12.

(v) Incident 5 – Charge 5

[129] This incident at the end of the evening is arguably the most serious and blatant of that night, and certainly shocked those who witnessed it as well as the complainant. Although the accounts of what happened differ in some minor details, the core features are well established and serious. The fact that the practitioner was so disinhibited that he touched Ms B intimately in front of other people may speak to his level of intoxication, which he says was by then staggering and slurring. Or it may lend weight to the submission made by Mr La Hood on behalf of the Standards Committee that somehow Mr Gardner-Hopkins thought that such conduct would be tolerated and represented a sense of entitlement.

[130] The accounts of the witnesses also agree that the practitioner suggested going home with Ms B at least twice, separately from his suggestion that they go to town together. Both Ms A and Mr E who were present, were so concerned about the safety of Ms B around Mr Gardner-Hopkins that they intervened to prevent him entering the taxi with her and this of itself reinforces how out of line his behaviour was. Both witnesses independently contacted Ms B the next day to check on her welfare and to apologise for not doing more to intervene.

[131] We have no hesitation in finding this conduct to be disgraceful and/or dishonourable and certainly a reckless breach of Rule 12.

(vi) Incident 6 – Charge 6

[132] No findings of fact need to be made as they are not disputed, following the practitioner's further detailed account of the incident under cross-examination.

[133] It was put to him that the extra detail provided by him placed the conduct in the disgraceful or dishonourable category, and Mr Gardner-Hopkins' response was after some hesitation, "*I'm not sure, it's awful* …". Certainly Mr Gardner-Hopkins expressed clearly the guilt that he felt immediately after the incident and indeed the reason why he stopped the sexual touching from proceeding even further. He says that he was

feeling guilty about his wife, who was asleep upstairs and also the fact that Ms K was in his team. Having stated that it was "awful" Mr Gardner-Hopkins said that he felt actively pursued, "*that I felt like there had been an attempt to get me drunk … and that she came after me and I, I still know I shouldn't have done it but*".[24]

[134] In our view, who initiated the contact is irrelevant. Given the enormous power imbalance between the partner and head of the team, and the summer clerk in that team, conduct which comprised intimacy only just short of sexual intercourse, can only be characterised as disgraceful and dishonourable.

[135] If we are incorrect in that assessment it must certainly be regarded as a reckless breach of Rule 12 as discussed above. Therefore, we find this conduct to be at the level of misconduct rather than the unsatisfactory conduct acknowledged by the practitioner.

Evidence

Ruling on admissibility of "historical" evidence

[136] Section 239 allows the Tribunal a broad discretion to admit evidence which might not otherwise be admissible under the Evidence Act to "…assist it to deal effectively with the matters before it…":

> **239 Evidence**
>
> (1) Subject to section 236, the Disciplinary Tribunal may receive as evidence any statement, document, information or matter that may, in its opinion, assist it to deal effectively with the matters before it, whether or not that statement, document, information, or matter would be admissible in a court of law…".

[137] Evidence relating to the practitioner's conduct on occasions preceding the events the subject of the charges, the firm's culture in general, and the matters (recorded in the memorandum by the Chief Executive) put to Mr Gardner-Hopkins following the disclosure of the concerning events, were objected to as irrelevant, and beyond the scope of this (quasi-inquisitorial) hearing.

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[24] NOE 449.

[138] At the beginning of the hearing we accepted the evidence on a provisional basis, noting that we would reserve our position as to its admissibility and if admissible, the weight to be attributed to it at the conclusion of the hearing.

[139] The evidence, which was accepted by Mr Gardner-Hopkins, in summary included that he (along with other senior counsel); failed to intervene to stop a practice of sharing images by email of a female lawyer - where, for example her G string was visible, and commented on - along with other images; had a one-night stand with a junior lawyer of another firm at a conference; and kissed a prospective client[25] at a social occasion right in front of Mr Z. Mr Z regarded this as inappropriate given that Mr Gardner-Hopkins was married or at least in a long-term relationship at the time.

[140] The other example of culture, provided by Ms X, a solicitor in the team, and Mr Z was a collection (kept by Mr Z on his cellphone) of "JGH" sayings, particularly (sexualised) double entendres. This list appears to have been the source of some pride to the practitioner and his team.

[141] Some of the sayings from this list were apparently used in the summer clerk skit -making fun of Mr Gardner-Hopkins. The list has now been destroyed by Mr Z so we are unable to comment further on its contents, however it reinforces not only the impression of the "laddish" atmosphere accepted by Mr Gardner-Hopkins, but also, in our view, the somewhat sexualised and objectified view of women, which he does not accept.

[142] Further evidence was given by Ms L, a junior solicitor, who had been at the firm for about two years. It was to Ms L that the summer clerks went when they all came to realise that more than one of them had been inappropriately touched by Mr Gardner-Hopkins at the Christmas party.

[143] In January, 2016, following the second incident involving Ms K five of the female summer clerks (Ms A, Ms B, Ms C, Ms D and Ms K) became aware of the incidents involving each of them and asked to meet with the solicitor Ms L for advice on what they should do.

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[25] Mr Gardner-Hopkins talked about "mutual attraction" with the client whom he knew well, which "...on one night eventuated in a kiss..." NOE 391.

[144] Ms L immediately informed the Human Resources Manager, in Auckland. The manager joined the group via video link and reassured the summer clerks that she believed them and that steps would be taken as a consequence.

[145] To her enormous credit Ms L has been a huge support for the young summer clerks from that time. Ms L said that during January and February 2016 looking after the summer clerks was a fulltime job for her, "… *they were traumatised and needed a great deal of emotional support* …".

[146] Asked to describe the culture in the EPNR team, Ms L stated:

> The (EPNR) team led by James Gardner-Hopkins had the worst reputation for the work hard, play hard culture and in terms of team culture. My perception was that there was a misogynistic culture in that team and certainly female employees did not last long.

[147] Later in evidence, she summarised it as "*toxic masculinity*".

[148] In objecting to all of this evidence, Mr Long described it as opinion evidence unsupported by detail, of little probative value and significant prejudicial value. He emphasised that while the examples provided by this evidence in general might raise concerns about his client's moral conduct, that it was not relevant for our purposes.

[149] In this case, the defence is absence of intention and particularly sexual intention, and accidental touching. Because of that, all of these pieces of evidence become relevant. Although we have not given great weight to the generalised comments about team culture, where there were specific examples in the peripheral or contextual evidence, we did attribute some weight, particularly as to the issue of intent, or recklessness as to conduct around women. That is an important element of one of the grounds of misconduct found. Mr Gardner-Hopkin's pattern of failing to observe boundaries with females after he had consumed alcohol must be relevant to our assessment of the described incidents before us.

[150] To the extent that it removes the possibility of the incidents at the Pier being a one-off aberration in the practitioner's conduct and approach towards females in the workplace**;** the evidence is therefore relevant to our deliberations. We therefore reject Mr Long's submission.

Hand Evidence

[151] The practitioner referred to a serious injury suffered by him in 2005 and went on to say:

> Because I feel so little with this hand, I do think it is possible that it could explain that some of the touching that the clerks experienced may have occurred unintentionally.

[152] He also stated he was "*not a groper*". To support that he pointed to the relevance of the loss of sensory function in his left hand:[26]

> … I have a significant loss of the sensory function and "proprioception" in my left hand. In other words, I have a reduced ability to feel with that hand, but I have limited awareness of its position in relation to my body.

[153] He called expert evidence from a Ms Walden a physiotherapist he had consulted and who specialised in hand injuries.

[154] Ms Walden described how some of the fingers in the left hand have diminished protective sensation. She confirmed the grip strength to be the same in both hands and for example, he could turn a doorknob normally.

[155] In answer to a question that there was nothing in his injury which would prevent Mr Gardner-Hopkins from reaching out and putting his arm around someone, and touching a body part, Ms Walden accepted this was the case.

[156] Furthermore, in answer to a question from the Tribunal, Ms Walden confirmed that there was nothing in the impediment to his fingers that would prevent him knowing where his hand was in space. The sort of abilities which were impeded were such as buttoning up a shirt or being aware of where his left fingers were on a keyboard. The practitioner's little finger was not impeded, and Ms Walden confirmed that Mr Gardner-Hopkins would know where his little finger was, as he would the back of his hand.

[157] In the light of that evidence we do not consider that the suggestion of Mr Gardner-Hopkins that he would "*have limited awareness of its position (of his hand) in relation to (his) body"* can be sustained.

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[26] NOE 366-367.

[158] The suggestion of the reduced functionality in his left hand providing a reason for the intimate touching in the examples in this case is not tenable.

[159] Furthermore, we note that, in all but one example, the descriptions given by the complainants were of the use of his right hand or both hands

Credibility and Reliability

[160] We heard evidence from each of the complainants who alleged inappropriate behaviour at the firm function at the Pier. We found their evidence compelling. Each gave evidence honestly. All accepted the difficulties in recalling the detail of events after the passage of over five years since they occurred. Leaving such detail to one side, the complainants all had a clear recollection of the acts that they alleged Mr Gardner-Hopkins engaged that night.

[161] Although not put to us in this way we have carefully considered the possibility that recollection of events could be influenced by the discussions among witnesses and the previous reviews arising from the allegations made. We were impressed by the care taken by the witnesses to recount events from their own memory. On more than one occasion, the witness referred to a clear memory of how she had felt at the time, because even if peripheral details had been lost to memory, the feeling (including that of powerlessness) had not. We expressly excluded from our deliberations, opinions expressed by these witnesses.

[162] Although we did not hear from the clerk involved in the conduct that occurred at the EPNR Team party at Mr Gardner-Hopkins' home, the detailed explanation of what occurred that night that Mr Gardner-Hopkins gave before us, coupled with descriptions from two independent witnesses, leaves us satisfied of the nature and extent of intimate contact that occurred between the clerk and himself.

[163] Mr Gardner-Hopkins' evidence has evolved over the course of the process before the Standards Committee and the Tribunal. Initially, he denied that the conduct occurred. Some admissions emerged when evidence from eye witnesses was exchanged. By the time he gave evidence before the Tribunal, Mr Gardner-Hopkins had had the advantage of hearing from each of the complainants, with their evidence

being tested under cross-examination. This was the point at which he accepted the honesty of the evidence that had been given against him.

[164] To his credit the practitioner has not sought to directly attack the credibility of the four summer clerk witnesses. He says that he accepts their perception of the events and is regretful for that. He is simply unable to reconcile his conduct with his own view of himself when sober.

[165] In our view, Mr Gardner-Hopkins has not previously been able to accept that he acted in the manner described by each of the complainants. Put colloquially, he has been in denial. He has no real recollection of what occurred that night. Since the allegations were first put to him, his attempts at reconstruction have been influenced by a belief that he could not have acted in the manner described.

[166] We are satisfied that Mr Gardner-Hopkins' explanations for the alleged conduct are unreliable. There is no doubt that he was severely intoxicated. Our findings in respect of what occurred at the Pier are based on what we regard as both credible and reliable evidence from each of the complainants.

[167] We have also taken into account the fact that, as his evidence evolved, concessions as to particular behaviour were only made when inescapable. The two most serious incidents (5 and 6) were accepted by him. There were eye witnesses in respect of each. This failure to make prompt concessions occurred despite Mr Gardner-Hopkins frank acknowledgement of poor memory and intoxication.

[168] We have carefully considered the practitioner's suggestion that all of the intimate touching of these young women on that evening were accidental. We are unable to support his version as credible. We consider that we are entitled to have regard to the evidence as a whole in making an assessment in respect of each separate incident.

[169] In assessing whether the touching was accidental or not, we consider that it is highly unlikely that the practitioner could have inadvertently touched four different young women (some of the most junior present at the party, therefore likely to be in awe of him), in a manner which was intrusive and intimate, completely accidentally. The practitioner's version of events that he was drunken and oafish in his behaviour

may well be true, but it does not explain how the “oafishness” always managed to manifest itself in intimate touching of vulnerable young women.

[170] If the touching had been accidental, the expected normal response to touching such a part of the body would be shock, immediate withdrawal of the offending hand and an apology. Nothing like that occurred.

Issue 3 - Personal Conduct

[171] If we are wrong in our assessment as to this conduct occurring in a professional context, we would find in respect of each instance and certainly cumulatively (alternative Charge 7) that the conduct would justify a finding that Mr Gardner-Hopkins was not *at the relevant time* a fit and proper person or was otherwise unsuited to engage in practice as a lawyer. That is, we find that the higher threshold is reached in any event. He was, on any view of the matter, out of control.

[172] This view is based on our assessment that the five incidents of touching were not accidental (it is not contended that Incident 6 was accidental touching). This decision affirms what has always been the case, namely that indecent, unconsented or unwelcome touch by a lawyer on another, breaches the standards of conduct expected of a member of the profession. Intimate non-consensual touch connected with the workplace, on someone that the lawyer has power over, has always been unacceptable.

[173] This is the case whether the lawyer intentionally touches the subordinate, or has failed to self-manage to the extent that the lawyer’s conduct is inappropriately disinhibited. The profession expects of its members that those who work with lawyers are respected and safe. A basic behaviour expected of lawyers towards those they work with is that they are respectful and do not abuse their position of power. There is no place for objectification of women or indeed any person, by those in the profession of law.

[174] We accept the submission of Mr Long that the threshold in s 7(1)(b)(ii) is a high one. We also note that it ought not to be confused with a finding that the practitioner is *currently* not fit to practice. That is something that the Tribunal will need to consider when determining penalty.

[175] Mr Long relies on the recent decision of *Stanley*,[27] in the Supreme Court. We do not regard that decision as assisting us greatly in this assessment. The evaluation of "*fit and proper*" for admission to the Bar is a prospective, forward looking exercise, as was held by the Court. While the comments as to honesty, trustworthiness and integrity are relevant, they do not assist greatly, given the very different context of the offending in this matter.

[176] The concept of integrity was also put to us by both counsel in relation to the English *Beckwith*[28] case. That case was concerned with a context of drunken sexual intercourse between a law firm partner and a departing legal associate. However, it does not assist us greatly because there was found to be no imbalance of power in that case, such as so starkly exists here.

[177] [Redacted].

[178] The practitioner's departure from the accepted standards of lawyers to such a gross extent as was demonstrated by his conduct on both 18 and 21 December occasions demonstrates that he was not *at the time* a fit and proper person to be a lawyer.

Issue 4 - Unsatisfactory Conduct

[179] Since we have affirmatively determined misconduct to have occurred, either under "professional" (Issue 2), or "personal" (Issue 3), we do not consider Issue 4 requires determination. There is authority for the proposition that misconduct having been found it is not necessary to consider unsatisfactory conduct.[29]

[180] However, for the sake of completeness, in the event that we are wrong on our findings as to level of liability in Issues 2 and 3, we note that the practitioner has accepted findings of unsatisfactory conduct which would fall within Issue 4(b), namely "personal" conduct. The charges which the practitioner admits are Charge 1, Charge 4, Charge 5 and Charge 6.

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[27] *Stanley v New Zealand Law Society* [2020] NZSC 83.
[28] *Beckwith v Solicitors Regulation Authority* [2020] EWHC 3231 (Admin).
[29] *J v Auckland Standards Committee 1* [2019] NZCA 614.

[181] For completeness we would find all Charges 1 through 6 inclusive as having been established under either s 12(b) ("professional" conduct) or s 12(c) ("personal" conduct). In relation to the former, there is no question but that the conduct was such "*as would be regarded by lawyers of good standing as being unacceptable, including conduct unbecoming a lawyer and/or unprofessional conduct".*[30]

[182] In respect of the two charges not admitted by the practitioner, namely Charges 1 and 3, since we have rejected the proposition that the touching was unintentional, they are clearly breaches of s 12(c) as a contravention of Rule 12, already discussed above.

Issue 5 – Alternative Charge 7

[183] Again, for the sake of completeness, if there were no finding of misconduct on the first six charges, we would find the cumulative charge proved to the standard of misconduct, even if only the four charges admitted by the practitioner were taken into account. The involvement of three different summer clerks on two separate occasions and the degree of intrusiveness, clearly reaches the standard of disgraceful or dishonourable conduct or alternatively, a reckless breach of Rule 12.

[184] Adding the findings on the remaining two charges, even at the level of unsatisfactory conduct, reinforces this view and also would result in a finding cumulatively of misconduct on Charge 7.

Concluding Observations

[185] We wish to comment briefly on the effects on the complainants, and the other two (then) junior women lawyers who gave evidence. Of the group, two have left New Zealand - one specifically as a result of these events; at least one has left the profession; another changed her area of practice so as to avoid contact with Mr Gardner-Hopkins (especially after he was elected President of the Resource Management Lawyers Association); another felt her career had been adversely affected. It is a mark of shame for the profession that its most junior members have shouldered the burden of bringing these events to notice, but it reflects only positively on them.

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[30] Section 12(b).

[186] All the conduct, other than Charge 6, occurred in public areas, which in some ways normalised the unacceptable. Understandably, all witnesses questioned and reflected on what they had observed and felt. They had the moral compass to know what had happened was wrong and the courage to speak out. In doing so, in no small part they have initiated long overdue and necessary steps to ensure this conduct is not repeated on others.

[187] The Tribunal would not want this decision to be read as one which prevents enjoyable or even warm interactions between practitioners. Or to be read as enforcing a humourless, rigid code of behaviour on the legal profession, which is already a stress-laden one. A careful reading of the evidence recorded in this case, and understanding of the relevance of power imbalances, will reveal the stark differences between healthy collegiality and what happened here.

[188] We also wish to record our gratitude to counsel for the Standards Committee and counsel for the practitioner for the manner in which they conducted this case, and we recognise that it will have weighed heavily on them.

Summary of Findings

1. We find the charge of misconduct established in each of Charges 1 to 6 respectively, pursuant to ss 7(1)(a)(i) and/or (ii).

2. Alternatively, we find the charge of misconduct proved in relation to Charges 1 to 6, pursuant to s 7(1)(b)(ii). That being the case we do not need to make a finding as to Charge 7, an alternative charge.

Directions

1. A telephone conference is to be convened as soon as possible to provide a timetable for any further evidence, the filing of submissions and discuss venue.

DATED at AUCKLAND this 22nd day of June 2021

Judge DF Clarkson
Chairperson