NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2022] NZLCDT 29
LCDT 001/22

IN THE MATTER of the Lawyers and Conveyancers Act 2006

BETWEEN **AUCKLAND STANDARDS COMMITTEE 1**
Applicant

AND **JUSTIN CHRISTOPHER HARDER**
Respondent

CHAIR
Ms D Clarkson

MEMBERS OF TRIBUNAL
Hon P Heath QC
Ms S Hughes QC
Prof D Scott
Ms S Stuart

HEARING 29 July 2022

HELD AT Specialist Courts and Tribunals Centre, Auckland

DATE OF DECISION 23 August 2022

COUNSEL
Mr P Collins for the Standards Committee
Dr R Harrison QC for the Respondent Practitioner

DECISION OF THE TRIBUNAL ON LIABILITY

Introduction

[1] Mr Harder is a lawyer who faces one charge of misconduct arising out of an incident where he conducted himself in a highly inappropriate way in January 2021.

[2] Mr Harder agrees that his conduct was unacceptable and regrettable, but argues that it was in his personal capacity, not professional, and as such does not reach the standard of misconduct. He acknowledges and accepts the alternative charge of unsatisfactory conduct.

Issues

[3] What the Tribunal must determine is:

1. Was the practitioner acting in his professional capacity[1] or his personal capacity?[2]

2. If professional—

   (a) did he wilfully or recklessly breach r 10,[3] or

   (b) was his conduct disgraceful or dishonourable?

3. If the practitioner was acting outside his professional capacity, was his conduct such as to render him not a fit and proper person, or otherwise unsuited to be a lawyer?[4]

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[1] Therefore, subject to s 7(1)(a) of the Lawyers and Conveyancers Act 2006 (LCA).
[2] Therefore, subject to s 7(1)(b) LCA.
[3] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.
[4] This is the threshold required to reach the level of "misconduct" under s 7(1)(b)(ii)

[4] The last question raises issues about how transitory the fit and proper assessment can be, and it is on this issue that a somewhat unusual situation arises.

MS D F CLARKSON, CHAIRPERSON

[5] I have decided that the conduct was personal in nature but did not meet the threshold for personal misconduct. My colleagues have reached a different conclusion on the latter issue. I explain my reasons in this decision.

Background

[6] The facts in this matter are largely undisputed. They are supported by the evidence drawn from two sources, primarily the comprehensive statement provided by Mr Harder himself to the Standards Committee, which was undertaking an investigation into the matter.

[7] There is also the evidence of Mr B who was counsel for Mr S at the time of the incident, who we will treat as the complainant in this matter.[5]

[8] Mr B had recorded the presentation of his client, Mr S, and statements made by him immediately after the incident giving rise to this charge and then a little later, took a fuller statement from Mr S, having discussed the matter with his head of chambers. This formed the basis for his evidence.

[9] The Standards Committee had also intended to call Mr S himself. However, a series of events occurred prior to the hearing which led to a (wise) decision of the Standards Committee not to call him or rely on statements he had indicated he would make.

[10] The background to the incident on 18 January 2021 is that approximately two days earlier, Mr Harder's [redacted] was the victim in a serious home invasion by three or four people at her home. In the course of this she was seriously assaulted and her handbag, containing essential personal items including her house and car keys, was taken. She contacted Mr Harder from hospital to tell him about this incident and he

[5] Although Mr B was at pains in his initial report to the Complaints service to say he was reporting conduct as he was obliged to, rather than complaining about Mr Harder.

and at least one of [redacted] went to visit her in hospital, where Mr Harder learned more about the home invasion. [Redacted] told Mr Harder that she thought the perpetrators had gang affiliations. She was visibly injured, in a distressed state, and felt unable to return to live at her home. Some emergency accommodation was arranged for her through Victim Support, but this was only temporary and Mr Harder came under some pressure from [redacted] to assist with [redacted] plight.

[11] Because of a number of personal factors, which it is unnecessary to detail but partly connected with the victim of this crime, Mr Harder was at the time under immense pressure. He understood from [redacted] that the recovery of her handbag and the personal items therein was of immense importance to her and she asked him for assistance in this.

[12] On Monday 18 January 2021, the victim telephoned Mr Harder to inform him that there was a bail hearing for one of the alleged perpetrators who had been apprehended following the home invasion and had been charged with aggravated burglary.[6] The victim had been asked for her views in relation to the bail application.

[13] The bail hearing was to be at the Auckland District Court and Mr Harder decided to go to the court to observe it. He says his thinking was that if he could gain additional information about the defendant, he might be able to discern whether he was a gang member or had gang connections.

[14] The cases initially observed by Mr Harder did not appear to be related to the incident and he had decided to leave the court. Coincidentally, outside courtroom 2, he bumped into Mr B, a barrister with whom he had previously worked at the Public Defence Service. Being the first day back in court in the new year, they briefly spoke about holidays and then Mr B told Mr Harder that he was intending to act for a man charged with an aggravated burglary, who had an opposed bail hearing. Mr Harder informed Mr B that he had a connection with the victim. Both returned to courtroom 2 where Mr Harder observed the bail application.

[15] Although the matter was adjourned to the following day for an address to be checked, Mr Harder did learn something about the defendant, which was that he had

[6] Apparently two of the alleged perpetrators had been apprehended but one was understood to still be at large.

the support of a mother who was involved in restorative justice. He also learned that Mr S had no convictions for offending of that particular nature and had been cooperative with the Police. Mr B told the court that Mr S did not know the victim and that he had provided the Police with the names of his two co-offenders.

[16] Mr Harder describes himself as being somewhat perplexed when he left the court, given the detail he had been told about the violent nature of the home invasion and the expected significant gang connection. The picture of Mr S did not seem to fit.

[17] Apparently, the Judge that day gave Mr Harder the impression that there was a reasonable prospect of bail being granted, should the proposed bail address prove suitable the following day. Mr Harder formed the view that given the restorative justice connection and the prospect of bail, Mr S might well be a person prepared to make amends towards his victim by assisting in the return of her personal items.

[18] Mr Harder says that on the spur of the moment, he decided to speak to Mr S to see if he was prepared to assist in the recovery of the handbag. He then took himself to the custody cells, advising the custody officer that he wished to speak with Mr S. As a lawyer probably known to the custody officer and familiar with the processes for gaining access to prisoners in the court cells, Mr Harder thereby gained access directly to Mr S.

[19] Mr S was placed in an interview booth behind a plastic partition and Mr Harder sat down opposite him without introducing himself in any way. He says he began by telling Mr S that he had a close personal connection to the victim and then asked him if he had connection to any gangs. Mr S responded that he had no gang connections and claimed that he had remained outside during the home invasion and had no knowledge of what had occurred inside. Mr Harder says that from that point his discussion focused on the possibility of recovering the victim's property. However, Mr S said that he had no knowledge of it or its whereabouts.

[20] However, Mr Harder persisted by asking Mr S who the other two offenders were. The response was to supply first names and the respective gang memberships.

[21] Mr S went on to ask Mr Harder to convey his remorse and regret for what had happened to the victim. Mr Harder agreed that he would pass those comments on and told Mr S that it could help his case if he assisted in locating the possessions.

[22] About halfway through Mr Harder's conversation with Mr S, Mr B, who had been speaking with the defendant's mother following the bail hearing, came to the door of the interview booth. Mr Harder asked Mr B if he could have "two more minutes" with Mr S and Mr B agreed and remained outside the door. Mr B was unable to hear what was discussed inside the booth.

[23] Mr Harder indicated that by about the stage where Mr S had expressed his remorse, the inappropriateness of his own actions had begun to dawn on him. He says that he then took steps to wrap the conversation up.

[24] As he left, Mr Harder's version of events is that he said to Mr S, "Take care of yourself". Mr Harder noted that Mr S appeared taken aback and said, "What's that meant to mean?", at which point Mr Harder realised that the defendant had felt threatened by the comment. He says he went on to explain himself by saying, "Get out, do some rehab and be good to your mother and things might work out okay for you".

[25] Mr Harder is adamant that he had not intended to intimidate or threaten Mr S and that his comment was "…a perhaps awkward attempt to end the conversation on an amicable note, once I had realised that I should not have been engaging in the conversation at all".

[26] The description of events is picked up at that point by the evidence of Mr B, who says that when he saw Mr S immediately after Mr Harder had left, "he appeared shaken and troubled. He said to me that he felt threatened because Mr Harder had explained to him that his [redacted] had gang affiliations".

[27] Mr B's hearsay statements about what Mr S reported to him about the victim's alleged gang affiliations are not relied on in this matter. There is evidence from both Mr Harder and the victim denying any such affiliations, thus no reason why he would refer to those, given that they did not exist.

[28] Mr B's evidence is more relevant as to his observation of the anxious presentation of his client following the interview with Mr Harder.

[29] Mr B's concern was such that, following that interview, he made special arrangements with the prison to have his client placed on "managed isolation given his fear of retaliation from [redacted] and [redacted] gang members". That isolation was approved by the prison authorities and continued for some time.

[30] Of course, it is to be noted that Mr S was likely to have feared reprisals from the gang members, on whom he had informed at the point where he was "cooperating with the police". This makes it somewhat difficult to attribute all of his anxiety to the interview with Mr Harder. However, we have no difficulty in accepting that Mr S did feel intimidated by the visit from this unidentified person, who was associated with the victim and who was attempting to gain information from him.

[31] In his evidence, Mr Harder also acknowledged that "…in hindsight my dealings with Mr S on the day may well have made him feel distressed and even intimidated". Having said that, Mr Harder completely denies addressing the defendant in a threatening or intimidating manner or making any threats of retaliation, particularly any involving gangs.

[32] In submissions, Mr Harder's counsel somewhat resiled from that acceptance, attributing the acknowledgement to a misunderstanding that the reference to intimidation reflected a statement made by Mr S, rather than, as transpired at the hearing, being a question from Mr B to Mr S.

[33] We consider that was a somewhat unfortunate backdown in the circumstances. As Mr Harder himself acknowledges in his affidavit of June 2022, the fact that Mr S had earlier informed on his two gang member co-offenders to the Police meant that he was likely to have been fearful about the prospect of gang retaliation generally, and that may well have led him to misunderstand some of Mr Harder's questions or his approach, and in any event to be intimidated by it.

Issue 1 – was this conduct personal or professional?

[34] Mr Collins, on behalf of the Standards Committee, submitted that their primary case was that the conduct described above fell within the regulated services category under s 7(1)(a)(i) and (ii).

[35] It is accepted by the Standards Committee that the practitioner was not directly engaged in the provision of regulated services at the time, there being no client for whom services were being provided, and having regard to the personal nature of the practitioner's interest in the matter.

[36] However, counsel relies on the *Orlov*[7] decision, to bring the conduct within the professional category. Specifically, Mr Collins submits that the conduct was "very much connected with the provision of such services".[8] That quote comes from the paragraph in *Orlov* which reinforces the proposition that there is no gap between the two areas of conduct covered by s 7(1)(a) and 7(1)(b).

[37] This Tribunal is of course bound by the full court decision in *Orlov*.

[38] Mr Collins further submits that the conduct "will only be in the personal category … if it does not involve the provision of regulated services and if it is "unconnected with the provision of legal services".

[39] While we accept that the conduct took advantage of the practitioner's status as a lawyer in order to gain access to the holding cells, we do not consider that such misuse of privilege itself provides a connection with the provision of regulated services.

[40] We accept the submission of Dr Harrison that there "must of necessity be or have been some "provision of regulated services" on the part of the lawyer concerned, which the conduct the subject of the charge can reasonably be characterised as "connected to"".[9] Since we do not consider there was any provision of regulated services, we consider the proposition to be correct.

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[7] *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2015] 2 NZLR 606.
[8] See above n 7 at [112].
[9] In the *Orlov* case the conduct complained of involved the manner of complaining and speaking about various Judges and was seen as seeking to achieve, indirectly, an advantage for clients and therefore there was a connection with the provision of regulated services.

[41] We reject the submission that this conduct falls within the professional or regulated services category of s 7(1)(a).

Issue 2

[42] Having determined the conduct to be personal, we are not required to consider these two issues.

Issue 3 – does the conduct meet the threshold for personal misconduct?

[43] In order to reach the standard of personal misconduct, there must be an assessment that the lawyer's actions were so egregious that they demonstrated him not to be a fit and proper person to practice as a lawyer, as discerned at that time.

[44] The deliberate decision to abuse his privilege as a lawyer, for his personal benefit, is viewed by all members of the Tribunal as a serious departure from the standards expected of members of the profession.

[45] Although described by Mr Harder as a "spur of the moment" misjudgment, it would seem that he had some minutes from the time of leaving the courtroom, descending to another floor, making himself known to those guarding the holding cells and finally sitting himself down before Mr S in a confrontational manner. This was a clear misuse of privilege and power, although we do not find it to be as serious as that demonstrated in the two other cases referred to us, namely *Murray*[10] and *Paulson Wilson*.[11]

[46] As was discussed in those cases, there is a very important relationship of trust and confidence between prison authorities (in this case Police and custody personnel) and the legal profession. This relationship of trust allows lawyers privileges in relation to access to clients in order to carry out their professional obligations, which privileges are not enjoyed by members of the general public.

[47] When lawyers abuse this privilege that important relationship is damaged and all members of the profession suffer as a result.

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[10] *Auckland Standards Committee 1 v Murray* [2014] NZLCDT 88.
[11] *National Standards Committee 2 v Paulson Wilson* [2021] NZLCDT 16.

[48] While it is clear that Mr Harder was under enormous pressure at the time he made this error in judgment, four out of the five members of the Tribunal consider his conduct to be so reprehensible as to reach a threshold that, at that point in time, he was not fit to practice as a lawyer.

[49] In previous decisions, most recently the *Gardner-Hopkins*[12] matter, we found that it was not necessary to demonstrate that the lawyer ought to be struck off or suspended for the conduct by the time the assessment is made at a hearing, but rather that the relevant time for that assessment is when the conduct occurred.

[50] Dr Harrison, for Mr Harder, submitted that the assessment of fitness by analogy, should be a forward-looking assessment of fitness, such as undertaken by the Supreme Court in *Stanley*.[13]

[51] He submitted that the conduct had to be assessed in the context of the pressures under which Mr Harder was operating on the day, the fact that it was a spur of the moment decision and that even on that day during the latter part of his interactions with Mr S, Mr Harder showed insight into the inappropriateness of his conduct.

[52] Dr Harrison also referred to the prompt and fulsome contrition demonstrated by his client and also to the steps taken by him to address his own conduct. We do not consider those are relevant matters at this stage but rather matters relevant for the penalty stage of the hearing.

[53] I have some sympathy with the submission that the assessment of fitness requires a fuller look at context and other operative factors where the conduct is of such a short-lived nature. A "rush of blood to the head" ought not, in my view, necessarily lead to the conclusion of overall unfitness at the time.

[54] In this case, I assess Mr Harder's poor judgment, leading to his admittedly appalling conduct, existed for about 15 minutes. Having regard to the significant pressures being brought to bear on him, and the brevity of the conduct, I do not find it

[12] *National Standards Committee 1 v Gardner-Hopkins* [2021] NZLCDT 21.
[13] *New Zealand Law Society v Stanley* [2020] NZSC 83, [2021] 1 NZLR 50.

leads me to an assessment that he was unfit to be a lawyer that day. I say that, while denouncing the conduct itself.

[55] However, as already recorded, the majority of four members considered the conduct to be so egregious as to render its transitory nature irrelevant. Thus leading to their assessment that he failed the fit and proper test.

[56] The *Stanley* decision was one concerned with the assessment of fitness in connection to admission to the Roll of Barristers and Solicitors itself.

[57] The Court undertook what was described as "a protective exercise focused on either the need for public protection or the maintenance of public confidence in the profession…" and declared "...the approach is not punitive".

[58] Nor need the current assessment be punitive. However, it is difficult to easily fit the exercise of a future focus, as occurred in *Stanley*, with the assessment of fitness at a particular point in time in the past, in order to properly consider the threshold set out in the legislation, in this instance. We note that Dr Harrison conceded that "…the context of admission to the legal profession is not entirely on all fours with that of "personal misconduct"…".

[59] The Tribunal was also concerned that even at the point when Mr Harder himself began to appreciate how wrong he was (and indeed it would seem that it took even beyond the arrival of the defendant's own counsel for this point to be reached) he chose to remain in the situation. That does him no credit.

[60] For the reasons set out in the majority's decision the Tribunal finds Mr Harder to be guilty of misconduct pursuant to s 7(1)(b)(ii).

HON PAUL HEATH QC, MS S HUGHES QC, PROF D SCOTT and MS S STUART

[61] We agree with what the Chair has written, save for the characterisation of Mr Harder's conduct on the day in question. With respect to the Chair, we take the view that the conduct amounted to personal misconduct under s 7(1)(b)(ii) of the Act.

[62] In answering questions from the Tribunal at the conclusion of his oral evidence, Mr Harder acknowledged that his actions were “deliberate” but that his “judgment was clouded” at the time they occurred.

[63] Mr Harder was entitled, as a private citizen, to go to the District Court and to observe Mr S’s Court appearance. However, at the point he decided to go to the cells and see Mr S without seeking consent from his counsel, he embarked upon conduct that he knew abused his position as a lawyer. We do not consider conduct of the type that occurred in this case as sufficiently transitory in nature as not to reach the threshold of personal misconduct.

[64] Once Mr Harder formed the intention to go to the cells to see Mr S, he walked some 50 metres to the doors to the cells, went down two flights of stairs and used an intercom to indicate to the custodial officers that he wished to see Mr S. Undoubtedly, they believed he was a lawyer entitled to visit Mr S and he knew that he was not entitled to do that.

[65] Mr Harder was given access to the cells and taken to a booth where Mr S met him. He was talking to Mr S for at least two minutes before Mr B interrupted, and Mr Harder told him that he would need a couple of minutes more. While the conduct could have been more serious, for example if any threatening behaviour had been evidenced, Mr Harder persisted in conduct that he knew was an abuse of his position as a lawyer for personal reasons. He was sufficiently clear-headed to ask Mr B to leave him alone with Mr S even after he was interrupted. In short, while his judgment may have been “clouded” Mr Harder certainly knew what he was doing, and that it was wrong.

[66] Those who are in custody are vulnerable. They are not permitted any freedom of movement and have few options by way of complaint. Mr Harder only gained access to the cells because the custodial officers believed he was a lawyer exercising his functions as such.

[67] While Mr Harder refrained from making any representation to the custodial officer answering the intercom that he was a lawyer, he was well aware that that was the only basis on which he would have been given access to the cells. Trust is an important element in the relationship between lawyers and custodial officers within

Courts. Mr Harder's conduct had the potential to undermine that trust significantly, and on a broader scale than just affecting him.

[68] For those reasons, we consider that the conduct in which Mr Harder engaged should be viewed as misconduct. That is not to say that the surrounding personal circumstances which were clearly operating upon his mind are irrelevant. They will be of importance when any penalty is imposed.

Directions

[69] Penalty submissions are to be filed on behalf of the Standards Committee within 21 days of the receipt of this decision. Penalty submissions may be filed by the practitioner within a further 21 days. A penalty hearing of two to three hours is to be allocated in consultation with the case manager.

DATED at AUCKLAND this 23rd day of August 2022

DF Clarkson
Chairperson