NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2022] NZLCDT 50
LCDT 013/22

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**HIEROPHANTIC HARLEQUINESQUE HUMAN** Appellant
AND	**NEW ZEALAND LAW SOCIETY** Respondent

DEPUTY CHAIR
Dr J G Adams

MEMBERS OF TRIBUNAL
Mr S Hunter KC
Ms K King
Ms M Noble
Prof D Scott

HEARING 6 December 2022

HELD AT Specialist Courts and Tribunals Centre, Auckland

DATE OF DECISION 22 December 2022

COUNSEL
Mr H Human the Appellant
Mr P Collins for the Respondent

DECISION OF THE TRIBUNAL RE APPEAL AGAINST REFUSAL TO ISSUE PRACTISING CERTIFICATE

[1] At what threshold should we exercise our gate-keeping role around the issue of a practising certificate? Should we not simply give Mr Human a practising certificate and let him try to make a go of it? Are we being overly protective of Mr Human, the public, and the reputation of the profession, if we refuse to do so?

How does this appeal work?

[2] Mr Human is of undisputed good character, intelligent and articulate. He is enrolled as a barrister and solicitor. With a Master's degree in Law, his formal education is superior to that of most lawyers. He was last issued with a practising certificate in June 2014 upon strict terms requiring mentoring. That outcome attempted to resolve similar proceedings to these.

[3] Mr Human appeals against the Law Society's refusal to issue him with a practising certificate to practise as a barrister sole, without supervision. An appeal like this, under s 42 of the Lawyers and Conveyancers Act 2006 (the Act), is by way of rehearing.

[4] The process and focus of an appeal such as this was described by the Tribunal in *J v New Zealand Law Society*[1] in these words:

> [6] The provisions of the Lawyers and Conveyancers Act 2006 which are pertinent are as follows:
>
> **30 Practice by lawyer on his or her own account**
>
> (1) No lawyer may commence practice on his or her own account, whether in partnership or otherwise, unless –
>
> (a) he or she –
>
> (i) meets the requirements with regard to both practical legal experience and suitability that are imposed by rules made under this Act; and
>
> (ii) meets any other criteria that are prescribed by rules made under this Act; or

[1] *J v New Zealand Law Society* [2012] NZLCDT 27 at [6] - [12].

…

31 Exceptions to section 30

(1) Despite anything in section 30, a lawyer may, at any time, commence practice on his or her own account, whether in partnership or otherwise, if, immediately before the commencement of this section, he or she would have been entitled to do so under the Law Practitioners Act 1982 had this Act not been passed; and, for the purposes of this subsection, section 55 of that Act has effect as if it had not been repealed.

…

39 Issue of practising certificates

(1) The New Zealand Law Society, on application made to it by any person whose name is on the roll, must issue to that person a practising certificate either as a barrister or as a barrister and solicitor.

…

41 Power to refuse to issue practising certificate

(1) A regulatory society may refuse to issue a practising certificate to a person on the ground that the person is not a fit and proper person to hold a practising certificate.

(2) For the purposes of determining whether or not a person is a fit and proper person to hold a practising certificate, the regulatory society may take into account any matters it considers relevant and, in particular, may take into account any of the following matters:

(a) ...

(i) any other matters the regulatory society thinks appropriate;"

[7] As emphasised already, the appellant's application, the subject of the present rehearing, was for the issue of a practising certificate. In terms of s 41(1) the Tribunal is directed to concern itself as to whether the applicant is a *"fit and proper person"*. This is a venerable expression which requires the inquirer to investigate the applicant's character on the one hand and skill and competence on the other. See, for example, the discussion on point by the leading academic, G.E. Dal Pont[2].

[8] In our view the plain and obvious meaning of *fit* is to include an appraisal of the appellant's competence to practice unsupervised. The appellant was right to face-up to this by his letter to the Society of 4 March 2012.

[9] If we are wrong however, then we find that it is a matter of *"relevance"*, referring to the first part of s 41(2). Further, it is a matter which the Tribunal thinks is appropriate to consider, in terms of s 41(2) (i). In answer to a submission made by the appellant, the Tribunal is not minded to read down s 41 so as to restrict relevant matters to a context of poor character or failure to comply with the law. We consider to do so would be to fail in our statutory obligations as expressed in the purposes of the Act.

[2] G.E. Dal Pont *Lawyers' Professional Responsibility in Australia and New Zealand* at p. 27-29.

3 Purposes

(1) The purposes of this Act are—

(a) to maintain public confidence in the provision of legal services and conveyancing services:

(b) to protect the consumers of legal services and conveyancing services:

(c) to recognise the status of the legal profession and to establish the new profession of conveyancing practitioner.

(2) To achieve those purposes, this Act, among other things,—

(a) reforms the law relating to lawyers:

(b) provides for a more responsive regulatory regime in relation to lawyers and conveyancers:

(c) enables conveyancing to be carried out both—

(i) by lawyers; and

(ii) by conveyancing practitioners:

(d) states the fundamental obligations with which, in the public interest, all lawyers and all conveyancing practitioners must comply in providing regulated services:

(e) repeals the Law Practitioners Act 1982.

[10] The concern for professional skill and competence is critical. The New South Wales Court of Appeal put it nicely when, though speaking of the examination system, it said there is a:

> "… responsibility of the Court and all who administer the examination system to give full weight to the clear public interest of ensuring that only those who have, inter alia, the requisite professional and competence should be permitted to go forth to the public as practitioners in the law. Members of the public must of necessity place considerable reliance upon the competence of persons who are duly admitted to practice in one or other of the branches of the legal profession. This in turn imposes a responsibility to ensure that the public's trust is not misplaced."[3]

[11] The thrust of the appellant's case was to deter the Tribunal from exercising any inquiry for such under s 41 by submitting that the application was, in effect, one to enable him to practice as a lawyer on his own account under s 30. This both ignores the terms of his own understanding of the process when first bringing the application, and misunderstands the relationship between the two sets of provisions. Putting the matter shortly, the respondent could not give leave to a lawyer to practice on his own account unless that lawyer first has a practising certificate. They are two discrete processes.

[12] As counsel for the respondent said, by way of illustration to his opposing submission, otherwise there could be a quite anomalous result, one with far-reaching and detrimental consequences. If the respondent is right, a lawyer suspended from practice and returning after the expiry of the suspension could conceivably require mandatory readmission to practice on his or her own account in circumstances where that might be entirely inappropriate. Parliament did not intend this sort of result.

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[3] *Re Templeton* [1981] 1 NSWLR 1 at 8.

[5] The New Zealand Law Society does not want to prevent Mr Human from practising law. It wishes to prevent him from embarking on a course in which he seems likely to struggle, and probably fail. It wishes to protect the public from an inadequately experienced, unsupervised practitioner. It wishes to protect the profession from reputational loss that can ensue where an inexperienced practitioner blunders.

Is Mr Human "fit" to practise without supervision?

[6] The New Zealand Law Society opposes the appeal because it argues Mr Human is not currently fit to practise without supervision. We consider this case under the heads:

- What does Mr Human's practising history tell us?
- What assessment do we make of his business plan?
- What current experience and education does he have?
- In conclusion, is he currently fit to practise without supervision?

What does Mr Human's practising history tell us?

[7] Following admission in February 2005, Mr Human was employed for seven months as a barrister, supervised by a solicitor who was subsequently struck off. He was a barrister sole for a further 11 months. He got into professional difficulty. Following a complaint and an investigation concerning wrongful acceptance of fees without proper invoicing or record keeping, acting without an instructing solicitor, and incompetence, he was found guilty of unsatisfactory conduct and fined by a Standards Committee.[4]

[8] After a substantial gap, and in the course of an appeal similar to this one, he was given a practising certificate on condition of mentoring. After eleven months, he let his practising certificate lapse in June 2015.

[9] In 2014/2015, Mr Human was mentored by an experienced barrister, Mr Parmenter. Mr Parmenter reported quarterly to the New Zealand Law Society. Within the first six months of mentoring, Mr Parmenter was concerned about the lack

[4] 2 November 2011. Fine $10,000; costs $2,500.

of volume of Mr Human's work; effectively that he was failing to establish a practice and gain experience. Mr Human told us he had about three instructions in the first six months of practice. After one year, Mr Parmenter described Mr Human, whom he found a pleasant person to relate to, as "a bit of a lost soul."[5] Mr Parmenter urged Mr Human to seek employment as a more sensible way to launch his career.[6]

[10] In his letter of May 2022, Mr Parmenter advised the Practice Approval Committee about his views. His letter contained the following two paragraphs[7]:

> As I recall, the issue for Mr Human, in the end, was not about competency; it was about his inability to make a living in law. He did not have any contacts in any firms (or anywhere), so work supply was slim. As I recall, he had not competed (sic) a Duty Solicitor course, so that area was closed off to him (I think there was a related difficulty which combined to prevent a regular income as Duty Solicitor but I cannot recall it).
>
> Throughout the mentoring period, I pushed Mr Human towards a job in a firm where he would receive a regular income and where he would have adequate oversight on matters of law. His difficulty there was that his background training was under the "tutelage" of some practitioners who were not held in high regard by the profession and he was "poisoned fruit".

[11] It is our impression that it is Mr Human's view, not that of Mr Parmenter, that he is seen as "poisoned fruit." We think it unlikely that potential employers would generally have such a prejudicial view. Mr Human gave oral evidence that he had applied for 50 to 60 jobs but, when asked for more detail, he could only say he had telephoned one named lawyer seeking a job (not in response to an advertisement) and had spoken to another named lawyer. We have a firm impression that he has not sought employment in a determined or pragmatic manner.

[12] Mr Human urged us not to read Mr Parmenter's letters on their face but to accept Mr Human's word that Mr Parmenter holds a different view now. There is no evidence to substantiate Mr Human's submission. Advancing such a submission without an evidential base illustrates a lack of forensic understanding.

[13] After eleven months, Mr Human let his practising certificate lapse in 2015 and undertook other work (dishwashing, painting backdrops) and University study. He has

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[5] Bundle 020.
[6] E.g. Bundle 019, 020, 021, 022.
[7] Bundle 067 Parmenter letter 17 May 2022.

not practised law for seven years. His practice in 2014/2015 was not commercially viable. He does not believe any oversight of his practice is necessary.

What assessment do we make of his business plan?

[14] Although, when asked to issue a practising certificate, the New Zealand Law Society need not generally be satisfied that the practitioner will cope financially, where, as here, there is demonstrable risk, the associated concerns about letting loose an inadequately trained lawyer on the public are amplified.

[15] Mr Human handed up a "Business Plan" during submissions. He had not shown it to Mr Collins earlier. Consequently, neither Mr Collins nor we were able to make much of it at the hearing. Upon perusal, later, it projects a rising income but there is nothing to indicate how the work will be sourced from which $100,000 is projected in the first year. The text is somewhat hyperbolic – e.g.

> What sets Mr Human Barrister apart from all other barristers and solicitors is myself as a brilliant and budding barrister. With the same passion, integrity and compassion that I have lived by, I will drive the growth and success of my sole practice.

The foundation of his business plan appears to be aspiration unbound by realism. It does not square with, nor address, his previous failure. We find no basis for confidence in his business plan.

[16] Mr Human's drive and enthusiasm have not so far demonstrated real gains in business matters. Over eleven years ago, a Standards Committee ordered him to pay a fine of $10,000 and costs of $2,500. In the intervening decade he reduced the debt to $8,830 as at 13 October 2022. Although he has recently increased his payments to $100 per week, we infer that he has not been able to manage his affairs in the last eleven years to enable him to reduce that debt by more than $370 a year (just over $7 per week) on average. That performance does not speak well of his realism in business matters.

[17] Mr Human expresses a desire to work with a named high-profile criminal barrister but he offers no evidence that the barrister knows of his plan. He exhibited an email from barrister Mr Kovacevich which states (among other things):

> I do not have a position.

> If you can practice on your own account then I am happy to offer guidance, instruction, materials and mentorship as I have done to many practitioners over many years.
>
> ….
>
> I may be able to instruct you from time to time.[8]

We regard this gesture as an insubstantial base upon which Mr Human might aspire to found a career as a barrister sole.

What current experience and education does he have?

[18] Mr Human has recently undertaken two Law Society courses. He observed a murder trial from the public gallery. He obtained copies of materials from another seminar that took place in a hotel where he was employed, and he managed to observe the seminar.

[19] Although the Law Society Courses on Introduction to Criminal Law, and Duty Solicitor training, are excellent courses, they are designed for the practitioner who has, or will have, ongoing training and oversight in an employed situation. The three or four days involved in that training are no substitute for the incremental, safe acquisition of skills and judgement that occurs in a sensible period of current practice. Mr Human falls short of demonstrating that he should leapfrog the "apprenticeship" that lawyers generally undergo before embarking on sole practice.

[20] He has also undertaken a tenancy dispute on his own behalf, succeeding at Tribunal and District Court stages. He is entitled to be pleased with the outcomes, but we do not regard them as exceptional given the facts of the case. We do not extrapolate that he has thereby demonstrated competence of a broad professional skill base to show he is competent to practise as a barrister sole.

Is he currently fit to practise without supervision?

[21] Legal practice, particularly court work, is not simply about book learning. In this hearing, Mr Human demonstrated some lack of forensic skills despite his appropriate presentation and demeanour. For example, he embarked upon a cross-examination of Law Society employee Ms Inder that proved fruitless because he had not appreciated that she was not the decision-maker. Another example was his failure to show his

[8] Exhibit R to Mr Human's affidavit 28 July 2022.

Business Plan to Mr Collins or the Tribunal in time for any evaluation of it during the hearing.

[22] Mr Human has a view that the New Zealand Law Society is discriminating against him by its stance. He suggests this may be because he was employed, several years ago, by two lawyers who had ongoing issues with the disciplinary processes, or because of his previous disciplinary finding. We do not detect discrimination. If anything, the New Zealand Law Society case advances a protective concern for Mr Human – as well as for the public. Its reasons are principled, addressing relevant issues.

[23] We note that changes in 2008 mean that lawyers must generally have obtained about three years full-time legal experience (4,830 hours) over the five years preceding their application to practise on their own account: see Lawyers and Conveyancers Act (Lawyers: Practice Rules) Regulations 2008 at regulations 3 and 12. This does not apply to Mr Human, who was admitted to practice before 2008. It nevertheless reflects the general expectation that lawyers will have obtained some meaningful amount of practical experience before they are regarded as fit and proper to practise unsupervised.

[24] As noted above, Mr Human is intelligent, he can present well in Court. As yet, he has insufficient experience to go solo. That is all there is to it. His failure to accept that situation concerns us. Associated with his lack of overseen experience is the warning implicit in his previous failure to get a practice going. There is no material to suggest he can now do better.

[25] We are not minded to renew the offer of 2014, a practising certificate with a mentoring condition. It did not work. Mr Parmenter remains well disposed towards Mr Human who is personable. Like Mr Parmenter, we urge him to seek employment. Mr Human's circumstances are very like those in *Re McGuire.*[9] With a decent period of tutelage, he could realise his ambition to become an independent practitioner. Another path would be for him to attach himself to a competent practitioner, partaking in work on cases, building experience over a couple of years to the point where his wish would become attainable.

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[9] High Court, Wellington, 10 August 2000, Heron J; M 161/00.

Decision

[26] Having approached the matter afresh, we are far from persuaded that Mr Human is primed to commence sole practice. In our view it would be unsafe for the public to permit him to practise under those conditions.

[27] The appeal is declined.

[28] We are inclined to thinks costs should lie where they fall (as was the case in *Re McGuire*[10]) but if the New Zealand Law Society seeks costs, we shall direct a timetable.

DATED at AUCKLAND this 22nd day of December 2022

Dr JG Adams
Deputy Chairperson

[10] See above n 9.