NON-PUBLICATION ORDERS MADE REGARDING NAMES AND PERSONAL INFORMATION. THESE ORDERS ARE MADE PURSUANT TO S 240 OF THE LAWYERS AND CONVEYANCERS ACT 2006.

NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2022] NZLCDT 55
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 KC
Ms S Hughes KC
Prof D Scott
Ms S Stuart

HEARING 6 December 2022

HELD AT Specialist Courts and Tribunals Centre, Auckland (Counsel, practitioner and Ms S Hughes KC attended by AVL)

DATE OF DECISION 23 December 2022

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

RESERVED DECISION OF TRIBUNAL PROVIDING REASONS FOR PENALTY IMPOSED

Introduction

[1] Mr Harder was found guilty of one charge of misconduct by a majority of the Tribunal on 29 July 2022. Following a penalty hearing, the Tribunal made orders censuring the practitioner and awarding a proportion of the two costs orders against him.

[2] This decision provides the reasons for those orders.

Scope of matters to be determined

[3] The scope was limited because, for reasons we shall outline, the Standards Committee properly and fairly accepted that the misconduct, as found, was not at the higher end of the spectrum of misconduct. For this reason, penalties of censure and fine were sought, together with partial costs recovery.

[4] For his part, Mr Harrison KC, on behalf of Mr Harder, accepted that the principles of penalty enunciated by counsel for the Standards Committee were correct, but opposed the imposition of a fine, as unnecessarily adding to the deterrent effect of a censure. Mr Harrison also challenged the level of costs sought.

[5] We set out, briefly, the relevant disciplinary penalty principles as they relate to these, quite unusual circumstances.

Seriousness of conduct as a starting point

[6] The Tribunal was unanimous in its finding that this conduct fell within the personal not professional category.[1] The majority found at the level of misconduct which requires a finding that at the time of the conduct in issue the lawyer was not a "fit and proper person or was otherwise unsuited to engage in practice as a lawyer".

[1] Thereby falling under s 7(1)(b)(ii) of the Lawyers and Conveyancers Act 2006.

[7] For the Standards Committee, Mr Collins accepted that, on the authority of *Gardner-Hopkins*,[2] that a finding of misconduct in the personal category "…ought not to be confused with a finding that the practitioner is currently not fit to practice".

[8] It was accepted that the nature of the misconduct in this case was transitory and, as such, did not require any consideration of interfering with the practitioner's ability to practice. It was accepted that not only was the conduct transitory in nature, but also out of character for this practitioner.

[9] However, the Tribunal recorded its unanimous view in the liability decision that Mr Harder's actions comprised a "…deliberate decision to abuse his privilege as a lawyer, for his personal benefit" and that this was "a serious departure from the standards expected of members of the profession, furthermore that it was a "clear misuse of privilege and power…".

Aggravating and mitigating factors

[10] There were no aggravating factors.

[11] There are a number of relevant mitigating features:

1. The cooperation with the Standards Committee from the outset and the practitioner's fast acceptance of responsibility, expression of regret and remorse and apology stand him in good stead.

2. Mr Harder has taken steps to examine with both peers and other professionals, what it was that led him to this misstep and therefore what can prevent reoccurrence.

3. There are no previous disciplinary findings, Mr Harder can rely on his clean record.

4. We take account of the practitioner's contribution to the profession. He is seen as a person to whom others can go for ethical and other professional advice. The numerous positive references endorse the Tribunal's own

[2] *National Standards Committee 1 v Gardner-Hopkins* [2021] NZLCDT 21 at [174].

impression that Mr Harder is normally a lawyer with high standards, pride in his profession and is extremely hard working for his clients.

[12] The references (although often not given much weight in disciplinary matters) were useful in this case to confirm also that the practitioner is a person sensitive and responsive to others, and in particular to those persons he represents who can be vulnerable, with problematic histories. He is also careful to observe Tikanga Maori.

[13] Mr Harder is described as a willing mentor and supportive colleague in all respects.

Penalty principles important in this case

[14] We accept Mr Collins' submissions that the relevant principles are:

(a) deterrence;

(b) consistency; and

(c) proportionality.

We add to that:

(d) the principle of the least restrictive intervention, as espoused in *Daniels*.[3]

[15] In addressing the issue of specific and general deterrence, Mr Harrison submitted that there was no need for a fine to be imposed for this purpose, in addition to the formal censure which Mr Harder accepted should occur. We accept that submission. We do not consider that the specific deterrence required in this case requires anything more than the formal censure which we deliver to Mr Harder, attached as Appendix 1 to this decision.

[16] Furthermore, we consider that the risk of receiving such a censure, which is a serious penalty, in that it remains on the practitioner's record permanently and is available to the public; coupled with the imposition of an order that the practitioner

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

contribute to the costs of the proceedings, is proportionate in relation to the level of misconduct in this case, and sufficient to deter others.

[17] In terms of consistency with other cases, as set out in our liability decision, we consider that this particular conduct is best compared with the Tribunal decisions in *Murray*[4] and *Paulson Wilson*.[5] That is because these cases also involved the abuse of privilege as lawyers and consequent damage to the relationship of trust between lawyers and prisons or other custodial authorities. However, as stated in the liability decision, this is certainly not at the same level of seriousness as those cases.

[18] Further cases that were cited to us in submissions by counsel involved situations where the Tribunal had imposed penalty in less serious misconduct cases, and in particular those where extenuating personal circumstances were involved.

[19] It is impossible to compare cases directly since each involves its own complex set of surrounding circumstances. However, we consider that the penalties imposed in this case are consistent with those imposed in previous decisions by the Tribunal.

[20] In determining not to impose a fine in addition to censure, we have also had regard to the principle of the least restrictive intervention as enunciated in the *Daniels* decision.[6]

Costs

[21] We now turn to consider the issue of costs. Once again, the Standards Committee was fair in discounting the quantum of costs to be claimed, by excluding those costs which arose from the pursuit of a witness who was subsequently found to be unreliable and whose evidence was abandoned by the Standards Committee. Mr Collins simply sought a contribution to the remaining costs of $16,000.

[22] Mr Harrison, while accepting that his client ought to make a contribution to the costs, advanced two reasons why that ought to be reduced in the circumstances of these proceedings. Firstly, he said that the case had been "unnecessarily complicated by the Committee's insistent pursuit of the professional misconduct charge". This was

[4] *Auckland Standards Committee 1 v Murray* [2014] NZLCDT 88.
[5] *National Standards Committee 2 v Paulson Wilson* [2021] NZLCDT 16.
[6] See above n 3.

an alternative charge which the Tribunal rejected, finding, as it did, that the conduct was personal. Mr Harrison had urged that the professional misconduct aspect of the charge be withdrawn at an earlier stage.

[23] Secondly, Mr Harrison submitted that the unsuccessful attempts to obtain evidence from Mr S required considerable extra attendances on behalf of Mr Harder to reveal the potential unreliability of that witness. In addition, an adjournment of a hearing set down for April was necessary because of matters surrounding that witness.

[24] Counsel submits that a further discount ought to be applied in relation to these issues.

[25] In response to point 1, Mr Collins pointed out that the hearing was still required, together with the general case management in the proceedings, and therefore at least the s 257 Tribunal costs ought not be reduced.

[26] In addition, Mr Collins made the submission that the professional and personal distinction is one of the most difficult areas of this part of the law and he submitted this case was on the margins. He submitted that the pursuit was not irresponsible, and there was an arguable case for the conduct being seen through the "professional" lens.

[27] Although not cited in submissions, the binding authority on the Tribunal in relation to costs is the decision of *Lagolago*,[7] in which Clifford J comprehensively discussed the topic of costs and the approach taken by various higher Courts in the past. His Honour held:[8]

> In my view, therefore, the correct approach in New Zealand in disciplinary proceedings where the relevant Tribunal does have a broad jurisdiction to award costs is that costs **do not simply follow the event**. The fact that a regulatory function is being discharged in the public interest is a relevant consideration, but is not determinative. … What is required is an evaluative exercise of the discretion provided by the Act.(emphasis ours).

[28] His Honour went on to state that the "Calderbank rules" do not apply in disciplinary proceedings, which is relevant to some extent here, as impliedly contained within the submission of Mr Harrison on his first point.

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[7] *Lagolago v Wellington Standards Committee 2* [2017] NZHC 3038.
[8] See above n 7 at [33].

[29] We note from Mr Collins' costs memorandum that the original Standards Committee costs amounted to some $28,941.83. From this it can be seen that the Standards Committee have significantly discounted the amount to be sought to take account of the issues raised by Mr Harrison's second point.

[30] We consider that Mr Harrison has placed too much emphasis on the concept that, as in civil proceedings, costs normally follow the event. That notion is specifically dismissed by his Honour, Clifford J, in the *Lagolago* decision.

[31] The dictum in *Laglago* also departs from the previously relevant authority of *Baxendale-Walker*.[9] In that matter, the English Court of Appeal held that:

> Absent dishonesty or a lack of good faith, a costs order should not be made against a regulator unless there is good reason to do so. That reason must be more than the other party has succeeded.

[32] In this case, there is no suggestion that we should make an order for costs against the Standards Committee, as prosecutor. That is the subject that *Baxendale-Walker* addresses. We are concerned with a different point. The issue for us is whether the Committee's costs should be reduced for reasons relating to its prosecutorial conduct and the additional costs that were thrown onto the practitioner as a result. There is no immutable rule as to whether costs should or should not be reduced in that circumstance. It is a factor to be weighed in the balance in the exercise of the Tribunal's discretion as to costs.

[33] We consider that having regard to the concession in the costs sought, already made by the Standards Committee, and despite one of the alternatives pleaded not finding favour with the Tribunal, the respondent is not assisted greatly by that outcome. He was still found guilty of misconduct.

[34] Having regard to the additional work required by Mr Harder's own counsel in relation to the complainant witness who was not called, we do consider a small further discount ought to be applied. Standing back and assessing a proper contribution by the respondent to the overall costs, we determined that a figure of $14,500 towards the Standards Committee costs ought to be paid by Mr Harder.

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[9] *Baxendale-Walker v Law Society* [2008] 1 WLR 426, which has been followed by the Tribunal in a number of cases.

[35] Furthermore, we certify the s 257 costs in the sum of $8,017 and, as is mandatory, this is ordered against the New Zealand Law Society.

[36] Having regard to the factors already referred to, we also considered that it would be proper to discount somewhat the practitioner's contribution to the repayment of those costs and we ordered that he is to pay 70 per cent of those to the New Zealand Law Society.

[37] Finally, to confirm the orders that were made on 6 December, the non-publication order, which had previously been made on 1 July 2022, was extended to include all personal material contained within the reference given by Ms Manning.

Orders

1. Mr Harder is censured in terms of the written censure attached as Appendix 1 to this decision.

2. He is to pay costs of $14,500 to the Standards Committee, pursuant to s 249.

3. Section 257 costs are awarded against the New Zealand Law Society in the sum of $8,017.

4. Mr Harder is to pay the sum of $5,611.90 to reimburse the New Zealand Law Society for 70 per cent of the s 257 costs.

5. The non-publication order is extended, as set out above.

DATED at AUCKLAND this 23rd day of December 2022

DF Clarkson
Chairperson

Appendix 1

CENSURE

Mr Harder, for reasons which have been suppressed, you allowed feelings of concern for a victim of crime to overwhelm your better judgement and lead you into this serious, albeit short lived, error in your conduct. Although personal conduct, you have recognised that your misjudgement reflected badly on you as a lawyer and on your whole profession. The relationship of trust between custodial authorities and lawyers is a privileged and precious one. By damaging that trust, you have potentially disadvantaged your colleagues at the criminal bar.

It is to your credit that you quickly recognised and acknowledged your error and expressed considerable regret for, and insight into, your actions.

This formal censure will remain on your record as a reminder to you and others of the importance of holding yourself to a high standard of conduct in your personal and professional life.