NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2014] NZLCDT 14

LCDT 025/11

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**WAIKATO BAY OF PLENTY STANDARDS COMMITTEE No. 2** Applicant
AND	**W** Practitioner

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr W Chapman

Mr A Lamont

Mr P Shaw

Mr S Walker

HEARING at Auckland

DATE OF HEARING 1 April 2014

APPEARANCES

Mr M Hodge for the Standards Committee

Mr P Gorringe for the Practitioner

DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[1] Today we are considering what began as one charge with six particulars against Mr W. These charges were laid in December 2011, however they relate to conduct under the 1982 Law Practitioners Act, and thus in terms of the transitional provisions of the Lawyers and Conveyancers Act, any penalties arising from determination of the charges are governed by the 1982 Act.

[2] Following the charges being laid in December 2011, a number of extensions, as I recall, were granted for a Response from the Practitioner because he was so unwell. At that stage he was receiving treatment [redacted]. The Response was received from him in May 2012 denying the charge and particulars. Since that time it has been particularly difficult to progress this matter to a hearing with the Practitioner consistently being considered too unwell to instruct his very patient and understanding counsel.

[3] Eventually it was agreed, following a telephone conference, that there was to be a proper [redacted] evaluation of the Practitioner's fitness to plead and to instruct counsel and that task was completed by November 2013. It led to the finding by the Doctor that the Practitioner was indeed able to understand the nature of the charges and to instruct his counsel. However there was still difficulty obtaining any formal evidence from the Practitioner. This led to a pragmatic approach by counsel to seek a short submissions only hearing with the Practitioner excused.

[4] It is a very unusual step for the Tribunal to excuse a Practitioner, but in the end it was approved and it was agreed that the very lengthy response which the Practitioner had made to the original complaint by his letter of June 2009 to the Standards Committee, would form the basis for his evidence in the absence of an affidavit being able to be achieved from him.

[5] Now the final procedural matter which needs to be recorded is that at the hearing the Standards Committee sought to amend the charge to an alternative

charge of negligence, and the terms set out in s 112(1)(c), using the wording in that section, and that was not opposed by Mr Gorringe on behalf of the Practitioner. It was duly granted by the Tribunal. At that point also, three of the particulars were withdrawn. Particulars two, four and six, and the Practitioner admitted particulars three and five. That left for determination, and the subject of submissions, just particular one.

[6] The brief background to this matter is that the Practitioner was approached by a solicitor indicating that, or asking if he were available to take on what was to be a potential claim under the Treaty of Waitangi, and the Practitioner accepted that invitation with alacrity. The approach from the solicitor had been, it turns out, because he suffered from some conflict of interest in relation to the matter but it would seem that Mr W didn't entirely appreciate that, and it seems he might have thought that he could use this practitioner as an instructing solicitor, but of course that wasn't possible because of the conflict of interest.

[7] So what happened was that Mr W allowed the client to approach him directly and interviewed him. And there were then some dealings over how an instructing solicitor could be provided, and in the course of that, it is apparent to us, that legal services were provided, an opinion was given, advice was given, and then a great deal of other activity occurred with a view to seeking both an instructing solicitor and proper financial arrangements to support the proposed claim.

[8] A second solicitor was proposed and a meeting was held in May with this solicitor, but once again it appeared that there was a conflict of interest problem which prevented that solicitor taking on the role of instructing solicitor.

[9] So from the time in April, when Mr W was first speaking with the client, until November when a proper instructing solicitor was eventually found, it is alleged that he accepted instructions without an instructing solicitor while being a barrister sole. In the course of that he accepted a payment directly from the client in the sum of $8,000.00. After some dispute over that payment, later the Practitioner refunded $4,000.00 of the payment. But once again it is clear, and reflected in the admission of particulars three and five, that he not only accepted a payment directly from a client as a barrister sole (which contravenes the Rules), but he also failed to invoice properly for the services, which he says were reflected in the funds retained.

[10] The final piece of background information which ought to be made clear is that these events happened within a couple of months of the Practitioner being admitted to the bar and in fact it was to be his first case as a barrister sole, so it was most unfortunate that things went so off the rails.

[11] Now turning to assess the particulars which remain to support the two alternate charges, one of misconduct and the alternative of negligence. The first particular is that the Practitioner accepted instructions and provided legal services without an instructing solicitor. In his submissions by careful reference to a series of documents provided by the Practitioner to the Standards Committee, counsel for the Standards Committee, Mr Hodge, has, in our view, established this particular to the necessary standard of proof on the balance of probabilities.

[12] The remaining particulars, namely three, 'obtaining fees directly from a client while a barrister', and five, 'failing to render an invoice', were admitted by the Practitioner. And thus all three fall for consideration under the two charges.

[13] Having heard the matter and read the papers, including the evidence filed by the Standards Committee, and having heard submissions by both counsel, the Tribunal finds that of the two alternatives the amended charge of negligence most closely fits the charge and we find that alternate charge established. It flows from that that the charge of misconduct will be dismissed.

[14] The offending, while serious, is more properly reflective of inexperience and negligence in not adhering to the intervention rule that a barrister sole must have an instructing solicitor.

[15] So having found under that head we then can turn to consider penalty, and again, we have heard submissions from both counsel for the Standards Committee and for the Practitioner. Although a fine was sought by counsel for the Standards Committee, we note that the maximum fine would have been $5,000.00 under the 1982 Act. It is our view that although the seriousness of this situation would normally demand the imposition of a fine, we consider that given the financial circumstances of Mr W that his meagre resources are better directed to costs and the costs of the proceedings.

[16] His circumstances, just in summary, are that he has no income because he is unable to work at the present time as a result of his illness which is ongoing, and he has no assets to speak of.

[17] The Standards Committee also sought a censure and it was conceded by Mr Gorringe, on behalf of the Practitioner, that that was proper.

[18] In relation to costs we consider that there ought to be some leniency to reflect the long process and personal circumstances of the practitioner and we direct that the practitioner pay costs in respect of the Law Society costs 50% of the actual costs rendered and that under s 257 the New Zealand Law Society is to pay the costs of the Tribunal in an amount to be certified subsequent to this decision, in relation to those costs the practitioner is also to reimburse the New Zealand Law Society 50% of the s 257 costs .

[19] The remaining matter to be addressed is that of suppression of the practitioner's name and of medical details.

[20] There is one further matter that ought to be addressed that compensation was sought by the Standard Committee on behalf of the complainant. In all of the circumstances we decline to make an order for compensation against the practitioner.

[21] Returning to the issue of suppression there will be a final order as to suppression of all medical evidence related to this matter and related to the practitioner's current health. In relation to name suppression there will be interim suppression order pending further medical evidence to be provided by Counsel for the practitioner within 21 days in particular to address the submission made that the rehabilitation of the practitioner might be negatively impinged upon by any publication of his name. The Standard Committee may have a further 14 days to reply to that further evidence and then the Tribunal will consider that matter on the papers.

SUMMARY OF ORDERS

1. The practitioner is censured.

2. 50% of the actual costs of the Standards Committee are awarded against the practitioner.

3. The s 257 costs of the Tribunal, certified at $2,855 are to be paid by the New Zealand Law Society.

4. The practitioner is to reimburse the New Zealand Law Society 50% of the s 257 costs.

5. All medical evidence and references in this decision to the practitioner's health are subject to a Final Suppression Order.

6. The practitioner's name is suppressed on an interim basis pending further submissions which are timetabled in this decision.

7. Compensation is declined.

DATED at AUCKLAND this 1st day of April 2014

Judge D F Clarkson
Chair