NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2017] NZLCDT 34

LCDT 022/16

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**WELLINGTON STANDARDS COMMITTEE 2** Applicant
AND	**PETER JAMES MORAHAN** Respondent

CHAIR

Judge BJ Kendall (retired)

MEMBERS OF TRIBUNAL

Mr J Bishop

Mr W Chapman

Mr S Maling

Mr K Raureti

On the papers

DATE OF DECISION 22 November 2017

COUNSEL

Mr D La Hood and Mr I S Auld for the Applicant

Mr A T Beck for the Respondent

DECISION OF THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL CONCERNING PENALTY

[1] The respondent was found guilty of two charges of negligence or incompetence in his professional capacity that have been of such of a degree or so frequent as to reflect on his fitness to practise as a barrister or solicitor or as to tend to bring the profession into disrepute. The full background to the charges found proved is set out in our decision of 22 September 2017.

[2] We directed that, after the filing of submissions by counsel, penalty would be considered on the papers unless either of counsel requested a hearing. No request has been made.

[3] The applicant has sought an order that the respondent be suspended from practice as a barrister and solicitor for a period of four months and to be censured. It also seeks that the respondent be ordered to make a written apology to the complainant. The applicant seeks orders for costs and reimbursement to it of the Tribunal's cost for the hearing.

The Offending

[4] The starting point in considering the penalty must always be the nature and seriousness of the negligence or incompetence of the conduct complained of.[1]

[5] We have found that the respondent's conduct involved breaches of a number of rules of conduct and client care over a number of years firstly by allowing his longstanding client relationship with one person to overlook his obligations to others involved and secondly by his conduct in respect of proceedings in the Family Court

[1] *Hart v Auckland Standards Committee 1* [2013] 3 NZLR 103.

which was criticised by that Court resulting in a substantial award of costs in favour of the complainant in these matters.

[6] We accept the applicant's submission that the respondent's overall course of conduct was relatively serious which requires us to consider suspension as the starting point for imposition of an appropriate penalty bearing in mind the purpose of penalty and the requirement to impose the least restrictive outcome.[2]

[7] The applicant seeks an order suspending the respondent from practice for a period of four months and that he be censured. The following submissions are made in support of that contention.

(a) The number of breaches of the rules of conduct and client care by the respondent over a number of years.

(b) The respondent's disregard of his responsibilities to the complainant and failure to protect her interests.

(c) The respondent's failure to recognise the conflicts of interest he had in respect of the various parties and focussing on his duty to one party only.

(d) Acting in the Family Court proceedings and the manner in which they were conducted.

[8] Counsel for the applicant submitted that there are aggravating factors which bear on the penalty to be imposed. He referred to the following:

(a) The respondent's previous disciplinary history where he was subject to a finding of unsatisfactory conduct by the Committee on 28 August 2014 in circumstances where he failed to obtain instructions from all the trustees of a trust, instead acting only on the instructions from one trustee. For that misconduct, he was censured and fined.

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

(b) That the finding is relevant in that it relates to the respondent's failure to take care to recognise duties and avoid conflicts of interest as is the issue in the these charges.

(c) That the respondent has taken an overly technical approach to the defence of these charges. As an example of that approach he sought to have Charge 1 struck out rather than focussing on the conduct alleged. It was counsel's submission that such an approach was not in accord with the purpose or spirit of the Tribunal process which is to examine the conduct of a practitioner to ensure that the standards of the profession are upheld.

(d) That the respondent displayed unprofessionalism when he made disparaging comments about the complainant in his initial response to her complaint. He later admitted that his views about her had come from his longstanding client.

(e) That the respondent has shown by the approach taken to the proceedings that he is not remorseful for his conduct.

[9] Counsel for the respondent has submitted that the objective of disciplinary proceedings in this matter can be achieved by ordering a censure of the respondent, a penalty of $5,000.00 and the payment of costs.

[10] His submission is that the Tribunal's finding that the respondent should not have continued to act for his longstanding client was at the heart of the matter. The respondent made a single bad decision by continuing to act. All other allegations have flowed from that single decision and there should be no double counting in respect of what essentially was a single error of judgment made some 15 years ago.

[11] Counsel for the respondent made the following further submissions:

(a) That the respondent's conduct was not deliberate or deceitful.

(b) There was no personal benefit to the respondent.

(c) That there is no suggestion that the respondent presents a risk to the public because the conduct concerned related to the matters of a single client.

(d) That there was no financial impact on the complainant and no loss sustained by her, there being no adverse outcome for her she having received her full entitlements and her costs were paid.

(e) That as far as deterrence is concerned, it is highly unlikely that the respondent would make the same error again.

Discussion and Decision

[12] Counsel for the applicant and the respondent have referred to relevant authorities in respect of suspension orders and to authorities relevant to penalties involving a lesser sanction.[3]

[13] While the Tribunal has regard to the authorities as guidance, the disciplinary outcome for each case must be assessed on an individual basis.

[14] While counsel for the respondent has been critical of references to conduct occurring before August 2002, there is authority that for penalty purposes the overall course of conduct can be considered. See *Daniels.*[4]

[15] Our decision is that the respondent is to be suspended from practice as a barrister and solicitor for a period of four months. In reaching that decision we have preferred the submissions of the applicant. While the respondent made the single mistake that his counsel refers to, that mistake gave rise to the breaches that we have found proved against him and which occurred over several years. The respondent's previous disciplinary finding is relevant because it relates to conduct not too dissimilar to the charges before us.

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[3] *Waikato Bay of Plenty Standards Committee 1 v Monckton* [2014] NZLCDT 5; *Canterbury Westland Standards Committee 1 v Grave* [2016] NZLCDT 8; *A v Canterbury Westland Standards Committee* [2015] NZHC 1896; *Wellington Standards Committee 2 v Lagolago* [2015] NZLCDT 43.
[4] See above n 2.

[16] The applicant further seeks that the respondent be the subject of censure. Suspension from practice is in the nature of a censure. The Tribunal is not minded to record a formal censure as part of the penalty process.

[17] The applicant has also sought an order that the respondent give the complainant a written apology. We have referred to the lack of any suggestion of remorse on the part of the respondent. We have reached the view that to order a written apology would be tantamount to an insult to the complainant. We accordingly decline that request.

[18] The applicant seeks an order for costs and disbursements totalling $37,171.63. Reference is made to The Tribunal's statement in *Canterbury District Law Society Complaints (No. 2) Committee v Iosefa,*[5]

> The Tribunal has no difficulty in restating the principle that the burden of costs of disciplinary proceedings ought to fall on the practitioner found to be at fault if at all possible, rather than on his or her professional body as a whole.

[19] Counsel for the respondent has challenged the costs of the applicant as being on the high side for what he describes as a one day hearing where costs for such a hearing in the High Court on the 2B scale would be $22,000.300.

[20] He further argues that the applicant included historical matters within the charge which it subsequently had to adjust. And further that some of the allegations made by the applicant were found not to be established.

[21] He submitted that the respondent should not bear all of the applicant's costs and that an order for payment of 50 per cent of the 2B scale costs should be made.

[22] We reject that submission. Costs before the Tribunal are fixed on what has been incurred in accordance with the principle stated above in *Iosefa.* In determining that the full costs should be paid, we have taken into account that the respondent

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[5] *Canterbury District Law Society Complaints (No. 2) Committee v Iosefa* [2009] NZLCDT 5 at [41].

failed in his challenge to have Charge 1 struck out and also the inclusion of relevant historical evidence which was held to put the particulars of the charges into context.

[23] The orders we now make are:

(a) Suspension from practice as a barrister and solicitor for four months effective from 4 December 2017.

(b) Costs in favour of the applicant totalling $37,171.63.

(c) Refund to the applicant the Tribunal's costs of the hearing which are certified at $12,272.00.

(d) Non-publication of the name of the complainant and of any clients referred to in these proceedings.

DATED at AUCKLAND this 22nd day of November 2017

BJ Kendall
Chairperson