

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2018] NZLCDT 7

LCDT 029/17

IN THE MATTER

of the Lawyers and Conveyancers
Act 2006

BETWEEN

**AUCKLAND STANDARDS
COMMITTEE 5**

Applicant

AND

DIANE FAYE LOW

Respondent

CHAIR

Judge BJ Kendall (retired)

MEMBERS OF TRIBUNAL

Ms F Freeman

Mr C Lucas

Mr G McKenzie

Ms C Rowe

HEARING on the papers by consent

DATE OF DECISION 23 March 2018

COUNSEL

Mr E J McCaughan for the Applicant

Mr M Francis for the Respondent

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

[1] The respondent has admitted a charge of misconduct. The Charge and particulars are set out in Appendix A.

[2] In summary, the respondent's misconduct related to issues concerning the Go Legal trust account which are:

- (a) Failure to reconcile the trust account with the trust ledger.
- (b) Failure to complete monthly reconciliations for client IBD accounts.
- (c) Certifying to the New Zealand Law Society monthly that she had correctly reconciled the trust ledger with corresponding trust bank accounts.
- (d) Failure to keep proper records.
- (e) Certifying to the New Zealand Law Society monthly that the Go Legal trust account records were a complete and accurate record of the transactions taking place each month notwithstanding the failures that had occurred.
- (f) Overdrawn trust account ledgers for 74 clients.
- (g) Failure to report to clients on 64 dormant balances.
- (h) Failure to adequately protect electronic systems and passwords thus enabling a staff member to misappropriate client funds.

- (i) Advising clients that she had professional indemnity insurance without specifying that it did not meet minimum standards set by the New Zealand Law Society.

[3] Counsel for the applicant and the respondent have agreed on penalty subject to the Tribunal's approval. The proposed penalty is as follows:

- (a) Censure.
- (b) A fine of \$8,000.00.
- (c) Costs orders for the payment of the Committee's legal costs and reimbursement of the Tribunal's costs of hearing.
- (d) An order that the respondent continue at her own cost to engage Mr Kevin Ogles to undertake a monthly review of her trust account and to countersign the monthly certificates as to their accuracy. This engagement is to continue for two years.
- (e) Within 12 months the respondent undertakes a Trust Account Supervisor Refresher Course.

[4] The starting point in determining penalty is the gravity of the misconduct itself, and the culpability of the practitioner for the particular breach of standards. In this case the maintenance of professional standards is of significant importance along with protection of the public given that the trust account framework is needed to protect the funds of the public. See *Daniels v Complaints Committee 2 of the Wellington District Law Society*¹ and *Wellington Standards Committee 2 v Jones*.²

[5] The applicant has submitted that there are aggravating features in this case:

- (a) The respondent's failures were broad and varied as set out in para [2] above.

¹ *Daniels v Complaints Committee 2 of the Wellington District Law Society* HC Wellington CIV-2011-485-227.

² *Wellington Standards Committee 2 v Jones* [2014] NZLCDT 52.

- (b) The failures spanned a number of years and, despite being aware of them, the respondent regularly made false representations to the New Zealand Law Society regarding her compliance.
- (c) The representations prevented the deficiencies from being identified and resolved at an early stage.

[6] Both counsel have accepted that there was no dishonesty in any of the respondent's conduct apart from the filing of false certificates.

[7] The applicant has noted the following mitigating features:

- (a) The respondent's timely resolution of the proceedings and her co-operation throughout including the initial investigation.
- (b) That the respondent was under stress and anxiety.
- (c) That the respondent has purchased a new digital system for the administration of trust and business accounts.
- (d) That the respondent has engaged Mr Ogles as a consultant lawyer to oversee her accounts.
- (e) That the respondent has engaged with a cognitive behaviour therapist to address avoidant behaviour.

[8] Counsel for the respondent has not contested the majority of the applicant's submissions. He has submitted that particular emphasis should, in the circumstances of this case, be placed on the provision "*of scope for rehabilitation*" in accordance with the least restrictive principle as stated in *Daniels*.

[9] Counsel for the respondent has emphasised the following mitigating features in favour of his client:

- (a) There was no dishonesty beyond the provision of certificates.

- (b) There was no personal gain to the respondent.
- (c) There was no loss to clients or a client complaint.
- (d) The respondent has shown genuine remorse.
- (e) The respondent has co-operated fully throughout the investigation and disciplinary process.
- (f) On discovery of the theft of funds by an employee, the respondent immediately brought the matter to the attention of the Law Society.
- (g) The respondent has taken every conceivable step to prevent failures occurring again as mentioned in para 7(c), (d) and (e) above.

[10] Each counsel have provided the Tribunal with careful assessments of the Tribunal's decisions in *Wellington Standards Committee 2 v Jones*³ and in *Auckland Standards Committee 4 v Appleby*⁴. Each of those cases concerned failures by the respondents in the maintenance of their trust accounts. In each matter the practitioners avoided suspension.

[11] The Tribunal has had regard to those cases and has decided that the respondent here can avoid suspension. It accepts that the respondent has presented strong mitigating factors that counter balance the aggravating factors of the length of time that the offending occurred and the falsity of the certificates presented by her to the Law Society.

[12] The Tribunal accordingly approves the penalty agreed to by the applicant and the respondent and makes the following orders:

- (a) The respondent is censured.
- (b) The respondent is fined \$8,000.00.

³ See above n 2.

⁴ *Auckland Standards Committee 4 v Appleby* [2014] NZLCDT 34.

- (c) The respondent is to pay the Law Society's costs of \$11,992.00.
- (d) The respondent is to continue at her own cost to engage Mr Kevin Ogles to undertake a monthly review of her trust account and to countersign the monthly certificates as to their accuracy. This engagement is to continue for two years.
- (e) Within 12 months the respondent is to undertake a Trust Account Supervisor Refresher Course.
- (f) The Law Society is to pay the Tribunal hearing costs which are fixed at \$864.00.
- (g) The respondent is to refund to the Law Society the Tribunal hearing costs of \$864.00.

[13] The Tribunal's censure to the respondent is as follows:

You are censured in the strongest terms. You have admitted breaches of your responsibilities in respect of the trust account reporting requirements including failure to correct or declare errors and other significant anomalies. In context, this is serious offending. The trust account is in place to protect the funds of the public. It is vital therefore that the public have confidence in its integrity and that practitioners adhere to the rules and regulations governing.

You are fortunate to have avoided a period of suspension.

DATED at AUCKLAND this 23rd day of March 2018

BJ Kendall
Chairperson

Charge

Auckland Standards Committee 5 (**Standards Committee**) hereby charges Diane Low (**Practitioner**) with:

Charge: Misconduct within the meaning of s 7(1)(a)(ii) of the Lawyers and Conveyancers Act 2006 (**Act**);

Particulars

1. At all material times the Practitioner was enrolled as a barrister and solicitor of the High Court of New Zealand and was the principal and trust account supervisor of the firm Go Legal.
2. Between 21 and 23 September 2016, Lee-Ann van Heerden, an Inspector with the New Zealand Law Society Inspectorate, carried out a limited review of the Go Legal trust account.
3. The Inspector's trust account review report identifies numerous instances (detailed below) of non-compliance with:
 - a. The Lawyers and Conveyancers Act 2006 (**Act**);
 - b. The Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (**Rules**); and,
 - c. The Lawyers and Conveyancers Act (Trust Account) Regulations 2008 (**Regulations**).

Failure to reconcile

4. From 31 August 2014 to 31 July 2016, the Practitioner failed to reconcile the Go Legal trust account with the trust ledger.
 - a. From 31 August 2014 until December 2015 the Go Trust account only failed to reconcile by \$219.61.
 - b. The sum of \$219.61 was recorded in a suspense account.
 - c. It was not until the theft by an employee in December 2015 that the trust account failed to reconcile by more than \$219.61.
5. The Practitioner also failed to complete monthly reconciliations for client interest bearing deposit accounts (**IBD accounts**).

6. Both the failure to reconcile the trust account and the failure to complete monthly reconciliations for the IBD accounts breached r 14 of the Regulations, which requires that a practice ensure that each trust bank account is reconciled with the trust ledger at the end of every month.
7. Notwithstanding the Practitioner's failure to reconcile the trust account and IBD accounts, the Practitioner certified to the New Zealand Law Society on a monthly basis that she had correctly reconciled the trust ledger with corresponding trust bank accounts, for both the general trust account and the IBD accounts, in breach of r 17 of the Regulations and rr 2.5 and 2.6 of the Rules.

Failure to keep proper records

8. The Inspector's review of the Go Legal cashbook identified a number of errors and anomalies including:
 - a. Payments incorrectly recorded as deposits;
 - b. Use of the same client code to cover numerous client matters;
 - c. Insufficient narrations when recording journals and transactions; and
 - d. Funds held under the name of a barrister rather than an individual client.
9. To get the trust account to balance, the Practitioner coded the variance to an office / suspense code.
10. The Practitioner also failed to maintain client ledgers to record client funds being held in IBD accounts, but did maintain a record of each client's IBD records in the form of bank records.
11. The Excel trust account system operated by the Practitioner was open to retrospective alteration and deletion.
12. The Practitioner's failure to keep proper trust account records, as set out at paragraphs [8] to [11] above, breached s 112(1) of the Act, as well as r 11 of the Regulations, which provide, inter alia, that a practitioner holding money on behalf of another person must, in relation to that money, keep trust account records that disclose clearly the position of the money in the trust account, keep records in such a manner as to enable them to be conveniently and properly reviewed by the inspectorate and, as far as practicable, ensure records are secure against retrospective alteration or deletion.
13. Notwithstanding the Practitioner's record keeping failures, the Practitioner certified to the New Zealand Law Society on a monthly basis that the Go Legal trust account records were a complete and accurate record of the transactions taking place in each individual month, in breach of r 17 of the Regulations and rr 2.5 and 2.6 of the Rules.

Trust account funds

14. The Inspector's review of the Practitioner's trust ledger as at 31 August 2016 noted that 74 individual client ledgers were overdrawn. The effect of this was that other clients' monies were used to fund the overdrawn ledgers. The Practitioner did not take immediate steps to lend to the clients the amounts necessary to prevent the trust accounts being overdrawn. The Practitioner was aware that the client ledgers were overdrawn in the amount of \$17,834.66 and she ensured the firm had sufficient funds (\$24,037.08) to cover the overdrawn amounts.
15. The Practitioner's handling of the overdrawn ledgers breached r 6 of the Regulations which states that if a trust account for a particular client, taken as a whole, is overdrawn, a practice must immediately lend that client the amount of money necessary to prevent that trust account being overdrawn.
16. On 18 December 2015, a former employee of the Practitioner misappropriated \$1,450 from a client trust account labelled "W".
17. The same former employee misappropriated a further \$1,450 from a separate client trust account labelled "P" on 21 December 2015.
18. The Practitioner marked these as unknown payments, and was unable to resolve them. She was unaware of the misappropriations until the former employee approached her and disclosed them prior to the Inspector's review.
19. The Practitioner had provided the former employee with her own electronic banking user name and password. If the former employee gained access to the Practitioner's "net code" token, the employee was able to make payments from the trust account.
20. In relation to the "W" misappropriation the Practitioner acknowledged that the former employee had used the Practitioner's electronic banking user name and password and had also picked up the Practitioner's "net code" token to authorise the payment while the Practitioner was out of the office.
21. In relation to the "P" misappropriation, the Practitioner acknowledged that she had actually authorised the payment. She stated that on that day the former employee had set up a large amount of payments for her to authorise. The Practitioner acknowledged that it was not unusual for her to "glance" at a payment at this level, and that her practice was to not check bank account details on smaller transactions. The Practitioner stated that she simply trusted her employees that the transaction would be correct.
22. In her supervision of the former employee, the Practitioner breached r 11.4 of the Rules which requires a lawyer to take all reasonable steps to prevent any person from perpetrating a crime or fraud through the lawyer's practice. The provision specifically refers to the protection of electronic systems and passwords.

Failure to report on dormant balances

23. On reviewing the trust accounting register, the Inspector noted 64 dormant credit balances for clients, totalling \$15,194.12 and six static IBD account balances totalling \$1,934.85.
24. The Practitioner failed to implement a process to report to clients at intervals of not more than 12 months on dormant balances (or otherwise deal with those balances), in breach of r 12(7) of the Regulations.

Late submission of monthly and quarterly certificates

25. Between February 2013 to October 2016, the Practitioner failed to file thirteen trust account certificates within the time frames required under r 17 of the Regulations.

Professional indemnity insurance

26. At the time of the Inspector's review, the Practitioner held professional indemnity insurance to a maximum value of \$500,000.
27. The New Zealand Law Society minimum standard is that a practice's indemnity limit is the greater of \$1,000,000 or \$750,000 per partner.
28. In "Terms of Engagement" issued by the Practitioner to clients, she disclosed that she had professional indemnity insurance without specifying that it did not meet the minimum standards set by the New Zealand Law Society, in breach of r 3.4(b) of the Rules.
29. Given the matters set out at above, the Practitioner has breached r 16(4) of the Regulations which states that every trust account supervisor is responsible for the administration of the trust accounting of the practice and is responsible for ensuring that the provisions of the Act, the Rules and the Regulations are complied with.