**THERE IS AN ORDER MADE PURSUANT TO S 240 LAWYERS AND CONVEYANCERS ACT 2006 FOR THE SUPPRESSION OF MEDICAL DETAILS.**

**NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2018] NZLCDT 26

LCDT 036/17

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| **UNDER** | The Lawyers and Conveyancers Act 2006 |
| **BETWEEN** | **AUCKLAND STANDARDS COMMITTEE 1 OF THE NEW ZEALAND LAW SOCIETY** Applicant |
| **AND** | **ROBYN PHILIPPA JOY FENDALL** Respondent |

**CHAIR**

Judge D F Clarkson

**MEMBERS**

Ms C Rowe

Ms M Scholtens QC

Mr B Stanaway

Ms S Stuart

**DATE OF HEARING** 25 and 26 June 2018

**HELD AT** Specialist Courts and Tribunals Centre, Auckland

**DATE OF DECISION** 6 August 2018

**COUNSEL**

Mr P Davey for the Applicant

Ms M Dew and Ms A Mitra for the Respondent

## REASONS FOR DECISION OF TRIBUNAL ON LIABILITY

### *Introduction*

[1] This decision records our considerations after a hearing where the issues were whether the practitioner, Ms Fendall, made false declarations to her insurer, intentionally, recklessly or carelessly. Such was relevant to the level of culpability, which, at the conclusion of the hearing, we found to be misconduct.

[2] The practitioner had been charged in the alternative with the three available levels of culpability[1] and had admitted "unsatisfactory conduct". She also admitted that she had been both reckless and negligent in making the false declarations.

[3] Although Ms Fendall asserted that the conduct was personal, not professional, she acknowledged that if the latter were found, she had recklessly contravened the relevant rules.[2]

### *Issues*

[4] The issues to be determined by the Tribunal were as follows:

1. Was the conduct in question professional or personal?

2. If professional conduct, was it:

    (a) Disgraceful or dishonourable as assessed by lawyers of good standing? or

    (b) A wilful or reckless contravention of the Rules?

[1] As well as alternatives pleading professional or personal misconduct having been laid.
[2] Rules 2.5 and 11.1 Rules of Conduct and Client Care under the Lawyers and Conveyancers Act 2008 (the Rules) (Amended Response, R Fendall 13 June 2018).

3. If personal conduct, did it reach the threshold that it would justify a finding that the practitioner was not a fit and proper person or was otherwise unsuited to engage in practice as a lawyer?

4. If none of the above questions was answered in the affirmative, was the conduct negligent or incompetent at the level defined in s 241(c)?[3]

5. If not, did unsatisfactory conduct occur?

***Background***

[5] Ms Fendall is a practitioner of many years' experience who has primarily specialised in representing young people in the Youth Court.

[6] Having taken out income protection insurance in 2002, she made her first claim under the policy in September 2009. Her claim was accepted because she was suffering from depression.

[7] This was the first claim period of two periods which are under consideration. The first period of receiving income protection payments was from September 2009 to August 2010. The payments received were $13,290 per month.

[8] The second claim period commenced, when Ms Fendall suffered a relapse of her condition and received payments from November 2011 to April 2014 (of $14,164 to $14,816 per month).

[9] A condition of the policy, to enable continuation of the payments to Ms Fendall, required her to submit monthly declaration forms, in which she was required to disclose whether she had undertaken any work activities and/or received any income during the period since the previous claim payment. She was also required to declare that her statements were "… *true and complete"* and *"that all occupational, medical and financial information* ..." relating to her had been provided to the insurer.

[3] Section 241(c) "... Has been guilty of negligence or incompetence in his or her professional capacity, and that the negligence or incompetence has been of such a degree or so frequent as to reflect on his or her fitness to practise or as to bring his or her profession into disrepute; …".

***First Claim Period***

[10] In each of the declarations for March 2010, April 2010 and May 2010 Ms Fendall declared that she had not received any income and nor had she been involved in any unpaid or volunteer work.

[11] In fact, she had received 16 payments for legal work during these periods. The total amount paid to her was $1,050.

***Second Claim Period***

[12] Once again, Ms Fendall was required to make monthly declarations and for completeness we record those terms which appear just above her signature on each form:

> "I declare that the above statements, made in relation to my claim with any of the Companies are true and complete. **I the Life Assured** declare that all occupational, medical and financial information pertaining to me has been provided and disclosed to Sovereign.
>
> I understand that failure to provide full disclosure of all occupational, medical and financial information that Sovereign would deem as relevant in the assessment of my claim under the policy(ies) would be considered to be material misrepresentation and/or material non-disclosure and as such Sovereign is entitled to use legal remedy, should this occur.
>
> I further understand that the occupational, medical and financial information provided is the basis on which Sovereign will base the on-going assessment of my claim under my policy(ies) and I have fully disclosed all relevant information in the utmost good faith."

[13] Of course, as a lawyer, Ms Fendall will have understood the terms, and the duty of utmost good faith between insured and insurer.

[14] Ms Fendall does not deny the false declarations, so we do not propose to recount the entire history, but summarise as follows: that false statements as to undertaking any work activities or receiving income were made from the months March 2012 to August 2012 when she had made a number of agency appearances for Ms E and received payments of $751 and $1,797 respectively.

[15] In addition, she gave evidence that she had made a number of appearances for long standing Youth Court clients for which she did not charge, but which she did not declare to the insurer.

[16] Further false declarations were filed in October 2012, November 2012, December 2012, January 2013, February 2013, May 2013, August 2013, October 2013 and November 2013.

[17] In November 2013 Sovereign engaged a private investigator to carry out surveillance of Ms Fendall's daily activities and requested she submit a daily log[4]. Notwithstanding that request and undertaking the activity of completing daily logs, Ms Fendall continued to make monthly false declarations about her work activities in the months of November 2013, December 2013, January 2014, February 2014 and March 2014.

[18] In total the income received by her for the undisclosed Court appearances was $26,123.96. During this period she continued to receive the almost $15,000 per month income protection insurance.

[19] Although she did not disclose receiving payments for work as a lawyer, Ms Fendall did remember to notify the insurer that she had sold books for a return of $55.

[20] In October 2012 Ms Fendall had also recorded, in relation to the question of involvement in business, that she was just "*continuing to intermittently process paperwork and pay bills …*". The preparation of invoices from her previous attendances for Youth Court clients had been the subject of considerable discussion with her occupational therapist and indeed was the subject of a detailed plan.

[21] Ms Fendall's defence was that firstly she was not only careless but reckless, in the manner in which she completed the monthly declarations and subsequently the activity log she was required to complete. But she also claimed that she was, at all times, very open with the health professionals with whom she was working, about her activities as a lawyer and her return to work. We will comment on this claim under the heading of credibility.

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[4] A similar declaration was required in respect of this log.

[22] Some of the comments recorded (and declared) by her, even before the activity log began in late 2013, are of concern. For example, the declaration of 4 February 2013 included the following statement:

> "Went to look @ Court one day – normal List Court – try to refamiliarise with process. Had anxiety attack after half an hour."

[23] This statement was made despite the fact that Ms Fendall had been appearing on a regular basis for Ms E as an agent for much of the preceding year, 2012.

[24] Also, in the declaration of 5 March 2013:

> "Went to Court one day to try to observe and felt unable to stay after relatively short time. Very stressful."

[25] Ms Fendall claimed that at least one of the medications on which she had been placed (for a period of up to six months between October 2012 and April 2013) had seriously impacted on her memory.

[26] On the other hand, Ms Fendall is confident that, on the occasional appearances which she said she made for her longstanding Youth Court clients, during the period of the claim, that she represented them in a competent manner.

[27] In relation to the activity logs, these were mostly completed on a weekly basis and contained considerable detail. For example, in the activity log of 8 January 2014, as noted in the closing submissions of Mr Davey, she … "*accurately recorded that she had been grocery shopping from about 1:00 pm, gone to the doctor at about 3 pm, picked up mail and gone to the Mad Butcher.*" She had however also stated that she had spent the morning cleaning and reading. The observations of the investigator (which are not disputed) are that Ms Fendall was attending the Waitakere District Court between 10.00 am and 10.40 am and that she then attended a Youth Justice Residence from 11.18 am to 1.13 pm.

> "At that point she was observed at New World at 1:36 pm, outside a medical centre at 2:51 pm, then outside Postshop getting mail at 3:39 pm before going to the Mad Butcher at 4:00 pm."

[28] It seems that Ms Fendall was able to accurately record all of her activities that day other than the work-related activities of attending Court and a Youth Justice Residence. There are other similar examples in February of 2014.

[29] In March 2014, the insurer wrote to Ms Fendall requesting she attend an interview to discuss concerns about her activity logs and declarations, which appeared to be inconsistent with surveillance they had undertaken. Thus, she was on notice from 18 March 2014 that she had been under surveillance during the period since she had been asked to complete activity logs.

[30] The meeting took place on 4 April 2014 and was recorded. A transcript was part of the material provided to the Tribunal. Ms Fendall attended the meeting with a support person but had not taken legal advice or considered it appropriate to take a lawyer with her.

[31] In the course of that interview Ms Fendall made a number of admissions, which are recorded in the opening submissions of Mr Davey (and we consider accurately so) as follows:

> "53.1 She had been occasionally working as a Youth Advocate but claimed that she had not been earning any income;
>
> 53.2 Her honesty with updates that she had provided to Sovereign had been impaired and that she had not been completely honest and not completely dishonest with Sovereign, which she referred to as "lies by omission";
>
> 53.3 She did not know how to tell Sovereign the things that she had been doing without getting herself into trouble;
>
> 53.4 She made the misrepresentations because she wanted to continue to receive the benefit payments and had financial pressures;
>
> 53.5 It did not start out as being intentional but became that way."

[32] The income protection insurance was terminated by the insurer on 11 April 2014 and a request was made for repayment of the benefit which had been paid during the surveillance period (in total $50,016). Ms Fendall paid this amount within a month.

[33] Subsequently the insurer also issued proceedings against Ms Fendall seeking repayment of the total benefits paid to her in respect of both claim periods. A settlement was reached, under which Ms Fendall repaid a further $400,000 to the insurer.

[34] In early 2016, the insurer made a complaint to the New Zealand Law Society which led, following investigation, to the laying of the charges under consideration.

***Issue 1 – Personal or Professional Misconduct?***

[35] Mr Davey relied on the decisions of *Orlov*[5] and *Deliu*[6] to argue that the practitioner's conduct was more connected with the work environment than the personal one. In *Orlov* it was found that:

> "… This structure supports giving a broad scope to professional misconduct with a consequent limiting of personal misconduct to situations clearly outside the work environment."

[36] Mr Davey argued that the conduct was connected with the work environment and constituted a breach of Rule 2.5 (certifying without reasonable grounds) and Rule 11.1 (misleading or deceptive conduct) … "on any aspect of the lawyer's practice".

[37] Mr Davey pointed out that specific questions had been responded to in the declarations, about work issues and Ms Fendall's practice. Mr Davey submitted that it meant that the conduct was closer to professional misconduct, as connected with the work environment. He pointed out that this insurance was to cover the practitioner's inability to work as a lawyer.

[38] Ms Dew, on behalf of Ms Fendall submitted that s 7(1)(a) did not apply because the conduct did not occur at a time when Ms Fendall was providing "regulated services". Ms Dew's analysis proceeded along the lines of the Tribunal's analysis of this issue in *Orlov* at first instance. But it is to be noted that that reasoning was overturned by the High Court on appeal.

[39] Ms Dew submitted that *Orlov* and *Deliu were* distinguishable in that "*the conduct was directly connected to Mr Orlov and Mr Deliu's provision of legal services to clients, their relationship with the courts and the judiciary and litigation in which they had acted*." Ms Dew contrasts these cases with the cases of *Denham*[7] and *X.*[8] The latter was the case in which the practitioner was involved in the periphery of an

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[5] *Orlov v NZLCDT* [2015] 2 NZLR 606, R Young and S France JJ at [102] and [107].
[6] *Deliu v National Standards Committee and Auckland Standards Committee No. 1 of the New Zealand Law Society* [2017] NZHC 2318, Hinton J, 25 September 2017.
[7] *National Standards Committee v Denham* [2017] NZLCDT 10.
[8] *Auckland Standards Committee 1 of the New Zealand Law Society v X* [2011] NZLCDT 15.

incorrect insurance claim for lost property. In *Denham*[9] the matter was personal conduct in which the practitioner pursued a private prosecution against her former husband, later held to be an abuse of process. The practitioner was acting in her personal capacity in the litigation and in fact had only held a practising certificate for nine months of the period during which the litigation was conducted.

[40] Ms Dew pointed out that Ms Fendall was filling out the form for herself and submitted that it was not ancillary to Legal Services for another person.

[41] Ms Dew further submitted that s 7(1)(b) "*is intended to capture only the most serious personal misconduct …"* and referred to the high threshold required, that for personal conduct to constitute misconduct it must reach the standard where the person is found to be *"not fit and proper to continue as a lawyer*". We accept that submission.

[42] We also accept Ms Dew's submission that it would be wrong to extend the category of professional conduct to cover situations which truly intrude into a lawyer's personal life, just because he or she has the status of a lawyer.

[43] The Act definitely created a boundary between personal and professional conduct, one which, according to the High Court of Australia in *A Solicitor*[10] is *"… often unclear*. *Professional misconduct does not simply mean misconduct by a professional person. At the same time, even though conduct is not engaged in directly in the course of professional practice, it may be so connected to such practice as to amount to professional misconduct.*"

[44] This case could be said to be close to that boundary, and a relatively fine call, but we repeat, as held in *Orlov* and *Deliu*, that the Act did not intend there to be any gap between the two categories and the conduct must fall within one or other. Further, *Orlov* is authority for a broad interpretation of the "professional" category, leaving s 7(1)(b) for purely personal actions.

[45] We find Ms Fendall's conduct to fall on the professional side of the boundary for the following reasons. Ms Fendall's evidence is that she desperately wanted to keep

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[9] See above n 7.
[10] *A Solicitor v The Council of NSW* [2004] HCA 1, (2004) 204 ALR 8 [20].

doing a little work as a Youth Advocate. She was candid in saying that this was bound up with what remained of her self-image and self-esteem. She had always felt that, [medical information removed], she was able to do a good job for her Youth Court clients. However, Ms Fendall needed the insurance payments to sustain her while she did this.

[46] While a good deal of Ms Fendall's evidence was evasive and less than credible, this was the one aspect of it which seemed to have a reliable core of truth. Put simply, she wanted to continue to practise law effectively at a hobby level, but to do so, she needed to remain in receipt of her insurance payments.

[47] This evidence resonated as truthful, not only in the genuine manner in which Ms Fendall described her feelings about her work, but because it provided a credible reason for her being prepared to take such enormous risks, in making false declarations, as opposed to the more flimsy explanations proffered by her, which are referred to in more detail later.

[48] In this way, her false declarations cannot be said to be "unconnected with the provision of Legal Services". They maintained her very ability to render legal services, as she chose to, at a limited level.

[49] Thus, the conduct is more analogous to that of Mr Orlov[11] and Mr Deliu.[12] In those cases there was no evidence that Messrs Orlov's and Deliu's complaints about Judges were directly on instructions of their clients; they were actions taken by the practitioners personally, just as the false declarations here are a personal act of the lawyer. But they were seen as sufficiently connected with acting for their clients to bring them within s 7(1)(a).

[50] In contrast, the actions of the lawyers in the two cases relied on by Ms Dew, *X*[13] and *Denham,*[14] were purely personal actions, which had no connection whatsoever with the provision of legal services to others.

[11] See above n 5.
[12] See above n 6.
[13] See above n 8.
[14] See above n 7.

[51] We have come down on the side of professional conduct, because we consider the dishonest conduct enabled the practitioner to provide legal services (at a "hobby" level) and thus cannot be said to be unconnected with the provision of legal services.

[52] However, we emphasise that even if we are incorrect in our categorisation of Ms Fendall's actions, and were required to make a finding under s 7(1)(b), we would find that the very high threshold contained in this section has been met by her actions.

[53] Before moving to consider the remaining issues, comment needs to be made on the following topics: the medical evidence; the admissions made in the interview with the insurer; and credibility generally.

## A. Medical Evidence

[54] We make limited reference only to the medical evidence which we received in some detail and considered carefully. We do not need to concern ourselves whether or not, and to what degree [medical information removed], since this was not challenged in these proceedings. The relevance of the medical evidence is twofold.

[55] First, as to the practitioner's state of mind when she made the false declarations, on which her insurer relied. It was submitted on her behalf that "*her negligence in completing the individual Declaration Forms was not deliberately dishonest – rather, it was in the context of her [medical information removed]*".[15]

[56] The [medical] tests confirmed Ms Fendall's high intelligence, verbal competence (despite some small decline) and ability to focus on and complete comprehensive tests. There was no suggestion that she was [medical information removed] in her reporting to the various health professionals, although we comment later, on material withheld from them by Ms Fendall. Broadly, the weight of the evidence did not support her assertions of [medical information removed] in relation to reporting.

[15] Submissions of Ms Dew as to Liability 19 June 2018 at [58].

[57] Secondly, as to her suggestion that she told health professionals and claims managers that she was working[16].

[58] There is no need to traverse the medical evidence in any further detail and indeed this accords with the privacy rights of the practitioner.

**B. Admissions Made to the Insurance Company**

[59] Counsel for Ms Fendall urges us to treat these admissions with some caution. She submits that at the time of the interview Ms Fendall was still suffering from depression. Ms Dew also submitted that "*there is no evidence that the Sovereign investigator informed Ms Fendall that Sovereign was aware she had been doing intermittent legal work and billing throughout both claim periods …*". We reject that submission which does not accord with the email which invited Ms Fendall to the meeting and clearly disclosed that there had been discrepancies between her declarations and the observations of her under a period of surveillance.

[60] That email was on 18 March 2014 and the meeting did not take place until 4 April 2014. As a lawyer of some 35 years' experience, Ms Fendall would have been under no misapprehension as to the importance of the meeting or her rights to obtain prior legal advice and if necessary legal representation at the meeting.

[61] Ms Dew attempted to characterise the questions in the course of the meeting as tantamount to cross-examination. To the contrary we found the questions to be mainly open-ended questions giving the practitioner plenty of time and opportunity to explain herself. Ms Fendall spoke at length and provided fulsome responses during which she voluntarily disclosed her level of honesty had been "impaired".[17]

> "… my honesty … it has been impaired … I have not been completely honest … lies by omission …"

[62] And that she had needed the payments to continue, because of her poor financial position.[18]

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[16] This is further discussed under the heading "Openness with Health Professionals".
[17] Bundle of documents 526.
[18] Bundle of documents 528 – Interview transcript.

[63] Taking account of her illness, the Tribunal has asked itself whether this was a situation where Ms Fendall was so overwhelmed that she "overdid" her confession and admitted matters falsely or that the interview was generally unfair. We cannot accept this to have been the case. This was not a complete "*mea culpa*" and capitulation. Her interview actually minimised the work for which she had billed – it completely missed out any reference to Ms E's agency instructions. While we note that Ms Fendall felt at the time of the interview that she had overlooked something, and then mentioned Ms E in a subsequent email;[19] this does not detract from the fact that the interview was conducted fairly, the practitioner had reasonable notice of it, and she chose to unburden herself to a considerable extent, albeit not fully.

[64] In those circumstances, we consider that we are able to place weight upon admissions made during that interview.

## C. Credibility Generally

[65] This is a case in which credibility was an important feature. We found Ms Fendall's evidence to be evasive, at times illogical, even far-fetched; and at times her affidavit evidence was shown to be actually misleading.

[66] For example, in her affidavit:[20]

> "[46] I accept that I negligently and recklessly failed to disclose legal work and legal income I received while on claim in the individual declaration forms and weekly activity logs set out in the Notice of Charges, with one exception. That exception is the weekly activity log for 26 February 2014, which does record that I did some work that day. In relation to the rest of the weekly activity logs and individual declaration forms, my failure to disclose was not deliberate and was in the context of circumstances I have set out in this affidavit."

[67] In cross-examination[21] having spent some time (evasively) on peripheral detail which did not address the question, Ms Fendall eventually conceded that she had deliberately not told the insurer about her work activities in the logs.

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[19] Although she significantly underestimated the quantum of the fees which had been received.
[20] Affidavit of RPJ Fendall, 12 April 2018 at [46].
[21] NOE pages 66 to 67.

[68] The explanation that her actions had nothing to do with financial gain was repeatedly made by Ms Fendall, and yet at the interview with the insurer and, eventually under cross-examination, the financial motivation was conceded:

> "… That was my only income so I needed to stay – the only income I had was from Sovereign so obviously I wanted to continue getting the benefit, and I had outgoings and that was my only income at – well, as it turned out when I was – there was (Ms E) as well but I wasn't thinking of that when I made that statement in the interview … and I did have financial pressures, so yes, I wanted to stay on benefit, of course I wanted to stay on benefit, because I had no other – at that point I was not earning – just putting (Ms E) to one side, at that point I was not earning money in any other way …"[22]

[69] In her affidavit Ms Fendall minimised the amount of legal work she had undertaken while receiving the benefit:

> "[50] … The work I did would generally only have been an appearance that lasted a maximum of 15 to 20 minutes … the appearances I did were usually only monitoring appearances, which usually only involved updating the Court about clients' progress … most of the work I did was for longstanding clients that I had known for years …"

[70] However, when challenged during cross-examination about this evidence Ms Fendall said:[23]

> Q: When it comes to paragraph 50(c) you say most of the work I did was for longstanding clients that I've known for years, that's not true is it?
>
> A: Oh, not if you're referring to (Ms E's) work. But I was referring there in that whole paragraph to the work that I was doing in terms of Youth Advocate work myself. I suppose – I can see what you're getting at now, I couldn't before because I was going to say there wasn't any – it's exact – both sentences are correct.
>
> Q: But you said before, most of the work you accepted was done for (Ms E's) clients didn't you, over this time?
>
> A: No. Most of the work I did on that table (*referring to schedule prepared by her counsel*) is for (Ms E's) clients. That's the only bill – work that was billed at any stage, those plus the three one-off situations. I didn't bill for any work that I did for my own clients.
>
> Q: So you're saying there was a lot of extra work you were doing as well, that you weren't billing for?
>
> A: I've always said that. I always said that I was acting for those two young clients. It's not a lot of work, it was a minimal amount of work but they

[22] NOE pages 68 to 69.
[23] NOE pages 52 to 54.

> were still appearing … so it wasn't something that I planned to happen, if I had to appear I had to appear. That is nothing to do with (Ms E's) work.
>
> The Court
>
> Q: Except you've referred to it as "most of the work that you did". So are you saying that the unbilled for your two boys (E and D), was actually more than appears on these three pages of tables of some 31 entries?
>
> A: Oh, I see. Right. Um, it felt like that, possibly because of the number of phone calls that E's mother particularly would ring …
>
> Q: … So you are resiling from the expression, "most of the work"?
>
> A: … In the sense that … I haven't … I haven't … I wasn't referring to (Ms E's) work when I was making that statement, but I don't think I did more work for myself per se than for (Ms E). …

[71] One of the explanations put forward by Ms Fendall for not declaring her work was that she felt that she really ought not to be working because [medical details removed] and she felt this could cause her trouble (rather than the financial motive for non-disclosure). She asserted that she did not expect that, had she declared her work, the payments would stop. However, she contradicted this by acknowledging her financial difficulties and her substantial outgoings (declared currently at over $100,000 per year) and her debts. Further we think the explanation untenable when it is clear that her professional advisors were on occasions encouraging her to work at whatever level she could.

[72] She asserted that she was concerned that actually working would be in jeopardy rather than the receiving of the benefit.

[73] That assertion cuts across her own admission in cross-examination that she needed to "stay on the benefit".

[74] During the Second Claim Period, Ms Fendall was making appearances as agent for Ms E from as early as April 2012 (given that the first payment for these was received in early May that year). However, she did not tell the insurer of these until 7 April 2014, following her interview. And at that point she estimated her "overlooked" income from that source as "*my best recollection is that the payments could be in excess of $10,000 in total, over the entire period. I did not knowingly keep this*

*information from you. I was utterly aghast and mortified when I realised* …". In fact by this stage Ms Fendall had received payments of almost $25,000 from Ms E.

[75] In evidence Ms Fendall maintained that she did not check her bank accounts, thus accounting for the vagueness about these payments. Given her dire financial situation this assertion also lacks credibility.

[76] The other important contextual matter which goes to credibility and level of intention is that during the second claim period, Ms Fendall was in the midst of disciplinary proceedings relating to errors and claims for services she had provided under Legal Aid and the Duty Solicitor Schemes. It had been accepted that the over-payments made to her were the result of her "failure to take proper care when recording time".[24]

[77] Ms Fendall had been investigated three times by the Legal Services Agency, who cancelled her provider listing and described her as "extremely negligent".

[78] It defies belief that, in the face of such intense scrutiny of her financial and time record-keeping, that Ms Fendall could have been careless (or reckless - as described by her) about financial claims and declarations.

[79] Indeed, the Tribunal's decision itself records that Ms Fendall had "*taken steps to ensure there will be no repeat, and we consider it unlikely that she will again make such a series of billing errors. These factors all reinforce our view that suspension is unnecessary, because a repetition is unlikely.*"[25]

[80] We note in that decision there was no mention that, by the time of the hearing, Ms Fendall was in receipt of the second period of income protection payments and was not meant to be working.

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[24] *Auckland Standards Committee 1 v Fendall* [2012] NZLCDT 1, hearing 31 January 2012, decision 14 February 2012.

> "[35] Mr Jones also noted that Ms Fendall … had improved her procedures and administrative systems related to billing."

[25] See above n 24 at [41].

[81] Indeed, her counsel argued strongly (and successfully) against her being suspended from practice. That decision was upheld on appeal.[26]

[82] We further note that all errors made by Ms Fendall in the periods under consideration relate to omissions or under-declaring income. There was never "carelessness" which led to her over-declaring. In other words, the errors always went in her favour.

***Openness with Health Professionals***

[83] In paragraph [27] of her affidavit Ms Fendall states:

> "I was always open about the work I was doing when speaking to the health professionals Sovereign assigned to me. Unfortunately, it did not occur to me that I needed to record that work on the individual declaration forms."

[84] We have already noted that Ms Fendall later conceded that these omissions were deliberate. At paragraph [52] of her affidavit Ms Fendall gives examples of disclosures to professionals. Some of these examples merely relate to discussions about rendering invoices for work carried out before she was receiving the claim. Other references simply proved to be inaccurate, particularly in relation to the second claim period.

[85] We start with the premise that the respective well-qualified and senior professional medical advisors engaged by the insurer owed and acknowledged a duty to report accurately to the insurer, inter alia, on the insured's ability to work. Thus, it is inconceivable that, had Ms Fendall been openly discussing ongoing work (particularly at the level which is subsequently disclosed by her bank records), they would have failed to report this to the insurance company.

[86] When challenged about what she had told Dr A who had been working with her, her evidence was that she had frequently talked to him about her Youth Advocacy work. In his report of 1 March 2012 he stated:

> "Robyn is currently not involved in her previous work role as a lawyer/barrister or any other work role."

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[26] *Auckland Standards Committee 1 v Fendall* [2012] NZHC 1825, Wylie J, 2 August 2012.

[87] When challenged about why, in a detailed and comprehensive report, Dr A would fail to record their alleged frequent discussions about her ongoing work, Ms Fendall suggested, (somewhat insultingly), that perhaps this was due to English being Dr A's second language.

[88] Again, Ms Fendall was evasive in relation to questioning about why she had not told her general practitioner about working, given his encouragement of her to get back to work:[27]

> Q: Well so do you, I mean at least from that time on you accept that you weren't open with your GP about what work you were carrying out?
>
> A: I don't think I saw him very often that year, but we didn't discuss it.
>
> Q: Well on the 4th September 2013 –
>
> A: Yes, I saw him again and I had a big gap between seeing him between –
>
> Q: He says he has a consultation with you on that day?
>
> A: Yes, he did. I hadn't seen him for some months before that.
>
> Q: He encourages you to go back to work, but clearly, he's under the impression that you're not working isn't he?
>
> A: I believe so, but I don't know for sure, we didn't discuss it.
>
> Q: Well he says he encouraged, on that meeting, he encouraged you to go back to work?
>
> A: As I say, he always encouraged me to go to work, he was very kind. I didn't feel that I was working and I didn't feel, it was such a small amount of my time that I compared to what I'd been working before, I didn't feel like I was working as such and I wasn't a fulltime lawyer, I wasn't, yeah.
>
> Q: So are you saying to everybody you didn't sort of see yourself as carrying out any work and you talk about really is it?
>
> A: Obviously, I knew if I was in Court I was in Court, but I wasn't sleepwalking, but I didn't see myself as working as an Advocate in the way that I had been before, it was really just continuing the work that I'd started and hoping at that point … certainly I said to Dirk that I felt apathetic about it and it would never happen and I was pretty much sorry for myself I suppose, and he came back in the context of that and tried to encourage me …"

[27] NOE page 40.

[89] We found more examples of Ms Fendall failing to tell professionals about working, rather than being open with them in the manner that she had asserted.

[90] There is a report from Dr B in November 2011 that records:

> "She is continuing to attend work for at least some of the week and appears to be doing this because of her enjoyment of the work and because it does tend to get her up and moving. However, she says she has difficulty keeping up with paperwork and I am concerned that she may make mistakes in her work role, because of her mental state. In my opinion she should stop attempting to work until her mental state has improved …".

[91] However, this is to be contrasted with his report of February 2012 which makes reference to the professional disciplinary hearings faced by her and notes:

> "Robyn is keen to again be able to practice (sic) as a Lawyer and it is to be hoped that the eventual outcome of her hearings are that she is indeed able to do this …".

[92] While this comment may have been during a period when Ms Fendall was doing little or no work, that cannot be said of later that year when Professor X recorded:

> "Interestingly, Robyn insists that her current withdrawal from work was at the advice of her previous case manager."

[93] That report was written following an attendance by Ms Fendall on Professor X in November 2012. It was inaccurate and misleading for her to have told Professor X that she had withdrawn from work when she had been appearing in Court regularly throughout 2012 from at least April (as set out earlier).

[94] Ms Fendall further told us that she was also still appearing for the two longstanding Youth Court clients during this time. Those attendances are unrecorded in the schedule of work provided to us because they were unpaid.

[95] Having seen and heard Ms Fendall at the hearing, closely analysing her evidence and the other evidence and materials filed we found her credibility substantially lacking. Save for her evidence on her desire to continue in practise referred to above, we gave little, if any, weight to her evidence.

***Issue 2(a) – Disgraceful or Dishonourable Conduct?***

[96] We were cognisant of the burden of proof and the necessary standard of proof in disciplinary hearings (including proof commensurate with the seriousness of the allegations) and were left in no doubt that the case was made out at the level of misconduct.

[97] In assessing Ms Fendall's degree of culpability (which had been pleaded in the alternative as to the three available levels), and only admitted at the lowest, namely unsatisfactory conduct, we had regard to the level of intention of her proven conduct.

[98] The circumstantial evidence pointing to deliberate and intentional conduct was overwhelming: the number of false declarations; the lengthy period of time over which they were made; the errors always to Ms Fendall's benefit; and the specific examples provided of her ability to file a detailed daily log which omitted nothing except the times when she was working. These, when put together with Ms Fendall's admissions of deliberate misstatements under cross-examination, led us to the inevitable inference that her conduct was intentional and deliberate.

[99] Even if it were accepted that somehow her depressive illness mitigated against intentionality - and there was no evidence to support this other than to limited memory problems - her recklessness in failing her obligation to act with the utmost good faith towards her insurer would still, in our view meet the standards of "disgraceful or dishonourable conduct".

[100] This assessment is an objective one, namely conduct that would be regarded as such by "lawyers of good standing". As a specialist tribunal, and having regard to the number of false declarations (18) and the period of time (25 months) in this case, we consider we are in a position to make that assessment.

[101] While we can accept that in some ways Ms Fendall was [medical information removed], at the same time she was able to appear in Court (she says competently), and despite her asserted memory loss was able to give detailed accounts of her day in the activity logs completed by her.

[102] We are reinforced in our view that Ms Fendall's conduct is properly described as "disgraceful and dishonourable" as there are not merely omissions made, but patently misleading statements made; such as, she was struggling to re-enter the Courtroom scene and to reintegrate herself back into Court work. This was at a time when she was in fact making regular Court appearances. Further, there are the false log entries which accurately record many aspects of her day other than those which relate to her work as a lawyer for which alternative fictional activity is substituted.

[103] The payments by Ms E were completely concealed by her – at the beginning of her interview with the insurer she stated:

> "I am not earning any income. I have not billed for any activities, any work that I have done in the role as a barrister at all in terms of billing the Court … the only thing I ever billed was one time I was down at court and for the court they asked me to do a stand-in for somewhere and it was a duty thing and I had to bill that because they pressured me …".

[104] We find that the practitioner is guilty of misconduct by reason of disgraceful or dishonourable conduct.

[105] For completeness we record that we regard this conduct to be at the most serious end of the spectrum.

***Issue 2(b) – Alternative Misconduct?***

[106] In fact, the practitioner admitted reckless breach of the Rules, in the event that her conduct was found to be professional rather than personal. That in itself would provide a basis for a further finding of misconduct.

[107] However, we put to Mr Davey, for the Standards Committee, that we would consider that somewhat of a duplication given that it rested upon the same particulars. Mr Davey agreed with that analysis and invited the Tribunal to treat the wilful/reckless breach charge as an alternative.

[108] In these circumstances, we do not need to make a finding in this regard having found misconduct on the basis of disgraceful or dishonourable conduct. However, if we are wrong in relation to the disgraceful or dishonourable finding, we consider it

would then be open to enter a finding of misconduct on the alternative admitted reckless breach of the Rules as pleaded.

***Issues 3, 4 and 5***

[109] We have found this to be professional conduct rather than personal and therefore these issues do not need to be resolved.

[110] We confirm the finding of misconduct conveyed at the conclusion of the hearing to the practitioner and Standards Committee. A penalty hearing has been fixed for 24 August and counsel have been directed to file submissions in the period leading up to that hearing.

**DATED** at AUCKLAND this 6th day of August 2018

Judge D F Clarkson
Chair