THERE IS AN ORDER MADE PURSUANT TO S 240 LAWYERS AND CONVEYANCERS ACT 2006 FOR THE SUPPRESSION OF MEDICAL DETAILS. PLEASE SEE ORDER 5 ON PAGE 10 FOR FULL SUPPRESSION DETAILS.

NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2018] NZLCDT 32

LCDT 036/17

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 24 August 2018

HELD AT Specialist Courts and Tribunals Centre, Auckland

DATE OF DECISION 18 September 2018

COUNSEL
Mr P Davey for the Applicant
Ms M Dew and Ms K Venning for the Respondent

DECISION OF THE TRIBUNAL ON PENALTY

Introduction

[1] Following the hearing on 24 August, we made an order striking Ms Fendall from the Roll of Barristers and Solicitors. We reserved our reasons for the making of that order. This decision provides those reasons.

Purposes of Penalty in the Professional Disciplinary Context

[2] We begin with some general comments concerning the purposes of penalty and the relevant test for striking off. These were summarised in the decision of *Daniels*[1] as follows:

(a) The primary purpose is not punishment, although orders inevitably will have some such effect;

(b) The predominant purpose is to protect the public interest, which includes the protection of the public;

(c) To maintain professional standards;

(d) To impose sanctions on a practitioner for breach of his/her standards;

(e) To provide scope for rehabilitation in appropriate cases;

(f) To carefully consider alternatives to striking off a practitioner, and if the purposes of disciplinary sanctions can be achieved short of striking off, then the lesser alternative should be adopted;

(g) In the end the test is whether a practitioner is a fit and proper person to continue to practice. If not, then striking off should follow;

[1] *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850 at [22].

(h) If striking off is not required but the misconduct is serious, then it may be that suspension from practising for a fixed period will be required.

[3] The jurisdiction to strike a practitioner off the Roll is contained in s 244 of the Act[2] which states:

> "(1) The Disciplinary Tribunal may not make an order, under section 242(1)(c), striking the name of a practitioner [or former practitioner] off the roll or an order, under section 242(1)(d), cancelling the registration of a practitioner [or former practitioner] unless in its opinion the practitioner [or former practitioner] is, by reason of his or her conduct, not a fit and proper person to be a practitioner.
>
> (2) Except by consent, the Disciplinary Tribunal may not make –
>
> (a) an order, under section 242(1)(c), striking the name of a practitioner [or former practitioner] off the roll;
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> …
>
> unless at least 5 members of the Disciplinary Tribunal are present and vote in favour of the order and those members are either the only members present and voting at the sitting of the Disciplinary Tribunal or the division of the Disciplinary Tribunal or are a majority of the members present and voting at the sitting of the Disciplinary Tribunal or the division of the Disciplinary Tribunal."

Seriousness of the Offending

[4] In assessing a proportionate penalty the starting point will always be the seriousness of the conduct:[3]

> "The nature and gravity of those charges that have been found proved will generally be important. They are likely to inform the decision to a significant degree because they may point to the fitness of the practitioner to remain in practice. In some cases these factors are determinative, because they will demonstrate conclusively that the practitioner is unfit to continue to practice as a lawyer. Charges involving proven or admitted dishonesty will generally fall within this category."

[5] The Tribunal, in its liability decision found that the misconduct (disgraceful and dishonourable) was "at the most serious end of the spectrum".[4] The extent of the

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[2] Lawyers and Conveyancers Act 2006.
[3] *Hart v Auckland Standards Committee 1 of the New Zealand Law Society* [2013] 3 NZLR 103 at [186].
[4] *Auckland Standards Committee 1 of the New Zealand Law Society v Fendall* [2018] NZLCDT 26, at [105].

practitioner's dishonesty is summarised by counsel for the Standards Committee as follows:

(a) She made 18 false declarations to the insurance company over a period of 25 months;

(b) The declarations contained false statements about her work activities, omitted the income earned from legal work and covered up the legal work that was being carried out;

(c) Her misconduct only came to light as a result of surveillance carried out by the insurer;

(d) As a result of her conduct she received significant sums from the insurer, which she then repaid following an investigation and settlement of subsequent litigation, involving a repayment by her of $450,000;

(e) Her conduct involved a breach of trust with her insurer;

(f) As a lawyer she ought to have known she owed a duty of utmost good faith to her insurer;

(g) She had started receiving income for legal work and completing associated false declarations shortly after she had been disciplined by the Tribunal in February 2012 for overcharging for legal aid work, and subsequently while that decision was under appeal.

[6] Mr Davey, for the Standards Committee, while acknowledging that no clients appear to have been harmed by the practitioner's actions, submitted that the conduct was still at "the most serious end of the spectrum" as found by the Tribunal.

Aggravating Features

[7] Ms Fendall has two previous disciplinary findings against her. The first in 2012 for misconduct relating to overbilling of the Legal Services Agency and the Ministry of Justice. The errors were accepted as inadvertent and the Tribunal, having regard to

Ms Fendall's contrition and the positive references concerning her work in the Youth Court, treated her leniently and did not suspend her from practice. Certainly, on appeal His Honour Wylie J concluded that:

> "… The respondent was singularly fortunate not to be suspended from practice."[5]

[8] While counsel for Ms Fendall emphasised that the 2012 hearing concerned billing errors which had occurred in 2005 and 2006 (and therefore some 12 years ago), the submission that the conduct was historical is considerably weakened, if not entirely defeated, by the fact that Ms Fendall was at that very time (2012) making the false declarations which are the subject of the proceedings before us.

[9] There is a further complicating and aggravating feature relating to the 2012 disciplinary proceedings which emerged in the course of these proceedings. It would seem that Ms Fendall effectively misled both the Tribunal, and the High Court, as to her position when appearing before them and seeking to continue to practice, ie: resisting suspension. She did not openly disclose to them that she had recently (November 2011) been accepted as unable to work due to a relapse of her depressive illness.

[10] Furthermore, in respect of her financial declaration to the Tribunal, she failed to update the position after she began receiving the insurance payments of over $14,000 per month. These had begun before the January 2012 hearing. Ms Fendall had been told that her claim had been accepted in December 2011 and in fact payments were backdated to October 2011. Her declaration on 3 November 2011 (at which time she was not aware whether her claim had been accepted), therefore excluded that income. The financial declaration was not updated at the Tribunal hearing[6] or subsequently when she appeared in July 2012 before the High Court.

[11] Thus, despite the fact that she was by then receiving insurance payments, Ms Fendall relied on her poor financial circumstances (as shown in the November 2011 declaration) to seek dispensation from costs payments in relation to the Tribunal costs. Her poor financial circumstances are also referred to by the Tribunal as a reason for not imposing a fine upon her.

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[5] *Auckland Standards Committee 1 v Fendall* (2012) 21 PRNZ 279, at [49.]
[6] The proceedings were filed in July 2011 but heard in January 2012.

[12] So not only was she legally unable to work at the time of both Court hearings, while advocating to be able to do so, she was less than forthright about her financial position. The Court was not told that she was [medical information removed]. Effectively Ms Fendall has provided different information to her doctor, to the New Zealand Law Society, to the Tribunal and to the High Court.

[13] We consider, having regard to the unsatisfactory nature of Ms Fendall's evidence before us, as recorded in our decision,[7] this conduct indicates a pattern of behaviour which is very concerning.

[14] The second disciplinary finding against her is of unsatisfactory conduct in relation to a completely inappropriate email that she sent to the Police. Ms Fendall accepted and apologised for this, however again it showed a distinct lack of judgment on her part.

Mitigating Features

[15] Accepting that strike off was the starting point for the offending under question, Ms Dew also acknowledged that in serious misconduct cases a practitioner's personal mitigation will carry significantly less weight than the need to protect the public interest. However, she submitted there were in this case strong mitigating features to be taken into account in support of a penalty short of strike off:

(a) The lack of harm to any clients or the Courts over 35 years of service in a challenging area of law;

(b) The positive testimonials from other colleagues who had regularly worked with her or observed her performance as a Youth Advocate. These were supportive references, referring to the undoubtedly positive qualities of this practitioner in carrying out her youth advocacy role;

(c) The early repayment of the monies to the insurer (and we would add to this the significant cost incurred in doing so, of $450,000);

[7] See note 4 at paras [65] to [82].

(d) The serious depression Ms Fendall had experienced during the period of the offending;

(e) The unreserved apology and responsibility taken by Ms Fendall which Ms Dew submitted demonstrated insight into her conduct;

(f) Ms Fendall's willingness to cooperate with the disciplinary process.

[16] We accept that these are all mitigating features to be weighed in the balancing exercise undertaken by the Tribunal. We acknowledge in particular that Ms Fendall by all accounts has been a valued advocate in the Youth Court, where reliable and competent counsel are much needed.

Comparative Cases

[17] Ms Dew referred the Tribunal to a number of decisions where practitioners had not been struck off. We consider that this practitioner's offending was markedly more serious than any of the examples quoted.

[18] In our view, the three most relevant decisions, on a comparative basis, are:

B v Canterbury Standards Committee No. 1.[8] In that matter the High Court considered the Tribunal had been amply justified in making an order for strike off because, amongst other things, there was proven dishonesty and there was no suggestion that the practitioner's depressive illness had affected his ability to distinguish between right and wrong.

The next matter was *Auckland Standards Committee 2 of the New Zealand Law Society v Anderson.*[9] In this matter, although the Tribunal found the dishonest conduct of the practitioner was not as wilful or deliberate as in *B*, taking into account the practitioner's depressive illness, it still made an order striking the practitioner's name off the Roll.

[8] *B v Canterbury Standards Committee No. 1 of the Lawyers Complaints Service of the New Zealand Law Society of Christchurch* [2012] NZHC 1274.
[9] *Auckland Standards Committee 2 of the New Zealand Law Society v Anderson* [2012] NZLCDT 17.

[19] Finally, in the matter of *National Standards Committee v Toner*[10] a practitioner had been discharged without conviction after a theft of $200 worth of groceries had been admitted. The practitioner also had suffered from significant psychological and addictive problems, followed by significant rehabilitative steps to address those issues. However, Ms Toner was found to have misled the Standards Committee and the Tribunal concerning her recent drug use and rehabilitation. Although her actions had not harmed any clients and were seen as largely self-destructive, the practitioner was suspended from practice for three years. We consider that in the current matter the offending is of a significantly more serious nature.

Decision to Strike Off

[20] We note that a further purpose of penalty, which is not referred to in the summary from *Daniels,*[11] is the principle of deterrence, both general and specific. This purpose also forms part of the "protection of the public" focus which is a key element of the Tribunal's statutory obligations. Although it is often quoted, the passage in *Bolton,*[12] best describes the importance of these concepts:

> "The second purpose is the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled but denied re-admission. If a member of the public sells his house, very often his largest asset, and entrusts the proceeds to his solicitor, pending re-investment in another house, he is ordinarily entitled to expect that the solicitor will be a person whose trustworthiness is not, and never has been, seriously in question. Otherwise, the whole profession, and the public as a whole, is injured. A profession's most valuable asset is its collective reputation and the confidence which that inspires."

[21] It is for that reason that the personal mitigating features of a practitioner must take a position behind the interests of the profession as a whole in the maintenance of its high reputation.

[22] As has often been said, that is the price an individual practitioner pays for the privilege of membership of the legal profession.

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[10] *National Standards Committee v Toner* [2013] NZLCDT 38.
[11] See note 1.
[12] *Bolton v Law Society* [1994] 2 All ER 486 at 492.

[23] Ms Dew urged us to accept that Ms Fendall had insight into her offending. Although we certainly accept that her apology was a fulsome one, we cannot fully accept that this demonstrated insight, having regard to the nature of her evidence. And, as stated in *Daniels*,[13] while the full exercise of a practitioner's rights is not an aggravating factor, Ms Fendall's decision to seek a review from the Legal Complaints Review Officer as to the prosecution of this matter, can be seen as diminishing her claim to "insight". We consider that decision, and her plea to only "unsatisfactory conduct" demonstrate a failure to address the seriousness of the conduct. These matters do nothing to reassure us that there will be no repetition of her conduct.

[24] Even if we are wrong about the risk of reoffending, against the background of this and the previous offending, the practitioner has disqualified herself from a third chance. The risk of damage to the reputation of the profession by allowing her to remain as a practitioner is too great.

[25] We find unanimously as a panel of five that Ms Fendall is not a fit and proper person to be entrusted with the legal affairs of members of the public.

[26] Although we accept Ms Dew's submission that Ms Fendall is the individual who has suffered most, we also consider that the profession as a whole has been seriously harmed by her conduct.

Orders

1. We confirm the order as to strike off which was made on 24 August 2018.

2. The practitioner is ordered to pay the costs of the prosecution in the sum of $30,450.00.

3. The costs of the Tribunal are certified at $12,344.00, under s 257 and are awarded against the New Zealand Law Society.

[13] See note 1.

4. Having regard to her cooperative approach to the disciplinary proceedings we propose to order that the practitioner reimburse the Tribunal costs as to 75% to the New Zealand Law Society.

5. There will be an order pursuant to s 240 suppressing any material on the file relating to Ms Fendall's medical conditions, other than to those references in the decisions that Ms Fendall suffered from a depressive illness.

DATED at AUCKLAND this 18th day of September 2018

Judge D F Clarkson
Chair