

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2019] NZLCDT 27

LCDT 014/19

IN THE MATTER

of the Lawyers and Conveyancers
Act 2006

BETWEEN

**AUCKLAND STANDARDS
COMMITTEE 1**

Applicant

AND

VICKI POMEROY

Respondent

CHAIR

Judge BJ Kendall (retired)

MEMBERS

Mr S Hunter

Ms A Kinzett

Ms P Walker

Mr I Williams

DATE OF HEARING 26 September 2019

HELD AT Auckland District Court

DATE OF DECISION 4 October 2019

COUNSEL

Mr J Parry and Ms L Luaitalo for the applicant

The respondent in person

**RESERVED REASONS FOR THE DECISION OF THE NEW ZEALAND LAWYERS
AND CONVEYANCERS DISCIPLINARY TRIBUNAL CONCERNING LIABILITY**

Introduction

[1] The applicant filed a charge against the respondent which was framed as disgraceful or dishonourable misconduct pursuant to s 7(1)(a)(i) of the Lawyers and Conveyancers Act 2006 (the Act) and/or wilful or reckless contravention pursuant to s 7(1)(a)(ii) of the Act. The respondent was also charged in the alternative with unsatisfactory conduct pursuant to s 12(b) and/or s 12(c) of the Act.

[2] The charge and particulars are annexed as Appendix 1.

[3] The respondent did not formally deny the charge prior to hearing nor was any evidence filed in response to the charge.

[4] The matter came before the Tribunal for hearing on 26 September 2019, at which time the respondent appeared in person and admitted the facts set out in support of the charge.

[5] The respondent discussed with the Tribunal at length details relating to an acute stress disorder, which details were advanced as the reason for failure to comply with matters leading to the charge.

[6] After hearing from the respondent, counsel for the applicant advised the Tribunal that he withdrew that aspect of the charge relating to disgraceful or dishonourable conduct.

[7] At the end of the hearing, we recorded a finding of unsatisfactory conduct against the respondent.

[8] This decision records the reasons for the finding that was made.

The Charge

[9] The charge is that the respondent failed to comply with a request made by the Committee to produce for inspection by the Committee the respondent's complete file in relation to Mr H. That failure was in breach of s 147(2)(a) of the Act. The respondent was requested to make the file available for inspection on nine occasions between September 2017 and 5 November 2018 but failed to comply with the Committee's requirement or to explain the failure to do so.

[10] The respondent having explained to us the acute stress disorder emphasised that there was an intention to comply with the requirement, but the disorder led to an inability to cope and that there was no recklessness towards the requests that had been made.

[11] The respondent, having initially engaged with the complaint process, offered two reasons for challenging the requirement to make the file available. First, a concern that the records sought might be privileged. Secondly, that the records asked for might not be pertinent or relevant to the Committee's consideration of the complaint.

[12] The respondent was advised by the Committee at the time that there was no merit in these points. The respondent acknowledged a lack of understanding and expertise in relation to the powers of the Committee and the disciplinary regime, but did not seek advice from another practitioner or research the issues. The respondent did not maintain at the hearing before us that there had been any proper basis for withholding the file. Rather, for the reasons referred to earlier, the respondent had simply disengaged from the process and failed to comply with the Committee's request.

[13] The Tribunal did not have any independent medical evidence before it concerning the disorder but, having seen and heard from the respondent, concluded that it was able to accept what the respondent had explained to it. The respondent did say that there was a session with a health professional which was unsatisfactory. Then, in early 2018, contact was made with the Law Society's health support programme, but the respondent found that also to be unsatisfactory. There was no evidence of an ongoing treatment plan.

[14] Counsel for the Committee did not challenge what the respondent had to say as to the acute disorder at material dates. He submitted that it was open to the Tribunal to make a finding of misconduct for the following reasons:

- (a) the respondent did occasionally engage with the Committee such that there was a reasonable conclusion that the respondent's mind had been turned to the request;
- (b) there was some capability displayed to resolve the matter evidenced by the respondent's engagement with the Tribunal's process at a teleconference on 26 July 2019;
- (c) The scope of the request was simple, unambiguous and made on multiple occasions. The respondent was aware of the obligation to comply; and
- (d) The respondent, notwithstanding the disorder, displayed a physical and mental capability to respond and could have therefore complied with the requirement made under s 147(2)(a) of the Act.

[15] Counsel submitted in the alternative that the conduct complained of at least met the test for unsatisfactory conduct in that the respondent fell short of the competence and diligence to engage with the process including before the Tribunal which is a fundamental requirement of a lawyer.

[16] Having accepted the respondent's explanation for the failures we concluded that a finding of unsatisfactory conduct was the appropriate conclusion to reach.

[17] In making that finding, we have noted that the respondent did, in the course of the complaint, hold an honest belief as to the objections raised. There was a recognition of failure to cope, but no advice given to the Committee of the situation or sustained help sought about the disorder. Practitioners have a duty to communicate with the professional body when there is an objection to, and/or inability to respond to the complaint process. Not to have done so, in even the broadest terms, is unsatisfactory.

[18] Given the history of the matter, we understand why the Committee brought the charge of misconduct. Persistent failure to comply with a proper request by a

Standards Committee or other deliberate actions that frustrate the operation of the professional disciplinary regime may often lead to a finding of misconduct. In the present case we determined, by a narrow margin, that the lesser finding of unsatisfactory conduct was appropriate for two principal reasons.

[19] First, we are satisfied that this is not a case where the respondent willfully frustrated the disciplinary process; rather, the respondent was overwhelmed by broader circumstances which, notwithstanding the lack of medical evidence, we are satisfied were linked to a medical condition.

[20] Second, the respondent did ultimately, albeit very belatedly, comply with the Committee's request by bringing the full file to the Tribunal hearing.

[21] We express concern about the respondent's underlying health condition and the impact that it has on the ability to continue in practice. In the interval, the respondent is invited to engage with the Law Society in the expectation that a plan can be settled upon to manage the future wellbeing of the respondent and advise it what is being undertaken presently in that regard including involvement with professional help.

[22] The applicant's submissions regarding penalty are to be filed ten working days before the date set for consideration of penalty. The respondent is to file submissions regarding penalty five working days before the hearing date, together with details as to financial position.

[23] There is an interim order pursuant to s 240(1)(c) of the Act prohibiting the publication of the name of the respondent or of any particulars of the respondent's affairs.

[24] The Tribunal will consider a permanent order for non-publication on the date set for consideration of penalty.

DATED at AUCKLAND this 4th day of October 2019

BJ Kendall
Chairperson

Charge

Auckland Standards Committee 1 (**Committee**) charges PV (**Practitioner**) as follows:

Charge: Misconduct within the meaning of s 7(1)(a)(i) and/or (ii) of the Lawyers and Conveyancers Act 2006 (**Act**) in that she wilfully or recklessly contravened provisions of the Act that apply to the Practitioner in the provision of regulated services:

(a) breach of s 147(2)(a) of the Act by failing to comply with a request made by the Committee to produce for inspection by the Committee her complete client file in relation to Mr H.

Or, alternatively, unsatisfactory conduct within the meaning of ss 12(a), (b) and/or (c) of the Act.

The particulars of the charge are as follows:

Background

- 1 At all relevant times, the Practitioner:
 - (a) was enrolled as a barrister and solicitor of the High Court of New Zealand.
 - (b) held a current practising certificate as a barrister and solicitor, and practised as a sole practitioner in her own practice.
- 2 In September 2017, the Committee invited the Practitioner to provide a full copy of her client file relating to Mr H (**File**). Mr H had made a complaint about the competency and timeliness of the service provided to him by the Practitioner (**Complaint**).
- 3 Initially, the Practitioner refused to provide the File, citing privilege and irrelevance. She later made contact by phone and queried whether the Committee required the File in soft or hard copy form. The Practitioner was advised whichever was more convenient. Following this contact, the Practitioner did not provide the file.
- 4 On 9 March 2018, the Committee resolved to require the Practitioner to provide the File pursuant to s 147(2)(a) of the Act.
- 5 On 30 May 2018, the Practitioner was advised of the requirement to provide the File and given a deadline of 20 June 2018 to comply. She failed to do so.
- 6 On 25 June 2018, the Practitioner was again advised of the requirement to provide the File and given a deadline of 29 June 2018 to comply. She failed to do so.
- 7 The Practitioner was reminded of the outstanding requirement on 12 July 2018 (by post and email), 15 August 2018 (by post and email), 17 September 2018 (by email only), 16 October 2018 (by post and email) and on 5 November 2018. The Practitioner continued to fail to comply with the Committee's requirement and made no contact to explain her failure.
- 8 In failing to comply with the requirement to provide the file, the Practitioner either wilfully or recklessly contravened s 147(2)(a)(i) of the Act.
- 9 On 14 December 2018, the Committee determined that the matter be considered by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal and the Practitioner was advised of this on 11 February 2019.