

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2021] NZLCDT 8

LCDT 018/20

IN THE MATTER

of the Lawyers and Conveyancers
Act 2006

BETWEEN

**AUCKLAND STANDARDS
COMMITTEE 4**

Applicant

AND

PATRICK JAMES KENNELLY

Practitioner

DEPUTY CHAIR

Judge J G Adams

MEMBERS OF TRIBUNAL

Ms K King

Ms A Kinzett

Mr B Stanaway

Ms S Stuart

DATE OF HEARING 18 March 2021

HELD AT District Court, Auckland

DATE OF DECISION 23 March 2021

COUNSEL

Mr P Davey for the Auckland Standards Committee

Mr M Atkinson and Ms H Birch for the Practitioner

DECISION OF THE TRIBUNAL RE PENALTY

Introduction

[1] Mr Kennelly failed to comply with an order of the Standards Committee that he pay compensation of \$3,084 to a former client. The compensation was ordered because of his poor attention to her case. Not only did he fail to respond to her queries, he failed to file court documents in accordance with a timetable, resulting in criticism by a judge and incurring a costs order against his client.

[2] Mr Kennelly applied to review the Standards Committee's decision. The Legal Complaints Review Officer (LCRO) confirmed the orders. Thereafter, the Standards Committee and the former client wrote repeatedly to Mr Kennelly but he failed to respond. The former client complained about Mr Kennelly's inaction. At the hearing, Mr Kennelly's submissions reprised his dissatisfaction with the original penalty. He did not answer the real point then at issue, namely his failure to comply with the order. The Standards Committee laid this charge. When advised of that fact, Mr Kennelly immediately paid his former client.

[3] Mr Kennelly admits his conduct was "unsatisfactory conduct" but disputes that it should be categorised as "misconduct."

[4] The issues we must decide are:

- Is the appropriate charge "misconduct" or "unsatisfactory conduct"?
- What is the appropriate penalty?

Misconduct or unsatisfactory conduct?

[5] Although the full range of penalties (even strike-off) is available where a charge of unsatisfactory conduct has been proved, the statutory rhetoric and case law indicates that misconduct is the category more grave than unsatisfactory.

[6] Mr Kennelly's pervasive lack of response concerned the Standards Committee. That reflects in their submission that his disobedient failure should be characterised at the gravest level (misconduct) and should result in his being suspended for four months.

[7] While we understand the stance of the Standards Committee, we must deal with this matter in proportion with other cases. We should:

- Compare with similar disobedience cases;
- Identify the salient features of this particular charge; and
- Take account of relevant context (the genesis of the charge, relevant features of the practitioner, disciplinary history).

Similar cases

[8] Mr Davey referred to *Hong v Auckland Standards Committee No. 3*¹ where suspension of four months for failure to comply with disciplinary sanctions was imposed on appeal. Gilbert J referred to the fact that fines had previously been imposed in such cases in New Zealand. In *Hong*, characterisation of the default as "misconduct" was not addressed on appeal.

[9] Mr Atkinson referred to several cases where disobedience was characterised as "unsatisfactory conduct." In *Otago Standards Committee v Elder*² reference was made to discussion of "misconduct" in *Complaints Committee No. 1 of the Auckland District Law Society v C*.³ In *Elder*, the Tribunal commented: "There may not be many cases where disregard of an order of a Standards Committee can be regarded as less serious than misconduct, however we do not consider this to be, by a fine margin, one of those cases."⁴

¹ *Hong v Auckland Standards Committee No.3* [2014] NZHC 2871.

² *Otago Standards Committee v Elder* [2020] NZLCDT 23.

³ *Complaints Committee No. 1 of the Auckland District Law Society v C* [2008] 3 NZLR 105.

⁴ At para [22].

[10] Despite that observation, we have not been referred to any New Zealand case involving a lawyer, other than *Hong*, where failure to comply with disciplinary sanctions resulted in a categorisation of “misconduct.”

[11] We accept that the statutory language and scheme allow for cases where “misconduct” will be the appropriate category, but the preponderance of practice to date shows that these cases typically fall within “unsatisfactory conduct.”

Salient features of this charge

[12] The order to pay compensation was made on 29 August 2016. Mr Kennelly exercised his right to review. For reasons beyond the control of any party, the LCRO decision upholding the Standards Committee was delivered on 3 April 2019. The effective disobedience runs from that date or close to it. These charges were laid on 30 April 2020. Mr Kennelly paid the client the compensation the following day, 1 May 2020.

[13] Mr Kennelly suggested his delay was explicable because he did not agree with the orders, he was considering further challenge, and he thought the client needed to obtain a consequent order in the District Court before the order could be enforced.

[14] We agree with his counsel, Mr Atkinson, who commented that Mr Kennelly would have done better to “suck it up.” He did not take further review action and therefore should have obeyed the order. That is consonant with his professional duty to uphold the law, even those aspects he may not like.

[15] The proposition that the client should be put to the trouble of yet another process to enforce the order is untenable. The Standards Committee has the power to impose the order. Patently, he complied with one of its concurrent orders in that he made arrangement to pay the fine.

[16] When he addressed us at the hearing Mr Kennelly spoke of his “pig-headedness” and his “dogged” attitude. Those expressions, which he volunteered, demonstrate more insight into his avoidant behaviour.

[17] We do not conflate this charge of disobedience with the former findings of inadequate professional representation. Mr Kennelly has already been penalised for those defaults. What he faces now is the discrete matter of his failure to obey the order to pay compensation.

[18] Mr Kennelly was penalised on 29 August 2016 for his poor professional representation. In addition to the compensation, he was fined \$12,000. His subsequent default (failing to pay that compensation) is most relevant in the period after the LCRO decision of 3 April 2019 upheld the Standards Committee decision. That default was marked by his persistent, avoidant non-responsiveness. Queries from his former client and from the Standards Committee elicited no reply.

Relevant context

[19] Mr Kennelly has a disciplinary history. We identify a theme of his not attending to matters in a timely manner. As recently as December 2020 he was fined \$5,000 and ordered to pay costs of \$2,000 for failing to comply promptly with an order that he transfer certain shares to beneficiaries in an estate where he was sole executor. Notably, the Standards Committee treated his default as unsatisfactory conduct.

Unsatisfactory conduct, not misconduct

[20] In this case, we note the charge as one of modest albeit revealing moment. By indulging his pique, Mr Kennelly has brought unnecessary, inconvenient consequences to himself, his former client and the Disciplinary services. We do not regard this matter, in its broader context, as one that should be categorised among the more serious defaults. That statement would not wield the same force in future if he proved to be on a course where he disregarded his professional obligations, whether of a similar kind or not.

[21] We find the charge at the level of unsatisfactory conduct (admitted by Mr Kennelly) is appropriate. We decline to characterise it as misconduct.

Penalty

[22] Mr Kennelly's failure to pay compensation in a timely manner meant that his former client received \$3,084 almost four years after the original order. Although three years of that was taken up by the application to review, from the client's point of view, she lost the use of money and Mr Kennelly had the benefit of its use.

[23] Pursuant to s 156(1)(d) of the Lawyers and Conveyancers Act 2006, we can order compensation. Confidence in the legal profession is enhanced by addressing wrongs done to clients. We were pleased to hear that Mr Kennelly apologised to his client within the last few days. We assess that a suitable compensation sum of \$600 would address the client's loss of use of money. Mr Kennelly informed us that he could and would pay such a sum immediately, if ordered.

[24] Mr Kennelly has had two prior appearances before the Tribunal, each relating to management of his trust account. We treat those as being defaults of a different kind to the one we are dealing with. He seems to have taken those trust account matters to heart, commenting proudly about the current clean state of his trust account.

[25] As a result of fines and costs on those charges and the recent one concerning an estate, he is paying off by instalments more than \$70,000 to the New Zealand Law Society. His practice has one employee. Predictably, suspension would have an adverse effect on some clients. Congruent with our determination about gravity, we do not regard this as an exceptional case of disobedience to the point that, as in *Hong*, suspension should follow. In our view, not only would that be disproportionate, it would do more harm than good.

[26] Our categorisation of this charge as unsatisfactory conduct, and our determination not to suspend, does not mean we regard this default as less than serious. It fails to meet a practitioner's duty to uphold the processes of law. It demonstrates a level of disregard for his client's interests. We are concerned about the discernible themes of avoidance and failure to address matters within appropriate time frames. In disciplinary matters, there is sometimes the possibility of a charge, within itself a small matter, accumulating moment because of prior history.

[27] Mr Kennelly is at risk of this if he does not smarten up his attention to his professional duties. Whether that involves turning work away, obtaining mentoring, and/or personal counselling to deal with stressors, is not something we intend to make orders about in this case.

[28] We are concerned to warn him, however that further charges, even in different areas of concern, will inevitably cause us to consider the more serious penalties of suspension or strike-off. Adequate management, week to week, and having processes to deal with what can become “mental-block” files appear essential for him. In the interests of his clients and pursuant to his professional obligations to provide reasonable service, he should review these matters.

[29] We were pleased to learn that Mr Kennelly has engaged with a group of colleagues who provide him with ongoing support.

[30] We regard an appropriate response to this charge involves compensation, fine, censure and costs. Mr Kennelly realises he will also suffer the embarrassment of publication, something he spoke about during his direct engagement with us at the hearing.

Penalty Orders

[31] Mr Kennelly shall pay compensation of \$600 to his former client within one week of the date of this decision. He shall provide proof of that payment to the Standards Committee within four weeks of the date of this decision.

[32] Mr Kennelly shall pay a fine of \$6,000. We observe that this is less than the sum of \$10,000 sought in part of Mr Davey’s submissions but, in the context of the charge overall, including Mr Kennelly’s financial circumstances, we regard \$6,000 as a sufficient marker of the gravity of this discrete default. In determining the fine, we note that there will be additional costs consequences for Mr Kennelly in this decision.

[33] We order Mr Kennelly to reimburse the full costs of the New Zealand Law Society in this matter which amount to \$7,475.

[34] The Tribunal costs to be paid by the New Zealand Law Society under s 257 are certified at \$2,216.

[35] We order that Mr Kennelly indemnify the New Zealand Law Society for the s 257 costs in full.

[36] Mr Kennelly is censured in the following terms:

Censure

Mr Kennelly, you have admitted one charge of unsatisfactory conduct by failing to pay compensation to a former client as ordered by the Standards Committee. Your persistent failure to pay was exacerbated by your failure to respond to reasonable enquiries from your former client and the Standards Committee. In these defaults you have fallen short of your professional obligations to abide the rule of law. Your former client suffered additional disappointment and disadvantage because you frustrated resolution of the original complaint process. You have let yourself and the profession down. This default adds to your profile built from other disciplinary findings, so that your practice will be under scrutiny as to your compliance with professional obligations of any sort.

[37] The name of the complainant is permanently suppressed.

DATED at AUCKLAND this 23rd day of March 2021

Judge JG Adams
Deputy Chairperson