NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2022] NZLCDT 13
LCDT 010/20

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE 2** Applicant
AND	**BARRY EDWARD BRILL** Practitioner

CHAIR
Ms D F Clarkson

MEMBERS OF TRIBUNAL
Hon P Heath QC
Mr S Hunter QC
Ms M Noble
Prof D Scott

HEARING HELD AT Specialist Courts and Tribunals Centre, Auckland

DATE OF HEARING 27 April 2022

DATE OF DECISION 16 May 2022

COUNSEL
Ms N Walker and Mr M Djurich for the Auckland Standards Committee
Mr W Pyke for the Practitioner

REASONS FOR DECISION OF THE TRIBUNAL AS TO PENALTY

Introduction

[1] In our decision of 21 January 2022, we found s 9[1] misconduct proven against Mr Brill, and in addition found one charge of unsatisfactory conduct established.

[2] This decision provides the reason for penalties imposed following the hearing on 27 April 2022, as follows:

1. A censure (as recorded later in this decision);

2. A fine of $7,500;

3. Costs orders, being 75 per cent of the Standards Committee costs and 75 per cent of the Tribunal costs.[2]

Process

[3] Following, broadly, the framework in *Hart,*[3] and reminding ourselves of the purposes set out in *Daniels,*[4] we began with an assessment of the level of seriousness of the misconduct. We then considered aggravating and mitigating features of the conduct and personal factors relating to the practitioner.

[4] We addressed the need for consistency by comparing this case with other similar cases.

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[1] Lawyers and Conveyancers Act 2006 (LCA), s 9 provides that it is misconduct for an employed lawyer (as opposed to a lawyer in practice on his or her own account) to provide regulated services to the public other than in the course of his or her employment by another lawyer, a law firm or other specified entities.

[2] Tribunal costs are mandatorily awarded against the New Zealand Law Society (NZLS), the second costs order against Mr Brill ordered reimbursement of 75 per cent of those costs as certified at the conclusion of this decision.

[3] See *Hart v Auckland Standards Committee 1 of the New Zealand Law Society* [2013] 3 NZLR 103, [181]-[189].

[4] *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] NZLR 850.

[5] Having reached this point, we then stood back and considered whether the overall penalty to be imposed in this case met the purposes of the legislation. That is, was it sufficient to protect the public, maintain the reputation of the profession and uphold professional standards. Those are the primary purposes of disciplinary sanctions rather than any punitive purpose, although it is recognised that orders may well have a punitive effect. Other principles of penalty which fit within the above considerations include any need for rehabilitation (not relevant in this matter), and for general and specific deterrence.

Background

[6] We have set out the background of the conduct, as found in our decision of January 2022.

[7] Section 9 is a relatively uncommon form of misconduct, so we briefly reiterate the concerns which necessitate this particular area of regulation.

> [50] The concerns underlying the prohibition on rendering services to the public by employees of organisations which are not law firms [are] self-evident. Unlike law firms, those organisations are not comprised of persons bound by the Conduct and Client Care Rules. They are unlikely to have the same systems in place to ensure that the Rules are complied with. They are less likely to carry professional indemnity insurance which would protect the client in the event of negligence. The provisions as to terms of engagement are not applicable to organisations other than law firms.[5]

[8] This disciplinary action was brought after Mr Brill (an employed or 'in house' lawyer) acted for a number of parties in High Court litigation and in an appeal to the Court of Appeal. Those persons were entitled to a lawyer who would provide them with an engagement letter; who would give the required disclosure regarding professional indemnity insurance; and who would adhere to the communication expectations of the Conduct and Client Care Rules and other professional standards. They were also entitled to be advised on the actual or potential conflict of interest as we found was likely to have existed between them and Mr Brill and his wife, as and when such arose.

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[5] *Auckland Standards Committee 2 v Barry Brill* [2022] [NZLCDT] 3 at [50].

[9] In relation to the background, or contextual matters, there are two other points that need to be made. One is that none of the friends and neighbours represented by Mr Brill made any complaint about his conduct. Counsel advised at the hearing that the practitioner was in touch with all but one of those parties and that they were aware of these proceedings. It is reasonable to infer that they did not feel the need to complain.

[10] Secondly, the services carried out by Mr Brill were on an unpaid basis. We consider this further under the heading of mitigation.

Seriousness

[11] We accept the Standards Committee's submission that this conduct is "moderately serious". As such, the Committee does not seek a penalty that would interfere with Mr Brill's right to practise.

[12] The Standards Committee does, however, emphasise the degree to which Mr Brill knew of the restrictions that apply to employed lawyers and that he was acting contrary to these restrictions. This is relevant to penalty. In this context, we have considered the history of Mr Brill's communications with the New Zealand Law Society (NZLS) regarding his practising certificate.

[13] This was an area of some contention at the penalty hearing. Counsel for the Standards Committee submitted that Mr Brill's numerous communications with the NZLS and its clear advice that he was unable to practise other than as an employee (that is not providing services to the general public), ought to be taken into account by the Tribunal as an aggravating feature of the misconduct.

[14] On the other hand, Mr Pyke submitted that this history should not be characterised as aggravating because it was not strongly linked to Mr Brill's misconduct. Mr Pyke submitted that Mr Brill's dealings with the NZLS and his understanding of his obligations are better characterised as "muddled". Mr Brill may have misunderstood his obligations but he did not deliberately cross the line into conduct which would only be permitted if he was practising on his own account. Mr Brill's repeated assertions during the disciplinary process that he did not regard the people he represented as "the public" speaks to this approach.

[15] We think that somewhat misses the point advanced by the Standards Committee. Mr Brill engaged in correspondence with the NZLS over a period of five-and-a-half years in relation to the status of his practising certificate. This extended well into the period when Mr Brill was conducting the litigation. He nevertheless failed to advise the NZLS of his involvement in the litigation, a matter that was plainly relevant to the very topic he and the NZLS were debating. Mr Brill's lack of candour with the NZLS must bear on our assessment of his knowledge of his obligations.

[16] We have therefore had regard to Mr Brill's extensive chain of correspondence with the NZLS, set out in the evidence,[6] and in particular the written communications in September 2010, July 2013, August 2013, and March 2016. It is hard to understand how Mr Brill could not have turned his mind to the current work he was undertaking on the litigation.

[17] Mr Pyke urges us not to place too much emphasis on the evidence of the practitioner quoted in the liability decision about possibly deciding "… *that it was best to say nothing* …". Mr Brill offered an alternative explanation, relating to his wife's involvement in the litigation, that we did not find particularly persuasive. For whatever reason, Mr Brill chose not to disclose plainly relevant information in correspondence with his professional body.

[18] We finally note in relation to Mr Brill's failure to provide client information (via an engagement letter) and the conflict of interest, we did not find these breaches to be wilful or reckless, hence the finding of unsatisfactory conduct rather than misconduct.

Aggravating Features

[19] We accept the Standards Committee's submission that the failure to disclose involvement in the litigation as discussed above ought to be regarded as an aggravating feature. The fact is that whatever Mr Brill's memory is now of why he did not disclose the information, it is clear from the correspondence that he went into some detail about his reasons for wishing to continue to hold a practising certificate and in setting out the nature of his work for BE Brill Limited. In that context we cannot accept that Mr Brill omitted to mention, over a lengthy period, that he was

[6] Summarised at [4.5] of the penalty submissions on behalf of the Standards Committee.

conducting litigation in the High Court and Court of Appeal simply because he regarded the matter as irrelevant or considered that the story was too complicated to recite.

[20] As submitted by Mr Djurich for the Standards Committee, practitioners cannot be allowed to "*shape their own responsibilities*". In other words, we must apply objective standards. An important one of these standards is the absolute duty of candour lawyers owe to their professional body when responding to its enquiries.

[21] Whether intended to mislead or not, the fact is that the NZLS **was** misled by Mr Brill's failure to disclose his involvement in the litigation. That ought not to happen.

Mitigating Factors

[22] It is conceded by the Standards Committee that a strong mitigating feature in respect of Mr Brill is his very lengthy career as a lawyer (over 50 years, with at least half of these in some form of active practice) without any previous blemish to his disciplinary record. He deserves considerable credit for that record.

[23] In addition, Mr Brill has served his country as a Parliamentarian and been involved in other community organisations for which also he ought to receive credit.

[24] We also acknowledge that Mr Brill did not engage in the litigation in respect of which he faces disciplinary consequences for personal gain, but rather out of a desire to help his neighbours. We accept that people looked to him as a senior member of the community and qualified lawyer and that he saw himself as stepping up to assist them.

Similar Cases

[25] As already indicated, s 9 misconduct is unusual and the Standards Committee has referred us to only two similar cases, both of which involved inexperienced practitioners. The Standards Committee submitted that because Mr Brill is very experienced, and because he was on notice of the issue through his communications

with the NZLS, that this offending ought to be regarded as more serious than that in the *Ram*[7] or *Vujnovich*[8] cases.

[26] Mr Pyke submitted that, to the contrary, the present case is less serious because the *Ram* and *Vujnovich* matters involved repeated breaches (albeit unintentional in at least the latter case). Here, Mr Brill's conduct was a "*one off*". That was strongly refuted by Mr Djurich. He submitted this cannot be seen as one off conduct because it consisted of acting in protracted litigation, involving six court appearances, one written leave application, and all manner of other attendances over two-and-a-half years.

[27] We are inclined to accept the Standards Committee's submission, rather than that of Mr Pyke, as a proper characterisation of this matter. It is hardly an isolated incident, notwithstanding that it may have been well-intentioned as set out above.

[28] Both of the cited cases resulted in a censure. We considered that, for consistency, Mr Brill also ought to be censured. This is a public marking of the conduct which remains on a practitioner's permanent record and is more accessible in terms of a disciplinary consequence than, for example, reading the decisions of the Tribunal.

[29] We consider that the delivering of a censure is also closely connected to the important principle of general deterrence which we consider to be of significance in this matter, although we accept that specific deterrence is not necessary because the practitioner is unlikely to repeat his conduct.

[30] In our decision in *Horsley*[9] we referred to the importance of general deterrence where we stated:

> [28] There is, in this case, a specific aspect of penalty which bears on the special role of the Tribunal in upholding professional standards, the reputation of the profession, and in protecting the public. That is the aspect of "general deterrence. …

[7] *Auckland Standards Committee 3 v Ram* [2011] NZLCDT 32.
[8] *Auckland Standards Committee 2 v Vujnovich* [2021] NZLCDT 1.
[9] *Canterbury Westland Standards Committee v Horsley* [2014] NZLCDT 47.

[31] We went on to quote from an Australian decision in *Legal Services Commissioner v Nomekos*[10] where general deterrence was well explained as:

> General deterrence requires consideration of whether there is a need to signal to other members of the profession that adverse consequences will follow such conduct, and thereby deter them from the same conduct, and in the interests of maintaining professional standards and public confidence in the profession.

Censure

[32] We record the following censure to Mr Brill:

> Mr Brill, in conducting litigation for neighbours and friends against your Body Corporate, we found you had provided legal services to the public, in breach of s 9 of the LCA. There are clear policy reasons set out in this decision for strict adherence to the two permitted modes of practice – as an employed lawyer, or as a lawyer qualified and approved to practice on his or her own account.
>
> Strict adherence to rules imposed by your professional body is also necessary to ensure the maintenance of the high professional standards demanded of all lawyers, and of the confidence of the public in the legal profession.
>
> You are formally censured for your conduct.

[33] We have also imposed a fine of $7,500.

[34] We finally note that we have reduced the costs award to 75 per cent of the costs claimed by the Standards Committee and the Tribunal's costs. The liability phase of this proceeding involved two hearings and for a variety of reasons has been protracted. We think it is fair for the parties to share some of the additional cost.

Summary of Orders Imposed on 27 April 2022

1. Censure as set out above.

2. There will be a fine of $7,500.

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[10] *Legal Services Commissioner v Nomekos* [2014] VCAT 251.

3. Costs are awarded as follows:

   (a) Seventy-five per cent of the Standards Committee costs – we calculate these at $25,881.

   (b) The s 257 costs are awarded against the NZLS and are certified in the sum of $14,048.

   (c) Seventy-five per cent of the s 257 costs are to be reimbursed by Mr Brill to the NZLS. The amount being $10,536.

DATED at AUCKLAND this 16th day of May 2022

DF Clarkson
Chairperson