ORDER FOR SUPPRESSION OF INFORMATION AS RECORDED IN PARAGRAPH [70] AND ORDER NO. 6 ON PAGE 15, PURSUANT TO S 240 OF THE LAWYERS AND CONVEYANCERS ACT 2006

NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2022] NZLCDT 24
LCDT 027/21

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE 2** Applicant
AND	**MEHAL KEJRIWAL** Respondent

CHAIR
Ms D Clarkson

MEMBERS OF TRIBUNAL
Mr G McKenzie
Ms N McMahon
Prof D Scott
Ms S Stuart

HEARING 28 June 2022

HELD AT Specialist Courts and Tribunals Centre, Auckland (practitioner attending by VMR from Sydney)

DATE OF DECISION 20 July 2022

COUNSEL
Mr P Collins for the Standards Committee
Mr A H Waalkens QC for the Respondent Practitioner

DECISION OF THE TRIBUNAL ON PENALTY

Introduction

[1] Ms Kejriwal is a young woman of only 30 years of age. The Tribunal has the difficult task of determining whether the admitted misconduct, involving dishonesty, can be dealt with by any order short of strike-off from the roll of barristers and solicitors.

[2] This decision analyses the level of seriousness of the misconduct, and then considers mitigating and aggravating factors relevant to the conduct and the practitioner.

[3] We weigh the relevant penalty principles and compare similar cases with the present one, in assessing the proportionate response.

Issues

[4] The issues we were required to determine included:

1. Where on the continuum of misconduct does this fit?

2. Are there any aggravating features of the conduct or in relation to the practitioner?

3. Are there any mitigating features?

4 How does this compare with similar dishonesty cases where strike-off has not been found necessary?

5. What prospects of rehabilitation of the practitioner exist, so that she may be certified to the public as fit and proper?

Background

[5] Ms Kejriwal was admitted on 6 July 2016 and began practice as a lawyer early in 2017, with a suburban Auckland firm. The events which led to the charge of misconduct, which she has admitted, occurred less than a year into her career as a lawyer, in November and December 2017. She was only 25 years old at the time.

[6] She remained employed with that firm until August 2018, when she departed New Zealand to work in Australia, but has not practised law since.

[7] The misconduct involved three instances of fraudulent conduct, designed to obtain funds for her own benefit.

[8] Two incidents involved altering a fee invoice, purportedly issued by her employer but with the practitioner's personal bank account inserted on the invoice for payment of the fee by direct credit. The third incident involved the forgery of a fee invoice from another firm, but this time the bank account shown for payment of the invoice was that of a friend of the practitioner. Those funds were then transferred later to the practitioner.

[9] The first two fraudulent fee invoices were rendered on 24 November 2017 and 6 December 2017 respectively.

[10] The third invoice, forged using another firm's letterhead, was issued on 22 December 2017 but involved a more significant transaction.

[11] This transaction involved a dealing with estate distribution funds in which the client was due, by means of a settlement under the Family Protection Act, a distribution from a parent's estate of $129,025.90. Instead of paying the funds into the trust account of the law firm whose letterhead had been forged, they were redirected into the bank account number provided at the foot of the falsified invoice, namely the account belonging to the practitioner's friend. That occurred on 22 December 2017.

[12] On 27 December 2017, Ms Kejriwal's friend deposited $129,700 into the practitioner's personal bank account.

[13] It was not until 9 January 2018 that the practitioner deposited $128,945.90 into the client's bank account. This was the amount due to her less the fee of $700 on the false invoice, and some disbursements.

[14] Under cross-examination, the practitioner, Ms Kejriwal, agreed that the full amount of the distribution was paid to the "false" bank account in order to avoid detection of the connected false fees account.

[15] The fraud was only detected when Ms Kejriwal's former employers attempted to make a further small distribution to the client in March 2020 but discovered from the other firm, in the course of attempting to pay them, that they could not locate any client of that name. Although a lawyer at the other firm had apparently acted for the client who Ms Kejriwal had falsely charged, and gave independent advice to her on the settlement, he did not open a file or charge a fee to her.

[16] The means by which Ms Kejriwal concealed her actions in relation to the estate distribution invoice meant that a significant sum of client money (almost $130,000) was placed at risk for a period of over two weeks, travelling as it did between two personal bank accounts rather than being held in a lawyer's trust account as would be expected. Ms Kejriwal denied that the funds were at risk because the friend whose personal bank account she had used was a "good person" and would not have done anything with the funds.

[17] We accept that the offending was for a limited period of approximately six weeks between 24 November 2017 and 9 January 2018.

[18] Ms Kejriwal's explanation for her offending was that at the time these actions occurred, she was suffering [redacted]. She was living in a different city from her family (although it appears that she had a brother with whom she had lived for a time in Auckland), and had few friends and other means of emotional support.

[19] Ms Kejriwal says that she felt unsupported and lacking guidance in her work environment. Evidence from the former employer disputes that assessment, referring to at least two people, the office manager and a principal in the firm, who gave Ms Kejriwal support and supervised her work.

[20] Ms Kejriwal has also provided the Tribunal with a retrospective assessment recently undertaken by a psychiatrist, in which he states:

> [redacted].

[21] This evidence, which was not the subject of cross-examination at the hearing, was gained from interviews by means of video conference with the practitioner, five years after the event and based on her self-reports. No contact was made with her wider family to corroborate allegations that the practitioner had made to the psychiatrist about some difficulties which she alleged about her upbringing. In a broad sense, these can be summarised and understood as the difficulties a teenage girl had in growing up in a country such as Australia with somewhat permissive or relaxed cultural values, in contrast to those of her parents who were strict, and strong followers of their religion.

[22] While Mr Collins, for the Standards Committee, did not seek to minimise the seriousness of the practitioner's current [redacted] difficulties, he submitted to the Tribunal that there did not appear to be a connection between these difficulties and the nature of the offending.

[23] A further matter raised by the practitioner was that she was struggling financially at the time of the offending and under some pressure in this regard from her [redacted]. However, bank accounts belonging to Ms Kejriwal would indicate that around the time of the offending she had a bank balance of $94,000. The total amount retained by her as a result of the three fraudulent acts was $2,665.

[24] Under cross-examination Ms Kejriwal asserted that some of her savings would have been student loan funds. However, we are not persuaded by that. Such large lump sums were no longer being paid by StudyLink to tertiary students for the period in question.

[25] The fraud relating to the forgery of the other lawyer's letterhead and misuse of the estate distribution funds was uncovered and reported to the Law Society in April 2020.

[26] The Standards Committee determined to conduct an own motion investigation and notified Ms Kejriwal in May 2020, setting out those matters of which they were

aware, concerning the December 2017 transfer of the estate distribution into Ms Kejriwal's friend's account and then to Ms Kejriwal herself, following which (after a two week plus delay) she returned the funds to the client retaining approximately $700 for herself.

[27] Within a week the practitioner had replied to the Standards Committee stating her shock, and feelings of guilt and remorse. She offered her full cooperation in the investigation and tendered her apologies. Specifically, she said to the Standards Committee:

> Until this day, I still think about the day I changed the invoice, and I do not know what came upon me to do this. It was a spontaneous act of that moment, and not something that I had planned to do, and therefore I did not think of the consequences and how it would not only affect my future, but would harm so many other people in the process as well. This was an extremely selfish act from me that I do not think I will ever forgive myself for. …

[28] She went on to describe her unhappiness (at the time of the offending) in her personal life and her professional life and her fragile mental state and stated that she had started seeing a psychologist for assistance. She made statements such as "… I feel like a new and grown person, this has been an extravagant learning experience for me…" and "this offence was completely out of character for me, and inconsistent with my usual thinking and behaviour".

[29] Importantly, when referring to this one event (of three), she told the Standards Committee:

> This was a **first time, one-off, spontaneous offence** that will never be repeated, as I have truly learnt my lessons and understood the seriousness of the offence. It was **a moment** of weakness given my [redacted] factors and personal life at the time.…(emphasis added)

[30] At the hearing Ms Kejriwal accepted that this was a lie. Two further offences were yet to be uncovered (which had preceded this fraud) and, following further investigations by her former firm in late 2020, the two falsified fee invoices were uncovered and subsequently admitted by the practitioner.

[31] The two further invoices were for $925 (November 2017) and $1,040 (6 December 2017).

[32] In February 2021, a representative from the Standards Committee again wrote to the practitioner for comment on these further two matters, at which time a holding response was received from Ms Kejriwal's counsel. In April 2021, Ms Kejriwal replied to the Standards Committee stating:

> I regret to say that it is correct there are wider issues than the single original invoice which related to the [B] estate matter. As I have indicated in my earlier response, I was at that time (2017-2018) under terrible stress and was not coping with numerous aspects of my life. Regretfully, I generated the false invoices that have been referred to. **I had forgotten about the other two invoices.** (emphasis added)

[33] At the hearing Ms Kejriwal elaborated on this "forgetting" by stating that she simply must have blocked her memory of these two other matters, albeit that they occurred within a matter of weeks from the time of the previously admitted offending, and indeed preceded it.

[34] When served with the charge and associated documents, Ms Kejriwal responsibly engaged counsel and promptly admitted responsibility and the charge of misconduct. Ms Kejriwal repaid $700 in relation to the first discovered offending and has promised, for the last 12 months, to repay the remaining sum fraudulently obtained. That amounts to approximately $1,965.

1. Where on the continuum of misconduct does this fit?

[35] Ms Kejriwal does not dispute the factual background as set out by the Standards Committee, and her counsel accepts that dishonesty offending properly carries a starting point of strike-off. However, Mr Waalkens QC urged us to stop short of that "last resort".

[36] Although the total amount of the three fraudulently obtained fees is relatively modest, these were calculated and well thought out incidents of blatant dishonesty. We reject the practitioner's attempt to describe them as "spontaneous". In particular, the means employed to divert the large estate distribution amount through another person's bank account and then into the practitioner's bank account was, by her own admission, calculated to avoid detection.

[37] This was not an instance of a struggling, impoverished lawyer accepting folding notes from a client and concealing that from an employer, which conduct has been observed previously by the Tribunal.

[38] Although the period over which the offences occurred is a relatively short one (six weeks), the fact that the fraudulent conduct occurred on three occasions is of significant concern to the Tribunal. When coupled together with the planned and deliberate nature of the offending, involving an alteration of documents to divert client funds, and the use of an associate to mislead any investigation, this places the offending at the very serious end of misconduct.

[39] We have no hesitation in stating that the conduct would support an assessment that at the time the practitioner was not a fit and proper person to be a lawyer.

[40] However, we are cognisant of the fact that the fitness assessment of the practitioner must be a current, not retrospective one.

2. Aggravating features

[41] We accept the submission of Mr Collins that the, albeit temporary, redirection of significant client funds (and thereby placing them at risk) significantly aggravates the three manufactured fees accounts taken by the practitioner.

[42] And, as submitted by Mr Collins, this conduct directly concerned her work as a lawyer and exploited a position of trust. Both the employer and clients were affected.

[43] A significantly aggravating further feature is lying to the Standards Committee when first asked to respond to the uncovering of the December 2017 incident.

[44] We have difficulty with the “blocking out” explanation relating to the two earlier, but later discovered, offences. The language used by the practitioner in her letter of October 2020 to the Standards Committee does not support this explanation.

[45] For example,[1] she states, “until this day, I still think about the day I changed the invoice, and I do not know what came upon me to do this” and then goes on to state that it was a “spontaneous act”, as quoted in [27] of this decision. And she says:

> I was very unhappy within my personal life, [redacted] that I cannot pinpoint at what moment I decided to do this, and what came over me to do it. I am truly remorseful for my actions, and hold myself accountable. Today the idea of doing something remotely like that makes me shudder, and goes against all my beliefs. I would never consider doing this, nor would something like this cross my mind.

[46] In fact, it had crossed her mind on at least the other two occasions which were later discovered. The practitioner, in her lengthy explanatory letter to the Standards Committee, goes into considerable detail about the functioning of the practice for whom she worked and the type of work undertaken by her and shows no indication of any memory loss in relation to all of these details. Later in the letter she stated, “This offence was completely out of character for me, and inconsistent with my usual thinking and behaviour”. She went on to state that she took full responsibility.

[47] The Tribunal has frequently stated how important it is for practitioners to respond to enquiries of this sort, from their professional body, with the utmost candour. The letter from which the above quotes are drawn, purports to speak with such candour and yet, while acknowledging a “one off” lapse, concealed two earlier fraudulent events which had occurred only two or three weeks before the conduct being investigated. It is simply not credible to accept that the practitioner had forgotten these events. This was an elaborate attempt to mislead the Standards Committee by omission and must be seen as a seriously aggravating feature.

[48] That the practitioner is not able to take responsibility for this deception, accepting as she did in cross-examination that it was a lie, must raise issues in relation to rehabilitation prospects.

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[1] Bundle of documents, p 68.

3. Mitigating features

[49] We take account of the practitioner's youth, inexperience and personal difficulties at the time, although we accept the submission that these factors cannot fully explain wilful dishonesty.

[50] We also take account of the fact that Ms Kejriwal has admitted the charge of misconduct and expressed her current remorse and regret for her actions.

[51] We record that there are no previous disciplinary findings against the practitioner, although this cannot be a weighty factor given that she was in practice for less than two years before travelling to Australia and leaving the profession.

4. Similar dishonesty cases

[52] Two cases in particular were cited to us, which we found relevant. These were *Canterbury Westland Standards Committee No. 3 v Hemi*[2] and *Waikato Bay of Plenty Standards Committee 2 v Bean*.[3] Both of these practitioners took small cash payments from clients, thereby depriving their respective employers of fees due. In Mr Hemi's case there were significant mitigating circumstances, and the Tribunal was satisfied that the three years Mr Hemi would be out of practice had provided significant confidence in rehabilitation and that, although by a fine margin, it was not necessary for him to be removed from the Roll.

[53] In the *Bean* matter, the practitioner self-reported and fully accepted responsibility for the $500 payment that she had received. She had surrendered her practising certificate and the Standards Committee was comfortable with the maximum period of suspension of three years which was imposed for this one-off example of misconduct.

[54] We considered the current matter to be significantly more serious than either the *Hemi* or *Bean* matters. In particular, the stark difference is in the respective practitioners' response to the discovery of wrongdoing. The response of Mr Hemi and

[2] *Canterbury Westland Standards Committee No. 3 v Hemi* [2013] NZLCDT 23.
[3] *Waikato Bay of Plenty Standards Committee 2 v Bean* [2016] NZLCDT 7.

Ms Bean respectively gave confidence to the Tribunal that rehabilitation was a realistic and proper option, in order to properly safeguard the public.

[55] Mr Waalkens also referred us to a recent High Court decision relating to a pharmacist who had been deregistered. In the *Shousha v A Professional Conduct Committee* decision,[4] Ms Shousha's cancellation of registration was overturned by the Court. Her Honour determined that the Tribunal (the HPDT),[5] had erred in finding the pharmacist was not amenable to rehabilitation or that she failed to demonstrate remorse or insight. Her Honour also found that "consistency with penalties in other cases would indicate suspension rather than cancellation".[6] We consider this case further under the heading of 'rehabilitation'.

5. Prospects of rehabilitation

[56] We reminded ourselves that the purpose of disciplinary proceedings is not punitive. Rather we focused on the issue of amenability to rehabilitation.

[57] The key question is whether the primary purpose of protecting the public can be achieved in any way other than strike-off. That reflects the principle of the least restrictive intervention, to achieve the purposes of the legislation.[7]

[58] In the *Shousha* decision, at [56], her Honour quoted from a decision of *Singh*[8] in which Ellis J said:

> I have reservations about the role that punishment should play where a choice is to be made between suspension and deregistration. More particularly, I would be uncomfortable with any suggestion that a practitioner should be deregistered merely because the conduct in question required a more 'punitive' sanction than suspension. Any such punitive focus appears to me to risk a diversion from the central issues, which are the practitioner's fitness to practise and ensuring that public health and safety are protected.

[59] At [58] of the Shousha decision, Gordon J stated:

> In cases of cancellation, the following principles are particularly relevant:

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[4] *Shousha v A Professional Conduct Committee* [2022] NZHC 1457, Gordon J, 21 June 2022.
[5] Health Practitioner's Disciplinary Tribunal.
[6] See above n 4, at [134].
[7] *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850.
[8] *Singh v Director of Proceedings* [2014] NZHC 2848.

(a) The primary purpose of cancellation or suspension is to protect the public and the choice between the two turns on what is proportionate.

(b) Cancellation is ordered not by way of punishment but because the person is not a fit and proper person to remain registered.

(c) The Tribunal must consider the available alternatives to cancellation, and explain why less severe options have not been adopted in the circumstances of the case.

[60] We noted that in the *Shousha* case the practitioner had actually undertaken steps which pointed positively to rehabilitation. We contrast this with the present case where the practitioner has said (for over a year, and four years after the event) that she would repay the funds which she had stolen from her employer but has not done so to date.[9]

[61] In assessing amenability to rehabilitation, we note the following:

- While we accept that Ms Kejriwal was in an [redacted] at the time of the offending and did not have local family support, we do not think this led her to offend in such a calculated and premeditated way.

- We do not accept that she was driven to offend by any financial pressure.

- If we are wrong that she did in fact succumb to pressure (of her [redacted]) in such an extreme way, we would be concerned about endorsing her to the public as sufficiently resilient to resist such pressures and retain an honest and scrupulously ethical approach to her work.

- We accept that Ms Kejriwal is now suffering from a [redacted], and that this is supported by [redacted] provided.

- In considering rehabilitation, it is very difficult to understand what needs to be remedied because it is not clear why Ms Kejriwal offended and then, some time later, despite being "haunted" by her misdeeds, lied again about them. Had Ms Kejriwal acknowledged all of her wrongdoing and repaid

[9] We do not overlook that Ms Kejriwal has sought help for her [redacted] problems, in particular relating to her current [redacted]. However, the material submitted would seem more directed towards coping with these proceedings, and her reaction to them, than to drilling into the motivations behind her offending, in a way that gives confidence as to rehabilitation.

the amounts immediately (given that she had the funds) we would have accepted that she had insight as well as remorse and therefore rehabilitation could be worthwhile. As stated in the *Shousha* decision:[10]

> Suspension (rather than cancellation) is appropriate where there is a prospect of rehabilitation and the practitioner's fitness to practice may be remedied. A period of suspension will enable a practitioner to reflect on their conduct and/or seek professional assistance to remedy the situation.

- While we accept that remorse is present with Ms Kejriwal, in that she details the shame she feels, her insight is not so apparent in her dishonest response, which, as we have found, compounds the seriousness of the dishonesty of the conduct itself.

[62] The non-repayment of the amounts owed to her former employer does raise real concerns as to her level of insight and therefore propensity for rehabilitation. It has been over four years since the offending, and over a year since she acknowledged the full extent of it. In that period, she has promised to repay the fees wrongly taken, and has had a bank balance varying between the $94,000 in early 2018, and the $40,000 – $50,000 savings she tells us she has now. Despite her promises to repay she has failed to repay the sum of approximately $1,900. The lying to the Standards Committee occurred long after the offending, namely in late 2020. Again, this does not augur well for prospects of rehabilitation.

[63] It is commendable, and indeed has been essential for the practitioner's wellbeing, that she is now under the care of a [redacted]. However, the treatment engaged has not yet, in our view, assisted the practitioner in really coming to grips with why she so deliberately deceived both her employer and her professional body.

[64] In the longer term, it is to be hoped that the assistance she is receiving will move her thinking to the next stage and she will be a position to apply for readmission to the legal profession.

[65] In the meantime, we do not consider that she can safely be endorsed to the public as a fit and proper person to be a lawyer. For those reasons, it is the unanimous view of the Tribunal that there must be an order striking the practitioner from the Roll.

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[10] See above n 4, at [135].

Suppression of name and details

[66] On 20 May 2022, we made an interim order supressing the practitioner's name and identifying details. That decision was made on the basis of medical evidence adduced by the practitioner which we considered had displaced the usual presumption of openness.

[67] In the decision *H v Bay of Plenty Standards Committee*,[11] the High Court held that the public interest in the openness and transparency of disciplinary proceedings could be displaced by personal, [redacted] of a practitioner. We accept that these issues are present for this practitioner.

[68] She is aware that a strike-off (or suspension) will inevitably involve publication in the New Zealand Gazette but beyond that she seeks suppression of all private medical information and also of her name.

[69] In the *H* case, the practitioner had retired from practice and therefore there was no public safety component residing in a suppression order. In this case, because of the dishonesty involved, we do not consider the present matter to be on all fours with the *H* decision. We consider it only proper for prospective employers to be able to access information about a person who has committed acts of dishonesty.

[70] For these reasons we do not consider that we are able to suppress the practitioner's name but, with the agreement of the Standards Committee, are prepared to make a final suppression order in relation to any of the information about medical or other health related matters for Ms Kejriwal. The interim order of 20 May 2022 for name suppression, is discharged.

[71] The final published decision will be redacted as to any reference to [redacted].

[11] *H v Waikato Bay of Plenty Standards Committee of the New Zealand Law Society* [2013] NZHC 2090 (16 August 2013).

Costs

[72] The practitioner has cooperated with the disciplinary process and the costs in this matter are not great. However, we do not see why admitted dishonesty ought to result in the profession bearing the costs of prosecution. There will be an order that the practitioner pay the costs of both the Standards Committee and the Tribunal.

Orders

1 The practitioner is struck off the roll of barristers and solicitors (pursuant to ss 242(1)(c) and 244 of the Lawyers and Conveyancers Act 2006 (the Act)).

2. The practitioner is to pay the Standards Committee costs in the sum of $12,833.88 (pursuant to s 249 of the Act).

3. The Tribunal costs are certified as $4,102 and are to be paid by the New Zealand Law Society (pursuant to s 257 of the Act).

4. The practitioner is to reimburse the New Zealand Law Society for the Tribunal s 257 costs in full (pursuant to s 249 of the Act).

5. The practitioner is to repay the outstanding amounts owed to her employer in respect of the two invoices, namely $1,965, pursuant to s 156(1)(g) of the Act, within 7 days of the date of this decision.

6. There will be an order for suppression of information concerning the practitioner's [redacted], pursuant to s 240 of the Act.

DATED at AUCKLAND this 20th day of July 2022

DF Clarkson
Chair