NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2022] NZLCDT 32

LCDT 022/21

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE 2** Applicant
AND	**RONALD BRUCE JOHNSON** Respondent

CHAIR

Ms D Clarkson appearing by VMR

MEMBERS OF TRIBUNAL

Mr G McKenzie

Ms S Sage

Ms S Stuart

Ms P Walker

HEARING 29 August 2022

HELD AT Specialist Courts and Tribunals Centre, Auckland

DATE OF DECISION 7 September 2022

COUNSEL

Mr M Mortimer-Wang for the Standards Committee

Mr A Gilchrist for the Respondent Practitioner

REASONS FOR DECISION OF TRIBUNAL ON PENALTY

Introduction

[1] In our decision of 19 August 2022, we found Mr Johnson liable at the level of misconduct in respect of one charge involving conflicts of interests. In addition, we found in respect of a second charge, dealing with trust account defaults at a more minor level, that unsatisfactory conduct had been established.

[2] In an oral ruling following the hearing on 29 August, we suspended Mr Johnson for three months from that date. We reserved the issue of costs to be paid to the Standards Committee and made orders for s 257 costs. We reserved our reasons. This decision provides those reasons.

Issues

[3] The only disputed area for the penalty hearing was whether the overall conduct needed to be marked by a modest suspension – as contended for by the Standards Committee – or whether censure and contribution to costs was sufficient – as contended for by the practitioner.

Discussion

[4] Consideration of proportionate penalty begins with an assessment of the seriousness of the conduct[1] under consideration.

[5] The decision of 19 August sets out the background to this matter. We find the conduct to be at a moderate level of misconduct. Certainly, it is not right on the borderline with unsatisfactory conduct, but neither is it at the higher end of the scale of seriousness.

[6] This was a clear case of a conflict of interests occurring on two occasions. However, the client involved was an experienced businessman, it was he who made

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

the approach to the practitioner for the loans concerned, and no loss was sustained by the client. The arrangement was on proper commercial terms and in no way exploited the client. Indeed, we accept Mr Johnson's explanation (as opposed to justification) that he was endeavouring to assist a client of many years' standing.

[7] However, what cannot be ignored is that a conflict of interests on a practitioner's part, occurring as it did in this case twice, is one of the most serious missteps that a practitioner can make.

[8] There is also the second charge in respect of which we entered a finding of unsatisfactory conduct in relation to the numerous, but mostly very minor, trust account defaults.

[9] Having regard to the fact that Mr Johnson accepted unsatisfactory conduct at the outset and had remedied all of the defects, we do not propose to add to the penalty in respect of this charge, except insofar as the practitioner ought to cover the costs involved.

[10] It was submitted on behalf of the Standards Committee that the starting point for the assessment of penalty ought to be a suspension of six months.

Mitigation

[11] We take account of the fact that Mr Johnson has been fully cooperative with the disciplinary process on this occasion, despite changing his mind so as to challenge the level of liability of the first charge. That is his right, and however, by not accepting the charge, he has deprived himself of a further element of mitigation which could have been claimed.[2]

[12] The other somewhat difficult challenge to the assessment of penalty and in particular mitigation, is that this offending preceded offending for which Mr Johnson has already been penalised, in earlier proceedings before the Tribunal.

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

[13] In the normal course of events, he would have been able to claim that this offending was his first and that a clear disciplinary history was a mitigating feature.

[14] However, we accept the submission made by Mr Mortimer-Wang that that benefit was given to Mr Johnson in 2018, when a penalty of three months suspension was imposed (reduced from an arguable 12 months), which significantly recognised the clean disciplinary record at that stage. We accept the submission that, having had the benefit of that reduction already, Mr Johnson cannot claim it again.

[15] Finally, we note that Mr Johnson has refrained from returning to practice following the end of his previous two suspension periods (at least six months ago). We are not prepared to formally endorse such informal suspension as leading to a reduction of any suspension that might be imposed by this Tribunal. Rather we are prepared to treat as a mitigating factor the fact that Mr Johnson has been sensible enough to take time to reflect on his conduct before embarking on the next phase of his career as an employed solicitor, as he is required to do given the prohibition placed upon him practising alone, at his previous penalty hearing.

Aggravating features

[16] Once again we are persuaded by the sensible submissions made by Mr Mortimer-Wang that, while we cannot treat as an aggravating feature Mr Johnson's prior disciplinary findings, we are in a position to observe a pattern of disregard of professional and ethical standards, as assessed at this point.

[17] Mr Johnson says that he is angry with himself, but clearly has had enormous difficulty in coping with the disciplinary process on all three occasions (which involve four separate sets of charges). Mr Johnson, through his counsel, apologised for his intemperate conduct towards the Tribunal at the liability hearing.

[18] That conduct does give us pause as to the level of insight able to be demonstrated by Mr Johnson.

Other penalty principles

[19] It is trite but perhaps requires repetition that the penalty process is not about punishment but rather about the upholding of professional standards and maintaining confidence of the public in those professional standards, in terms of the purposes of the Lawyers and Conveyancers Act 2006 (the Act).[3]

[20] The most relevant other penalty principles are that of specific and general deterrence in relation to breaches of the important rules preventing lawyers acting in conflict of interest situations. It has been held that general deterrence can warrant a period of suspension even in the absence of individual risk.[4]

Other cases

[21] It is agreed that perhaps the most relevant comparison is the decision of *Auckland Standards Committee 3 v Ellis*.[5] It is accepted by the Tribunal that the *Ellis* case involved a more egregious conflict of interest. In that case the practitioner was suspended for six months.

Decision

[22] Although Mr Gilchrist urged the Tribunal to stop short of a suspension, in favour of a censure and costs order only, it was the view of the Tribunal that the seriousness of this conduct could not be marked by any penalty short of a period of suspension.

[23] Having regard to the above factors and in particular to the penalty imposed in the *Ellis* matter, we determined that a suspension period of three months was a proportionate response in this instance.

Costs

[24] We consider that the Standards Committee ought not to have pursued the charge 2 at the level of misconduct, having regard to the *de minimis* nature of most of the defaults under consideration. Having regard to that and our subsequent finding of

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[3] Section 3.
[4] *Hooker v Auckland Standards Committee 1* [2020] NZHC 2970, Gwyn J.
[5] *Auckland Standards Committee 3 v Ellis* [2018] NZLCDT 4, [2018] NZLCDT 25.

unsatisfactory conduct, we are prepared to discount the amount the practitioner ought to contribute towards the costs incurred by his profession in bringing these matters to the Tribunal. There will be an order for costs against the practitioner in respect of the Standards Committee costs in the sum of $20,000, this represents a little over 25 per cent discount of the full amount claimed.

Summary of orders

1. Mr Johnson was suspended from practice for three months from 29 August 2022, pursuant to s 242(1)(e) and s 244 of the Act.

2. Costs are to be paid to the Standards Committee by Mr Johnson in the sum of $20,000, pursuant to s 249 of the Act.

3. The Tribunal's costs are assessed at $3,667 and are to be paid by the New Zealand Law Society, pursuant to s 257 of the Act.

4. The practitioner is to reimburse all of the Tribunal costs to the New Zealand Law Society, pursuant to s 249 of the Act.

DATED at AUCKLAND this 7th day of September 2022

DF Clarkson
Chairperson