ORDERS FOR PERMANENT SUPPRESSION OF NAMES AS RECORDED IN PARAGRAPH [31]. ORDERS MADE PURSUANT TO S 240 OF THE LAWYERS AND CONVEYANCERS ACT 2006

NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2023] NZLCDT 11
LCDT 006/22

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE 1** Applicant
AND	**Ms A** Respondent

CHAIR
Dr J G Adams

MEMBERS OF TRIBUNAL
Ms K King
Ms N McMahon
Ms M Noble
Ms S Stuart

HEARING 17 April 2023

HELD AT Specialist Courts and Tribunals Centre, Auckland

DATE OF DECISION 27 April 2023

COUNSEL
Mr P Collins for the Standards Committee
Mr I Brookie and Ms R van Boheemen for the Respondent Practitioner

DECISION OF THE TRIBUNAL RE PENALTY

Adjusting to the circumstances

[1] When this case began, Ms A faced three weighty charges. We come now to deal with penalty in a markedly different landscape.

[2] Our liability decision tells the story. On one charge, she accepted as unsatisfactory conduct her breach of exam rules by placing prohibited materials on her desk. There is no finding of cheating. The adverse finding is sufficient to mark that conduct, it requires no additional penalty. The other two charges resulted in one finding of misconduct for blackmail. In relationship property negotiations, she conveyed her client's threat that, if his offer was not accepted, he would inform Immigration of matters prejudicial to the interests of his former partner. Although we described the conduct as "pernicious"[1], and we expected Ms A's ethical sense should have alerted her to the impropriety of doing what her client wanted, we recognised[2] that she, "relatively inexperienced, was out of her depth, and was unsupported professionally at work. [Her then employer] was found by the Standards Committee to have failed to supervise her adequately" for which he was fined.

[3] The purposes of the Lawyers and Conveyancers Act 2006 require the Tribunal to balance the interests of the public, the reputation of the legal profession, and those of the practitioner. In this case, we must hold Ms A to account for her conduct, even though it was done in ignorance, and in circumstances where she was not properly supervised. We must protect the public interest by ensuring that she works in safely guided conditions while she consolidates good practise. We must achieve these outcomes in a balanced manner. To achieve balance, we should adjust to what we are now dealing with, not slavishly following the path indicated by the three originating charges.

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[1] [2022] NZLCDT 51 at [45].
[2] [2022] NZLCDT 51 at [49].

[4] The issues are:

- What framework of penalty orders is required?
- Should Ms A's name be permanently suppressed?
- Should Ms A's former employer's name be suppressed?

What framework of penalty orders is required?

[5] Counsel adopted our indication that a rehabilitative approach was appropriate. We acknowledge the principle that the orders we impose should be the least restrictive interventions[3].

[6] At the time relevant to the conduct, Ms A was nearing 40 years of age. She was relatively new to legal practice. A solo mother, she was keen to better her circumstances. She was not brought up in New Zealand. Her first language is Mandarin. Although an employee, she was employed on a contract basis. Her employer undertook no pro-active supervision of her work. Even when he was copied into correspondence about the dispute between Ms A and the other lawyers (who pointed out that what she was doing infringed the rules) he did not intervene. She was left to flounder in her ignorance. Although she can be expected to have known her conduct was wrong, even if she didn't know the precise rule, it is fair to say that the misconduct would not have occurred if she had been properly supervised. Her then employer has been dealt with at a modest level in the privacy of a Standards Committee process.

[7] The offending blackmail letter was emailed by Ms A from her home email after 1am. That she was working at such an hour probably reflects the social and financial pressures she was under. Although we have not found her guilty of any dishonesty, we find her at risk in the following respects: inadequate understanding of ethical rules; a tendency to react rather than reflect; a tendency to comply with inappropriate demands from her client (particularly male clients) rather than observing the boundaries congruent with a lawyer's role. Her lack of experience and her lack of good example (in her former employment) are also of concern. Her written

[3] *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850 at [22].

expression in English needs improvement. She may be assisted by better work/life balance, and we think she could develop more wisdom in managing her role. We are concerned that she is eager, despite these matters, to start practice on her own account.

[8] We are pleased to note two developments. Firstly, her present employer appears to supervise her work appropriately. Second, she has commenced mentoring with Ms Mortimer-Wang, a Mandarin speaking lawyer of high repute. Ms Mortimer-Wang has reported on the positive progress of the mentoring. We regard the combination of supervision with her present employer and mentoring with Ms Mortimer-Wang as an excellent package, well-tailored for Ms A.

[9] We are conscious that we rely on the public-spiritedness of Ms Mortimer-Wang in building the mentoring into our orders set out below. We have no power to compel Ms Mortimer-Wang, but we are grateful for what she has done and appears willing to continue for a time.

[10] Mr Collins seeks an order under s 242(1)(g) prohibiting Ms A from practising on her own account without prior authorisation from the Tribunal. Although Mr Brookie attempted to persuade us that this issue is more properly the preserve of the Practise Approval Committee, and that we should not “ban” Ms A from practising on her own account, we take the view that when Parliament enacted the subsection s 242(1)(g), it must have meant it to be exercised where the Tribunal found it appropriate to do so. In this case, we do find it appropriate to do so. In our view, Ms A is not nearly ready to undertake practise on her own account.

[11] We treat the menu of available orders as items we can modify to suit the circumstances. We do not think we are constrained into making a s 242(1)(g) order only in the open-ended terms of the subsection. We have framed a lesser range to provide the least restrictive term we consider appropriate. The outer limit, October 2024, approximates to the time when Ms A will have had the advantage of three years of appropriate supervision in her practise. The order does not restrict her from attempting to persuade the Practise Approval Committee earlier that she is ready to practise on her own account.

[12] We impose an order requiring Ms A to advise any future employer up to October 2024 about her disciplinary history. Like the s 242(1)(g) order, this is designed to protect her employers while she is receiving the supervision she requires and to protect the public. We found our jurisdiction to make this order under s 242(1)(h)(iii). That subsection permits conditions in relation to employment. By dealing with our concern to protect the public and future employers in this manner, we find ourselves freer to consider name suppression for Ms A. In part, this requirement ensures that future employers will be informed so they can properly adjust supervision requirements of her work. That ensures ongoing scaffolding of her work, a positive feature for the public, the employer and Ms A.

Should Ms A's name be permanently supressed?

[13] The starting point is that hearings must be held in public.[4] This openness serves a purpose of the Act "to maintain public confidence in the provision of legal services"[5] by demonstrating that disciplinary processes are open to public scrutiny.

[14] Name suppression is permitted by s 240(1) "if the Disciplinary Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person…and to the public interest…". Rodney Hansen J summarised the test in this way:

> in exercising its discretion to order name suppression under s 240, the Tribunal is required to decide whether the personal interests of the practitioner (or others) outweighs the public interest in an open process including disclosure of the practitioner's name.[6]

Put another way, name suppression is only "proper" if Ms A's interests displace the public interest in an open process including disclosure of her name.

[15] We had earlier refused interim name suppression.[7] We acknowledge that the circumstantial matrix now apparent to us is materially different from what appeared then.

[16] The public interest in this case includes the need to be assured that the practitioner will only be able to practise if she can do so safely. That requires her to

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[4] Section 238(1) Lawyers and Conveyancers Act 2006 (the Act).
[5] Section 3(1)(a) of the Act.
[6] *H v Waikato Bay of Plenty Standards Committee 1* [2013] NZHC 2090 at [20].
[7] [2022] NZLCDT 43, 30 November 2022.

be properly supervised and to receive mentoring until she has developed to a point satisfactory for withdrawal of that scaffolding. Because she is now in safe circumstances, there is a lessened need for her to be identified.

[17] Should she seek new employment, there is a need for any potential employer to know about her disciplinary history so that they can provide her with appropriate supervision, at least until October 2024 while she develops her practice. We have made a specific order to manage that concern.

[18] Her present employer has raised his concern about whether her current employment could continue if her name were published, and it attracted negative attention to his practice. We do not accord any weight to that concern. We assume he has employed her with knowledge of these matters and must therefore have known what consequences might have followed from them.

[19] Three new features to which we pay attention are proportionality, relativity with her former employer and adverse risks of publication. We expand on these concerns in the following paragraphs.

[20] At the outset, there were three weighty charges. In respect of the cheating allegation, it initially appeared that Ms A had admitted the charge. During the hearing, we picked up that the apparent admission was not an admission at all. Her awkwardness in constructing the pertinent sentence in English gave a false appearance. Everyone had misunderstood what she was saying. That charge reduced to a lesser issue which she admitted.

[21] As to the other charges, she was found guilty of misconduct only in respect of blackmail. Because the opposing lawyers acted appropriately, no damage was ultimately done to anyone's rights. She was guilty of a foolish, ignorant mistake. Her own responses at the time made it clear that she had no idea that she had stepped out of line. Although we do not excuse her for her own professional error, the fact that she was unsupervised was a significant contributor.

[22] We have, of course, found her conduct to be at the level of misconduct, but we do not regard it, in this case, as a major breach. Had the size and gravity of the matter been confined to what we ultimately found; her case might well have been

resolved at Standards Committee level. It was referred to us because the combination of allegations assumed more gravity than, after hearing, they were found to contain. Had it been resolved at Standards Committee level, there would have been no issue about name suppression. Her name would not have been published. Should she suffer the effects of publication because of the unhappy circumstances that caused this matter to be escalated to the Tribunal, circumstances that were ultimately unfounded? We think not.

[23] Misconduct is not always of greater gravity than unsatisfactory conduct. In our liability decision, we observed[8] to the effect that categorisation of her conduct as misconduct did not preclude lenience or the elevation of rehabilitation over penalising responses. It is good that her lack of knowledge surfaced within sufficient time to implement rectification and rehabilitation measures.

[24] Relativity with her former employer is an inextricable aspect of the matrix within which we consider name suppression. Had she been properly served by her employer, she would not be before us. Adequate supervision would have screened out the conduct. Her then employer was dealt with at Standards Committee level and fined. Ms A, whom we find was oppressed under layers of victimhood, paid that fine on his behalf. We cannot see why her culpability should exceed his by publishing her name when her former employer's name was not published.

[25] The pattern of employer inattention repeated when Ms A improperly registered a caveat in March 2021. Her employer was fined for his failure to properly supervise her. Ms A was not fined but was ordered to pay costs and to undertake training in relation to caveats. At that time, the Standards Committee observed[9]:

> Competent supervision enables junior lawyers to develop knowledge and competence, assume responsibility for their own area of expertise and provides assurances to clients that their instructions will be carried out in a correct and professional manner. When junior lawyers are not competently supervised, the consequences for clients can be serious and the repercussions can also erode the trust and confidence that the public holds in the legal profession.
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> The failure of senior practitioners to provide competent supervision to junior lawyers is also unfair on junior lawyers who, in the absence of competent

[8] See [2022] NZLCDT 51 at [46].

[9] This is an extract from the Standards Committee decision relating to Ms A's employer Mr Z.

> supervision, are likely to be exposed to scrutiny and censure. As such, the above breaches of Rules 11 and 11.3 of the RCCC are a serious matter. The Committee was of the view that its findings should attract a fine of $4,500 payable to the New Zealand Law Society.

[26] In the circumstances of this case, we consider it would be grossly unfair to Ms A if her name is published while her former employer's name is suppressed.

[27] Mr Brookie submitted that Ms A was at risk of her fledgling career being unfairly blighted by adverse publicity linking her to emotive tags such as cheating or blackmail. Indeed, the day after the penalty hearing, a newspaper article offered the incorrect impression that she has been guilty of cheating. We should not expose her to further similar risks of association with labels suggesting gravity that will be misunderstood by many members of the public.

[28] Although we like to think that reasonable members of the public would read our decisions fully (or read newspaper articles fully) before forming firm impressions, in this case, we accept the risk that lurid headlines linked to Ms A's name may produce a grave misapprehension of the gravity and circumstances of her conduct. It could be ruinous of her career in a way that is out of proportion to what she did, and the unsupported circumstances in which the conduct occurred.

[29] We have been at pains to disclose the strands we must reconcile in this question about name suppression. Against the general trend of our practice, we recognise that a combination of circumstances peculiar to this case move us to find, in terms of s 240, that it is "proper" to permanently suppress Ms A's name. We choose to meet the public interest in this case by other protective orders and look to foster Ms A's development as a sound practitioner for the benefit of the public.

Should Ms A's former employer's name be published?

[30] That being the case, we do not need to publish the name of her former employer whose case was never directly before us. Like other lawyers and clients involved in this case, his name is permanently suppressed. But Ms Mortimer-Wang is entitled to have her name published to reflect our gratitude for her generous assistance.

Orders

[31] The Tribunal make the following orders.

1. Ms A and Mr Z are granted permanent name suppression. The liability and penalty decisions are published with redaction of any information that would enable Ms A or Mr Z to be identified.

2. The names of clients, other lawyers, and Ms A's present employer are all permanently suppressed. Ms Mortimer-Wang's name is exempt as noted above.

3. Ms A may not practise on her own account until:

   (a) 31 October 2024; or

   (b) Such earlier date when she persuades the Tribunal/Practise Approval Committee that she is ready to practise on her own account.

4. Ms A must attend the entire Stepping Up Course in person and at her cost prior to her making an application to practise on her own account.

5. The current mentoring arrangements must remain in place with Ms Mortimer-Wang for a period of 12 months from December 2022 or such longer period Ms Mortimer-Wang may consider necessary. If Ms Mortimer-Wang terminates the arrangement earlier, Ms A must advise the Tribunal which may impose additional orders to adjust for that circumstance. (These orders are made under s 156(1)(m) of the Act).

6. Ms Mortimer-Wang is asked to advise the Tribunal each quarter commencing in July 2023 and ending when the mentoring period has expired that Ms A is participating appropriately in the mentoring process.

7. If Ms A leaves her current employment while she is receiving mentoring, Ms A must advise the Tribunal so that it can review the mentoring arrangements so that it is satisfied that the mentoring remains relevant and appropriate.

8. Ms A must advise any future employers up to October 2024 of her disciplinary history.

9. The New Zealand Law Society is to pay the Tribunal s 257 costs which are certified in the sum of $9,099.00.

10. Ms A is legally aided. Counsel should file submissions if any costs question arises.

DATED at AUCKLAND this 27th day of April 2023

Dr JG Adams
Deputy Chair