NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2023] NZLCDT 13
LCDT 003/22

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**NATIONAL STANDARDS COMMITTEE (No 1)** Applicant
AND	**RICHARD DEAN PALMER** Practitioner

CHAIR
Ms D Clarkson

MEMBERS OF TRIBUNAL
Ms S Hughes KC
Mr G McKenzie
Prof D Scott
Ms S Stuart

HEARINGS 24 February 2023 and 20 March 2023

HELD AT Auckland Tribunals Centre (Practitioner appeared remotely)

DATE OF DECISION 28 April 2023

COUNSEL
Ms S Carter and Ms N Town for the Standards Committee
Ms P Fee and Mr G Potter for the Practitioner

DECISION OF THE TRIBUNAL ON PENALTY

What this is about

[1] In November 2022, we found three charges of misconduct proven against Mr Palmer. This decision considers what are the proper disciplinary consequences, having regard to the seriousness of the misconduct, personal factors of the practitioner and the outcomes of similar cases.

What happened after the penalty hearing?

[2] In the course of the penalty hearing, Mr Palmer's counsel relied on two affidavits,[1] sworn by principals in the firm at which he was employed. The affidavits were relied on to show that Mr Palmer had behaved impeccably towards women in his four years at the firm, which he had joined following his departure from Duncan Cotterill after the events which led to two of the misconduct findings. Mr Lang deposed that Mr Palmer had made a "complete and frank disclosure" of those circumstances.

[3] The affidavits also described Mr Palmer's skill as a lawyer and particularly as a mentor of younger members of the firm. These qualities were also relied on by Ms Fee in her submissions.

[4] The descriptions of Mr Palmer's work and conduct were framed in the present tense. The impression left with the Tribunal was of a man reformed and chastened by the complaints against him which had caused the departure from his previous firm, and of a man settled in his current employment, looking after clients and with the full support of his employers.

[5] Shortly after the hearing concluded, the firm in question, Saunders & Co, released a press statement, which was published in the news media. In the press statement, Saunders & Co said:

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[1] Affidavit of David Lang, sworn 29 April 2022, and affidavit of Megan Gregson sworn 9 May 2022.

> Upon becoming aware of the full extent of the complaints against Dean Palmer, we commenced an employment process which remains ongoing pending the tribunal's sentencing.

[6] It subsequently transpired that Mr Palmer had been placed on leave while an ongoing employment investigation was undertaken, in November of 2022, following the release of the Tribunal's liability decision. That status was formalised into a suspension in early December of 2022.

[7] The Tribunal members were surprised to learn of Mr Palmer's suspension, which had taken place some months before the penalty hearing, at which Mr Palmer's counsel argued that a disciplinary suspension from practice would effectively end his career.

[8] Moreover, it was submitted that Mr Palmer's clients would suffer if he was removed from practice.

[9] We shall address the specific concerns about Mr Palmer's non-disclosure of this suspension at the hearing under the heading of 'aggravating factors'.

[10] There appeared to be a number of discrepancies or failures to update the position from the April 2022 affidavits sworn in support of Mr Palmer,[2] which were presented to the Tribunal as current at the penalty hearing in February 2023.

[11] The chairperson directed that the hearing be resumed to allow questioning of the two deponents from Saunders & Co as to the discrepancy between their description of the situation, as at April, and the actual position in relation to Mr Palmer's employment as at the date when penalty was under consideration. The resumed hearing took place in March 2023.

[12] Both deponents[3] indicated that it "hadn't occurred" to them to update their affidavits to avoid the Tribunal being misled in the way that ultimately occurred. They had not been called as witnesses at the hearing although another partner was present to observe. It was established that the position was indeed that revealed by the firm's

[2] They were also provided to support unsuccessful applications for non-publication of the practitioner's and the firm's names respectively.
[3] Mr Lang and Ms Gregson.

statement to the Press, rather than the impression left with the Tribunal at the February hearing.

Purposes and principles of penalty

[13] It is now well established that the purpose of penalties imposed in professional disciplinary proceedings is not punitive. Rather, it reflects the purposes of the Lawyers and Conveyancers Act 2006 (LCA): the protection of the public, the upholding of professional standards and of the confidence that the public has in the legal profession.

[14] As well as that, an assessment of proportionate penalty includes consideration of the following:

(a) the principle of the least restrictive intervention, as enunciated in the *Daniels* decision;[4]

(b) the principles of specific and general deterrence; and

(c) consideration of the prospects of rehabilitation, in order that the risk of reoffending is reduced.

[15] Having established the level of seriousness of the misconduct (because there is a continuum of gravity and a range of behaviours which may be established under the heading of "misconduct"), the Tribunal then goes on to consider aggravating factors, mitigating factors, and to undertake a comparison with similar cases which have previously been determined by the Tribunal or higher courts.

Seriousness

[16] We consider that in assessing the overall seriousness of this conduct, we must take account of the total picture.

[17] There were three instances where we found Mr Palmer to have conducted himself in a disgraceful and dishonourable manner, all of which involved younger

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

female employees of the firms in which Mr Palmer was a senior and respected member.

[18] The three instances, involving four complainants, occurred over a two-to-three-year period so that these incidents cannot be seen to be isolated or out of character. Viewed in totality, they comprise a pattern of conduct which leads to our conclusion that this was serious misconduct, but not at the most serious level.

[19] As pointed out by the High Court in the *Gardner-Hopkins* matter:[5]

> … There has been a profound societal change in attitude towards sexual harassment over the last decade and that shift in perception is important when considering penalty in light of the need to maintain the confidence of the public in the legal profession. …

Mitigating factors

[20] Mr Palmer has been in practice for 42 years and this is his first encounter with the disciplinary process. We grant him considerable credit for that record and note that we have also taken account of the letters written by clients in support. Those support letters include a letter from a younger woman lawyer who had been very successfully mentored by Mr Palmer.

[21] At 65 years of age, Mr Palmer says he believes, putting aside these matters, "that overall my contribution to the legal profession has been positive". We accept that is undoubtedly the case, with the exception of this very unfortunate conduct.

[22] In her submissions, Ms Fee pointed to the steps taken by Mr Palmer, as deposed by him, to avoid a repetition of the events under consideration. Mr Palmer's assertion that he has not behaved in any way improperly, since he began employment at the firm, Saunders & Co, is corroborated by the affidavits of two partners, Mr Lang and Ms Gregson. Mr Palmer ought to be given some credit for the modifications to his behaviour. However, we cannot give as much weight to this factor as we otherwise might, having regard to the manner in which he gave evidence in only September of

[5] *National Standards Committee 1 v Gardner-Hopkins* [2022] NZHC 1709.

last year, which we considered showed a lack of genuine insight of the harm done, and a tendency to minimisation.

Aggravating factors

[23] We also viewed the submissions made on Mr Palmer's behalf as an attempt to minimise the seriousness of the conduct. For example, in suggesting that because a junior lawyer at an exit interview stated that she thought Mr Palmer "had not meant any harm", ignores the power imbalance of a junior who herself was minimising its effect on her, and did not wish to be seen as a trouble-maker. It is clear that this conduct was experienced as harmful by Ms X, from her evidence, her victim impact statement and from the supporting statement of close family friends who had noted her reaction at the time of these events and described her distress.

[24] We found that Mr Palmer's trivialising of his conduct[6] as "silly", "unwise" and "misguided" does not align well with the impact on the women involved.

[25] It fails to acknowledge how such conduct can drive women from the legal profession and undermine public respect for it.

[26] This is ironic since Mr Palmer sees one of his greatest strengths as a mentor who encourages young lawyers to flourish in the law. This represents a considerable blind spot for Mr Palmer. Ms Fee, on his behalf, conceded that there had been "a degree of defensiveness" in her client's evidence. We consider it goes well beyond that and accept Ms Carter's submission that there was a "cumulative pattern of behaviour" which went unrecognised by Mr Palmer when first warned about it during his departure from Anderson Lloyd. Then, having been warned a second time while at Duncan Cotterill, where his behaviour with young women lawyers was challenged, Mr Palmer did not appear to understand the impact of his conduct and continued, despite the warnings.

[27] Another misguided submission was that we ought not to place much weight on the warnings to which we have referred. The submission that the Anderson Lloyd warning may well have been a strategic employment-related step entirely misses the

[6] During his cross-examination at the substantive hearing.

point that the conduct itself was reprehensible and the warning ought to have given Mr Palmer pause for thought.

[28] With the second warning, Ms Fee was somewhat insistent that it required more formality in order to be relied on. Once again that misses the point that, informal or not, Mr Palmer did not appear to have been able to take on board the fact that his conduct was being described as unacceptable and inappropriate, even while offering to apologise at the time.

[29] The harm done to the four complainants is a serious aggravating feature. Ms X in particular was very distressed by the ongoing (three months) pestering emails attempting to organise what was effectively a date with her. It is Ms X in respect of whom a compensation order is sought.

[30] Even though more senior than Ms X, Ms A described her discomfort during the "client lunch touching" incident in 2017, and her (unsuccessful) attempts to avoid Mr Palmer (she had shifted position at the table only to be followed by Mr Palmer). She found having to travel back to the office in a car with him disturbing and anxiety provoking.

[31] As to the two summer clerks involved in the first incident in 2015, they described feelings of being trapped because they had been taken away from the office in Mr Palmer's car and even on return to the city, despite their voiced anxiety to return to the office and prevent making a bad impression on their employers, they felt simply unable to refuse Mr Palmer's directions to take them to yet a further bar, which included the visit to the sex shop. That was obviously an embarrassing and uncomfortable situation for them to be in and they ought never to have been put in that position.

[32] The fact that there were three instances of misconduct over a lengthy period and involving four complainants has already been taken into account in determining the level of seriousness of this conduct. We repeat what we said in the *Gardner-Hopkins* case:[7]

> [173] ... The profession expects of its members that those who work with lawyers are respected and safe. A basic behaviour expected of lawyers towards those they work with is that they are respectful and do not abuse their position

[7] *Nationals Standards Committee 1 v Gardner-Hopkins* [2021] NZLCDT 21 at [173].

> of power. There is no place for objectification of women or indeed any person, by those in the profession of law.

[33] Mr Palmer's inability to detect the discomfort in the summer clerks, or indeed in Ms X's many excuses for not meeting with him is a concerning factor. Similarly, with Ms A, he was clearly unable to detect that she had deliberately moved away from him after his touching of her and then made it worse by following her to sit beside her again.

[34] The fact that some of the conduct occurred after warnings given to him as discussed in paragraph [26], is certainly an aggravating feature. We have already discussed the attempts to marginalise or minimise these warnings in a manner which we consider shows a focus on them that is misconceived and self-serving.

[35] The final aggravating factor which we address is that of the non-disclosure by Mr Palmer of the fact that he had been suspended from his employment in early December of last year. Because his counsel, including his new counsel, Mr McLellan KC, have so firmly advanced that this ought not to be regarded as an aggravating feature and indeed was either irrelevant or of peripheral relevance only to the Tribunal, we consider we ought to deal with this particular aspect in some detail.

[36] Firstly, we set out a brief chronology of the events following the release of the decision in which the three charges of misconduct were found proven:

- On 10 November 2022, the liability decision was released.
- On 16 November, media reports of the decision appeared.
- On 21 November, Mr Palmer received a letter from Saunders & Co in which they said, "Our preliminary view is that we are proposing to terminate your employment on this date …"
- Mr Palmer was placed on leave, with his consent.
- Around this time, Saunders & Co also released a media statement, informing the public and their staff of the steps that had been taken to provide a safe working environment for the firm's employees.

- On 25 November 2022, Mr Palmer instructed counsel to represent him in relation to the employment investigation which had been begun by Saunders & Co.

- Since he was placed on leave, Mr Palmer has not been on the firm's premises, although we note from the email correspondence between the firm and Mr Palmer that there were some incidents in which he was in the office carpark seeking to obtain material from his office. He has not attended social functions held by the firm.

- On 1 December 2022, Mr Palmer was required to attend a disciplinary meeting.

- A disciplinary meeting and investigation occurred on 12 December 2022, following which the firm suspended Mr Palmer immediately, pending the Tribunal's decision (on penalty). Once suspended, Mr Palmer's access to the office and the computer system were removed and his name was removed from the website.

- Arrangements were made from that time for Mr Palmer to continue to act in situations where he is a personal trustee, but he was not to carry out other legal work.

[37] Despite all of that high level of activity in the employment dispute and the obvious change of status and client servicing arrangements which were in place, Mr Palmer swore an affidavit on 8 December 2022, in which he described his practice and his conduct in the present tense without reference to any of these processes, for example:

> [10] I have taken, and continue to take, the following particular steps to address any risk of future errors of judgement:
>
> [10.1] I am now very careful about associating with junior colleagues both professionally and socially …. I do not allow myself to get into situations where I could make errors of the same nature as those subject to the decision …
>
> [10.2] I am careful when giving work to a junior colleague …

> [10.3] …(a) I only very occasionally attend Friday drinks … or social functions …
>
> [10.5] I am careful not to ever physically touch colleagues …

[38] Later in his affidavit, in seeking to persuade the Tribunal not to impose a period of suspension, he stated:

> [16] My current practice involves litigation support work, providing legal advice ... Given my age and career stage, any period of suspension is likely to cause significant difficulties for my ability to practice in the future, and the longer the more severe. If a suspension were ordered of more than six months' duration, I believe it would be fatal to my ability to practice law again and would have a significant ongoing impact on my ability to earn a living.
>
> [17] To understand the potential impact on my practice …
>
> [18] Because of the nature of my practice, if I were suspended, my work would be limited to being an independent trustee of a number of trusts. In that role, I would not be able to provide legal advice as part of my trustee services. This would materially impact my clients as they would need to go elsewhere for that advice …
>
> [19] If I had to pass those files on to other lawyers, there would inevitably be some additional cost incurred to the clients of their new lawyers getting up to speed.

[39] By the time this affidavit was sworn, Mr Palmer's ability to conduct his "current practice" had been severely curtailed and indeed he did not have a "current practice" in the normal sense of that phrase, by reason of the fact that he was on enforced leave, with special arrangements being made for the handling of clients so that he was not on the premises.

[40] In the course of submissions, Ms Fee sought that there be two weeks' notice[8] before any period of suspension was imposed in order that Mr Palmer be able to make arrangements with clients – we now know that these must have already been well in place, given the December suspension.

[41] When asked about the effect on clients of any suspension, Ms Fee said "huge" and referred to Mr Palmer's "extensive trust practice".[9] When asked if other lawyers in the firm could pick up the work, she acknowledged that that could happen.

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[8] Notes of evidence, p 36.
[9] Notes of evidence, p 37.

[42] It was also disingenuous and misleading by omission to refer to the likelihood that Mr Palmer might not "…continue to be retained in the event of a suspension", without also informing the Tribunal that he was already the subject of an employment investigation and employment suspension.

[43] At the resumed hearing in March, evidence was given by Mr Lang, one of the partners in the firm, that Mr Palmer was "... suspended and not performing any legal work" for the firm.[10] He went on to say that although Mr Palmer was carrying out his duties as a trustee where needed, that the legal work for his clients was being looked after by a number of other people in the firm.

[44] These facts are directly relevant to the Tribunal's consideration of the appropriateness and length of suspension as a penalty. Thus, we reject the submission from Mr McLellan KC, who filed supplementary submissions on behalf of Mr Palmer, that "the employment suspension has only an indirect connection with the charges …" and that "non-disclosure of the employment suspension is neither an aggravating factor nor a factor which reflects on the respondent's fitness to practice".

[45] The Tribunal's firm view is that failing to disclose his employment suspension at the time of the penalty hearing in February, and to correct his own affidavits and the affidavits of the Saunders & Co partners on which he relied, reflects poorly on him. At worst it could be seen as dishonesty by omission, at the very least it shows very poor judgement. As such, it most certainly reflects on his fitness to practice.

[46] In the *Daniels* decision,[11] the Court held that it was permissible for the Tribunal to take account of the overall conduct by the practitioner of the proceedings.[12]

[47] In the *Parlane* decision,[13] the Court discussed the particular nature of professional disciplinary proceedings. The obligations of a practitioner to be open and candid with his professional body were stressed.

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[10] Notes of evidence, p 49.
[11] *Daniels*, above n 4.
[12] In the *Daniels* matter, the attacks on the complainant by the practitioner in the course of his defence were seen as relevant to his fitness to practice.
[13] *Parlane v NZ Law Society Waikato Bay of Plenty Standards Committee No. 2* HC Hamilton CIV-2010-419-1209, 20 December 2010, Cooper J.

[48] This is not a forum where a practitioner can stand back and put the prosecution to proof. That has long been understood and was emphasised in *Parlane*, where the Court spoke of the duty all lawyers have to their fellow practitioners and to their disciplinary body and stated "… there must also be a duty to act in a professional, candid and straightforward way in dealing with the society and its representatives …".[14]

[49] And further in *Johns v Law Society of NSW*:[15]

> "The obligation to inform and assist has always been regarded as resting upon a solicitor or barrister whose conduct is the subject of an inquiry whether by the Court or the Committee, as appears in the Court's observations on numerous occasions ..."

[50] We consider that Mr Palmer has failed in this duty to be candid and open. He has not informed and assisted the Tribunal in the manner expected and as such we regard that as a seriously aggravating factor.

Suspension

[51] The purposes of imposing a period of suspension have been discussed in many cases and include:

(a) to protect the public from further reoffending;

(b) to allow the practitioner to have a period of reflection upon the manner of their practice;

(c) to allow for further education; and

(d) to achieve the purposes of penalty in providing a consequence that will satisfy the public that the professional disciplinary bodies do not take lightly serious departures from expected standards of behaviour.

[52] While a suspension may have, of necessity, a punitive outcome, that is not its purpose. We also bear in mind that any suspension can bring disruption for clients. We note, however, that in this case these matters have already largely been

[14] Above n 13, at [108].
[15] [1982] 2 NSW LR 1 at 6 (Court of Appeal of New South Wales).

addressed. There is certainly no need for the two-week delay sought by counsel at the penalty hearing.

[53] In this case the Standards Committee has sought a period of suspension in the range of 18 months to two years.

[54] We accept that we can be guided by the decision in *Gardner-Hopkins*.[16] It is accepted by the Standards Committee and by the Tribunal that this conduct is considerably less serious than that in *Gardner-Hopkins,* where the starting point was strike-off and ultimately a three-year suspension was imposed. We accept the submission that the starting point in this matter is towards the higher end of suspension, but that credit needs to be given for Mr Palmer's lengthy unblemished career.

[55] Furthermore, in this matter, we propose to accede to the request to provide compensation payment to one of the complainants. We take account of the fact that compensation was not ordered in *Gardner-Hopkins*.

[56] In all of the circumstances, we consider 18 months suspension to be proper.

Compensation

[57] The Standards Committee, on behalf of Ms X, sought an award of compensation for emotional harm.

[58] In the *Downing* case,[17] we discussed the principles applicable to this discretionary award. We adopt the summary in Ms Carter's submissions at [43]:[18]

> 43.1 There must be a causal connection between the action of the practitioner and the damages sought, although actual cause need not be proved.
>
> 43.2 There is no requirement for medical evidence or a diagnosis, and injury to feelings is a real loss.

[16] Above n 5.
[17] *Nelson Standards Committee v Downing* [2022] NZLCDT 21.
[18] Penalty submissions (24 November 2022).

> 43.3 The award of damages is to compensate for the injury to feelings not to punish the practitioner.
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> 43.4 The conduct of the practitioner respondent may, however, exacerbate or mitigate the injury and to this extent will be relevant.
>
> 43.5 There is a subjective element to the assessment – the assessment is fact specific, and personal to the person who has suffered harm. The key question is the impact caused to the specific individual in question.

[59] Counsel also referred us to the *Carlyon Holdings Limited* case.[19] That case, considered in the Human Rights Review Tribunal, provided guidance on determining damages in sexual harassment cases. The factors include:

1. The nature of the harassment.

2. The ongoing nature and frequency of the harassment.

3. The age and vulnerability of the victim.

4. The psychological impact of the harassment on the victim.

[60] Ms Carter submitted that an award of $12,000 would be reasonable in these circumstances, having regard to the factors outlined. We also had the benefit of a victim impact statement from Ms X. In it, Ms X described the degree of anguish and self-doubt which the stream of emails caused her. It was her first job and she was not clear about the expectations of socialising with senior lawyers outside work hours. She stated:

> I was worried that avoiding socialising with him would have negative consequences for me. Over time I became increasingly uncomfortable and didn't want to see him or be alone with him in the office, … I avoided him as best I could and often felt like I was walking on egg shells when I was at work.

[61] Unfortunately, Ms X did not receive support from her work mentor and felt very alone and isolated. She had not been enjoying her role as a lawyer and said that Mr Palmer's actions were "the last straw". She left the profession and retrained in another profession.

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[19] *Carlyon Holdings Limited v Proceedings Commissioner* (2000) 5 HRNZ 527.

[62] Later, she was badly affected when Mr Palmer's then employment lawyers contacted her and sought to meet with her to describe her version of events. The tone of this correspondence was particularly stressful. Her mood, sleep and study were affected.

[63] Ms Fee did not wish to strongly oppose an award of compensation but initially submitted that the amount should be between $5,000 and $10,000. She submitted that that amount perhaps could be increased, but in exchange for a shorter period of suspension. We do not consider it proper to offset penalties in such a direct manner, although obviously the orders made as a consequence of this conduct should be seen in totality, in assessing a proportionate response.

[64] In all of the circumstances, we consider that an award of $10,000 to Ms X is proper to reflect the emotional harm to her over the period in question and subsequently.

Costs

[65] The Standards Committee brought six charges against Mr Palmer, although we regarded the sixth charge as an alternative, (it being a cumulative charge in the event that the earlier charges did not themselves constitute misconduct). Of the five remaining charges, there were findings of misconduct in three and thus the prosecution was successful in relation to 60 per cent of the charges brought. Ms Fee submitted that there had been considerable work done on charges four and five and that this ought to be reflected in a significant reduction in the costs award.

[66] As the matter progressed, in fact it was the first three charges which absorbed the bulk of the time and evidence and we do not consider that charges four and five added a great deal of costs to the proceedings.

[67] Now that Mr Palmer has accepted responsibility for his conduct in charges one to three, it is in our view, unacceptable for the profession to meet more than a modest proportion of the costs.

[68] We consider that the practitioner ought to pay 80 per cent of the Standards Committee costs as finally certified.

[69] We also consider that there ought to be reimbursement by the practitioner to the New Zealand Law Society of the s 257 Tribunal costs which are mandatorily ordered against the New Zealand Law Society. We consider the practitioner ought to reimburse 100 per cent of the Tribunal costs.

Summary of orders

1. Mr Palmer is suspended for a period of 18 months, pursuant to ss 242(1)(e) and 244 of the LCA, commencing three days from the date of this decision.

2. There is an order, pursuant to s 156(1)(d) of the LCA and s 242(1)(a) awarding compensation for emotional harm to Ms X who is able to be identified by the New Zealand Law Society who can arrange the facilitation of such payment. The award is in the sum of $10,000.

3. The practitioner is to pay 80 per cent of the Standards Committee costs of $48,304.51, namely $38,643.61.

4. The New Zealand Law Society is to pay the Tribunal costs under s 257 in the sum of $26,725.00.

5. The practitioner is to reimburse the New Zealand Law Society for the full Tribunal costs.

6. There is a censure imposed upon the practitioner. The form of censure is attached as Appendix 1 to this decision.

DATED at AUCKLAND this 28th day of April 2023

DF Clarkson
Chairperson

Appendix 1

Censure

Mr Palmer, although we accept that the disciplinary process has provided a salutary lesson to you, we determined that a more permanent consequence ought to exist, in the form of a formal Censure.

Your conduct towards the complainants was reprehensible and disturbing to them. In our Penalty Decision we stated that we were concerned at your lack of insight into the harm caused by your actions. We trust that you will use the period of suspension imposed on you to reflect on these matters.

Your serious misconduct brings the reputation of the profession into disrepute. It was disgraceful and dishonourable conduct.

You also failed to disclose to the Tribunal at the time of the penalty hearing that you were already suspended from your employment.

You are formally censured. This Censure will form a part of your professional record.