NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2023] NZLCDT 42
LCDT 005/22 and 012/22

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**GENERAL STANDARDS COMMITTEE 1 and WAIKATO BAY OF PLENTY STANDARDS COMMITTEE 1** Applicant
AND	**JEREMY JAMES McGUIRE** Respondent

CHAIR
Ms D Clarkson

MEMBERS OF TRIBUNAL
Ms N Coates
Ms M Scholtens KC
Prof D Scott
Dr D Tulloch

HEARING 20 September 2023

HELD AT Remote hearing by MS Teams

DATE OF DECISION 10 October 2023

COUNSEL
Mr P Collins for the Standards Committees
Mr R Latton for the Respondent Practitioner

DECISION OF THE TRIBUNAL ON PENALTY

What this is about

[1] This decision considers the proper penalty for a lawyer who has, over a long period of time, "thumbed his nose" at the disciplinary institutions of his profession. We made two findings of misconduct following a defended hearing earlier this year, at which Mr McGuire represented himself.[1]

[2] Two Standards Committees had ordered Mr McGuire to pay certain amounts to two clients. Mr McGuire disagreed with those orders, refused to comply with them and pursued a number of legal and personal avenues to avoid payment.

[3] The legal means included various appeals or other applications, even a stay of enforcement application, in civil recovery proceedings.

[4] The personal avenues involved ignoring, insulting and misleading[2] the two clients. The full background and details about Mr McGuire's conduct at and leading up to the liability hearing is contained in our decision.[3]

[5] Following the Tribunal's liability determination, Mr McGuire took the step of instructing counsel to represent him at the penalty hearing. Mr McGuire failed to appear himself.

[6] After years of delay, Mr McGuire paid the clients the sums ordered in 2018 and 2019, the day before the penalty hearing. The fines and costs orders have still not been paid by Mr McGuire.

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[1] *General and Waikato Bay of Plenty Standards Committees v McGuire* [2023] NZLCDT 16.
[2] By telling the client he didn't know what she was talking about and that he did not owe her money.
[3] See above n 1.

Issues

[7] The primary dispute between the Standards Committees and counsel for the practitioner resided in whether suspension from practice was necessary and proportionate to mark the misconduct in this case. The Standards Committees sought a four month suspension. Mr Latton urged the Tribunal to stop short of suspension. As will be seen, part of the assessment of penalty involves considering the current matter alongside other similar cases. Counsel also differed as to the application of cases and the outcome of this comparative exercise.

Process and principles

[8] The steps to be taken and principles to be applied in determining penalty are now well known:[4]

1. The seriousness and nature of the misconduct is considered.

2. Aggravating and mitigating factors are taken into account.

3. The need for deterrence, general and specific, is weighed.

4. Evidence of remorse and insight is important in assessing whether there is likely to be a repetition of the conduct as well as being a mitigating feature.

5. An exercise of comparison with similar cases such as already described, is undertaken where possible.

6. The principle of the least restrictive disciplinary intervention is also weighed, as are the prospects of rehabilitation.

Seriousness

[9] It is not disputed that refusing to comply with orders made by one's professional body is serious misconduct. Mr Latton attempted to lighten this somewhat by reference

[4] *Hart v Auckland Standards Committee 1* [2013] 3 NZLR 103.

to the small sums of money which Mr McGuire had been ordered to pay. As pointed out by Mr Collins, that is a double-edged sword. The sums are such that any sensible practitioner would have paid them promptly to show respect to his professional body and his former clients. Mr Latton acknowledged this, but said that his client had developed a "blind spot" where the Law Society is concerned because of an earlier dispute with them (between 2011 and 2016), which resolved finally at mediation, to Mr McGuire's benefit.

[10] While we understand that, as a contextual background matter, a past error on the part of the Law Society might be of relevance in understanding Mr McGuire's belligerent approach to them, it does not explain his disgraceful conduct towards his clients. Nor does it detract from the seriousness of the two findings of misconduct before us. We do not find this to be misconduct at the lower end of the scale as urged upon us by the practitioner.

Aggravating factors

[11] Primary amongst these is Mr McGuire's prior disciplinary record. Mr McGuire has nine unsatisfactory conduct findings against him, including seven since 2018 (three arising from the subject of these proceedings). This paints a picture of a practitioner who needs to take stock of himself and his professional practice.

[12] A further seriously aggravating feature is the manner in which Mr McGuire treated his clients up to and at the liability hearing. As recorded in our liability decision, the complainants "…have been put to extraordinary lengths to obtain their entitlement…".[5] We went on to find "…that Mr McGuire's mistreatment of his former clients goes beyond putting them to extraordinary trouble and expense. In his affidavit evidence and in his submissions, Mr McGuire directly attacked the integrity and credibility of both complainants".[6]

[13] Mr McGuire required both complainants to appear for cross-examination at the liability hearing and further attempted to impugn their credibility. As recorded in the liability decision, prior to it he had made contact with "…one of the complainant's

[5] See above n 1 at [39].
[6] See above n 1 at [40].

estranged family members to let her know about the hearing, once again in an effort to undermine the complainant's credibility. This was arguably a breach of his confidentiality obligations to that complainant".[7]

[14] It is notable that we found Mr McGuire's conduct to constitute misconduct under both limbs of s 7(1)(a) of the Lawyers and Conveyancers Act 2006 (the Act), not only wilful disobedience of orders, but also disgraceful and dishonourable conduct, given his conduct towards his clients.

[15] A further aggravating feature is the lack of insight or remorse shown by Mr McGuire. His non-appearance at the penalty hearing, stating that he had another hearing listed in which he was to appear, reinforces his attitude towards these proceedings and his conduct overall. Lack of insight bears on our assessment of the risk of repetition of the conduct, and the slim prospects of rehabilitation. Those matters are central in determining whether Mr McGuire ought to be removed from practice, at least on a temporary basis.

[16] The final aggravating factor is Mr McGuire's failure to pay the various fines and costs ordered by Standards Committees since August 2018. This default encapsulates the "thumbing his nose" at the disciplinary institutions of the legal profession mentioned above. Until these fines and costs are paid it would be difficult to accept that Mr McGuire understands and intends to abide by the fundamental obligations of lawyers.

Mitigating features

[17] That Mr McGuire finally instructed counsel to represent him after many years of representing himself gives a glimmer of hope that he might be at least on the path to gaining some insight. This has led to the very belated payment of part of the orders. We take this into account but cannot give him too much credit because we consider he still needs to seriously reflect on his conduct. Mr McGuire's inability to move on from his dispute with the Law Society many years ago is striking, and until that occurs it is hard to see how he can bring a balanced and respectful approach to his profession.

[7] See above n 1 at [42].

Deterrence

[18] We accept the submission of Mr Collins that both general and specific deterrence apply in this case.

[19] Mr Collins submitted that "...the practitioner's consistent conduct in both charges was characterised by stubborn resistance and unreasonable denial". That is entirely correct and in giving this penalty principle considerable weight, we refer to the decision of *Legal Services Commissioner v Nomikos*,[8] where it was said:

> Specific deterrence, for example, requires consideration of the likelihood of the practitioner re-offending, whether because of:
>
> - a lack of insight into what occurred;
> - a lack of remorse about what occurred;
> - a history of offending conduct as opposed to a one-off explicable departure from otherwise high standards of conduct; or
> - other matters indicating that a particular sanction is required to deter the practitioner from re-offending or, conversely, that rehabilitation has taken place.

[20] In that decision, the Tribunal went on to point out:

> 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, in the interests of maintaining professional standards and public confidence in the profession.

[21] A firm response signals to members of the profession that failure to abide orders of disciplinary institutions will not be tolerated.

Similar cases

[22] Mr Collins referred to the recently decided case of *Tennet*.[9] That case is particularly relevant because it comments on the usefulness of consideration of similar cases in professional disciplinary matters.

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[8] *Legal Services Commissioner v Nomikos* [2014] VCAT 251.
[9] *Tennet v Wellington Standards Committee 2* [2023] NZHC 2500, 6 September 2023.

[23] In referring to the decision in *Sorensen*,[10] it was noted that:

> Detailed comparisons between the orders made in one case as against another are not likely to be of great assistance to the Tribunal, or to the Court on appeal. Nevertheless, the Tribunal itself said (in the decision presently under appeal) that it was necessary to consider penalties applied in a comparable context to ensure that the sanction imposed was not disproportionately severe. ...

[24] In *Tennet*, her Honour McQueen J, went on to say:[11]

> Parity and consistency are undoubtedly guiding factors but the breadth of factual circumstances that may properly be called misconduct does indeed mean that detailed comparisons between Tribunal decisions are unlikely to be helpful in all cases. …

[25] Mr Collins provided a schedule of cases where suspension had followed a breach of Standards Committee or LCRO[12] orders. The range of suspension periods was from two months to fifteen months. It is difficult, however, to compare these cases with the present, because in a number of the cases cited, other serious misconduct was also involved and covered by the overall penalty. Perhaps the closest to the present case was to be found in *Auckland Standards Committee 2 v Name Suppressed*,[13] which involved non-compliance with Standards Committee investigatory orders. No other misconduct was involved. A censure and four-month suspension was imposed.

[26] Mr Latton strongly relied on the Tribunal's decision in *Kennelly*.[14] That case also involved failure to comply with a Standards Committee order to pay compensation. In it, the practitioner admitted that he had taken a "[pig headed]" and "dogged" attitude towards the orders. The Tribunal stopped short of suspending the practitioner in that case.

[27] We decline to adopt the approach in *Kennelly*. Firstly, there is a significant difference, in that Kennelly involved a finding of unsatisfactory conduct rather than misconduct (x 2) as in this matter.

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[10] *Sorensen v New Zealand Law Society (Auckland Standards Committee 2)* [2013] NZHC 1630 at [39].
[11] *Tennet*, above n 9, at [56].
[12] Legal Complaints Review Officer.
[13] *Auckland Standards Committee 2 v Name Suppressed* [2018] NZLCDT 19.
[14] *Auckland Standards Committee 4 v Kennelly* [2021] NZLCDT 8.

[28] Secondly, the consequence of the Tribunal extending a further chance to Mr Kennelly in that decision was that he was back before the Tribunal in a relatively short time and was suspended at that point. As conceded by counsel for Mr McGuire, the intervention was, with due respect to that Tribunal, a "spectacular failure". Mr Latton submits that should not prevent us from also giving Mr McGuire a further opportunity. We do not consider, given the aggravating features set out above, particularly the previous disciplinary findings and the lack of insight, that it is proper to provide a further opportunity to Mr McGuire. We do not consider that any consequence short of suspension would reflect the seriousness of the present matter.

[29] We consider that the Standards Committee has pitched at the correct level in seeking four months suspension, and we propose to order that.

[30] Mr Latton has asked that any period of suspension be delayed until Mr McGuire's appeal to the Court of Appeal has been determined. We are most concerned that that involves an indeterminate period of delay. We are also somewhat puzzled about the present state of the appeal. Both counsel understood, having had recent discussions with the Court, that a fixture was about to be allocated. However, the Tribunal had received correspondence from the Court to the effect that since Mr McGuire had not complied with various directions the Registrar intended to abandon the appeal. Subsequent inquiries confirmed that Mr McGuire was still in default.

[31] While we are prepared to delay for a short period, say two weeks, in order for Mr McGuire to rearrange his affairs and properly hand over to his nominated attorney, despite the Standards Committees not opposing this course, we do not consider that further delay would be a proper disciplinary response.

Compensation

[32] In addition to a period of suspension, the Standards Committees seek an order for compensation for each of Mr McGuire's clients in the sum of $3,000. Mr McGuire, through Mr Latton, accepts that "some compensation" is due to his former clients. Mr Latton suggests that $600, as awarded in the first *Kennelly* case, would be an appropriate level.

[33] We refer to the Tribunal's decision in the *Downing and Reith*.[15] In that case, at [26], we set out a number of principles to provide guidance for compensatory awards. We do not propose to repeat all of those here, save to say that there must be a subjective element to the assessment. In compensating for non-monetary loss, we referred to a number of decisions which had considered the means of assessment of non-pecuniary losses. In summary, the awards must be "fair and reasonable" but of necessity somewhat arbitrary. It is not intended to provide restitution but rather an acknowledgement of the injury to feelings, and to take account of the conduct of a practitioner and whether that exacerbates or mitigates the injury which has occurred. We have already commented on the disgraceful manner in which Mr McGuire treated his clients. We consider, having regard to the awards in *Downing and Reith* and to awards made in recent sexual harassment cases, that a figure of $3,000 for each client is reasonable and proper.

Costs

[34] Mr Latton resists an order of indemnity costs. However, he himself describes Mr McGuire as being unhelpful to his cause and as acting in a "fit of pique". It is undoubtedly the case that Mr McGuire's belligerent attitude and willingness to drag this matter out over a period of years has increased the costs significantly. There is no reason why all of that ought to be borne by his professional body.

[35] We were not provided with any evidence as to Mr McGuire's means or assets. In the absence of evidence as to the practitioner's means, we prefer to leave it to the New Zealand Law Society to make such arrangements for payment as it sees fit. We are however, mindful that Mr McGuire's suspension necessarily impacts on his ability to earn income, and this ought to be reflected in a small discount in his contribution to costs. We consider that the practitioner ought to meet a significant proportion of costs (80%) of the Standards Committees and the full costs of the Tribunal by way of reimbursement of s 257 costs.

[15] *Nelson Standards Committee v Downing and Reith* [2022] NZLCDT 21.

Orders

1. Mr McGuire will be suspended from practice as a barrister or solicitor for four months, commencing 14 days from the release of this decision, pursuant to ss 242(1)(e) and 244 of the Lawyers and Conveyancers Act 2006 (the Act).

2. Mr McGuire is censured in the terms attached to this decision as Appendix 1, pursuant so s 156(1)(b) and 242(1)(a) of the Act.

3. Mr McGuire is to pay compensation of $3,000 to each of the complainants, pursuant to ss 156(1)(d) and 242(1)(a) of the Act.

4. Mr McGuire is to pay the Standards Committee costs of $28,594.42, pursuant to s 249 of the Act.

5. The New Zealand Law Society is to pay the costs of the Tribunal in the sum of $11,622, pursuant to s 257 of the Act.

6. Mr McGuire is to reimburse the New Zealand Law Society in full for the s 257 costs, pursuant to s 249 of the Act.

DATED at AUCKLAND this 10th day of October 2023

DF Clarkson
Chairperson

Appendix 1

Censure

Jeremy James McGuire, you have been found guilty of misconduct because of noncompliance with statutory orders made by two Standards Committees. You thereby committed a wilful breach of your obligations to uphold the rule of law. The orders required payments to clients who you had mistreated and whose integrity you attacked and whose credibility you impugned. While this misconduct apparently had its origin in difficulties you perceived with Standards Committees and the Law Society's disciplinary procedures, your conduct was characterised by serious failings of acceptable professional standards, bringing the profession into disrepute, and undermining the authority and standing of the professional disciplinary system. You would clearly benefit from professional support and mentoring to avoid the mistreatment of any future clients. You are censured. This censure will remain on your permanent record.