THERE IS TO BE NO PUBLICATION OF THE NAME AND ANY PERSONAL INFORMATION THAT MIGHT LEAD TO THE IDENTIFICATION OF THE COMPLAINANT, INCLUDING HER ADDRESS, WORK LOCATION AND POSITION. THERE IS ALSO A NON-PUBLICATION ORDER IN RESPECT OF ANY OF THE DETAILS CONTAINED IN APPENDIX 2 OF THIS DECISION. THESE ORDERS ARE MADE PURSUANT TO SECTION 240 LAWYERS AND CONVEYANCERS ACT 2006.

NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2023] NZLCDT 43

LCDT 016/22

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**NATIONAL STANDARDS COMMITTEE 2** Applicant
AND	**MURRAY JOHN TINGEY** Respondent

CHAIR

Ms D Clarkson

MEMBERS OF TRIBUNAL

Mr I Hunt

Mr H Matthews

Ms M Noble

Ms G Phipps

HEARING 31 July 2023

HELD AT District Court, Auckland

DATE OF DECISION 10 October 2023

COUNSEL

Ms Dew KC for the Applicant

Mr Illingworth KC, Ms Fee and Mr Lewis for the Respondent

DECISION OF THE TRIBUNAL ON PENALTY

[1] The imposition of penalty in this case is troubling and complicated. That is because the conduct, although connected in some ways with professional activities, has largely occurred against the background of a lengthy intimate relationship.

[2] It is further complicated by the fact that the conduct occurred 12 to 14 years ago. Both the complainant and the respondent have moved on and achieved significantly in their respective careers and lives.

[3] In a jurisdiction that is not supposed to be punitive but rather protective, the fixing of proportionate penalty involves many factors but must also be carried out with the purposes of the LCA[1] in mind.

Process to be followed

[4] The starting point is:

1. To ascertain the seriousness of the misconduct.[2]

2. Any aggravating features are then taken into account.

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[1] Lawyers and Conveyancers Act 2006 (LCA), s 3:

3 Purposes

(1) The purposes of this Act are—
- (a) to maintain public confidence in the provision of legal services and conveyancing services:
- (b) to protect the consumers of legal services and conveyancing services:
- (c) to recognise the status of the legal profession and to establish the new profession of conveyancing practitioner.

(2) To achieve those purposes, this Act, among other things,—
- (a) reforms the law relating to lawyers:
- (b) provides for a more responsive regulatory regime in relation to lawyers and conveyancers:
- (c) enables conveyancing to be carried out both—
  - (i) by lawyers; and
  - (ii) by conveyancing practitioners:
- (d) states the fundamental obligations with which, in the public interest, all lawyers and all conveyancing practitioners must comply in providing regulated services:
- (e) repeals the Law Practitioners Act 1982.

[2] *Hart v Auckland Standards Committee 1 of the New Zealand Law Society* [2013] NZHC 83, [2013] 3 NZLR 103.

3. Mitigating factors are considered.

4. The applicability of other important sentencing principles such as deterrence and rehabilitation; and the principle of the least restrictive intervention must be taken into account.

5. An assessment of the risk of repetition of the conduct.[3]

6. Although given somewhat less weight than other factors, personal circumstances of the practitioner are considered.

7. A comparison is made with other similar cases, should they exist.

8. In this case an important feature must be the effects of delay and how that ought to impact on penalty.

9. The importance of maintaining public confidence in the provision of legal services, which incorporates scrutiny of the disciplinary process.

The purposes of disciplinary penalties was discussed by the Court of Appeal in *Morahan*[4]*:*

> [40] In deciding whether s 351 of the 2006 Act prohibited the Tribunal from considering in its penalty decision Mr Morahan's conduct prior to 1 August 2002, we consider it helpful to first examine the purpose that underpins penalties that are imposed by professional disciplinary bodies. Those purposes can be summarised in the following way:
>
> (a) When deciding what penalty to impose upon a practitioner found guilty of a disciplinary charge, the Tribunal must bear in mind its responsibility to protect the public. This function has been stated on numerous occasions and is reflected in the purposes of the 2006 Act.
>
> (b) The Tribunal plays an important role in maintaining public confidence in the profession through the setting of standards.
>
> (c) Penalties imposed by the Tribunal may have a rehabilitative function, in that a penalty may be designed to assist a practitioner who has been found wanting to be reintegrated into the profession.

[3] We consider 4 and 5 together.
[4] *Morahan v Wellington Standards Committee 2* [2019] NZCA 221, at [40]. Footnotes omitted.

(d) It is also important to recognise that penalties imposed by the Tribunal may have a punitive function. From a practitioner's perspective, any penalty imposed by the Tribunal is likely to be viewed as punitive.

1. Seriousness

[5] The incident which we described in our liability decision, occurring on 14 November 2009, is by far the most serious of all the events considered by the Tribunal. We regard it to be serious misconduct.

[6] It was an incident of domestic violence which, although the complainant was not physically harmed, left her frightened and distressed. Although the parties reconciled and the relationship continued for a period of time, that was not a momentary consequence. In her victim impact statement, Ms X described how for a long time she felt unsafe in her own home, had heightened anxiety levels and her self-esteem was impacted. She described herself as feeling "…humiliated, ashamed and hopeless".

[7] [redacted].

[8] The other examples where Mr Tingey behaved badly in relation to Ms X are less serious but ought not to be experienced by any colleague, or ex-partner within either the workplace or home.

[9] In our liability decision we described Mr Tingey's conduct as "grossly inappropriate", "unacceptable" and "unbecoming".[6]

[10] The fact that there were three other incidents, demonstrating such poor judgement and behaviour on Mr Tingey's part means that the most serious incident cannot be regarded as an isolated event during which, in an intoxicated state, he made a series of bad decisions.

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[5] [redacted].

[6] *National Standards Committee 2 v Tingey* [2023] NZLCDT 22.

[11] It must be remembered, however, that the conduct under consideration is now very historical.

[12] While noting the conduct occurred over a lengthy period, we would not go so far as to accept Ms Dew's submission that this "involved a pattern of misconduct", given that we did not find that the less serious incidents, examined individually, had reached the standard of misconduct.

[13] What is clear is that there was a pattern of inexcusable and reprehensible behaviour towards Ms X, in the context of their intense and volatile relationship. It was conduct where in all but the latest event his desire for the relationship to resume (as happened on occasions) overrode the professional decorum expected of members of the legal profession.

2. Aggravating features

[14] We accept Ms Dew's submission that the fact that these events covered a period of almost two years is an aggravating feature.

[15] Mr Tingey himself accepts that, as a senior member of the profession, he was expected to show better judgement and professionalism. However, we do not consider such to be an aggravating feature. Instead, it is treated as the absence of a mitigating feature.

3. Mitigating features

[16] Mr Tingey's acceptance of the most serious conduct, even before the charge was laid, is to his considerable credit. This admission was not just an intimation of a guilty plea. Mr Tingey provided the Standards Committee with a 3-page, 45 point admission document. As it transpired, that document was very closely aligned with the Tribunal's findings following the disputed facts hearing. Ms Dew conceded that the admissions ought to lead to a significant discount on penalty.

[17] Mr Tingey apologised to the complainant twice in 2013, long before any complaint was made and unprompted by any suggestion of repercussions for him. We

assess those apologies as genuine and insightful, and as showing genuine regret for his actions (and not just the consequences), so are also a mitigating factor.

[18] Mr Illingworth submitted that the fact that Mr Tingey has lost up to 75% of his ongoing work as a result of the publicity surrounding the hearings ought not to be treated as a natural consequence of his misconduct, as held in *Gardner-Hopkins*[7]. This was because, Mr Illingworth submitted, enormous damage was done to Mr Tingey's reputation by the inaccurate reporting[8] which accompanied and followed the disputed facts hearing, such that the loss of clients and of professional standing was far greater than would have occurred had the facts been reported accurately.

[19] While we also accept the submission made by Ms Dew that there is no way of quantifying the level of reputational damage, beyond that which would have been suffered had the reporting been accurate, we consider that when the picture painted of the practitioner was significantly more damaging than the established facts, that this is a factor which we can take into account in mitigation.

[20] A further mitigating factor is that some years before the complaint was made Mr Tingey sought professional help to address factors which might have led to his conduct. We have been provided with reports from two health professionals which canvass the type of work undertaken and the ongoing relationship between Mr Tingey and [redacted]. We are in the position of considering the appropriate penalty for a person who has used the intervening years, unprompted by disciplinary intervention, to reform himself and address his past poor behaviour and judgements. Although he made another bad (but more minor) judgement call, again while intoxicated, in 2016, he at least recognised his error immediately, and put things right with the lawyer involved as soon as he was able.

[21] We have also considered the glowing references provided for Mr Tingey by both colleagues and clients. He is clearly a talented lawyer, whose skills are recognised widely. He has appeared in cases that have established important precedents and

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[7] *National Standards Committee (No 1) of New Zealand Law Society v Gardner-Hopkins* [2022] 3 NZLR 452; [2022] NZHC 1709.

[8] A number of widely read publications prominently referred to the complainant as a "junior Colleague" or "junior lawyer", rather than a person of [redacted] standing, as found by the Tribunal. The Tribunal specifically found that there was no power imbalance between complainant and Mr Tingey, and that his conduct was not in any way to be regarded as predatory, which is the implication carried by numerous references to "junior" in respect of the complainant.

acted for those of various means. That he has undertaken and organised pro-bono work is to his credit and provided services for the public benefit.

4. and 5. Need for Deterrence and future risk assessment

[22] It is common ground that the experience of the disciplinary process has been such an aversive one for Mr Tingey, that there is low concern that he will repeat the conduct.

[23] As to general deterrence, Ms Dew submitted that it is important that a standard of conduct towards colleagues is marked out. We accept that even where a personal relationship exists between colleagues, there is an expectation of civility and decency in lawyers. It is Ms Dew's submission that nothing short of a period of suspension from practice will mark the seriousness of the conduct under consideration and provide sufficient deterrence to other lawyers.

[24] Mr Illingworth points to the enormous consequences to his client - loss of a partnership, legal costs approaching $500,000, a 3-year investigation, being vilified and losing friends and colleagues. His submission is that those consequences and the denunciation of his professional body will be sufficient to deter any other practitioner from similar conduct. It is, again, relevant to note that the emotional and financial cost was increased by the need for a disputed facts hearing despite the early admissions made by Mr Tingey.

Other relevant penalty principles

[25] When imposing penalty, although there may be punitive effects for the lawyer, that is not the primary purpose of disciplinary penalties. [redacted].

[26] We are also required to consider the practitioner as he is today. As stated by the High Court in *Gardner-Hopkins*[9]:

[9] See above n 7 *at* [75].

> The relevant assessment of fitness and propriety must be made today, and the steps taken to address the misconduct since it occurred will be a relevant and, in some cases, important consideration.

[27] Consideration of the need for and prospect of rehabilitation is another important consideration. In this case, because of the steps already taken by this practitioner we do not consider that suspension would have any positive or additional effect on the rehabilitation already undertaken over many years. We accept that Mr Tingey is in a very different place in his career, personal life and in terms of his own self-awareness than he was when the misconduct occurred.

[28] The decision in *Daniels*[10] reminds us that we must impose the "least restrictive outcome" necessary to achieve a proportionate response.

[29] We must remind ourselves, in imposing penalty, that the purpose of the legislation is to protect the public, and to uphold professional standards so as to maintain the confidence of the public in the provision of legal services. There is no question that there is any need for direct public protection, given that Mr Tingey is regarded as highly competent, indeed a leader in his field. But that protection incorporates the public confidence element to which we have referred above.

[30] We also refer to s 244(2)(c) of the LCA, which provides that suspension from practice can only be imposed if there is unanimity in that course, in a tribunal of five members.

6. and 8. Personal Circumstances and Effects of Delay

[31] Less weight is accorded to personal circumstances in this jurisdiction than in others. However, the very unusual circumstances of this case, involving a delay of between 12 and 14 years since the conduct occurred, mean that there needs to be careful examination of where Mr Tingey is now.

[32] As a barrister, Mr Tingey is not in a supervisory role over other staff and he has no employees. He is in a stable personal relationship. He states he does not consume

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

alcohol to excess. He is 17 years older than he was when the relationship with the complainant began, and 12 years older than he was when it ended.

[33] Given that the primary purpose of sanction is not to punish or denounce[11], and given that the most serious incident occurred some 14 years ago, with other lesser events occurring in the context of, or the immediate aftermath of the end of a long consensual and intimate relationship, the conduct does not and should not require the same response as it would if these were recent events. We do not consider that would be fair, or in accordance with the principles of the LCA.

7. Comparable cases

[34] Ms Dew referred us to a series of four cases[12] which could broadly be labelled under the heading of sexual harassment. They all concerned either verbal or physical harassment, in circumstances where there was a considerable power imbalance in favour of the practitioner.

[35] Ms Dew bases her assessment of the proper penalty for this matter on a review of the various periods of suspension that had been imposed on those practitioners by the Tribunal (in addition to the other relevant submissions on penalty made for the Standards Committee).

[36] With respect, we do not consider these cases to be of particular relevance in the present matter. Those cases were examples of an abuse of a power imbalance by the practitioner in either a directly sexual manner or involving an invasion of personal space or boundaries in a completely inappropriate way.

[37] By contrast, the present matter arose in the context of a consensual, long term intimate relationship between [redacted], and without the elements of predatory behaviour or abuse of power that occurred in the other cases.

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[11] In contrast, for example, to sentencing for historical criminal offending.
[12] *National Standards Committee 1 v Palmer* [2023] NZLCDT 13; *National Standards Committee 2 v Mr Q* [2023] NZLCDT 14, *Auckland Standards Committee 4 v Schlooz* [2021] NZLCDT 12; and *National Standards Committee 1 v Gardner-Hopkins*, see above n 7.

[38] We consider that the three cases involving assault[13] referred to by Mr Illingworth to be of greater relevance, accepting that the present case is the first of its kind and involves very particular circumstances.

[39] Each of the three cases referred to involved serious domestic violence at a much higher level than in the present case and had resulted in far more serious sanctions in the criminal jurisdiction of the District Court.

[40] Despite the much more serious nature of the offending in those matters, having regard to all of the circumstances, the Tribunal suspended only one of the lawyers, Mr Dender.

[41] Although the conduct in the present matter continued over a longer period than in the above instances, it was at a significantly lower level and consistency would appear to mitigate against suspension of Mr Tingey.

9. Public confidence

[42] We do not consider that, having regard to the unique aspects of this case, public confidence in "the provision of legal services" would be undermined by a less intrusive penalty than suspension.

[43] We consider that a censure which denounces Mr Tingey's conduct, together with a significant fine and the large costs which the practitioner has incurred (including a contribution to the Tribunal's costs, and the Standards Committee's costs) is sufficient to mark out the seriousness of this conduct.

Fine

[44] Taking into account the financial position of the practitioner, the Tribunal imposes a fine of $15,000.

[13] *Auckland Standards Committee 1 v Matheson* [2015] NZLCDT 4; *Canterbury Westland Standards Committee 2 v Healy* [2020] NZLCDT 4; and *Hawke's Bay Standards Committee v Dender* [2017] NZLCDT 39.

Suppression

[45] Mr Illingworth sought non-publication of a number of details, set out in Appendix 2. Ms Dew consented to all but those set out in para [1.4] (which were original allegations not found proven by the Tribunal).

[46] We consider that a more accurate picture of the Tribunal's decision would be reflected by non-publication, in any report, of all of the details, contained in the application. There is a risk that reporting unsubstantiated allegations may give undeserved currency. Therefore we grant the application in its entirety.

Costs

[47] In her submissions, Ms Dew concedes that, having had one of the charges dismissed, and having failed to make out the strongly advanced suggestion of power imbalance, that a discount from a full contribution to the Standards Committee costs is warranted. She suggests a 20% discount from costs that are in excess of $62,000.

[48] For his part, Mr Illingworth points to the two-day disputed facts hearing having resulted in almost identical findings to those previously admitted by his client. This resulted in considerable additional costs for the practitioner, as well as the stress of giving evidence on such personal matters for the complainant and him.

[49] While accepting that a penalty hearing would have to have been held in any event, Mr Illingworth points to the extremely high legal costs incurred by his client, and submits that costs as between the Standards Committee and the practitioner should lie where they fall. Given the enormous disparity between the parties' costs ($62,000 against $500,000), and the outcome of the disputed facts hearing, that ought to be regarded as a large concession.

[50] We consider there is merit in that submission, provided there is, an allowance for the Standards Committee costs for the penalty hearing of approximately 30%, it achieves overall fairness, taking account of the fact that in bringing charges the Standards Committee is fulfilling a statutory role.

[51] We consider that both the practitioner and the Standards Committee ought to equally bear the Tribunal costs.

Orders

1. The practitioner is formally censured in terms of the attached Appendix 1. (pursuant to ss 156(1)(b) and 242(1)(a) LCA)

2. The practitioner is fined the sum of $15,000. (pursuant to ss 156(1)(i) and 242(1)(a) LCA)

3. The application by Mr Tingey for non-publication of the details set out in the application of 24 July 2023, attached as Appendix 2, is granted in full.

4. The practitioner is to pay $20,000 towards the costs of the Standards Committee. (pursuant to s 249 LCA)

5. The New Zealand Law Society are to pay the Tribunal costs in the sum of $33,785. (pursuant to s 257 LCA)

6. The practitioner is to reimburse the New Zealand Law Society for half the Tribunal costs, namely $16,892.50 (pursuant to s 249 LCA)

7. The non-publication order of 17 May 2023 is to stand, in terms of the High Court Ruling of 14 September 2023.

DATED at AUCKLAND this 10th day of October 2023

DF Clarkson
Chairperson

Appendix 1

Censure

Mr Tingey, you have acknowledged your wrongdoing in relation to Ms X, which occurred over a period of two years.

You failed to manage your behaviour in a manner expected of a member of the legal profession. In doing so, you let yourself and your profession down.

Moreover, you caused distress and fear to Ms X. Your actions contributed to a significant and, temporarily at least, detrimental career move by Ms X - that was grossly unfair to her.

We accept that you have taken steps to address this historical conduct since then.

This censure is to remind you that any repetition of this conduct will not be tolerated.

It remains as part of your permanent professional record.

Appendix 2

1.1 The contents of the submissions and/or evidence by the respondent and/or his experts relating to counselling or therapy provided, or the emotional or psychological condition or assessment of the respondent;

1.2 The identity of, or any details which may provide identification of, the persons who have provided character references in respect of the respondent;

1.3 Any unrelated complaints, or disciplinary findings by a standards committee, or review to the Legal Complaints Review Office, or evidence given in respect of such disciplinary findings or review, relating to any matter other than the misconduct charge.

1.4 Any allegation that the respondent:

1.4.1 had any imbalance of power over the complainant;

1.4.2 was significantly more senior than the complainant and had control over her;

1.4.3 forced his way into the complainant's hotel room to leverage her to resume the relationship;

1.4.4 said that he would make sure that the complainant never worked in law again;

1.4.5 grabbed the complainant's handbag to stop her leaving her office;

1.4.6 accepted that there was a basis for the complainant to get a restraining order;

1.4.7 called the complaint incessantly;

1.4.8 continued to harass the complainant for years after their relationship ended;

1.4.9 acted in pattern of intimidation and aggression over the course of the relationship with the complainant.