PERMANENT NON-PUBLICATION ORDERS IN PLACE FOR NAME OF THE FIRM WHO EMPLOY MR U, ALL COMPLAINANT NAMES, NAME OF MR U, HIS CHILDREN AND FORMER WIFE. THESE ORDERS MADE PURSUANT TO S 240 LAWYERS AND CONVEYANCERS ACT 2006.

NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2024] NZLCDT 10
LCDT 018/23

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**CANTERBURY WESTLAND STANDARDS COMMITTEE 2** Applicant
AND	**Mr U** Respondent

CHAIR
Ms D Clarkson

MEMBERS OF TRIBUNAL
Mr I Hunt
Mr T Mackenzie
Prof D Scott
Dr D Tulloch

DATE OF HEARING 18 March 2024

HELD AT Christchurch District Court

DATE OF DECISION 9 April 2024

COUNSEL
Mr A Harvey and Ms N Town for the Standards Committee
Mr U the Respondent Practitioner

DECISION OF THE TRIBUNAL ON PENALTY

What this is about

[1] What penalty should be imposed on a lawyer who, in his personal capacity, has been found guilty of serious misconduct for the language used by him in communications with the court and colleagues? The Standards Committee contends that the conduct was so abhorrent that suspension from practice[1] is necessary to demonstrate its seriousness and the disapproval of Mr U's professional disciplinary body.

[2] Mr U contends that, in context, his appalling lack of judgement and restraint is understandable, unlikely to be repeated and calls for a censure only.

[3] The background to the misconduct is set out in our decision of 9 February 2024 and relates to communications with the Family Court and with a firm and individual solicitors who were representing Mr U's former partner. The misconduct also extended to other members of the profession who had become involved in the case and indeed to members of the Police.

Process to reach a proportionate and fair penalty

[4] Accepting that the purpose of this Tribunal is not to punish, but to protect the public, the starting point and any penalty assessment is the seriousness of the conduct.[2]

[5] The Tribunal must then take into account aggravating and mitigating factors.

[6] In order to achieve consistency as far as possible, similar prior cases are compared with the present case.

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[1] As well as costs orders.
[2] *Hart v Auckland Standards Committee 1 of the New Zealand Law Society* [2013] 3 NZLR 103.

[7] The Tribunal must then weigh the relevant penalty principles. In this case the relevant penalty principles are deterrence, both general and specific; rehabilitation; denunciation; and the least restrictive intervention principle.

[8] Finally, standing back and making an overall assessment of the practitioner, the Tribunal must determine whether he is currently fit to practise as a lawyer.

Seriousness

[9] In our liability decision, we described what Mr U had done as "very serious misconduct". We found that the language used, the repetitive nature of the conduct and the number of people affected meant that it reached the higher threshold for misconduct under s 7(1)(b)(ii) of the Lawyers and Conveyancers Act 2006 (the Act).

[10] Nothing in the submissions made by Mr U at the penalty hearing has moved us from that assessment.

Aggravating features

[11] The Standards Committee submitted that aggravating features included the "repeated and sustained" nature of the conduct and the large number of people targeted. In finding the conduct "very serious misconduct" we referred to the "sheer quantity and breadth of the outrageous and insulting communications". We must be cautious not to include this both as an assessment of seriousness and also an aggravating feature.

[12] What we do consider is an aggravating feature is the fact that Mr U repeated his egregious conduct following the intervention of the Law Society at an informal level in order to offer him the opportunity to repent of his conduct and apologise.

[13] Having taken advantage of this opportunity, to so quickly go on to reoffend in precisely the same manner is certainly an aggravating feature. The conduct in all covered seven months.

[14] In our decision we note that a total of 11 people or organisations were the subject of Mr U's insults.

[15] We accept the submission made on behalf of the Standards Committee that the elements of sexism and gratuitous personal abuse are also aggravating features.

[16] A further aggravating feature is that in one instance the disgraceful email was, by Mr U's own admission, written in a deliberate attempt to provoke another lawyer.

[17] The Standards Committee also submitted that it was an aggravating feature that, in the course of representing himself and defending himself in these proceedings, Mr U raised a technical and last minute, defence[3] and failed to acknowledge, until at least the liability hearing, that his conduct even reached the level of unsatisfactory conduct.

[18] We make it clear that it is not generally an aggravating feature for a practitioner to vigorously defend disciplinary proceedings nor to bring admissibility challenges. Every person charged has that right.[4] Here the challenge, although brought without notice, and incorrect in its framing, did have some substance in its theory.

[19] However, the *Daniels* decision also made it plain that the Tribunal is entitled to scrutinise the overall manner of a practitioner's conduct in responding to disciplinary proceedings while making its assessment of the overall fitness of the practitioner to remain practising as a lawyer.

[20] While we noted that Mr U was at all times when appearing before us polite and respectful of the Tribunal and opposing counsel, his written material presented a jarringly different picture.

[21] In his submissions on penalty, Mr U made serious allegations against opposing counsel, including those of "bad faith". The tenor of Mr U's submissions carried over an unfortunate theme from the original evidence in this case of Mr U failing to appreciate that lawyers follow instructions and represent their client's position. Mr U continually falls into the position of concluding that a lawyer representing a party in litigation is, whenever presenting adverse evidence or arguments against Mr U, taking on the matter directly.

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[3] The admissibility issue referred to in our liability decision at [22] – [29].
[4] This was made clear in the decision of *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850.

[22] Only when tackled on this by the Tribunal in the hearing did Mr U agree to retract these comments. The comments were unnecessarily personal in nature and Mr U appeared not to understand the concept of bad faith, his expression of which had absolutely no basis in fact.

[23] In addition to the further personal attacks on colleagues during these proceedings, there were a number of instances in Mr U's submissions which demonstrated a lack of insight about the harm caused by his conduct and what he saw as its justification. These are not aggravating factors but will be referred to when we reach the point of overall assessment of fitness at the present time.

Mitigating features

[24] The first mitigating feature is that Mr U comes to the Tribunal with a clean disciplinary record, although that must be tempered with the fact that a seven month period of Mr U's initial brief period as a practising lawyer included this offending conduct.

[25] The second mitigating factor is the co-operation by Mr U with the disciplinary process, and compliance with directions of the Tribunal.

[26] Mr U has, throughout the proceedings, asked the Tribunal to take account of the enormous personal pressure under which he was operating when the misconduct occurred. In his most recent submissions, he referred to there having been a "devastating trigger" occurring before each of the four events which comprised the misconduct.

[27] There is no doubt that at the time of the misconduct, Mr U was under considerable stress. His inability to afford counsel meant that he was personally litigating protracted Family Court proceedings. At the same time, we understand he had some part time employment and certainly had the primary care of his two children. These are difficult circumstances for any inexperienced lawyer to cope with, and it is clear from the nature of Mr U's "venting" that he was not coping.

[28] In the circumstances where we have found personal misconduct rather than professional misconduct, we do consider we can take these circumstances into

account, to a certain degree, in mitigation. They do not of course provide any excuse for the conduct and were it to be repeated, Mr U could expect to face very serious consequences.

[29] We also note in considering the overall culpability of Mr U, that the communications were kept within the confines of the parties and the private setting of the Family Court. Mr U did not succumb to the temptation of social media or other more public expressions of discontent. We refer to this aspect later under the heading of comparable cases.

[30] The final matter on which we wish to comment under this heading is that Mr U refers to his 'self suspension'. Standing aside from practice can in some instances be taken into account if, in the course of doing that, the practitioner is addressing the issues which have led to his or her misconduct.

[31] While we note that Mr U has gone on to complete his Family Court litigation and therefore says he is unlikely to repeat his conduct, this is not a situation where, for example, he has been undertaking any form of therapy or re-education, and for these reasons, we cannot place much weight on the fact that he has been out of practice for several months. We also note that Mr U was primarily practising in employment law, and has continued to do so albeit as an advocate instead of a lawyer, and on a more part time basis. We do not see Mr U as having already undertaken a true suspension.

Similar cases

[32] The two closest cases which were the subject of discussion were *Orlov*,[5] and *Schlooz*.[6] As noted in the *Schlooz* appeal, it is "…not possible to superimpose cases with entirely different contexts and varieties of misconduct upon each other to form some form of template for penalty imposition".[7] However, in an effort to maintain, as far as possible, consistency and therefore fairness, the penalties imposed in these previous two cases were considered.

[5] *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2014] NZHC 1987.
[6] *Auckland Standards Committee 4 v Schlooz* [2021] NZHC 2185.
[7] Above n 6, at [17].

[33] In the *Orlov* case, it is somewhat difficult to assess what the High Court might have imposed as a penalty because it simply recorded that the effective suspension[8] of eight months was, in the full Court's view, sufficient penalty.

[34] In the *Schlooz* case, the Tribunal imposed a suspension of four months which was upheld on appeal to the High Court.

[35] In the High Court, Toogood J found that *Orlov* was a more serious case than that of *Schlooz*. One of the elements in this assessment was that *Orlov* involved "…repeated attacks on the competence of a judicial officer in the context of statements in proceedings before judicial and quasi-judicial bodies that were capable of being published".[9] In holding thus, Toogood J considered that the private nature of the communications created by Mr Schlooz made them less serious. That is also a factor in this case.

[36] The other distinguishing feature found between *Orlov* and *Schlooz* was the acceptance of responsibility by way of a guilty plea by Mr Schlooz, whereas Mr Orlov at no time ever acknowledged that his (mis)conduct was inappropriate.

[37] Later in his decision, Toogood J held:[10]

> … A starting point of six months' suspension for the most serious cases of the type is a significant penalty, likely to result in a substantial loss of income for the practitioner and to cause severe disruption to his or her practice. In my view, setting a starting point of suspension for a period of 12 months, being the lower end of the range that the Standards Committee submitted would have been appropriate in this case, would be disproportionately high for the most serious cases of first offending of this nature.

[38] He also endorsed the Tribunal's discount of two months from the starting point of six months to take account of Mr Schlooz's "…admission of guilt, measures taken to address the underlying causes of his aberrant behaviour and his prior good record …".[11]

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[8] Following an order for strike off by the Tribunal, there is automatic suspension from practice pending any appeal. This occurred in Mr Orlov's case, for eight months.
[9] Above n 5, at [44].
[10] Above n 5 at [47].
[11] Above n 5 at [48].

[39] We find the following distinguishing features between the present case and the *Schlooz* case, which we consider places it closer to the *Orlov* level of seriousness than *Schlooz*, and thereby justifies a more serious response.

1. Mr U breached his obligation to uphold the rule of law[12] by attacking the institution of the Family Court itself. That factor was not present in the *Schlooz* case.

2. Bearing in mind the obligations on an officer of the court in filing documents, the fact that Mr U formally filed his abusive and derogatory comments in the court is a serious matter. Again, this was not a relevant factor in *Schlooz.*

3. There was a greater number of targets of Mr U's conduct. Although Mr Schlooz exceeded the total number of instances of Mr U, his target was one individual, albeit a person in a vulnerable position.

4. Mr Schlooz "fell on his sword". By admitting misconduct and not attempting to downplay or minimise the seriousness of his conduct, Mr Schlooz gained considerable credit with the Tribunal. Mr U cannot rely on that mitigatory factor.

5. The previous intervention by the Law Society to set Mr U straight, an opportunity which he squandered, is the final distinguishing feature.

Current fitness for practice

[40] We have already referred to Mr U's conduct of these proceedings as they pointed to his current fitness to practice. While we do not consider Mr U to be a direct risk to the public in the manner of his practice, we do consider him to pose an indirect risk to the reputation of the profession. This risk can only be reduced or eliminated by Mr U gaining further insight into his conduct and, at this stage, given the tenor of his most recent written submissions, we have considerable concerns about that level of insight.

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[12] Section 4 of the Act.

[41] By way of example, at paragraph [3] of his submissions, he states:[13]

> It is my further submission that counsel seeks to elevate the findings to a more serious degree than has been found. It is my further submission that this not only unfair to me, but is done in bad faith.

[42] Later in the submissions, Mr U submits:[14]

> … counsel says my misconduct was targeted at a large number of people. It is my submission that my commentary was targeted at the relevant people who were destructively (unfairly) impacting on my personal life. …

[43] We note that the targets comprised 11 different people or institutions. We consider that this submission demonstrates a considerable lack of insight still in place. At one point in the hearing, when questioned about his allegation of "bad faith", he was only able to explain such a personal attack by stating "…I suppose it's still my emotional connection to my personal matters ma'am that's the difficulty…". He went on to say that he considered the Standards Committee submissions "attacked" him.

[44] Mr U has not demonstrated that he really grasps how damaging of the institution and of his profession such comments were. While he made most of them in a private setting, they still breached his obligations to "…uphold the rule of law and to facilitate the administration of justice in New Zealand."[15]

[45] One of the purposes of suspension is to provide an opportunity for reflection, rehabilitation and further education. During the hearing, the Tribunal discussed with counsel the possibility of further training on ethics and conduct for Mr U.

[46] Ms Town for the Standards Committee has helpfully filed a memorandum subsequent to the hearing setting out two courses which could be attended by Mr U to assist him in this regard, and we propose to direct in our orders that he attend one of these. We consider that Mr U will also need to work on his personal vulnerabilities and his responses and reactions to other people, including colleagues.

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[13] The latter sentence was retracted at the urging of the Tribunal. However, it is of concern that Mr U sees counsel (personally) elevating findings when the Tribunal found in its liability decision "very serious misconduct".
[14] Respondent's submissions on penalty (10 March 2024) at [13].
[15] Section 4 of the Act.

[47] On an overall assessment of Mr U at this point, the Tribunal was unanimous in its view that he is currently not fit to practice, although remains optimistic that with further time and guidance he will be so. We then turn to consider the length of suspension which is proper in this case.

Discussion

[48] The Standards Committee submitted that this case was more serious than *Orlov* and that a period of suspension of at least 12 months was required to reflect the seriousness of Mr U's conduct. It was submitted that that was the least restrictive penalty and further referred to the need for deterrence as a penalty principle.

[49] We endorse the submission that this case calls for a penalty sufficient to provide both specific deterrence to the lawyer, and general deterrence to other members of the profession.

[50] We do not accept that this matter is as serious as *Orlov*. None of the mitigating factors which are present in this case were present in *Orlov*. Indeed, there were none. The combative and downright rude manner in which Mr Orlov conducted himself in the proceedings contrasted starkly with Mr U's polite and respectful conduct to the Tribunal.

[51] Considering the decision of Toogood J in *Schlooz*, we consider that a proper length of suspension for Mr U is six months, to reflect that this matter is a more serious matter than *Schlooz*. That length will provide Mr U with the opportunity of further reflection and education, and thereby fulfil the rehabilitative purpose of disciplinary penalties.

[52] There will be an opportunity to review Mr U's progress when he comes before the Practice Approval Committee at the point when he seeks a further practising certificate.

Costs

[53] The Standards Committee seeks full costs reimbursement, including the full reimbursement of the mandatory Tribunal costs. Their costs are likely to be in excess of $16,000. The Tribunal costs are somewhat less than that.

[54] At our request, Mr U provided some evidence of his financial position by providing rates and other invoices. It is clear that he is still struggling financially and is $8,000 overdue on his rates assessment. However, it is also clear that he has an interest in a number of properties and without full valuations and indebtedness assessments, his suggestion that the equity remaining is little is unable to be substantiated.

[55] Mr U has an interest in a bar at which he works on a part time basis receiving a modest income. He would perhaps be better to put his talents to use as an employment advocate or other similar role which he has played in the past. We accept that his role as primary caregiver to his children means that his ability to earn is somewhat restricted and that his financial responsibilities are higher than many practitioners who come before us.

[56] Mr U submitted that "…despite the finding of personal misconduct (alternative charge), I have otherwise successfully defended the bulk of the charges, and defended the Standards Committee's main case for professional misconduct – which is an important precedent for the profession". We do not accept that Mr U has "successfully defended the bulk of the charges". In fact, we found misconduct proved on the higher threshold of the two alternatives and although this case may provide some precedent value in the distinction between professional and personal conduct, that alone is not a reason for significantly discounting the costs award.

[57] Taking all of those matters into account but noting that the profession ought not to bear the full costs of this prosecution, we direct that Mr U is to pay costs to the Standards Committee of $12,000, and is to reimburse 80 per cent of the Tribunal costs as assessed.

Censure

[58] We consider that the suspension itself operates as a censure to Mr U. Furthermore, we have set out very clearly our views on his conduct in the liability decision and those comments are for him to reflect on during his period of suspension. On that basis, we make no formal censure.

Orders

1. The practitioner is suspended from practice for six months from the date of the penalty hearing, that is 18 March 2024 (pursuant to s 242 of the Act).

2. The practitioner is to pay $12,000 towards the costs of the Standards Committee (pursuant to s 249 of the Act).

3. The New Zealand Law Society is to pay the Tribunal costs in the sum of $18,903 (pursuant to s 257 of the Act).

4. The practitioner is to reimburse the New Zealand Law Society 80 per cent of the s 257 costs, namely $15,122.40 (pursuant to s 249 of the Act).

5. The practitioner is to undertake the Professional Conduct module of the Stepping Up course, on 26 July 2024, at his own cost (pursuant to ss 242 and 156(1)(m) of the Act). He is to confirm with the counsel for the Standards Committee when he has completed this course.

6. We reconfirm the final suppression orders recorded in the liability decision. No publication of the name of the firm who employ Mr U, the complainant names, the names of Mr U's children and former wife (pursuant to s 240 of the Act).[16]

DATED at AUCKLAND this 9th day of April 2024

DF Clarkson
Chairperson

[16] *Canterbury Westland Standards Committee 2 v Mr U* [2024] NZLDT 4 (9 February 2024).