

SUPPRESSION ORDER IN PLACE – SEE PARAGRAPH 57(e)

**IN THE NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

Decision No: [2012] NZLCDT 1

LCDT 008/11

IN THE MATTER

of the Law Practitioners Act 1982
and the Lawyers and Conveyancers
Act 2006

AND

IN THE MATTER

of Robyn Philippa Joy Fendall of
Auckland, Barrister

TRIBUNAL

Chair

Mr D J Mackenzie

Members

Mr G McKenzie

Mr P Shaw

Mr W Smith

Mr S Walker

COUNSEL

Mr G Illingworth QC and Mr M Treleaven for Auckland Standards Committee No.1

Mr D Jones QC and Ms M Dew for the practitioner, Ms Fendall

HEARING at Auckland on 31 January 2012

DECISION OF THE TRIBUNAL ON PENALTY, COSTS, AND SUPPRESSION

Introduction

[1] Ms Fendall was charged with misconduct in her professional capacity. In the alternative she was charged with negligence or incompetence in her professional capacity of such a degree or so frequent as to reflect on her fitness to practise or as to tend to bring the profession into disrepute.

[2] The charge was heard under the Lawyers and Conveyancers Act 2006 ("LCA"). LCA replaced the Law Practitioners Act 1982 on 1 August 2008. Because Ms Fendall's conduct the subject of the charge occurred during the period February 2005 to September 2007, when the Law Practitioners Act was in force, some provisions of that Act apply in respect of the charge, under the transitional provisions of LCA.¹

[3] Ms Fendall pleaded guilty to the charge of misconduct, and the Tribunal convened in Auckland on 31 January 2012 to hear submissions on penalty, costs, and suppression. This decision records the oral decision given at the hearing regarding suppression and notes the Tribunal's reasons for that decision, and determines penalty and costs.

Background

[4] The charge arose following investigations by the Legal Services Agency into invoices Ms Fendall had rendered for her professional services in respect of attendances as duty solicitor, and for legal aid and youth advocacy attendances.

[5] An initial investigation into invoices Ms Fendall had issued to the Legal Services Agency commenced at the end of 2006. As a result, the Legal Services Agency identified some inaccuracies in the time charged to it by Ms Fendall. It appeared that in some instances the same time had been charged as both Legal Aid and Duty Solicitor attendances, effectively resulting in some double-billing of Ms Fendall's time.

[6] The amounts concerned arose from invoices issued by Ms Fendall during the period 24 February 2005 to 22 June 2006. The total amount over-charged was

¹ Section 351 Lawyers and Conveyancers Act 2006 provides that the conduct must have been conduct that could have been the subject of disciplinary proceedings under the Law Practitioners Act 1982, that the conduct has not previously been disposed of under the Law Practitioners Act, and that the conduct has not occurred more than 6 years prior to 1 August 2008. Section 352 notes that any penalty imposed must be a penalty that was available under the Law Practitioners Act at the time of the conduct. The only matter of relevance for present purposes is section 352, as the conditions of Section 351 have been met.

\$8,325. This was raised with Ms Fendall in February 2007. There followed an exchange of correspondence between the Agency and Ms Fendall through to April 2007, at which time Ms Fendall accepted there had been some errors in her billing.

[7] Ms Fendall repaid the \$8,325 over-charged to the Legal Services Agency in December 2007. The Legal Services Agency cancelled Ms Fendall's Duty Solicitor listing approval for three months, to mark its concern at Ms Fendall's billing errors. The cancellation was to be reviewed after a further investigation of Ms Fendall's invoices, this time covering the period 1 September 2006 to 1 September 2007.

[8] By April 2008 this second investigation had detected that 5.5 hours of her time had been over-charged, in the same way, during the period concerned. The amount involved was \$742.50. Ms Fendall acknowledged the over-charging and repaid that amount to the Legal Service Agency in May 2008. Her Duty Solicitor listing was reinstated by the Agency at that time.

[9] The Legal Services Agency then commenced a third investigation, largely covering the same period as the second investigation, but including all of September 2007. This investigation of Ms Fendall's invoices for the period 1 September 2006 to 30 September 2007 extended the investigation to include invoices issued to the Ministry of Justice during that period.

[10] This third investigation found there had been over-charging during the period reviewed. This over-charging arose because on occasions the same time had been charged to the Legal Services Agency for Duty Solicitor attendances as had been charged to the Ministry of Justice for Youth Court appearances.

[11] This over-charging was raised with Ms Fendall in July 2008. After some correspondence and analysis of her time records and the invoices that appeared incorrect, Ms Fendall identified a total of \$4,176 incorrectly invoiced to the Legal Services Agency, and she repaid that amount. She also repaid the Ministry of Justice \$4,123 it had been overcharged.

[12] The Legal Services Agency concluded, following the investigations, that there was no dishonesty. It accepted that it was a matter of failure to take proper care when recording time and subsequently invoicing charges based on that incorrect time record. This also appears to have been the view of the Serious Fraud Office, to whom a complaint about Ms Fendall's invoicing practices had been made, as evidential material available to the Tribunal² showed that Office had advised that it considered the over-charging indicated accidental events rather than criminal events.

[13] Following its third investigation the Legal Services Agency suspended Ms Fendall and cancelled her provider listing for what it described as her "*extremely*

² Page 167 Bundle

negligent' conduct arising from the occasions on which she had billed an amount in excess of her proper entitlement.

[14] An own motion enquiry was commenced by Auckland Standards Committee No.1 ("ASC") in 2009, after it became aware, from media reports, of the action of the Legal Services Agency. Subsequently, a complaint was received by the New Zealand Law Society from the Legal Services Agency. This complaint was about the matters which had led to the cancellation of Ms Fendall's provider listing by the Agency.

[15] The own motion investigation was commenced to enquire into the circumstances of the cancellation of Ms Fendall's listing approvals to provide services under the legal aid and duty solicitor scheme. The subsequent Legal Services Agency complaint provided to ASC detailed the Agency's investigations and its decision to cancel Ms Fendall's listing approvals. The complaint was supported by the particular over-charging instances found by the Legal Services Agency in audits of Ms Fendall's accounts, and her explanations.

[16] The own motion investigation and the enquiry into the complaint resulted in the charges referred to above being laid against Ms Fendall by ASC.

[17] The misconduct charge against Ms Fendall provided two alternative propositions, either;

- (a) That at the times the excessive claims were submitted Ms Fendall knew she had no entitlement to the amounts in question; or,
- (b) That at the times the excessive claims were submitted Ms Fendall had a duty to ascertain her entitlement to the amounts in question and failed to comply with that duty.

[18] Ms Fendall pleaded guilty to the misconduct charge on the basis that she had failed in her duty to ascertain her entitlement to the amounts claimed, as noted in (b) above. That was accepted by ASC and the matter proceeded on that basis, rather than the more serious misconduct alternative which alleged she had claimed the amounts knowing she had no entitlement.

[19] The Legal Services Agency had undertaken audits of Ms Fendall's invoices, covering the period 24 February 2005 to 30 September 2007, as part of its investigations noted earlier. The audits undertaken by the Legal Services Agency identified that over the periods in question it had been overcharged a total of \$13,243.50 and that the Ministry of Justice had been overcharged by \$4,123.

[20] The Agency's investigation found that the over-charging appeared to arise principally out of Ms Fendall failing to sign off the Duty Solicitor attendance sheet when she switched roles during the course of a day, and made appearances either on legal aid assignments, or as a youth advocate in the Youth Court. As a result,

when she issued an invoice for attendances, some of that time was in excess of her proper entitlement, as it formed part of the time used to calculate another fee that Ms Fendall was claiming.

[21] Full repayment of the amounts over-charged was made by Ms Fendall to the Legal Services Agency (\$13,243) and the Ministry of Justice (\$4,123) when the amounts concerned were identified and brought to her attention.

[22] ASC indicated via its counsel, Mr G Illingworth QC, that it recognised there was no evidence that Ms Fendall knew she had no entitlement to the amounts in question at the time she claimed payment. For that reason ASC was prepared to deal with the matter on a guilty plea to the alternative basis of the misconduct charge; that Ms Fendall failed in her duty to ascertain her entitlement to the amounts claimed. Our view of the facts accords with that approach. There has been negligence rather than dishonesty, and Ms Fendall has accepted that her time recording and charging systems were deficient on occasions.

[23] Having pleaded guilty to misconduct on the basis that she had failed in her duty to ascertain her entitlement to the amounts in question, the Tribunal has now to decide an appropriate penalty.

Penalty

ASC position

[24] At the hearing Mr G Illingworth QC for ASC sought that Ms Fendall be suspended from practice for a period. ASC sought, effectively, a suspension from practice of 2 years.

[25] In support of its submission seeking suspension, Mr Illingworth noted for ASC that Ms Fendall;

- (a) Had a clear obligation to ensure that amounts claimed were within the boundaries set by applicable payment policies established by the Legal Services Agency and the Ministry of Justice
- (b) Had been expressly notified on a number of occasions of the need to ensure her charging complied with appropriate policies
- (c) Had not complied despite these warnings and over a long period
- (d) Had effectively misappropriated public funds in excess of \$17,000;
- (e) Had brought the profession into disrepute, with both the Legal Services Agency and with the Ministry of Justice.

[26] The maximum period of suspension available under the applicable Act³ is 3 years. Mr Illingworth submitted that was the starting point for what he described as serious and repeated breaches of a practitioner's obligations in relation to financial matters. He said that the maintenance of public confidence in the profession required that Ms Fendall be suspended for a significant period.

[27] He accepted that in the absence of any previous misconduct findings against Ms Fendall, and taking into account her very good record of service to the courts and to her clients, there may be some basis for such factors to mitigate penalty. He suggested the possibility of the Tribunal considering a period of suspension of two thirds of the maximum period of 3 years, that is, 2 years suspension from practice.

[28] Mr Illingworth QC emphasised that the low error rate (having regard to the total amount billed) claimed on behalf of Ms Fendall as something the Tribunal should consider in deciding penalty was irrelevant. He said that what was relevant was that over a period of approximately 3 years Ms Fendall had received an amount of over \$17,000 to which she was not entitled, and that confidence in the profession was adversely affected by the loss of trust arising from Ms Fendall's actions.

[29] Mr Illingworth said that because lawyers operate on a basis of trust it is a fundamental requirement that lawyers be assiduous in ensuring all charges they make are properly calculated. He submitted that in this case there were numerous overbillings and despite the Legal Services Agency signalling its concerns to her regarding her billing practices, Ms Fendall "*failed to get it right*". Government Agencies rely on trust when dealing with payments of public money to claimants, and the legal profession was adversely affected by the sort of issue that had arisen with regard to Ms Fendall's inaccurate invoices he said. Ms Fendall had been alerted on a number of occasions by the Legal Services Agency that her compliance with its billing policies and accuracy in time recording and charging may not be adequate, yet subsequent errors still occurred.

Ms Fendall's position

[30] For Ms Fendall, it was submitted by Mr D Jones QC that suspension was not warranted or necessary in the circumstances of the case. Censure and costs were suggested as adequate when the context of the overcharging was considered, together with Ms Fendall's "*otherwise exemplary conduct*".

[31] Ms Fendall's position was that the overbilling was the result of genuine error. Her misconduct was her failure to operate in a way that would prevent billing errors occurring, Mr Jones said.

³Penalties are governed by the Law Practitioners Act 1982 as the conduct complained about occurred prior to the introduction of the Lawyers and Conveyancers Act 2006, although in respect of suspension penalties are the same under both Acts.

[32] There was no question of dishonesty he noted. The billing errors were minimal in the context of her total billing – mistakes involving a total amount of \$17,366 out of a total billing over the period concerned of \$1,210,000. This reflected simple administrative error it was submitted, occurring on just a few days of the many examined in the audits which covered a period of 31 months.

[33] The submission for Ms Fendall was that the background to the errors was an inadequate billing system based on time records that were not accurate in the context of a busy lawyer trying to service different requirements (criminal legal aid, duty solicitor, and youth advocate work) on the same day. This included dealing with unscheduled early assignments and appearances which resulted in Ms Fendall, on occasions, failing to sign on and off the duty solicitor sheet as required. Compared to her total billings the error rate was low Mr Jones submitted, and understandable in the circumstances of the daily demands on Ms Fendall arising from the need to provide multiple clients appearing in different jurisdictions with adequate professional service.

[34] Mr Jones QC submitted that the misconduct was at the lower end of the scale, and noted that Ms Fendall had already paid a heavy price. She had been suspended from providing services since September 2009 and her income had dropped significantly as a result. She had suffered adverse and undue media coverage. [redacted].

[35] Mr Jones also noted that Ms Fendall had pleaded guilty, shown remorse and concern, apologised, made full repayment when amounts were identified, and had improved her procedures and administrative systems related to billing. There had been no previous disciplinary issues involving Ms Fendall in 28 years as a lawyer, and she was extremely well thought of by judiciary and fellow practitioners in the court where she practised, Mr Jones said. Testimonials from three District Court Judges were available to the Tribunal.

Discussion

[36] In deciding an appropriate penalty the Tribunal has to consider the objectives of the professional disciplinary regime. Essentially it is to ensure the public interest is protected regarding legal matters, by ensuring proper standards and conduct.⁴

[37] In *Daniels v Complaints Committee 2 of the Wellington District Law Society*,⁵ a case dealing with a professional disciplinary matter arising at a time when the Law Practitioners Act 1982 was in force, the court commented on the Tribunal's penalty function, saying;

⁴ For example, see *Chow v Canterbury District Law Society* [2006] NZAR 160, as noted at para [18]

⁵ CIV-2011-485-000227 High Court, Wellington, 8 August 2011

“It is well known that the Disciplinary Tribunal’s penalty function does not have as its primary purpose punishment, although orders inevitably will have some such effect. The predominant purposes are to advance the public interest (which include “protection of the public”), to maintain professional standards, to impose sanctions on a practitioner for breach of his/her duties, and to provide scope for rehabilitation in appropriate cases.”⁶

[38] Public confidence in the legal profession is an important element of public interest. This was encapsulated by Sir Thomas Bingham in *Bolton v Law Society*.⁷

“In most cases the order of the tribunal will be primarily directed to one or other or both of two other purposes. One is to be sure that the offender does not have the opportunity to repeat the offence. This purpose is achieved for a limited period by an order for suspension; plainly it is hoped that the experience of suspension will make the offender meticulous in his future compliance with the required standards. The purpose is achieved for a longer period, and quite possibly indefinitely by an order of striking off. The second purpose is the most fundamental of all; to maintain the reputation of the solicitors’ profession as one in which every member, of whatever standing, may be trusted to the ends of the earth.”

[39] While dishonesty is not a prerequisite to misconduct, the negligence in Ms Fendall’s case is properly in the realm of misconduct. It was of a continuing nature, after concerns had been raised, indicating an indifference to ensuring charges were accurately made.⁸ While Ms Fendall’s negligence amounts to misconduct, our focus in deciding penalty is what is necessary having regard to the public interest, particularly protection of the public and the reputation of the profession.

[40] The negligence constituting the misconduct which Ms Fendall has accepted by her guilty plea is that she has failed in her duty to ascertain she was properly entitled to amounts billed. Adequate billing systems and time recording procedures would have prevented or detected the time charge anomalies. Ms Fendall, despite being aware of previous charging mistakes, has been negligent in not making adequate changes to her systems and procedures, and not subsequently monitoring her invoicing sufficiently closely to detect continuing errors.

[41] In our view this is not misconduct of the type that requires that Ms Fendall be removed from practice to protect the public or to maintain confidence in the profession. We say that because;

- (a) The billing errors were made between nearly 5 and 7 years ago. There has been no complaint from any client of Ms Fendall’s about her

⁶ Ibid, at para 22

⁷ [1994] 2 All ER 486 (CA) at 492

⁸ Complaints Committee No 1 of the Auckland District Law Society v C [2008] 3 NZLR 105

charging practices since that time of which the Tribunal is aware. In this regard we note that the Ministry of Justice appears to have accepted that the changes in Ms Fendall's systems and procedures have addressed issues, and it continues to retain Ms Fendall on certain matters. In light of Ms Fendall's acceptance that she has made errors, and in light of the changes to her administrative systems and operating procedures she has implemented, the risk of her failing in her duty to ensure what she charges is correctly based when using time records in future, is remote.

- (b) The passage of time since the misconduct reinforces our view. It makes the first objective referred to by Sir Thomas Bingham,⁹ regarding the purpose of suspension, being to ensure a practitioner has no opportunity to repeat the misconduct, somewhat futile, even if we thought suspension appropriate, which we do not. The High Court acknowledged this approach as appropriate in *Ellis v Auckland District Law Society*.¹⁰
- (c) While it is not an excuse for Ms Fendall's misconduct, in failing to ensure correct amounts were charged, the nature of her practice does provide a context. The circumstances of the demands made on Ms Fendall, and the very good professional service she gave, as evidenced by the views of three judges which were before the Tribunal, are relevant in assessing the nature of the misconduct itself, and thereby future risk, for penalty purposes.¹¹ The material before the Tribunal showed that Ms Fendall was an extremely busy practitioner, and, according to members of the judiciary who sit at the Waitakere District Court, an invaluable contributor to the needs of the court and those she represented. Her workload and commitment were amply demonstrated by the fact that during that 31 month period Ms Fendall billed a total of approximately \$1,210,000 to the Legal Services Agency and Ministry of Justice. Given the particular circumstances in this case, there is no public policy requirement that mandates removal of Ms Fendall from practice. In fact her availability to practise is considered valuable by those well placed to make that assessment.
- (d) While it does not excuse the breach of duty which Ms Fendall has acknowledged, it has been accepted by all concerned that the overcharging arose inadvertently, as a result of billing error. There was no deliberate systematic over-charging by Ms Fendall, as is indicated

⁹ In *Bolton v Law Society*, supra, and as noted in [38] above

¹⁰ [1998] 1 NZLR 750 at 758 lines 32 - 46

¹¹ See *Waikato/Bay of Plenty District Law Society v Harris* [2006] 3 NZLR 755 at 780 para 121 (Court of Appeal)

by her errors totalling \$17,366 out of total billings over the period of \$1,210,000, and the fact that the errors occurred on relatively few days compared to the number of days examined in the 31 month period covered by the audits.

- (e) Ms Fendall provided professional services, often on short notice as demands arose, to multiple clients appearing in different jurisdictions on the same day. She was required to alternate her provider status back and forth between Legal Aid, Duty Solicitor, and Youth Advocate often in the course of a busy day, and to ensure her time records recorded accurately her movements between the different jurisdictions. On some occasions she failed to ensure that her time, as she alternated between jurisdictions, was correctly logged. Her time recording systems proved to be inadequate, and accordingly, by relying on incorrect time records, she failed in her duty to ensure she had accurately ascertained her fee entitlement. Ms Fendall had, of course, been warned that she needed to be more accurate with recording her time, yet she subsequently made further errors. That is what elevates it to misconduct, but so far as penalty is concerned we take into account the background against which the errors occurred, and that also militates against any requirement for suspension to ensure public protection and confidence.
- (f) Ms Fendall is contrite about her negligence in failing to sign on and off the duty solicitor register as matters arose during the course of a day, and her failure to check invoices for accuracy. She has acknowledged that she has made some errors in her charging methodology. She co-operated fully with the Legal Services Agency in its audit, and with the New Zealand Law Society investigation, and went to some lengths to analyse the instances of overcharging to explain how the errors had occurred. She has apologised for those errors which resulted in the overcharging. All amounts were repaid when the errors were identified. The Society has accepted the overcharging was not deliberate, and that no dishonesty was involved, as has the Legal Services Agency and Serious Fraud Office. Ms Fendall has taken steps to ensure there will be no repeat, and we consider it unlikely that she will again make such a series of billing errors. These factors all reinforce our view that suspension is unnecessary, because a repetition is unlikely.
- (g) Details of Ms Fendall's financial situation and health were provided to the Tribunal. Much of her work has been cut off as a result of the Legal Services Agency cancelling her provider contract. [redacted]. Her failure to put in place adequate administrative systems and procedures, to ensure all billing practices complied with applicable policy, and to properly monitor all invoices for accuracy, has exacted a heavy

personal toll which we take into account in deciding the penalty we consider appropriate for her errors arising from her failure to accurately ascertain amounts to which she was entitled.

[42] In summary, having regard to all of these matters, the purposes of the disciplinary regime, the factual circumstances of this case, the position Ms Fendall has adopted throughout the audits and investigations, and to the matters raised in submissions by both counsel, we consider that to remove Ms Fendall from practice by suspending her would be an unnecessary and excessive regulatory response. The public interest does not require that Ms Fendall be removed from practice. As to public protection, there is little risk of her repeating her mistakes. As to public confidence in the profession, Ms Fendall has been charged, and has admitted her misconduct. The particular nature of her conduct, and the circumstances applicable, do not require her removal from practice to ensure public confidence in the profession.

Costs

[43] Counsel advised the Tribunal that agreement had been reached on ASC costs.

[44] In respect of ASC costs a sum of \$5,000 was to be paid by Ms Fendall, and ASC had acknowledged that in light of Ms Fendall's financial situation it would allow her time to pay that amount. It indicated that it considered 3 months would be sufficient, but for Ms Fendall, Mr Jones QC indicated that a period in excess of 3 months would be necessary.

[45] The Tribunal will of course accept the agreed quantum of costs, but the time for payment is really a matter for the parties. The Tribunal will not order a time for payment beyond the 3 months already indicated by ASC, and has assumed that if Mr Jones has a proposition for payment based on reasonable grounds, then ASC will give that due consideration and make any extension to time for payment as it may consider appropriate.

[46] The Tribunal's costs are certified at \$9,450 under section 257 LCA.

Suppression

[47] At the commencement of the hearing the Tribunal considered an application from Ms Fendall for name suppression and suppression of any particulars of her personal affairs. After hearing submissions the Tribunal withdrew to consider the matter, and after that consideration ordered that name suppression be declined and

that particulars of Ms Fendall's personal affairs relating to her health and details of her financial position be suppressed.

[48] Ms Fendall sought name suppression. [redacted].

[49] Ms Fendall said she had become badly affected by the investigations by the Legal Services Agency and its resulting suspension of her and cancellation of her provider status. She also noted the stress she was experiencing from the ongoing disciplinary proceedings brought against her by the Law Society. [redacted].

[50] Significant media coverage was experienced by Ms Fendall when this matter first came to light. Numerous examples of the coverage were given. She expects that media interest in her will be "*re-ignited*" by this decision being issued. She thought some of the previous coverage had unfairly portrayed her position, and she wished to avoid such an undue burden in future.

[51] The application was opposed by ASC. It opposed on the basis that nothing raised by Ms Fendall rebutted the prima facie presumption in favour of openness. It noted that; Ms Fendall had acknowledged her misconduct; there is a high public interest in knowing who has been guilty of misconduct; the matter was already in the public domain; and, in any event, publicity may help set the record straight. This last point refers to a suggestion by Mr Illingworth QC that suppression could prevent it being clarified that Ms Fendall is a diligent and competent practitioner who has failed in her duty to ensure accuracy when completing bills, rather than being an incompetent and dishonest practitioner.

[52] The Tribunal has to be satisfied that it is proper to grant suppression having regard to Ms Fendall's interests and to the public interest. We have to balance her private interests against the importance of the freedom of speech recognised by section 14 New Zealand Bill of Rights Act 1990, the importance of open judicial proceedings, and the right of the media to report court proceedings.¹² Suppression in professional disciplinary cases requires us to consider the requirement for openness indicated by section 111 Law Practitioners Act (sections 238 and 240 in LCA), and to give due regard to the public interest, including protection of the public and the confidence of the public in the profession.¹³

[53] We took into account the letter from Ms Fendall's General Practitioner, but we do not consider that it raises anything which outweighs the public right to know, especially as it is not uncommon for many people who face proceedings of various kinds to be adversely affected by that fact. Nothing in that letter puts it into any extraordinary category that would give it sufficient weight to change the Tribunal's view that suppression should not be granted.

¹² R v Liddell [1995] 1 NZLR 538, 546-7

¹³ S v Wellington District Law Society [2001] NZAR 465

[54] We note also that matters at the heart of this case have previously been the subject of wide publicity, so it is well and truly in the public domain in any event, making a suppression order at this late stage somewhat futile, even if her concern is further media interest.

[55] Ms Fendall has pleaded guilty to misconduct on the basis noted in this decision. The factors allowing name suppression require some considerable weight where professional misconduct has been established,¹⁴ and nothing before the Tribunal has been of sufficient weight to displace the required openness of proceedings. As a consequence the Tribunal declined name suppression, but allowed suppression of personal details regarding Ms Fendall's health and personal affairs.

Determinations and Orders

[56] The Tribunal records that Ms Fendall has pleaded guilty to a charge of misconduct on the basis that she failed to comply with her duty to ascertain that amounts she claimed from the Legal Services Agency and the Ministry of Justice for professional services were amounts to which she was entitled.

[57] For the reasons noted in this decision the Tribunal makes the following determinations;

- (a) In respect of her misconduct, Ms Fendall is censured. Her admitted carelessness is serious, given that she had been put on notice, and that notwithstanding she was well aware of her duty to ensure her practices and procedures were correct she continued to make errors that resulted in incorrect amounts being billed. That has the potential to adversely affect the reputation of the profession, which relies in large part on trust. Practitioners have an important duty to ensure that nothing they do is prejudicial to that confidence, and Ms Fendall has fallen short in this instance, certainly so far as the Legal Services Agency is concerned. The Tribunal understands the context and the factors noted have been taken into account, but nothing excuses the misconduct, and those matters are relevant only in avoiding removal from practice by way of suspension.
- (b) The Tribunal has noted Ms Fendall's financial position, and the personal cost she has already suffered, including significant loss of income. Consequently we do not consider a fine appropriate. It would be largely punitive. Nor do we consider any monitoring, training, or supervision is warranted. She has learnt her lesson and changed her practices and procedures, and a repetition is unlikely.

¹⁴ T v Director of Proceedings CIV-2005-409-002244, High Court, Christchurch, 21 February 2006

- (c) By consent, ASC costs of \$5,000 are ordered to be paid by Ms Fendall. ASC has indicated it will allow 3 months to pay, and we note that assurance.
- (d) Ms Fendall is ordered to reimburse the New Zealand Law Society the sum of \$5,000 towards the costs of \$9,450 it must pay under section 257 LCA. Such reimbursement is to be made within 6 months, or such other time as the parties may agree, of this determination. The amount is limited to \$5,000, and time is allowed, because of Ms Fendall's financial position, recognising that costs should not be punitive, and because we take into account in exercising our costs discretion the otherwise meritorious elements of Ms Fendall's practice over many years, the particular nature and circumstances of the misconduct, and the approach she has taken in the various investigations and hearings.
- (e) Particulars of Ms Fendall's health and personal financial position provided to the Tribunal, or as noted in paragraphs 34, 41(g), 48 and 49 of this decision, are permanently suppressed.

Dated at Auckland this 14th day of February 2012

D J Mackenzie
Chair