NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2015] NZLCDT 18

LCDT 032/14

BETWEEN	**CANTERBURY WESTLAND STANDARDS COMMITTEE 3 OF THE NEW ZEALAND LAW SOCIETY** Applicant
AND	**SUSAN BARBARA LEWIS** Respondent

CHAIR

Judge BJ Kendall (retired)

MEMBERS OF TRIBUNAL

Mr W Chapman

Mr M Gough

Mr A Lamont

Mr S Maling

HEARING at Christchurch

DATE 23 March 2015

DATE OF DECISION 12 May 2015

COUNSEL

Mr H van Schreven for the Applicant

Mr P Doody for the Respondent

DECISION OF THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL CONCERNING CHARGE AND PENALTY

[1] The respondent was charged by the applicant with misconduct under s 241(a) of the Lawyers and Conveyancers Act 2006 ("the Act") and with an alternative charge under s 241(b) of the Act alleging unsatisfactory conduct.

[2] The respondent denied both charges.

[3] The Tribunal heard the charges in Christchurch on 23 March 2015. At the conclusion of the hearing and after deliberation the Tribunal found that the respondent was guilty of unsatisfactory conduct. Counsel for the Committee and the respondent then agreed that a hearing as to penalty could take place on the papers. It was agreed that counsel for the Committee would make submissions by 8 April. Counsel for the respondent would reply by 24 April, and then the applicant would file responding submissions (if any) by 1 May 2015.

[4] This decision now records the reasons for the finding of unsatisfactory conduct, determines the penalty to be imposed, and the reasons for doing so.

[5] The background facts to the charges as alleged by the applicant are:

a. The respondent was counsel for the respondent mother in proceedings brought under the Care of Children Act 2004 concerning the parenting of her children.

b. The proceedings had been the subject of a hearing in the Family Court and of an interim judgment delivered on 25 September 2013.

c. The respondent filed a memorandum in the Family Court at Christchurch on 8 November 2013 which stated:

> **"MAY IT PLEASE THE COURT:**
>
> Counsel have consulted with their respective clients in this matter, and advise the following is agreed:
>
> *Today only* Mrs S will deliver M to the Child Care Centre at Ipm and will administer her medication no later than 2.30pm. Mr S will then collect the child.
>
> On future occasions, M will be taken to the school by Mrs S and placed into Mr S's care at the end of the school day at the same time as C is collected.
>
> All change-overs during the school term will be at the school and at non-school times will be at the Avonhead Mall.
>
> **Dated** at Christchurch this 8th day of November, 2013
>
> S B Lewis
>
> Solicitor for A S
>
> TO: The Registrar, Family Court
>
> AND TO: Counsel for the Applicant
>
> AND TO: Counsel for the Child"

d. That the memorandum set out what the respondent represented as agreed and consented variations to the interim order of 25 September 2013 and purported to deal with matters relating to the exchange of caregiver which had been the subject of the parties' dispute in the Proceedings.

e. That the memorandum followed an earlier memorandum filed by the father's counsel which detailed that by consent the changeover time be specified as 3.00pm.

f. That, on becoming aware of the respondent's memorandum, counsel for the father filed a memorandum to the Court rejecting the statements made by the respondent as to 'agreed variations'.

g. That counsel for the father and counsel for the child both stated that they had not been consulted about the matter of the memorandum. They had neither agreed to, nor consented to the filing of the memorandum and had not been provided with a copy of it.

[6] The respondent swore an affidavit in response to charge on 18 December 2014 in which she accepted:

a. That she was counsel for the mother in the proceedings referred to.

b. That the proceedings had been the subject of a hearing and that an interim judgment had been delivered.

c. That she had filed the memorandum referred to in paragraph 5(c) above.

[7] The respondent's response has been that the memorandum related to a one-off occasion only. She said that the change originated from a request through the office of the father's counsel; that she contacted her client about it; and received her consent to it.

[8] The respondent accepted that she did not contact counsel for the child about it because it involved only the parents.

[9] The Committee's contention is that the memorandum was not true or correct, and that the respondent knew or ought to have known that:

a. She had not in fact reached agreement with counsel for the father as to all the matters contained in the memorandum.

b. She did not consult with, nor reach agreement with, counsel for the child.

c. That she did not provide a copy of the memorandum to either counsel neither at the time of its filing nor shortly afterwards.

[10] Counsel for the father filed an affidavit in which she deposed that she had written to the respondent asserting that the information provided by her to the Court was untrue. She also said that the respondent's advice to the Court that counsel had been provided with a copy of the memorandum was incorrect and misleading as she had never received a copy of it. It was only by coincidence that she had become aware of it at all.

[11] The respondent has not challenged the evidence of counsel for the father.

[12] The respondent appeared before the Tribunal and gave evidence. She spoke of the stress she was under from her client having accepted instructions at the last moment. Her client was difficult and demanding, contacting her "over every little thing".

[13] The respondent produced a copy of a file note she made on 8th November 2013 (the day of the memorandum) in which is noted "*today only: collection from pre-school".* The respondent clearly struggled before the Tribunal to put into context the notes she had made. She admitted that she did not send a copy of her memorandum to other counsel and that she did not speak to the father's counsel about it. She said that the mother was very particular about her role as a mother and that everything had to be done at once. In filing the memorandum, she considered that it was a wise thing to record a one-off occasion.

[14] Having considered the totality of the evidence, the Tribunal concludes that the memorandum created by the respondent stated a position that was not correct and in particular that there was no agreement between counsel and the parties. The memorandum also clearly implied that it had been copied to other counsel. It had not been.

[15] The presiding Family Court Judge did make an order based on the contents of the respondent's memorandum and had later to revoke it after counsel for the father had filled her memorandum.

[16] The question then becomes whether the respondent's conduct was misleading or deceptive. The memorandum was incorrect and misled the Court into making an order which later had to be revoked. Viewed on its own, the content of the memorandum would lead to a conclusion that the document was intended to mislead the Court.

[17] There has to be an element of knowledge or intention on the part of a lawyer before a finding can be made that a lawyer has misled or deceived a Court or some evidence of reckless disregard as to the accuracy of the information conveyed to the Court.

[18] Having heard from the respondent, the Tribunal concludes that the respondent believed in the correctness of the content of her memorandum but that she was wrong to do so. She had succumbed to the pressure from her client and did not stand back to ensure that what she had set out in the memorandum was factually correct. We do not find that there was any kind of moral lapse on her part.

[19] The Tribunal finds her conduct to be unsatisfactory falling short of gross, wilful or reckless as to amount to misconduct (s 241(b)).

Decision as to Penalty

[20] The applicant submits that while the circumstances of this case would generally justify a censure and perhaps a financial penalty in addition to costs, the respondent's previous history and aggravating features indicate that an order of suspension is the appropriate penalty.

[21] The respondent was the subject of three charges of misconduct before the Canterbury Law Practitioner's Disciplinary Tribunal in January 2004 which related to:

i. the preparation and filing of an affidavit found to be *"well out of line, containing inflammatory, irrelevant and unsupported allegations"; and*

ii. A charge involving the administration of an estate where a document headed "Power of Attorney" was attempted by the respondent to have been filed as a will annexed to an application for Probate; and

iii. Inactivity relating to a file in which the respondent plainly had no expertise.

[22] The respondent was censured, fined and ordered to practice only in areas specified in the decision one of which included Family Law.

[23] The respondent was next the subject of a charge of incompetence in her professional capacity of such a degree as to reflect on her fitness to practice and as to bring the profession into disrepute. The charges related to an adoption and a failure to advise her client about the guardianship rights of the father of the child to be adopted. This failure led to the child being taken to Australia and placed with prospective adoptive parents. The father took advice and the child had to be returned to New Zealand.

[24] The respondent admitted the charges before the New Zealand Law Practitioners Disciplinary Tribunal in December 2007. The Tribunal noted with concern that the respondent had made "*mistake on mistake and that these mistakes led to the very serious ultimate outcome. The failings were …. at the highest end of the scale".*

[25] The Tribunal ordered that she be suspended from practice for three years.

[26] Counsel for the applicant further submitted that the Tribunal should have regard to the following aggravating features:

a. That the memorandum was filed without contemporaneous service on other counsel and thus prevented an immediate challenge and/or correction of what was stated in it.

b. That the terms of the memorandum and the order subsequently made created a position adverse to the interests of the other party.

c. That the respondent's initial response to the matters raised against her was to say her file note showed that the agreement stated in the memorandum was made following a telephone conversation with the father's counsel. Subsequent disclosure of the file note at the hearing showed that the note was one relating to the respondent's discussion with her client.

d. That the respondent displayed lack of remorse and lack of insight into the offending when she sought to deflect the gravity of the filing of the misleading document by referring to its content as relating to a "one-off" event.

[27] Counsel submitted that, having regard to all the factors outlined, the appropriate penalty would be an order for suspension for a term between six and 12 months.

[28] Counsel for the respondent has submitted that an appropriate outcome should be a written censure together with limited costs.

[29] He submits that the position advanced by the Committee is that the respondent deliberately misled the court and that, in terms of public perception, is at the high end of culpability.

[30] His position is that the Court had not been misled as can be seen from the email from the case manager of the Family Court which sought confirmation with respect to the matters outlined in it. Accordingly it cannot be said that the emphasis given to the memorandum by the applicant and its impact on other counsel can be an aggravating feature justifying suspension.

[31] He further submits that the file note referred to in paragraph 26(c) and about which the respondent was criticised for not disclosing prior to the hearing, was in fact available to the applicant in the file which the respondent had provided to it.

[32] Counsel for the respondent is also critical of the Committee for not dealing with the complaint at Committee level rather than referring the complaint to the Tribunal which reflects on penalty and costs.

[33] The Committee's response of 29 April is that any action of alleged deception must be treated seriously and directly where a finding of misconduct is at least susceptible and thus justifies a referral of the matter to the Tribunal for determination. That is a proper response to counsel for the respondent's criticism.

[34] Counsel has criticised as improper the reference by the Committee in its submissions to two "*undetermined matters"* against the respondent presently before the same Committee.

[35] The Committee, in its submission of 29 April in reply, rejects the criticism and submits that the Tribunal should have before it all relevant and potentially relevant material. It submits that present history of complaints is highly relevant in the context of disciplinary proceedings. It deliberately did not supply detail and accepts that the complaints must proceed through the system. It also accepts that the weight to be given to such complaints is a matter for the Tribunal.

[36] The Tribunal records immediately that it takes no account of that reference in reaching its decision on penalty. The present complaints are not yet processed. They may be frivolous, minor, or serious. It is not appropriate to consider them in the context of determining penalty.

[37] The Tribunal has found that the respondent did not intend to mislead the Court such that her offending does not reach the higher end of culpability.

[38] What concerns the Tribunal is that the respondent has displayed conduct which is not dissimilar to the conduct referred to in the earlier disciplinary matters involving her and notably in Family Law. It arises from her becoming too closely

aligned with the interests of her client(s), and responding to client demands impulsively especially in situations of perceived emergency.

[39] The Tribunal concludes that the respondent has yet to learn from past errors and mistakes such that a period of suspension from practice is the appropriate penalty that must be imposed.

[40] The Tribunal accordingly orders that the respondent be suspended from practice for a period of six months with effect two weeks from the date of delivery of this decision.

[41] The applicant seeks costs of both the Law Society and reimbursement to the Society of the Tribunal's costs.

[42] The respondent pleads financial hardship. Her guaranteed income is $350.00 per week. She has applied for additional support from WINZ. Her mortgage commitments are such that she has a small balance to cover her living expenses. Her counsel submits that the overall merits can be properly met with a limited costs order to be paid over time.

[43] Counsel for the Committee points to shortcomings in the disclosure of financial information relating to the respondent's capital position and her income from other sources. It submits that, taken at face value, the respondent's financial position reinforces a view that the imposition of censure and limited fine and costs only is an inadequate response to the gravity of the offending.

[44] It is necessary for the Tribunal to give weight to the importance (in the context of upholding public confidence in the profession) of reinforcing the duty required of practitioners as officers of the Court.

[45] The Tribunal notes that, in any event, it is a matter between the applicant and the respondent to make arrangements for the payment of any costs awarded.

[46] The Tribunal accordingly makes the following orders:

a. Suspension of the respondent from practice as both a barrister and a solicitor for six months with effect two weeks from the date of delivery of this decision.

b. That the respondent pay the costs of the New Zealand Law Society in the sum of $6,292.50.

c. That the respondent refund to the New Zealand Law Society the s 257 costs of the Tribunal which are fixed at $3,086.00.

DATED at AUCKLAND this 12th day of May 2015

BJ Kendall
Chairperson