NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2013] NZLCDT 23
LCDT 029/12

IN THE MATTER of the Lawyers and Conveyancers Act 2006

BETWEEN **CANTERBURY-WESTLAND STANDARDS COMMITTEE NO. 3**
Applicant

AND **LEONARD JAMES LESLIE HEMI,** Lawyer, of Gisborne
Respondent

CHAIR
Judge D F Clarkson

MEMBERS OF TRIBUNAL
Mr C Lucas
Mr S Morris
Mr T Simmonds
Mr W Smith

HEARING at Auckland on 15 May 2013

APPEARANCES
Mr M Hodge for the Standards Committee
Dr R Harrison QC for the Respondent

DECISION OF THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

Introduction

[1] The hearing on 15 May 2013 was one concerning penalty, the practitioner having admitted two charges as set out below. At the conclusion of the hearing, following deliberation, the Tribunal announced the orders it proposed to make reserving reasons to be delivered in writing. This decision comprises those reasons.

Charges and Background

Charges:

The Canterbury-Westland Standards Committee Number 3 of the New Zealand Law Society (**Standards Committee**) charges **Leonard James Leslie Hemi (Practitioner)** of Gisborne with two charges of misconduct under the Lawyers and Conveyancers Act 2006 (**Act**).

Background

1 At all material times the Practitioner held a practising certificate as a barrister and solicitor issued under the Act.

2 At all material times the Practitioner was a solicitor employed by the firm E L (**Firm**).

3 In 2011, while in the employment of the Firm, the Practitioner carried out legal services for the following two clients of the Firm:

(a) E M; and

(b) T B (**Clients**).

4 Without the knowledge of the Firm, and without having rendering an invoice to the Clients, the Practitioner personally obtained payments as follows for legal services provided to the Clients:

(a) E M - $700.00; and

(b) T B - $500.00 (**Payments**).

5 The Payments were not directed by the Practitioner into the Firm's trust account or general account. The Practitioner applied the Payments for his own personal use.

First Charge - disgraceful or dishonest conduct

6 By his conduct as outlined above, the Practitioner acted disgracefully or dishonourably by obtaining and applying for his own personal use the Payments which were properly payable to the Firm as his employer.

Second Charge - wilful or reckless breach of Act and Regulations

7 By his conduct as outlined above, the Practitioner wilfully or recklessly breached ss 110 and 111 of the Act and regulations 11 and 12 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008, by failing to render invoices to the Clients, failing to deposit the Payments in the Firm's trust account and failing to provide trust account receipts to the Clients.

[2] The above charges set out the background to the offending itself, however there is a wider context relating to the practitioner's own circumstances. Mr Hemi is a 40-year-old married man with two very young children. He was admitted in 2004 and thus at the time of these charges had been practising for approximately seven years. He practised primarily in the areas of criminal and family law, with clients who were mainly supported by legal aid.

[3] At the time he offended against his employer (in late 2011) he had been working for him for only a few months. Prior to that he had worked with two other firms in Gisborne, both of whom speak extremely highly of Mr Hemi's work and his character. Mr Hemi was working extremely long hours and this was partly because of his level of commitment towards his clients, the low fee paying nature of the work undertaken by him, and his wish to assist those who could not afford his services, on a *pro bono* basis. The level of this *pro bono* work was apparently relatively high, a matter with which with Mr Hemi's employer disagreed (but which had been accepted by his previous employers).

[4] At the beginning of 2011 Mr Hemi's mother, who lives in Hamilton had been diagnosed with cancer and during the year underwent chemotherapy followed by radiotherapy. From statements provided to the Tribunal it is clear that this is a close-knit family albeit spread around the North Island and Australia. The family agreed to share the care of their mother while she was undergoing the cancer treatment. Indeed it is accepted by Mr Hemi's mother and sister that considerable pressure was put on Mr Hemi despite his stressful workload, to take his share by visiting his mother and caring for her over weekends at least.

[5] Mr Hemi states that he could not afford to travel to Hamilton from Gisborne despite his long hours of work, because his income was modest and he was supporting his wife and children. He found this distressing. He says that this is why he accepted the two "cash jobs" the subject of the charges.

[6] While not seeking to excuse his actions Mr Hemi has placed this contextual material, together with evidence of subsequent steps taken by him, before the Tribunal in order to identify possible risk factors for him in the future.

[7] Specifically, after working with a psychologist, Mr Hemi has identified that having an inability to say "no" to clients who were unable to pay for their legal services was a particular vulnerability of his, especially when it has the impact of completely overwhelming him in terms of workload and family obligations.

[8] We were impressed with the honest appraisal provided by Mr Hemi in this regard, since the Tribunal is often presented with rather glib and superficial analysis of a practitioner's psychological functioning. In particular, he identified a level of resentment in himself that he was working so hard but struggling so hugely in a financial sense. He has correctly identified that this, together with the overwork factors referred to above, caused his judgment at the time to be severely impaired - in a manner which simply cannot be tolerated in his profession.

[9] Mr Hemi's employer complained to the police about Mr Hemi's behaviour and as a consequence he has faced two charges of theft. Subsequent to the Tribunal hearing it has come to the Tribunal's notice that Mr Hemi has been convicted and ordered to come up for sentence within six months if called upon, in the District Court.

[10] Thus the consequences for Mr Hemi have been severe. He handed in his practising certificate immediately after being confronted with the allegations and has not worked in the 18 months since that time. Mr Hemi has indicated that he would like to undertake teacher training, however his convictions for dishonesty may preclude that option.

Penalties sought by Standards Committee

[11] It was submitted by Mr Hodge on behalf of the Canterbury-Westland Standards Committee No. 3 that strike off was necessary to reflect the seriousness of the offending. As a second submission Mr Hodge submitted that if suspension were to be considered adequate, that it ought to be at the top end of the three year maximum provided for in the legislation.

[12] He referred us, as would be expected, to the decision of *Bolton v Law Society.*[1] Mr Hodge cited the passage (at page 431) where Sir Thomas Bingham NR had this to say:

> "The most serious [lapse in professional conduct] involves proven dishonesty, whether or not leading to criminal proceedings and criminal penalties. In such cases the [Solicitors Disciplinary] Tribunal has almost invariably, no matter how strong the mitigation advanced for the solicitor, ordered that he be struck off the roll of solicitors."

[13] Mr Hodge accepted that there is no absolute inevitability about strike off and that the test was not black or white even where dishonesty is involved. Mr Hodge reminded the Tribunal the test was whether we considered Mr Hemi to be a fit and proper person to be a practitioner.

[14] Mr Hodge further relied on the decision of the High Court in *Hart*[2] where, in discussing the "nature and gravity" of charges at paragraph [186] Their Honours said:

> "They are likely to inform the decision to a significant degree because they may point to the fitness of the practitioner to remain in practice. In some cases these factors are determinative, because they will demonstrate conclusively that the practitioner is unfit to continue practice as a lawyer. Charges involving proven or admitted dishonesty will generally fall within this category."

[15] Mr Hodge submitted that were circumstances of serious stress to reoccur in the practitioner's life that the Tribunal can have little confidence that Mr Hemi would not behave dishonestly again. For the reasons stated below we do not accept that submission.

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[1] [1994] 2 All ER 486.
[2] [2013] NZHC 83 (Winkelmann and Lang JJ).

[16] We were also referred to the recent High Court decision in *Fendall*[3] where, in contrast to the circumstances relating to the practitioner in *Hart,*[4] the practitioner had accepted responsibility early and taken all possible steps to remedy her negligence. However as Mr Hodge pointed out, the *Fendall* case did not involve deliberate dishonesty.

Submissions for the Practitioner

[17] Dr Harrison QC on behalf of the practitioner submitted that the argument for strike off fell short "by a narrow but appreciable margin". He submitted this was the outcome having regard to: the nature of the practitioner; the overall circumstances; and Mr Hemi's conduct subsequent to the offending including steps for rehabilitation. Dr Harrison agreed that adjectives such as "normally, usually, generally" have characterised disciplinary decisions involving dishonesty leading to strike off. However, he cautioned the Tribunal against adopting other than a thoroughly individualised approach and referred us to the *obiter* comments of His Honour Wylie J in the *Fendall* decision at paragraph [49]:

> "... It seems to me that at some stage, the Courts may wish to reconsider whether the public interest, in the sense discussed above, and the standing of the profession, still require the rather stern approach laid down in *Bolton*, particularly given the new disciplinary regime put in place by the 2006 legislation, with its increased emphasis on lay participation."

[18] In referring us to paragraphs [36] and [42] of *Fendall*[5] Dr Harrison reminded us that under the Lawyers and Conveyancers Act 2006 ("LCA") the primary function of the Tribunal is not to punish the practitioner but rather to protect and promote the public interest.

[19] Paragraph [42] reads:

> "Suspension as a penalty is clearly punitive, but its purpose is more than simply punishment. The primary purpose of suspension is to advance the public interest. The public interest includes the interest of the community and the profession by recognising that proper professional standards must be upheld and by ensuring there is deterrence, both specific for the practitioner and general for all practitioners. Suspension operates to ensure that only those who are fit to practice are given that privilege. Members of the public who entrust their personal affairs to legal practitioners are entitled to know that a professional disciplinary body will not treat lightly, serious breaches of its

[3] *Auckland Standards Committee No. 1 v Fendall* [2012] NZHC 1825.
[4] (supra) [2013] NZHC 83 (Winkelmann and Lang JJ).
[5] See above footnote 3.

> expected standards by a member of the legal profession. **While suspension is a grave step, it is a penalty that can be appropriate where the misconduct, although serious, does not show that the practitioner is irretrievably unfit to practice."** (Emphasis added).

[20] Dr Harrison drew our attention to the steps taken by Mr Hemi to engage with a psychologist and analyse how he had come to behave in a manner in which he recognised as thoroughly wrong and contrary to his normal ethical standards. It was also submitted that this misconduct, while dishonest, was not directed at clients (such as in overcharging) and that dishonesty directed at clients must be seen as the most reprehensible.

[21] Dr Harrison relied on a number of passages from the High Court decision in *Sisson.*[6] In that matter the practitioner was found to have charged a client who was entitled to legal aid, in addition to her legal aid grant, approximately $17,500. Thus the monetary figures involved were significantly greater than in the present matter. At paragraph [48] however the Court had this to say:

> "We agree with the Tribunal that the appellant's professional misconduct touched at the very heart of the relationship of trust between solicitor and client. It was serious misconduct. Protection of the public required that decisive protective steps were taken. **But, on looking at the misconduct in isolation it was conceivable that a penalty less than striking off could have been imposed."** (Emphasis added).

[22] The Court then went on in paragraph [53] to record the fact that the Tribunal, when striking off Ms Sisson, had had considerable regard to the manner in which she conducted herself in the course of the disciplinary proceedings.

[23] At paragraph [54] the Court endorsed the comments in *Hart*[7] and had this to say:

> "[54] A practitioner's conduct in the course of the disciplinary process may influence the final outcome. In *Hart* ... the full Court (Winkelmann, Lang JJ) said:
>
> > "[187] ... Willingness to participate fully in the investigative process, and to acknowledge error or wrongdoing where it has been established may demonstrate insight by the practitioner into the causes and effects of the wrongdoing. **This, coupled with acceptance of responsibility for the misconduct, may indicate that a lesser penalty than striking off is sufficient to protect the public in future."** (Emphasis added).

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[6] *T A Sisson v Standards Committee No. 2 of the Canterbury-Westland Branch of New Zealand Law Society* [2013] NZHC 349.
[7] See above footnote 2.

> We agree with these observations. This is not to treat behaviour in the course of disciplinary process as aggravating the misconduct. Rather, such behaviour is assessed and brought into account and the evaluation of the likely efficacy of available penalty options ..."

[24] Dr Harrison pointed the Tribunal to what he submitted were six key features in the assessment whether strike off was necessary in respect of this practitioner and these circumstances:

[a] The misconduct arose out of a combination of acute family and personal crisis which interacted with significant financial difficulties.

[b] The nature of the offending was limited in duration with two episodes occurring over the duration of two to three months. The sums involved were relatively small and the actions not directed against clients.

[c] The practitioner admitted his wrongdoing from the outset, showed genuine contrition and has made reparation.

[d] The practitioner has sought professional help to address the underlying causes of his misconduct and has therefore submitted that it is highly unlikely to reoccur.

[e] This practitioner has an otherwise excellent reputation for integrity and a track record as an idealistic and committed lawyer otherwise not motivated by personal gain.

[f] The practitioner has the potential and personal qualities to make a real contribution to the community as a lawyer.

References

[25] In relation to the last point a number of references were provided to the Tribunal by Mr Hemi from colleagues and former employers. Without exception these references were glowing. For example from his previous employer (each partner having signed the reference individually) Mr Hemi was described as"

> "... A conscientious and passionate lawyer who worked tirelessly for his clients. At no time did we ever have reason to question his honesty either towards his

> clients or to us as his employers. The offending, to which he has pleaded guilty, is, in our view, entirely out of character and it seems occurred at a time when he was under significant emotional and financial stress."

[26] Another, from an experienced Auckland barrister:

> "In our many discussions about his many cases and life in general, Leonard always struck me as a man with real integrity who had a real social conscience and who felt privileged to be a lawyer so he could represent those who found themselves in the criminal justice system. Leonard always impressed me as someone who would go the extra mile for any client and never seemed to be driven by the pursuit of financial gain. In that regard I was surprised to hear of Leonard's problem. I can only assume he made an error of judgment he will always regret."

Discussion

[27] We accept that both counsel have correctly highlighted the law as to penalty decisions in cases of this kind.

[28] We also note that the Standards Committee accepted the practitioner's post-offending conduct, and that this could properly be taken into account in assessing whether he was a fit and proper person to remain on the roll of barristers and solicitors. We regard this as a proper concession having regard to the extracts quoted above from the *Hart* decision and also in the light of the dicta in *Daniels*[8] at [22]:

> "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 at appropriate cases. Tribunals are required to carefully consider alternatives to striking off a practitioner. If the purposes of imposing disciplinary sanctions can be achieved short of striking off then it is the lesser alternative that should be adopted as to proportionate response. That is "the least restrictive outcome" principle applicable in criminal sentencing. In the end, however, the test is whether a practitioner is a fit and proper person to continue in practice. If not, striking off should follow. If striking off is not required but the misconduct is serious, then it may be that suspension from practicing for a set period will be required."

[29] We note that the conduct of the practitioner post-offending has been impeccable. He immediately apologised to his employer and fully reported on his caseload in order that his clients did not suffer and a proper handover could take

[8] *Daniels v Complaints Committee No. 2 of the Wellington District Law Society* [2011] 3 NZLR 850.

place. He surrendered his practising certificate pending the outcome of these proceedings which he records in his affidavit as signifying *"... a mark of my contrition and as the only appropriate response to my behaviour."* He immediately wrote to the Legal Services Agency asking for his legal aid assignments to be reassigned to alternate counsel to ensure minimum disruption.

[30] The practitioner also fully cooperated with the police investigation after his employer laid a complaint against him and has fully cooperated with the Tribunal proceedings admitting the charge promptly in his formal response.

[31] He has taken steps to consult a psychologist as already recorded in this decision. He is, we are satisfied, generally remorseful for his behaviour. He records that his "professional and family life has been turned completely upside down." Naturally as the principal breadwinner for his young family the impact on them has been acute. That is not to say that such matters outweigh the seriousness of the offending, but the subsequent harm suffered is part of the overall picture. The practitioner records that he will be unable to be a legal aid provider for five years following any suspension or strike off.

[32] In addition the practitioner has, in his evidence, tendered an apology to the Tribunal and to the legal profession for his misconduct, accepting that he has let his profession down in a manner which he will always regret.

[33] Section 244 of the LCA requires that all five members of the Tribunal must unanimously agree before a practitioner can be struck from the roll. No such agreement was reached among the members of this Tribunal, indeed by the conclusion of the hearing and following deliberations, there was a unanimous view that despite the very serious nature of this misconduct and without wishing to minimise that in any way, we reached the view that by a fine margin, after a lengthy suspension, this practitioner will be a fit and proper person to resume practice as a legal practitioner. We were strengthened in this view by the practitioner's own evidence and the testimonials provided, which affirm that despite this very serious lapse in judgment, he is the sort of practitioner who can contribute again to the community. The community as a whole requires lawyers with the willingness to help others regardless of their ability to pay or the type of legal problem faced by them. We are satisfied that Mr Hemi is a lawyer prepared to provide such service.

[34] Because of the nature of the offending, that is, dishonest offending, we accept the submission of Mr Hodge that any suspension would need to be at or near the three year maximum. We considered that the 18 months of voluntary suspension and the loss of income thereby, ought to be taken into account in fixing the term and thus we imposed a term of 18 months Suspension from the date of the penalty hearing.

[35] We make no order as to compensation.

[36] We consider that costs ought to follow the event, however make some provision for the practitioner's poor financial circumstances.

Summary of orders

[a] The practitioner is suspended from practice as a barrister or solicitor or both for 18 months from 15 May 2013, pursuant to s 242(1)(e).

[b] There will be no order as to compensation.

[c] The practitioner is to pay the costs of the New Zealand Law Society in the sum of $10,000, pursuant to s 249.

[d] The New Zealand Law Society is to pay the costs of the Tribunal in the sum of $2200, pursuant to s 257.

[e] The practitioner is to refund to the New Zealand Law Society full Tribunal costs ordered pursuant to ss 257 and 249.

DATED at AUCKLAND this 4th day of June 2013

Judge D F Clarkson
Chair