

**NEW ZEALAND LAWYERS AND  
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2015] NZLCDT 23

LCDT 043/14

**BETWEEN**

**WELLINGTON STANDARDS  
COMMITTEE 1 OF THE NEW  
ZEALAND LAW SOCIETY**

Applicant

**AND**

**DIANNE LESTER** of Wellington,  
Solicitor

Respondent

**CHAIR**

Judge BJ Kendall (retired)

**MEMBERS OF TRIBUNAL**

Mr M Gough

Mr S Maling

Mr A Marshall

Mr K Raureti

**HEARING** at Wellington Tribunals Office

**DATE** 26 June 2015

**DATE OF DECISION** 9 July 2015

**COUNSEL**

Mr S Kinsler and Ms C Cross for the Applicant

Mr P Chisnall for the Respondent

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

[1] The respondent has admitted six charges as follows:

- (a) One charge of misconduct within the meaning of s 7(1)(a)(ii) of the Lawyers and Conveyancers Act 2006 (“the Act”).
- (b) One charge of negligence or incompetence in a professional capacity within the meaning of s 241(c) of the Act.
- (c) Four charges of unsatisfactory conduct within the meaning of s 12(a) and (c) of the Act.

[2] The Tribunal granted the applicant leave to withdraw three other charges.

[3] The respondent has been admitted and in practice since 1988. Since then she has established and grown a substantial civil litigation practice. One of her major clients was a debt collecting agency who is the complainant in respect of these six charges. She undertook in excess of 1700 files excluding simple one-off document instructions. These were described by her counsel as large scale extremely high turnover debt collecting matters primarily undertaken in the District Court jurisdiction in multiple locations throughout New Zealand.

[4] The respondent has admitted failing her client in respect of each charge as follows:

**(a) Misconduct**

- (i) Having been instructed in February 2011 to commence proceedings to recover a debt of \$44,382.77, she failed to file in time a notice of pursuit of claim such that the proceedings came to an end apart from a counterclaim that had been filed by the defendant to the claim.

- (ii) She did not advise the client that the claim was at an end and that the counterclaim was the only matter that was still extant.
- (iii) She did not advise the client of a settlement offer made by the defendant on 6 September 2012.
- (iv) She advised her client in late October 2012 that the Court had no recollection of the notice of pursuit of claim ever having been filed, that the notice of pursuit of claim had in fact been filed and that she would make further enquiries.
- (v) As a result of an enquiry from her client in January 2013, she did not tell it that the matter was at an end, but continued to advise that the matter was awaiting a hearing.
- (vii) She continued in this vein in May 2013, August 2013, October 2013 and December 2013.
- (vii) In January 2014, in response to a request from the client for an update, she continued to fail to advise her client that the claim had come to an end but rather that the matter would be called for case management purposes on 27 February 2014. In an attempt to repair the situation the respondent arranged for an agent solicitor to file fresh proceedings at her expense but did not advise her client of the situation.

**(b) Negligence**

- (i) She failed to execute a deed of settlement with the defendant in respect of proceedings commenced in June 2008 for the recovery of a debt of \$114,314.70. The settlement having been arrived at on 30 October 2009. The result was that the claim came to an end in February 2011. The settlement had not been finalised but the respondent advised her client that the deed was in the process of being executed.

- (ii) She did not advise her client that the claim was at an end and in July 2011 she advised that she had not heard from the defendant's solicitor and would follow the matter up.
- (iii) She did not respond to her client's request for information made on 13 September 2011, 15 March 2012, 16 April 2012, 17 August 2012 and 1 November 2013.

**(c) Unsatisfactory conduct**

- (i) The respondent's failings in respect of the four charges of unsatisfactory conduct have a similar pattern in that she failed to pursue claims in a timely fashion with the result that the claims came to an end by operation of law. This was the case in respect of three of the charges of unsatisfactory conduct.
- (ii) The fourth charge related to the respondent's failure to serve a bankruptcy notice and then failing to seek an extension of time in which to file the notice.
- (iii) In each case she then failed to advise her client that the claim was at an end; failed to answer requests for information; saying that she was following matters up without success; and allowed matters to continue for up to two years. The failures ceased when the client engaged new counsel.

[5] The applicant submitted that the Tribunal should make the following penalty orders:

- (a) Suspending the respondent from practice as a barrister and solicitor for three months.
- (b) Censure.
- (c) Payment of the applicant's costs.

(d) Reimbursement of the Tribunal's costs.

[6] The applicant submitted that the aggravating features of the respondent's conduct in respect of the charge of misconduct were:

(a) Her admission of a reckless breach of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, being Rules 3, 3.2, 3.3, 5.11, 7.1, 7.2, 10, 11, 11.1 and 13.3.

(b) The conduct, while not deliberately dishonest, exhibited a high degree of recklessness in that:

(i) For 17 months she led her client to believe that the claim being advanced on behalf of that client was live when she knew it was not.

(ii) During that 17 months she attempted to repair matters without instructions from her client and without advising her client of the possibility of a claim against her and that independent advice should be sought.

(iii) She breached the fundamental aspects of the fiduciary duties owed by a lawyer to a client by her failure to keep the client informed, act on instructions and to keep the client informed.

(iv) Her failure over a period of 17 months elevated her recklessness to the serious level contended for.

[7] In respect of the charge of negligence or incompetence, the applicant submitted that the respondent's failure was aggravated by the fact that she delayed execution of the deed of settlement to such an extent that the underlying claim expired and then never informed her client of that fact despite requests for information as late as four years after the acceptance of the settlement offer.

[8] In respect of the charges of unsatisfactory conduct, the applicant submitted that in each case the respondent failed to advise her client that the claim was at an end

and failed to answer requests for information or said that she was following matters up without success.

[9] The repeated nature of this conduct and the period of up to two years over which it occurred enhanced its seriousness.

[10] The applicant further submitted that the client suffered financial and reputational harm as a result of the respondent's actions. The financial loss was said to be in the vicinity of \$250,000 - \$300,000. The client's reputation was damaged and there was loss of goodwill which it is said was significant given the competitive market within which it operates. The client also incurred costs arising from the respondent's failures in that it had to instruct other counsel to investigate the status of the proceedings and re-issue proceedings where that was possible.

[11] The applicant further submitted that the respondent's failures undermined the integrity of the profession as a whole. Members of the public place trust in lawyers. The respondent breached that trust repeatedly over a period of years falling short of the standards that are expected of lawyers and thus damaging the profession as a whole. Her client had instructed her to act for it on behalf of a number of commercial clients whom she failed. It was submitted that her failings affected the wider business community which in turn compounded the damage to the profession.

[12] The applicant acknowledged the following mitigating factors concerning the respondent's conduct.

- (a) She has had a lengthy and previously unblemished career since commencing to practise in 1988. She is held in high regard by senior counsel and is seen to be competent and honest.
- (b) She has taken steps to remedy her offending
  - (i) By doing less debt recovery/civil work. She has focused on more general legal work.

- (ii) She has put in place more stringent diary structures to ensure that matters are followed up.
  - (iii) Stays abreast of new developments in the areas of law she now works in.
  - (iv) She has a supportive and constructive partnership with Philip McCabe.
- (c) The respondent's plea of guilty to the charges indicates that she has accepted responsibility for her conduct.
- (d) That some allowance could be made because of the introduction of the District Court Rules 2009 with their various time frames which caused confusion for practitioners resulting in them making unintended errors.

[13] Counsel for the applicant, in support of the submission that the Tribunal should impose a period of suspension, has referred it to the decisions in *Southland Standards Committee v W.*<sup>1</sup>, *Waikato Bay of Plenty Standards Committee 1 v Monckton*,<sup>2</sup> and *Auckland Standards Committee 5 v Khan*,<sup>3</sup> The Tribunal has considered each of those decisions. The applicant generally concedes that the respondent's conduct does not exhibit such significant or widespread incompetence as was the case in *W*. Likewise her negligence/incompetence in respect of the deed of settlement was not as serious as that of the practitioners in *Monckton and Khan*. It nevertheless submits that when all the charges are taken together a short period of suspension is the appropriate penalty along with the other orders that are asked for.

[14] Counsel for the respondent has submitted that the Tribunal impose orders against her for all the charges being a financial penalty, censure and costs.

[15] He submits that the Tribunal leave to the civil environment the question of financial contribution for the losses sustained by the client. There has been no

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<sup>1</sup> [2013] NZLCDT 28.

<sup>2</sup> [2014] NZLCDT 51.

<sup>3</sup> [2014] NZLCDT 14.

quantification of any claim and he noted that the respondent has offered to pay the sum that was lost as a result of her failure to execute the deed of settlement. The Tribunal agrees with that submission.

[16] Counsel for the respondent has submitted that the following mitigating factors be taken into account which would persuade the Tribunal not to impose a period of suspension. They are:

- (a) There was no deliberate intent on her part - a fact which is accepted by the applicant.
- (b) She has readily admitted her failings and is genuinely remorseful.
- (c) She has now become very meticulous in making sure that she has detailed diary and reminder methods in place to avoid the previous failures to follow up on matters.
- (d) She has moved away from undertaking large scale credit recovery work and does not now undertake intense recovery work in the District Courts and has no intention of doing so in the future.
- (e) There were a 'cluster of issues' affecting the respondent at the time of her failings. They were related to work/partnership issues combined with her extensive practice and also being a working mother. Additionally matters were made worse for her by the serious illness of her partner in practise requiring a greater assumption of roles and responsibilities in managing the partnership. Then followed the dissolution of the partnership and the unsuccessful joining of another firm which was short lived.
- (f) There was the impact at that time of the District Court Rules 2009 which it is said dramatically changed the landscape and led to frustrations and delays in the processing of work in the courts. The Rules were subsequently revoked which was an acknowledgment of their shortcomings.

[17] The respondent addressed the Tribunal. She immediately apologised for her failings. She told the Tribunal that she had moved from what she described as process work to people work with a developing interest in elder law. She now has the benefit of a work environment where she has the support of her partner, a senior practitioner. She also has the mentoring support of senior counsel. She stressed that the effect on her arising from the charges was that she had let a client down which told against her previous good work with that client. She urged the Tribunal to have regard to the references she had been given and produced from a wide variety of people which emphasised the high regard which she continues to enjoy and that she makes herself available in a mentoring role to others.

[18] The respondent produced 17 references from people in the law and the credit control business who have emphasised her skill as a lawyer, her honesty and integrity, and their continued confidence in her, following her advice to them of the charges which she has admitted. Her present senior partner expresses confidence in her abilities and by inference confidence in her integrity and the belief that the public can have trust in her such that there is no requirement to protect the profession.

[19] The applicant has responsibly acknowledged the mitigating factors that have been advanced on behalf of the respondent. Its primary submission is that the number of charges (the most serious of which is misconduct) and the length of time over which the respondent's failings occurred elevate her conduct to the serious category.

[20] The Tribunal has taken time to consider all the material before it and the submissions of counsel for each of the applicant and the respondent. It has decided that the appropriate penalty to impose is censure, fine, and costs. It has reached that conclusion having regard to the following:

- (a) That the respondent's conduct was not deliberately dishonest.
- (b) That her conduct did not display widespread incompetence and or negligence which has displayed a need to protect the public.
- (c) Her otherwise unblemished career over approximately 25 years.

- (d) Her genuine remorse for her conduct.
- (e) The confidence expressed in her is such that she is unlikely to re-offend.
- (f) The changes that she has made in her practise of the law.

[21] The Tribunal has considered that matters are finely balanced and has reached its decision by a close margin.

[22] The Tribunal accordingly makes the following orders in respect of all charges:

- (a) Censure of the respondent.
- (b) A fine of \$7,500.00.
- (c) Costs to the Law Society of \$26,006.10.
- (d) Refund to the Law Society the costs of the Tribunal pursuant to s 257(3).  
The s 257 costs are certified in the sum of \$4,632.00.

**DATED** at AUCKLAND this 9<sup>th</sup> day of July 2015

BJ Kendall  
Chairperson