NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2012] NZLCDT 3

LCDT 001/12

UNDER	Section 248 of The Lawyers and Conveyancers Act 2006
AND	In the matter of an application by D H McDonald and G A Brummer to employ B R Hancock, being a lawyer struck off the roll of Barristers and Solicitors

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Ms C Rowe

Mr P Shaw

Mr B Stanaway

Mr I Williams

HEARING at AUCKLAND on 21 February 2012

APPEARANCES

Mr G W Calver for the Applicants

Mr P Collins for the New Zealand Law Society

DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[1] The applicants seek consent, pursuant to s.248 of the Lawyers and Conveyancers Act 2006 ("the Act") to employ Mr B R Hancock, a former barrister and solicitor who was struck off the roll by this Tribunal by decision of 23 December 2011. Section 248 reads as follows:

> "**248 Consent to employ**
>
> (1) A practitioner or an incorporated firm may apply to the Disciplinary Tribunal for its consent to the employment by the practitioner or incorporated firm of a person who-
>
> (a) is under suspension from practice as a barrister or as a barrister and solicitor or as a conveyancing practitioner; or
>
> (b) has had his or her name struck off the roll otherwise than at his or her own request; or
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> (c) has had his or her registration as a conveyancing practitioner cancelled by an order made under this Act; or
>
> (d) is disqualified, by an order made under section 242(1)(h), from employment in connection with a practitioner's or incorporated firm's practice.
>
> (2) The applicant must,-
>
> (a) if a lawyer or an incorporated law firm, serve notice of the application on the New Zealand Law Society (which is to be entitled to appear and be heard on the application); or
>
> (b) if a conveyancing practitioner or an incorporated conveyancing firm, serve notice of the application on the New Zealand Society of Conveyancers (which is to be entitled to appear and be heard on the application).
>
> (3) If the Disciplinary Tribunal is satisfied, on the application of a practitioner or an incorporated firm, that there is good reason why the person to whom the application relates should be employed, the Disciplinary Tribunal may, in its discretion, after taking into consideration the matters specified in subsection (4) and such other matters as it considers relevant, grant or refuse its consent to the employment of that person by that practitioner or incorporated firm.

(4) The matters that the Disciplinary Tribunal must consider in relation to the proposed employment of the person to whom the application relates are as follows:

(a) the need to protect both the public and the standing of the profession:

(b) the seriousness of the proved offending of that person:

(c) any matter relevant to the honesty of that person:

(d) the work on which that person will be employed and the extent to which, and the manner in which, the carrying out of that work by that person will be supervised:

(e) the previous record, in relation to disciplinary matters; of that person:

(f) the relevance of the nature of the penalty imposed on that person by way of suspension, striking off, cancellation of registration, or disqualification.

(5) Despite subsections (3) and (4), the Disciplinary Tribunal may take into account, but to a minor degree, the personal circumstances of the person to whom the application relates.

(6) Consideration of the personal circumstances of the person to whom the application relates must always be subordinated to the need to protect both the public and the standing of the profession.

(7) If the Disciplinary Tribunal grants its consent, it may do so on such terms and conditions as it thinks fit."

[2] This application is opposed by the New Zealand Law Society, the reasons for the opposition are clearly set out in the evidence of Ms Mary Ollivier. The factors taken into account by the Board of the New Zealand Law Society closely follow those factors which are set out in subsection (4) of s.248.

[3] In addition, counsel for the Society submitted that the applicants had not met the threshold requirement in s.248(3) that there be "*good reason to employ*" Mr Hancock.

[4] In considering the application and interpreting the terms of s.248 the Tribunal is bound to have regard to the s.3 purposes of the Act particularly:

"(a) to maintain public confidence in the provision of legal services and conveyancing services:

(b) to protect the consumers of legal services and conveyancing services ..."

"Good reason to employ"

[5] The applicants, who have been colleagues of Mr Hancock for some 35 years in a provincial town, became involved in the matter because Mr Brummer was the Attorney for Mr Hancock, who was a sole practitioner. When his trust account discrepancies were discovered, Mr Hancock went to Messrs Brummer and McDonald and sought their assistance in taking over his practice.

[6] Mr McDonald attended the hearing and gave helpful oral evidence. We found him a reliable and straightforward witness. He described how the initial transfer of Mr Hancock's practice to them had been somewhat pressured because it was undertaken to avoid formal Law Society intervention, and thereby to protect Mr Hancock's client base. Unfortunately neither he nor his partner, nor indeed Mr Hancock, had anticipated that Mr Hancock might be struck off but rather that a suspension or some other sanction was seen as more likely.

[7] From the time that they took over the practice, Messrs McDonald and Brummer employed Mr Hancock as a law clerk and he largely looked after his own files under their supervision and with very different work practices imposed upon him. Mr Hancock had been in the habit in his own practice of working very long hours without good structure or administrative or collegial support.

[8] It was the evidence both at the penalty hearing in December and during this application that Mr Hancock had made considerable progress in terms of his physical and mental health and general approach to work since having the support of his colleagues, the applicants. There is no suggestion but that Mr Hancock is a competent solicitor. His difficulties arose out of the total mismanagement of his trust and office funds as set out in our decision of 23 December.

[9] The applicants regard Mr Hancock's ongoing employment by them as essential to enable them to manage the largely increased client base that they now have and satisfy the needs of all of their clients in a competent and efficient way.

[10] The applicants preferred not to employ another solicitor or legal executive to carry out this work but saw the best option as employing Mr Hancock who did not

require training and was already familiar with the files. Although it was stated not to be the primary motive, there was clearly an element of humanitarianism, in assisting Mr Hancock at age 60, to maintain some form of employment albeit at a significantly reduced rate of income.

[11] In summary the "good reason" advanced is:

[a] To meet the interests of all of the firm's clients.

[b] To assist the applicants in carrying out their work without the need to engage and train a new employee.

[c] A humanitarian outcome for the practitioner Mr Hancock.

Threshold

[12] We consider the plain reading of subsection (3) does indeed provide a threshold test before the second stage of exercise of discretion is undertaken. That means as a preliminary matter the Tribunal must be *"... satisfied ... that there is good reason why the person to whom the application relates should be employed ..."*. It is only after that good reason is established that the Tribunal then will exercise its discretion having regard to the subsection (4) factors.

[13] Whilst convenient, the interests of the firm's clients was not to be answered only by the employment of this practitioner. There is no suggestion that the clients' interests could not be fully met by the skills of the existing firm or any substitute employee. Moreover, most of the firm's clients had already been "handed over".

[14] We do not consider that the mere preference of the applicants to employ this particular practitioner rather than another provides good reason to employ. We note that in the only other decision made under this section the Tribunal took the same approach, in terms of threshold.[1]

[15] Mr Hancock was not expecting an income of any substance. By recollection he expected to be paid less than going rates by a considerable margin. When examined

[1] *Coxon v NZLS* [2010] NZCDT 1

Mr Hancock acknowledged that he had not fully explored alternative employment, seemingly expecting to be re-employed. He acknowledged that there was other employment possibly available, even if menial.

Discretion

[16] However if we are incorrect in the two stage inquiry we have adopted, we propose to consider the subsection (4) factors to be considered in the exercise of the discretion.

(a) The need to protect both the public and the standing of the profession

[17] In this case that consideration needs to be divided into two parts.

[18] The New Zealand Law Society considered that there was need for protection of the public. That submission appeared to be advanced on the basis that the offending was serious and prolonged. It is conceded however that the employment arrangements proposed would not allow Mr Hancock any access to the trust account. We also note that the misuse of his trust account arose not from motives of personal gain but rather from seriously prolonged mismanagement.

[19] There is no suggestion that Mr Hancock is other than a competent lawyer. However the Law Society do point to the most recent medical report provided to the Tribunal in October 2011. This report contained some level of ongoing fragility and vulnerability to stress factors which the Law Society considered relevant to public protection.

[20] We do not consider that direct protection for the public is a strong ground for refusing the application, and accord it little weight.

[21] However the second limb of paragraph (a) that is the "standing of the profession" is a matter of serious concern. It is submitted on behalf of the Law Society if Mr Hancock were to be employed, after such a short time (two months) after striking off (by the firm which had acquired his practice), there would be serious risk of loss of public confidence. Ms Ollivier's evidence was that *"there would be an understandable and unavoidable impression in the public mind that the striking off did*

not have any practical consequences for Mr Hancock." While on behalf of the applicants Mr Calver pointed out the many ways in which Mr Hancock's situation could be viewed as greatly diminished and the extent to which he had suffered serious consequences, we accept the submission that there is a clear risk of a "revolving door" appearance, particularly having regard to the type of work which would be undertaken by Mr Hancock if the application is granted.

(b) The seriousness of the proved offending of that person

[22] There was no challenge to the seriousness of the offending which involved ongoing dishonesty to the New Zealand Law Society on a prolonged basis after a warning some years earlier. We do not propose to repeat the comments but simply refer to our decision of 23 December where the Tribunal's decision that the practitioner was unfit to continue on the roll of Barristers and Solicitors speaks for itself. However we do accept that Mr Hancock's offending is in a different category from those who set out to steal from their clients for personal gain. We also note Mr Calver's submission that this practitioner had previously had a good disciplinary record and had been in practice for many years prior to these transgressions.

(c) Any matter relevant to the honesty of that person

[23] The comments in the foregoing paragraph also relate to this. We also note Mr McDonald's evidence of the careful monitoring by the partners of all of the work undertaken in their practice and frequent consultation between solicitors in relation to the work.

(d) The work on which that person will be employed and the extent to which in the manner in which the carrying out of that work by that person will be supervised

[24] Again the comments in the preceding paragraph are relevant. Mr McDonald was closely cross examined on the nature of the work which would be undertaken by Mr Hancock. It is quite clear that, other than the work reserved specifically by the legislation for lawyers, such as solicitor certificates and e.dealings, Mr Hancock would be to all intents and purposes carrying out the same work as a lawyer would have undertaken and that he undertook prior to his striking off.

[25] In this respect the application is distinguishable from the *Coxon*[2] decision where the work of the employee in that case was to be much more closely circumscribed and was not to involve any one to one contact with clients. We were satisfied from the evidence that the work proposed for Mr Hancock was of a much broader nature and thus there is much greater risk to the public perception of lack of consequences as a result of his striking off.

(e) The previous record, in relation to disciplinary matters, of that person

[26] We were made aware that there are currently three complaints before the Hawkes Bay Standards Committee relating to Mr Hancock. It was Mr McDonald's evidence that none of these are of any substance. These may not be considered "previous" in terms of the subsections.

[27] The relevance of the nature of the penalty imposed on Mr Hancock in our December decision was also put to us. In relation to this matter we were referred to the decision of *Sidney v Auckland District Law Society.*[3] Although this decision was decided under the previous legislation we consider that it is highly relevant because the very principles set out in that decision have been incorporated in the above stated factors. At page 439 the full Court had this to say in relation to the nature of penalty imposed as a relevant factor in permission to employ:

> *"The reason for the last consideration mentioned is that, at the end of the finite term (in this case three years) an applicant suspended from practice is entitled to apply for a practising certificate even though the applicant may not be entitled as a right to practice on his or her own account, it would be difficult for a Law Society to refuse a practising certificate if, during the period of suspension, the application had neither worked in the law nor been guilty of any misconduct."*

[28] By contrast a proposed employee who has been the subject of a striking off order has no such expectation of straightforward re-entry to the professions. A full application will have to be made to be restored through the roll, and such is not normally considered until some years have passed following striking off with considerations of rehabilitation, restitution, and redemption. Thus we accept the Law Society's submission that a case for the employment of a struck off lawyer is less compelling than that for the employment of a suspended lawyer.

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[2] See 1.
[3] [1996] 1 NZLR 431

[29] Having regard to all of the above factors, even had "good reason" been established, the Tribunal would have exercised its discretion against the granting of the application. While we have considerable sympathy for the position of both the applicants and Mr Hancock and this decision is not lightly made, we have been firmly persuaded by the Law Society that the "revolving door" perception is a very real risk which could damage the standing of the profession in the eyes of the public and thus the application is declined at this point.

DATED at AUCKLAND this 12th day of March 2012

Judge D F Clarkson
Chair