

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2014] NZLCDT 32

LCDT 027/13

IN THE MATTER

of an Appeal under Section 42 of
the Lawyers and Conveyancers
Act 2006

BETWEEN

**HIEROPHANTIC
HARLEQUINESQUE HUMAN**
Appellant

AND

NEW ZEALAND LAW SOCIETY
Respondent

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr M Gough

Mr G McKenzie

Ms M Scholtens QC

Mr W Smith

HEARING at the Employment Court at Auckland

DATE OF HEARING 19 March 2014

Further evidence and submissions considered On the Papers

**DECISION OF NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

Introduction

[1] This application relates to a refusal to issue a practising certificate to the appellant, which refusal was notified to him by letter of 19 December 2013. The appeal was heard on 19 March 2014. In the course of the appeal the Tribunal considered that there were a number of further matters of evidence which ought to be considered, therefore the hearing was adjourned part-heard with a lengthy list of directions as to further documentary evidence to be provided. The Law Society was then to respond to this documentary evidence and to include undertakings which it might seek, were the practising certificate to be granted.

[2] Further detail concerning the additional material provided by the appellant will be set out below. Suffice it to say that the appellant provided a significant volume of information to the Tribunal and in particular obtained the support of a senior practitioner as a mentor, (the central issue from the Tribunal's perspective). Taking account of this, the New Zealand Law Society ("NZLS") provided to the Tribunal further memorandum which attached further undertakings by the practitioner and his mentor, Mr Ray Parmenter, and indicated that it was withdrawing its opposition to the appeal and would abide the decision of the Tribunal.

[3] Thus the matter was further considered by the Tribunal on the papers to reach a decision. The Tribunal has determined to allow the appeal and these are the reasons for that decision, which are somewhat truncated in the circumstances of the withdrawal of the NZLS opposition.

Background

[4] Mr Human was admitted to the Bar on 11 February 2005. Since then he has practised as a barrister for a period of some 18 months or so, seven months of which was in a practice where he was supervised by a practitioner who has subsequently been struck off. For the remaining 11 months he practised as a barrister sole.

[5] Mr Human was absent from New Zealand for a time and has not held a practising certificate since 1 October 2011.

[6] During the 11 months when he practised as a barrister sole, with no real support or mentoring arrangement in place, he got into difficulties while acting for clients in a matter before the Tauranga District Court. He was found to have taken fees as a barrister without properly invoicing or keeping correct records as he was obliged. It was also found that he had not had an instructing solicitor at the relevant time.

[7] Following a complaint the Standards Committee conducted a hearing and found the appellant to have breached the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 and to have acted incompetently contrary to Rule 3 of the Conduct and Client Care Rules and also to have breached Rules 5, 10 and 4.4. The penalty imposed on the practitioner was a fine of \$10,000 together with costs of \$2500 and refund of his fees paid by the complainant. He was also to make his practice available for inspection and undertake the “Stepping Up” program at his own expense. These orders were made on 2 November 2011 and he was to make the relevant payments within 30 working days.

[8] The finding was of Unsatisfactory Conduct and thus did not of itself raise “fitness to practice” issues. Had there been sufficient concern in that regard, the Standards Committee would have undoubtedly referred the matter for prosecution before the Tribunal, which may impose sanctions of suspension, or in the most serious of cases, strike-off, where fitness to practice of a practitioner is at issue.

[9] The appellant voluntarily stopped sole practice in November 2011 and since that time has been seeking employment in order that he might comply with the orders made against him. The appellant attached evidence of dozens of job applications made by him, in the period from late 2011 until shortly before the hearing in 2014, by which time he had obtained employment as a transcriber.

[10] The appellant had taken the “Stepping Up” program which was paid for by his parents.

[11] The appellant makes a point that at the time the penalties were imposed on him by the Standards Committee there had been no inquiry into his personal or financial

situation. That position was and is one of extreme hardship. The appellant has a student loan of \$71,000, amounts owing to the NZLS for fine, costs and repayment of fees approaching \$18,000, and assets of under \$3000.

[12] He has for the most part of the past two and a half years been in receipt of an unemployment benefit but despite this the appellant has been able to make payment towards the amounts owed to the NZLS in a modest, but in the Tribunal's view, significant amount (from November 2013 he increased his payments to \$60 per month). However the NZLS has not regarded his repayments as sufficient and refers to his "financial instability" as one of the reasons for the refusal of the practising certificate.

Reasons for refusal of practising certificate

[13] In opening submissions Mr Collins recorded that the Practice Approval Committee ("PAC") *"was not satisfied that the appellant was a fit and proper person to practice as a barrister on his own account:*

[a] Because of concerns about his fitness to practice on his own account arising from the adverse findings of the Auckland Standards Committee No. 4 in a determination dated 2 November 2011 and his failure to comply with the orders of the Standards Committee, in the same matter, over a prolonged period;

[b] Because of his financially unstable situation; and

[c] Overall, PAC was not satisfied that it could safely accredit the appellant to the public in an unsupervised situation."

[14] While the refusal letter from the PAC referred to compliance with orders of the Standards Committee and failure to pay any costs or expenses as a relevant factor in the granting of a practising certificate, it was conceded at the conclusion of the hearing by Mr Collins that the appellant's situation reflected "inability rather than unwillingness" to comply with the Standards Committee orders. The appellant has effectively been in a "Catch 22" position whereby in order to fulfil his obligations to his professional body, he must be able to practice in his profession, but has been

prevented from doing so, on the basis of a view which relies on his non-payment of the fines imposed on him.

Submissions for the Appellant

[15] The appellant emphasised his commitment to a legal career, and provided evidence of his attempts to re-enter the profession without success. He considered that as a barrister sole, and with his empathy as a member of a minority community, he would have the opportunity of helping a number of people with legal problems. He confirmed his continued reading to keep up to date with the law, and that he regularly attended hearing at the District and High Courts to observe.

[16] The appellant confirmed that he had learned from the previous offending and could now be trusted to be “...*a person of unquestionable integrity, probity and trustworthiness.*” He expressed regret for his offending, and explained that his attempts to locate his former clients to make the repayment ordered had been frustrated by another practitioner. Evidence was adduced to support this.

[17] In relation to his previous disciplinary matter, Mr Human emphasised that the Standards Committee had not even sought an order that he not practice on his own account, let alone be suspended from practice. However, that is what has occurred by default, because of his inability to pay.

Submissions for NZLS

[18] Mr Collins reminded the Tribunal that a *de novo* hearing must be undertaken pursuant to s 42¹ and that the Tribunal must reach an independent view on the basis of the evidence, regardless of the withdrawal of opposition. The focus is on whether the practitioner is a fit and proper person to practice on his own account.

[19] It was accepted that had the appellant been seeking a practising certificate as an employee, the NZLS would have viewed the matter differently from the outset.

¹ *S N H v New Zealand Law Society* [2009] NZLCDT 2, at [27].

[20] Mr Collins cross-examined the appellant carefully as to his financial backing and plans. This was considered by the tribunal to be important in the overall assessment of the appellant and that further specific detail was required.

Further Evidence at the Tribunal's request

[21] We provided the appellant with the opportunity to call further evidence on very specific matters and in particular to address what we considered was the major gap in his case, from a public protection viewpoint, namely his obtaining better supervision of his work by means of a mentor. In particular we required him to provide documentary evidence as to:

“... The WINZ Start Up grant and the effect on that of any income or finance from other sources on either the amount or availability of the grant.....

- [3] At least a letter from your parents if not an affidavit to confirm their support and its terms if any.
- [4] Obtain letters from potential instructing solicitors. The Tribunal doesn't expect them to commit to a quote of work of any sort but simply to their confidence and the likelihood of work flowing your way. If they would refer to the type of work so we can see what areas of practice you would be likely to undertake,
- [5] Evidence of the cost of your leasing or renting professional premises.
- [6] An annual and monthly budget and/or cashflow statement which is to include arrangements for repayment of the Law Society.
- [7] Any written indication of support from your bank you can provide.
- [8] A clear letter from your transcribing employer or the person to whom you are contracting to confirm that ongoing work is available to you.
- [9] A letter from a senior practitioner who is willing to mentor you and indicating that that person is prepared to meet with you at least fortnightly.”

[22] The appellant responded fulsomely to this challenge and has provided, for example, a business plan which goes into depth and detail which is unlikely that many other barrister sole would have embarked upon. He has put a great deal of time and thought into this business plan and its analysis. The supporting figures may be somewhat ambitious but if he is able to achieve a portion of his stated goals he will succeed. He deserves considerable credit for the work he has put into this.

[23] In relation to his funding, while he has not provided the detail we sought from either WINZ or his bank, he has provided written commitment from both his partner and his parents to fund his business by way of a gift for start-up funds in the sum of \$13,000. Having regard to his cash flow statements and the offer of the lease of serviced premises which is included in his material, we consider this private funding to some extent replaces the need for the bank and WINZ details sought.

[24] The appellant has provided two letters from solicitors who have indicated they are prepared to instruct him should he have a practising certificate.

[25] Most importantly he has sought and found a mentor, Mr Ray Parmenter, who has written to the New Zealand Law Society setting out the nature and level of supervision he is prepared to offer, without charge, to the appellant. For the sake of completeness we set out in full the arrangements, in order that it can be understood that this is not simply a casual or occasional telephone call type of supervision:

“In that context, I have agreed to be Mr Human’s mentor and this is my letter confirming the proposed terms of that agreement:

1. I am to meet with Mr Human, in person, at not less than fortnightly intervals, for a period of two years from the date on which he is granted a practising certificate by the Disciplinary Tribunal.
2. If for any legitimate reason it is not possible for us to meet in person, whether because of my unavailability or for any other reason, we will consult by telephone or alternatively meet in person as soon as possible after the date on which the regular fortnightly appointment would have occurred.
3. The subject-matter of our discussions, and the focus of my mentoring of Mr Human, will include the following matters:
 - (a) The volume and subject-matter of his legal work and his competency to undertake that work;
 - (b) The nature and integrity of the arrangements he has with instructing solicitors in individual matters and his observance to the intervention rule;
 - (c) Providing such assistance as might be helpful in ensuring compliance with his continuing legal education, responsibilities and in the development of a Continuing Professional Development Plan and Record;
 - (d) Assisting in his understanding of and compliance with ethical matters arising in the course of his legal work;

- (e) Monitoring the financial and administrative soundness of his practice with reference to the aspirations expressed in his business plan; and
 - (f) Any other issues arising out of a professional, ethical or practical nature in the context of his practice, in which he requires guidance or correction.
4. I will provide brief written reports to the Law Society at 3-monthly intervals, from the date on which Mr Human is granted a practising certificate. I expect that those reports will explain generally the nature of the discussion that has occurred between us and will include any observations I might wish to make about the satisfactory conduct of his practice, or otherwise, so far as I can tell from my consultations with him. The contact person at the Law Society, to whom any reports are to be submitted, is Lisa Attrill, Registry Manager, DX SP 20202, Wellington, and email lisa.attrill@lawsociety.org.nz
 5. Apart from my quarterly reports, I will promptly notify the Law Society if at any time I become aware of any matters causing significant concern about standards of professionalism or public protection in the context of Mr Human's practice.
 6. I will not be charging Mr Human for my assistance as I regard it as part of my professional obligations to my profession and to a struggling practitioner. Nevertheless, I acknowledge that any costs involved in this arrangement are between Mr Human and me and are not the responsibility of the Law Society. I understand that a copy of this letter will be filed with the Disciplinary Tribunal."

[26] We commend Mr Parmenter for being prepared to take on this responsibility. It is in the best traditions of the legal profession to provide such support and guidance to a fellow practitioner. We note that the appellant has now also signed an Undertaking to the NZLS to meet with Mr Parmenter on the above basis, as well as to make payments against his fine, of \$100 per month, increasing in accordance with his business plan.

[27] We are mindful of the public protective objects of the Lawyer and Conveyancers Act ("the Act"), and the protection of the reputation of the profession, in making our assessment of whether this appeal ought to be granted. It is extremely significant from the Tribunal's point of view that the New Zealand Law Society has withdrawn its opposition and indicated it will simply abide the decision of the Tribunal.

[28] We note that in allowing the appeal we do so on the basis of the undertakings of the practitioner to the New Zealand Law Society and would expect the New

Zealand Law Society to monitor these undertakings carefully and bear in mind any compliance issues when a further practising certificate is considered.

[29] We also note as a relevant factor that, had this practitioner simply had better financial circumstances and been in a position to comply with all of the Standards Committee orders in a timely manner, there would not have been sufficient reason for the PAC to decline his practising certificate.

[30] We did hold some concerns that the appellant might not entirely appreciate the reasons for the Intervention Rule, but we note that this is specifically addressed by Mr Parmenter in his letter to the NZLS and we find that reassuring.

[31] Mr Human strikes us as a young man of considerable potential and of very good intentions. He has simply had no adequate supervision and guidance in his career to date and we consider that the intervention of Mr Parmenter to fill this void resolves any outstanding concerns which might have been held by the Tribunal.

Decision

[32] The appeal will be allowed.

DATED at AUCKLAND this 13th day of June 2014

Judge D F Clarkson
Chair