NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2015] NZLCDT 37

LCDT 025/12

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**LEGAL COMPLAINTS REVIEW OFFICER** Applicant
AND	**BOON GUNN HONG** Practitioner

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Ms S Fitzgerald

Mr K Raureti

Ms C Rowe

Mr I Williams

HEARING 14 October 2015

HELD AT Auckland District Court

DATE OF DECISION 12 November 2015

COUNSEL

Mr P Collins for the Legal Complaints Review Officer

Mr B Hong, respondent in person

DECISION OF THE TRIBUNAL AS TO PENALTY

[1] Mr Hong was prosecuted by the Legal Complaints Review Officer ("LCRO") for misconduct, which the Tribunal found to be established in our decision of 19 August 2015.

[2] Having heard submissions on penalty, we indicated to counsel that we did not intend to impose the "ultimate" sanction of strike-off, which had been sought by the LCRO. We also said that a period of suspension was in contemplation, the length of which and supporting reasons, would be given in a reserved decision. This is that decision.

Submissions for the LCRO

[3] Mr Collins, for the LCRO, presented cogent and persuasive submissions. Other than as to final outcome, and some minor matters, we accept them in their entirety.

[4] We do not consider, however, in all the circumstances, the level of offending is such as to compel us to the unanimous view that Mr Hong is no longer a fit and proper person to practice as a lawyer.

Relevant information subsequent to the hearing

[5] After the hearing had concluded, Mr Hong made available to the Tribunal a decision of His Honour Kos J, which had been released immediately following the penalty hearing.[1] This decision was as a result of the judicial review proceedings brought by Mr Hong in relation to a determination of the Standards Committee on 14 February 2013. That decision found unsatisfactory conduct on Mr Hong's part and made four consequential orders. One of these orders was attendance at an education course. Mr Hong did not attend that course and subsequently a charge was laid by the Standards Committee against Mr Hong for breach of the Standards Committee Order.

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[1] *Hong v Auckland Standards Committee No. 3 & Ors* [2015] NZHC 2521.

[6] That charge came before this Tribunal in April 2014 and the Tribunal found Mr Hong guilty of misconduct. In June 2014 the Tribunal imposed a penalty upon Mr Hong of 10 months suspension.

[7] Mr Hong appealed that penalty and on appeal the suspension was reduced to the four months which had already been served by Mr Hong while awaiting the hearing of the appeal.

[8] On the same day of his High Court appeal Mr Hong then filed an application for judicial review against the Standards Committee and the Tribunal. It is that judicial review which is the subject of the decision on 14 October last. The review was successful and as a result both the Standards Committee finding and the Tribunal finding and the subsequent finding of the Tribunal were set aside. Thus, Mr Hong has served a period of suspension of four months for offending in respect of which the finding has been set aside.

[9] We note that His Honour commented[2]:

> "[61] Nothing in that aspect of this decision should be seen as any commendation of Mr Hong's failure to comply with what remained at the time a formal determination of the Committee. If Mr Hong was minded to challenge that determination, he should have issued his judicial review proceedings and negotiated or obtained a stay. His insolent disregard of the Committee's determination was deplorable."

[10] Notwithstanding those comments and notwithstanding the fact that we are dealing with a different charge entirely, the Tribunal considers that justice demands that the period of suspension served, wrongly as it transpires, be taken into account.

[11] We consider the most principled way of doing so, is to take account of it as a mitigating factor in the overall assessment of penalty.

Assessment of penalty

[12] In summary the Tribunal proceeds to consider penalty as follows:

1. The starting point is the seriousness of the offending.

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[2] See above n 1.

2. Aggravating features, including disciplinary history are then taken into account.

3. Mitigating features including the manner of response to the process are also weighed.

4. The Tribunal then undertakes a comparison with other penalties imposed for similar offending.

5. Finally, there is an overall assessment of the fitness of the practitioner and a consideration of the least restrictive penalty to be imposed.

[13] The guiding principles are found in a number of authorities but primarily the decision of *Daniels,*[3] *Sisson,*[4] *Dorbu*[5] and *Hart.*[6]

1. Seriousness of the offending

[14] We do not propose to repeat the findings made in our liability decision. Mr Collins has highlighted a number of these in his submissions and we note that we used words such as "*inappropriate threats*", "*thinly veiled threat*", "*threat that he would contact his former clients directly* …", "*extraordinary arrangement*", "… *little insight*", "*troubling lack of insight into his professional obligations in relation to his former clients*", "*flagrant breach of rules*" and "*thoroughly demonstrated his discourtesy and disrespect for a fellow practitioner"*.

[15] In summary we respectfully concurred with the view of Her Honour Winkelmann J, in remitting this matter to the LCRO for further consideration,[7] that this conduct was serious in its reflection on the standing of the profession in general rather than being regarded as a mere spat between lawyers.

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[3] *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850.
[4] *Sisson v Standards Committee 2 of the Westland Branch of the New Zealand Law Society* [2013] NZAR 416.
[5] *Dorbu v New Zealand Law Society* [2012] NZAR 481.
[6] *Hart v Auckland Standards Committee 1* [2013] 3 NZLR.
[7] *Deliu v Hong and New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2015] NZHC 492 at [40].

[16] On the other hand this is not offending which involves serious risk or damage to clients, or any form of dishonesty and thus is not at the high end of misconduct, such as to demand the penalty sought by the LCRO.

2. Aggravating features

[17] In this matter we considered that the aggravating features are that the attacks were, as described by Mr Collins, "*persistent and wilful*". They continued over a lengthy period and were not just a moment's aberration or loss of control.

[18] Mr Collins has also referred to Mr Hong's lack of insight and remorse. Whilst this cannot be considered an aggravating feature it certainly can be taken into account in the overall assessment of the practitioner's fitness and in assessing the likelihood of reoffending.

[19] The other possible aggravating feature is the practitioner's disciplinary history. We take careful account of the comments of His Honour Gilbert J[8] in relation to this history to the effect that Mr Hong has been in practice for many years (over 20 years) and the previous findings against him would be considered to be at the lower level of professional failings. Indeed this is even more so with the removal of two of the previous findings as a result of the outcome of the judicial review proceedings referred to previously.

[20] We have placed little weight on Mr Hong's previous offending particularly given that there is no previous offending of a similar nature to that under consideration.

3. Mitigating features

[21] There was no direct harm to clients in the manner in which Mr Hong conducted himself. No dishonesty was involved.

[22] We accept that Mr Hong felt strongly provoked by Mr Deliu, however that cannot be permitted to excuse Mr Hong's behaviour, which was intemperate, as found.

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[8] *Hong v Auckland Standards Committee No. 3* [2014] NZHC 287.

[23] The strongest factor which we can take into account for Mr Hong is that he has served a period of four months suspension unnecessarily. The difficulty is that it was in connection with an entirely separate matter, but we do consider that this period must be taken into account in the overall interests of justice.

[24] Finally, Mr Hong submitted that his health had suffered and he had been highly stressed as a result of these proceedings and the numerous other proceedings which have involved him, arising out of his disagreement with Mr Deliu. We have no difficulty in accepting that this is the case, given the number of proceedings, although we note we have no specific medical evidence about Mr Hong's current health.

4. Consistency with other decisions relating to suspension

[25] In his submissions Mr Hong referred us to 18 decisions of the Tribunal. None are on all fours with Mr Hong's conduct and we note that in a number of instances the practitioners admitted the offending and were highly cooperative in the course of the investigation and prosecution. Contrition and insight were clearly features of a number of the penalty decisions referred to and furthermore some dealt with negligence rather than "misconduct". Having said that, we accept Mr Hong's submission that a number of these decisions concerned behaviour more serious than his.

[26] Of the decisions referred to us, that which most closely reflects the conduct under consideration is that of *Orlov*[9]. In Mr Orlov's case it was speech directed against a Judge, which we regard as much more serious than Mr Hong's offending. Mr Orlov's conduct was also sustained and yet Their Honours considered that, having regard to it being the practitioner's first offence, strike-off was "*too severe a response to a first offence of misconduct involving speech*". The Court found that the seven months suspension that had been served by Mr Orlov reflected an appropriate penalty.

[27] A more recent decision, which has a number of similarities to the present, is that of *Eichelbaum.*[10] In that case, there were two findings of misconduct and one of unsatisfactory conduct. In relation to the first misconduct finding the threats made by

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[9] *Orlov v NZLCDT* [2015] 2 NZLR 606 at [191]-[204].
[10] *Eichelbaum v Canterbury Westland Standards Committee No 2 of the New Zealand Law Society* [2015] NZHC 1896, Venning J, 12 August 2015.

the practitioner were similar in that they included irrelevant and scurrilous personal matters in an effort to achieve the practitioner's objective. In the present matter Mr Hong's objective was to withdraw litigation against him. But we also accept his evidence that he was concerned for his former clients, in that he saw the litigation as misconceived and costly to them. In the *Eichelbaum* case the objective was to obtain payments of various fees, thus greater self-interest was involved in that matter. The High Court upheld the finding of the Tribunal that misconduct had occurred (while providing regulated services) under s 7(1)(a)(i).[11]

[28] In relation to the second finding of misconduct in *Eichelbaum* there had been five separate communications (emails and letters) as particulars of the charges. The High Court upheld the finding that together they constituted a wilful or reckless breach of Rule 10 and Rule 10.1.[12] Thus the situation was very similar to the present matter.

[29] In discussing penalty in the *Eichelbaum* decision His Honour Venning J made reference to two other features which are also present in Mr Hong's case. The first is the aggravating feature of the behaviour continuing "… *over an extended period of time for over six months*".[13]

[30] The second common feature is the mitigating feature of provocation. In the *Eichelbaum* case His Honour referred to the "… *rude and intemperate correspondence from [the complainant]*".[14]

[31] A further similarity might be seen as the doubts expressed by the Tribunal in its penalty decision as to the practitioner's level of insight.[15] These doubts were also

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[11] See above n 10 at [79] "The Tribunal was quite correct to find that in context the appellant's conduct was in breach of r 2.7. As the Tribunal noted, the inclusion of such material in the affidavit and the threat to use it was reprehensible. It was conduct that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable and as such constituted misconduct under 7(1)(a)(i) of the Act."

[12] Rule 10 deals with "proper standards of professionalism" and Rule 10.1 states "A lawyer must treat other lawyers with respect and courtesy".

[13] See above n 10 at [116].

[14] See above n 10 at [114].

[15] *Canterbury Westland Standards Committee No. 2 of the New Zealand Law Society v Eichelbaum* [2015] NZLCDT 8 at [23]. See also *A v Canterbury Westland Standards Committee No.2 of the NZLS* [2015] NZHC 1896.

held by the High Court Judge[16]. Thus, concern as to insight is a common factor in the two decisions.

[32] A distinguishing feature between Mr Hong and Mr Eichelbaum is the Tribunal's confidence that the behaviour was unlikely to be repeated by the latter practitioner. This issue weighed strongly in the assessment of public protection, and "specific deterrence" principles, which were addressed in the Tribunal's decision.[17]

> "….. we discussed general and specific deterrence. While we accept that it is important that other practitioners are fully aware that the conduct will not be tolerated, we do not consider that this is a case where suspension is required for specific deterrence purposes. We accept his counsel's submission that the effect of the disciplinary proceedings upon Mr Eichelbaum has been considerable. We also have reached the view that this really represented a "*meltdown of this practitioner*" in a stressful situation where relationships, which had previously been quite close and crossed the boundary into personal relationships had totally broken down. We would not expect Mr Eichelbaum to find himself in this situation again."

[33] We also note in terms of mitigation of penalty Mr Eichelbaum was able to call on 30 years practice with an unblemished disciplinary record as well as strongly positive professional references provided to the Tribunal at the penalty hearing.

[34] Unfortunately, as indicated, the Tribunal is concerned as to Mr Hong's level of insight to the degree that we consider there is a real risk of repetition of the conduct. A short period of suspension is required in our view to allow the practitioner to reflect on his behaviour and ensure that in future when he strikes a challenging situation, particularly in a personal sense, that he seeks assistance in dealing with it.

[35] We do consider that consistency with the *Eichelbaum* decision, which upheld the decision not to impose suspension in a situation where there were additional findings of misconduct and unsatisfactory conduct to the present matter, means that there ought to be a relatively low starting point say of approximately three months, before taking account of the aggravating and mitigating features.

5. Overall fitness

[36] Under this heading we note that Mr Hong presents himself as a man who works long and hard for the benefit of his clients. Mr Hong did himself no favours by the

[16] See above n 10 at [116].
[17] See above n 15 at [24].

manner in which he conducted the disciplinary proceedings. His attacks on prosecuting counsel were thoroughly reprehensible. Despite the fact that he had made a formal apology to Mr Deliu, he demonstrated little contrition or insight into his behaviour.

[37] Mr Collins submitted that '*there can be no confidence that conduct of this sort found to have occurred in the charge will not be repeated* …". Regrettably we accept that submission as to the lack of confidence for the future. In a letter to the High Court, copied to the Attorney General, shortly before the penalty hearing, Mr Hong accused the Tribunal of bad faith. He does not appear to fully appreciate the boundaries he ought to impose upon himself in his professional dealings. In a document he filed with the Tribunal he was still making allegations about Mr Deliu and denying that his earlier threats concerning the junior barristers were inappropriate. He further referred to having been "*defamed*" by prosecuting counsel, leading to his *"… being maliciously suspended*" by the Tribunal.

[38] Even making allowance for the fact that English is Mr Hong's second language we remain of the view that these statements demonstrate a serious lack of insight on Mr Hong's part.

Outcome

[39] Weighing all of the above matters we consider that the proper response to this particular offending is that Mr Hong ought to be suspended for two months.

[40] We understand that Mr Hong is appealing the liability finding against him. Because of the most unusual circumstances of Mr Hong's previous suspension, we are prepared to stay the current suspension pending the outcome of Mr Hong's appeal to the High Court.

Orders

1. Pursuant to s 242(1)(e), suspended from practice as a barrister or as a solicitor, or as both, for a period of two months. The suspension is stayed pending the appeal.

2. We note that the costs were partly incurred because of the failure of the LCRO to plead in the alternative in the first proceedings. We find the LCRO 'direct' costs of $4,000.00 to be properly incurred as part of the complaints process. In the circumstances we award $27,000.00 of the total costs claimed of $32,832.00.

3. We consider Mr Hong should meet the full Tribunal costs by reimbursement of these to the New Zealand Law Society. The Tribunal costs are certified at $12,331.00.

DATED at AUCKLAND this 12th day of November 2015

Judge D F Clarkson
Chair