NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2014] NZLCDT 38

LCDT 023/14

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE 1** Applicant
AND	**BRENT WILLIAM THOMSON** of Auckland, Lawyer

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr C Lucas

Mr G McKenzie

Ms C Rowe

Mr W Smith

HEARING at Auckland

DATE OF HEARING 3 July 2014

COUNSEL

Mr P Davey for the Auckland Standards Committee

No appearance for the Respondent

DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

Introduction

[1] This decision concerns the penalty to be imposed upon Mr Thomson who has admitted one charge of misconduct. The misconduct charge is brought pursuant to s 241(d), namely that Mr Thomson has been convicted of offences punishable by imprisonment and the convictions tend to reflect on his fitness to practise, or tend to bring his profession into disrepute.

Background

[2] The offences for which Mr Thomson was convicted are as follows:

[a] Section 7(1)(a) of the Misuse of Drugs Act 1975 - using a Class A controlled drug, namely methamphetamine, between 1 January 2013 and 3 October 2013;

[b] Section 7(1)(a) of the Misuse of Drugs Act 1975 - possession of a Class A controlled drug, namely methamphetamine, on or about 3 October 2013; and

[c] Section 7(1)(a) of the Misuse of Drugs Act 1975 - possession of a Class C drug, namely cannabis, between 1 January 2013 and 30 October 2013.

[3] Mr Thomson promptly pleaded guilty to these offences and was sentenced in January 2014; he was convicted and fined $150 in respect of each charge.

[4] It was accepted that the drugs concerned were for Mr Thomson's personal use and that the offending involved repeated incidences over the period concerned. It is also accepted that it occurred in Mr Thomson's personal time, not during his employment. The concerning aspect of the offending, other than its inherent seriousness and obvious questions it raises as to Mr Thomson's personal functioning, is that at the time he was employed as a police prosecutor, undoubtedly

prosecuting other offenders for similar offences. The hypocrisy of that and the manner in which it reflected on the New Zealand Police was considered to be an aggravating feature by the sentencing judge His Honour Judge Taumaunu. Furthermore, the practitioner also posted two videos of himself on a website which depicted him injecting himself with a syringe referring to it as "slamming" (a slang term for intravenous use of methamphetamine). There were also blog entries which talked about this illegal drug use.

[5] Unsurprisingly the offending attracted some publicity which connected him with the legal profession.

[6] Mr Thomson has, since apprehension, been fully cooperative both with the police investigation and with the Law Society investigation which followed and has expressed remorse as well as accepting full responsibility for his offending.

[7] He has participated in the disciplinary proceedings to a relatively minimal extent. He has provided an explanation to the Tribunal for not taking up the invitation of counsel for the Standards Committee to provide evidence about his rehabilitation and progress in his therapy and treatment. Mr Thomson considered that to involve his psychotherapist in a hearing might prejudice the therapeutic relationship between he and his therapist which he was not prepared to risk. He stated:

> "I make it clear that I opt not to participate, in the face of an unopposed application that I be struck off, not out of disrespect to the Tribunal or the Committee. No one is more acutely aware of how inappropriate my behaviour was or the issues facing me if I was to seek to practise law in my current condition. … My recovery is simply more important to me than anything else."

[8] He indicated that he was fully prepared to abide any decision of the Tribunal. Mr Thomson subsequently filed submissions in response to those filed by the Standards Committee in which he stated that the penalty of strike off which had been sought was "*appropriate*" and further "*counsel for the Committee has, in my view, been moderate and even-handed in submissions. Counsel for the Committee does not go as far to say, but I submit that there is a positive benefit in making an order striking me off, in that it would show a robust response by way of example to others in my position*."

Submissions for the Standards Committee

[9] Mr Davey submitted that strike off was indeed justified by the offending in question and its surrounding circumstances. In doing so he referred the Tribunal to a number of previous decisions which will be referred to under the heading of "Discussion". The particularly aggravating features were pointed to as being the occupation of the practitioner as a police prosecutor and the posting of blogs and videos where they could be assessed by others.

[10] In comparing this offending with similar offending of other practitioners who had been suspended rather than struck off Mr Davey pointed out that the difficulty faced by the Tribunal on this occasion was that, with no medical or similar evidence to indicate timing as to when the practitioner might be once again a fit and proper person, the Tribunal was not in a position to make that assessment.

Discussion

[11] Although the practitioner does not oppose his name being struck from the Roll of Barristers and Solicitors, indeed in his submissions to the Tribunal urges such, that is not an end to the matter. Before making an order for strike off the Tribunal, comprising at least five members must unanimously determine that *"… the practitioner is, by reason of his or her conduct, not a fit and proper person to be a practitioner*."[1]

[12] The starting point in determining proper penalty is the seriousness of the misconduct itself.[2] There is no doubt that this is serious offending, albeit not dishonesty offending. Aggravating features of the offending have been referred to as residing in the practitioner's occupation and in the social media posts made by him. The Tribunal has not been made aware of any mitigating matters relating to the offending itself.

[13] We then look at the practitioner's previous disciplinary history and his overall conduct with the proceedings, to assess further his fitness to practise. This is the first disciplinary offence sustained by this practitioner in 9-10 years of practise.

---

[1] Section 244 Lawyers and Conveyancers Act 2006 ("the Act").
[2] *Hart v Auckland Standards Committee No. 1* [2013] NZHC 83.

[14] As acknowledged in submissions and in the sentencing process of the criminal proceedings, Mr Thomson has fully cooperated with both investigations and admitted guilt at the earliest possible opportunity. That is certainly to his credit and may stand him in good stead in the future. It is accepted as a mitigating feature in respect of how this misconduct ought to be penalised.

[15] We remind ourselves of the dictum in *Daniels,*[3] which emphasises that if a penalty short of strike off can be imposed, it ought to be[4]. The Court went on to point out that "the test is whether the practitioner is a fit and proper person to continue in practice. If not, striking off should follow …".

[16] We have reviewed a number of decisions of the Tribunal where drug use or excessive alcohol use has been involved either directly, or underlying the misconduct under consideration.[5] The decision closest on a factual basis to the present is the fairly recent decision of *National Standards Committee v Wootton.*[6] In that matter the practitioner had also been convicted of possession of methamphetamine and of a pipe for use of it, under the same provisions of the Misuse of Drugs Act 1975. Having acknowledged that the practitioner had been making efforts to rehabilitate himself and had surrendered his practising certificate two years earlier, the Tribunal imposed a period of suspension of one year. In that matter the practitioner had also, although not having fully participated in the proceedings, agreed to an undertaking that he undertake random blood testing as part of any future re-entry into the profession.

[17] The two major distinguishing features between the present matter and the *Wootton* case are submitted to be the two aggravating features already referred to, namely being a police prosecutor and the social media posts demonstrating the drug abuse. The additional factor is that there is an absence of material before the Tribunal to make an informed assessment of when Mr Thomson might be fit to practice again.

---

[3] *Daniels v Complaints Committee No.2 of the Wellington District Law Society* NZLR 2011 850 (HC).
[4] At para [22].
[5] *Auckland Standards Committee v Flewitt* [2010] LCDT 12, *Auckland Standards Committee 1 v Ravelich* [2011] NZLCDT 11, *Hawke's Bay Lawyers Standards Committee v Beecham* [2012] NZLCDT 29, *Canterbury-Westland Standards Committee v Taffs* [2013] NZLCDT 13, *National Standards Committee v Sarah* [2014] NZLCDT 26, *National Standards Committee v Toner* [2013] NZLCDT 38.
[6] [2013] NZLCDT 43.

[18] Having regard to the purposes of the Lawyers and Conveyancers Act 2006 ("the Act") which are to maintain public confidence in the provision of legal services and to protect consumers of legal services, it is submitted that given Mr Thomson's acknowledgement that he is not currently fit to practice, the Tribunal is left with no option but to prevent him from practising indefinitely and this can only occur by strike off.

[19] The Tribunal accepts that submission but gives credit to the practitioner for his cooperative approach and his frankness with his professional body, the Police and Court system, and his previous clean disciplinary record. However, we consider that the circumstances of his offending and the aggravating features noted are such that no penalty short of strike off will properly reflect the seriousness or protect the public, in the absence of reliable material to suggest another rehabilitative course.

[20] What we are able to say is that in the future, should the practitioner be able to establish that he has fully rehabilitated himself and dealt with his drug taking habit that he may well be in a position to seek re-entry into the profession.

Costs

[21] The Standards Committee seek costs together with reimbursement of the Tribunal costs which will be incurred pursuant to s 257. The costs for the Standards Committee are modest at $3,620. The Tribunal costs will be certified at $1,598.

[22] The practitioner is in a parlous state financially. He is in receipt of a sickness benefit and has a number of outstanding debts. He may have to declare himself bankrupt. His health is fragile. In all of the circumstances and having regard to the level of cooperation of the practitioner we do not propose to award full indemnity costs against him. The orders which we make are as follows:

1. The practitioner will be struck from the Roll of Barristers and Solicitors pursuant to s 242(1)(c).

2. The practitioner will be ordered to pay costs in the sum of $1,200 in respect of the Standards Committee costs pursuant to s 249.

3. The New Zealand Law Society is directed to pay the sum of $1,598 in respect of the Tribunal costs pursuant to s 257.

4. The practitioner is directed to reimburse the New Zealand Law Society in the costs of the Tribunal in the sum of $500.

DATED at AUCKLAND this 11th day of July 2014

Judge D F Clarkson
Chair