NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2013] NZLCDT 38

LCDT 034/12

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**NATIONAL STANDARDS COMMITTEE** Applicant
AND	**EMILY JANE SARAH TONER** Practitioner

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr C Lucas

Mr S Morris

Mr T Simmonds

Mr W Smith

HEARING at Auckland District Court

DATE OF HEARING 14 and 15 May 2013

APPEARANCES

Mr C Morris for the National Standards Committee

Mr P Wicks for the Practitioner

DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL AS TO PENALTY

Introduction

[1] This decision relates to the penalty to be imposed upon Ms Toner following her admission of a charge of misconduct, the supporting particulars of which are as follows:

> 1. At all material times the Practitioner held a practising certificate as a Barrister and Solicitor issued under the Lawyers and Conveyancers Act 2006.
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> 2. On 15 November 2011 the Practitioner stole grocery items from a supermarket to a value of $199.10 ("the theft"), and
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> 3. As a result of the theft the Practitioner was arrested, charged with theft and pleaded guilty to the same in the District Court at North Shore on 5 December 2011, and
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> 4. On 27 March 2012 the Practitioner was granted a discharge without conviction pursuant to Section 106 of the Sentencing Act, and
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> 5. The material provided by the Practitioner to the Court by way of explanation and mitigation for theft, and as further provided to the National Standards Committee relating to the practitioner's mental health and well-being raises issues as to whether the practitioner remains fit to practice and if so on what terms.

[2] This decision has been considerably delayed because of the unusual course of events which occurred in the course of the hearing, which are detailed below.

Background

[3] The actual conduct of the practitioner occurred in 2011 and is summarised in the first set of submissions filed for the National Standards Committee ("NSC") at paragraph 2:

> "2.1 Ms Toner pleaded guilty to a charge of theft as a result of her going into a supermarket in Albany and stealing grocery items totalling $199.10.

> 2.2 Ms Toner paid for items from a basket of groceries, which came to $11.00 worth, but stole the grocery items she had concealed in a shopping bag with her jacket draped over the top. Ms Toner pleaded guilty to the charge of theft on 5 December 2011.
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> 2.3 Given Ms Toner was employed as a solicitor, and at the Auckland Crown Solicitors Office, and was in Albany for the purposes of prosecuting a matter, the media reported the matter extensively.
>
> 2.4 Ms Toner pleaded guilty to the charge of theft on 5 December 2011 and was sentenced on the 27th March 2012 in the District Court at North Shore."

[4] At the conclusion of her sentencing, with considerable material having been placed before the learned District Court Judge, the practitioner was discharged without conviction.

[5] Because of the steps which the practitioner had taken to address the underlying causes of her offending the NSC adopted what could be seen as a humane and rehabilitation-focussed approach to the penalty. It was initially urged upon the Tribunal that a suspension for two years would be appropriate in all of the circumstances.

[6] The practitioner's submissions were not far apart from this approach. She accepted that a period of suspension properly reflected the seriousness of her misconduct but asked that the suspension be limited to 12 months, together with a period of oversight for a further two years. To this end she provided to the Tribunal a set of undertakings which provide the New Zealand Law Society ("NZLS") with the ability to seek medical and other reports, assessment, and that treatment be undertaken as required.

[7] A summary of the practitioner's problems, which are said to have led to her offending, have been described by a psychiatrist as:

> "Ms Toner has suffered for several years from significant psychological and addictive problems." [rest of quote redacted]

[8] In his initial submissions, Mr Morris on behalf of the NSC referred to the well-known text *Dal Pont* "Lawyers Professional Responsibility" 4th ed., as follows:[1]

[1] Paragraph 25.90.

> "Where a conviction stems from an offence unrelated to the practice of law, whether or not it should generate a disciplinary sanction and, if so, what sanction, rest on the extent to which (if any) the lawyers conduct underlying the conviction can be isolated from his or her status as a lawyer. To this purpose a Disciplinary Tribunal or Court may enquire into the evidence underlying the conviction, not with a view to questioning the correctness of the conviction, but to determine the separate issue of whether the lawyer remains fit to practice and, if so on what terms."[2]

[9] For these reasons, as agreed by the practitioner, there was considerable information before the Tribunal about Ms Toner's psychological history and various treatments undertaken by her.

[10] This was not only necessary because of the need to understand how Ms Toner came to be before us but also to fulfil our obligation to protect the public from any future "acting out" on Ms Toner's part as a result of her personal difficulties.

[11] The focus of the hearing was squarely on Ms Toner's steps towards rehabilitation thus far and risks to that by possible relapses, particularly in relation to drug and alcohol abuse, in the future. In particular the NSC had raised questions over whether Ms Toner might in future be able to sustain her recovery in the face of the practice of a profession as stressful as the law. In respect of these matters she swore a supplementary affidavit on 8 May 2013 in which she said:

> "4. In the 17.5 month period since November 2011 my focus has been on my rehabilitation and getting help and support to enable me to ultimately return to full-time work as a legal practitioner and subject to the outcome of this proceeding.
>
> 5. I completely agree that addictive illness is a chronic relapsing condition, and that prediction of the future is difficult. In that regard I have done a lot of work in the 17.5 months since the incident and specifically focusing on my recovery, on identifying my triggers and learning how to manage them.
>
> 6. A most crucial event for me since November 2011 has been my ability to now fully accept and acknowledge my addictions, and to understand that prior to November 2011 I wasn't coping and was not seeking the help I needed."

[12] Later in the affidavit she indicated that she did not wish to be able to return to practice earlier than the two-year period which had been suggested by the NSC as a proper period of suspension. She indicated that she was mindful of the pressures of

[2] It is to be remembered that in fact in this instance a conviction was not entered but the practitioner was discharged without conviction pursuant to s 106 of the Sentencing Act.

legal practice and would have to keep herself well. She referred to a "significant amount of work on managing triggers" and said:

> "11. While I don't intend to relapse, engage in unacceptable behaviour ever again, or place myself in the position I found myself in November 2011 I fully accept that I cannot predict the future and it would be a danger to be complacent. I can however promise that I have learnt a huge lesson and will do everything possible to ensure that I am well in the future."

[13] Ms Toner provided the Tribunal with specific details about the numerous recovery programs that she was attending diligently. She further provided in support a medical certificate from Dr Alloro who is her principal psychologist in respect of the eating disorder matters. Having addressed the eating disorder treatments Dr Alloro went on to say:

[quote redacted]

[14] Dr Alloro was cross examined by video link and it would have to be said, when asked any questions which related to substance abuse was evasive and unprepared to answer. She said that was not the focus of her work. Ms Toner also provided from her general practitioner, whose letter included the following paragraph:

[quote redacted]

[15] In relation to her drug addiction, the material that had been provided to the Tribunal prior to the hearing including the affidavit's of Ms Toner and the material that was before the District Court on sentencing, indicated she had been clean of drug abuse since mid-2005 (therefore a period of some eight years). This is confirmed in the report of the late Dr Greig McCormick who provided the report for the District Court sentencing in December 2011. On page two of that report he records:

[quote redacted]

[16] Clearly that statement was relied upon by the NSC in the approach taken by them initially in relation to proper penalty relating to this charge.

[17] In questioning by the NSC Ms Toner referred to an inpatient admission at "Thrive", an inpatient unit in Auckland for eating disorders. This admission had been in early 2012. Ms Toner indicated that she had been taking prescription Benzodiazepine medication and that Thrive wished her to withdraw from these chemicals before full treatment from them.

[18] She then, in oral evidence, admitted she had actually been discharged from Thrive because she had abused alcohol also.

Disclosure during evidence before Tribunal

[19] After cross examination had been concluded, the Tribunal asked some questions of Ms Toner. In answer to one of those questions as to how long it had been since she had had a relapse in relation to her addictions, she responded (quite readily) that she had been at her lowest ebb in January of 2013 after engaging in a four-day methamphetamine binge with a former associate from Springhill Addiction Centre. This was a stunning revelation to counsel for the NSC and to the Tribunal. All of the evidence to date had been, as previous indicated, based on rehabilitation and risk of relapse following an eight-year period of being clean of drugs.

[20] After allowing some further cross examination the hearing was then adjourned to the next day to allow Mr Morris to obtain updated instructions from the NSC.

Amended Submissions for the National Standards Committee

[21] As a result the NSC indicated that they were instructed to seek that the practitioner be struck off the roll of barristers and solicitors. They considered that she had misled the Tribunal and the NSC in a manner which was unacceptable for a practitioner and that strike off was the only proper response to the overall picture as now presented.

[22] As well as the lack of candour shown by the practitioner in omitting reference to this significant relapse in her two affidavits leading up to the hearing, it was also submitted by counsel for the NSC that the behaviour itself was of serious concern. It involved a number of days of drug use with an associate. It required the practitioner to purchase utensils for the purpose. As such it was submitted that this demonstrated a "lack of working support networks and an exercise of poor judgement".

[23] The belated revelation also caused the NSC to lack confidence in the series of undertakings which had been negotiated over quite a lengthy period. Concern was expressed about the unreliability of those supporting Ms Toner, for example her

general practitioner who also had made no reference in her letter to the relapse, knowing this would be relied upon by the Tribunal.

[24] Mr Morris went on to submit that, in the event that the Tribunal was unable to reach unanimity as to strike off, that a three year suspension ought to be considered. The Tribunal was reminded that in exercising a protective jurisdiction, personal mitigating factors were less weighty.

Submissions for the practitioner

[25] For the practitioner Mr Wicks submitted that a pattern of complex addictions had meant a "long road" for his client, but that since February 2013 she had "turned the corner". He reminded the Tribunal of the high relapse rate of people with addictions, that his client had shown insight by seeking help and had been much healthier over the next four months.

[26] Mr Wicks accepted that the one year suspension initially advocated was now too short and that if necessary three year suspension plus two years of agreed monitoring in terms of the undertakings provided would be accepted. He submitted that the stigma of a strike off was likely to cause a significant setback to the practitioner.

[27] Mr Wicks argued the need for suppression and in particular, of the medical information provided to the Tribunal which had been suppressed by the District Court at the sentencing in 2012. The practitioner was also anxious about publication of her recent relapse.

[28] Subsequent to oral submissions further written submissions and affidavits were provided by both the practitioner's parents and the practitioner to support the application for suppression. It was, however, accepted that any suppression order ought not to restrict the ability of the NZLS in assessing the practitioner's fitness to practice in the future.

[29] Suppression was opposed by both the NSC and by Mr I Steward on behalf of Fairfax Media. Mr Steward filed thorough and helpful submissions. He pointed out that the February relapse involved *"criminal behaviour more serious than that upon*

which the original charge was based." Mr Steward submitted that the public interest in openness was particularly strong, because the information sought to be suppressed involved *"...serious offending, committed recently and contemporaneous with the Tribunal's process."*

[30] Further evidence was also provided as to the practitioner's current fragility. It was somewhat unfortunate that this was largely directed towards name suppression entirely (rather than portions of the evidence), which overlooked the acknowledged reality that her name must be published in a Gazette notice where suspension is ordered.

[31] The affidavits of the practitioner's parents also appeared to ignore this reality and thus the evidence as to any increased risk to her of publication of details of her recent relapse as opposed to a more general report into the background to her offending, remains unclear.

Discussion

Suppression

[32] We do not consider public protection demands access to medical reports written about the practitioner and her history. We do however consider that details of the recent serious drug relapse are of importance in understanding the reasons for the Tribunal making the decisions which it is about to record.

[33] The public are entitled to know why a profession has taken disciplinary steps against one of its members. It is further entitled to understand those matters which are considered by the Tribunal to be sufficiently serious to remove a practitioner, even temporarily, from practice.

[34] The public interest in knowing that a practitioner facing disciplinary proceedings has recently had a serious relapse must outweigh the practitioner's distress and shame at having that revealed.

[35] It is also important for members of the profession to understand that complete candour and honesty when dealing with the professional body responsible for

disciplinary standards is insisted upon. The consequences for a lack of candour, as has occurred in this case, must be clear. In *Daniels*[3] it was held:

> [34] ...The public are entitled to scrutinise the manner in which a profession disciplines is members, because it is the profession with which the public must have confidence if it is to properly provide the necessary service...'

[36] The suppression order we make, is as to the content of medical reports provided for this hearing (and including those provided for the District Court hearing in 2012) and the expert evidence arising from those reports, together with the practitioner's evidence arising, with the exception of the information about her recent drug relapse. There is an exception to the suppression order which relates to any professional disciplinary bodies having access to the material such as the NZLS, the Health and Disability Commissioner or the Medical Council, arising out of any subsequent proceedings to these.

[37] At the hearing it was agreed that this decision, for reasons of suppression, might be released in a draft form. This has been overtaken by the subsequent submissions and evidence. However we propose that this decision although final, be suppressed from all but the parties for 14 days in order that the practitioner has time to take any further steps that she may wish in relation to suppression orders.

Suspension or strike off?

[38] The relevant factors in considering penalty for a practitioner found guilty of misconduct are now reasonably well settled.

[39] In *Dorbu*[4] the High Court held:

> "[35] The principles to be applied were not in issue before us, so we can briefly state some settled propositions. The question posed by the legislation is whether, by reason of his or her conduct, the person accused is not a fit and proper person to be a practitioner. Professional misconduct having been established, the overall question is whether the practitioner's conduct, viewed overall, warranted striking off. The Tribunal must consider both the risk of reoffending and the need to maintain the reputation and standards of the legal profession. It must also consider whether a lesser penalty will suffice. The Court recognises that the Tribunal is normally best placed to assess the seriousness of the practitioner's offending. Wilful and calculated dishonesty

[3] *Daniels v Complaints Committee 2 Wellington District Law Society* [2011] NZLR 85 (Gendall, MacKenzie and Miller JJ).
[4] *Dorbu v New Zealand Law Society* [2012] NZAR 841 (HC).

> normally justifies striking off. So too does a practitioner's decision to knowingly swear a false affidavit. Finally, personal mitigating factors may play a less significant role than they do in sentencing.[12]

[40] These principles were relied on by the Full Court in *Hart*[5]:

> "[185] As the Court noted in Dorbu, the ultimate issue in this context is whether the practitioner is not a fit and proper person to practise as a lawyer. Determination of that issue will always be a matter of assessment having regard to several factors.
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> [186] The nature and gravity of those charges that have been found proved will generally be important. They are likely to inform the decision to a significant degree because they may point to the fitness of the practitioner to remain in practice. In some cases these factors are determinative, because they will demonstrate conclusively that the practitioner is unfit to continue to practice as a lawyer. Charges involving proven or admitted dishonesty will generally fall within this category.
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> [187] In cases involving lesser forms of misconduct, the manner in which the practitioner has responded to the charges may also be a significant factor. Willingness to participate fully in the investigative process, and to acknowledge error or wrongdoing where it has been established, may demonstrate insight by the practitioner into the causes and effects of the wrongdoing. This, coupled with acceptance of responsibility for the misconduct, may indicate that a lesser penalty than striking off is sufficient to protect the public in the future.
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> [188] For the same reason, the practitioner's previous disciplinary history may also assume considerable importance. In some cases, the fact that a practitioner has not been guilty of wrongdoing in the past may suggest that the conduct giving rise to the present charges is unlikely to be repeated in the future. This, too, may indicate that a lesser penalty will be sufficient to protect the public."

[41] In the *Daniels*[6] matter, the Full Court stressed the necessity in examining whether a lesser intervention will suffice.

> [22] ...Tribunals are required to carefully consider alternatives to striking off a practitioner. If the purposes of imposing disciplinary sanctions can be achieved short of striking off then it is the lesser alternative that should be adopted as the proportionate response ...
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> And
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> [24] A suspension is clearly punitive, but its purpose is more than simply punishment. Its primary purpose is to advance the public interest. That includes that of the community and the profession, by recognising that proper professional standards must be upheld, and ensuring there is deterrence, both

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[5] *Hart v Auckland Standards Committee 1 of the New Zealand Law Society* [2013] NZHC 83, Winklemann J and Lang J.
[6] See footnote 3.

> specific for the practitioner, and in general for all practitioners. It is to ensure that only those who are fit, in the wider sense, to practise are given that privilege. Members of the public who entrust their personal affairs to legal practitioners are entitled to know that a professional disciplinary body will not treat lightly serious breaches of expected standards by a member of the profession."

[42] The principle of rehabilitation must also always be considered. That is a very weighty factor in the present case. The Tribunal wishes to hold out some hope to Ms Toner that her successful rehabilitation will allow her undoubted talents as a lawyer to be utilised in the future.

[43] The Tribunal, after careful and lengthy consideration, found itself unable to reach a unanimous view that strike off was a necessary response. This was largely because of our mindfulness to make the least restrictive intervention to reflect the seriousness of the offending and the practitioner's overall behaviour in relation to the disciplinary process. In the exercise of weighing up the severity of the practitioner's conduct we note that no clients were harmed by her actions, which were largely self-destructive.

[44] However, she did do considerable harm to the reputation of the profession as a whole. We also take account of her lack of candour in the course of the disciplinary process. Weighing all of the above factors, we are of the unanimous view that the practitioner should be suspended for the maximum period of 3 years.

[45] We consider that the undertakings provided which would allow for monitoring for two further years after suspension if the practitioner re-enters the profession at that point, provide a significant protection for members of the public in terms of the various health issues and addictions acknowledged by the practitioner.

[46] We do, however, urge that there be a full reassessment of the practitioner's rehabilitation and progress prior to her having a practice certificate issued at the end of what will be the maximum period of suspension imposed by this Tribunal.

ORDERS

[a] Ms Toner is suspended for a period of three years from the 30 June 2013.

[b] Costs in favour of Standards Committee $7,566.

[c] Section 257 costs of the Tribunal are ordered against the New Zealand Law Society in the sum of $4,100.

[d] The practitioner is to reimburse the NZLS the s 257 costs in full.

[e] The suppression order we make is as to the content of medical reports provided for this hearing, (and including those provided for the District Court hearing in 2012) and the expert and practitioner's evidence arising from those reports, but not including the evidence of her recent drug relapse. There is an exception to the suppression order which relates to any professional disciplinary bodies having access to the material such as the NZLS, the Health and Disability Commissioner or the Medical Council, arising out of any subsequent proceedings to these.

[f] This decision is initially to be released to the parties only and is therefore suppressed until 6 September 2013.

DATED at AUCKLAND this 22nd day of August 2013

Judge D F Clarkson
Chair