NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2014] NZLCDT 41

LCDT 030/13

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE No. 3** Applicant
AND	**BOON HONG** Practitioner

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr W Chapman

Mr A Lamont

Mr P Shaw

Mr S Walker

HEARING at Auckland

DATE OF HEARING 30 June 2014

COUNSEL

Mr P Collins for the Auckland Standards Committee

Ms K Davenport QC for the Practitioner

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

Introduction

[1] Following the hearing of the misconduct charge laid against Mr Hong, the Tribunal gave an oral decision finding the practitioner guilty of misconduct pursuant to s 71A(i) and (ii). This decision relates to the penalty to be imposed as a consequence of that finding.

Submissions for the Standards Committee

[2] Penalty submissions were filed on 10 April 2014, well in advance of the penalty hearing. Thus the practitioner was on notice from that time that the Standards Committee sought an order suspending him from practice for 12 months. The basis of that submission was outlined by Mr Collins to rest on three main planks.

1. The seriousness of the misconduct

[3] This misconduct, which resided in the wilful disobedience of Standards Committee orders following a finding of unsatisfactory conduct against the practitioner *"..will inevitably undermine public confidence in the profession and in its disciplinary institutions*," in the submission of the Standards Committee.

[4] Furthermore it is submitted that it:

> "… constitutes a failure by the practitioner to discharge his fundamental obligation to uphold the rule of law and to facilitate the administration of justice."

[5] Because of this level of seriousness Mr Collins submits that it is important that there be a deterrent element to the penalty so that:

> "A message is conveyed to the legal profession as a whole that disobedience to orders of Standards Committees will not be tolerated and can be expected to have dire disciplinary consequences for the errant lawyer."

[6] Mr Collins also referred to what he described as a disturbing lack of judgment of the practitioner in the manner in which he conducted his defence and his continued non-compliance with the orders throughout the time leading up to the hearing and indeed until very shortly before the penalty hearing itself. We interpose at this point that the practitioner provided evidence to the Tribunal that he had attended two Webinars on Wednesday 25 June 2014 (not the seminars to which he had been directed). He also produced a receipt to confirm that he had made payments of his costs and fine on 12 June 2014. The Standards Committee filed an affidavit from Ms Pipe commenting on the timing of these responses, coming as they did one day after Mr Hong's Attorney was contacted by the Society as to the period of suspension sought.

[7] Mr Collins pointed to the fact that, in the course of the hearing before the Tribunal in April, the practitioner complained of overwork and levels of stress which had prevented compliance. Mr Collins invited the Tribunal to set this against the voluminous submissions filed by Mr Hong which, it was submitted, would have taken much more time to prepare than attendance at the half-day seminar directed.

2. Disciplinary history

[8] The second major submission made by Mr Collins to support the relatively lengthy period of suspension proposed was the "*legitimate concerns raised by the practitioner's disciplinary history*". In support of this submission the Standards Committee filed a further affidavit from Ms Pipe confirming the disciplinary history of the practitioner.

[9] The practitioner's disciplinary history is not comfortable reading for the Tribunal because, although, when viewed individually the four previous findings against the practitioner are not at the most serious end of the scale, they do display an ongoing pattern of professional failings.[1] They date from 1997 to February 2013, and the first decision contains a comment which concerns the Tribunal because it appears to have been borne out by subsequent actions by the practitioner, particularly the 2013 finding. In its decision, the Auckland Law Practitioner's Disciplinary Tribunal said:

> "We are, however, disturbed by Mr Hong's apparent lack of appreciation of normal standards and duties and practices of a solicitor, and his apparent lack of appreciation that this conduct was reprehensible. …"

[1] *Legal Complaints Review Officer v Boon Gunn Hong* [2013] NZLCDT 9.

[10] In November 2004 the Practitioners Disciplinary Tribunal again dealt with Mr Hong noting in relation to the breach of an undertaking that of itself was serious enough, but it was concerned that Mr Hong did not take the opportunity to rectify his breach but rather minimised it in correspondence with the complainant practitioner. Thus he failed to pay due regard to the importance of an undertaking.

3. Timing of offending and Practitioner's insight

[11] Finally in relation to disciplinary history, Mr Collins submitted that the timing of the current misconduct immediately followed a discharge by this Tribunal of a charge of misconduct against him in which the Tribunal had given the practitioner the benefit of the doubt and commented that:

> "… Mr Hong has clearly learnt his lesson in this unfortunate episode. He made it clear to the Tribunal in questioning that he accepted that he had lost his way when he personalised matters and he would be vigilant to ensure that he did not expose himself again to such proceedings. …"[2]

[12] That assurance to the Tribunal occurred exactly one week after the decision of the Standards Committee had been given, but was still disobeyed by the practitioner, leading to this charge. While we would not normally consider as against the practitioner, a disciplinary decision in which the charge had been dismissed, there is another reason for it to be considered and that is Mr Collins' submission that Mr Hong misled the Tribunal on that occasion. This is demonstrated where the Tribunal states "*his evidence also noted that in his many years of practice this was his sole indiscretion resulting in disciplinary charges*."[3] That was plainly not the case.

[13] Mr Hong made a similar statement to the Tribunal at the April hearing when he said that he had "never been complained about by any client". Ms Pipe's affidavit attaches the complaint history for the practitioner which includes a 2005 complaint by a client as well as a number of other complaints from other practitioners. Mr Collins submitted that the timing of the current offending immediately following the previous disciplinary discharge and his assurances to the Tribunal are an aggravating factor as are the "*wilfulness and flagrancy of the misconduct"; and the "evident lack of insight and therefore the absence of any confidence that the Practitioner has learned his lesson and will not re-offend*".

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[2] See n 1, at paragraph [65].
[3] Ibid.

[14] Mr Collins also submitted that the manner of conduct of the defence ought to be regarded as an aggravating feature. However he modified that in his oral submissions, to simply suggest it ought to be taken into account in terms of "overall fitness" as indicating a lack of judgment and lack of insight into his responsibility to his profession.

[15] As to whether a penalty short of suspension was required, Mr Collins referred us to a number of decisions of the Tribunal in which periods of suspension of varying lengths had been imposed. He submitted that the broader public protection which concerned the upholding of the confidence in the profession and in its disciplinary institutions, required a significant term of suspension for this practitioner.

[16] Mr Collins submitted there were no mitigating features which could be put forward for the practitioner.

Submissions for the practitioner

[17] It was the strong submission of Ms Davenport QC that his recent instruction of counsel and recent compliance with the orders which had formed the basis of the misconduct provided some confidence that Mr Hong had changed his attitude.

[18] Ms Davenport submitted that the misconduct did not "engage wider public safety interests". While accepting that the behaviour was reprehensible Ms Davenport referred us to the "least restrictive intervention" principle and the purposes of penalty commented on in the *Daniels*[4] decision. Indeed both counsel referred us to the predominant purposes of penalty in a disciplinary sense, that being: protection of the public; maintenance of professional standards; sanction; and rehabilitation.

[19] Ms Davenport also acknowledged that a deterrent sanction was necessary in relation to this type of offending but submitted that did not lead inevitably to suspension being the proper outcome. Ms Davenport urged the Tribunal to impose a fine and to consider a rehabilitative platform.

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[4] *Daniels v Complaints Committee No. 2 of the Wellington District Law Society* [2011] 3 NZLR 850 (HC).

[20] In relation to the decisions provided to the Tribunal on behalf of the Standards Committee Ms Davenport referred to most having been founded in "*serious criminal conduct/dishonesty or repeated negligence and incompetence*." She distinguished Mr Hong's misconduct from those categories. It was conceded on behalf of Mr Hong that his defence was misconceived and that was now recognised by him. However Ms Davenport pointed out the practitioner's right to mount a defence and that that could not amount to an aggravating factor.

[21] In terms of mitigating features, Ms Davenport submitted that his stress and overwork was a matter which ought to be taken into account by the Tribunal. While she accepted that:

> "… In hindsight Mr Hong acknowledges that his time would have been better spent complying with the orders of the Standards Committee, his suggestion that he was overworked and stressed does have some substance."

[22] Ms Davenport then went on to describe the practitioner's involvement in a long running defamation case involving another lawyer which had significantly depleted him and was ongoing. Ms Davenport also informed the Tribunal that during December 2013 the practitioner's parents had both died in quick succession. We note that the charges were laid in October 2013, and related to non-compliance with orders made in February 2013.

[23] In relation to Mr Hong's previous disciplinary record Ms Davenport submitted that:

> "… His history does not warrant a significant escalation in penalty. Given that Mr Hong complied with the previous sanctions (save for the orders which form the present charge), a fine and costs will serve as a sufficient penalty in the circumstances."

[24] Finally Ms Davenport submitted that the Tribunal could have some confidence in Mr Hong's change of attitude and the "contrition" shown after the liability hearing. Ms Davenport did accept that this contrition was rather late to appear.

Discussion

[25] We accept the purposes of the penalty process generally and specifically those purposes of suspension set out in the dicta in *Daniels*:[5]

> "[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 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."

[26] Both counsel are also agreed that the misconduct is serious. The Tribunal's concern is that this type of offending needs to be marked with a firm response in order that the institutions of professional discipline are not undermined.

[27] While we accept that the practitioner has finally complied with the orders, the proximity to the penalty hearing is such that it seriously undermines his plea of proper contrition or understanding of his professional obligations.

[28] The Tribunal is particularly concerned that this practitioner does not accept that he is a member of a professional body and that his conduct therefore reflects on the profession as a whole. The practitioner espouses high principles in his personal decision making and in his claimed devotion to his clients. Unfortunately he does not seem to relate that to more generally accepted professional standards of behaviour.

[29] Mr Hong has been given a number of opportunities to reflect on his professional standards and behaviour over the course of 17 years of disciplinary findings. He has been given the opportunity of censure and fine and further education. He does not appear to have learned from these opportunities and we consider that a further opportunity cannot be justified.

[30] It is the Tribunal's view that anything less than a significant period of suspension would be an insufficient response to a flagrant breach of orders as

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[5] See note 3.

against the history of disciplinary offending over a 17 year period (albeit at the lower end).

[31] The practitioner has not assisted himself in the misleading statements made to this Tribunal and the Tribunal chaired by Mr Mackenzie in February 2013.

[32] We note the other cases referred to however consider that comparisons with other cases are not particularly useful in anything other than the broadest manner of deciding whether this is to be a strike off case, a suspension case or whether some lesser penalty will suffice.

[33] In this type of offending there must be an element of deterrence in the penalty and we are of the strong view that rehabilitation is much more likely to be fostered by a period outside practice in order to reflect on his behaviour and future actions rather than being permitted to continue with "business as usual".

[34] We note that this practitioner is a sole practitioner in suburban practice. On reflection, he may well consider that there is a need for him to regularly connect with his colleagues and peers for additional support and guidance where necessary, despite being a mature practitioner of some 22 years experience. He has demonstrated at times a singular lack of understanding of his proper role in representing his clients and in his professional obligations.

[35] We accept that Mr Hong's manner of conduct of his defence cannot be regarded as an aggravating feature, however his lack of judgment and insight into his behaviour are certainly matters which can be taken into account in assessing his overall fitness to practice, as held in *Daniels*[6] at paragraph [32]:

> "[32] A tribunal, when determining ultimate fitness to remain in practise, whether limited by suspension, or by striking off, is entitled to review the entire conduct of the practitioner and transgressions the subject of the disciplinary proceedings, and the general behaviour of the practitioner. It cannot regard poor behaviour as justifying more severe penalties, but it is the obvious absence of a mitigating factor and relevant to balancing matters of character."

[36] We consider that a period of suspension of 10 months is proper in all the circumstances outlined above.

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[6] See note 3.

ORDERS

1. Mr Hong will be suspended from practice for 10 months, commencing 7 days from the date of this decision.

2. Mr Hong is Censured.

3. There will be an order for Mr Hong to pay the costs of the Standards Committee in the sum of $20,786.

4. The Tribunal's costs of hearing are certified at $5,335. These are to be paid by the New Zealand Law Society (NZLS) pursuant to s 257.

5. Mr Hong is to reimburse the NZLS for the full s 257 costs.

DATED at AUCKLAND this 17th day of July 2014

Judge D F Clarkson
Chair