NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2015] NZLCDT 5
LCDT 035/14

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**THE NEW ZEALAND LAW SOCIETY'S WELLINGTON STANDARDS COMMITTEE 1** Applicant
AND	**LINDA NALDER** Respondent

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr W Chapman
Mr S Gill
Ms J Gray
Mr M Gough

HEARING at WELLINGTON

DATE OF HEARING 12 February 2015

DATE OF REASONS FOR DECISION 11 March 2015

APPEARANCES

Mr K Johnston for the Applicant
Mr P Churchman QC for the Respondent

DECISION OF THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[1] Linda Nalder was a recently qualified, and not yet registered legal executive, when she accidentally came upon a draft will, while looking for a precedent. The will was that of her father-in-law, and its provisions excluded Ms Nalder's ex-husband and their children from inheritance.

[2] A few years previously, a failed property venture resulted in Ms Nalder declaring in bankruptcy. One of the debts unpaid on her bankruptcy was a significant one to her former in-laws. Ms Nalder was horrified that this debt appeared to have led to the exclusion in the will, which she had seen.

[3] Her guilt and distress at this discovery led her to make the serious error which brought her before the Tribunal. She decided she had to tell her ex-husband (with whom she enjoyed a good relationship) of the will provisions. Her mother-in-law was present at the time. In doing so, she breached the duty of confidence owed to the client (testator) by her and the firm who employed her.

[4] There are some unusual aspects to the background which are relevant both as to the correct charge to be found proven (two charges having been laid in the alternative), and as to penalty.

[5] Ms Nalder accepts her conduct was wrong, and she does not oppose a finding of "unsatisfactory conduct". She contends, in the circumstances, her conduct does not reach the threshold for misconduct of a non-practitioner employee, as defined by s 11 of the Lawyers and Conveyancers Act 2006 ("LCA").

[6] Her counsel also raises concerns about the motivation for the complaint, which was not lodged by the client, and the relevance of this to the issue of penalty – which then links in turn to the s 11 definition.

Issues

[7] The central issues to be determined by the Tribunal are:

1. What interpretation should be given to the words "… liable to have …" in s 11?

2. Has the Standards Committee proved, to the standard required, that Ms Nalder's conduct reached this level?

3. What are the proper penalties to be imposed?

The Charges

"… The New Zealand Law Society's Wellington Standards Committee hereby charges the respondent, Linda Nalder with:

1. Misconduct pursuant to s 241(a) of the Lawyers and Conveyancers Act 2006;

2. Or, in the alternative, unsatisfactory conduct pursuant to s 241(b) of the said Act.

Particulars of Charge

At all material times and in particular in or about April 2013, the respondent was an employee of Simpson & Co, Solicitors, Otaki and Paraparaumu;

In or about April 2013, a client of Simpson & Co, Mr W, engaged the firm to prepare a will for him;

Mr W's will was prepared by another employee of the firm, X;

The respondent was an in-law of Mr W, being married to, though estranged from, his son, Mr W Jnr.

> While Mr W's will was still in draft form, and before it had been executed by him, the respondent accessed the same and discussed its contents with Mr W Jnr, thereby knowingly breaching the duty of confidentiality owed to Mr W by Simpson & Co."

[8] The final particular in support of the charge was amended by consent at the request of the Standards Committee and differs considerably from the original which alleged that the respondent had made a copy and shown it to Mr W Jnr. This particular was amended after rebuttal evidence in this regard was filed by the respondent from two deponents in addition to her own evidence, that no copy had ever been made. The original reflected incorrect information provided to the Standards Committee by the complainant. The Standards Committee chose to pursue this complaint as an "own motion" complaint, further reference will be made about this later in this decision. The investigation was based on a complaint originally lodged by the former brother-in-law of the respondent, Ms Nalder, and for the purposes of this decision the references to 'the complainant' are references to this original complainant.

Issue 1 – Misconduct

[9] Section 11 reads as follows:

> **11 Misconduct defined in relation to employees who are not practitioners**
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> In this Act, **misconduct**, in relation to a person who is not a practitioner but who is an employee of a practitioner or an incorporated firm,—
>
> (a) means conduct of the person in the course of his or her employment by the practitioner or incorporated firm that would, if it were conduct of a practitioner, render the practitioner liable to have his or her name struck off the roll or to have his or her registration as a conveyancing practitioner cancelled; and
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> (b) includes conduct of the person which is unconnected with his or her employment by the practitioner or incorporated firm but which would justify a finding that the person is not of good character or is otherwise unsuited for employment by a practitioner or incorporated firm.

[10] This definition is to be contrasted with that of misconduct in relation to a practitioner which is defined in s 7 on a much broader basis.

[11] Although setting out the various definitions provided in the LCA as to conduct, Mr Johnston, for the Standards Committee, did not directly address us on the intent

of the legislation in setting two different standards for practitioners and non-practitioner employees in ss 7 and 11 respectively.

[12] As can be seen from the wording of s 11(a), there is an additional element imported, in a somewhat circular fashion, that renders a non-practitioner guilty of misconduct only if she would have been "liable to have" her name struck off the role as a result of her conduct, had she been a practitioner.

[13] Mr Johnston submitted that this wording was intended to be extremely broad and that "liable" ought to be interpreted in a manner that meant strike-off was a possibility only.

[14] For the practitioner, Mr Churchman QC describes s 11 as "opaque", but submits that the "absolutist test" put forward by the Standards Committee, that only a potential strike-off need be established, was incorrect. Mr Churchman submitted a better approach would be that there was a "likelihood of strike-off as an outcome". To interpret more broadly, Mr Churchman submitted, would be to render s 11 so broad as to be meaningless and unnecessary. In other words there would have been no reason to distinguish between a practitioner and non-practitioner conduct. We accept Mr Churchman's submission is the correct interpretation of s 11. If strike-off were only a mere possibility for the conduct, in other words covering a much broader, less serious range of conduct, its reference in s 11 would be of little assistance.

[15] Therefore, the answer to Issue 1 is that the Tribunal considers that in order to reach the standard of "misconduct" as defined in s 11 the conduct must be so serious that, were the employee a practitioner, he or she would have been likely to have his or her name struck off the roll.

Issue 2 – Standard of Proof

[16] Mr Churchman reminded us that the Standards Committee has the burden of proof to show that this outcome was likely and that that required an analysis of exactly what happened in this case and the contextual factors surrounding it.

[17] Neither counsel was able to refer us to any decision in New Zealand or comparable jurisdictions, where a breach of confidence only, in the case of an

employee (as opposed to linked with other concerning conduct) had been considered. As far as the Tribunal is aware, since the LCA came into effect, all cases involving non-practitioners have involved fraud or theft, in other words blatant dishonesty where strike-off would have been inevitable had the employee been a practitioner.

[18] Mr Johnston referred to a number of Australian cases as well as a recent New Zealand case, involving breach of confidence. We accept Mr Churchman's submission that none of these cases are analogous to the present matter and involved much more egregious conduct on the part of the practitioner. For example in one instance a lawyer had broken into a locked drawer to obtain a copy of a will of Mr Hancock, then one of Australia's richest men in an attempt to obtain confidential information that he could then exploit for his own personal gain.[1]

[19] In this matter Ms Nalder has filed her own full affidavit completely accepting, from the outset, her fault in disclosing the document and stating what steps she had taken to make good this serious lapse in professional judgment. She immediately resigned her job and apologised to the testator client. In addition her firm provided a full apology and Ms Nalder has provided evidence to the Tribunal which is unchallenged, that this apology was accepted by the client as an entirely satisfactory outcome of this matter.

[20] She apologised fulsomely to not only the client but her employer and the New Zealand Law Society. She accepts that she knew that the duty of care owed to clients was important and that there was no excuse for her action. However she sets out the context of her guilt and distress at seeing the will's provisions. This is offered as an explanation rather than excuse for her lapse in judgment.

[21] In our Oral decision of 12 February we made it very plain to Ms Nalder that the Tribunal considers confidentiality to be a core value in legal practice. However, in the present matter, the Tribunal does not consider that a one-off lapse of this sort, given the context and the outcome, particularly since no actual harm was done to any person and given her level of experience at the time (she was still quite junior) would not have led, were she a practitioner, to strike-off on a first disciplinary offence.

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[1] *LPCC v Camp* [2010] WASC 188.

[22] Thus we find the Standards Committee has not proved on the balance of probabilities that the conduct met the level of s 11, as interpreted by the Tribunal.

[23] Instead we make the alternate finding of unsatisfactory conduct.

Issue 3 – Penalty and Costs

[24] Since the background to this complaint is relevant to both penalty and costs, in our view we propose to treat these together.

[25] We have referred in the opening of this decision to Ms Nalder's bankruptcy which occurred in 2009. Despite her bankruptcy and the extinguishing of the debt to her in-laws, she and her estranged husband had attempted to continue to make interest payments on the debt for some time, until this became untenable. On 10 November 2013 Ms Nalder received an email from the complainant as follows:

> "I understand an interest payment to W was missed last month. Please pay the arrears and current month's payment by the 17 November 2013 or Stage 1 of Debt Collection will commence. This will involve informing the appropriate people in regards to the obtaining and leaking of confidential information pertaining to W's private affairs from Simpson & Co law firm.
>
> (Signed complainant)."

[26] This email was provided to the Law Society by Ms Nalder in her response to the complaint which was lodged on 27 November 2013. Ms Nalder, in her unchallenged evidence also sets out the threatening and stalking behaviour which she has suffered from the complainant, culminating in the calling of police and a trespass notice being served on the complainant.

[27] Ms Nalder also refers to the complainant's motivation in making the complaint, given that his father was overseas at the time and had indicated to her that he was happy with the apology. Ms Nalder refers to the compensation sought by the complainant.

[28] Indeed in the complainant's own letter he refers to the very email which would appear to be a blackmail attempt. He further refers to $200,000 allegedly lost in interest payments by his parents. He clearly does not understand the nature of bankruptcy and states his concern at his potential personal loss if his parents' estates are depleted.

[29] The Tribunal considers that it must make some cautionary comment to Standards Committees about the potential for manipulation and thus undermining of public confidence in the complaints system.

[30] Mr Johnston pointed out that this matter did not proceed on the original complaint but was converted to an "own motion" inquiry by the Standards Committee because of the serious nature of the breach of professional conduct involved.

[31] While we absolutely accept that the Standards Committees have responsibilities to investigate serious allegations, there does need to be care taken where there is a particular context involved and it is likely that this matter could have proceeded on a less formal track.

[32] We are also concerned at the process adopted by the Standards Committee when the complaint was referred to Ms Nalder. Surprisingly, she was not given a copy of the complaint and therefore although she was given details of the substance of the complaint she was not told who had complained about her, or the full detail, which in the event proved to be completely inaccurate. This was not made available to her until the disciplinary proceedings commenced and thus her response to the Standards Committee could potentially have been seriously impaired.

[33] We say no more about process and move to consider matters of mitigation or aggravation:

[a] No loss ensued to any person as a result of this professional default.

[b] The client did not complain and evidence has been provided he was satisfied with the apology provided to him.

[c] Ms Nalder was an inexperienced and unregistered legal executive at the time.

[d] She came across the draft will by accident not as a deliberate strategy.

[e] This was an isolated incident; there is nothing before us to show any pattern of conduct.

[f] No personal gain has resulted to Ms Nalder, indeed as a consequence she resigned from her position and is now working part-time only on the minimum wage.

[g] Ms Nalder has immediately acknowledged her wrongdoing and taken responsibility for it and has cooperated with the disciplinary proceeding throughout. She engaged senior counsel and indeed the charge was amended to reflect a more accurate view of the matter. Ms Nalder acknowledged the level of conduct, that is " unsatisfactory conduct" that has now been found to be the correct level of charging and in that sense the Standards Committee is "unsuccessful" in its prosecution.

Orders

[34] We confirm and incorporate the orders made orally on 12 February as follows:

1. An order pursuant to s 242(1)(h)(ii) that no practitioner or incorporated firm employ Ms Nalder in connection with practitioner's or incorporated firm's practice so long as the order remains in force: The order is for 18 months commencing with the date of resignation from her previous employment with Simpson & Co.

2. There will be no order as to costs.

3. The New Zealand Law Society is to pay the s 257 costs of the Tribunal in the sum of $4,898.

DATED at AUCKLAND this 11th day of March 2015

Judge D F Clarkson
Chair