

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2014] NZLCDT 64

LCDT 010/14

UNDER

the Lawyers and Conveyancers Act 2006

IN THE MATTER OF

an application for restoration to the roll of
barristers and solicitors

BETWEEN

DAVID PHILIP FLEWITT

Applicant

AND

THE NEW ZEALAND LAW SOCIETY

Respondent

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr C Lucas

Ms C Rowe

Mr W Smith

Mr I Williams

HEARING at Auckland

DATE OF HEARING 16 October 2014

APPEARANCES

Mr C R Pidgeon QC for the Applicant

Ms V Casey for the Respondent

DECISION OF THE TRIBUNAL
ON APPLICATION FOR RESTORATION TO THE ROLL

[1] Mr Flewitt seeks to be reinstated to the roll of barristers and solicitors. A previously capable and committed lawyer, he was, for the few years leading up to his leaving legal practice in 2008, in the grip of that most pernicious of drugs, methamphetamine.

[2] As recorded in the Tribunal's decision of June 2010, that addiction resulted in the dishonesty offending which, in turn, brought him before the Tribunal. He was struck off.

[3] By that stage, not only had he lost his career, but also his home and (temporarily) his family.

[4] By the time of the strike-off hearing, Mr Flewitt had begun to turn his life around. He had been clean of drugs for over six months, had established a support network and had sought help from a psychiatrist and a therapist. He had also regained the shared care of his children. His recovery was in its early stages.

[5] In its decision the Tribunal, while compelled for the reasons then given to impose the most serious sanction, commended Mr Flewitt for his recovery and told him that if he maintained his "... progress and drug-free lifestyle" that he could be reconsidered in future as a fit and proper person to practice as a lawyer again. It is gratifying to note that Mr Flewitt has grasped this challenge and maintained his recovery, acquiring new skills and restoring a full work and family life. He now asks for the opportunity to apply himself to the career which he says is his real passion.

[6] The New Zealand Law Society ("NZLS") initially adopted a neutral stance to this application, but have since expressed reservations about Mr Flewitt practising as a Barrister Sole as opposed to an employed lawyer.

[7] The issues for determination are:

1. What is the meaning of “fit and proper”?
2. Having regard to the reasons for strike-off, has the lawyer displaced the burden on him as to the current risks he might pose to the public and to his profession?
3. Are there means of minimising such risks sufficiently to protect the public?
4. In this case should the Tribunal determine the type of practising certificate to be issued, by means of a condition on readmission, or should that be a matter for the New Zealand Law Society in the first instance?

Issue 1: “fit and proper” - discussion of the tests

[8] The leading case in determinations as to restoration to the roll is *Leary*.¹ A more recent decision provided by the NZLS is that of *Ali*.² Both of these decisions refer to the much older decision of *Re: Lundon*.³

[9] In the *Leary*⁴ decision the High Court overturned the Disciplinary Tribunal’s refusal to reinstate the practitioner. In doing so it affirmed that the correct approach is a prospective one.

[10] The full Court in *Leary*⁵ cited for the approval a passage from the decision of Kirby P in *Foreman*.⁶ That passage discussed the concepts of redemption and forgiveness as fitting within a concept of social justice for very practical reasons. That is, the public interest which resides in the constructive use of the skills of qualified persons who have undergone many years of training. The public interest and the interests of the profession, in the encouragement of rehabilitation of those members of the profession who have lapsed, is a significant one.

¹ *Leary v New Zealand Law Practitioners Disciplinary Tribunal* [2008] NZAR 57, full Court HC.

² *Ali v New Zealand Law Society* [2014] NZHC 1111.

³ *Re: Lundon* [1923] NZLR 236

⁴ See footnote 1.

⁵ See footnote 1.

⁶ *Law Society of New South Wales v Foreman (No. 2)* (1994) 34 NZWLR 408 (CA) at 419.

[11] While the language and some of the concepts in the *Lundon*⁷ decision are somewhat dated, we accept that the following statement still holds good:

“The relations between a solicitor and his client are so close and confidential, and the influence acquired over the client is so great, and so open to abuse, that the Court ought to be satisfied that the person applying for admission is possessed of such integrity and moral rectitude of character that he may be safely accredited by the Court to the public to be entrusted with the business and private affairs.”⁸

[12] In *Al*⁹ at paragraphs [21] to [24] His Honour Faire J set out four factors, three of which are relevant to the current application:

“[21] They are, first, that the focus is necessarily forward looking. The Court’s function is not to punish the applicant for past conduct. The Court is required to consider the applicant’s worthiness and reliability in the future.

[22] Second, the onus is upon the person who has erred. That will be a heavier one where the candidate has transgressed following admission and is applying for readmission.

[23] (*Not relevant*).

[24] The fourth is that it is important to look at the facts of the case in the round and not simply to just pay regard to the previous conviction or other disqualifying conduct.”

[13] In *Leary*¹⁰, while firmly endorsing the future focus required, the Court also emphasised the necessity to examine the conduct that led to the strike-off:

“[44] That exercise, too, necessarily requires an inquiry into the actions which led to the striking off, which, in its turn involves acceptance by an applicant that those actions occurred and that they transgressed the legal and ethical standards of the profession. Without recognition that the actions breached the applicable standards and the consequences of the breach - particularly to the public, the Courts and all other practitioners - it will be difficult for the Tribunal to conclude the same actions would not be repeated should similar circumstances arise in the future.”

[14] The Tribunal’s task is to assess whether, having regard to the applicant’s drug habit which led to his offending and in turn strike-off, he has undertaken sufficient rehabilitation to now be regarded as a fit and proper person to be entrusted with client affairs.

⁷ See footnote 3.

⁸ See footnote 3, at 657 to 658.

⁹ See footnote 2.

¹⁰ See footnote 1.

Issue 2 - evidence of current “fitness”

[15] In his own evidence the practitioner set out his path to rehabilitation which, as indicated, began well before he was struck off the roll. Following that, he maintained his abstinence from drugs and by the beginning of 2011 had also decided to abstain from alcohol use. He has maintained his abstinence from drugs for over four years and nine months and from alcohol for over three years and nine months. To support him in this process he attends Alcoholic Anonymous (“AA”) and Narcotics Anonymous (“NA”) meetings regularly. He is a leader in some of those groups.

[16] During 2012 the applicant studied full time and gained a post graduate diploma in the Theory of Addictions. He was then employed full time between February and September 2013 as a counsellor at Lifeline Aotearoa. He specialised in areas of problem gambling, depression and self-harm.

[17] From September 2013 the applicant has been employed by the Salvation Army working with the Epsom Lodge Supportive Accommodation Service.

[18] We have been provided with testimonials from both Lifeline and the Salvation Army. Both referees speak highly of Mr Flewitt’s abilities, recovery and honesty. In particular we refer to the reference provided by Captain Newman where, in setting out the skills of the applicant in assisting his clients, he refers Mr Flewitt as being:

“... An authentic example of redemption when there is an honest commitment to life change. He has great interpersonal skills and I have found the way he engages with clients as being professional, compassionate and honest, remaining ethical and appropriate at all times. He displays and utilises a clear understanding of boundaries with both male and female clients, and is well respected by both work colleagues and our clients.”

[19] Two experienced psychiatrists provided evidence in support of Mr Flewitt’s application. Firstly Dr McIvor, who provided the report which had been prepared by Mr Flewitt’s previous psychiatrist Dr McCormick, but which was unsigned at the time of that doctor’s sudden and untimely death. That report was prepared mid-way between strike-off and the current application and confirmed that Mr Flewitt expressed an “ongoing motivation to be drug free” and supported that with practical information. In his summary the late Dr McCormick had said:

“At this time Mr Flewitt’s prognostic factors are all positive - he is in a stable and supportive personal relationship, he is intimately involved in his childrens’

lives and care, he continues to be abstinent from alcohol and other drugs having reached lengthy periods of sobriety, his days are structured and full, he is studying, and he is maintaining good levels of exercise and personal fitness ... it appears to be that Mr Flewitt has made a range of changes which make the risk of relapse highly unlikely for him in the medium and long term.” (May 2012)

[20] Updating that information was the evidence of Dr Emmerton of July 2014. Dr Emmerton appeared before us and was available for cross-examination. He was not initially cross-examined by the NZLS who, in submissions, confirmed that they did not challenge Mr Flewitt’s “evidence of his reform and personal achievements since his conviction”.

[21] Dr Emmerton found Mr Flewitt was able to:

“... Consistently demonstrate capable insight and reliably good judgment relative to his personal challenges and objectives.

Notably I found no symptoms or signs indicative of relapsing drug or alcohol use, nor characteristic indications of relapse potential in his overall rationale or disposition, while David’s reporting remained reliable and internally consistent.”

And

“It is my opinion Mr David Flewitt has demonstrated an ongoing recovery from poly-substance abuse and dependency, involving proven and genuine abstinence, stable relationships and sustained personal growth and resilience.

The offending behaviours, family dysfunction and emotional symptoms characteristic of his drug abuse and withdrawal, were monitored through several years of stressful personal, financial and legal challenges; I can find no evidence of relapse about his acquisition of new skills and knowledge of addiction, indicating possibly some attempt at restitution of his losses. Therein I speculate David’s progression to a mature personality has more recently demonstrated sustained, effective coping abilities and a future focus.

David appears to be in later, resolution phase of his recovery ... I find David’s objective to restore his professional practice and function an admirable goal in his recovery overall. In these terms I find no medial [sic] or psychiatric or psychological impediment to him functioning to his legal qualification. Prognostically, he seems very well protected by his motivation principally, his loving and stable relationship with Jackie and their children, his healthy lifestyle and a general attunement and vocational achievement in addictions care.”

[22] In relation to the offending which brought him before the Tribunal Dr Emmerton had this to say:

“With respect to David’s history of offending and Dr McCormick’s prior conclusion, I agree this most likely represented a direct consequence of his

drug dependence. The stable personal and family life and career re-development, through considerable financial hardship, perhaps demonstrate a novel preeminence of self- and family care in his life.”

[23] As to maintaining his recovery Dr Emmerton recognised that he continued to attend AA and NA and utilised the professional and personal support that he had developed over the years. He confirmed that Mr Flewitt “... *remains accepting of any monitoring and oversight to his recovery, and I am happy to support him clinically in this regard.*”

[24] We confirm that in its decision in 2010 the Tribunal accepted that but for the addiction, the dishonesty offending would not have occurred. Thus we see the onus on Mr Flewitt as being to persuade the Tribunal that he is unlikely to relapse in his recovery, and hence will be able to maintain his “moral compass” which he frankly acknowledges he lost while addicted to methamphetamine.

[25] We consider that, on the basis of the evidence provided to the Tribunal both by experts and to corroborate his own account of abstinence, settled employment and home life, that Mr Flewitt has satisfied that onus of proof.

[26] For completeness we should add that currently Mr Flewitt is an undischarged bankrupt. The Tribunal costs in relation to the 2010 hearing were to be recovered from Mr Flewitt, however he was unable to meet this payment to the NZLS and accordingly declared bankrupt some two years ago. The Official Assignee has been consulted in relation to the possibility of future practice as a lawyer.

Issue 3 - are there means of minimising any remaining risks sufficient to protect the public? - undertakings

[27] Dr Emmerton’s evidence was that a safe period of further monitoring by a psychiatrist and ongoing relationship with a psychotherapist was one to three years.

[28] In response to questions from the Tribunal Mr Flewitt indicated he was prepared to submit to any form of testing including random blood testing, that was directed by the Tribunal. At the hearing, the NZLS prepared draft undertakings which we now set out:

1. Not to take illegal drugs
2. To attend AA and NA meetings: - at least fortnightly for one year - at least monthly for two years following and to provide evidence of attendance in a manner and frequency approved by the NZLS.
3. To participate in random drug testing (possible hair testing on at least one occasion) at his own cost, following the process and reporting timeframes approved by the NZLS until Dr Emmerton advises this is not required.
4. To attend regular appointments with Dr Emmerton or a person nominated by him, as considered appropriate by Dr Emmerton and provide reports from Dr Emmerton of attendance to the NZLS.

[29] Mr Flewitt has confirmed he is prepared to give each of those undertakings to the Tribunal and the NZLS.

[30] We consider that these undertakings and in particular the random testing agreed to by Mr Flewitt provide a significant safeguard against risk of relapse such as would endanger clients and the profession.

Issue 4 - further conditions on restoration?

[31] The NZLS concedes that the condition able to be imposed pursuant to s 246, by the Tribunal, is not a proper one given the fields of expertise of this lawyer. Subsection (4) does not seem to contemplate a situation where a recently restored practitioner wishes to practice as a barrister sole, as is the case here.

[32] Furthermore Mr Flewitt's competency as a lawyer was not challenged at any point in the hearing. We accept the submission of the NZLS that a supportive environment such as in a group Chambers or an employee situation might prove to be a less stressful re-entry into the profession. However we consider that the type of condition is firstly, unsuitable for a barrister and secondly, is intended to be directed at concerns about competence and experience which are not present in this case.

[33] We note that Mr Pidgeon QC, counsel for the applicant, has offered to continue in a mentoring role for Mr Flewitt. It is clear that he and his client enjoy a very positive relationship and that Mr Pidgeon has been most impressed at Mr Flewitt's recovery and efforts to rehabilitate himself. It may be that in considering an application for a practising certificate from Mr Flewitt, undertakings from a senior member of the profession such as Mr Pidgeon could be obtained in relation to ongoing support and mentoring for a short period at least.

[34] We consider these are best matters dealt with by the NZLS at the time of consideration of a practising certificate rather than being matters which are properly in the domain of the Tribunal.

Order

[35] There will be an order restoring the name of David Philip Flewitt to the Roll of Barristers and Solicitors.

DATED at AUCKLAND this 31st day of October 2014

Judge D F Clarkson
Chair