NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2016] NZLCDT 7
LCDT 019/15

IN THE MATTER of the Lawyers and Conveyancers Act 2006

BETWEEN **WAIKATO BAY OF PLENTY STANDARDS COMMITTEE 2**
Applicant

AND **ANGELA BEAN**
Practitioner

CHAIR
Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr W Chapman
Mr S Morris
Mr P Shaw
Mr I Williams

HEARING at Tauranga District Court

DATE OF HEARING 10 March 2016

DATE OF DECISION 12 April 2016

COUNSEL
Ms N Copeland for the Standards Committee
Mr T Conder and Mr L Stewart for the Practitioner

REASONS FOR DECISION ON PENALTY

[1] Ms Bean appeared before the Disciplinary Tribunal for a penalty hearing, having admitted two charges of misconduct pursuant to s 7(1)(a)(i) of the Lawyers and Conveyancers Act 2006 ("the Act"), namely that her conduct "… would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable …".

[2] At the conclusion of the hearing we made the orders which are set out at the end of this decision and reserved our reasons to be delivered in writing. This decision sets out those reasons.

Background

[3] Ms Bean represented a couple in what came to be a somewhat difficult transaction for a number of reasons. At the conclusion of this transaction Ms Bean was asked by one of her clients what level of fees had been incurred, and he signalled that his (estranged) wife was concerned about this. On being told that the time recorded came to approximately $4,000 the client asked Ms Bean "what she could do for cash". Ms Bean told the client the fee would be $2,500.

[4] Ms Bean acknowledges that cash jobs were not something that the firm for whom she worked would approve of, but that she had discretion to write off time, and had general independence concerning billing of fees.

[5] However, when the client returned the next day with the $2,500 cash, instead of invoicing him for that amount, she raised an invoice for $500 and took $2,000 for herself.

[6] Ms Bean, who described herself as being at a very low ebb and highly stressed at the time, almost immediately regretted this act of dishonesty, but seemed unable to put it right. Within four to five days her deception was discovered by her employer and she was confronted about it. She immediately acknowledged her wrongdoing, returned the money, resigned and apologised.

[7] Shortly after this, she self-reported to the New Zealand Law Society ("NZLS"), and handed in her practising certificate on 17 July 2015. She has not sought to practice law since.

Penalty Agreement

[8] The Standards Committee laid charges and Ms Bean, through her counsel, admitted these at the earliest opportunity and fully cooperated with the process. In advance of the hearing, counsel reached agreement as to the main penalty which should be imposed and sought the Tribunal's approval.

[9] They disagreed on two issues: contribution by the practitioner to costs; and final name suppression.

Suspension

[10] A period of three years was agreed as the proper penalty and the Standards Committee further agreed that the period from 17 July 2015, when the practitioner handed in her practising certificate, could be taken into account. This penalty, we are satisfied, is proper based upon the principles which have been applied in previous cases before the Tribunal and the Courts.

[11] The starting point is *Bolton v Law Society.*[1] That decision held that where deliberate dishonesty is involved, the Tribunal will almost inevitably strike-off the practitioner from the roll of Barristers and Solicitors. However *Bolton* itself proved an exception to that principle and the Courts have repeatedly noted that where a lesser penalty will suffice to mark the seriousness of the conduct and to protect the public, that that ought to be considered (*Daniels*[2]).

[12] In *Dorbu*[3], a full bench of the High Court held:

> "… 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

[1] *Bolton v Law Society* [1994] 2 All ER 486.
[2] *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850 (HC).
[3] *Dorbu v New Zealand Law Society* [2012] NZAR 488.

> 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 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."

[13] In this instance both counsel accept that the conduct concerns a single event. It is accepted that the conduct is very serious, but the actions of the practitioner in fully accepting responsibility for her actions and taking steps to remove herself from the profession and seek medical help and therapeutic support do provide substantial mitigation.

[14] The practitioner has an unblemished disciplinary record and has practised law for 15 years without any previous concerns. At the time of the conduct and subsequently she has been diagnosed as suffering from [redacted].

[15] We were referred by way of analogy to a case with many similar features, that is the *Hemi*[4] decision. In that matter the practitioner had on two occasions accepted cash from clients and failed to pass it on to his employer. He was suspended for three years, taking into account a period of voluntary suspension which had already occurred. Mr Hemi, like Ms Bean had acted in an exemplary manner following his detection and was no longer practising law.

[16] We were also referred to the *Toner*[5] decision, where an offence of dishonesty had also been involved. But the practitioner had sought professional help and made significant steps towards rehabilitation in relation to her drug addiction and as a result she also was suspended for three years.

[17] In summary we have determined that the agreed penalty of three years suspension, taking account of time already "served" was proper in terms of the penalty principles, the objects of the Act, and precedent.

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[4] *Canterbury Westland Standards Committee No. 3 v Hemi* [2013] NZLCDT 23.
[5] *National Standards Committee v Toner* [2013] NZLCDT 38.

Censure

[18] We impose the following Censure upon the practitioner:

> Ms Bean, the Tribunal has chosen to censure you in addition to imposing the other penalties it has. A formal written censure serves to remind you, members of the legal profession generally and members of the public that a departure from proper behaviour, particularly a departure into the fringes of dishonesty, cannot go without adverse comment. You are censured accordingly.

Costs

[19] The Standards Committee sought an order in respect of their costs which were $6,008.73 which we considered were reasonable.

[20] Counsel for the practitioner sought a reduction to reflect Ms Bean's personal circumstances. Counsel sought that only 20% of the costs be ordered to be repaid by the practitioner. Counsel also submitted that the Tribunal's broad discretion ought to be exercised in this manner to reflect fairness and to take account of the practitioner's cooperative approach to the proceedings.

[21] We do accept that Ms Bean has been entirely cooperative with the process and sought to minimise costs and indeed the modest costs award sought reflects the benefit of that cooperation already.

[22] We note however that she is working in fulltime employment and although this is apparently at a lower rate than she was earning as a lawyer we do not consider she is in such straitened circumstances that she ought not to have to bear the cost of this prosecution, brought by her profession because of her actions.

[23] There is also no reason why the profession ought to bear the full burden of the Tribunal's expenses as will be reflected in an order which the Tribunal is bound to make against the New Zealand Law Society pursuant to s 257. We consider these also ought to be reimbursed in full by the practitioner.

Name Suppression

[24] At the conclusion of the hearing we indicated to counsel that we rejected the application for final name suppression as sought. Instead, we granted a limited suppression order relating to the practitioner's former employer's name, her current employer's name and company's name and the practitioner's personal medical and financial details. These are all to be redacted from this decision before publication.

[25] We note that should the practitioner apply for a practising certificate in the future a full unredacted copy of this decision is to be made available to the New Zealand Law Society in order to consider that application.

[26] Ms Bean's counsel set out succinctly and accurately the approach to name suppression in his submissions, namely the Tribunal must carry out a balancing act between the public interest in publication and the interests of the person seeking name suppression. Secondly, that there is a presumption of open justice which requires to be displaced by the practitioner and that the public interest in publication is to fulfil a protective rather than a punitive function, although it is always acknowledged that there is a punitive element suffered by a practitioner when disciplinary decisions are published.

[27] It was submitted that there was a risk of a negative impact on Ms Bean's health and that her recovery from [redacted] might be impaired. The evidence in this regard did not go so far as to cause fears for the practitioner's own safety however. We acknowledge that the embarrassment and humiliation that follows publication will inevitably be distressing for practitioners but the circumstances have to be compelling to tip the balance.

[28] The second basis relied on was the risk of embarrassment or adverse impact on Ms Bean's current employer. This employer was fully aware of Ms Bean's actions and these proceedings when employing her but has sworn an affidavit that [redacted] holds concerns about the reputation of the business should it be associated with Ms Bean. We have attempted to mitigate any potential damage in this regard by suppressing the name of the employer and the company.

[29] As submitted by Ms Copeland on behalf of the Standards Committee, in quoting from the *Hart*[6] decision "… the Act itself is designed to promote public confidence in lawyers by an open approach to disciplinary matters".

[30] Full exposure of the disciplinary process is considered to enhance public confidence in the profession and to protect members of the public. It has been said:

> "The public interest in being aware of the proceedings in which a practitioner has been found guilty of misconduct and is suspended, and knowing that such an outcome will usually not be hidden, must be high".[7]

[31] Finally, we consider that the need for openness is even more important where the disciplinary matter reflects some level of dishonesty. In these cases the threshold to overcome the presumption of openness is even higher.

[32] For all of the above reasons we refuse the final suppression order other than in the terms already stated. However, we indicated to counsel that the interim suppression order would remain in force for the duration of the appeal period.

Summary of Orders

1. A censure is imposed upon the practitioner under terms set out in para [18] of this decision.

2. The practitioner is suspended for a period from the date of hearing until 17 July 2018, that is equivalent to three years suspension from the time when the practising certificate was surrendered by Ms Bean.

3. Costs as sought by the Standards Committee are awarded against the practitioner (s 249).

4. The s 257 Tribunal costs of $5,820 are ordered against the New Zealand Law Society.

5. Pursuant to s 249 the practitioner is to reimburse the New Zealand Law Society for the total of the s 257 costs.

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[6] *Hart v Standards Committee No. 1* [2011] NZCA 676 at [18].
[7] *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850 at [58].

6. From the expiry of the appeal period herein the interim suppression order will lapse, except that the names of the practitioner's former employer, legal firm, and her current employer, both personal and company name, will be suppressed, as will the practitioner's personal medical and financial details.

DATED at AUCKLAND this 12th day of April 2016

Judge D F Clarkson
Chair