BEFORE THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2015] NZLCDT 7

LCDT 039/13

BETWEEN	**WAIKATO BAY OF PLENTY STANDARDS COMMITTEE No 2 OF THE NEW ZEALAND LAW SOCIETY**
	Applicant
AND	**BRETT COOPER**
	Respondent

CHAIR

Judge BJ Kendall (retired)

MEMBERS OF TRIBUNAL

Ms J Gray

Mr S Grieve QC

Ms C Rowe

Mr W Smith

HEARING at Auckland District Court

DATE 2 March 2015

DATE OF DECISION 26 March 2015

COUNSEL

Mr R McCoubrey for the Standards Committee

Mr A Simperingham for the Practitioner

DECISION OF THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL CONCERNING CHARGES AND PENALTY

Introduction

[1] The Hearing of the Tribunal on 2 March 2015 concerned two charges of misconduct brought by the applicant against the respondent as follows:

Charge one

Misconduct within the meaning of s 7(1)(a)(i) and/or s 7(1)(a)(ii) of the Lawyers and Conveyancers Act 2006 ("the Act") in that his actions:

1. would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable; and/or

2. consisted of a wilful or reckless breach of s 4(a) of the Act and/or rr 2.1, 11.1 and/or 13.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 ("the Rules").

The allegation is that the practitioner misled the Court. He had been directed to attend the Rotorua District Court on 28 May 2012 to argue an application that he had made for an adjournment. He did not appear, but sent an email to the Court on that morning stating that he was unwell and could not appear and conduct a hearing to an acceptable professional standard. He attached a medical certificate.

When the matter was called, the Court asked another lawyer, Mr Birks, who was in Court as duty solicitor, to contact the practitioner. He did so by phone and then informed the Court that the practitioner was ill.

The practitioner was in fact appearing on another matter in the Christchurch District Court in circumstances where he was well enough to attend a hearing in that Court but informed the Court at Rotorua that he was too unwell to attend there on that day.

Charge Two

Misconduct within the meaning of s 7(1)(a)(ii) of the Act in that his actions consisted of a wilful or reckless breach of s 4(a) of the Act and/or rr 2.1 and/or 13.2 of the Rules.

The allegation is that, in the overall conduct of proceedings in *Police v Tregonning* (the matter in respect of which the practitioner had been directed to appear on 28 May 2012), he did not conduct himself to a professional standard and failed to comply with his overriding duties as an officer of the court and to facilitate the administration of justice. He failed to organise himself to avoid conflicting appearances in different Courts and he failed to instruct an agent to appear on his behalf.

Each charge was laid with alternative charges of negligence or incompetence in his professional capacity within the meaning of s 241(c) of the Act.

[2] The practitioner denied both charges of misconduct and the alternative charges of negligence or incompetence under s 241(c). He admitted the alternative charges of unsatisfactory conduct under s 12(a) in that his conduct fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

[3] After the hearing and following deliberation, the Tribunal found that Charge one relating to misconduct had been proved. The Tribunal accepted the practitioner's plea of guilty to the alternative charge of unsatisfactory conduct in respect of Charge two.

[4] The Tribunal announced the following orders after hearing submissions from each counsel as to Penalty.

a. Suspension for 18 months from 2 March 2015;

b. Costs of the Law Society (s 249 of the Act) to be submitted within 10 days;

c. Refund to the Law Society of the costs of the Tribunal as fixed under s 257(3) of the Act. The s 257 costs are certified in the sum of $5,540.

d. Interim suppression of the name of the practitioner pending a formal application for final suppression, such application to be made by 23 March 2015.

[5] It reserved its reasons to be delivered in writing. This decision now records those reasons.

[6] Charge one arises out of a letter of complaint sent by Judge Connell on behalf of the Rotorua District Court Judges relating to the respondent's conduct in the matter of *Police v Tregonning.*

[7] The evidence on behalf of the Committee is that the respondent was counsel for Mr Tregonning who faced one charge of driving with excess alcohol in his breath. That charge was laid in the Rotorua District Court and was first called on 15 February 2011. It was then adjourned nine times up until 9 March 2012. On that date the charge was adjourned to 28 May 2012 for a defended hearing. The file recorded that the respondent would be available on that date and that this was a final adjournment. The respondent failed to appear in the Rotorua District Court on that day to conduct the defended hearing on behalf of the defendant.

[8] The Committee relied on three documents to support the charge as follows:

a. The respondent's email to the Court dated 14 May 2012 in which he requested an adjournment of the hearing set for 28 May 2012 for the

reason that he had a case in the Christchurch Court on that day. (Exhibit GH6 to the affidavit of Garreth Heyns of 16 February 2015).

b. An email from the Registrar of the Court to the respondent dated 24th May 2012 recording that Judge Cooper had directed that the application for adjournment was to be argued on the date of hearing by both the respondent and the Police. (Exhibit GH9) The message as well advised the respondent as follows:

> "So just so we are clear:
>
> **1 this matter will be called in the fixtures court on Monday;**
> **2 Mr Cooper both you and the defendant are expected to be present;**"

c. An email from the respondent dated 28 May 2012 sent to the registrar at 8.41 am (Exhibit GH10) in which he wrote:

> "Thank you for your recent email regarding this matter.
>
> Unfortunately I have the flu and can not appear today and conduct a hearing to an acceptable professional standard. My medical certificate is attached.
>
> I have contacted Mr Tregonning and advised him to appear today. The problem was on 9/3/12 Mr Tregonning had the hearing date in his mind as 4/5/12 and advised counsel of this date and we both appeared that day for hearing. We reported to Mr Kelvin Wong that day after being told by the police (Richard) it was not listed that day.
>
> I would request that the Registrar contact counsel before any date is confirmed due to current Court commitments.
>
> My apologies to the Court for this error and my non appearance today".

[9] It is not disputed that the respondent appeared in the District Court at Christchurch on that day.

[10] When the Tregonning matter was called in the Rotorua District Court on 28 May 2012, the presiding Judge asked Mr Birks (a duty solicitor on that day) to make

enquiries of the respondent. He advised the Court that the respondent was ill. The Committee said that Mr Birks was asked where the respondent physically was and for a second time advised the Court that the reason that the respondent was unable to appear was that he was unwell.

[11] Mr Birks was called on behalf of the respondent. He said that he was the rostered duty solicitor on the day. The Tregonning matter was called and the respondent was not present. There was some discussion about a medical certificate. As requested by the Judge, he rang the respondent. He assumed that it was a cell phone call during which he had a brief discussion with the respondent. When the matter was recalled he confirmed the medical certificate which he took to be accurate. He said that he had not asked where the respondent was. The matter was stood down again. He rang the respondent a second time but could not make contact. He did not recall having made any remark about the respondent being at home. He made an assumption that the medical certificate was sufficient to establish that the respondent was unwell. He said that he could not recall specifically what he discussed with the respondent.

[12] The respondent has admitted the sequence of events leading up to 28 May 2012 with the exception of the email from the Registrar dated 24 May 2012. He denies that he has misled the Court.

[13] The respondent gave evidence before the Tribunal. He said that he regularly suffers from sinusitis which affects his ability to carry out his professional duties and the conduct of cases to an appropriate level. This condition is affected by stress and he has learned that it is better not to go to Court when suffering. On 24 May 2012 he was in Nelson and felt unwell. He consulted a Dr Riley who certified that he should be off work for a week. He said that he did not improve over the weekend.

[14] His evidence was that he went to Christchurch on 28 May 2012 because his client there was to be sentenced in the Christchurch District Court and that he felt an obligation to represent his client in Court despite being unwell. He said that his state of health could manage a sentencing but could not allow him to conduct a defended

hearing in Rotorua where the demands upon him of concentration and the stress of conducting a defence were significantly greater.

[15] On 28 May 2012 he travelled from his home in Rotorua to Auckland airport; then from Auckland to Christchurch; appeared in the District Court at Christchurch to represent his client at sentencing; then returned to Rotorua via Auckland.

[16] He said that his email of 28 May to the Court was entirely honest.

[17] He said that he did not get the email of 24 May 2012 from the Court and that his email of 28 May did not relate to that email. He was unable to refer to any other email message to which his email might relate.

[18] The Tribunal does not accept that evidence. It accepts the assertion of the Committee that the email of 28 May speaks for itself, the purpose of which was to cause the recipient (the Court) to conclude that the respondent was unwell. As counsel for the Committee observed "*it says what it says."*

[19] The Tribunal concludes that the email was misleading and intentionally so. The respondent, although unwell, chose to go to Christchurch. He travelled from Rotorua to Auckland and then to Christchurch where he conducted a hearing and then returned. It was a plain choice of going to Christchurch rather than remaining in Rotorua and appearing in Court there.

[20] For those reasons the Tribunal has found that Charge one is proved.

[21] In respect of Charge two, the respondent has pleaded guilty to the alternative charge of unsatisfactory conduct. The Tribunal has accepted that plea after taking into account that much of what is alleged against the respondent has been included in Charge one such that there is in this charge a strong element of repetition.

[22] As to the penalties imposed, the Tribunal, while taking into account the respondent's health issues, has noted that those issues did not prevent him from going to Christchurch and did not prevent him from doing a deliberate act which it

has found to be misleading and dishonest. His fitness to practice is brought into question when his obligations to the Court are brought to bear.

[23] After the hearing was concluded and after reporting its decision and penalty, the Tribunal received a copy of a letter written by Mr Birks on 13 March 2012 advising the respondent that the date of 28 May 2012 set for the hearing was a final remand. That letter is important. In a response to a question from the Chair, the respondent stated that the first he knew of the 28 May 2012 date of hearing was when he appeared in Court with his client on 4 May 2012. That was plainly a lie given that he had Mr Birks' letter a few days after the 9 March adjourned hearing. The respondent can count himself fortunate that this advice was received after the hearing concluded. The resulting penalty could well have been different as the Tribunal's finding is that the letter is further confirmation that the respondent was not truthful before it.

[24] The interim order suppressing publication the name of the practitioner must now lapse. Section 256 of the Act requires that on the making of an order suspending a practitioner from practice, a notice must be published in the *Gazette* stating the date and effect of the order. Accordingly no order can be made under s 240.[1]

[25] The costs of the Law Society are approved in the sum of $27,925.62.

DATED at AUCKLAND this 26th day of March 2015

BJ Kendall
Chairperson

[1] *Canterbury District Law Society v David Alan Wood* [2009] NZLCDT 11.