BEFORE THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2014] NZLCDT 74

LCDT 026/14

BETWEEN **THE NATIONAL STANDARDS COMMITTEE OF THE NEW ZEALAND LAW SOCIETY**

Applicant

AND **MINKAI HUANG**

Respondent

CHAIR

Judge BJ Kendall (retired)

MEMBERS OF TRIBUNAL

Mr W Chapman

Ms C Rowe

Mr P Shaw

Mr B Stanaway

HEARING at Auckland

DATE 13 November 2014

COUNSEL

Mr L Clancy for the Standards Committee

Mr L Cordwell for the Respondent

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

[1] The Tribunal has reserved its reasons for making its orders following the hearing on 13 November 2014 at which the practitioner admitted one charge as set out below. This decision now records those reasons.

Charge and Background

The National Standards Committee of the New Zealand Law Society charged Minkai Huang of Auckland, former barrister, pursuant to s 241(d) of the Lawyers and Conveyancers Act 2006, with having been convicted of an offence punishable by imprisonment which conviction reflects on his fitness to practice or tends to bring his profession into disrepute.

The practitioner was convicted of an offence under s 220 of the Crimes Act 1961 that, being in a special relationship, he committed theft. The offence is punishable by a sentence of imprisonment of a maximum of 7 years.

The factual back ground, in summary, is that the practitioner was employed at the relevant time by Equity Law Barristers. He commenced his employment sometime in 2011. He did not have a fixed salary, but was to receive 30% of the fee billed for any work that he carried out.

Between September and October 2011, a client of Equity Law Barristers resident in China requested assistance in an immigration matter. The client became dissatisfied with the service provided and contacted the practitioner directly. He agreed to represent the client, but did so without authorisation from his employer.

He received a fee of $9,500 directly into a bank account controlled by him and accordingly committed theft from his employer. The client later withdrew her instructions having been advised that she was not eligible for a temporary visa. She requested a refund of the fee. The practitioner declined to make the refund even although he had not commenced any work for the client.

> Having pleaded guilty to the offence, the practitioner was convicted and later sentenced on 10 December 2013 to 100 hours community work. He completed that work within a month of sentencing. He has as well repaid the fee in full.

[2] The Standards Committee sought an order for strike off. It submitted that because the practitioner had been convicted of an offence of dishonesty, striking off was the appropriate penalty. The practitioner's actions created a risk for the client in that her payment was not held in the Equity Law Barristers Trust Account. His offending was further aggravated by the fact that he retained the fee for around eight months despite having conducted no work and having been requested to make the refund.

[3] Counsel for the Committee acknowledged that the practitioner has appeared remorseful for his conduct, been co-operative with the disciplinary process, has surrendered his practising certificate and withdrawn his application to practise on his own account. He submitted that personal mitigating factors may be less significant in the disciplinary context than in sentencing in criminal proceedings.

[4] Counsel for the practitioner submitted that the starting point in determining the proper penalty is the seriousness of the misconduct itself. He submitted that the following factors must be considered alongside the misconduct:

(a) That the practitioner has made reparation of the full amount.

(b) That this is a single incident in an otherwise unblemished record.

(c) That the practitioner has already been sanctioned by the Court causing a significant amount of embarrassment and shame to himself and his family.

(d) That the practitioner suspended himself and has not practised since the complaint was made.

(e) That there was no loss to the client.

(f) That this is the first disciplinary offence committed by the practitioner; and

(g) That he co-operated fully with the investigation and admitted his guilt at the earliest possible opportunity.

[5] Counsel for the practitioner submitted that a balancing of the above factors with the seriousness of the offending would permit a penalty short of striking off. He advocated a period of suspension.

Discussion

[6] Both counsel for the Committee and the practitioner have referred the Tribunal to the established guiding principles in disciplinary proceedings and in particular to the principles applicable to strike a practitioner off the roll. In *Dorbu v New Zealand Law Society*[1], the full court of the High Court when considering whether the practitioner's conduct, when viewed overall, warranted striking off said that *"wilful and calculated dishonesty normally justifies striking off".* It also said that "*personal mitigating factors may play a less significant role than they do in sentencing".*

[7] Both counsel for the Committee and the practitioner submitted that the case of *Hemi*[2] (where suspension rather than striking off was the penalty) has similarities with the present case. However, in that case (which also involved criminal offending), the amounts involved were significantly lower than here. There was strong personal mitigation. There was also *pro bono work* and no jeopardy to client funds. The Tribunal considers that the special features of *Hemi* are absent in this case.

[8] The Tribunal has found that here the practitioner has not persuaded it that there are any strong mitigating factors that would justify an order short of striking off.

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[1] [2012] NZAR 481 at [35].
[2] *Canterbury-Westland Standards Committee 3 v Leonard James Hemi* [2013] NZLCDT 23.

[9] In this case the Tribunal when considering the requirement to maintain the reputation and standards of the legal profession, has taken into account that the offending of this practitioner involved a client who was living overseas.

[10] The Tribunal accordingly reached the unanimous decision that it should order the practitioner be struck off and made the following orders:

Orders

1. The practitioner is struck off the roll of barristers and solicitors.

2. The practitioner is to pay the costs of the New Zealand Law Society in the amount of $7,461.17.

3. The practitioner is to refund to the New Zealand Law Society the Tribunal's s 257 costs which are fixed at $1,769.

DATED at Auckland this 26th day of November 2014

BJ Kendall
Chairperson