NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

Decision No. [2009] NZLCDT 2

LCDT 001/09

BETWEEN	S N H Appellant
AND	NEW ZEALAND LAW SOCIETY Respondent

Hearing: 17 March 2009

Appearances: Mr R B Squire QC for the Appellant
Mr G Turkington for the Respondent

Chair: Judge D F Clarkson

Members of Tribunal: Mr J Upton QC
Ms S Gill
Ms S Cole
Mr B van der Kolk

Judgment: 5 May 2009

DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS TRIBUNAL

INTRODUCTION

[1] This is an appeal pursuant to s.42 of the Lawyers and Conveyancers Act 2006 ("the Act") against the refusal of the New Zealand Law Society's Fitness to Practise Committee ("FPC") to issue Mr H a current practising certificate. Pursuant to s.42(2)(a) the appeal proceeded by way of rehearing and indeed in this instance it preceded on a *de novo* basis. The process is discussed further in this decision.

BACKGROUND

[2] Mr H had been in practice for over 20 years when he was adjudicated bankrupt in mid-April 2008. As a result of his bankruptcy his practising certificate was suspended.

[3] Prior to this event Mr H had appeared on 30 August 2007 before the New Zealand Law Practitioners Disciplinary Tribunal ("NZLPDT"). He had pleaded guilty to a charge of bringing the profession into disrepute by reason of having sustained four convictions for breath or blood alcohol offences. He was censured by the Tribunal and gave an undertaking to them that he would:

(1) Abstain from alcohol for 12 months from 30 August 2007;

(2) That he would supply liver function tests every four months to the Wellington District Law Society; and

(3) That he would maintain contact with the counsellors with whom he was working with at that time and consented to those counsellors disclosing any concerns about his process or conduct by reports to be provided every four months.

This undertaking was signed 30 October 2007.

[4] Unfortunately the appellant did not abide by any one term of this undertaking. The second part of the undertaking was that relating to liver function tests. Mr H did not fully explain why these had not been provided except to say that they were of themselves inconclusive and he considered not particularly useful. It seems that Mr H has gained further information about the nature of this testing during his period of residential treatment. It is unfortunate that he did not see fit to undertake the tests in any event, in order to at least comply with one part of the undertaking or alternatively take up the matter with the Society in an effort to have that part of the undertaking amended.

[5] The most serious breach occurred on 27 and 28 November 2007, when the appellant, as he put it "slipped", consumed alcohol and then drove a motor vehicle. He was charged with a further drink driving offence, although was subsequently acquitted.

[6] It is important, for the purposes of this decision to go briefly into the circumstances leading up to the undertaking being given. The NZLPDT's concerns are not difficult to discern. A person who is addicted to alcohol in the way which Mr H openly concedes he was and offends on a repeated basis in this manner is not only a risk to himself and the public but brings the entire profession into serious disrepute, particularly if it is perceived as doing nothing about it member's problem. The NZLPDT not only recorded its disappointment in Mr H's behaviour, but wanted to ensure the protection of the public, by requiring the undertakings given.

[7] In his affidavit and in his oral evidence before this Tribunal, on the occasion of the appeal Mr H was candid both about his drinking and about the personal circumstances which had caused him stress and led to his financial circumstances becoming so depleted. It is not necessary to go into the detail of those personal matters except to say that by the time the undertaking was entered into in October 2007 Mr H was confident, firstly that his personal circumstances had improved to an extent to where he was not likely to suffer the stresses of frequent travel and the difficulties he had encountered over previous years, but secondly, he was confident that he had sought help for his alcohol addiction and had this largely under control. In evidence Mr H confirmed that the counsellor who he was attending in October 2007 classified him as being "in remission". Further in October 2007 Mr H had completed a number of assessments including the medical assessment necessary to achieve the return of his licence from the secretary of Land Transport. He was able to resit and had regained his driver's licence after some 15 months without it.

[8] Mr H's evidence to the Tribunal was that up until the incident in November 2007 the therapeutic approach offered to him was based on a "harm minimisation and behavioural modification model.

[9] Following his apprehension in November 2007, we accept that he was utterly dismayed with his behaviour and appalled at the likely consequences. He was of course, on conviction, contemplating a likely jail sentence. He was also aware that he had breached his undertaking very shortly after giving it and could not understand how he had allowed himself to get into this position. Thus the very next day he attended his counsellor and despite the counsellor's advice that this was a "mere slip" and that residential treatment was unnecessary, Mr H insisted on a referral immediately to a rehabilitation centre where he could live-in and deal more comprehensively with the addiction. It was necessary for him to travel to the Capri Trust in Auckland to receive this treatment as that was the only facility which could receive him immediately. He remained at that centre until they closed it over the Christmas period. He was then obliged to return to Wellington and wind up his practice, marshal the necessary funds for further residential treatment and then he returned to complete this during May and June of 2008.

[10] This program had a completely different approach, namely a 12-step abstinence program rather than that which his previous counsellors had offered. It was for this reason that the previous counsellors did not provide the four-monthly reports referred to in the undertaking.

[11] Mr H's evidence was that at the time the undertaking was given he had sustained periods of abstinence and was reassured by the assessments to which we have referred. He considered that he was well placed to give the undertakings. However having undertaken the residential treatment and considerably enhanced his knowledge and education, he now realises that the undertaking effectively set him up to fail. In saying that he is not suggesting that was the intention of the NZLPDT, however he says now that he had not made sufficient changes in his lifestyle to be as confident and knowledgeable about abstinence as he now is.

[12] Again it is not necessary to go into the details which were imparted by Mr H in his evidence about his changed way of life and the support he received. Suffice to say the Tribunal was impressed with his continuing efforts to ensure that he does not put himself at risk of succumbing to his alcohol dependency because of the way in which he structures his day and his life in general. Mr H's attitude now is

that he cannot promise that he will never drink but that he can promise that he will not drink and drive.

[13] The Tribunal was, of course, anxious to ascertain whether any of Mr H's clients have suffered as a result of his alcoholism. He reassured the Tribunal that such was not the case but he was frank enough to acknowledge that he believed that in the absence of alcohol he would in future perform at an even higher level.

[14] Mr H outlined to the Tribunal the specific supports in place on a weekly and if necessary, more frequent basis and reassured us that should he "slip" in future he had sufficient supports in place to prevent a full relapse.

[15] Mr H's appeal is supported by two practitioners who are in a position to employ him immediately.

DECISION OF THE FITNESS FOR PRACTISE COMMITTEE

[16] Because he was receiving residential treatment Mr H did not respond in a timely manner to the approaches by the New Zealand Law Society in respect of providing information both as to the breach of undertaking nor in relation to the application for reinstatement of his practising certificate. On one occasion, we are satisfied that he gave a less than open response to the Law Society when responding to an inquiry about the blood alcohol charge arising out of the November 2007 incident. Mr H conceded this was not an appropriate response and one of which he thought better shortly afterwards and determined to cease practice. It is most unfortunate that from the time that Mr H's period of residential treatment was concluded that information seems to have been provided to the FPC on a somewhat piecemeal basis. The comprehensive picture available to the Tribunal at this hearing was clearly not available to the Committee when it reached its decision. Thus that decision was hardly surprising and the Tribunal has no criticism of the Committee in respect of the substance of the decision. There were clearly very serious concerns and indeed there remain serious concerns about Mr H's behaviour in the past.

[17] As well as the substantive issues outlined above a procedural issue also arose in the course of the hearing.

PROCEDURAL MATTERS

[18] Mr Squire raised with the Tribunal the process followed by the NZLR (FPC) and submitted that it failed to follow the prescribed process contained in Regulation 7(2) of the Lawyers' and Conveyancers' Act (Lawyers: Practice Rules) Regulations 2008. He said that process was mandatory, with the result that the decision reached was procedurally and in substance flawed and wrong.

[19] Regulation 7 provides as follows:

> "**Issuing or declining or refusing to issue, practising certificates**
>
> (1) If the Law Society is satisfied that there are no grounds for declining or refusing to issue an applicant with a practising certificate, it must, as required by section 39(1) of the Act, issue the appropriate kind of practising certificate to the applicant, in a form prescribed by the Law Society.
>
> (2) However, if the Law Society believes on reasonable grounds that there are or may be grounds for declining or refusing to issue a practising certificate, the Law Society Must –
>
> (a) notify the applicant of the reason why the Law Society believes that there are or may be grounds for declining or refusing the application; and
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> (b) specify a time, which must be reasonable in the circumstances, within which the applicant may respond to the notice; and
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> (c) consider any response from the applicant that is received within the specified time; and
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> (d) either issue a practising certificate in accordance with subclause (1), or decline or refuse to do so.
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> (3) If the Law Society declines or refuses to issue a practising certificate, it must notify the applicant in writing of that decision and at the same time advise the applicant of his or her right to appeal against that decision to the Disciplinary Tribunal under section 42 of the Act."

[20] Mr Squire argued that that provision required the FPC, once it had formed the belief that there were or may have been grounds for declining or refusing Mr H's application:

i) To notify Mr H of the reasons why the FPC had that belief;

ii) Provide him with a reasonable opportunity to respond; and

iii) To consider Mr H's response before making a decision whether to decline to issue him with a practising certificate. He submitted that the FPC failed to comply with the mandatory requirements of Regulation 7. No notification, he said, was given to Mr H by the FPC as to its belief before it declined to issue a practising certificate, and it gave him no opportunity to comment or respond before it made its decision to refuse his application.

[21] Mr Squire submitted that the requirements of Rule 7 were fundamental, and that failure to comply with them must render any decision invalid.

[22] Mr Turkington for the NZLS, submitted that Mr H was fully aware of the matters to be traversed, was notified by the FPC before it made its decision on 24 October 2008, and then, when it turned out that he had not received the relevant correspondence, reconsidered the matter after further input from Mr H.

[23] Mr Turkington said that a wealth of information had been put forward by Mr H to the Society and referred in particular to his letters of 7 July 2008 and 11 July 2008 to the Wellington District Law Society together with the various annexures to the latter letter. The letter of 8 October 2008 to Mr H was a signal to Mr H that the grounds to be considered were those in his letter of 7 July 2008, and gave him a chance to make any further submissions before the Committee met to make its decision on 24 October 2008. Mr Turkington said that that letter and what preceded it made it plain what was to be considered by the Committee at its meeting.

[24] Mr H had said earlier that he did not receive that letter of 8 October 2008 because he had been out of Wellington at the relevant time and not cleared his mail until his return. We accept that evidence. It was not really challenged in any event. Mr Turkington said that if there was any fault in the decision of 24 October 2008 was cured by a subsequent reconsideration by the Committee on 22 December 2008.

DISCUSSION

[25] The Tribunal considers the provisions of Regulation 7(2) to be mandatory, and intended for the benefit of the practitioner in question. Normally, therefore, it would have to be observed in its terms unless, for example, the practitioner in question has waived its requirements. As to waiver in such circumstances, note e.g. *Hill v Wellington Transport Licensing Authority* [1984] 2 NZLR 314. Failure to comply with the requirements of Regulation 7(2) would therefore normally be regarded as a breach of natural justice and render invalid the decision in question. However, until set aside in appropriate proceedings, such a decision would still stand and be able to be appealed.

[26] Whether such a breach, if present, could be cured on appeal depends on the nature of the appeal process, and whether, to quote from Judicial Review, GDS Taylor, 1991 at para.13.78:

> "… the appeal proceedings as to a de novo one or otherwise sufficiently independently of the original decision to say that the breach in the original decision no longer had any effect on the appellate decision …. The test is whether in the end the plaintiff had a fair hearing. Thus a full appeal on the merits will cure breach but a less than perfect appeal process will not …"

[27] The Tribunal regards its function and role under s.42 of the Lawyers and Conveyancers Act 2006 as unqualified and allowing the Tribunal to deal with such appeals *de novo*. As a result, it is the Tribunal's duty in such cases to reach its own independent findings and decision on the evidence which it hears or admits, and while entitled to give such weight as it considers appropriate to the opinion of the FPC, it is in no way bound thereby. In brief, in a s.42 appeal, the Tribunal does not see that there is any presumption in favour of the decision under appeal. It considers

that the Tribunal has to approach the matter afresh. Note *Shotover Gorge Jet Boats v Jamieson* [1987] 1 NZLR 437 and more recently *Austin Nichols & Co v Stichting Loadestar* [2008] 2 NZLR 141 and *Cullen v PCC* (Auckland, High Court CIV-2008-404-6786, judgment dated 28 November 2008).

[28] In the present case, as a result, the Tribunal does not need to reach a considered view on which of the two competing arguments put forward before it is correct as to whether Regulation 7(2) has been complied with, because whichever it is, the Tribunal is required in its view to look at the matter *de novo*, and it now moves on to do so. The Tribunal considers that it is acting on appeal sufficiently independently of the original decision to cure any defect in that decision or the process which preceded it.

DECISION OF THE TRIBUNAL

[29] Subsequent to the hearing, as requested, the Tribunal has received an updated report form Capri Trust, who are the treatment facility for Mr H, confirming his progress and the ongoing arrangements for his support.

[30] We are satisfied, having had the opportunity of the additional material, as well as of hearing from Mr H directly, that the appeal ought to be allowed and a Practising Certificate issued for Mr H by the Society. Mr H is well aware that he has a great deal at stake should he repeat the mistakes, particularly in terms of honouring his commitments to his profession.

PUBLICATION

[31] Section 240 of the Act provides:

> "**240 Restrictions on publication**
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> (1) If the Disciplinary Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person (including (without limitation) the privacy of the complainant (if any)) and to the public interest, it may make any 1 or more of the following orders:

(a) an order prohibiting the publication of any report or account of any part of any proceedings before it, whether held in public or in private:

(b) an order prohibiting the publication of the whole or any part of any books, papers, or documents produced at any hearing:

(c) subject to subsection (3), an order prohibiting the publication of the name or any particulars of the affairs of the person charged or any other person.

(2) Unless it is reversed or modified in respect of its currency by the High Court on appeal under section 253, an order made under subsection (1) continues in force until such time as may be specified in the order, or, if no time is specified, until the Disciplinary Tribunal, in its discretion, revokes it on the application of any party to the proceedings in which the order was made or any other person.

(3) Subsection (1)(c) does not apply to, or in respect of, –

(a) any communications by or between any or all of the following:

(i) the Council of the New Zealand Law Society:

(ii) the Council of the New Zealand Society of Conveyancers:

(iii) an officer of either of the societies specified in subparagraphs (I) and (ii):

(iv) an employee of either of the societies specified in subparagraphs (I) and (ii):

(v) a Standards Committee:

(vi) an employee of a Standards Committee:

(vii) the Legal Complaints Review Officer:

(viii) the Disciplinary Tribunal:

(b) the publication pursuant to section 256 of a notice in the Gazette."

[32] It was correctly submitted for Mr H that a great deal of personal material has been referred to in the course of the hearing and this decision and suppression of the practitioner's name and of those supporting him in his rehabilitation is proper.

[33] The Society takes a neutral stance, accepting that this is not a case where publication is required for protection of the public, and that publication could compromise his efforts in rehabilitation.

[34] Both counsel cited the proper authority for considerations of this kind as: *S v Wellington District Law Society* [2001] AR465.

[35] We consider that publication is not in either the public or the practitioner's interests and that the order for suppression as sought is proper.

COSTS

[36] Section 249 governs this issue:

> "**249 Order for payment of costs**
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> (1) The Disciplinary Tribunal may, after the hearing of any proceedings, make such order as to the payment of costs and expenses as it thinks fit.
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> (2) In particular, the Disciplinary Tribunal may order that costs be awarded to any person to whom the proceedings relate, and that those costs be paid –
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> (a) by the New Zealand Law Society (if that person is a lawyer or a former lawyer or an incorporated law firm or former incorporated law firm or an employee or former employee of a lawyer or incorporated law firm); or
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> (b) by the New Zealand Society of Conveyancers (if that person is a conveyancing practitioner or a former conveyancing practitioner or an incorporated conveyancing firm or former incorporated conveyancing firm or an employee or former employee of a conveyancing practitioner or incorporated conveyancing firm).
>
> (3) In particular, without finding the person charged to be guilty, the Disciplinary Tribunal may, if it considers that the proceedings were justified and that it is just to do so, order that person to pay to the New Zealand Law Society or the New Zealand Society of Conveyancers such sums as the Disciplinary Tribunal thinks fit in respect of the expenses of and incidental to the proceedings and any investigation of that person's conduct or of that person's affairs or trust account carried out by, or on behalf of, a Standards Committee or the Legal Complaints Review Officer.

> (4) In this section, expenses includes not only out-of-pocket expenses but also such amounts in respect of salaries of staff and overhead expenses incurred by either the New Zealand Law Society or the New Zealand Society of Conveyancers as the Disciplinary Tribunal considers properly attributable to an investigation."

[37] We consider that this appeal is correctly included in the definition of "proceedings" and that jurisdiction exists for an award of costs. As between the parties, we agree with the submissions of both counsel, that given the further material available to the Tribunal, costs ought to lie where they fall.

[38] Whilst it would have been usual to order some costs and expenses of the Tribunal, we recognise that given Mr H's current bankruptcy this is neither desirable nor practicable.

D F Clarkson
Chair
New Zealand Lawyers and
Conveyancers Disciplinary Tribunal