NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS

NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS ACT 1996

IN THE MATTER	of the New Zealand Institute of Chartered Accountants Act 1996 and the Rules made thereunder
AND	
IN THE MATTER	of **Member W**

DETERMINATION OF THE DISCIPLINARY TRIBUNAL OF THE NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS
15 October 2018

Hearing:	21 May, 27 July 2018 Submissions as to penalty, costs and publication on the papers
Location:	The offices of Chartered Accountants Australia and New Zealand, Level 7, Chartered Accountants House, 50-64 Customhouse Quay, Wellington, New Zealand
Tribunal:	Mr MJ Whale FCA (Chairman) Mr DJH Barker FCA Mr JN Murray FCA Mr JD Naylor FCA Ms A Kinzett (Lay member)
Legal Assessor:	Mr David Laurenson QC
Counsel:	Mr Richard Moon for the prosecution

At a hearing of the Disciplinary Tribunal on 21 May 2018 held in public at which the Member was in attendance and not represented by counsel the Member originally denied the particulars and pleaded not guilty to the charges. The hearing proceeded on that basis.

The charges and particulars as laid were as follows:

CHARGES

THAT in terms of the New Zealand Institute of Chartered Accountants Act 1996 and the Rules made thereunder, and in particular Rule 13.39 the Member is guilty of:

1. Breaching the Rules and/or Institute's Code of Ethics,

2. Failing to respond promptly to communications from the Institute; and/or

PARTICULARS

IN THAT in the Member's role as a Chartered Accountant and in relation to a complaint, the Member:

(1) Failed to engage with NZICA's New Zealand Quality Assurance team in a timely and/or professional manner in that the Member;

(a) failed to provide information requested by the Quality Assurance team to demonstrate the shortfalls identified in a 2013 practice review by NZICA had been addressed;

(b) failed and/or refused to participate in a future review and/or alternative meetings proposed by the Quality Assurance team to help the Member remediate the shortfalls; and/or

(c) failed to respond and/or respond in an appropriate manner to correspondence from the Quality Assurance team; and/or

(d) failed to document a system of quality control for the Member's practice, as required by *PS-1 Quality Control*,

in breach of the Fundamental Principle of Professional Competence and Due Care and/or paragraphs 130.1 and/or 130.4 and/or the Fundamental Principle of Professional Behaviour and/or paragraph 150.1 of the Code of Ethics (2014); and/or

(2) Failed, since 1 July 2014, to meet the minimum requirements for continuing professional development ("CPD") by:

(a) failing to complete 120 hours of CPD over each rolling triennium (of which 60 hours must be verifiable) and/or complete 20 hours of CPD each year; and/or

(b) failing to maintain a record of their CPD and or retain it for the required period of five years,

in breach of Schedule 2 of *Regulation CR-7 "Continuing Professional Development"*, applicable to all members of Chartered Accountants Australia and New Zealand resident in New Zealand.

BACKGROUND

The Member was before this Tribunal as a result of their failure to return to the Professional Conduct Committee ("PCC") by the required date an order by consent proposed by that Committee pursuant to Rules 13.7(d) and 13.8 of the Rules of the New Zealand Institute of Chartered Accountants, following the Member's Final Determination hearing held on 28 November 2017.

The Member's evidence under cross examination, which the Tribunal accepts, is that the Member signed the consent order, intending to accept it, but overlooked posting it until after the stipulated date. The PCC determined, in the Tribunal's view correctly, that Rule 13.8 precluded it from accepting the order - because the period specified in the notice the Member was given had expired before the PCC had received the signed consent order, the Rules deemed the PCC as having decided to refer the matter to this Tribunal.

After all the evidence had been completed but before submissions on liability were heard, it came to the Tribunal's attention that written notice of the Member's Final Determination had been given to the Member one day later than stipulated in Rule 13.10. The Tribunal sought submissions from the Member and the PCC as to whether the parties accepted there had been a breach of Rule 13.10 and, if so, what the effect of that breach was on the disciplinary process resulting in this hearing and on the hearing itself. It also recommended that the Member seek legal advice before filing and serving their submissions.

The Tribunal received and considered those submissions, and directions from the Tribunal's legal assessor. It noted the direction of the legal assessor that the Tribunal's only powers were either to dismiss the charges or to proceed with the hearing – it was not possible to unwind the Tribunal process and reinstate the proposed consent order.

The Tribunal did not accept the Member's submission that given the context of its day of arrival, the notice about the consent order was 15 days late. It finds that in terms of the Rules the notice was sent to the Member one day late.

The Tribunal determined that the breach by the PCC of Rule 13.10 did not justify the dismissal of the charges - the disciplinary proceedings should continue and be completed. In doing so:

- It relied on the principles laid down in *Auckland District Law Society v Leary*, High Court, Auckland M1471/84, 12.11.85, Hardie Boys J and the Court of Appeal decision *Chow v Canterbury District Law Society* [2005] NZCA 313; and

- It accepted the PCC's submissions that the rule breached was procedural, the degree of non-compliance was minor and there had been no prejudice to the Member arising from the failure to comply with Rule 13.10. The Tribunal should not let a technicality such as this prevent determination of a proper disciplinary proceeding even though the charges could not be characterised as serious.

DECISION

As a result of the Member seeking legal advice, the Member admitted all the particulars and changed their plea on both charges to guilty. The Tribunal confirms that the particulars have been made out by the evidence before it and the relevant particulars support the charges.

PENALTY

The conduct by which the Member has fallen short in performing their professional obligations is at the low end of the scale of seriousness. That conduct was not client facing. The Tribunal accepts that during much of the relevant period the Member suffered more than their fair share of personal and family issues and consequent health issues and that that had an effect on the Member's conduct. However, as the Tribunal has previously noted, failure to respond to correspondence from and provide information requested by the Institute, even to the limited degree that occurred in this case, is a significant matter. Failure to comply with minimum requirements for CPD is unacceptable – as the PCC noted in its Final Determination, CPD is an important membership obligation that helps ensure members are keeping up to date with continually changing professional practices and developments in accounting. The Member's failure to have documented quality control policies and procedures is also unacceptable - as the PCC also observed in the Member's Final Determination, the quality control standard serves an important function of ensuring practitioners - be they in sole practice or in a larger firm - are providing a structured, organized and efficient service to their clients. Throughout this time the Member had also received some support and significant latitude from the Institute.

The Member's conduct is sufficiently serious to warrant disciplinary sanction. The Member has acknowledged this as they have agreed with the PCC's submission that a censure should be imposed.

The Tribunal accepts that in these circumstances censure is the appropriate penalty. In reaching that view, it has taken into account the following:

- The factors to be considered when determining an appropriate penalty identified in *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354.

- The Member's 33 years' unblemished record.

- There has been no suggestion of any lack of quality in the services the Member provides clients.

- The practice review by the PCC prior to making its Final Determination had a satisfactory outcome (the reviewer noting that although the Member continued to have a shortfall in their CPD hours and did not have a log available, the Member appeared to have significant technical knowledge).

- The Member has met the minimum verifiable CPD hours requirement for each of the years ended June 2017 and 2018.

- The Member has now in most respects documented a satisfactory quality control process.

Pursuant to Rule 13.40(k) of the Rules of the New Zealand Institute of Chartered Accountants the Disciplinary Tribunal orders that the Member be censured.

COSTS

In accordance with a direction of the Tribunal before the teleconference referred to below, the PCC produced a costs schedule totaling $31,387, which included costs of $5,026 in relation to addressing the Rule 13.10 issue, and a costs estimate of $1,810 in relation to preparation for and attending a teleconference mainly addressing the Rule 13.10 issue. The costs schedule did not include the PCC's costs of making submissions, or the time of the legal assessor and the Tribunal in considering the parties' written submissions, on penalty, costs and publication. The Tribunal estimates those costs and time at between $3,000 and $5,000.

The PCC (quite correctly) does not claim its costs in responding to the issue the Tribunal raised in relation to Rule 13.10. But it does seek the balance of its costs, in full, in accordance with the Practice Note as to Costs issued by the Tribunal.

The Member made lengthy submissions about costs. The Member noted that their counsel had suggested to the PCC that those costs be split (presumably equally) but that that suggestion had been (implicitly) rejected. The Member submitted that the Tribunal should stand back and ask itself whether the profession has adequately supported its member given the known personal circumstances, and that there should be come compassion.

The Tribunal's general approach is that the starting point is 100% of costs, noting that the Institute already bears the cost of abandoned investigations and costs up to the Professional Conduct Committee's decision to hold a Final Determination. In this case that means the starting point is $27,000-$29,000 before costs of publication.

In the Tribunal's view, the PCC fairly put to the Member in Mr Moon's email of 15 March 2018 the options available to the Member as to how matters could be dealt with before the Tribunal. Mr Moon in that email also suggested that the Member obtain legal advice. The Member did not seek legal advice and, as the Member was entitled to do, chose to deny the particulars, plead not guilty and put the PCC to proof. As a result the PCC (and the Institute) have incurred significant additional costs. The Tribunal accepts the PCC's submission that the Institute's membership at large should not pay those costs or the costs of proceedings which automatically followed from the Member's failure to deliver the consent order by the required time.

The Tribunal is conscious that the Member's failure to return the signed consent order in time may have in part arisen from the fact that it was received immediately before Christmas. There may well have been good reasons why the notice was delivered then, but it is a practice which the PCC should in future avoid for all notices unless members are given until the end of January to respond. But this matter is not one to be taken into account in determining the quantum of the costs award.

In reaching its decision as to what costs award is fair and reasonable in the circumstances, the Tribunal has had regard to the fact that the Member incurred costs in seeking legal advice about the impact on the proceedings of the PCC's breach of Rule 13.10. In the Tribunal's opinion, the Member should not have to bear those costs.

There are no other mitigating factors such as excessive or unnecessary expenses incurred or demonstrated evidence of hardship (inability to pay).

Pursuant to Rule 13.42 of the Rules of the New Zealand Institute of Chartered Accountants the Disciplinary Tribunal orders that the Member pay to the Institute the sum of $21,000 in respect of the costs and expenses of the hearing before the Disciplinary Tribunal and the investigation by the Professional Conduct Committee. No GST is payable.

SUPPRESSION ORDERS

Pursuant to Rule 13.62(b) of the Rules of the New Zealand Institute of Chartered Accountants the Disciplinary Tribunal orders that all details relating to the Member's health, personal and family circumstances be suppressed.

PUBLICATION

The PCC sought publication of this decision on the CAANZ website and in *Acuity* magazine, with mention of the Member's name and locality. It submitted that this is the default position under Rule 13.44(a). The public interest considerations of open justice and transparent regulation strongly underpin that approach. In this case the Member's private interests, including any effect of publication on their health, do not displace the public interest factors.

The PCC further submitted that although the Member's significant personal and family issues to some degree explained (and mitigated) the Member's conduct, historical medical evidence does not assist the Tribunal in weighing the effect on the Member of publication of its decision (*Qui v NZICA*, Appeals Council, 21 May 2018).

The Member tendered medical records supporting their uncontested evidence during the hearing about their medical history.

The Member submitted that the personal and family circumstances which affected their conduct are relevant to both penalty and name suppression. The Member also drew the Tribunal's attention to the fact that the PCC, when proposing the consent order following the Final Determination, expressly directed that it was not in the public interest that notice of its decision and the consent orders be published.

The Member also submitted that the personal and family circumstances are the very reason why a person's name should be suppressed, because otherwise those personal circumstances become known to the public at large. However, the Tribunal considers that concern has been addressed by the Tribunal ordering that all evidence and other information relating to the Member's health, personal and family circumstances be suppressed.

The Tribunal accepts the PCC's submission, supported by the authorities (including *Qui* by which it is bound), that historical medical evidence does not particularly assist the Tribunal in determining whether the health of a member may be so affected by publication of their name and location as to displace the public interest considerations earlier referred to. Further, such evidence as there is about the likely effect of publication on the Member's current health is in the Tribunal's view insufficient. As noted in *Qui*, there would need to be compelling evidence of publication having a highly prejudicial effect on a member's health (physical or mental) before the Tribunal should make

an assessment of whether protecting the member's health outweighed the public interest in identifying the member.

As the Court of Appeal confirmed in *Y v the Attorney General* [2016] NZCA 474, the correct approach is for the Tribunal to *strike a balance between open justice considerations and the interests of the party who seeks suppression.* The Court in that case acknowledged that in some situations there may be little or no legitimate public interest in knowing the name or identifying particulars of a party or in knowing particular details of a case.

Having carried out that balancing exercise, for the reasons that follow the Tribunal considers that in the circumstances of this case legitimate public interest considerations can be met by publishing the decision without mention of the Member's name and location:

- The breaches by the Member were at the low end of the scale of seriousness. They were also not client facing.

- Although it is by no means its primary purpose, publication is often seen as having a punitive effect. In this case the Tribunal considers the detrimental effect on the Member would be totally disproportionate to the nature and seriousness of their conduct.

- There is precedent for this approach by the Tribunal, including *Re Member Y* (31 March 2016).

The PCC, no doubt applying the same principles as referred to above and without the benefit of a full hearing and cross examination, decided that it was not in the public interest to publish its decision. In the Tribunal's view there was nothing in the evidence before the Tribunal which if known to the PCC would have affected that decision. However, in its submissions the PCC noted that the Appeals Council in *Qui* attached no significance to the fact that the consent order offered (which expired despite an intention to accept it) would not have included publication. We do not understand the Appeals Council as saying that no significance can ever be attached to such a decision or that such a decision cannot be regarded as a factor in appropriate circumstances. However, the Tribunal records that it would have reached its decision on publication in any event.

The Tribunal also distinguishes *Qui* (in which the Tribunal's decision to order publication with name and locality was upheld on appeal) on the following grounds:

- In *Qui* some of the conduct complained of was client facing (failing to act in a timely and/or professional manner in dealings with a former client and their incoming accountant) - generally speaking, there is a legitimate public interest in learning of the identity of a member in those circumstances; and

- In *Qui*, unlike this case, the member also pleaded guilty to the more serious charge of negligence of such a degree as to bring the profession into disrepute.

In accordance with Rule 13.44(a) of the Rules of the New Zealand Institute of Chartered Accountants the decision of the Disciplinary Tribunal shall be published on the CAANZ website and in *Acuity* magazine without mention of the Member's name and locality.

RIGHT OF APPEAL

Pursuant to Rule 13.47 of the Rules of the New Zealand Institute of Chartered Accountants which were in force at the time of the original notice of complaint, the parties may, not later than 14 days after the notification to the parties of this Tribunal's exercise of its powers, appeal in writing to the Appeals Council of the Institute against the decision.

The suppression orders shall take effect immediately. No decision including the direction as to publicity shall take effect while the parties remain entitled to appeal, or while any such appeal by the parties awaits determination by the Appeals Council.

MJ Whale FCA
Chairman
Disciplinary Tribunal