

**BEFORE THE NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS
APPEALS COUNCIL**

IN THE MATTER OF an appeal against a determination of the Disciplinary Tribunal of the
New Zealand Institute of Chartered Accountants dated 4 November
2013

BETWEEN **LYNN ROBERTSON**, Accounting Technician (suspended) of
Dunedin

Appellant

AND **THE PROFESSIONAL CONDUCT COMMITTEE OF THE NEW
ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS**

DECISION OF APPEALS COUNCIL AS TO COSTS

Dated 4 June 2015

Members of the Appeals Council:

Les Taylor QC (Chairman)
Paul Armstrong FCA
John Hagen FCA

Counsel:

Richard Moon for the Professional Conduct Committee

Appeals Council Secretariat:

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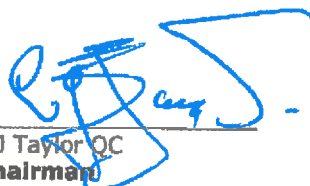
1. On 23 December 2014 the Appeals Council issued a final decision following its interim decision dated 29 August 2014. In that decision the Professional Conduct Committee ("PCC") was directed to file submissions as to costs by 30 January 2015 with any submissions in reply to be received no later than 12 February 2015.
2. On 27 January 2015 we received submissions from the PCC seeking an order for costs on an indemnity basis in the sum of \$23,654.53. On 10 February 2015 the appellant wrote advising that she had no ability to pay the proposed costs because her employment had been terminated and she attached various documents relating to her financial position.
3. The PCC responded on 20 February 2015 noting that, although a mortgage had been disclosed in the information provided by Mrs Robertson, there had been no disclosure of the asset in respect of which the mortgage was registered and that she appeared to be able to earn some income. It therefore submitted that there should be no reduction to the award of costs "bearing in mind the Institute has the option to negotiate, compromise and/or enforce such debts."
4. The Appeals Council issued a minute on 22 April 2015 indicating that it was not satisfied that the financial position of the appellant was such that no order as to costs, or a reduced order as to costs, should be made. Before making a final determination, however, the Appeals Council gave the appellant the opportunity to provide a sworn statement fully detailing all assets and liabilities associated with her, her immediate family or any related Trust. The appellant was given 14 days from the date of the minute to provide a sworn statement.
5. On 7 May 2015 the appellant wrote to the Appeals Council again stating that she had no ability to pay the costs sought of \$23,654.53. She advised that the small accounting firm that she had contracted to had terminated her contract and she had had no success in obtaining any of the jobs that she had applied for. She further asserted that she had been removed as a tax agent and was unable to get work as a self-employed accountant.
6. The appellant further advised that her husband was unable to work and that one of her two children lives in the joint family home which is valued at \$335,000 with a \$65,000 mortgage. She has real concerns, however, that she would not be able to borrow money to pay the amount of any costs award. She stated that her husband would not consent to the raising of any such mortgage and that, because of her inability to service a loan, she did not believe she would be able to raise finance in any event.

7. The appellant attached to her letter her 2015 tax accounts and her current bank statement which indicate that she has no available cash or likely income to enable payment of the costs sought by the PCC.
8. Notwithstanding the Appeals Council's specific request that the appellant provide a sworn statement of position, the appellant has chosen not to do so. We therefore deal with the PCC's application for costs on the basis of the information provided by the appellant, which we take at face value, but record our remaining concern that, in the absence of a sworn statement, there may not have been full disclosure by the appellant.
9. On 2 February 2015 the Disciplinary Tribunal issued a practice note as to costs and expenses, a copy of which is attached to this decision. We consider that the practice note reflects a proper approach to the award of costs and we have applied the terms of the practice note to this decision.
10. In our view the only matter which could justify a reduction or refusal of the award of costs sought by the PCC is whether the appellant has demonstrated hardship resulting in a significant inability to pay and for which proper information has been provided. On the basis of the information provided by the appellant, it seems clear that she is not currently able to pay the amount of costs sought from income or cash resources available to her. We also accept her assertion that she may have difficulty in accessing the substantial equity in the family home in order to enable payment of a costs award against her.
11. The fact is, however, that there is a substantial equity in the home and, if the property was sold or some finance was able to be raised with security over the property, the appellant would be able to pay the amount of costs sought by the PCC. Absent the issue of the appellant's inability to pay, the Appeals Council is satisfied that the full amount sought by the PCC in respect of the appeal should be paid by the appellant.
12. We have given careful consideration to the matters raised by the appellant. Although we accept that the appellant does not have sufficient income or cash resources to enable her to pay the costs sought at present, there clearly is a substantial equity in the home which could be used to pay an award of costs. There is therefore considerable force in the submissions of counsel for the PCC that there should be no reduction to the award of costs bearing in mind that the Institute has the option to negotiate, compromise and/or enforce such debts.

Conclusion

13. Given the evidence that there is substantial equity in the home, we are not satisfied that the appellant has a significant inability to pay which would justify reduction of an award of costs or a refusal to make an order for costs. We therefore order the appellant to pay costs in the sum of \$23,654.53.

Dated this 14th day of June 2015.


L.J. Taylor QC
Chairman
Appeals Council

Disciplinary Tribunal of the New Zealand Institute of Chartered Accountants

Practice Note as to Costs and Expenses

1. On 19 September 2012, the Disciplinary Tribunal issued a Practice Note As to Costs and Expenses ("the 2012 Practice Note") in which it gave notice of the procedure it intends to follow with regard to the making of orders as to costs and expenses under Rule 21.33 of the then Rules of the New Zealand Institute of Chartered Accountants. The Rules referred to in the 2012 Practice Note were, on 15 December 2014, repealed and replaced by a new set of Rules of the New Zealand Institute of Chartered Accountants ("the 2014 Rules"). This Practice Note adjusts the 2012 Practice Note only to the extent that it refers to Rule 13.42 of the 2014 Rules, rather than to Rule 21.33 of the 2012 Rules; both of which are in the same terms.

2. Accordingly, the Disciplinary Tribunal gives notice of the procedure it intends to follow with regard to the making of orders as to costs and expenses under Rule 13.42 of the 2014 Rules. The Rule provides:

"The Disciplinary Tribunal may make such order as it thinks fit as to the payment of the costs and expenses of:

- (a) The investigation and prosecution by the Professional Conduct Committee;*
- (b) the Disciplinary Tribunal's hearing;*
- (c) the consideration of any application to the Disciplinary Tribunal under Rules 13.26, 13.48 and 13.66; and*
- (d) the publication of the Disciplinary Tribunal's decision."*

3. The Tribunal must determine any such application on the basis of its assessment of what is fair and reasonable in the circumstances.

4. Where a charge is established, it will normally be fair and reasonable for the member to be ordered to pay a sum equal to all the costs and expenses as described in the Rule. Circumstances where it may be appropriate to award less than the full amount include:

- Charges, or particulars not proven and/or withdrawn where, and to the extent that, additional costs to the member can be directly attributed to the withdrawal or failure to prove;
- excessive or unnecessary expenses incurred; and
- demonstrated evidence of hardship by the member resulting in a significant inability to pay;

but these factors will be considered only where they are directly relevant to the issue of fairness, and where proper information is provided in respect of them.

5. If no charge is established, the Tribunal may nonetheless determine that the prosecution was justified and that it is therefore fair and reasonable to make an order that the member pay the costs and expenses incurred. What is fair and reasonable in these circumstances will be determined on a case by case basis.
6. An order in respect of costs and expenses is not a payment for a service provided to the member. Accordingly no GST is payable.
7. This Practice Note is made pursuant to Rule 13.35 of the Rules.

Dated at Auckland this 2nd day of February 2015

A handwritten signature in black ink, appearing to read 'MJ Whale', with a small dot at the end.

MJ Whale FCA
Chairman
Disciplinary Tribunal

For any queries please contact the Tribunal Secretariat as follows:

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