

**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 **Alistair Grant Schmidt** Chartered Accountant, of **Auckland**

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**DETERMINATION OF THE DISCIPLINARY TRIBUNAL OF THE NEW ZEALAND  
INSTITUTE OF CHARTERED ACCOUNTANTS  
29 November 2019**

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**Hearing:** 20 November 2019

**Location:** The offices of Chartered Accountants Australia and New Zealand, Level 7, Chartered Accountants House, 50 Customhouse Quay, Wellington, New Zealand

**Tribunal:** Mr MJ Whale FCA (Chairman)  
Mrs A Atkinson FCA  
Mr DJH Baker FCA  
Ms A Kinzett (Lay member)

**Legal Assessor:** Mr Paul Radich QC

**Counsel:** Mr Richard Moon for the prosecution  
Mr Harry Waalkens for the Member

**Tribunal Secretariat:** Janene Hick  
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At a hearing of the Disciplinary Tribunal held in public at which the Member was in attendance and represented by counsel, two Charges were withdrawn and the Particular was amended by consent. The Member admitted the Particular and pleaded guilty to the remaining Charge.

The Charge and amended Particular were as follows:

## **CHARGE**

**THAT** in terms of the New Zealand Institute of Chartered Accountants Act 1996 and the Rules made thereunder and, in particular, Rule 13.50<sup>1</sup> the Member is guilty of:

- 1) Misconduct in a professional capacity.

## **PARTICULARS**

### **IN THAT**

Being a Chartered Accountant in business, and in relation to a complaint the Member:

1. Failed to comply with NZICA's Code of Ethics, being the 2014 and/or 2017 version as applicable (**the Code**)<sup>2</sup>, while employed by Inland Revenue as a Specialist Investigator in that the Member:
  - (a) Accessed the Inland Revenue personal tax file for the Complainant and his companies, NNN Limited and/or TTT Limited, without authority and/or without legitimate reason on more than 70 occasions over a three-year period between 16 April 2013 and 18 January 2016; and/or
  - (b) Added a file note to the Inland Revenue file for TTT Limited on 9 September 2015 to include allegations of improper conduct by the Complainant without authority and/or without legitimate reason and/or when he had a conflict of interest.

in breach of the Fundamental Principles of Integrity (Section 110), Objectivity (Section 120) Confidentiality (Section 140) and/or Professional Behaviour (Section 150) set out in the Code.

## **DECISION**

The hearing proceeded on the basis of an agreed summary of facts.

The Member and the complainant have been involved in an ongoing acrimonious dispute (unrelated to the provision of accounting services) since 2013. It was against this background that the Member accessed personal information of the complainant and his companies held by his employer, Inland Revenue, without authority.

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<sup>1</sup> Formerly Rule 13.39 of NZICA's Rules effective 15 December 2014 to 29 May 2019

<sup>2</sup> The Code of Ethics 2014 being applicable to conduct from 1 January 2014 and the Code of Ethics 2017 for any conduct occurring from July 2017. The relevant provisions are, in this context, the same in both codes.

In September 2015, the Member also added a file note to the tax file of one of the complainant's companies which alleged improper conduct by the complainant – the allegations have never been investigated and are denied by the complainant.

The Tribunal finds that the Particular, which the Member has admitted, is made out by the evidence. The Tribunal agrees with the Professional Conduct Committee (“PCC”) that the Member's conduct constitutes a significant breach of trust given the circumstances and is a very clear and deliberate departure from acceptable professional standards. It involves a breach of one of the cornerstones of the profession – the fundamental principle of integrity. The fact that the conduct referred to in Particular 1(a) was carried on for a period of almost three years is an aggravating factor. In the Tribunal's view the conduct is sufficiently serious as to constitute misconduct in a professional capacity. It finds the Charge, which the Member has accepted, proved.

## **PENALTY**

The parties were aligned in what they considered to be the appropriate penalty, which was a suspension of membership for a period of 12 months. The parties also agreed that there should be an order that the Member contribute \$5,000 towards the complainant's costs in relation to the complaint.

The PCC drew the Tribunal's attention to *Commerce Commission v New Zealand Milk Corporation Limited* [1994] 2 NZLR 730 – there a full High Court held that, where the parties have reached a consensus on penalty, the Court is likely to provide its approval if it accepts that the agreed penalty is proportionate to the evidence available and the defendant's conduct. This approach has since been applied in disciplinary proceedings against medical practitioners and vets, and by this Tribunal.

The Tribunal was also referred to paragraphs [30]-[32] of the decision in *Commerce Commission v PGG Wrightson Limited* [2015] NZHC 3360 where it was said at [32]:

*... when a Court is presented by the parties with a proposed penalty, it is still essential that the Court perform its own assessment of the appropriate range of penalties. If the penalty is not within the proper range, the Court must intervene and impose what it assesses as the appropriate penalty.*

What is the appropriate range of penalties?

The Appeals Council in *Lee* (19 July 2013), following a review of a number of earlier Tribunal decisions on penalty, has held that as a general rule, a finding of misconduct in a professional capacity will normally result in the member being struck off or at least suspended.

No two cases are the same and the facts in this case appear to be unique. However the Tribunal was referred to three decisions which indicate the appropriate range of penalty.

In *Lee*, the member made a false statutory declaration which the Tribunal found he knew was false. There was potential for personal financial gain (generation of fees) as a result. There were a number of mitigating factors taken into account when assessing penalty. The Appeals Council imposed a 12 month period of suspension of membership and a \$5,000 fine.

In *Miller* (18 September 2017), the member proposed a retrospective amendment to the accounting treatment of an advance of \$740,000 without a proper basis and provided information to liquidators of a client which he knew was false. He pleaded guilty to professional misconduct and conduct unbecoming an accountant. He was suspended for two years.

In *Landon* (23 December 2016), the member committed theft by taking approximately \$440 from her then employer. Whilst the Tribunal has stated on numerous occasions that dishonesty of that type is incompatible with membership of the Institute, in the particular circumstances and having regard to a number of mitigating factors the Tribunal imposed a 30 month suspension of membership.

The Member's misconduct was serious. However, in the Tribunal's view, removal from the Register would be a disproportionate response - as would imposing a lengthy period of suspension (more than two years) having regard to the mitigating and other factors referred to below.

In reaching its decision as to the appropriate range in the circumstances of this case, the Tribunal has taken into account the following factors:

- The Member acknowledged the seriousness of his conduct at the earliest opportunity and has cooperated fully in the disciplinary process. As the PCC acknowledged, this is not a case of a member who lacks insight.
- He has not been involved in disciplinary proceedings before.
- He has apologised to the complainant.
- There was no personal financial gain.
- It appears from glowing testimonials from two chartered accountants that the Member's conduct was completely out of character.

Whilst the Tribunal would have imposed a longer period of suspension, it accepts that a period of 12 months' suspension is just within the range of penalty which can be regarded as the least restrictive penalty, and one which protects the public (if that is necessary here) and deters others, facilitates the Tribunal's role in maintaining professional standards and reflects the seriousness of the misconduct – factors which the Tribunal must consider when assessing penalty (*Roberts v Professional Conduct Committee of the Medical Council of New Zealand* [2012] NZHC 3354).

**Accordingly, pursuant to Rules 13.51(b) and (o) of the Rules of the New Zealand Institute of Chartered Accountants the Disciplinary Tribunal orders that:**

- **The Member be suspended from membership of the Institute for a period of 12 months; and**
- **The Member pay to the complainant the sum of \$5,000 towards the costs and expenses incurred by the complainant in relation to the complaint and the matters which gave rise to it.**

## **COSTS**

The Professional Conduct Committee seeks full costs of \$14,104.

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.

The Member accepted that he should pay full costs. The Tribunal considers such an order to be fair and reasonable in the circumstances.

**Pursuant to Rule 13.53 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 \$14,104 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 13.78 of the Rules of the New Zealand Institute of Chartered Accountants the Disciplinary Tribunal orders that the names of the complainant and his companies, and any information and documents which might identify them, be suppressed**

#### **PUBLICATION**

The PCC sought the standard publication order. The Member accepted that such an order was appropriate in the circumstances. The Tribunal agrees.

**In accordance with Rule 13.55 of the Rules of the New Zealand Institute of Chartered Accountants the decision of the Disciplinary Tribunal shall be published on the Chartered Accountants Australia and New Zealand's website and in the official publication *Acuity* with mention of the Member's name and locality.**

#### **RIGHT OF APPEAL**

Pursuant to Rule 13.63 of the Rules of the New Zealand Institute of Chartered Accountants, the parties may, not later than 21 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.

No decision other than the direction as to publicity and the suppression orders 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**