

**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 **Paulette Julia O'Reilly**, Chartered Accountant, of **Lower Hutt, Wellington**

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**DETERMINATION OF THE DISCIPLINARY TRIBUNAL OF THE NEW ZEALAND  
INSTITUTE OF CHARTERED ACCOUNTANTS  
5 December 2016**

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**Hearing:** 23 November 2016

**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)  
Prof DJD Macdonald FCA  
Mr DP Scott FCA  
Dr R Janes (Lay member)

**Legal Assessor:** Mr Paul Radich QC

**Counsel:** Mr Richard Moon for the prosecution  
Mr John Morrison for the Member

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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 the Member admitted the amended particulars and pleaded guilty to the amended charges.

The amended charges and amended particulars are as follows:

### **AMENDED 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. Conduct unbecoming an accountant; and/or
2. (withdrawn)
3. Breaching the Institute's Code of Ethics.

### **AMENDED PARTICULARS**

**IN THAT** in her role as a Chartered Accountant in public practice and in relation to a complaint from the Complainant, the Member:

1. Failed to act on the Complainant's instructions to pay in a timely manner the balance of client monies held on his behalf in the Member's Savings account to Inland Revenue, in breach of the Fundamental Principle of Professional Competence and Due Care of the Code of Ethics (2014); and/or
2. Has until 13 September 2016 asserted a possessory lien over the Complainant's monies, in circumstances where it is unreasonable and/or unprofessional to do so, in that,
  - a. the purpose of the Member holding those funds was to pay Inland Revenue; and/or
  - b. the Member's engagement letter does not give her authority to deduct fees from client monies and/or to assert a possessory lien over any monies held; and/or
  - c. the Member did not bill the Complainant and/or follow-up the outstanding invoices in a timely manner; and/or
  - d. given the Member's knowledge of the Complainant's position with Inland Revenue, the assertion of a lien imposes an unreasonable level of hardship on him, when the Member had other legal avenues to pursue outstanding fees,

in breach of Fundamental Principles of Objectivity and/or Professional Behaviour and/or paragraphs 270.1 and/or 270.2 of the Code of Ethics (2014); and/or

3. Has failed to comply with the requirements of PS-2 *Client Monies*<sup>1</sup>, in that the Member:
  - a. has received funds from the Complainant into the Member's personal Savings bank account since approximately 2006, contrary to the requirement that all client monies received by a member be paid into a trust account, as required by paragraphs 7 of PS-2 (2003) and/or 30 of PS-2 (2008); and/or

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<sup>1</sup> PS-2 *Client Monies and Members' Trust Accounts* ["PS-2 (2003)"] was first issued in 2003 and updated in 2008 to PS-2 *Client Monies* ["PS-2 (2008)"]. The same standards apply in both versions with some amendments to wording and paragraph numbering however the principles remain the same. Both references are given.

- b. having agreed to receive client monies from the Complainant, failed to establish a trust account in accordance with paragraphs 10 to 13 PS-2 (2003) and/or paragraphs 31 to 33 of PS-2 (2008); and/or
- c. has failed to prepare and issue on a timely basis and/or at least annually and/or at the Complainant's request, a statement containing details of the Member's application of the Complainant's client monies and/or any interest earned as required by paragraphs 48 PS-2 (2003) and/or 61 PS-2 (2008); and/or

in breach of the Fundamental Principle of Quality Performance and/or Rules 9 *Due Care and Diligence* and/or 11 *Compliance with Technical and Professional Standards* of the Code of Ethics (2003)<sup>2</sup> and/or the Fundamental Principle of Professional Competence and Due Care and/or paragraphs 100.5(c) and/or 130.1 of the Code of Ethics (2014)<sup>3</sup>; and/or

4. Failed to invoice the Complainant and/or the A Trust in a timely manner for work completed and/or advise the Complainant in a timely manner that an invoice issued on or about 21 May 2013 remained outstanding, in breach of paragraph 147 and/or the Fundamental Principle of Professional Behaviour of the Code of Ethics (2003); and/or
5. Failed to file the Complainant and/or his wife and/or their associated entities tax returns in a timely manner, in breach of Fundamental Principle of Quality Performance and/or Rules 9 *Due Care and Diligence* and/or 10 *Timeliness* of the Code of Ethics (2003) and/or the Fundamental Principle of Professional Competence and Due Care and/or paragraph 130.1 and/or 130.4 of the Code of Ethics (2014).

## **DECISION**

The Tribunal finds that the conduct referred to in the particulars, which the Member has admitted, is established by the evidence which the parties agreed be presented to it and the documents in the bundle produced by consent to which the Tribunal's attention was drawn. It also finds that the Member's conduct constitutes breaches of the provisions of the Code of Ethics referred to in each particular.

Further, the Member's conduct is such that it falls well short of acceptable standards. The number and nature of breaches of the Code are sufficiently serious as to warrant disciplinary sanction and a finding of conduct unbecoming an accountant, which the Member has accepted.

The Tribunal finds that the particulars support charges 1 and 3.

## **PENALTY**

The Professional Conduct Committee (PCC) sought the Member's censure and orders that the outstanding fee the Member charged the Complainant be waived, that the Member's firm be subject to practice review within 6 months and that there be an investigation of the Member's practice by the PCC (the scope being a PS-2 client monies type audit in relation to the Member's bank account into which the Complainant's funds were paid).

The investigation is necessary so that the Complainant can be satisfied that all the funds he entrusted to the Member have been properly accounted for, which the Member has advised the Tribunal is the case.

The Member did not oppose a censure or an order that the fee be waived but submitted that it was not appropriate to add a further impost by way of a fine. There was some resistance to an investigation into the Member's bank account as the Member considered it to be a private arrangement to help her client.

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<sup>2</sup> For conduct occurring prior to 1 January 2014.

<sup>3</sup> For conduct occurring post 1 January 2014.

The Member's conduct here involves the incorrect handling of client monies, a serious matter – clients expect that their funds will be held in a way which protects them (as compliance with the Professional Standard for handling of client monies is designed to achieve). Further, asserting a possessory lien over an extended period of time against client funds which should have been paid to Inland Revenue, when there was no basis for asserting a lien, is unprofessional – the fact that the Member genuinely believed she was entitled to claim a lien (even after this was questioned at the Member's Final Determination by the PCC) but took no steps to confirm the validity of the Member's view until after the Charges were laid against the Member, is in itself concerning.

The Member's conduct also involves significant shortcomings in an area of core business for chartered accountants – the preparation and filing of tax returns. Clients are entitled to expect that their tax returns are prepared and filed in a timely manner. Where a Member requires additional information from their client in order to complete returns, the Member has an obligation to clearly identify for the client the information that is still needed – despite numerous communications from the Member's client about completion of the returns the evidence is that the Member failed to do this. The Member's failure added significantly to the delays.

The PCC referred the Tribunal to three of its previous decisions dealing with breaches of PS-2 (client monies).

In *Jekel* (23 March 2009), which also involved mishandling of the client's tax affairs, the Member was found guilty of conduct unbecoming an accountant, negligence or incompetence and breaching the Institute's Code of Ethics. He was censured, ordered to pay a monetary penalty of \$5,000 and his practice was to be subject to a further practice review.

In *Hobbs and Rose* (8 October 2008), the Members pleaded guilty to conduct unbecoming an accountant, negligence or incompetence and breach of the Institute's Code of Ethics. They were censured and each ordered to pay a monetary penalty of \$5,000.

In *I L Stevenson* (30 April 2012), the Member pleaded guilty to breaching the Institute's Code of Ethics and was censured.

No two cases will be alike, but the Tribunal considers that the Member's conduct is at least as serious as that in the first two cases.

The Tribunal in reaching its decision as to penalty has also taken into account the following matters in the Member's favour:

- The Member has not handled any other client funds. Misguidedly, the Member made an exception in this case with the intention of helping out a client.
- There is no suggestion that the Member's failings to file tax returns or delays about invoicing are more widespread than this one client;
- The Member's expression of remorse at the hearing;
- The Member's active involvement in a number of community organisations; and
- There is no suggestion that the Member has been previously subject to the Institute's disciplinary processes.

The Tribunal considers that a censure and an order that the Member waive an outstanding fee for \$10,000 is an appropriate and proportionate penalty in these circumstances. Although the Member's client and related entities would have received some benefit from the work the Member carried out and charged for, that is outweighed by the additional costs, and tax penalties and interest, he has incurred as a result of the Member withholding funds and the delays in filing tax returns which the Tribunal considers on the evidence the Member was primarily responsible for. It agrees that also imposing a monetary penalty would be disproportionate.

The Tribunal was advised that a practice review of the Member's firm is due in any event (the normal processes were put on hold pending the outcome of this hearing). It is appropriate that the Tribunal orders that such a review take place within a short timeframe.

The Tribunal has also determined to order an investigation into the Member's practice so far as it relates to the Member's handling of the funds of the Complainant. There is an absolute need for transparency in this matter – the Member chose to co-mingle his funds with those of her own (even if only to a limited extent). It is in the interests of the Complainant, the public and the profession that there is a transparent process in ensuring that funds handled by a chartered accountant are properly applied and fully accounted for - in this case an investigation is the only effective means of achieving that.

**Pursuant to the Rules of the New Zealand Institute of Chartered Accountants the Disciplinary Tribunal makes the following orders:**

- 1. Rule 13.40(k): that Paulette Julia O'Reilly be censured**
- 2. Rules 13.40(i): that Paulette Julia O'Reilly waive her invoice number INV-0763 dated 31 October 2015 for \$10,005 issued to an entity associated with the Complainant.**
- 3. Rule 13.40(f): that Paulette Julia O'Reilly's firm be subject to a practice review by the Institute within 6 months of the date of this decision and that the Institute shall report its findings to the PCC.**
- 4. Rule 13.40(e): that Paulette Julia O'Reilly's practice be investigated by the PCC to the following extent – a PS2 client monies type audit be undertaken on her bank account into which the Complainant's funds were lodged to confirm that those funds have been properly applied and fully accounted for to the Complainant.**

**COSTS**

The PCC seeks full costs of \$40,683 as per a schedule presented to the Tribunal.

Whilst acknowledging the Practice Note as to Costs and Expenses the Tribunal issued some time ago, the Member submitted that it was fair and reasonable that:

- The profession, having a direct interest in the disciplinary process as a mechanism to protect its reputation, should share in the cost of it even where charges are upheld or substantially upheld – consistent with the practice of most other professional bodies; and
- The impost of costs should be settled alongside the means of the practitioner such that they are not reduced to penury;

The Member also submitted that there should be an independent review and verification of the costs claimed and the necessity for them but did not consider there were any components of the cost schedule that the Member wished to particularly draw the Tribunal's attention to.

The Tribunal proposes to apply the Practice Note. 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 Tribunal has reviewed the items in the costs schedule. In light of the reduced hearing time which resulted from the Member's admission of amended particulars and guilty plea at the beginning of the hearing, it has deducted part of the Tribunal costs so that the starting point is \$37,308. The Tribunal has also taken into account the fact that the Member had substantially admitted most of the particulars at an earlier stage and the (limited) information which the Member provided as to her financial position.

In all the circumstances, the Tribunal considers that an award of \$35,000 is fair and reasonable.

**Pursuant to Rule 13.42 of the Rules of the New Zealand Institute of Chartered Accountants the Disciplinary Tribunal orders that Paulette Julia O'Reilly pay to the Institute the sum of \$35,000 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.**

#### **PUBLICATION**

The PCC seeks publication in *Acuity* and on the Institute's website with mention of the Member's name and locality. The Member did not oppose this.

**In accordance with Rule 13.44 of the Rules of the New Zealand Institute of Chartered Accountants, notice of the Tribunal's decision shall be published in the Institute's official publication *Acuity* and on the Institute's website with 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.

No decision other than 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**