

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 **Levonne Linda Underwood**, Chartered Accountant, of **Auckland**

**DETERMINATION OF THE DISCIPLINARY TRIBUNAL OF THE NEW ZEALAND
INSTITUTE OF CHARTERED ACCOUNTANTS
21 February 2017**

Hearing: 9 February 2017

Location: The offices of Chartered Accountants Australia and New Zealand, Level 7, Chartered Accountants House, 50-64 Customhouse Quay, Wellington, New Zealand

Tribunal: Prof DJD Macdonald FCA (Acting Chairman)
Mr J Naylor FCA
Mr DP Scott FCA
Dr R Janes (Lay member)

Legal Assessor: Mr David Laurenson QC

Counsel: Mr Richard Moon for the prosecution
Mr Prajna Moodley for the Member

Tribunal Secretariat: Janene Hick
Email: janene.hick.nzica@charteredaccountantsanz.com



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 particulars and pleaded guilty to the charges. The Member also elected not to give evidence in regard to the particulars and charges.

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. Misconduct in a professional capacity; and/or
2. Conduct unbecoming an accountant; and/or
3. Negligence or incompetence in a professional capacity, and that this has been of such a degree or so frequent as to reflect on the Member's fitness to practice as an accountant and/or tends to bring the profession into disrepute; and/or
4. Breaching the Institute's Code of Ethics.

PARTICULARS

IN THAT in the Member's role as a Chartered Accountant in public practice and in relation to a complaint from Mr W on behalf of the Member's client X Limited the Member:

1. Breached the Fundamental Principle of Quality Performance and/or Rules 9 and/or 10 of the Code of Ethics (2003)¹ and/or the Fundamental Principle of Professional Competence and Due Care and/or paragraphs 130.1 and/or 130.4 and/or 130.6 of the Code of Ethics (2014)², in that the Member:
 - a) failed to ensure, since approximately 2006, that X Limited's tax returns were filed on a timely basis resulting in Use of Monies Interest ("UOMI") and/or penalties being incurred; and/or
 - b) allowed and/or caused X Limited to lose its extension of time with the Inland Revenue for periods between 2007 and 2014; and/or
 - c) failed to advise X Limited of:
 - i) delays in filing their tax returns; and/or
 - ii) the loss of extensions of time; and/or
 - iii) that UOMI and/or penalties had been imposed; and/or
 - iv) that tax refunds had been used to offset penalties and/or interest; and/or
2. Breached the Fundamental Principles of Integrity and/or Professional Behaviour and/or paragraphs 110.1 and/or 110.2 and/or 150.1 of the Code of Ethics (2014), in that the Member:
 - a) directed Inland Revenue to allocate X Limited's tax refunds to offset UOMI and/or penalties (incurred because of the Member's failure to file tax returns on a timely basis) without informing X Limited and/or seeking its authority to do so; and/or

¹ Being the Code of Ethics applicable for conduct prior to 1 January 2014

² Being the Code of Ethics applicable for conduct post 1 January 2014

- b) on or about 10 September 2015, when asked by the directors of X Limited to explain specific expenditure included in the financial statements, failed to advise them of material information including that UOMI and/or penalties had been imposed on X Limited by Inland Revenue; and/or
- c) in early November 2015, provided X Limited with Inland Revenue Income Tax Detail Statements for the years ended 31 March 2013 to 31 March 2015 inclusive, which the Member had falsified and/or manipulated to obscure the fact that UOMI and/or penalties had been imposed on X Limited by Inland Revenue and/or to obscure the timing of various payments to Inland Revenue and/or the allocation of refunds against penalties.

DECISION

Despite the Member's guilty plea, the Professional Conduct Committee (*PCC*) chose to obtain sworn evidence from the following witnesses:

- *Ms K* – an investigator in the Professional Conduct team at NZICA
- *Mr W* – the complainant and an ex senior partner of the Member's accountancy practice
- *Yee Ping S'ng* – an independent investigator with tax expertise, engaged by the PCC to provide a written report on whether the Member's conduct met the applicable standards and ethical requirements of NZICA.

The Member's counsel, Mr Moodley, indicated that he thought that the PCC's evidence was unnecessary given the Member's guilty plea to the charges and acceptance of the particulars.

Ms K provided sworn evidence as to:

- the nature and timing of Mr W's complaint;
- details of the Member's various responses to the complaint; and
- details of the PCC's final determination dated 4 October 2016.

Mr W provided sworn evidence on the events leading to his complaint and his professional relationship with the Member as an employee, and then a director of the Member's practice and, finally, as a director of the client company.

Mr W's complaint related to the financial statements the Member presented to the client company's Board on 10 September 2015 and the explanation the Member provided regarding the items:

- use of money interest (UOMI) of \$21,405; and
- non-deductible expenditure of \$39,839.

Mr W subsequently requested that the Member provide copies of GL printouts for the UOMI and non-deductible expenditure and the client's tax assessments for 2013 – 2015 inclusive, as he was not fully satisfied with the Member's explanations.

The Member provided Mr W with a copy of what the Member purported to be the GL printouts and the Inland Revenue's income tax detailed statements for 2013 – 2015.

Mr W, who remained concerned as to the correctness of the documents the Member provided, obtained detailed statements directly from Inland Revenue. He determined that the Inland Revenue statements he obtained were materially different from the Inland Revenue statements the Member provided.

Subsequently, a meeting was held between Mr W, the Member, and the Member's fellow director of the company that runs the Member's accountancy practice who was instructed to review all tax assessments and returns since 2005. The director detailed the penalties and interest the company had owing to Inland Revenue since 2005. He also informed Mr W that he could not find copies of any of the Inland Revenue assessments provided by the Member, or the general ledger reports the Member said she had sent.

The Member stated that she would pay all of the penalties and interest owed by the client out of her own funds – the Member's counsel stated subsequently that the amount was held to be reimbursed in April 2016 and the amount the Member paid was \$60,000 more than the ultimate assessment, leading to a refund to the Member of this amount.

Ms S'ng reported to the PCC on 12 September 2016 on the results of her investigation on behalf of the PCC. Her conclusions included the following:

- the Inland Revenue printouts provided by the Member to Mr W do not appear to be true copies – they appear to have been significantly altered to obscure the penalties and interest charged to the Member's client and deceive or mislead Mr W;
- comparing the printouts provided by the Member to Mr W with the printouts Mr W obtained directly from Inland Revenue, it would appear that the printouts provided by the Member had not in fact been issued by Inland Revenue;
- based on the evidence provided directly from Inland Revenue, the Member consistently did not file her client's tax returns on time; and
- the Member did not advise her client that:
 - tax returns were outstanding and had not been filed for a number of years, and
 - significant penalties and UOMI had arisen from the Member's non filing of the tax returns in a timely manner.

In Ms S'ng's opinion, the Member breached the Code of Ethics and Professional Standards which are mandatory for all members of NZICA.

The Tribunal agrees with the PCC that the sworn evidence discloses both 'incompetence' and 'deceit' (a breach of the fundamental principle of integrity) on the Member's part - both of which are serious enough to represent conduct unbecoming an accountant and reflect on the Member's fitness to practise as an accountant.

The Tribunal finds - on the basis of the Member's guilty plea and the sworn evidence provided by the PCC - that the particulars have been made out and the charges proved.

PENALTY

The PCC sought removal of the Member's name from the Register – in their view, this is the proportionate and appropriate penalty to protect the public and other potential employers, to deter others, and to facilitate the Tribunal's role in maintaining professional standards.

Providing false Inland Revenue statements to the client, and the strong inference that the Member knew the tax returns had not been filed, is a very serious matter which breaches the fundamental principle of integrity – which the PCC say is the most fundamental principle of the Code of Ethics. Honesty and integrity cannot be compromised.

The PCC referred to the decision of the Appeals Council in *Lee* (19 July 2013) which said (in paragraph 50) “*The cases which were relied on by the PCC show that as a general rule, a finding of misconduct will normally result in the member being struck off or at least suspended ...*”

The PCC submitted that removal of the Member’s name would be consistent with other decisions of the Tribunal which involved deception and breach of integrity – those of *McCullough* (7 December 2005), *Watson* (15 December 2009), *Williams* (8 May 2012), and *Tam* (7-8 August 2012).

In *BF McCullough*, the member pleaded guilty to two charges relating to preparing two sets of financial statements for his client’s company – one for the Inland Revenue and one for a bank. This was a fundamental breach of professionalism and integrity, and the member’s name was removed from the register.

In *LJ Watson*, the member pleaded guilty to two charges relating to compiling financial statements for his client which were false and misleading. This was a breach of the fundamental principle of integrity, and the member’s name was removed from the register.

In *SM Williams*, the member was found guilty of four charges relating to false and misleading statements and lack of timeliness. This was a fundamental breach of professionalism, and the member’s name was removed from the register.

In *VCY Tam*, the member was found guilty of two charges relating to seven occasions of fraud against the Inland Revenue. This was misconduct in a professional capacity, and the member was removed from the register.

The PCC sought to distinguish these cases from cases where suspension had been the appropriate response – those of *Lee* (on appeal 19 July 2013), *Moffat* (18 December 2014), *Hennessy* (28 July 2015), *Power* (on appeal 2 December 2016) and *Landon* (13 December 2016).

In *Junho Lee*, the member was found guilty of knowingly making a false declaration and providing incorrect information to the Institute. The member was censured and ordered to pay a monetary penalty. On appeal, the Appeals Council found that the member’s conduct amounted to seriously dishonest behaviour and showed a lack of integrity which reflects very badly on the profession. The Appeals Council suspended the member from membership for a period of twelve months.

In *BG Moffatt*, the member pleaded guilty to three charges involving some instances of dishonest behaviour and the failure to manage conflicts of interest. This was conduct which fell well short of the standard expected and the member was suspended from membership for a period of two years.

In *JB Hennessy*, the member was found guilty of two of three charges relating to preferring his own interests over his clients' interests. This was misconduct in a professional capacity and the member was suspended from membership for a period of two years.

In *RJ Power*, the member was found guilty of failing to recognise conflicts of interest and managing threats to his objectivity. This was a repeat offence and the member's name was removed from the register. On appeal, the Appeals Council found that the factors to be taken into account in deciding the appropriate penalty were finally balanced and they ordered that the member be suspended for a period of 12 months.

In *GM Landon*, the member was convicted of theft of a minor amount when acting in a special relationship – an offence that the sentencing judge considered to be at the lowest end of the spectrum. This was misconduct in a professional capacity and the member was suspended from membership of the Institute for a period of thirty months.

The Member's counsel referred to the sentencing principles set out in the *Power* appeal, and discussed the *Moffat* and *Landon* decisions – all of which led to the member's suspension rather than strike-off.

The Member's counsel submitted that the Member received no personal benefit from the charges she pleaded guilty to and, accordingly, the objectives of sentencing may be achieved by:

- the Member's censure, together with a period of twelve months rehabilitation (a suggested rehabilitation programme was provided by the Member's counsel); or
- the Member's suspension for a period of twelve months, together with rehabilitation.

The Member's counsel also detailed various personal circumstances relating to the Member and her family's health which he asserted had affected the Member's performance.

The PCC, in response to the Member's counsel's submissions, made the following comments:

- The Member has chosen not to give evidence.
- The Tribunal needs to be cautious of the Member's counsel's statements, as against the sworn evidence of the PCC's three witnesses.
- The Member's counsel refers to 'edited' Inland Revenue statements when in fact they were bogus statements.
- The Member's non filing of tax returns took place over a protracted period.
- The Member lied to the PCC and provided false documentation at the PCC meeting on 4 October 2016.

In addition, the PCC does not understand the Member's personal issues being used by the Member's counsel as an explanation for her behaviour.

The Tribunal:

- accepts the sworn testimony of Ms S'ng in her report dated 12 September 2016 (in contrast, the Tribunal does not accept that the Inland Revenue statements fabricated by the Member represent 'editing of income tax detailed statements', as asserted by the Member's counsel in paragraph 24 of his submissions); and
- accepts the validity of the comments made by the PCC in the preceding two paragraphs.

The Tribunal agrees with the PCC that this case is more serious than the cases they and the Member's counsel outlined where suspension was considered appropriate. The Tribunal has stated on previous occasions that dishonesty of the type the Member has admitted is incompatible with membership of the Institute. The public and the profession are entitled to expect that members conduct themselves with honesty and integrity.

The Tribunal wishes to send a very clear message to members that breach of the fundamental principle of integrity is a very serious matter and will be dealt with severely. Accordingly, the Tribunal believes that the appropriate and proportionate penalty is that the Member's name be removed from the register of members.

Pursuant to Rule 13.40(a) of the Rules of the New Zealand Institute of Chartered Accountants the Disciplinary Tribunal orders that the name of Levonne Linda Underwood be removed from the Institute's register of members.

COSTS

The Professional Conduct Committee seeks full costs of \$32,431.

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's counsel indicated that, in his view, the sworn evidence provided by the PCC's three witnesses was unnecessary since the Member pleaded guilty to the charges and accepted the particulars.

The Tribunal is prepared to give the Member some credit for the additional costs incurred because of the PCC choosing to provide detailed evidence – a credit of \$3,000 is deemed fair and appropriate.

The Member did not provide any evidence of mitigating circumstances such as excessive or unnecessary expenses incurred or evidence of hardship.

Pursuant to Rule 13.42 of the Rules of the New Zealand Institute of Chartered Accountants the Disciplinary Tribunal orders that Levonne Linda Underwood pay to the Institute the sum of \$29,431 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 the names of the complainant, the client and the entity the Member is a director of be suppressed.

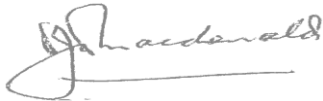
PUBLICATION

In accordance with Rule 13.44 of the Rules of the New Zealand Institute of Chartered Accountants the decision of the Disciplinary Tribunal shall be published on 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 13.47 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 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.

A handwritten signature in dark ink, appearing to read 'DJD Macdonald', with a long horizontal flourish extending to the right.

**DJD Macdonald FCA
Acting Chairman
Disciplinary Tribunal**