

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 **A Member**

**DETERMINATION OF THE DISCIPLINARY TRIBUNAL OF THE NEW ZEALAND
INSTITUTE OF CHARTERED ACCOUNTANTS
4 December 2018**

Hearing: 21 November 2018

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)
Mrs A Atkinson FCA
Mr DJH Barker FCA
Prof DJD Macdonald FCA
Dr R Janes (Lay member)

Legal Assessor: Mr Matthew Casey QC

Counsel: Mr Richard Moon for the prosecution

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At a hearing of the Disciplinary Tribunal held in public at which the Member was in attendance and not represented by counsel the Member admitted the particulars and pleaded guilty to the charges.

The charges and particulars are 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) Conduct unbecoming an accountant; and/or
- 2) Negligence or incompetence in a professional capacity and that this is of such a degree and/or so frequent so as to bring the profession into disrepute; and/or
- 3) Breaching the Rules and/or the Institute's Code of Ethics,

PARTICULARS

IN THAT

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

1. Performed the audit of the XYZ and the audit of XYZ Holdings Limited for the year ended 31 March 2016 when the Member:
 - (a) did not hold a Certificate of Public Practice in breach of Rule 10.3(b)(ii) of NZICA Rules and/or the Fundamental Principle of Professional Behaviour (paragraphs 110.5(e) and/or 150.1 of the Code of Ethics (2014)¹ (the "Code"); and/or
 - (b) was not a qualified auditor under the Financial Reporting Act (2013) as required by enactments applicable to the entities being audited² in breach of the Fundamental Principles of Professional Competence and Due Care (paragraphs 100.5(c) and/or 130.1 and/or 130.3 of the Code) and/or Professional Behaviour (paragraphs 100.5(e) and/or 150.1 of the Code); and/or
2. Failed to perform assurance engagements in accordance with the relevant technical and professional standards, in that the Member did not:
 - (a) in the course of his audit of XYZ for the year ended 31 March 2016:
 - (i) ensure the client prepared consolidated financial statements incorporating entities controlled by XYZ including its wholly owned subsidiaries XYZ Holdings Limited, and/or XYZ WRT and ABC Limited, and/or QRS Limited, and/or UVW Limited, and/or modify his audit report in respect of the clients' non-compliance with Public Benefit Entity ("PBE") standards; and/or
 - (ii) complete and/or retain audit documentation as required by ISA 230 and/or PES-3 paragraphs 45 to 46; and/or

¹ And, as applicable, the equivalent provisions of the Code of Ethics (2017).

²Being sections 42C(2) of the Charities Act 2005 and 207(1) of the Companies Act 1993.

(b) in the course of his audit of JKL for the year ended 31 December 2016, design and/or perform audit procedures to obtain sufficient appropriate audit evidence and/or document the audit procedures and/or evidence obtained as required by ISA 500 and/or ISA 230; and/or

(c) in the course of his audits of GHI and XYZ for the year ended 31 March 2016, both of which are registered charities, issue unmodified audit reports given the charities' performance reports were not prepared in accordance with PBE standards,

in breach of the Fundamental Principle of Professional Competence and Due Care (paragraphs 100.5(c) and/or 130.1 and/or 130.3 of the Code)³; and/or

3. Issued, on 20 March 2018, an audit report for DEF for the year ended 31 December 2017 in contravention of a direction by the Practice Review Board pursuant to Rule 12.6(d), dated on 15 November 2017, not to undertake assurance engagements without the supervision of a mentor and completion of specified training, in breach of Rule 12.6(d) and/or the Fundamental Principle of Professional Behaviour (paragraphs 100.5(e) and/or 150.1 of the Code); and/or
4. Failed to respond to the practice review report in a timely manner and/or failed to provide information requested for the practice review contrary to NZICA Rule 12.5 and/or the Fundamental Principle of Professional Behaviour (paragraphs 100.5(e) and/or 150.1 of the Code); and/or
5. Failed to undertake and/or maintain appropriate records to comply with minimum requirements for Continuing Professional Development in breach of schedule 2 of Regulation CR7 applicable to all members of CAANZ resident in New Zealand.

DECISION

The Particulars cover four types of conduct:

- Undertaking audits when the Member was not qualified to do so, and continuing to undertake an audit after being told he could not without complying with requirements he failed to comply with
- Lack of professional competence
- Failure to respond in a timely manner, and to provide some information, in relation to the Practice Review process
- Failure to comply with his continuing professional development obligations.

The Tribunal finds that the Particulars, which the Member has admitted, are made out by the evidence submitted by the Professional Conduct Committee (PCC), which the Member did not contest. It follows that Charge 3, to which he pleaded guilty, is proved.

The Tribunal also finds that Charges 1 and 2, to which the Member also pleaded guilty, are proved.

As to Charge 2, the Member's failure to recognize that he was not qualified to carry out the audit of XYZ and XYZ Holdings Limited, his failure to perform three audits in compliance with the relevant standards and the nature of his shortcomings, demonstrate a lack of care and skill and conduct which falls well below the standard expected of any auditor. In the Tribunal's view, the conduct established is of such a degree and so frequent as to bring the profession into disrepute. The public expect auditors of companies and registered charities to maintain professional

³ And, as applicable, the equivalent provisions of PES-1 (Revised).

competence and remain up to date with the standards, and also to perform audits in a professional manner.

As to Charge 1 the test for conduct unbecoming an accountant is whether the conduct was an acceptable discharge of a members professional obligations according to the standards applied by competent, ethical and responsible practitioners. The threshold is inevitably one of degree.

In the Tribunal's view the Member's conduct described in Particulars 1 and 3 – 5 fell considerably short of acceptable standards and constituted conduct unbecoming an accountant.

PENALTY

The PCC submitted that the appropriate penalty was that the Member be censured, that a fine be imposed to sanction the conduct of misleading the Institute and that the Member be ordered not to undertake assurance engagements for a period of 10 years.

The PCC referred the Tribunal to its decisions in *Middleton* (15 March 2018) and *Freeman* (31 May 2018). Both cases involved lack of quality control and professional competence and failure to properly engage with the Institute's processes. Mr Freeman also provided misleading information to the Institute. Mr Middleton undertook audits which he was not qualified to undertake (under the new regulatory regime which applied for accounting periods commencing on or after 1 July 2015), and continued to conduct audits after being directed not to. Both pleaded guilty to the same four charges as the Member has.

In *Freeman* the penalty imposed was a censure, a fine of \$4,000 to sanction conduct of misleading the Institute, and an order preventing the member from undertaking assurance engagements for 10 years.

In *Middleton* the penalty was a censure, a fine of \$5,000 to sanction the conduct of performing audits when directed not to, and a ban on undertaking audits for two years.

The PCC noted that as the Member's conduct predated the *Middleton* and *Freeman* decisions, the penalty imposed should be broadly in line with the penalties imposed in those decisions.

The Member was prepared to accept a ban from doing audits for 10 years, requested leniency on the fine because of his difficult financial position (which he explained in some detail) and had no submission to make on censure.

No two cases are the same, particularly in relation to the nature and extent of the conduct, aggravating and mitigating factors, and the extent of the impact of the conduct on the public.

In reaching its decision on penalty, the Tribunal has taken into account each party's submissions and the following factors:

- The Member's acknowledgement of his conduct and shortcomings at an early stage, and his remorse
- The Member's personal and family circumstances at the time which may in part explain his conduct but, as he has previously acknowledged, does not excuse it
- The steps the Member has taken to rehabilitate – although the Tribunal gives this less weight in light of his failure to undertake any verifiable CPD in 2017 or to date this year.

Having regard to all the circumstances, the Tribunal considers that a censure, the imposition of a monetary penalty of \$1,500 (equivalent to the fee the Member received for undertaking an audit after being directed not to, and reduced from what would otherwise have been imposed due to his financial position), and an order that the Member does not conduct any assurance engagements for a period of 5 years is the proportionate response to the conduct the Member has admitted. That penalty appropriately protects the public and should deter others, facilitates the Tribunal's role in maintaining compliance with and enforcing professional standards, reflects

the seriousness of the conduct, punishes the Member and is the less restrictive penalty in the circumstances.

The Disciplinary Tribunal orders that pursuant to the Rules of the New Zealand Institute of Chartered Accountants:

- Pursuant to Rule 13.40(c), the Member pay to the Institute a monetary penalty of \$1,500
- Pursuant to Rule 13.40 (k), the Member be censured
- Pursuant to Rule 13.40 (n) the Member must not undertake any assurance engagements for a period of five years

COSTS

The Professional Conduct Committee seeks full costs of \$13,990.

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 submitted that he was in financial hardship and provided details of his financial position. The PCC indicated that the Institute would likely favourably consider instalment arrangements for any costs award the Tribunal might make.

The Tribunal considers that an award of \$10,000 to be fair and reasonable in all the circumstances.

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 \$10,000 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 sought the default position in the Rules of publication of this determination in the official publication *Acuity* and on CAANZ's website with mention of the Member's name and locality, but responsibly acknowledged the significant negative impact on the Member's mental health and rehabilitation if this were to occur and asked the Tribunal to weigh both these factors.

The Member sought suppression of his name. The Member submitted evidence of his medical condition and the consequences on his health of the disciplinary process to date and of any publication and his ability to rehabilitate. The Member advised the Tribunal about his current employment, which is in a corporate environment. The Member has made it clear to the Institute that he will no longer be carrying out audits (and as a result of the Tribunal's order above he cannot do so for five years in any event).

In the Tribunal's view this is one of those rare circumstances where a member's personal interests outweigh those of the public in knowing his identity. The Tribunal considers that publication of the Member's name would have a disproportionately adverse impact on him relative to the nature of his offending. The Tribunal is satisfied that it would seriously affect the Member's rehabilitation. Because of the Member's changed circumstances, his recognition that his conduct fell unacceptably short of the required standards and the impact the disciplinary process has had on his health the Tribunal is also satisfied that it is very unlikely that he would repeat this type of conduct. The Member's relatively young age is also a factor. After conducting the balancing exercise referred to in *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850, the Tribunal has concluded that public interest considerations can be sufficiently met in this case by publication of the decision without the Member's name and location.

In reaching this conclusion the Tribunal has had regard to the Appeals Council's decisions in *Member Y* (17 October 2016), and *Qiu* (21 May 2018).

However the Tribunal considers that it is appropriate that the Institute provides this decision to the clients for which the Member performed an audit as an unqualified person, with an accompanying letter. The reason (apart from a higher public interest factor) is that those entities may have been put in breach of their statutory obligations by having an audit completed by an unqualified person and they should be made aware of this.

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* without mention of the Member's name and locality.

Pursuant to Rule 13.44(b)ii of the Rules of the New Zealand Institute of Chartered Accountants, the Tribunal orders that the Institute provide this decision, together with a suitably worded covering letter, both in a form to be approved by the Chairman of the Tribunal, to the Member's former clients for which he performed statutory assurance engagements whilst not qualified to do so.

SUPPRESSION ORDERS

Pursuant to Rule 13.62 of the Rules of the New Zealand Institute of Chartered Accountants the Disciplinary Tribunal orders that the Member's name, all details of his personal and family circumstances except as recorded in this decision, and the names of his clients or former clients referred to in these proceedings be suppressed (although the letters from the Institute referred to in the publication order above may include the Member's name).

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