NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS

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 **Martin John Pitt** Chartered Accountant, of **Auckland**

DETERMINATION OF THE DISCIPLINARY TRIBUNAL OF THE NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS
2 December 2019

Hearing:	13 November 2019
Location:	The offices of Chartered Accountants Australia and New Zealand, Level 1, 12-16 Nicholls Lane, Parnell, Auckland, New Zealand
Tribunal:	Mr MJ Whale FCA (Chairman) Mr N De Frere CA Mr R Simpson CA Ms A Kinzett (Lay member)
Legal Assessor:	Mr Paul Radich QC
Counsel:	Mr Richard Moon for the prosecution
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 not represented by counsel, the Particular was amended by consent. The Member admitted the amended Particular, and pleaded guilty to Charges 2 and 3 and not guilty to Charge 1.

The Charges and amended Particular 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 13.50[1] the Member is guilty of:

1) Misconduct in a professional capacity; or

2) Conduct unbecoming an accountant; and/or

3) Breaching the Rules and/or the Institute's Code of Ethics.

PARTICULARS

IN THAT

In the Member's role as a Chartered Accountant and in relation to a complaint, the Member:

(1) In respect of the audit of OOO Trust Board for the year ending 31 March 2016 ("the audit"), the Member:

(a) On or about 10 February 2017, inserted the Engagement Partner's signature in the audit report (either himself or by instructing an agent to do so) and issued it to the client without their authority and/or them having completed their final review of the audit file; and/or

(b) When questioned about the audit by the Engagement Partner concerned, failed to be upfront and/or forthcoming and/or provided information that was incorrect and/or misleading, in that:

i. when asked, on or about 13 February 2017, to provide an update as to the status of the audit the Member advised that he was still working on it, when this was false; and/or

ii. when asked, in October 2017, to provide an explanation regarding the audit sign-off process, including when the audit work was completed and the audit report issued, the Member advised that the audit report had not been issued and was "mocked up and ready to go", when this was false as he had issued the report to the client in February 2017,

in breach of the Fundamental Principles of Integrity and/or Professional Behaviour and/or paragraphs 100.5(a) and/or 100.5(e) and/or 110.1 and/or 110.2 and/or 150.1 of the Code of Ethics (2014)[2].

[1] Formerly Rule 13.39 of NZICA's Rules effective 15 December 2014 to 29 May 2019

[2] And, as applicable, the equivalent provisions of the Code of Ethics (2017) and/or PES 1 (Revised).

DECISION

The Tribunal notes that Charges 1 and 2 have been laid in the alternative.

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

The Member was an employee of a chartered accounting firm. The risk management policies and procedures of the firm provided that work carried out to support the giving of an opinion or advice was to be subjected to a final review by a partner or authorised individual before being sent to the client. The Member was aware of the policy regarding final review of work. An audit client urgently required an audit opinion (the client had encountered difficulty in preparing its performance report and the extended deadline given by the regulator to file the audited performance report was fast approaching). The engagement partner had reviewed the audit file and raised a number of review points, but before he had completed his final review of the audit file and without his authority, the Member issued a finalised audit report (on 10 February 2017).

The Member accepted that he deliberately misled the engagement partner three days later about the status of the audit, and did so again in October 2017 following a request by the engagement partner to report on the audit signoff process, including the timing of the work on the file, its completion and when the audit report was issued. The engagement partner discovered that the Member had misled him only after searching a public Register which disclosed that the performance report containing a signed audit report had been filed on the Register on 14 February 2017.

The Professional Conduct Committee ("PCC") submitted that if the conduct was not professional misconduct, it was at the high end of conduct unbecoming. It considered the conduct in Particular 1(b) to be more serious than that in Particular 1(a) but in both cases there was deception and falsity and a breach of the Fundamental Principle of Integrity of the Code of Ethics – a cornerstone of the public's and profession's expectation of membership.

Misconduct in a professional capacity covers intentional wrong doing, or conduct which is a deliberate departure from acceptable standards. It is something more than professional incompetence or deficiencies in the practice of the profession. Whether any conduct constitutes professional misconduct is to be determined from the nature of the conduct and not from the consequences (although the consequences may have a bearing on penalty). The question the Tribunal has to consider is whether the Member so behaved in a professional capacity that the conduct under scrutiny would be reasonably regarded by other chartered accountants as constituting professional misconduct. The test is an objective one.

The charge of conduct unbecoming an accountant involves something different to and less serious than misconduct in a professional capacity. It is conduct which departs from acceptable professional standards in a way significant enough to attract sanction for the purposes of protecting the public. The test is whether the Member's conduct was an acceptable discharge of their professional obligations, and the threshold is inevitably one of degree. The best guide to what is acceptable professional conduct is the standards applied by competent, ethical and responsible practitioners.

The PCC referred to the Tribunal's decision in *RD Campbell* (24 July 2019) where the member had pleaded guilty to both professional misconduct and conduct unbecoming an accountant in relation to providing misleading or false information to the Institute and continuing to undertake audits after being directed by the Institute not to. However, the Tribunal found that the charge of professional misconduct had not been made out – although he was at best careless when completing a mandatory notification to the Institute and he was not open and honest in disclosing to the Institute certain other information, the Tribunal held that his conduct did not quite meet the threshold for the more serious charge.

The Member here submitted that he was just trying to serve the client. At the time he was also under considerable work pressure and was exhausted. There was no deliberate intention to mislead the engagement partner. He was at best careless and in the circumstances his actions constituted conduct unbecoming rather than misconduct in a professional capacity.

The Member advised the Tribunal that although the agreed summary of evidence stated that his advice to the engagement partner in October 2017 was deliberately misleading, having subsequently read the *Campbell* decision, he did not see his conduct as being a deliberate intent to deceive – it was at best careless.

The Tribunal does not accept that the Member's conduct referred to in Particular 1(b) was at best careless. It considers he deliberately misled the engagement partner on both occasions, as he originally acknowledged, and that that is serious misconduct. It, together with the issue of the audit report without authority, meets the threshold of misconduct in a professional capacity.

The Tribunal is satisfied that Particulars 1(a) and (b) have been made out on the evidence and that the conduct constitutes a breach of both the Fundamental Principles of Integrity and Professional Behaviour. It follows that the Member is guilty of Charge 3, as he admitted. The Tribunal also finds the Member guilty of Charge 1, the more serious of the two alternative charges.

PENALTY

The PCC referred to the factors identified by the Court in *Roberts v Professional Conduct Committee of the Medical Council of New Zealand* [2012] NZHC 3354 as being relevant where tribunals are determining penalty. They are, which penalty:

- Most appropriately protects the public and deters others;
- Facilitates the Tribunal's important role in setting and maintaining professional standards;
- Reflects the seriousness of the misconduct;
- Punishes the practitioner (although subsequently Courts have taken the view that punishment is more a by-product of the other factors);
- Allows for the rehabilitation of the practitioner;
- Promotes consistency with penalties in similar cases;
- Is the least restrictive penalty appropriate in the circumstances; and
- Looked at overall, is the penalty which is fair, reasonable and proportionate in the circumstances

The PCC also referred to the Appeals Council's decision in *Lee* (19 July 2013) where at [50] the Council stated 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 the penalty which best meets the principles set out in *Roberts* is a period of six months' suspension. That would be sufficient to condemn the conduct and deter others. It would also adequately protect the public and not deflect the potential for the Member's rehabilitation.

The Member submitted that, at the time he issued the audit report and (initially) misled the engagement partner, he was under extreme mental and physical exhaustion as a result of both work pressure and family matters, and made the wrong call. He accepted that that was no excuse. He has subsequently sought out an experienced chartered accountant who mentors him on a regular basis. It was extremely unlikely that he would ever work in the audit field again.

He submitted that suspension would be too harsh a penalty given the mitigating factors that he and/or the PCC raised (see below) – a fine would be the appropriate penalty.

In reaching its decision on penalty, the Tribunal has taken into account the following mitigating factors:

- The Member self-reported the matter (although members have an obligation to do so, self-reporting is rare) and is relatively young;
- He has had no prior involvement with the disciplinary process and cooperated throughout;
- His regret and remorse and his insight into his conduct;
- There was no financial personal gain; and
- The rehabilitative steps he has taken.

The Tribunal also notes that there appears to have been no technical issues with the way that the audit was conducted.

The Tribunal does not consider a censure and/or a fine to be an adequate penalty. Although the conduct was to some degree "in-house", it had the potential for public-facing consequences. The Tribunal has found intentional deception. As the PCC noted, there has been a breach of a cornerstone of the profession – the fundamental principle of integrity. The Tribunal does not consider the mitigating factors are sufficient to displace the general rule that a finding of professional misconduct will normally result in at least a suspension.

Neither party was able to refer the Tribunal to a decision which was very similar to the situation in this case. However, in *Lee*, the Member had made a false statutory declaration which the Tribunal found to be deliberate. The Appeals Council imposed a 12 month suspension and a fine of $5,000. In the Tribunal's view, Lee's conduct was more egregious than the conduct here as it was not in-house and had the potential to adversely affect the public in a significant way. Also, the mitigating factors in *Lee* were in the Tribunal's view not as extensive as here. The Tribunal considers the penalty it has decided to impose is not inconsistent with that in *Lee*.

The Tribunal agrees with the PCC's submission that the least restrictive penalty which, looked at overall and in particular in light of the mitigating factors referred to above, is fair, reasonable and proportionate in the circumstances, is a period of suspension of six months.

Pursuant to Rule 13.51(b) 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 six months.

COSTS

The Professional Conduct Committee seeks full costs of $10,232.

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 is unaware of any factors that would justify a discount in this case – the fact that the Member cooperated during the disciplinary process in itself results in a reduced costs claim.

The Tribunal considers that an award of $10,000 is fair and reasonable in all 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 $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 AND SUPPRESSION ORDERS

The PCC sought that the Tribunal's decision be published on the Chartered Accountants Australia and New Zealand website and in the official publication *Acuity*, with mention of the Member's name and location.

The Member submitted that his name should be supressed. He did not see any significant public benefit in reporting his name – he was no longer in public practice and had no intention to be in public practice. He was concerned that publication could jeopardise the audit client, given the number of similar organisations that he was involved in the audit of. Publication of his name might also jeopardise a transaction in which he was currently involved, resulting in a loss to other parties which would be unfair on them.

The Member relied on a decision of the Professional Conduct Committee dated 18 July 2018 (*Member X)*. That member signed a review engagement report when not legally able to do so and submitted false information to the Institute, among other misconduct. The PCC considered the issues to be serious. It decided to publish its decision, but not the member's name having regard to the fact that there had not been any harm to the public and the member did not pose a risk to clients and/or the public going forward. However, as the PCC submitted before the Tribunal, the rules relating to publication of a decision of the PCC are different to those by which the Tribunal is guided.

The Courts have held that in order to provide for the public interest in open justice and transparency, freedom of speech and the maintenance of confidence in the professional disciplinary process, publication will be required in most cases – particularly where the case, as here, involves a serious charge. This position is strongly reflected in the Institute's Rules (Rule 13.44(1a) of the 2014 Rules)[3]. Public interest includes the interest in knowing the identity of a person found to have been guilty of a disciplinary offence, and avoiding impugning the reputation of other members.

However, the Tribunal must weigh these public interest considerations with the private interests of the Member. In *Whyte* (8 April 2014), the Appeals Council confirmed that unless there are special circumstances which justify a decision to limit or prohibit publication, publication will follow a finding of guilt. In *Qui* (21 May 2018), the Appeals Council held that where the private interests related to the health of the member, there would need to be compelling evidence of a highly prejudicial effect on the member's health when considering whether the prejudicial effect outweighed the public interest.

Here, the Charge is serious and the Member's conduct was in part public facing. Although the Member states that he does not intend to return to public practice, that is not in itself a reason to suppress his name. As to the potential effect on the client, the Tribunal cannot see that given the suppression orders it proposes to make publication will have any impact at all on it. The Member did not explain how or why publication of his name might have an adverse impact on the transaction in which he was involved but in the Tribunal's view any impact could be appropriately managed and mitigated if not removed altogether.

The Tribunal considers that the public interest factors referred to above significantly outweigh the private interest factors to which the Member has referred. The application for name suppression is declined.

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 firm of chartered accountants of

[3] The Tribunal's Legal Assessor advised that the Rule in force at the time the complaint was made applies (the current Rule on publication being less favourable to the Member).

which the Member was an employee, the client and other third parties, and any information or documents which might identify them, be suppressed.

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 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