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 **Khieng Chiv** Chartered Accountant, of **Auckland**

DETERMINATION OF THE DISCIPLINARY TRIBUNAL OF THE NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS AS TO PENALTY, COSTS AND PUBLICATION
6 November 2019
(the determination as to liability is attached to this decision)

Hearing:	2 July 2019
Determination as to Liability:	15 July 2019
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 A Newman FCA Ms A Kinzett (Lay member)
Legal Assessor:	Mr Matthew Casey QC
Counsel: **Advocate:**	Mr Richard Moon for the prosecution Mr Michael Meyrick for the Member
Tribunal Secretariat:	Janene Hick Email: janene.hick.nzica@charteredaccountantsanz.com

INTRODUCTION

In a Determination dated 15 July 2019, the Tribunal found the following Charges (to which the Member had pleaded guilty) proved:

1) Misconduct in a professional capacity;
2) Conduct unbecoming an accountant;
3) Supplying information to the Institute that is false or misleading;
4) 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;
5) Breaching the Institute's Rules and/or Code of Ethics.

The Tribunal has subsequently received submissions from the Professional Conduct Committee ("PCC") and the Member on penalty, costs, suppression orders and publication, and has also received directions from its legal assessor.

References in this Determination to the Rules of the New Zealand Institute of Chartered Accountants are to those Rules in force at the time the original complaint was made.

PENALTY

The PCC sought suspension of the Member's membership for between two and four years. It also considered that additional safeguards may be necessary to ensure the Member is able to re-enter membership on a solid footing – those measures could include suspension of the Member's Certificate of Public Practice, a further practice review, mentoring and/or further training.

The PCC referred the Tribunal to *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354 where the Court identified the following principles as being relevant when tribunals are determining penalty. They are, which penalty:

- Most appropriately protects the public and deters others;
- Facilitates the Tribunal's important role in setting professional standards;
- Reflects the seriousness of the misconduct;
- Promotes consistency with penalties in similar cases;
- Allows for the rehabilitation of the practitioner, where appropriate;
- Punishes the practitioner;
- 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 Courts have however made it clear that punishment is generally not to be considered as a factor in its own right but is more properly to be regarded as a consequence or by-product of an application of the other principles, the main purpose of disciplinary proceedings being to ensure appropriate standards of conduct are maintained. The Courts have also stated that the most serious penalties should be reserved for the most serious cases.

The PCC also referred the Tribunal to the Appeals Council decision in *Lee* (19 July 2013) which confirmed that a finding of misconduct in a professional capacity will normally result in the Member being struck off or suspended.

The PCC submitted that the Member's conduct was towards the most serious end of the spectrum, involving elements of dishonesty (in providing false and misleading information to the Institute, some of which conduct the Tribunal has found to be deliberate), lack of integrity and incompetence

in the running of his practice and performing compilation engagements. It submitted that the operation of an insolvent practice would, on its own, generally justify a period of suspension.

The PCC acknowledged that the Member's conduct did not include the more overt self-interest found in *Gormack* (DT 14 November 2016) where the Member clearly placed his own financial interest above those of his clients, or the outright misappropriation of client funds such as in *O'Reilly* (DT 28 November 2017) – in those cases the Member was struck off.

The PCC also referred the Tribunal to a number of its other decisions, the key ones of which from the Tribunal's perspective will be discussed below.

After identifying what he considered to be the ratio in *Roberts* (the principle of law on which a Court bases its decision), the Member's advocate submitted that the principles from that case listed above were persuasive but not compelling - the imposition of a penalty was strictly a matter of discretion and while the Tribunal may be guided by the *Roberts* decision it has no need to follow it if the circumstances require different action. The Tribunal accepts that imposing a penalty involves the exercise of discretion but otherwise rejects that submission. As noted by the Tribunal's legal assessor, the principles in *Roberts* are well founded and supported by other authorities. They have been frequently applied by disciplinary tribunals, including this Tribunal and the Appeals Council.

As the Tribunal's legal assessor has also noted in his directions, the overriding purpose of professional disciplinary regimes, and of the sanctions imposed, is to protect the public. Protection of the public includes not simply protecting from the risk of harm posed by a particular Member, but protection in the broader sense by the setting and maintaining of standards of professional conduct. In the words of Eichlebaum CJ (in *Dentice v The Valuers' Registration Board* [1992] 1 NZLR 720 at 724): *[Disciplinary] provisions exist to enforce a high standard of propriety and professional conduct.*

However, all of the principles in *Roberts* (except punishment for the reason discussed above) must be considered by the Tribunal in reaching its decision as to penalty, not just some of them.

The Member considered that the most serious conduct was that of operating his accountancy practice while it was insolvent. The Member submitted that that was not the same as being bankrupt. The Tribunal disagrees. As the sole holder of a Certificate of Public Practice, the Member was in effect the practice. As stated in the Tribunal's determination as to liability, it is simply unacceptable and most unprofessional for a chartered accountant, a substantial part of whose practice is tax reporting and tax compliance on behalf of clients, to fail to pay on due date or make appropriate arrangements for the payment of their firm's tax obligations – particularly PAYE (which is in the nature of trust funds) and GST. That applies irrespective of the practice structure a Member provides services under. The Tribunal considers the Member's deliberate deception of the Institute about his professional indemnity insurance cover is an equally serious matter.

The Member invited the Tribunal to take a "global" approach to penalty as set out in the Sentencing Act (that is, to impose a penalty for the most serious Charge with the other Charges being included in it). However, the Member acknowledged that that Act does not apply to this disciplinary process. It is the practice of this Tribunal to have regard to each of the proven Charges and the underlying misconduct of the Member (although not in a way which amounts to double-counting) and to

assess the overall penalty in light of that – it has been provided with no principled basis to warrant departure from that practice in this case.

In relation to Ms X's complaint, where the Tribunal found the Member's conduct to be unbecoming of an accountant, the Member invited the Tribunal to accept that Ms X has her remedy (through the Disputes Tribunal) and that it is unnecessary, and would be an injustice, for the Tribunal to effect any further remedy here. No penalty is justified in relation to this conduct – but if a penalty is to be imposed it should be included as part of the "global" penalty.

That submission overlooks the fact that a key purpose of disciplinary proceedings is to ensure that appropriate standards of conduct (including professional behaviour) are maintained. The Member's conduct towards Ms X clearly fell below the standard. There is also a need to protect the public and deter others. In the Tribunal's view, simply leaving a complainant to enforce a civil remedy does not achieve those objectives. The submission also overlooks that aspects of the relevant particular related to a deliberate breach (as the Tribunal found) of the Institute's regulations – a matter that is not directly related to any remedy Ms X may have. The Member's conduct towards Ms X warrants disciplinary sanction.

The Member placed significant emphasis on his willingness and ability to be rehabilitated, and the steps that he had already taken along that path. They include:

- Taking steps to resolve issues with the liquidators of both his practice and a family company of which he was a director, and the IRD – but the only evidence of this apart from his own statements was a Settlement Deed between the Member, the family company and its liquidators where he agreed to pay a substantial sum to settle a debt claimed by that company and claims by the liquidators for breach of director's duties, both of which claims he had denied;
- Steps to obtain advice and mentoring from an experienced and reputable professional;
- The Member's willingness to have the Institute or any appropriate body or person monitor his practice; and
- The Member's statement that he would not restart the Accounting Career Connect business without taking advice, including advice from the Institute.

The Member stated that further steps necessary are well on track but that assertion does not sit comfortably with the Member's later statement that it might be that those steps will have to remain on hold pending the outcome of certain proceedings – he also did not explain what those steps are or why they may need to remain on hold.

The Member invited the Tribunal to deal with the penalty as follows:

- Impose a "global" penalty as described above;
- Make a finding that he is capable of rehabilitation – in which case the Tribunal must take that into account when assessing penalty;
- Impose the least restrictive penalty possible in the circumstances;
- Follow what the Court did in *Roberts* – that is, impose a suspension only long enough to allow him to attend whatever courses the Tribunal considers necessary for him to become familiar with and understand ethical considerations and appropriate boundaries, being a period no longer than three to six months;
- Order the Member's practice to be monitored for 12 months (or such longer period as may be considered necessary by the Institute) by a person acceptable to the Institute;
- Order the Member be mentored by a person acceptable to the Institute for the same period as the monitoring;

The Member would undertake not to be involved in business activity outside of his accountancy practice for the next 12 months;

The Tribunal's legal assessor has directed that it is not necessary that it make an express finding as to whether the Member is capable of rehabilitation – the prospect of the penalty imposed assisting in his rehabilitation is one of several factors to take into account.

The Tribunal is not prepared to make a finding that the Member is capable of rehabilitation – it considers that it has insufficient corroborated evidence before it to make such a finding. It is also concerned that the Member continues to show a disturbing lack of insight in relation to the unacceptable nature of his dealings with Ms X. Despite the Tribunal's findings, based on the relevant documents and oral evidence tested by cross-examination, as to the mutually agreed training arrangements, that Ms X completed the agreed training and that the Member/ACCL guaranteed her a specific job which was not ultimately provided to her, the Member/ACCL have applied for a re-hearing of a Disputes Tribunal decision in an effort to avoid having to refund the fees that she paid.

However, it has taken into account in reaching its decision certain rehabilitative steps the Member has taken as mentioned below and the monitoring/mentoring/training steps the Member (and the PCC) have suggested – but, as can clearly be seen from the Appeals Council's decision in *Lee*, rehabilitation is only one of the factors to be taken into account in assessing penalty.

The Tribunal records that before reaching its decision on penalty, in addition to the evidence adduced at the Hearing it also considered all the documents attached to the Member's "submissions" dated 3 July 2019 – except for the bank statements and some loan refinancing statements and related documents. To the extent the bank and related documents are relevant, in the Tribunal's view they do not in themselves without more corroborate the Member's statements about funds that were used to support the operations of the family company.

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

- That the Member is relatively new to practice and that he has not been subject to disciplinary proceedings before (both of which were factors taken into account by this Tribunal and the Appeals Council in *Lee*);
- The steps the Member has taken to remedy the quality and competence issues the subject of the Hearing and to remove the offending material referred to in Particular 7(d) and (e) (although little weight is placed on those steps as failure to have done much of what the Member has now done would constitute continuing or further breaches of his professional obligations);
- The monitoring the Member is organising with a senior member of the profession.

The Tribunal considers that the penalty which most appropriately protects the public and deters others, facilitates the Tribunal's important role in setting and maintaining professional standards and reflects the seriousness of the misconduct, is one which includes a period of suspension and orders that are aimed at ensuring that if the Member returns to public practice his level of competence will meet, and be maintained at, the requisite professional standards.

The maximum period of suspension the Tribunal can impose is five years. The Tribunal considers that the appropriate period of suspension in this case is two years. It has reached this view following an analysis of similar cases – one of the principles identified in the *Roberts* case is that the penalty should be one which is consistent with penalties in similar cases, although of course no two cases will be the same.

A penalty of three to six months' suspension (linked to what the Member says would be the rehabilitation period) is wholly inappropriate – it does not reflect the seriousness (or the range) of the misconduct, would do very little to deter others and in the Tribunal's view would not be seen by either the public or the profession as being consistent with the Tribunal's role of maintaining and enforcing professional standards. As the Tribunal's legal assessor has noted, the decision in *Roberts* was based mainly on the failure of the relevant tribunal to give reasons for imposing the

maximum period of suspension (or a longer period of suspension than completion of appropriate training programs would have required) – the approach of imposing a period of suspension limited to the time required for appropriate rehabilitation has not been adopted in other cases or by this Tribunal or the Appeals Council.

In *Lee*, the Appeals Council imposed a one year period of suspension on a Member who made a false declaration. However, the conduct here is significantly broader in scope – including negligence and other shortcomings in professional behaviour.

In *Miller* (DT 29 August 2017), where the Charges included misconduct in a professional capacity and conduct unbecoming an accountant, the Tribunal found the conduct to be unprofessional and involving dishonesty, deliberately misleading another professional and negligence. The Tribunal imposed a two year suspension.

In *Chan* (DT 28 March 2018), where the Charges proved were the same as here, the conduct involved elements of dishonesty, self-interest and significant incompetence (the grossly negligent handling of client monies). The penalty imposed was a two year suspension (not 18 months as recorded in the PCC's submissions).

In *Horrell* (DT 17 January 2019), the Charges were conduct unbecoming an accountant and negligence, relating to involvement in clients' business dealings where the conflicts of interest were both serious and sustained and there was clear evidence of self-interest. The Tribunal imposed a four year suspension of membership. In the Tribunal's view, the Member's conduct, whilst encompassing a broader range, is less egregious than the conduct in that case.

The PCC noted that the integrity related concerns in this case (even in combination) may be considered less egregious than those in *Moffatt* (19 December 2014), where the Member, amongst other failings, accepted cash payments without declaring them to the IRD, *Hennessy* (28 July 2015), where the Member repaid himself before, and to the detriment of, his clients and *Landon* (22 December 2016) employee theft of less than $500 with mitigating circumstances. In the first two cases the Members were suspended for two years, in the last 30 months. Whilst the PCC's observation might be accurate, the misconduct here was significantly broader in scope – including negligence and other unacceptable professional behaviour.

In the Tribunal's view, a suspension of membership for two years is not inconsistent with the cases analysed above.

On the evidence before it, the Tribunal agrees with the PCC's submission that it is questionable whether the Member has ever had the competence to deliver services to the public at the level expected of a chartered accountant.

As to the other orders it proposes to make, they too reflect the Tribunal's concern to protect the public, maintain professional standards and also in part assist in the Member's rehabilitation. It considers the combination of all the orders to be the least restrictive penalty appropriate in the circumstances and, looked at overall, the penalty which is fair, reasonable and proportionate in the circumstances.

The Tribunal makes the following orders pursuant to Rules 13.40(b), (d), (g) and (f) of the Rules of the New Zealand Institute of Chartered Accountants respectively:

1. **The Member be suspended from membership of the Institute for a period of two years;**
2. **The Member's Certificate of Public Practice be suspended until order 3 is complied with;**
3. **If the Member wishes to re-enter public practice following the end of his suspension of membership, he must have first attended a course for new public practitioners approved by the Institute or Chartered Accountants Australia and New Zealand and engaged an experienced member of the profession as an adviser and mentor – the period of engagement to be for at least 18 months; and**

4. **If the Member re-enters public practice, the Institute is to review his practice at the end of the first six months and of the first 18 months and report its findings to the Professional Conduct Committee.**

COSTS

The PCC sought costs of $32,318. The Tribunal notes that the schedule which records details of that figure (including an allowance for a disbursement which will not be incurred) only covers the estimated costs to the date of the hearing and the Tribunal's subsequent determination as to liability. It does not include costs incurred by the Institute (or the Tribunal) in relation to the application to adduce further evidence, the preparation of submissions and directions on penalty, costs and publication or the Tribunal's determination on those points – the total of which will be significant.

The Member submitted that costs should be limited to $7,000 – the figure at which the Member alleged in his submissions Mr Moon for the PCC, in a conversation with the Member's then lawyer, had mentioned costs would be capped at if he was to plead guilty and end the hearing in one day. The Member has provided no evidence in support of his assertion. Mr Moon disputes that any figure was mentioned during his conversation with the Member's lawyer. In any event, the hearing was not completed in one day – only matters relating to liability were addressed in that time.

The Tribunal has issued a practice note relating to costs. The Tribunal's general approach is that the starting point is 100% of costs, noting that the Institute already bears the costs of abandoned investigations and costs up to the PCC's decision to hold a Final Determination. The Member provided some financial information about his practice and some evidence of financial difficulties, but little detail of his overall financial position. It is difficult for the Tribunal to assess from the information made available to it the extent of the Member's net assets or any financial hardship, and therefore what if any discount should be applied.

In any event, the amount sought by the PCC represents a substantial discount on the actual total costs incurred. Having regard to all the circumstances, the Tribunal considers that an award of $31,500 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 the Member pay to the Institute the sum of $31,500 in respect of the costs and expenses of the hearing before the Tribunal and the investigation by the PCC. No GST is payable.

PUBLICATION AND SUPPRESSION ORDERS

The PCC sought publication of the Determinations on the CAANZ website and in *Acuity* magazine, with mention of the Member's name and locality. It sought to have details of the Member's clients and unrelated third parties suppressed.

In a submission, filed outside of time but which the Tribunal is prepared to consider, the Member requested that his name not be published. The Member submitted that the Tribunal is required to impose a penalty consistent with his being rehabilitated into the profession (if it considers rehabilitation is an appropriate option). The *Roberts* decision indicates that the primary purpose of disciplinary procedures is to allow rehabilitation. The Member's efforts to rebuild his practice would be hampered if his name was published.

But, as the Tribunal has held earlier, rehabilitation is not the primary objective when considering penalty – it is only one of several factors and in this case, as it was in the Appeals Council's decision in *Lee*, that factor is outweighed by the more significant factors referred to in the Tribunal's determination on penalty.

As the Courts have stated in the disciplinary context, 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 of the name of a member found guilty as a result of disciplinary proceedings will be required in most cases – particularly where the case, as here, is sufficiently serious. This position is strongly reflected in the Institute's Rules (Rule 13.44(1)(a)). Public interest includes the interest in knowing the identity of a person held to have been guilty of a disciplinary offence.

The Courts, and this Tribunal, have held on numerous occasions that harm to reputation is an inevitable outcome of publication following an adverse disciplinary finding and is not in itself a reason not to publish.

As this Tribunal and the Appeals Council have also noted in numerous cases (for example, *Whyte* (AC 8 April 2014) and *Qui* (AC 21 May 2018)), there must be special circumstances, or highly prejudicial effect (particularly on physical or mental health), if the private interests of the Member or any other person are to displace the public interest considerations referred to above.

In the Tribunal's view, the matters the Member has raised do not amount to special circumstances or evidence any highly prejudicial effect.

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 Member's clients and unrelated third parties be suppressed.

In accordance with Rule 13.44 of the Rules of the New Zealand Institute of Chartered Accountants, the Determinations of the Disciplinary Tribunal shall be published in the official publication *Acuity* and on the Chartered Accountants Australia and New Zealand 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, the parties may, not later than 14 days after notification to the parties of this Determination, appeal in writing to the Appeals Council of the Institute against the Determinations.

The suppression orders shall take effect immediately. No other decision except the direction as to publicity, shall take effect while the parties remain entitled to appeal, or while any such appeal by the parties awaits a determination by the Appeals Council.

MJ Whale FCA
Chairman
Disciplinary Tribunal

NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS

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IN THE MATTER	of the New Zealand Institute of Chartered Accountants Act 1996 and the Rules made thereunder
AND	
IN THE MATTER	of **Khieng Chiv** Chartered Accountant, of **Auckland**

DETERMINATION OF THE DISCIPLINARY TRIBUNAL OF THE NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS
15 July 2019

Hearing:	2 July 2019
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 A Newman FCA Ms A Kinzett (Lay member)
Legal Assessor:	Mr Matthew Casey QC
Counsel: **Advocate:**	Mr Richard Moon for the prosecution Mr Michael Meyrick 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 an advocate, Particular 7(d) was amended and Particular 7(e) was added by consent. The Member admitted Particulars 1-6, and indicated that he accepted most of the sub-particulars of Particular 7 but denied other aspects of that Particular. The Member pleaded guilty to all the Charges.

The Charges and amended Particulars 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; or

2) Conduct unbecoming an accountant; and/or

3) Supplying information to the Institute that is false or misleading; and/or

4) 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

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

PARTICULARS

IN THAT

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

1. Operated an accounting practice, through KC Partners Chartered Accountants ("KC Partners"):

   (a) while the practice was insolvent; and/or
   (b) which had significant debt owed to Inland Revenue that did not appear to be under arrangement or otherwise monitored,

   in breach of the fundamental Principle of Professional Behaviour (paragraphs 100.5(e) and 150.1 of the of the Code of Ethics (2014)[1] ("the Code"), and/or clause 6.1(b) of Appendix V of the NZICA Rules; and/or

2. Submitted a Practice Review Information Questionnaire ("PIQ") on or about 12 December 2017 that was false and/or misleading, in that the Member stated:

   (a) he held professional indemnity insurance of $2M, with a deductible of $5,000, when he held no such insurance at all; and/or
   (b) the practice had a system of quality control compliant with Professional Standards ("PS")-1 when no such system was in place; and/or

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

(c) the system of quality control included an annual self-assessment, last completed on 17 July 2017, when no such assessment had been completed; and/or

3. Failed to implement quality control policies and/or procedures and/or a monitoring arrangement, as required by PS-1, in breach of the Fundamental Principle of Professional Competence and Due Care (paragraphs 100.5(c) and/or 130.1 and/or 130.2 and/or 130.3 of the Code); and/or

4. Failed to ensure his compilation engagement for A Limited, for the year ended 31 March 2017, was completed in accordance with relevant professional and technical standards in that:

   (a) the Member used an incorrect reporting framework for the financial statements; and/or
   (b) the financial statements contained incorrect balances and supporting workpapers could not be located; and/or
   (c) there were inadequate or no disclosures of accounting policies for material items; and/or
   (d) the Member prepared statutory resolutions that did not reflect current accounting and financial reporting law,

   in breach of the Fundamental Principle of Professional Competence and Due Care (paragraphs 100.5(c) and/or 130.1 and/or 130.2 and/or 130.3 of the Code) and/or Professional Behaviour (paragraph 150.1 of the Code); and/or

5. Failed to undertake appropriate Continuing Professional Development ("CPD") to comply with minimum requirements for CPD in breach of schedule 2 of Regulation CR7 applicable to all members of CA ANZ resident in New Zealand; and/or

6. Failed to maintain his professional competence to ensure that he remained up to date with all current standards applicable to the work of his practice, 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).

Further, being a Chartered Accountant in public practice and in relation to a complaint by Ms X, the Member:

7. Advertised and/or marketed training placements for his business "Accounting Career Connect" by reference to statements that he knew, or ought to have known, were false and/or misleading and/or furnished recklessly and/or carelessly and/or omitted or obscured information, in that the Member:

   (a) stated trainees were guaranteed a job upon the completion of the training; and/or
   (b) assured the complainant she would be offered a job at a Thai business in Auckland upon completion of the training; and/or
   (c) stated (and/or implied or inferred) that completed training would be recognised by CA ANZ as meeting its practical experience requirements; and/or
   (d) used and/or continued to use the CA ANZ branding and/or Approved Training Employer status in the promotion of Accounting Career Connect's services, when such use should be limited to his accounting practice,
   (e) modified the CA ANZ logo to an unapproved form;

in breach of the Fundamental Principles of Integrity (paragraphs 100.5(a) and/or 110.1 and/or 110.2 the Code) and/or of Professional Competence and Due Care (paragraphs 100.5(c) and/or paragraphs 130.1 and/or 130.2 of the Code) and/or of Professional Behaviour (paragraphs 100.5(e) and/or 150.1 of the Code).

DECISION

Particulars 1-6: Complaint by the Institute

The Tribunal is satisfied that Particulars 1-6, which the Member has admitted, have been made out on the evidence before it.

In relation to Particular 1, at the time of the practice review which gave rise to this complaint, the Member's firm owed Inland Revenue Department more than $80,000 in unpaid PAYE and GST, some of which extended back two years. His firm was ultimately put into liquidation by Inland Revenue and one of the liquidator's reports disclosed that the total shortfall to creditors exceeded $180,000.

In relation to Particular 2, the Tribunal infers from the fact the Questionnaire stipulates that members must choose between options as to the amount of insurance held and the extent of the deductible, which the Member did, that the provision of false information about his firm's PI insurance cover was not reckless or careless but deliberate. Most users of a chartered accountant's services expect them to hold PI insurance and it is a requirement for members to do so, a key distinction between chartered accountants and most other providers of general accounting services – the Member not only failed to hold insurance but in the Tribunal's view deliberately concealed this from the Institute.

As to Particular 3, the evidence of the Professional Conduct Committee's ("PCC") witness, which the Member did not challenge, was that the practice review indicated a significant lack of quality control in the practice and there were important instances of non-compliance with the relevant standard. In particular, lack of a cyclical review of engagements from each service line his firm offered, by a member who had no association with the engagement - in this case another member in public practice as the Member was the sole CPP holder in the firm.

In relation to Particular 4, when conducting the compilation the Member used a reporting framework for financial statements that had been replaced three years previously. There was also a significant unexplained variance in the GST figure in the financial statements compared with that in a reconciliation of GST. When the practice reviewer drew the Member's attention to non-disclosure of an accounting policy for Goodwill which was a material item in the financial statements, the way in which he rectified that (simply duplicating words used by the reviewer which did not amount to an accounting policy) demonstrates a concerning lack of understanding of reporting standards.

As to Particulars 5 and 6, the Tribunal accepts the PCC's evidence that such continuing professional development as the Member was engaged in did not appear tailored to his practice or likely to address the obvious gaps in his knowledge.

Particular 7: Complaint by Ms X

The Member's advocate questioned whether the Tribunal had jurisdiction to consider this complaint on the basis that Ms X's contract was with Accounting Career Connect Limited ("ACCL"), not the Member's firm. That question can be addressed in short order.

Paragraph 1.2 of the Code of Ethics states that the requirements in the Code are equally applicable whether the member is in public practice, industry or commerce. For example, the Fundamental Principle of Integrity imposes an obligation on all members to be straightforward and honest in all professional **and** business relationships (emphasis added) (Paragraph 110.1 of the Code). The Fundamental Principle of Professional Behaviour imposes an obligation on all members to, among other things, avoid any action that the member knows or should know may discredit the member's profession (paragraph 150.1).

In any event, the Tribunal is satisfied that the two businesses (training and professional services) were so closely connected that without question the Code applied to the Member's dealings with Ms X. For example, his firm's logo appeared on much of the online promotional material used by ACCL, next to its own logo. Reference was also made in the ACCL promotional material to intensive training in his firm which had Approved Training Employer ("ATE") status, the contract Ms X signed had his firm's logo prominently displayed on it and the contract provided that the fee for the programme was to be paid into his firm's bank account, not that of ACCL. Both businesses, which the Member controlled, operated from the same offices.

The Tribunal finds that the allegations contained in sub-particulars (a)-(e) have been made out on the evidence before it, to the requisite standard of the balance of probabilities. In doing so, it has been necessary to assess the Member's credibility and that of Ms X.

In the Tribunal's view, Ms X was a credible witness under cross-examination. It rejects the Member's advocate's submission that she was deliberately obtuse about the terms of the contract. In its view she consistently maintained her original evidence, was open and candid - not evasive - and answered all questions put to her. The Tribunal considers the Member's evidence was on occasions inconsistent with the documentary evidence and he did not make concessions about the shortcomings with the terms of the contract that he should have. In light of developments subsequent to the hearing referred to at the end of this decision, it considers that the Member was at best careless as to the truth around what documentation had been provided to the PCC before his final determination hearing. It prefers the evidence of Ms X.

Sub-particular (a)

Ms X's assertion that the Member guaranteed her a job at a business in Auckland on completion of training (whether or not there was a misunderstanding that the business was a Thai business) is consistent with the online promotional material and the terms of her contract.

Sub-particular (b)

The Member's assertion that the job offered was at a tyre business, not a Thai business, is of no moment.

The Member's social media comments in May and December 2017 (in which to the extent that he identifies himself by title he does so as a partner at his firm) talk about training, work experience

and job placement as a single package and that a job is guaranteed. The Member's assertions that at the time he was dealing with Ms X there was an additional fee to be paid if a job placement was successful are inconsistent with that material and, in the Tribunal's view, with the terms of the contract.

It is common ground that ACCL did not place Ms X in a job. The Member asserts that the reason for this is that she had not completed her training. She claims that she had.

What the Tribunal understands to be the essentially standard form contract which Ms X signed is not helpful to either party. The Member told the Tribunal that the training arrangements were that a person needed to train either for three months full time (Monday to Friday) or six months part time at the weekend (Saturday and Sunday). The Member acknowledged that he knew Ms X was working full time and therefore asserted that her training was not complete until she had done six months part time training – she had only done three months. But that is not what the contract says. It states that the training would be on a full time basis Monday to Friday for three months. The candidate will then continue to remain in the firm for a further three months with one full day's work experience (a Saturday) *while [the candidate] searches for employment.* But the contract also states that employment was guaranteed. There is no mention in the contract to part time training or that it must be for six months.

The Tribunal also notes that in written submissions the Member made to the Disputes Tribunal, where Ms X was seeking a refund of the fees she paid because the Member had not provided her with a job, there are at least two unqualified statements that Ms X had completed her training. Further, the documentary evidence available to the Tribunal discloses that at no time after she emailed the Member in January 2018 stating that she had finished her training and asking about the job the Member had said was available did he or any of his associates assert that there was no obligation to place her in a job because she had not finished the training. In the Tribunal's view, the Member's evidence under cross examination when asked whether he had raised the issue of unfinished training with Ms X at the time was unconvincing.

The Tribunal accepts Ms X's evidence that the mutually agreed training arrangement was that she only needed to attend weekend classes for the three month duration of the course. Although the Tribunal has reached its own decision on the documentary evidence before it and the evidence given to it under oath and subject to cross-examination, it notes that when at the actual hearing before the Disputes Tribunal the Member asserted that Ms X had not completed her training, that Tribunal found to the contrary.

The Tribunal also accepts Ms X's evidence that the Member told her he would reserve for her one of the available jobs at an Auckland based business. The Member/ACCL not only guaranteed her a job – he guaranteed her a specific job.

Sub-particular (c)

The factual allegation is borne out by the online promotional material the Member used. However, as the training appears to have been provided by the Member's firm which was ATE accredited and the PCC did not particularise the manner in which it alleged that the information was false or misleading, reckless or careless, the Tribunal does not find this sub-particular to be made out.

Sub-particulars (d)-(e)

There was ample evidence before the Tribunal that the CAANZ branding and ATE status was used in the promotion of ACCL's services, including on ACCL's Facebook pages and, to a more limited extent, on its website. The Tribunal also finds that the CAANZ logo was modified to an unapproved form by the inclusion of the expression *Approved Training Employer* immediately below the authorised symbol and words.

The regulation setting out the terms on which members can use the logo, with which compliance is mandatory, requires the logo to be used strictly in accordance with the Style Guide and that a member must not alter the logo or use it in respect of any unrelated goods or services. The Member's advocate's argument that the logo had not changed and there was simply additional words added close to the logo is an exercise in semantics and is rejected. Among other things, the Style Guide stipulates that there must be a stated amount of clear space between the logo and any other wording - that was not the case here.

Is Particular 7 made out?

As to sub-particulars (a) and (b), the Member told the Tribunal that at the time he entered into the contract with Ms X, he genuinely believed that there was a job available for her at the "tyre" company. However, the job placement person at ACCL left the company around January 2018 and she was the person who had all the employer contacts – the Member lost those contacts and with them the jobs that had been available. If that were the case, in the Tribunal's view the Member was at best reckless and/or careless in procuring ACCL to represent or agree that it could guarantee jobs when it had no contractual commitments from businesses to accept trainees who had completed its courses. The Tribunal finds that the Member's conduct was in breach of each of the Fundamental Principles of the Code referred to in the Particular – a lack of straightforwardness and fair dealing, and a lack of care resulting in conduct which the Member should have known might discredit his profession.

As for sub-particulars (d) and (e), the Tribunal finds that the Member's conduct was careless and, from March 2018, deliberate. The practice reviewer at that time had drawn the Member's attention to these matters and requested him to remove the material from ACCL's website and only use the logo on KC Partners' website. The Member gave the Institute the impression that he had removed the logo as at 23 March but in fact the conduct continued at least up to this date of this hearing, as the Member acknowledged during his evidence. The Member's conduct constitutes a breach of the Fundamental Principles of Integrity and Professional Behaviour.

The Particular other than sub-particular (c) is made out.

Charges

As previously stated, the Member has accepted all the Charges. The Tribunal however must make its own assessment as to whether the Charges are proved.

It is clear from the Tribunal's finding on and the Member's admission of Particular 2 that the Member is guilty of Charge 3.

The conduct the subject of Particular 7 in the Tribunal's view is sufficiently serious, and falls well below the standards expected of a chartered accountant, that it constitutes conduct unbecoming an accountant – Charge 2 is proved.

In relation to Particulars 3-5, in the Tribunal's view, the extent of the Member's failures – the lack of any quality systems or processes and the fundamental shortcomings in the compilation engagement that was reviewed - is of such a degree as to bring the profession into disrepute. Charge 4 is proved.

Misconduct in a professional capacity (Charge 1) constitutes intentional wrongdoing 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 its 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.

In the Tribunal's view the conduct the subject of Particulars 1 and 2 cumulatively constitutes professional misconduct. It is simply unacceptable and most unprofessional for a chartered accountant, a substantial part of whose work is tax reporting and tax compliance on behalf of clients, to fail to pay on due date or make appropriate arrangements for the payment of their firm's tax obligations – particularly PAYE (which is in the nature of trust funds) and GST – some may also consider this to be a breach of the trust of the public. The Tribunal also considers the Member's deliberate deception of the Institute about his professional indemnity insurance is a serious matter for the reason previously stated. Together these two matters meet the requisite threshold.

Other Matters

In the Tribunal's view, the Member's assertion that the Disputes Tribunal case brought against him and ACCL by Ms X (successful) and another Disputes Tribunal case brought by another trainee of ACCL (unsuccessful) are virtually identical, is simply not tenable. Ms X was seeking a refund of the fees she paid ACCL because she did not get the specific job ACCL guaranteed (or for that matter any other job). The other trainee was claiming a refund where they had only partially completed their training. They are significantly different fact situations. The Tribunal considers that the Member's sense of injustice is misplaced.

The Member made much of his perception that Ms X's more recent conduct towards him, including the laying of the complaint with the Institute, has been driven by vindictiveness. Even if that was the case, although based on the information before the Tribunal there is nothing to substantiate that perception, the motivation of a person making a complaint will rarely be a factor to be taken into account by the Tribunal, unless it goes to the credibility of the complainant. The Tribunal found Ms X to be a credible witness. She was entitled to make the complaint – it was clearly not vexatious and moreover, it has been upheld.

At the end of the hearing, the Member sought leave to produce further information *in relation to the document that has been submitted to the PCC about the progress I have made and the notes, the quality control procedures and the engagement letter from Tim Shaw.* Leave was granted on the basis that the information would be provided to the PCC to reach a view as to whether it could

be put forward to the Tribunal by consent. If the PCC had issues with any or all of the information the Tribunal's legal assessor would provide directions.

The Member provided 127 pages of documents, approximately half of which were bank statements. The PCC objected to the Tribunal receiving them. Among the grounds of objection were that the bulk of the material had not previously been provided to the PCC and it did not appear to be relevant. The Tribunal has been informed that most of the documents the Member now wants to submit were not signalled when he made his application at the end of the hearing.

In a memo dated 5 July 2019 the Tribunal's legal assessor, Mr Casey QC, advised that none of the material relates to the Ms X complaint and, with the exception of the bank statements, all of it postdates the time period covered by the Vial complaint. He directs that the material cannot go to the question of liability. Mr Casey's further advice to the Tribunal, which it accepts, is that material relating to the refinancing of a $1 million loan and the bank statements should be excluded and that the other material submitted by Mr Chiv is relevant only to penalty and can be received for consideration at that stage.

PENALTY, COSTS, SUPPRESSION ORDERS AND PUBLICATION

The Tribunal directs the PCC to:

- File and serve any submissions it wishes to make on penalty, costs, suppression orders and publication; and
- Provide the Member and the Tribunal with an updated schedule of estimated costs

no later than 26 July 2019.

The Tribunal directs the Member to file and serve any submissions he wishes to make on penalty, costs, suppression orders and publication (and any supporting material not provided to the Tribunal before the end of the hearing that is relevant to his submissions) following receipt of the PCC's submissions, no later than 9 August 2019.

The Tribunal intends to consider these matters on the papers, following receipt of directions from the Tribunal's legal assessor which will be circulated to the parties. However, if either party wishes to be heard or the PCC objects to the production of any supporting material by the Member, they are to advise the Tribunal's secretary no later than 5pm 14 August 2019. A teleconference will then be organised.

MJ Whale FCA
Chairman
Disciplinary Tribunal