

**BEFORE THE NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS  
APPEALS COUNCIL**

**IN THE MATTER OF** an appeal against the decision of the Disciplinary Tribunal of the New Zealand Institute of Chartered Accountants dated 22 December 2015 (as to liability) and 31 March 2016 (as to penalty, costs, suppression and publication)

**BETWEEN** **THE PROFESSIONAL CONDUCT COMMITTEE OF THE NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS**

**Appellant**

**AND** **Member Y**

**Respondent**

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**DECISION OF APPEALS COUNCIL**

**Dated 17 October 2016**

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**Members of the Appeals Council:**

Les Taylor QC (Chairman)  
Paul Armstrong FCA  
Gary Leech FCA

**Counsel:**

Richard Moon for the Professional Conduct Committee  
Richard Fowler QC and Gerard Dewar for the Member

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Please refer to the decision of the Disciplinary Tribunal dated 31 March 2016



## **The appeal**

1. This appeal has a number of unusual features.
2. First, it is an appeal by the Professional Conduct Committee (**PCC**) in circumstances where some of the charges were found to be proved but others were not.
3. Second, and perhaps most importantly, the decision of the Disciplinary Tribunal (**the DT**) records a finding that certain aspects of the Member's conduct were unbecoming a chartered accountant and were "improper and fell well below the standards expected of a chartered accountant in public practice". Notwithstanding that finding, however, the DT held that the charge of conduct unbecoming had not been made out. That was because they found that not all of the particulars in sub-paragraphs (i) to (v) in Particular A of the charges had been made out.<sup>1</sup>
4. Finally, the circumstances which gave rise to the charges were themselves somewhat unusual. The charges arose out of information supplied and statements made by the Member to an insurance company which was investigating whether the recipient of an insurance benefit was receiving income from work carried out by him. The appeal raised important questions as to the standard of conduct required of a Member in circumstances where a third party, such as the insurer in this case, requested information from the accountants acting for the person who was the subject of the investigation and also for his associated entities.
5. We note that the DT in its decision made a specific finding that the Member did not know that his client had been carrying out work for a company in which he and another shareholder were involved.<sup>2</sup> That finding was not challenged on appeal. The focus of the appeal was on whether the information supplied by the Member to the insurance company was, in context, misleading and whether, in the circumstances, the Member ought to have known that.
6. The DT also found that the conduct complained of in Particular D(i) (which related to the provision of misleading information to the PCC) was not intentional or deliberate. In respect of Particular D(ii) (which also related to the alleged provision of misleading information to the PCC) it found that there was no clear cut explanation as to how the misleading information occurred and was not therefore prepared to draw an inference that the Member was in breach of the Fundamental Principles of Integrity or Professional Behaviour.

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<sup>1</sup> DT decision at pages 4 and 5

<sup>2</sup> DT decision at page 6.

7. The PCC, in appealing the DT's decision, was anxious to establish that it was not necessary to prove that the conduct claimed of in Particular D(i) was intentional or deliberate and that the absence of a clear cut explanation from the member in respect of Particular D(ii) did not mean that no adverse inference could be drawn as to whether the provision of the misleading information constituted a breach of the Fundamental Principles of Integrity or Professional Behaviour.
8. The Disciplinary Tribunal expressed the view, however, that even if it were wrong in its view that the conduct did not breach those standards it "did not consider the conduct sufficiently serious to warrant a disciplinary sanction".<sup>3</sup>

### **Hearing of the appeal**

9. The appeal was initially set down for a hearing time of one day which proved to be somewhat optimistic. The hearing before the Disciplinary Tribunal took three days. There were a significant number of witness statements and exhibits and 500 pages of transcript which were the subject of quite detailed scrutiny at the appeal hearing. The appeal was therefore adjourned part-heard and allocated another one day of hearing.
10. At the resumed hearing, following the morning adjournment, discussions took place between counsel for the PCC, Mr Moon, and counsel for the Member, Mr Fowler QC. As a result of those discussions, the Member consented to the appeal being allowed and the Member being found guilty of conduct unbecoming. The finding of guilt of conduct unbecoming is based on the (alternative) finding by the DT at pages 6 and 7 of its decision.<sup>4</sup> The Member also pleaded guilty to providing misleading information to the PCC (which was the charge to which Particulars D (i) and D(ii) related).
11. The (alternative) finding by the DT that the Member's conduct was unbecoming (although not proved in the DT because of the way in which Particular A in the amended notice of charges was interpreted and applied following a direction by the Legal Assessor) was as follows:

It is not acceptable to change financial statements already approved and signed off by the directors and provide them to a third party when the client (In this case both directors) has not approved the changes. It is also not acceptable to give that third party the impression that the financial statements provided were the final and approved financial statements when they were not. The proper approach would have been to provide the original signed statements with an explanation of the matter which was misleading. In the Tribunal's view, this conduct, particularly where at the same time as providing

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<sup>3</sup> DT decision at p8.

<sup>4</sup> Quoted in part at para 11 below

[deleted] with the financial statements referred to in (iii) you had incorrectly advised [deleted] that it was [deleted] who had subcontracted to the business and received the \$42,000 referred to in the financial statements, would be conduct unbecoming an accountant. Your conduct was improper and fell well below the standards expected of a chartered accountant in public practice.

12. Having read the evidence before the DT in detail, and having canvassed many aspects of the evidence in the course of the hearing, we agree with and fully endorse the above finding by the DT. In our view the Member's conduct fell well below acceptable standards for the reasons summarised by the DT and fully justifies a finding that the Member's conduct was unbecoming.
13. We think that the decision by the Member to consent to the appeal being allowed and to plead guilty to conduct unbecoming, as found above, was a responsible decision. To his credit the Member, through his counsel, did not seek to challenge the above alternative finding by the DT in any way. Mr Fowler, on behalf of the Member, quite properly accepted at the outset that it was a finding that was open to the DT on the evidence. He accepted that, if the interpretation by the DT of Particular A was not upheld on appeal, then the charge of conduct unbecoming would be established.
14. Because of the decision by the Member to consent to the appeal being allowed in respect of the charge of conduct unbecoming it has not been necessary for us to grapple with the correctness or otherwise of the Interpretation of Particular A adopted by the DT following the direction by the Legal Assessor. We note, however, that, although each case must be assessed on its own particular facts, we consider that, as a general rule, the particulars of the charges should be construed in a manner which best achieves the object of the disciplinary process which is to identify and sanction conduct which does not meet the required and accepted standards of the profession.
15. The purpose of particulars is to ensure that the Member is fairly informed of the charges against him and of the conduct which it is alleged has breached the standards of the profession. Providing that purpose is not overridden, and provided the Member is not unfairly prejudiced in his defence of the charges, we would generally favour an approach to interpretation which best achieves the object of the disciplinary process. We do not consider that a restrictive or narrow approach

to interpretation, or amendment, of the charges is necessary. We see this approach as consistent with the cases cited in argument by Mr Moon.<sup>5</sup>

16. In pleading guilty to the Particulars in D(i) and D(ii) the Member was not accepting that the conduct was intentional or deliberate but, at least implicitly, was accepting that the conduct need not be intentional or deliberate for the relevant standard to be breached. We agree with that as a general proposition and also accept that the question of whether the conduct was intentional or deliberate will generally be a matter which is relevant to penalty rather than breach.
17. We should add, however, that, where the conduct complained of does not in all the circumstances warrant any penalty or sanction, the relevant standard is unlikely to have been breached even though the conduct complained of (e.g. in this case the provision of misleading information) is proved. We presume this is why the DT specifically recorded in its decision that, even if it was wrong in its reasons for finding that the particulars in D(i) and D(ii) did not breach the relevant standards, the conduct complained of in Particulars D(i) and D(ii) did not in its view warrant sanction.
18. Although it is not necessary for us to decide the matter we note that where, as here, the information which was the subject of particulars D(i) and D(ii) was potentially misleading we do not think the absence of an explanation as to how or why the information was provided in that form would preclude a finding that it was in breach of the relevant standards. Nor do we consider that the absence of an adequate explanation precludes any adverse inference being drawn.
19. As noted by the majority of the Supreme Court in *Z v Dental Complaints Assessment Committee*<sup>6</sup> the disciplinary process is of an inquisitorial nature and persons subject to it are not entitled to all of the protections of persons afforded to a defendant in a criminal trial. In determining whether the charge was proved on the balance of probabilities the DT could clearly take the absence of any, or any adequate, explanation by the Member for the conduct into account.
20. We suspect that the DT in this case chose not to draw any adverse inference rather than being of the view that it could not (as a matter of law) do so. However, for the avoidance of doubt, we confirm that, in the absence of proper and full explanation,

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<sup>5</sup> See for example *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, *Oriov v National Standards Committee* [2013] NZHC 1955, *Mond v Association of Chartered Certified Accountants* [2005] EWHC 1414

<sup>6</sup> At [115]

the DT is entitled to (although not obliged to) draw adverse inferences if it thinks fit.

21. Mr Moon expressed some disquiet at the hearing that the DT may have misapplied the standard of proof and adopted a "sliding scale", depending on the seriousness of the charge, to the standard of proof required.<sup>7</sup> We are not convinced the DT misunderstood the test but, for the avoidance of doubt, we confirm that the standard of proof to be applied is as described by the majority of the Supreme Court in *Z*.
22. The standard of proof is the balance of probabilities and does not change. However, as noted by the majority in *Z*, the standard is flexibly applied because it accommodates serious allegations "through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities standard."<sup>8</sup>
23. Counsel also agreed proposed rulings by the Appeals Council as to the appropriate response regarding penalty, costs, suppression and publication (subject of course to the decision of the Appeals Council in respect of those matters). The hearing was therefore adjourned again so that the Appeals Council could hear submissions on penalty, costs, suppression and publication. These matters were heard in a further hearing which took place on 1 September 2016 (the penalty hearing).

#### **Penalty**

24. Counsel for the PCC and the Member agreed that the Member should be censured in respect of the conduct which was admitted by the Member in the course of the appeal (i.e. Particulars A(i),(ii) and (iii) in respect of the charge of conduct unbecoming and Particulars D(i) and D(ii) in respect of the charge of providing misleading information to the PCC). We agree that censure is appropriate in respect of that conduct (especially in respect of the charge of conduct unbecoming).
25. In respect of the charge of conduct unbecoming an additional monetary penalty was proposed of \$15,000.00. No monetary penalty was sought in respect of the admission of the charge arising from Particulars D(i) and D(ii). Having considered relevant cases in respect of penalty for findings of conduct unbecoming, we agree that censure and a penalty of \$15,000 is appropriate and order accordingly. We also agree that no additional penalty is required in respect of the admission of Particulars D(i) and D(ii).

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<sup>7</sup> The DT at page 6 referred to the standard as being "the balance of probabilities but at the higher level given the given the gravity of the charges and allegations".

<sup>8</sup> *Z* at [102]

26. In addition to the censure and monetary penalty of \$15,000, the Appeals Council orders (as agreed between the Member and the PCC) that the Certificate of Public Practice of the Member be suspended for a period of 12 months from the date of this decision.

#### **Costs**

27. The DT awarded costs of \$43,000 in respect of total costs of \$94,160. Counsel for the PCC and the Member had suggested an uplift in the award of costs in respect of the DT hearing of \$5,000. Following indications by the Appeals Council at the penalty hearing, the Member indicated agreement to an order that costs of the DT hearing be fixed at 80% of actual costs of \$94,160. We therefore order the Member to pay costs of the DT hearing in the sum of \$75,328.
28. No costs were sought in respect of costs of the appeal and we make no order as to costs of the appeal.

#### **Suppression of third party information**

29. In accordance with the decision of the DT (which was not challenged) the names of the insurer and the clients of the Member and those associated with them are suppressed from publication.

#### **Publication of Member's name and locality**

30. The DT in its decision concluded that publication of the Member's name and locality would be out of all proportion to the seriousness of the conduct for which the Member was found guilty.<sup>9</sup> Following the decision of the Member to consent to the appeal being allowed and the Member admitting conduct unbecoming, the Appeals Council indicated that it wished to fully reconsider whether continued suppression of the Member's name and locality was appropriate. For its part the PCC adopted the position that it neither consented to nor opposed the Member's request for non-publication of his name and locality.
31. Mr Fowler made careful and comprehensive submissions in support of the Member's request that his name and locality be suppressed. We note that, in the normal course, an order for publication would be made where charges have been established against the Member. For the reasons discussed in decisions of the Appeals Council such as *Robertson, Whyte and O'Hagan* the Appeals Council will normally take considerable persuasion that the circumstances are such that

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<sup>9</sup> DT decision at p11.

publication of the Member's name and locality should not occur. That is particularly so where, as here, the conduct of the Member is sufficiently serious to warrant a finding of conduct unbecoming. Mr Fowler in his submissions pointed to a number of factors which he submitted justified a decision not to publish the name and locality of the Member. These can be summarised as follows:

- (a) The Member has taken the unusual and responsible step of consenting to the appeal being allowed and thereby admitting conduct unbecoming. We certainly agree that the conduct of the Member in consenting to the appeal being allowed was a responsible decision and reflects recognition by him that his conduct was below acceptable standards.
- (b) The Member recognises that his conduct was below the standards of conduct expected of a chartered accountant and sincerely regrets that he did not make more full disclosure when corresponding with the insurance company and did not fully verify the accuracy of the information which he provided to the insurance company. In the course of the hearing before the Appeals Council the Member acknowledged that, in retrospect, he may have been blinded in his decision making by undue loyalty to his clients.
- (c) At the time of the events the Member was the sole owner of his business. Since the events the business has been purchased by another company in which the Member has no ownership interest. In addition, although the Member is employed by the new owner, he is no longer providing general accountancy services and instead is engaged in development and services relating to a discrete part of the business which does not involve provision of general accountancy services.
- (d) The shareholders in the new business are experienced and respected accountants. They have given detailed evidence of new systems and checks and balances which should ensure that there is no repeat of conduct of the kind which gave rise to the charges in this case. We rely upon and accept their assurances in that regard.
- (e) Because of the changed circumstances described above, and the Member's recognition of the unacceptable nature of his conduct, it is highly unlikely that such conduct would be repeated by the Member in the future. Having heard from the Member directly and having read his statements and those of the new owners, we accept that there is minimal risk of repeat offending by the Member. We have no doubt that the Member truly regrets his



actions and recognises the seriousness with which the Appeals Council views that conduct.

- (f) We received medical information in respect of the Member both from the Member himself and his doctor. The evidence provided suggests that the Member was, at the time of the events, suffering from bouts of depression and has suffered further depression and anxiety symptoms since the laying of charges in this case. In our view the medical evidence was not sufficient in itself to justify a decision not to publish the Member's name and locality. The Member, quite responsibly, did not seek to attribute his condition as an excuse or full explanation for his conduct. It is, however, a factor which we have considered.
  - (g) The Member is relatively young and there is every prospect that the new and more disciplined environment in which he is now employed will have a rehabilitative effect and will assist him in ensuring that there is no repeat of the kind of conduct which gave rise to the charges against him.
32. We do not think that any one of the above factors, or even a combination of some of them, would justify a decision not to publish the Member's name and locality. As noted in the decisions referred to above, there is a presumption in favour of publication and, for non-publication to be justified, there must be special circumstances which outweigh the strong public interest factors which favour publication of the Member's name and locality.
33. Having carefully considered the above factors, however, we consider that, when taken together, non-publication of the Member's name and locality can be justified. We place particular importance on the fact that the Member is young and that, in the changed circumstances since the conduct complained of, there is little risk of a repeat of this kind of behaviour and good prospects of rehabilitation. We remain concerned, however, that two significant stakeholders with whom the Member deals and who, in turn, refer business to his employer should be specifically informed of this decision, and the decision of the DT, and that the decisions relate to the Member with whom they deal. The Member has stated that he is willing to provide an undertaking (described in paragraph 34 below) which meets our concern in respect of the two third party stakeholders with whom he deals.
34. We are, in light of that undertaking, prepared to grant the Member's request that publication of this decision, and publication of the DT's decision appealed from, shall not include the Member's name or location providing the Member complies

with the following undertaking which is provided by the Member (and has been approved and supported by his employer) under Rule 13.65(b):

The Member shall, within 7 days of receiving the Appeals Council's decision without mention of the Member's name and location, provide his current employer's senior business contacts at the two significant stakeholders identified by the Member and confirmed by counsel for the PCC, with a copy of the Appeal Council's decision and a copy of the DT decision to which this appeal relates (again without mention of the member's name and locality) together with a covering letter confirming:

- (a) that he is the Member referred to; and
  - (b) his ongoing role with the business of his current employer.
35. A copy of such correspondence must be provided to the Appeals Council Secretariat within two business days of being sent as evidence the undertaking has been complied with. If the undertaking is complied with, we order that this decision and the DT's decision, without the Member's name and location, be published on the Institute's website and in Acuity. If the undertaking is not complied with, we order that this decision, and the decision of the DT, be published on the Institute's website and in Acuity with the Member's name and location included.

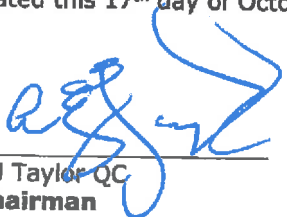
#### **Conclusion**

36. We make the following orders:
- (a) The appeal is allowed (by consent).
  - (b) The Member is censured in respect of the conduct admitted by him as particularised in Particulars A(i), A(ii) and A(iii) in respect of the charge of conduct unbecoming and Particulars D(i) and D(ii) in respect of the charge of providing misleading information to the PCC.
  - (c) In respect of the charge of conduct unbecoming the Member is ordered to pay a fine of \$15,000.
  - (d) The Member's Certificate of Public Practice is suspended for a period of 12 months from the date of this decision.
  - (e) The Member is ordered to pay costs of the DT hearing of \$75,328.
  - (f) The names of the insurer and the clients of the Member and those associated with them are suppressed from publication.

(g) Provided the Member complies with the undertaking referred to at paragraph 34, this decision and the decision of the DT to which this decision relates shall be published without the Member's name and location on the Institute's website and in Acuity. If the undertaking is not complied with the decision of the DT and this decision are to be published on the Institute's website and in Acuity with the Member's name and location included.

37. To the extent that the decision of the DT is not varied or modified by the above orders, the decision and orders of the DT stand.

Dated this 17<sup>th</sup> day of October 2016.



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L J Taylor QC  
Chairman  
Appeals Council