

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 **Aolele Su'a Aloese**, Chartered Accountant, formerly of **Auckland** now of **Brisbane**

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

Hearing: 11 December 2018

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

Tribunal: Mr MJ Whale FCA (Chairman)
Prof DJD Macdonald FCA
Mr J Naylor FCA
Dr RS Janes (Lay member)

Legal Assessor: Mr Paul Radich QC

Counsel: Mr Richard Moon for the prosecution



At a hearing of the Disciplinary Tribunal held in public which the Member attended by teleconference and was not represented by counsel the Member admitted Particulars 1(c) and (e) and 2(b)iv, and denied Particulars 1(a), (b) and (d), 2(a) and 2(b)iii. The Professional Conduct Committee ("PCC") withdrew Particular 3 at the beginning of the hearing. The Member pleaded guilty to Charge 3 (in relation to the Particulars she admitted) and not guilty to Charges 1 and 2.

The charges and 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) Conduct unbecoming an accountant; and/or
- 2) Negligence or incompetence in a professional capacity and that this is of such a degree and/or so frequent so as to bring the profession into disrepute; and/or **(not guilty)**
- 3) 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. Failed to comply with NZICA's public practice rules and/or the Code of Ethics (the **Code**) 2014 and/or 2017¹, in that the Member:
 - (a) failed to pay the Inland Revenue Department taxes owing by her chartered accounting practice(s), WWW and/or ZZZ, including income tax and/or PAYE and/or GST and/or Kiwi Saver contributions, in breach of the Fundamental Principle of Professional Behaviour (paragraph 150.1 of the Code 2014); and/or
 - (b) failed to comply with arrangement(s) made with the Inland Revenue Department to repay outstanding taxes owed by WWW and/or ZZZ in breach of the Fundamental Principle of Professional Behaviour (paragraph 150.1 of the Code 2014); and/or
 - (c) allowed WWW and/or ZZZ to operate whilst insolvent and/or in a state where they were unable to pay their debts as they fell due, in breach of Rule 6.1 of Appendix 5 of NZICA's Rules;
 - (d) allowed WWW to be struck off the companies register when it had debts owing to Inland Revenue and/or failed to ensure WWW was wound up in an orderly or professional fashion in breach of the Fundamental Principle of Professional Behaviour (paragraph 150.1 of the Code 2014); and/or

¹ The Code of Ethics 2014 being applicable to conduct from 1 January 2014 and the Code of Ethics 2017 for any conduct occurring from July 2017. The ethical provisions are the same in both codes.

- (e) failed to obtain consent of the Regulatory Board to practice through ZZZ as required by clauses 2.2 and/or clause 2.4 of Appendix V of the NZICA Rules; and/or
2. Failed to ensure that assurance engagements she performed for XYZ for the year ended 30 April 2016, and/or ABC for the year ended 30 June 2016 were completed in accordance with the relevant technical and professional standards, in that the Member:
- (a) failed to obtain and/or document sufficient appropriate audit evidence to support her audit opinions and/or demonstrate compliance with relevant audit standards in breach of ISA (NZ) 200 and/or ISA (NZ) 230 and/or ISA (NZ) 500, in particular:
 - i. the audit file for XYZ only contained evidence of audit procedures to assess cash at bank and/or grant income and/or there was no audit evidence in respect of all other material balances; and/or
 - ii. there was no audit file to support the audit of ABC or the Member failed to retain her audit file for the retention period of at least five years from the date of her audit report and/or safeguard the confidentiality of it, such that there is no evidence of compliance with relevant assurance standards; and/or
 - (b) in the Member's audit reports for XYZ and/or ABC:
 - iii. expressed her opinion in a manner that did not comply with the requirements of ISA (NZ) 700 and/or ISA (NZ) 705; and/or
 - iv. omitted references to ISAE (NZ) 3000 although the audit reports in each case stated that she had audited non-financial information;

in breach of the Fundamental Principles of Professional Competence and Due Care (paragraphs 100.5(c) and/or 130.1 and/or 130.3 of the Code 2014); and/or

3. [Withdrawn]

DECISION

The Tribunal finds all of the Particulars, including those the Member has admitted, established (although Particular 2(a) only partly established) on the evidence before it on the balance of probability - recognising a higher standard of proof is required in light of the seriousness of one of the Charges.

In relation to the Particulars which the Member has denied, the Tribunal finds as follows:

Particular 1(a): The schedule the Member provided shows that tax owing by the two entities (including interest and penalties) exceeds \$55,000, and some of that relates to periods as far back as 31 March 2008 for one entity and 31 March 2015 (shortly after it was incorporated) for the other. Some of the unpaid tax is PAYE and KiwiSaver contributions – the status of which is not dissimilar to trust funds. Failure to pay tax when due is a breach of the Fundamental Principle of Professional Behaviour which imposes an obligation on all Members to comply with relevant laws and regulations and avoid any action which the Member knows or should know may discredit the Member's profession.

Particular 1(b): Although the Tribunal accepts that the Member had in place payment arrangements with Inland Revenue for some time, the evidence discloses that the entities had defaulted on those arrangements and there are currently no other arrangements in place with Inland Revenue. This is a breach of the Fundamental Principle of Professional Behaviour. Clients relying on chartered accountants for financial and accounting advice expect their advisers to be complying with their tax obligations – their failure to do so may discredit the profession.

Particular 1(d): The evidence clearly establishes that the Member's entity was struck off the Companies Register because she had deliberately failed to file an annual return. The Member acknowledged that she had previously been advised by the Companies Office that she could not deregister the company because it had debts to the IRD. The Tribunal agrees with the Institute's Investigator, Mr Selwyn-Smith that the proper (professional) course was to commence an insolvent liquidation process.

Particular 2(a): The Tribunal notes that the Member is a qualified auditor and that she has had significant experience and training in carrying out audits. It accepts the Member's statements to it that she would never sign an audit report unless she had actually carried out the audit and adhered to the relevant standards when doing so. It gives the Member the benefit of the doubt about her explanations as to why she was unable to provide the complete audit file for one of the audits and no audit file to support the other audit. The Tribunal finds the Particular proved only to the limited extent that the Member was unable to demonstrate compliance with relevant audit standards - because she did not act diligently in ensuring she was able to produce the audit files, the Member's conduct constitutes a breach of the Fundamental Principle of Professional Competence and Due Care.

Particular 2(b)(iii): The Tribunal has reviewed the audit reports and the relevant standards and is satisfied that this particular has been breached. Although the breaches were minor and, as the PCC acknowledged, technical, there is force in the opinion of Mr Selwyn-Smith that if the form of an opinion is incorrect its credibility and that of the auditor expressing it are undermined. In both cases the entities were registered charities and the audit opinions were in the public domain. This particular (and Particular 2(b)(iv)) in the Tribunal's opinion constitute breaches of the Fundamental Principle of Professional Competence and Due Care.

It follows from the Tribunal's findings on the Particulars that the Member is guilty of Charge 3.

The Member submitted that her conduct was not deliberate or intentional but was due to unforeseen circumstances beyond her control including breakdowns in her family relationship and health issues. Whilst those factors partly explain what occurred, (it appears that tax arrears were accruing before the time of her personal difficulties) and go to mitigation, they do not excuse the conduct.

As to the Charges to which the Member pleaded not guilty:

The Tribunal finds the Member not guilty of Charge 2 (negligence or incompetence to the requisite degree). Whilst there was a breach of the Fundamental Principle of Professional Competence and Due Care in relation to the conduct referred to in Particular 2 - lack of care and attention in carrying out the particular tasks and incompetence in the sense of inability to perform to expected standards – in the Tribunal's view, given its analysis above, the Member's conduct was not of such a degree or so frequent as to tend to bring the profession into disrepute.

As to Charge 1, conduct unbecoming an accountant 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 for professional conduct is the standards applied by competent, ethical and responsible practitioners.

In the Tribunal's view, the Member is guilty of Charge 1 in relation to the conduct referred to in Particular 1. In some respects individually and certainly cumulatively that conduct falls well below acceptable standards. The Tribunal is concerned about the amount of tax arrears and the period of time over which they have accrued and the Member's practice entities' inability to comply with arrangements made with the Inland Revenue. These are serious failings. Operating her practice entities while insolvent is also a serious breach.

Allowing one of her practice entities to be removed from the Register in the way that she did, after being told by the Companies Office that she should not also falls well short of expected standards as does practising through an unapproved entity.

PENALTY

The PCC submitted that the appropriate penalty in this case was the Member's censure and the cancellation of her Certificate of Public Practice. In seeking that penalty it had regard to the personal circumstances the Member has experienced over recent years. It submitted that that penalty aligns with other not dissimilar cases.

However, the PCC also submitted that there was a case for consideration of a period of suspension being imposed, as the Member had effectively been trading at the expense of the Inland Revenue over a long period of time and her conduct as set out in Particular 1 was at the serious end. The Member acknowledged the likelihood of suspension or removal of her Certificate of Public Practice.

In *Roberts v Professional Conduct Committee of the Medical Council of New Zealand* [2012] NZHC 3354, the Court identified the following factors 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 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.

In reaching its decision as to penalty the Tribunal has taken into account both the Member's personal circumstances at the time and the following additional factors:

- Her previously unblemished record as a Member for 19 years;

- Her work for organisations involved in Pacific Islands development (although some of that was paid work);
- Her attendance of an ethics course following the practice review that led to the lodging of the complaint against her and this hearing; and
- Her promotion of the profession to the Pacifica community;
- Importantly, her commitment to owning the debts incurred by her practice and her preparedness to repay them notwithstanding her poor financial position and her current employment circumstances. Although the Tribunal has reservations about the Member's ability to do so, she has in the past demonstrated that commitment;
- Her insight about and acknowledgement of the wrong decisions she has made.

In all the circumstances, the Tribunal considers that a period of suspension would be a disproportionate response to the Member's conduct and would not assist her rehabilitation. It considers that a censure and the cancellation of the Member's Certificate of Public Practice is the least restrictive penalty which meets the objectives of protecting the public and deterring others, maintains professional standards, allows for her rehabilitation and reflects the seriousness of the conduct. As the Tribunal held in *Moore* allowing one's own practice PAYE and GST obligations to remain unpaid without any agreed payment plan in place is incompatible with offering tax and accounting services to the public as the holder of a Certificate of Public Practice.

That penalty is also consistent with those imposed in not dissimilar cases such as *Le Quesne* (17 December 2012). Whilst it is a heavier penalty than that imposed in *Whyte* (9 December 2013), the Tribunal held in that case that it had not been proved that the practice entity (although insolvent at one point) continued to be insolvent. The penalty is lighter than that imposed in *Moore* (8 August 2012) (suspension for a period of one year) but in that case there was in at least one respect more serious conduct than in this case.

Pursuant to Rule 13.40(d) of the Rules of the New Zealand Institute of Chartered Accountants, the Disciplinary Tribunal orders that the Member's Certificate of Public Practice be cancelled.

Pursuant to Rule 13.40(k) of the Rules of the New Zealand Institute of Chartered Accountants, the Disciplinary Tribunal orders that the Member be censured.

COSTS

The PCC sought full costs of \$19,396.

The Member accepted the costs figure but indicated that in light of her financial position she would need time to pay.

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 considers that a small discount is warranted in light of the PCC's failure to establish a significant element of Particular 2(a) and one of the Charges. In reaching its decision on what is fair and reasonable in the circumstances the Tribunal has also taken into account the Member's current financial position (although as there is no detailed evidence of that as required by the Tribunal's Practice Note, the discount for that is minimal). It considers \$17,000 appropriate.

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 \$17,000 in respect of the costs and expenses of the hearing before the Disciplinary Tribunal, the investigation by the Professional Conduct Committee. No GST is payable.

PUBLICATION AND SUPPRESSION ORDER

The PCC sought the default position in Rule 13.44 of the Institute's Rules that the decision be published in *Acuity* magazine and on Chartered Accountants Australia and New Zealand's website, with mention of the Member's name and locality. It submitted that any private interest factors put forward by the Member (referred to below) when balanced against public interest considerations were outweighed by the public interest.

The Member submitted that her name should be suppressed for the following reasons:

- Publication would impact adversely on her emotional and mental wellbeing in light of the personal family circumstances in which she continues to find herself;
- Publication would negate any prospect of her finding employment in accounting or audit;
- Because of the status of her close family members who are Pacifica, their mana will be disproportionately and unfairly damaged; and
- She has been associated with regional organisations in the Pacific whose reputations would also be damaged.

The starting point is that the public interest in open justice and transparency creates a presumption in favour of full publication. That presumption is strongly reflected in the Institute's Rules, including Rule 13.44(a). The Appeal Council has stated, as has this Tribunal, that publication should occur in the preponderance of cases especially where the conduct is sufficiently serious which it is here. As was said in *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] NZHC 850, whilst protection of the public is a matter of "public interest", that concept covers a far wider ambit than simply protection – it is in the interests of the profession that the public have confidence in the disciplinary process by which the profession deals with its members.

As to the grounds the Member has submitted to support suppression, the Tribunal considers that they neither alone nor cumulatively outweigh the public interest described above. As to the effect on the Member's mental health, although the Tribunal has sympathy for the Member's position, the consequences of any disciplinary process are stressful. There is no evidence before it to demonstrate that publication would have a highly prejudicial effect on her health, which is the test adopted in the Appeals Council's decision in *Qiu* (21 May 2018) for considering whether this factor outweighed the public interest.

Harm to reputation which may affect subsequent employment is an inevitable consequence of publication if a professional is the subject of an adverse disciplinary finding, but of itself cannot provide sufficient ground for there to be suppression of name (*Daniels*, above). The Tribunal is also not satisfied that the limited publication proposed would result in a wholly disproportionate adverse effect on the standing of the Member's close relatives in the community. As to damage to the reputation of organisations that the Member has been associated with or employed by, the Tribunal is not convinced that the limited publication of this decision would impact adversely on that reputation – although the Member played senior roles, her association with both organisations appears to have ended.

When conducting the balancing process between the public interest in open justice and the maintenance of confidence in the professional disciplinary process and the Member's private interests, the Tribunal also does not consider that it would be appropriate if a prospective employer, were it to do due diligence, would be unable to locate any record of disciplinary action against the Member in the Institute's system, particularly in light of the relative seriousness of the key findings against her.

For all these reasons the Tribunal considers that the public interest in knowing the Member's identity outweighs the interests of the Member and her family.

As the Member's practice entities are no longer operating, and given the nature of the Member's conduct the subject of this hearing, the Tribunal considers it is appropriate to suppress the names of those entities. It will also, as is its practice, suppress details of the Member's personal circumstances.

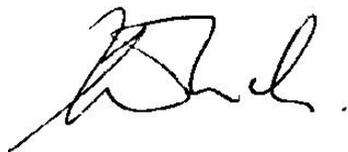
Pursuant to Rule 13.62(b) of the Rules of the New Zealand Institute of Chartered Accountants, the Disciplinary Tribunal orders that the names of the Member's practice entities referred to in these proceedings, and all details of the Member's personal and family circumstances, including the names of and information (other than the Member's name) that might identify members of her family, be suppressed.

In accordance with Rule 13.44 of the Rules of the New Zealand Institute of Chartered Accountants the decision of the Disciplinary Tribunal shall be published on Chartered Accountants Australia and New Zealand's website and in the official publication *Acuity* with mention of the Member's name and locality.

RIGHT OF APPEAL

Pursuant to Rule 13.47 of the Rules of the New Zealand Institute of Chartered Accountants which were in force at the time of the original notice of complaint, the parties may, not later than 14 days after the notification to the parties of this Tribunal's exercise of its powers, appeal in writing to the Appeals Council of the Institute against the decision.

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



MJ Whale FCA
Chairman
Disciplinary Tribunal