

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 **Gina Marie Landon**, Accounting Technician, of **Pukekohe**

**DETERMINATION OF THE DISCIPLINARY TRIBUNAL OF THE NEW ZEALAND
INSTITUTE OF CHARTERED ACCOUNTANTS
22 December 2016**

Hearing: 13 December 2016

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 RG Simpson CA
Ms A Kinzett (Lay member)

Legal Assessor: Mr Paul Radich QC

Counsel: Mr Richard Moon for the prosecution

Tribunal Secretariat: Janene Hick
Email: janene.hick.nzica@charteredaccountantsanz.com



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

The charges and particulars as laid were as follows:

CHARGES

THAT in terms of the New Zealand Institute of Chartered Accountants Act 1996 and the Rules made thereunder, and in particular Rule 13.39 the Member:

- (1) Is guilty of misconduct in a professional capacity; and/or
- (2) Has been convicted of an offence punishable by imprisonment or a fine, and the conviction reflects on the Member's fitness to practise accountancy and/or tends to bring the profession into disrepute.

PARTICULARS

IN THAT in breach of the Fundamental Principles of Integrity and/or Professional Behaviour and/or paragraphs 110.1 and/or 150.1 of the Code of Ethics 2014, the Member:

- (1) On about or between 1 April 2015 and 30 May 2015 committed theft by taking approximately \$437.90 from the Member's then employer, dishonestly and without claim of right; and/or
- (2) On or about 6 May 2016 was convicted and sentenced pursuant to section 220 of the Crimes Act 1961 in relation to a charge of theft in a special relationship, the victim of the Member's offending being her then employer.

DECISION

The Tribunal finds on the evidence before it that the particulars have been made out and that the charges are proved.

This is a case of a breach of trust when the Member was responsible for the payroll function and had access to the online banking system at a company the Member was contracted to. Although the amount misappropriated was less than \$500, any misappropriation of monies where you are in a special relationship with the entity is a very serious matter and is unacceptable behaviour for a member of the Institute. It strikes at the heart of the fundamental principle of integrity and falls squarely within the charge of misconduct in a professional capacity.

The misappropriation of monies in any capacity and to any degree while engaging in the provision of accounting services also reflects on fitness to practise accountancy and tends to bring the profession into disrepute.

PENALTY

The Professional Conduct Committee (*PCC*) sought removal of the Member's name from the Register. In their view this is the penalty required to protect the public and other potential employers, to deter others and to facilitate the Tribunal's role in maintaining professional standards.

Misappropriation of funds in circumstances where there is a special relationship, and where there was a degree of premeditation and planning such that the offending was only discovered by chance (as was the case here), is a very serious matter which breaches the fundamental principle of integrity – which the PCC say is the most fundamental principle of the Code of Ethics. Honesty and integrity cannot be compromised.

The PCC also submitted that removal of the Member's name would be consistent with other decisions of the Tribunal – those of *AR Sharma* (19 September 2012), *L Robertson* (24 February 2015) and *N Lakshmanan* (31 August 2016).

In *AR Sharma*, the member pleaded guilty to three representative charges relating to misappropriating gift vouchers for her benefit or that of family and friends over three years to a value in excess of \$14,500. This was a case of breach of trust and clearly not a spur of the moment decision. The member's name was removed from the Register of Members.

In *L Robertson*, the member pleaded guilty to three charges of theft by a person in a special relationship of amounts exceeding \$80,000. The member provided evidence of overcoming a gambling addiction that was behind the thefts, the money she stole had been repaid and Inland Revenue with knowledge of the convictions agreed to allow her to continue to act as a tax agent. She had the support of clients to whom she had disclosed her offending and had a previously unblemished record and community service of more than 25 years. The member's name was removed from the Register.

In *N Lakshmanan*, the member pleaded guilty to dishonesty offences under the Crimes Act. The amounts involved exceeded \$200,000. The offences took place over a number of years and were found to be both methodical and sophisticated. The member put forward character references and letters of support. The member's name was removed from the Register.

The PCC sought to distinguish the case of *A Member* (26 June 2012). There the member had been convicted for twice shoplifting goods having an aggregate value of approximately \$1,200. As a result she lost her job with a firm of Chartered Accountants. She had almost fully repaid the fines and reparation ordered by the Court and intended to repay the small balance remaining. The Tribunal, in suspending her from membership for 18 months rather than removing her name from the register, took account of the job loss as well as her age, her remorse and her family circumstances during the time the offending occurred. It considered that in those circumstances removal of the member's name would be a disproportionate penalty having regard to the nature of the offence.

The PCC submitted that this case was more serious than the case of *A Member*, because the Member's offending was in the course of the Member's employment as an accountant and the premeditation and planning involved. The fact that the amount stolen by that member was greater was not a determining factor. Quantum may be more important in a criminal context where the focus is in part on the harm done - here the focus should be on the distinguishing features of the theft.

The Member submitted that removing her name from the register would be wrong. The Member gave evidence that her conduct was a one off act of stupidity driven by the desperate financial circumstances in which she found herself (needing to pay an amount up front for a tenancy bond that day when she had insufficient funds to do so, as otherwise the Member and her daughter would become homeless). The amount the Member misappropriated was close to the shortfall in the funds the Member had available to meet the bond. It was not premeditated. The Member was not herself at the time. The Member's personal circumstances were very difficult and she also had a significant health issue. The amount involved was small but the Member accepted that was no excuse.

The Member also presented testimonials and character references, including one from the Member's NZICA appointed mentor, which attested to her honesty and good character. The

Member had studied part time for 15 years to achieve a Bachelor of Business degree while raising her daughter as a single parent. The Member had eight years of being an assistant accountant without any issues. The Member continued to seek assistance from her mentor to help develop her professional career. The Member has on numerous occasions since her offending expressed her remorse and shame for her actions. The Member has also realised what other options are available to her should she find herself in a financially challenging situation again. The Member stated that she is now managing the health issue she had at the time of her offending.

The Member criticised as inaccurate and very personal, assertions made by the complainant about her and her work. As the Member has admitted the Particulars and as those assertions have no relevance to the charges, the Tribunal has not taken them into account.

The Member also criticised the complainant's approach and his refusal to participate in a restorative justice/conciliation process under Rule 21.9 - now Rule 13.12 - of the Institute's Rules. Even if that Rule applied in this situation, a matter on which the Tribunal makes no determination, the complainant was entitled to decline the Member's request to use that process. However, the fact that the Member offered to engage is a factor in her favour.

The Tribunal has also had regard to the submissions made in the Member's support by her daughter.

The Tribunal accepts the Member's evidence that she was about to disclose her conviction to the Institute shortly after she was convicted, but this was pre-empted by the filing of the complaint. However, in the Tribunal's view that is not a mitigating factor as disclosure of the Member's offending should have occurred much earlier. The Tribunal also notes that it was not until at least 12 months later that the Member repaid the amount that she had taken.

Despite the Member's assertions, the Tribunal considers that, because of some of the steps the Member needed to take to obtain the funds, there was at least an element of preplanning in the Member's action – this does not appear to have been simply opportunistic or spur of the moment conduct.

The Member did not see how the three cases the PCC referred to in support of its submission that her name be removed from the Register related to her – partly because her health and personal circumstances were different. However, in at least one of the cases the member's mental health at the time was said to be one of the causative factors giving rise to the offending. Also in each case the conduct involved a breach of trust, theft and premeditation and planning.

The Tribunal has stated on previous occasions that dishonesty of the type the Member has admitted is incompatible with membership of the Institute. The public and the profession are entitled to expect that members conduct themselves with honesty and integrity. The Tribunal considers that theft by a member when providing accounting services and/or when in a position of trust is the most serious professional misconduct.

In *A R Sharma, L Robertson and N Lakshmanan*, the offences took place over a significant period of time and involved substantial sums of money. The Tribunal gave much consideration to whether there should be a different outcome here, such as a period of suspension, because of the quantum involved and the fact that this was a one off act. There is force in the PCC's submission that the focus should be on the distinguishing features of the theft, not the amount. It might also be argued that drawing a line between removal and suspension on the basis of quantum, and/or number of incidents, would be arbitrary and cannot be justified on a principled basis.

However, the issue for the Tribunal is, looking at the matter overall and taking into account mitigating and aggravating factors, what is the penalty which is fair, reasonable and proportionate in the circumstances? What is the least restrictive penalty which most appropriately protects the

public and deters others, facilitates the Tribunal's role in maintaining professional standards, reflects the seriousness of the misconduct, punishes the member and, if applicable, allows for the rehabilitation of the member.

The Tribunal notes that although the Judge was not prepared to discharge the Member without conviction, the Member was put on a good behaviour bond for six months on a charge which has a maximum penalty of seven years' imprisonment – he considered the nature of the offending to be moderately serious but noted that, when it was put in context, it was at the very lowest end of the spectrum. However, the purposes of a penalty in the Tribunal's jurisdiction is different to that in criminal cases. And it is for the Tribunal alone to determine that penalty.

In the Tribunal's view, in this case the objectives referred to above can be adequately met by imposing a period of suspension from membership.

The Tribunal has power to suspend a member for up to five years. As stated earlier, the Tribunal considers this type of offending is the most serious professional misconduct. Deterrence is also an important consideration in this context. The Tribunal wishes to send a very clear message to members that misappropriation of monies, even where there is a single act and the amount involved is small, and irrespective of the reasons, will be dealt with severely.

The Tribunal agrees with the PCC that this case is more serious than the case of *A Member* referred to above. In that case the Member was suspended for 18 months. Here the additional features of the offending were the theft of money from a company the Member was contracted to and at least an element of pre-planning. The Tribunal considers a period of suspension of 30 months as the appropriate and proportionate response.

Pursuant to Rule 13.40(b) of the Rules of the New Zealand Institute of Chartered Accountants the Disciplinary Tribunal orders that Gina Marie Landon be suspended from membership of the Institute for a period of 30 months.

COSTS

The Professional Conduct Committee seeks full costs of \$8,353.

The Tribunal's general approach is that the starting point is 100% of costs, noting that the Institute already bears the cost of abandoned investigations and costs up to the Professional Conduct Committee's decision to hold a Final Determination.

The Member advised the Tribunal that the job that she was currently employed in which she had hoped would become a permanent position was going to end shortly. However this in itself in the Tribunal's view does not warrant departure from its general approach.

The Member did not provide any evidence of mitigating factors such as excessive or unnecessary expenses incurred or evidence of hardship.

Pursuant to Rule 13.42 of the Rules of the New Zealand Institute of Chartered Accountants the Disciplinary Tribunal orders that Gina Marie Landon pay to the Institute the sum of \$8,353 in respect of the costs and expenses of the hearing before the Disciplinary Tribunal and the investigation by the Professional Conduct Committee. No GST is payable.

SUPPRESSION ORDERS

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 complainant, his employer and the entity the Member contracted to be suppressed.

PUBLICATION

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.

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

A handwritten signature in black ink, appearing to read 'MJ Whale', is positioned above the typed name and title.

**MJ Whale FCA
Chairman
Disciplinary Tribunal**