

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

**IN THE MATTER OF** an appeal against decisions of the Disciplinary  
Tribunal of the New Zealand Institute of Chartered  
Accountants dated 15 July 2019 and 6 November  
2019

**BETWEEN** **KHIENG CHIV** of Auckland, Chartered Accountant  
**Appellant**

**A N D** **THE PROFESSIONAL CONDUCT COMMITTEE OF  
THE NEW ZEALAND INSTITUTE OF CHARTERED  
ACCOUNTANTS**  
**Respondent**

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**DECISION OF APPEALS COUNCIL**

**12 March 2020**

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**Members of Appeals Council**

Les Taylor QC (Chairman)  
Gary Leech FCA  
Aaron Walsh FCA

**Counsel**

Appellant: self-represented  
Richard Moon for the Professional Conduct Committee

**Appeals Council Secretariat**

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## **Introduction**

1. In its decision dated 15 July 2019 the Disciplinary Tribunal found Mr Chiv guilty of five charges including misconduct in a professional capacity, conduct unbecoming, supplying information to the Institute that was false or misleading, negligence or incompetence in a professional capacity of such a degree as to bring the profession into disrepute and breaching the Institute's rules and/or Code of Ethics. The charges were accepted by Mr Chiv before the Tribunal. There is no appeal against the findings of guilt by the Tribunal.
2. In its decision dated 6 November 2019 the Tribunal ordered that Mr Chiv be suspended from membership of the Institute for a period of two years and made other orders in relation to Mr Chiv's Certificate of Public Practice. It also ordered that Mr Chiv pay costs in the sum of \$31,500 and that its determination be published in the official publication Acuity and on the Chartered Accountants Australia and New Zealand website with mention of his name and locality.

## **Scope of appeal**

3. Mr Chiv filed a notice of appeal dated 19 November 2019. The appeal was confined to issues of penalty. In making his submissions in support of the appeal Mr Chiv filed written submissions which were confined to the issue of penalty. Mr Moon, on behalf of the PCC, filed reply submissions which were also confined to questions of penalty.
4. Mr Chiv then filed a document referred to as a "Response to Submission by Richard Moon, counsel for PCC" on 23 February 2020 (the day before the hearing of the appeal on 24 February 2020). At paragraph 4 of that document Mr Chiv requested that the Appeals Council:

Reversed the decision of the Disciplinary Tribunal, by reducing the suspension time to six months for me to undertake appropriate CPDs, reduced the cost to \$7,000 as mentioned by Richard Moon in his conversation with my lawyer, Tony Woodhouse. (Tony could produce the file notes of the conversation in court if necessary and get right to the bottom of this story) or cap the cost at \$15,000, and only publish the decision in Acuity magazine, not on the Institute's website to serve the purpose of rehabilitation.

5. It appears from the above submission that Mr Chiv seeks to appeal not only issues as to penalty but also seeks a reduction in costs ordered by the Disciplinary Tribunal and publication only in the Acuity magazine and not on the Institute's website. We note that no application was made by Mr Chiv to amend the grounds of the appeal nor was any notice given or evidence provided in support of these new issues on appeal. Had such an application been made, we would not have been minded to

grant it given the very late raising of these issues and the lack of merit in the submissions made by Mr Chiv in support of them.

6. As to costs, the Tribunal made express findings in relation to the assertion (unsupported by any independent evidence and denied by counsel for the PCC) that an agreement had been reached to limit costs to \$7,000. As the Disciplinary Tribunal pointed out<sup>1</sup> Mr Chiv provided no evidence in support of his assertions of the alleged agreement between his lawyer and Mr Moon and in any event the hearing before the Tribunal was not completed in one day – only matters relating to liability were addressed in that time. We see no basis for interfering with the decision of the Disciplinary Tribunal as to costs.
7. In respect of publication, the only ground put forward was to assist in Mr Chiv's rehabilitation and restoration of his practice. That purpose could not, in itself, justify non-publication. There is nothing in Mr Chiv's submission that would persuade us that publication in both the Institute's magazine and its website should not be ordered.

#### **Representation at Appeals Council hearing**

8. The hearing of the appeal was due to commence at 10.30am on Monday, 24 February 2020. At 2.10am on that day the Institute received an email from Mr Chiv in which he advised that he would be excusing his appearance in person as he had some symptoms of flu and was in self isolation for two weeks "due to the Corona Virus pre-caution and self-isolation". He noted in his email, however, that he authorised any person appointed by the Appeals Council to read through the submissions on his behalf (including submissions which had been made on penalty, costs and publication). No request was made for adjournment of the hearing.
9. We confirm that we have read all of the submissions filed on behalf of Mr Chiv including those before the Disciplinary Tribunal. We also read the submissions of Mr Moon for the PCC and questioned him on a number of matters at the hearing.

#### **Appeal against penalty**

10. Mr Chiv's appeals as to penalty can be briefly summarised as falling into two main submissions:
  - (a) That his conduct in this case, as found by the Disciplinary Tribunal, was not as serious as the conduct of the appellant in the High Court in *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand*.<sup>2</sup> In

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<sup>1</sup> At page 7.

<sup>2</sup> [2012] NZHC 3354.

*Roberts* the High Court considered an appeal by Mr Roberts from a penalty of three years' suspension which the High Court reduced on appeal to 18 months. The conduct of the appellant in that case related to his forming a relationship with a patient during the period she was a patient in a ward which he was working on as a nurse.

- (b) Mr Chiv submits that any period of suspension should be confined to the minimum period required for his rehabilitation and argues that to impose any greater length of suspension would be contrary to the decision in *Roberts*. Although providing no evidence, Mr Chiv argues that six months would be a sufficient period for him to rehabilitate himself and that any period of suspension should therefore be limited to no more than six months.
11. The Disciplinary Tribunal in its decision set out in some detail the reasons for its decision to impose a penalty of two years. We agree with the analysis by the Disciplinary Tribunal and see no reason to interfere with its decision. We are certainly not persuaded that it is wrong.
  12. We consider the first of the submissions summarised above to be misconceived and without merit. The decision of the High Court in *Roberts* outlines a number of factors which are relevant to sentencing and which we agree should be taken into account when considering penalty. However, we consider Mr Chiv's attempts to compare the conduct in that case with his conduct in this case to be completely misconceived.
  13. Although the facts in cases are never precisely the same, the Disciplinary Tribunal is required, when considering penalty, to maintain consistency with other cases of a similar nature. That principle is one which is recognised in *Roberts* and one which the Tribunal clearly applied when considering other cases involving similar types of conduct to the conduct of Mr Chiv in this case.
  14. This case, however, has nothing to do with an inappropriate sexual relationship between Mr Chiv and his clients. There is no proper comparison between the conduct of the appellant in *Roberts* and the types of conduct which have given rise to the imposition of a penalty in this case. We also note that the *Roberts* case related to a different profession, with a different penalty regime and different considerations when considering the relationship between the professional and the client.
  15. As to the second ground, we agree with and endorse the comments by the Disciplinary Tribunal that rehabilitation of a member is only one of the factors which are relevant to the decision as to the appropriate penalty. There are other very important considerations which must be taken into account including, in particular in

this case, a penalty which most appropriately protects the public, deters others from offending in a similar way and in setting professional standards.

16. The charges in this case, and the particulars which support them, contain elements of dishonesty, practising while insolvent (including failing to pay GST and PAYE of approximately \$80,000), failure to carry out the required CPD obligations and significant failings in Mr Chiv's practice. As the Disciplinary Tribunal noted, it is questionable whether Mr Chiv has ever had the competence to deliver services to the public at the level expected of a chartered accountant.
17. We also agree with the comments by the Tribunal that Mr Chiv's dealings with Ms X show a disturbing lack of insight in relation to the unacceptable nature of those dealings. Having entered into a contract guaranteeing a job following completion of a training course, there is evidence that Mr Chiv threatened Ms X with defamation proceedings unless she withdrew her claim in the Disputes Tribunal at Auckland for recovery of the fee paid by her.
18. Mr Chiv in his defence of that claim asserted that Ms X had completed the training but was not entitled to a refund because there was a separate fee for job placement. In submissions before the Disciplinary Tribunal Mr Chiv appeared to assert that the reason for not refunding the fee was that Ms X had not completed the training.
19. Ms X attended the hearing before us. The Disputes Tribunal upheld her claim and ordered a refund of the fee she had paid. Mr Chiv challenged that decision apparently by seeking a rehearing and by an appeal. We were informed by Ms X that both avenues of challenge have been dismissed. Notwithstanding that no payment has been made by Mr Chiv.
20. Given the lengths that Ms X has had to go to, we are disappointed, to say the least, that payment has not been made. This, to us, reinforces the view expressed by the Disciplinary Tribunal that Mr Chiv has little or no insight into the serious nature of his conduct towards Ms X.
21. To the extent that rehabilitation is relevant, we are not at all satisfied that a period of six months is all that is required. Nor was there any comprehensive rehabilitation plan put forward either to the Disciplinary Tribunal or to the Appeals Council.
22. Although asserting, before the Disciplinary Tribunal, that Mr Chiv had been told by a senior member of the profession that his practice was now in order, the only evidence put forward in support of that was a letter from that member proposing a detailed monitoring and mentoring programme and offering to provide such a programme. There is no evidence that any such programme has been entered into,

let alone completed, and no evidence as to the adequacy of the suggested programme given the significant deficiencies in Mr Chiv's practice and conduct.

23. In any event the time taken to properly rehabilitate the member is only one factor to be taken into account. It is by no means determinative of the appropriate period of suspension. We do not accept Mr Chiv's submission that the *Roberts* decision requires that any period of suspension is, or should be, limited to the time required for rehabilitation.
24. We are not at all persuaded that the penalty imposed by the Disciplinary Tribunal was wrong. Given the serious nature of the conduct identified in this case, and the significant failings in Mr Chiv's practice, we agree that a period of two years suspension is the minimum necessary and is a penalty which is fair and reasonable in all the circumstances.

### **Conclusion**

25. Mr Chiv's appeal is dismissed.

### **Costs**

26. Mr Chiv is to pay the full costs of the appeal. Should there be any dispute as to the amount of the costs payable, any such dispute can be referred to us.

### **Publication**

27. This decision, including the name and details of the appellant, is to be published in Acuity and on the Institute's website. The names of Mr Chiv's clients and unrelated third parties, unless they consent to publication, are to be suppressed.

Dated this 12th day of March 2020.



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L J Taylor QC  
**Chairman**  
**Appeals Council**