

**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 14 May 2015

**BETWEEN** **BRENT O'HAGAN**, Chartered Accountant of Te Kuiti  
  
**Appellant**

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

---

**DECISION OF APPEALS COUNCIL**

**Dated 8 September 2015**

---

**Members of the Appeals Council:**

Les Taylor QC (Chairman)  
Paul Armstrong FCA  
John Hagen FCA

**Counsel:**

Richard Moon for the Professional Conduct Committee

**Appeals Council Secretariat:**

Janene Hick  
Email: [janene.hick.nzica@charteredaccountantsanz.com](mailto:janene.hick.nzica@charteredaccountantsanz.com)



## The appeal

1. Mr O'Hagan appeals against a decision of the Disciplinary Tribunal decision dated 14 May 2015 in which the Tribunal found Mr O'Hagan guilty of the charges against him. In its decision the Tribunal censured Mr O'Hagan and made orders that he pay costs in the sum of \$5,000 and that the decision of the Tribunal be published on the Institute's website and in the official publication *Acuity* with mention of Mr O'Hagan's name and locality. His membership of the Institute was ordered to be suspended for the period of his bankruptcy.
2. In his appeal dated 2 June 2015, Mr O'Hagan appealed the Tribunal's decision both as to costs and publication on the grounds that he was "unable to make representations and submissions by telephone as arranged." In his submissions in support of the appeal, however, Mr O'Hagan raised two other matters as follows:
  - (a) He argued that the charges which gave rise to the decision of the Disciplinary Tribunal should never have been brought. Although he admitted that he had not done things 100% correctly and was happy to accept a censure for that, in his view, the disciplinary process had been abused and the taking of matters to the Disciplinary Tribunal was "using a sledgehammer to crack a walnut". (For ease of reference we describe these submissions as "the improper process ground").
  - (b) Having read the transcript of the hearing before the Disciplinary Tribunal (which for reasons explained below he did not attend), Mr O'Hagan argued that, rather than being suspended from membership as a result of his bankruptcy (which occurred in February 2015), he should instead have been given the opportunity to resign. Mr O'Hagan had, on 30 June 2013, tendered his resignation. His resignation was not, however, accepted because his conduct was under investigation by the PCC. ("the resignation/suspension ground").
3. Counsel for the PCC objected to the Appeals Council determining the improper process ground. He submitted that issues which Mr O'Hagan sought to raise had not been raised in the notice of appeal and were not appropriate matters for the Appeals Council to determine on an appeal. The issues raised various matters of fact which had not been raised before the Disciplinary Tribunal and which could not properly be dealt with by the Appeals Council.
4. The PCC did not, however, oppose the Appeals Council hearing and determining the resignation/suspension ground. Although this issue does involve allowing an

extension of the grounds for appeal it arises because Mr O'Hagan did not attend the hearing by telephone. In light of questions raised in the hearing by some members of the Disciplinary Tribunal, Mr O'Hagan says the result may well have been different had he attended the hearing by telephone.

5. The issues as to costs and publication were clearly stated grounds of appeal and the Appeals Council is therefore required to determine them.

#### **The improper process ground**

6. We note at the outset that, in an email dated 6 May 2015 to counsel for the PCC, Mr O'Hagan stated that an issue which he had raised with Mr Moon "*could be used to argue the charges are improperly bought (sic), I will leave that until after the hearing as at the end of the day I was lax with some sign-offs and am bankrupt so what is the point.*" The issues which Mr O'Hagan now seeks to raise on appeal were not raised or considered by the Disciplinary Tribunal. It would appear from Mr O'Hagan's email that he chose not to raise them with the Disciplinary Tribunal.
7. The Appeals Council does not consider it has any jurisdiction to hear or determine the improper process ground of appeal which Mr O'Hagan raised in his submissions. Even assuming (but without deciding) that the Appeals Council has a discretion to extend the grounds of appeal to include this ground it would not have allowed any such extension.
8. The Appeals Council is not the appropriate body to hear or determine complaints as to whether the charges which gave rise to the decision appealed against should, or should not, have been brought. Nor is it the appropriate body in which to raise complaints about the process giving rise to charges which have been made and determined by the Disciplinary Tribunal.

#### **The resignation/suspension ground**

9. As noted above, counsel for the PCC did not object to the resignation/suspension ground of appeal being determined by the Appeals Council. Although it was not stated in the grounds of appeal we have decided to hear and determine it given the agreement of both parties to our doing so.

#### **Background**

10. The charges against Mr O'Hagan in this case arose from a dispute between Mr O'Hagan and his former employer Waitomo Adventures Limited. That dispute

resulted in decisions of the Employment Relations Authority and, on appeal, the Employment Court. One of the charges against Mr O'Hagan was that he had brought discredit to the profession by conducting himself in such a manner that caused a Judge of the Employment Court to make adverse comments about him in its public judgment dated 21 December 2012.

11. Subsequent to the decision of the Employment Court, Mr O'Hagan made a complaint against another member of the Institute who had given evidence as an expert witness on instructions from Mr O'Hagan's employer Waitomo Adventures Limited. The Chairman of the Professional Conduct Committee decided to take no further action in respect of that complaint on the ground that it was vexatious.
12. Mr O'Hagan sought review of that decision. In a decision dated 25 June 2013 the Reviewer of Complaints, Mr Turkington, found that the complaint was vexatious and determined not to review the decision of the Chairman of the Professional Conduct Committee.
13. On 30 June 2013, following receipt of the Reviewer of Complaints' report, Mr O'Hagan wrote a letter to the PCC complaining about the Reviewer of Complaints report. He concluded that letter by stating that the alleged failure of the Institute to investigate his complaint "leaves me with no faith in the Institute and for this reason I am resigning my membership". In a separate letter to the Secretary of the Institute, also dated 30 June 2013 and received on 4 July 2013, Mr O'Hagan submitted his resignation.
14. On or about 6 July 2013 (the letter was mistakenly dated 6 June 2013), however, the Institute declined to accept Mr O'Hagan's resignation. That refusal was based on Rule 2.12(b) of the Institute Rules (2012) which provides that the Institute may refuse to accept the resignation of any member if:

Any matter concerning the member is before the Professional Conduct Committee... for investigation or hearing....
15. The obvious purpose of Rule 2.12(b) is to prevent a member pre-empting or avoiding a disciplinary process by seeking to resign before a matter which is before the PCC for investigation or hearing has been completed. In this context we accept the submission of counsel for the PCC that the word "matter" used in Rule 2.12(b) has a wide meaning. It is not necessary, in order for the rule to apply, that a complaint has been made or charges laid.
16. A complaint was subsequently made by the Director of the Institute on 15 July 2013 and, on 22 August 2013, a complaint was also made by Mr O'Hagan's

former employer Waitomo Adventures Limited. Ultimately, on 20 March 2015, the PCC made a final determination to refer the particulars of charges to the Disciplinary Tribunal. A notice of formal charges dated 7 April 2015 was provided to Mr O'Hagan and a hearing of the charges was set down for 14 May 2015.

17. In the meantime, in February 2015, Mr O'Hagan had been declared bankrupt. His bankruptcy was one of three charges that were referred to the Disciplinary Tribunal.
18. In an email to Mr O'Hagan dated 3 May 2015 counsel for the PCC indicated that, in the event the charges against Mr O'Hagan were proved, the PCC would be seeking a censure in relation to charges one and/or two and "the suspension of your membership for the period of your bankruptcy (in relation to charge three)". Charge three was the allegation that Mr O'Hagan had been adjudicated bankrupt in the High Court at Hamilton on or about 16 February 2015.
19. In an email dated 6 May 2015, Mr O'Hagan responded to Mr Moon's email of 3 May 2015. He indicated in that email that, because of mental and emotional health issues, he did not wish to attend the hearing of the Disciplinary Tribunal by videoconference in Auckland but stated that he would be "prepared to answer questions by telephone from home if that would assist. I expect to be home by around 11:00am". He did not in that email indicate any objection to his suspension in the event that charge three in respect of his bankruptcy was found to be proved.
20. In the hearing before us, however, Mr O'Hagan stated that he understood that he would be joined in to the Disciplinary Tribunal hearing by telephone (although his email of 6 May only stated that he would be available to be contacted "if that would assist"). He submitted that, if he had been contacted and particularly if he had heard the queries raised by members of the Tribunal as to whether suspension was appropriate (given his previous attempted resignation and indication that he had no intention of practising as a chartered accountant), he would have made submissions that the appropriate course was to determine the disciplinary charges against him and allow him to resign. Had he been given the opportunity to resign he says he would have done so and his suspension from membership would not have been necessary.
21. Given Mr O'Hagan's statement in his 6 May 2015 email that he would be available by telephone "if that would assist" the Appeals Council does not consider that there can be any criticism of the fact that the Disciplinary Tribunal did not contact Mr O'Hagan by telephone. We accept, however, that if Mr O'Hagan had attended

the hearing by telephone, he may well have made further submissions on the resignation/suspension issue especially in light of the comments made by two of the members of the Tribunal in the course of the hearing on the issue of suspension.

22. The onus is on Mr O'Hagan to show that the Tribunal, in exercising its discretion to impose a suspension from membership for the period of his bankruptcy, was plainly wrong or that the decision resulted from a failure to take into account relevant considerations or taking into account irrelevant considerations. We have, however, decided to consider this ground of appeal on its merits. There is at least a risk that, because of a misunderstanding by Mr O'Hagan, the Tribunal has not taken into account submissions or arguments which Mr O'Hagan may have otherwise put forward that suspension was not, in the circumstances, an appropriate response to his bankruptcy.

*Mr O'Hagan's submission*

23. In essence, Mr O'Hagan says that he had, since 30 June 2013, expressed his wish to resign. Mr O'Hagan, in his letter to the PCC of 30 June 2013, stated that his reason for resigning was his dissatisfaction with the way in which his complaint against another member of the Institute had been dealt with. In his response to the original complaint of 15 July 2013 by the Director of the Institute Mr O'Hagan, in a letter dated 30 July 2013, concluded by saying that:

My resignation was not bought (sic) about by a feeling of a possible complaint (if a complaint was going to be made, I thought it would have been when the Institute was first aware of the matter); my resignation was the compound of a number of factors including, no longer actively accounting, cost, not able to afford continuing education, possibility of bankruptcy.

24. In his submissions before us Mr O'Hagan stated that when he received the decision of the Reviewer of Complaints he "saw red" and decided to resign from the Institute. He reiterated that he did not, at that time, have any knowledge that the PCC was investigating his conduct. He says that he did not resign so as to pre-empt or avoid a disciplinary process which he thought might be instituted against him.
25. In short, Mr O'Hagan says that when he tendered his resignation he had lost faith with the Institute and no longer wanted to be a part of it. As far as he was concerned he had terminated his membership and has no wish, then or now, to be a member of the Institute.

26. He says that, had he attended the hearing of the charges against him by telephone and heard the concerns expressed by two members of the Tribunal as to whether suspension was warranted in the circumstances, he would have requested that he be allowed to resign once the initial charges against him had been determined. He deeply resents being "kept in limbo" by being unable to resign during the period of his bankruptcy and having his membership suspended during that period.

*Submissions by the PCC*

27. Counsel for the PCC stated that it was not accepted that Mr O'Hagan had no inkling of possible disciplinary complaints or charges against him. Mr Moon points to the fact that the Employment Court had made very adverse comments about the conduct of Mr O'Hagan and that the Reviewer of Complaints, in making his decision not to review the decision of the Chair to take no further action in respect of Mr O'Hagan's complaint, had been critical of Mr O'Hagan's conduct.
28. Mr Moon accepted, however, that at the time the resignation was received there had been no communication from the Institute to Mr O'Hagan indicating that his conduct was under investigation by the PCC. He submitted that, in any event, Mr O'Hagan's motives or reasons for submitting his resignation were irrelevant.
29. Mr Moon submitted that bankruptcy of a member was a serious matter which, in itself, was a breach of the Rules of the Institute. He stated that, where the disciplinary procedures of the Institute were invoked in respect of a member's bankruptcy, suspension for the period of the bankruptcy was the well-established sanction.
30. Mr Moon accepted that there was a discretion as to what the appropriate response should be in the event of bankruptcy during membership being established. He argued, however, that the previously indicated desire of Mr O'Hagan to resign was not a sufficient reason to allow him to resign rather than impose a suspension of his membership for the period of his bankruptcy.
31. Mr Moon submitted that there were significant policy reasons why allowing Mr O'Hagan to resign rather than be suspended was not appropriate. He said that, where a matter such as the bankruptcy of a member "strikes at the heart of membership" it would usually result in suspension.
32. Mr Moon argued that allowing the member to exit with a resignation was inconsistent with the objects of the disciplinary process. It was, he submitted, inconsistent with reasonable expectations of the public and members as to the

appropriate response once the disciplinary process was invoked. Bankruptcy of a member tends to bring the Institute into disrepute and was a serious matter which fully justified a suspension during the period of the bankruptcy.

33. Mr Moon went on to submit that how a person exits the Institute is a matter of some importance because it will influence how a person may be readmitted to membership. He accepted that where a member has been suspended because of bankruptcy the process for re-entry would be less onerous than, for instance, where a person had been struck off because of misconduct. Nonetheless, a person who had been suspended for bankruptcy would face greater hurdles than a person who had simply resigned and who had not been the subject of any disciplinary processes.
34. Mr Moon submitted that it was not sufficient to rely on Mr O'Hagan's stated intention that he had no wish to be a member and that he should not therefore be sanctioned in a way that was uncomfortable for him or which did not respect his desire not to be part of the Institute.

#### *Decision*

35. The Appeals Council accepts that, in circumstances where a member has been bankrupted during the period of his or her membership and disciplinary processes are invoked in respect of that bankruptcy (whether alone or in combination with other disciplinary matters), the sanction of suspension is an appropriate response. As Mr Moon submitted the bankruptcy of a member is a serious matter and would normally mean that the member should be suspended from membership for the period of the bankruptcy.
36. We also accept that a member who is the subject of disciplinary processes arising out of member's conduct during the period of membership should not be allowed to pre-empt or avoid disciplinary proceedings or sanctions by resigning. That is the reason why Rule 2.12(b) can be invoked to refuse to accept a resignation in circumstances where the conduct of a member is under investigation or before the PCC.
37. The circumstances of this case are, however, somewhat unusual. The conduct which was the subject of the charges against Mr O'Hagan related to proceedings which were the subject of a public decision by the Employment Court. The decision of the Employment Court was made on 21 September 2012.



38. At the time Mr O'Hagan tendered his resignation, on 30 June 2013, no formal complaint had been made against him. He was clearly dissatisfied with the way in which his complaint against another member of the Institute had been dealt with by the Institute. His resignation was tendered within a few days of receipt of the decision of the Reviewer of Complaints. It was accompanied by a letter expressing his dissatisfaction with the Institute. We are satisfied that the prime reason for Mr O'Hagan's resignation was his strong dissatisfaction with the way in which his complaint had been dealt with.
39. Throughout the disciplinary process Mr O'Hagan has made it clear that he has no wish to be a member and has no intention of practising as a chartered accountant. By the time his period of bankruptcy ends he will be 70 years of age. We think it is highly unlikely that Mr O'Hagan will change his mind in the future either as to his attitude to membership of the Institute or his intention not to practice in the future as a chartered accountant.
40. Finally we note that, although the disciplinary process was commenced in July 2013, it was not resolved before the Disciplinary Tribunal until May 2015, a period of nearly two years. There were, however, good reasons for that delay and neither Mr O'Hagan nor the Appeals Council are critical of it.
41. Mr O'Hagan's bankruptcy occurred towards the end of that period in February 2015. We therefore have some sympathy for the strongly expressed view of Mr O'Hagan that the timing of his bankruptcy was somewhat unfortunate. Had the disciplinary processes been determined before his bankruptcy he says he would have immediately resigned and would not be faced with imposition of a sanction for becoming bankrupt during the period of his (unwanted) membership.
42. In the course of the hearing before the Disciplinary Tribunal Professor McDonald noted that in the past the Tribunal had agreed to people resigning after a decision had been given where they had previously asked to resign and during the process had not been allowed to. Professor McDonald questioned the point of suspending a member so that he could not resign during the period of suspension in circumstances where Mr O'Hagan wished to resign. Mr Scott raised similar concerns and questioned why, when Mr O'Hagan did not want to be a member and by all accounts wanted to retire, he was effectively "locked in".
43. Notwithstanding those concerns the Tribunal ultimately decided to impose suspension. As submitted by Mr O'Hagan, however, he did not make further

submissions in the light of those comments by members of the Tribunal because he did not, for the reasons explained above, participate in the hearing by telephone.

44. We accept Mr Moon's submission that it would not normally be appropriate to allow a member to resign at the end of a disciplinary process rather than impose sanctions which are otherwise appropriate. The proper completion of the disciplinary process and the imposition of appropriate sanctions is an important part of the function of the Institute and the purpose of the disciplinary processes. If, in this case, we formed the view that Mr O'Hagan's wish to resign was simply a device to avoid the imposition of an otherwise appropriate sanction we would have no hesitation in upholding the decision of the Disciplinary Tribunal.
45. On the evidence before us, however, we do not consider that Mr O'Hagan, in seeking to be given the opportunity to resign rather than be suspended for his bankruptcy, is motivated by anything other than his desire to implement the resignation which he tendered on 30 June 2013. We also accept that he has no intention of practising as a chartered accountant in the future.
46. In the particular circumstances of this case we have decided to allow this part of the appeal by varying the order for suspension made by the Disciplinary Tribunal as follows:
  - (a) Mr O'Hagan shall have the opportunity to resign from the Institute by tendering a letter of resignation within 14 days of the date of this decision.
  - (b) Subject to subparagraph (d) the resignation shall be effective within 35 days of the date upon which it is tendered or the date on which it is accepted in writing by the Institute (whichever is the earlier).
  - (c) In the event that Mr O'Hagan tenders his resignation in accordance with (a) above and such resignation becomes effective the order of the Disciplinary Tribunal imposing Mr O'Hagan's suspension shall be revoked and shall have no further effect.
  - (d) Should Mr O'Hagan's request to resign be declined under Rule 3.8 and 3.9 of the Rules (2014) Mr O'Hagan shall be suspended from membership for the period of his bankruptcy or until such time as his resignation is accepted (whichever is the earlier).

### **Appeal of costs order**

47. The PCC sought an order for costs by the Disciplinary Tribunal in the sum of \$17,443 being the costs incurred by the PCC in respect of the charges against Mr O'Hagan. The normal starting point, as noted by the Tribunal, is 100% of costs incurred. The Tribunal, however, was aware that Mr O'Hagan was bankrupt and was aware of his other personal and financial circumstances. It therefore decided that, in light of Mr O'Hagan's circumstances and his cooperation with the Institute during the process, a costs order of \$5,000 was fair and reasonable.
48. Mr O'Hagan in his submissions before us stated that, contrary to the submission of the PCC before the Tribunal that his difficult financial position might not be permanent, there was no prospect of his paying the amount ordered of \$5,000 and no prospect of his financial circumstances changing so as to enable him to pay those costs. He said that, if the order remained, he would have to make himself bankrupt in respect of that debt and there was no point in making an order for him to pay costs in those circumstances.

### *Decision*

49. In an appeal from the exercise of a discretion by the Disciplinary Tribunal the onus is on the appellant to establish that, in exercising its discretion, the Disciplinary Tribunal has failed to take into account a relevant consideration, has taken into account irrelevant considerations or that the decision is plainly wrong. We are not persuaded that Mr O'Hagan has discharged that onus.
50. We accept that, given Mr O'Hagan's age, his very limited income and the fact that his half-share in the jointly owned family home is to be sold to his wife and the proceeds applied towards his current bankruptcy, it is unlikely that his financial position will significantly improve. We do not consider, however, that that is a sufficient reason to interfere with the decision of the Tribunal.
51. There is no indication in the decision, or in the materials before the Tribunal, that there was any real expectation of a significant change in the financial circumstances of Mr O'Hagan in the future. Nor do we accept that Mr O'Hagan will not in the future have the ability to pay what was a very modest and substantially reduced costs order by the Tribunal. The appeal as to costs is therefore dismissed.

### **Appeal of publication order**

52. It has become the established practice of the Disciplinary Tribunal when ordering publication to order that the decision, including the name and location of the member, be published on the Institute's website and in its publication, *Acuity* (the publication in *Acuity* is usually a summary but refers to the full decision on the website). Under Rule 13.44(a) that is essentially the default position unless the Tribunal directs otherwise. We note, however, that under Rule 13.44(a) the default position is that in addition to the member's name, address and the particulars of the charge the rule only requires that there be a summary of the reasons for the decision and any penalty imposed.
53. Mr O'Hagan challenges the decision of the Tribunal to order publication because he is concerned that the decision may be read by some as suggesting that he has been found guilty of fraud or misappropriation of funds. He objects in particular to the part of the decision in which the particulars of the charge are recorded especially the excerpts quoted in those particulars from paragraphs 72 and 73 of the judgment of the Employment Court dated 21 September 2012.
54. The conduct described in paragraphs 72 and 73 of the Employment Court judgment are the particulars of one of the charges of which Mr O'Hagan was found guilty and from which there is no appeal. There is nothing in those particulars which makes a finding of fraudulent misappropriation of funds nor is there any finding by the Disciplinary Tribunal that Mr O'Hagan has been guilty of any such fraudulent misappropriation. The essence of the charges is failure by Mr O'Hagan to obtain proper written authority and his conduct, as described in paragraphs 72 and 73 of the Employment Court judgment, bringing discredit to the profession.
55. In our view the particulars of the charges are an essential part of the decision. The finding of guilt and the penalty imposed of censure in respect of the conduct of Mr O'Hagan cannot, in our view, be properly understood by the public or the profession without knowledge of the conduct complained of.
56. One of the important purposes of the disciplinary process is to maintain high standards within the profession and to educate members of the profession as to the standard of conduct required. It is important that the disciplinary process be transparent and that there be accountability where the conduct of a member falls below those standards. Publication of decisions by the Tribunal is an important part of that process.

57. We see no reason to interfere with the decision of the Tribunal to order publication. This aspect of the appeal is therefore dismissed.

### **Conclusion**

58. Mr O'Hagan's appeal is allowed in part. As provided in paragraph 46 above the order for suspension made by the Tribunal is varied accordingly. The appeal is otherwise dismissed.

### **Costs of the Appeal**

59. Although Mr O'Hagan has been partially successful with this appeal we note that the intention to seek suspension of his membership during the period of bankruptcy was signalled to Mr O'Hagan prior to the hearing of the Disciplinary Tribunal. Mr O'Hagan made no submission on that issue when he had the opportunity to do so. As noted, however, we accept that Mr O'Hagan might have made submissions had he been joined to the hearing of the Disciplinary Tribunal by telephone.

60. Given that Mr O'Hagan has been partially successful with the appeal and taking into account his parlous financial position, our preliminary view is that there should be no costs order in respect of the appeal. Should either party wish to seek costs, however, they may do so by way of written submission within 10 days of the date of this decision with each party having a right to reply to any such submission within a further 10 days.

Dated this 8th day of September 2015.

  
L J Taylor QC  
Chairman  
Appeals Council