

**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 21 March 2019 and 22 July 2019

BETWEEN **KALWANT SINGH GILL, Chartered Accountant of
Palmerston North**

Appellant

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

DECISION OF APPEALS COUNCIL

Dated 27 February 2020

Members of the 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:

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



Introduction

1. Mr Gill appeals a decision of the Disciplinary Tribunal dated 21 March 2019 (as to liability) and 22 July 2019 (as to penalty, costs and publication).
2. Mr Gill represented himself both before the Disciplinary Tribunal and on this appeal. Although his appeal was general in nature and appeared to appeal all findings of liability, penalty, costs and publication, the appeal as presented in written and oral submissions was more focused.
3. In considering the appeal we have dealt with those aspects of the Disciplinary Tribunal decision which appear to us to be in issue from reading Mr Gill's written submissions and his assertions and submissions in the hearing before us. In the course of the appeal, following an indication from the Appeals Council that Mr Gill did not appear to have sufficient grounds to justify non-publication of his name and details, Mr Gill withdrew his appeal on publication. We therefore deal only with his appeal as to liability, penalty and costs.

Appeal as to liability

Challenge to Jurisdiction

4. Mr Gill sought to maintain before us that the whole disciplinary process was flawed because he was not "in practice" and therefore the review of his practice was unlawful. The Disciplinary Tribunal rejected this argument. It found that Mr Gill was in practice because he carried out six audits over a two-year period.¹
5. Mr Gill argued that he was not in practice because the very few audits he carried out were a result of approaches made to him and that he was not offering services to the public. We reject that submission.
6. Although Mr Gill was not required to have a Certificate of Public Practice, because his annual income from accounting services was below the levels of fees which members may earn without being required to hold a Certificate of Public Practice, the provision by Mr Gill of audit services clearly constituted offering accounting services to the public. That is so even if, which Mr Gill asserted before us, he did not actively or positively offer services but was approached to provide audit services for a small number of charitable organisations.
7. That conclusion is reinforced by Rule 10.1(b) of the Institute's Rules (effective 15 May 2015) which provides that "offering accounting services to the public"

¹ Liability decision at p6.

includes conduct of a member in offering or providing accounting services to, or accepting assignments from, the New Zealand public. Even though the accounting services provided by Mr Gill were small in number, and his fee income was below the threshold for which a Certificate of Public Practice is required, the accounting services provided by him were required to be carried out in accordance with the Rules and standards required of Chartered Accountants. The review of Mr Gill's practice and the disciplinary charges which gave rise to the findings of the Disciplinary Tribunal were in all respects lawful.

Background to charges

8. In his appeal against the Tribunal's findings of guilt, Mr Gill focused his appeal on the finding of professional misconduct and, we think to a lesser extent, the Tribunal's finding of conduct unbecoming.
9. In November 2016 Mr Gill provided a signed, undated, and unmodified audit report in respect of "non-compliant" accounts of his clients. The audit report was in the same form as previous years. It contained no adverse comment even though Mr Gill had serious concerns about the accounting systems and practices of his client (which he articulated in a management letter dated 13 December 2016). Neither the audit report nor the management report noted that the accounts did not comply with the applicable reporting standards.
10. The audit report and accounts were provided to a government agency. Mr Gill knew that the accounts were needed by his client to obtain government funding.
11. Mr Gill says he did not know the accounts would be submitted by the client. He says that he had told the client that the accounts were not compliant and that new accounts should be prepared for submission to the government agency. He says he only provided the undated and unmodified audit opinion as an example of what the client would get if it did not compile complying accounts. He says he did so in an effort to persuade his client to prepare compliant accounts. He also says that he made it clear to his clients that there would have to be an adverse comment in any audit report submitted to the agency because of the poor internal control environment.
12. The signed unmodified audit opinion and noncompliant accounts were approved by resolution at an AGM held by the organisation on 12 December 2016 (the day before Mr Gill's management report dated 13 December 2016).. Mr Gill says he was unaware of the meeting or the approval of the accounts at the meeting.
13. There is no independent evidence, written or oral, corroborating Mr Gill's assertions as to why he provided the undated and unmodified audit opinion with the accounts

to his clients in circumstances where he knew the accounts were required for funding. At the very least we consider his conduct in doing so was reckless and unwise. We do not, however, need to make any finding on that issue. That is because the facts relating to the Disciplinary Tribunal's findings of professional misconduct/conduct unbecoming relate to Mr Gill's subsequent dealings with the Institute rather than the provision of the original unmodified audit opinion and accounts to his client.

14. In February 2017 the government agency wrote to the Institute advising that the accounts received by it were non-compliant and suggested that the Institute follow that up with the auditor, Mr Gill. The email said that the agency "will help the charity to re-do their accounts, they are particularly struggling with the cash flow statement".²
15. Following some initial enquiries, the Institute's investigator wrote to Mr Gill by email dated 6 March 2017 seeking a copy of the accounts which had been submitted to the government agency but which were not yet publicly available. He also advised that the accounts of another charity audited by Mr Gill were non-compliant with reporting requirements under the Charities Act.³
16. In response to that request Mr Gill emailed the Institute on 3 April 2017 enclosing a set of compliant accounts which appeared to be signed and dated by the trustees on 7 and 8 November 2016 together with a new audit opinion which contained adverse comments. The audit opinion was signed and dated 15 November 2016. It is common ground that neither the attached accounts nor the audit opinion were completed until late March/early April 2017.
17. As noted above the new audit opinion was backdated to 15 November 2016. The accounts provided were signed by the trustees and dated (respectively by the trustees) 7 and 8 November 2016. However, the signature pages to the compliant accounts provided to the Institute by Mr Gill are a photocopy of the signature page to the earlier non-compliant accounts prepared in 2016.
18. The accounts and audit opinion clearly conveyed the impression that they had been completed in November 2016 when in fact they had only recently been completed. The impression conveyed was misleading. The new accounts and audit opinion were provided to the Institute without any explanation or advice that they had only recently been completed. Taken at face value they appeared to have been completed in November 2016.

² PCC 083

³ PCC 031

19. Following receipt of those accounts a formal review of Mr Gill's practice was instituted. It is plain from the evidence that, when asked to provide his audit files as part of the practice review, Mr Gill provided audit files containing documents which had been created after the audits and accounts had been completed. Mr Gill also made statements in relation to the existence and use of his Audit Assistant programme which were in many respects untrue and in any event misleading.
20. When it became clear to Mr Gill that the Institute investigator was pursuing access to his Audit Assistant programme (which Mr Gill had initially denied even having) documents which had been created on that system were, within minutes of the investigator's email, deleted from the system. Unhappily for Mr Gill the investigator, once he obtained access, was able to reinstate the deleted documents. The documents had been created in May 2017 well after the new audit opinion and accounts had been completed.
21. The clear inference to be drawn from the deletion of these records is that the deletions were intended to cover up the fact that bogus documents had been created on Mr Gill's system in relation to the audits carried out by him. Despite this issue being raised as a concern at the PCC stage of the disciplinary process Mr Gill has provided no plausible explanation for the deletions but has adamantly denied any responsibility for them occurring.
22. The basic facts described above cannot seriously be disputed. To a large extent Mr Gill did not seek to challenge them in any detail.
23. Mr Gill argued forcefully, however, that his conduct did not constitute professional misconduct/conduct unbecoming because of the circumstances in which the conduct arose. Whilst he acknowledged that he had made mistakes and that he had created false documents and had backdated his audit opinion, he endeavoured to persuade us that his conduct did not in all the circumstances constitute professional misconduct/conduct unbecoming which could justify a penalty of suspension.
24. As noted above, Mr Gill represented himself both before the Disciplinary Tribunal and before us. Inevitably, therefore, the distinction between evidence and submissions in the appeal has become somewhat blurred.
25. We have listened carefully to all of Mr Gill's assertions on the appeal. Some of the assertions appear to be new or at least an extension on the evidence which he gave before the Disciplinary Tribunal. However, we have not found it necessary, for the purposes of deciding this appeal, to make any ruling as to the distinction between evidence and submissions or whether application should have been made to call new evidence.

Decision on liability

26. The Tribunal found that the provision to the Institute, without any explanation, of the newly created audit opinion and accounts was misleading by omission and "at best reckless". In making its finding that Mr Gill's conduct constituted misconduct in a professional capacity, the Tribunal found that Mr Gill had deliberately set out to mislead the Institute about the extent of his audit files and the work he had actually carried out on the audit. It found that Mr Gill was in effect "falsifying records".⁴
27. In his appeal before us Mr Gill sought to mitigate the effect of his conduct by arguing that, at the time the original (non-compliant) accounts and audit opinion were prepared, he had only provided the signed and undated audit opinion as an example of what could be provided if the non-compliant accounts were to be used by the client but that he had strongly recommended that compliant accounts be prepared. He says that he did not know that the non-compliant accounts would be provided by his client to the government agency although he acknowledged that he knew, at the time he provided the signed and undated audit opinion to the client, that the client needed the accounts in order to obtain further funding.
28. We were unconvinced by this explanation and do not find Mr Gill's explanation credible. In our view Mr Gill's conduct, when he knew the client needed the accounts for the purpose of obtaining funding, was unprofessional and wrong. Whilst he may have been motivated by an intention to assist his client he should not have provided the accounts and audit opinion to the client if, as he asserts, he knew the audit opinion was required to be adverse and that the accounts were not compliant. In our view, however, even if his assertions were corroborated, either in the documents or in evidence before the Disciplinary Tribunal (which they were not), they would not excuse Mr Gill's conduct in providing the Institute with the backdated audit opinion and accounts without any explanation.
29. In our view, the written and oral evidence before the Disciplinary Tribunal and the documentary evidence clearly supports the Disciplinary Tribunal's findings that Mr Gill deliberately set out to mislead the Institute. As found by the Tribunal his conduct in providing the back dated audit opinion and accounts to the Institute without any explanation was, at best, reckless. His conduct, following the instigation of the review, in creating false documents and submitting them as if they formed part of the original audit file was clearly intended to deliberately deceive the Institute investigator. Mr Gill's various statements in relation to his knowledge and use of the

⁴ Liability decision at p9.

Audit Assistant programme were to a significant extent untrue and were, in our view, deliberately misleading.

30. Mr Gill sought to excuse, or at least explain, his untruthful and misleading statements in relation to Audit Assistant. He said he made the misleading and untruthful statements because he himself could not access the Audit Assistant programme. He said he wanted to find out what the person who had access to the Audit Assistant programme had done before enabling the Institute investigator to obtain access. Even assuming that was true, however, (and we make no finding in that regard) it could not possibly justify what was clearly deliberately misleading conduct by Mr Gill in relation to the Institute's investigation of the audit.
31. We consider that the Disciplinary Tribunal's finding that Mr Gill's conduct constituted professional misconduct was justified. The Tribunal's finding of conduct unbecoming is also justified on the evidence. We did not understand Mr Gill to be seeking to challenge the findings of guilt by the Disciplinary Tribunal in respect of the remaining charges numbered 3, 4, and 5. For the avoidance of doubt, however, we confirm that in our view the Tribunal's findings of guilt in respect of those charges are supported by the evidence.
32. Mr Gill's appeal as to liability is therefore dismissed.

Penalty

33. The rules and ethics of the Institute require a high level of integrity, honesty and transparency in all dealings by its members whether in relation to their clients, the Institute or third parties. Mr Gill, in his dealings with the Institute, fell well below those standards.
34. We agree with the decision of the Tribunal that, in the particular circumstances of this case, the conduct was not such as to require removal of Mr Gill's name from the Register.
35. In our view, however, the conduct was serious in nature. It involved intentionally misleading conduct and elements of dishonesty. Although relating to dealings with the Institute, rather than misleading or deceiving clients or other third parties, we do not think that any lesser standard should apply where the victim of the deceitful conduct is the Institute rather than clients or third parties.
36. The consequences of Mr Gill's conduct were limited in this case primarily as a result of the tenacity of the Institute's investigator. Those involved in investigations on behalf of the Institute are entitled to expect complete honesty and transparency of

its members in their dealings with the Institute. Mr Gill's conduct was far from honest or transparent.

37. Whilst we accept the expressions of remorse by Mr Gill and share the Disciplinary Tribunal's view that conduct of this kind is unlikely to be repeated by him, we are not at all convinced that Mr Gill has any real insight into the seriousness of his conduct. His attempts to justify his conduct, his reliance on a misconceived and meritless argument as to the validity of the process, his failure to plausibly explain the deletions from the Audit Assistant system and his tendency to expressly or inferentially blame others for the misconduct leave us with the impression that Mr Gill has little real insight into the seriousness of his misconduct.
38. We have read the cases referred to by the Tribunal when considering penalty. We were not referred to any others in the submissions before us. Although the facts of this case do not fall easily within the facts of those cases (which generally related to clients) they show significant failings of integrity and transparency with varying degrees of self-interest.
39. We have no doubt that a penalty of suspension is warranted even though, in this case, Mr Gill has given assurances that he has no intention of providing accounting services and we think it is unlikely that he will do so. As noted by the Tribunal, however, penalty plays an important role in maintaining standards and in sending signals to the profession by way of deterrence.
40. Having considered the cases and the submissions of counsel for the Institute and from Mr Gill we are not persuaded that the Tribunal's imposition of a penalty of suspension for 2 years was wrong. We therefore dismiss the appeal as to penalty.

Costs Appeal

41. In its decision, the Tribunal took into account Mr Gill's submission that a full costs order of \$27,778 as sought by the PCC was beyond his financial means. After having regard to all the circumstances and relevant guidance, the Tribunal considered a lesser cost award of \$23,250 was appropriate.
42. At the hearing Mr Gill was invited to supply further financial information to support any Appeals Council departure from its normal practice of awarding full costs in the event the appeal was unsuccessful. Mr Gill was to do so on oath and a statutory declaration then followed.
43. We have reviewed the information relating to Mr Gill's and his interests' current income level and financial position. While Mr Gill has made a reasonable attempt to

set out his assets and liabilities, the balances were not in all cases fully supported, fully explained, or clear.

44. Based on the information provided, it appears that Mr Gill has a relatively low level of personal annual income, but he does have an interest in at least four property assets (although Bank debt and other debts appear to attach to those properties). Mr Gill may, therefore, have a shared positive equity interest in these properties.
45. The information provided also indicates that an amount of \$100,000 was to be gifted between Harminder Gill and Simran Gill in respect of the sale of a property located at 11 Amesbury Street, Palmerston North. Harminder Gill is the vendor stated on the sale and purchase agreement and Simran Gill the purchaser, with a stated purchase price of \$500,000. Bank loan documentation indicates lending of \$400,000 and a Bank condition of written confirmation of \$100,000 gifted monies. This transaction was not explained by Mr Gill but there is a strong inference of his part interest in an asset that was intended to be, or has now been, gifted to a possible family member. No valuation of this property was provided by Mr Gill supporting the asset value or determined purchase price.
46. The appeal from the Tribunal's decision as to costs is an appeal from the exercise of a discretion. We should only interfere if we consider that the Tribunal erred in principle, has taken into account irrelevant facts, has failed to take account of relevant facts or the decision was plainly wrong. Based on the information before it the Tribunal made a small but not insignificant reduction from the full costs of the proceedings before the Tribunal. There is nothing in the further information provided to us which persuades us that any further reduction in costs ordered to be paid should be made.
47. Mr Gill endeavoured to persuade us that any costs order should be capped at the amount of fees he has earned and should not take into account assets in entities which are not in practice as chartered accountants (such as his interest as a shareholder of his cleaning company). We reject those submissions. Although impecuniosity is a factor which can (and in this case has been) taken into account when ordering costs we do not accept that, when assessing the member's ability to pay, limitations of the kind proposed by Mr Gill need to be taken into account.
48. We are not persuaded that there is any basis for interfering with the Tribunal's decision as to costs. The appeal against costs is therefore dismissed.

Costs of appeal

49. We are not convinced on the financial information presented to us that costs of this appeal should be reduced. The appeal had little merit and we see no reason to depart

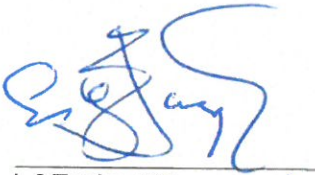
from our normal practice of awarding full costs of the appeal when the appeal is unsuccessful.

50. We therefore order Mr Gill to pay the full costs of this appeal. If there is any dispute as to the amount of the costs on appeal the dispute may be referred to us for determination. We would not, however, expect there to be any dispute as to the amount of the costs.

Conclusion

51. The appeal is dismissed. The orders of the Disciplinary Tribunal stand.
52. Mr Gill is ordered to pay the full costs of this appeal.
53. This decision, including the member's name, address and particulars of the charges, shall be published in the Institute's magazine *Acuity* and on the Institute's website.

Dated this 27th day of February 2020.



L J Taylor QC
Chairman
Appeals Council