NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS

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 **Roger Peter Sinclair,** Chartered Accountant, of **Hastings**

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

Hearing:	23 November 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) Mrs A Atkinson FCA Mr DJH Barker FCA Prof DJD Macdonald FCA Dr R Janes (Lay member)
Legal Assessor:	Mr Matthew Casey QC
Counsel:	Mr Richard Moon for the prosecution Mr John Upton QC
Tribunal Secretariat:	Janene Hick Email: janene.hick.nzica@charteredaccountantsanz.com

At a hearing of the Disciplinary Tribunal held in public at which the Member was in attendance and represented by counsel the Member admitted the Particulars, pleaded guilty to Charge 3, guilty to Charge 1 in respect of Particular 5 and not guilty to Charge 2.

The charges and particulars are 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

3) Breaching the Rules and/or the Institute's Code of Ethics,

PARTICULARS

IN THAT

In the Member's role as a Chartered Accountant in Public Practice and in relation to a complaint, the Member:

1. Accepted appointment as auditor and/or performed the audits of two entities[1] when the Member was not a qualified auditor under the Financial Reporting Act (2013) as required by the enactment applicable to those entities[2] and/or when he was aware (or ought to have been aware) that such audits must only be performed by a qualified auditor, in breach of the Fundamental Principles of Professional Competence and Due Care and/or Professional Behaviour and/or paragraphs 100.5(c) and/or 100.5(e) and/or 130.1 and/or 130.3 and/or 150.1 of the Code of Ethics (2014)[3]; and/or

2. Failed to implement and/or apply and/or document his compliance with his firm's documented quality control policy on monitoring assurance engagements as required by PS-1 and/or PES 3 (Amended), in breach of the Fundamental Principle of Professional Competence and Due Care and/or paragraphs 100.5(c) and/or 130.1 and/or 130.3 and/or 130.4 of the Code of Ethics (2014)[4]; and/or

3. Failed to ensure that assurance engagements he performed were completed with professional competence and/or due care and/or diligence and/or in accordance with the relevant technical and professional standards, in that:

    a. In acting as auditor for ABC for the year ending 31 March 2016, the Member failed to:

[1] XYZ for the year ending 31 December 2016; and/or DEF for the year ending 31 December 2016.
[2] Charities Act 2005, s 42C(2).
[3] And, as applicable, the equivalent provisions of PES 1 (Revised).
[4] And, as applicable, the equivalent provisions of the Code of Ethics (2017) and PES 1 (Revised).

i. ensure a planning meeting of the audit team was held to discuss the susceptibility of the performance report to material misstatement due to fraud, as required by ISA (NZ) 240 and/or ISA (NZ) 315 (revised); and/or

ii. undertake and/or document appropriate audit procedures and/or obtain sufficient appropriate audit evidence to draw reasonable conclusions on which the Member based his auditor's opinion, as required by ISA (NZ) 500 Audit Evidence and/or ISA (NZ) 230 Audit Documentation, in respect of:

A. risks due to fraud, as required by ISA (NZ) 240; and/or

B. risk of material misstatement, as required by ISA (NZ) 315 and/or ISA (NZ) 330 and/or ISA (NZ) 500; and/or

C. related parties, as required by ISA (NZ) 550; and/or

D. going concern, as required by ISA (NZ) 570; and/or

E. entity information and statement of service performance, as required by ISA (NZ) 700 and/or ISA (NZ) 580; and /or

iii. take responsibility for the direction, supervision, and performance of the audit engagement in compliance with professional standards and applicable legal and statutory requirements, as required by ISA (NZ) 220; and/or

iv. failed to satisfy himself that sufficient appropriate audit evidence had been obtained, as required by ISA (NZ) 220; and/or

v. document his reviews of audit work performed and/or the date and extent of his reviews, as required by ISA (NZ) 230; and/or

b. In acting as auditor for DEF for the year ending 31 December 2016 and/or XYZ for the year ending 31 December 2016, the Member failed to express his audit opinion in the correct terms and/or wording and/or in accordance with the applicable financial reporting framework, as required by ISA (NZ) 700 (Revised); and/or

c. In acting as reviewer for GHI for the year ending 31 January 2017, the Member failed to comply with the requirements of ISAE (NZ) 3000 (Revised) and/or ISRE (NZ) 2400, in that the Member:

i. failed to correctly specify in in his engagement letter the agreed terms of his engagement; and/or

ii. failed to take responsibility for the direction, supervision, and performance of the review engagement in compliance with professional standards and applicable legal and statutory requirements; and/or

iii. document his reviews of the work performed and/or the date and extent of his reviews; and/or

iv. issued his review report prior to completing and/or documenting his review of the engagement documentation; and/or

v. failed to undertake and/or document appropriate review procedures and/or obtain sufficient evidence in relation to statement of service performance and/or entity information, despite referring to them in his review report,

in breach of the Fundamental Principle of Professional Competence and Due Care and/or paragraphs 100.5(c) and/or 130.1 and/or 130.4 and/or 130.5 of the Code of Ethics (2014)[5]; and/or

4. Failed to maintain his professional competence to ensure that he remained up to date with all current standards applicable to assurance engagements in breach of the Fundamental Principle of Professional Competence and Due Care and/or paragraphs 100.5(c) and/or 130.1 and/or 130.3 of the Code of Ethics (2014)[6]; and/or

5. Issued an audit report on 6 April 2018 for GHI in respect of the year ending 31 January 2018 in contravention of directions issued by NZICA on 15 November 2017 pursuant to Rule 12.6(d) not to undertake assurance engagements without undertaking further specified training and without the supervision of a mentor acceptable to NZICA, in breach of the Fundamental Principles of Professional Competence and Due Care and/or Professional Behaviour and/or paragraphs 100.5(c) and/or 100.5(e) and/or 130.1 and/or 130.4 and/or 150.1 of the Code of Ethics (2017)[7].

BACKGROUND

This case is one of more than half a dozen cases with very similar features which have come before the Tribunal this year.

The Particulars cover four types of conduct:

- Undertaking statutory audits when the Member is not qualified to do so;
- Continuing to undertake an audit after being told he could not without complying with requirements he failed to comply with;
- Lack of professional competence; and
- Failure to document compliance with his firm's quality control policy and procedures on monitoring assurance engagements.

DECISION

The Tribunal finds that the Particulars, which the Member has admitted, are borne out by the evidence before it, which was produced by consent. It follows that the Member is guilty of Charge 3 which he accepts.

The test for conduct unbecoming an accountant (Charge 1) is whether the conduct was an acceptable discharge of a member's professional obligations according to the standards applied by competent, ethical and responsible practitioners. The threshold is inevitably one of degree.

In the Tribunal's view, the conduct the subject of Particular 1, as well as the conduct the subject of Particular 5 (which the Member has acknowledged as being such) is conduct unbecoming an

[5] And, as applicable, the equivalent provisions of the Code of Ethics (2017) and PES 1 (Revised).
[6] And, as applicable, the equivalent provisions of the Code of Ethics (2017) and PES 1 (Revised).
[7] And, as applicable, the equivalent provisions of PES 1 (Revised).

accountant. It is highly unprofessional for a Member to put himself, and his clients, in breach of legislation. The Tribunal does not accept the Member's submission that there was nothing to indicate that he was acting otherwise than in good faith in what he did, particularly in light of his letter to the Institute shortly before he signed the audit report to the effect that his firm had resigned from all assurance engagements.

And it is simply unacceptable to ignore a direction of the type referred to in Particular 5 issued by the Institute. There is no suggestion in the material before the Committee including the Member's Final Determination before the PCC which he attended, that this was a simple oversight. Further, based on the material before the Tribunal, in its view the Member's admitted failure to maintain his professional competence in the assurance area (Particular 4) is conduct which falls significantly short of what would be regarded as an acceptable discharge of his professional obligations in an area where public expects a high degree of professional responsibility. The Tribunal finds Charge 1 proved in relation to those three particulars.

The PCC submitted that individually or cumulatively the conduct in Particulars 3 and 4 support Charge 2. It referred the Tribunal to its decisions in *Middleton* (15 March 2018), *Freeman* (31 May 2018) – in both cases much of the conduct was similar to that the subject of this case – and *Drew* (5 July 2012). The Tribunal agrees.

In the Tribunal's view, the Member's failure to perform an audit and a review engagement in compliance with the relevant standards, his failure to maintain professional competence and the extent of his shortcomings in those areas demonstrate a lack of care and skill, and conduct which falls well below the standards expected of an auditor. It constitutes negligence and incompetence (the inability to perform to expected standards) in a professional capacity. The nature of the Member's shortcomings is such as to bring the profession into disrepute - for example, signing audit reports for charities in the wrong form which are then placed on a public register.

PENALTY

The PCC sought that the Member be censured, that a fine be imposed to sanction the conduct in Particular 5 and that he be ordered not to undertake assurance engagements for a period of 10 years or such other period as the Tribunal sees fit. *Middleton* and *Freeman* were referred to.

The Member left it to the Tribunal to decide the appropriate penalty but submitted that *Middleton* and *Freeman* were more serious cases than his (because the Particulars in those cases cover a much wider range of offending than that to which he has pleaded guilty).

Although no two cases are the same, in the Tribunal's view the Member's offending is sufficiently similar to the relevant offending in *Middleton* and *Freeman* as to warrant his penalties being broadly in line with those imposed in the earlier decisions. The Member's conduct also predated those decisions, which is a significant factor to support consistency in approach.

In reaching its decision on penalty, the Tribunal has taken into account the following factors:

- The Member's previously unblemished record during 45 years of membership;
- The Member's early acceptance of the Particulars and, although at a very late stage, his remorse;
- The Member's full cooperation with the disciplinary process;
- The Member's voluntary involvement in community work in the region;
- The Member's submission that he did not directly profit out of any of this work (his firm's fees were very modest);
- There is no suggestion of any loss, although the potential for loss cannot be overlooked;

The Member submitted that carrying out an audit when he had been directed not to without complying with certain requirements was a misguided attempt to assist his client in a time pressure situation. The Code of Ethics is clear – members must not carry out engagements that they are

not legally qualified or professionally competent to carry out. The end does not justify the means. The Member now acknowledges that his conduct reflected a serious error of judgement on his part.

Having regard to all the circumstances, the Tribunal considers that a censure, the imposition of a fine of $5,000 to sanction the conduct of performing an audit when directed not to and an order that the Member does not conduct any assurance engagements for a period of five years is the proportionate response to the conduct and the Charges the Member has admitted and/or been found guilty of. That penalty appropriately protects the public and should deter others, facilitates the Tribunal's role in maintaining compliance with and enforcing professional standards, reflects the seriousness of the conduct and is the least restrictive penalty in the circumstances.

This is at least the fifth case involving members conducting statutory assurance engagements when they were not qualified to do so. In all cases the relevant conduct predated the first decision of the Tribunal in this area – *Middleton* (15 March 2018). Members can expect that any future cases involving signing audit reports after 31 March 2019 when not qualified to do so may result in more serious consequences than for those unqualified members who have come before the Tribunal to date.

The Disciplinary Tribunal orders that:

- **Pursuant to Rule 13.40(k) of the Rules of the New Zealand Institute of Chartered Accountants, the Member be censured;**
- **Pursuant to Rule 13.40(c), the Member is to pay the Institute a monetary penalty of $5,000;**
- **Pursuant to Rule 13.40(n), the Member is not to undertake audit or any other assurance engagements for a period of five years.**

COSTS

The Professional Conduct Committee seeks full costs of $17,913.00

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 submitted that in the circumstances a contribution of 75% of costs was appropriate. The Member submitted that there were a number of factors including his cooperation and admission of the facts as soon as possible. However, those factors have already been taken into account in the sense that the costs sought are significantly less as a result of that cooperation and early admission. The Tribunal agrees with the PCC that the other factors the Member put forward are not mitigating factors in relation to costs. Having regard to all relevant circumstances, the Tribunal considers that costs of $17,000 is reasonable in the circumstances.

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 $17,000.00 in respect of the costs and expenses of the hearing before the Disciplinary Tribunal, the investigation by the Professional Conduct Committee and the cost of publicity. No GST is payable.

SUPPRESSION AND PUBLICATION

The PCC sought the default position of publication of this decision in *Acuity* magazine and on Chartered Accountants Australia and New Zealand's website with mention of the Member's name and location. The Member sought name suppression on the basis that the publicity would have a

serious impact on his mother and the health of his mother-in-law as a result of their age or health condition. The Member produced no medical evidence in support of his submissions.

The Member acknowledged that granting name suppression was exceptional.

The starting point is that the public interest in open justice and transparency and the maintenance of confidence in the professional disciplinary process creates a presumption in favour of full publication. That presumption is strongly reflected in the Institute's Rules, including Rule 13.44(a). The fact that some of the Member's conduct relates to statutory assurance engagements, a very public facing role, reinforces that presumption in cases such as this. Harm to reputation is an inevitable consequence of publication but of itself cannot provide sufficient grounds to suppress the Member's name.

As the Appeals Council noted in *Member Y* (17 October 2016), it would normally take considerable persuasion that the circumstances were such that publication of a member's name and locality should not occur. That is particularly so where the conduct of the Member is sufficiently serious to warrant a finding of conduct unbecoming.

After balancing public interest considerations with the Member's and his family's private interests (*Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850), the Tribunal has concluded that the Member and his family's circumstances are not so special as to outweigh the strong public interest factors which favour publication of his name and location, and that an order suppressing the Member's name should not be made.

However, as is usually the case, the Tribunal will order suppression of the name of the Member's clients, his former firm and all health details.

The Tribunal also considers that it is appropriate that the Institute provides this decision to the clients for which the Member performed a statutory assurance engagement as an unqualified person, with an accompanying letter. The reason (apart from a higher public interest factor) is that those entities may have been put in breach of their statutory obligations by having an audit completed by an unqualified person and they should be made aware of this. The Tribunal is not satisfied that the form of letters the Tribunal has seen which have already been sent to some or all of his clients sufficiently explain the position.

In accordance with Rule 13.44 of the Rules of the New Zealand Institute of Chartered Accountants, the Disciplinary Tribunal orders that this decision 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.

In accordance with Rule 13.44(b)(ii) of the Rules of the New Zealand Institute of Chartered Accountants, the Disciplinary Tribunal orders that the Institute provide this decision, together with a suitably worded covering letter in a form to be approved by the Chairman of the Tribunal, to the Member's former clients for whom he performed statutory assurance engagements whilst not qualified to do so.

Pursuant to Rule 13.62 of the Rules of the New Zealand Institute of Chartered Accountants, the Disciplinary Tribunal orders that all details of the Member's family circumstances except as recorded in this decision and the names of the Member's clients or former clients referred to in these proceedings and of his former firm be suppressed (although the letters from the Institute referred to in the publication order above may include that of his former firm).

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 order shall take effect immediately. No decision including the directions 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