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 **Ciara Marie Britton**, Former Chartered Accountant, of **Auckland**

DETERMINATION OF THE DISCIPLINARY TRIBUNAL OF THE NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS
24 December 2020

Hearing:	10 December 2020
Location:	The offices of Chartered Accountants Australia and New Zealand, Level 1, Carlaw Park Complex, 12-16 Nicholls Lane, Auckland, New Zealand
Tribunal:	Mr MJ Whale FCA (Chairman) Mr N De Frere CA Ms A Kinzett (Lay member)
Legal Assessor:	Mr Paul Collins
Counsel:	Mr Richard Moon for the prosecution Mr Steve Keall for Ms Britton
Tribunal Secretariat:	Janene Hick Email: janene.hick.nzica@charteredaccountantsanz.com

At a hearing of the Disciplinary Tribunal which was held in public, the Former Member was in attendance and was represented by counsel. A minor amendment was made to the Particulars by consent. The Former Member admitted the amended Particulars and pleaded guilty to the Charges.

The Charges and amended Particulars 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 13.50[1] the Former Member is guilty of:

(1) Misconduct in a professional capacity; and

(2) Breaching NZICA's Rules and/or Code of Ethics

PARTICULARS

IN THAT as a Chartered Accountant in business and in relation to a complaint, the Former Member

1. Between 1 June 2019 and 30 April 2020, misappropriated approximately $101,806 from X and/or its related entities including:

   (a) unauthorised payments of approximately $52,800 from X and/or its related entities to her personal bank account; and/or

   (b) unauthorised payments of approximately $49,000 from X and/or its related entities to meet personal expenditure: (i) made directly to third party vendors; and/or (ii) charged to company credit cards; and/or (iii) charged to X's account with Y Limited,

   in breach of the Fundamental Principles of Integrity and/or Professional Behaviour and/or sections 110 and/or 150 of the Code of Ethics.

DECISION

The parties produced an Agreed Summary of Facts.

The Tribunal is satisfied on the basis of the agreed facts that the Particulars have been made out and that they support the Charges.

The Tribunal notes that the misappropriations began almost immediately after the Former Member took up employment with a company with which she had had previous professional involvement. There was evidence that some transactions initiated by the Former Member into her bank account were disguised in the company's records. The misappropriations took place through numerous transactions over a period of more than 9 months, until the Former Member was caught out. As the financial controller of the company, the Former Member was in a position of trust which was seriously abused.

This was professional misconduct at the most serious end of the spectrum.

The Tribunal finds the Former Member guilty of the Charges.

[1] Formerly Rule 13.39 of NZICA's Rules effective 15 December 2014 to 29 May 2019

The Tribunal also notes the lack of candour in the Former Member's stated reason for resigning from the Institute – a career break - very shortly after her employer discovered the misappropriations

PENALTY

The parties were aligned in what they considered to be the appropriate sanction – an order that had the Former Member still been a member of the Institute her name would have been removed from the Register of Members.

The Professional Conduct Committee (PCC) drew the Tribunal's attention to *Commerce Commission v New Zealand Milk Corporation Limited* [1994] 2 NZLR 730 – the full High Court held that where the parties have reached a consensus on penalty, the Court is likely to provide its approval if it accepts that the agreed penalty is proportionate to the evidence of available, and the defendant's conduct. That approach has since been applied in disciplinary proceedings by this and other disciplinary tribunals.

The Tribunal has also had regard to the decision in *Commerce Commission v PGG Wrightson Limited* [2015] NZHC 3360 at [30] – [32] where it was said at [32]:

> *... when a Court is presented by the parties with a proposed penalty, it is still essential that the Court perform its own assessment of the approximate range of penalties. If the penalty is not within the proper range, the Court must intervene and impose what it assesses as the appropriate penalty.*

The PPC also drew the Tribunal's attention to two of its previous decisions (*Fokerd*, 20 December 2019 and *Sharma*,18 January 2019), where either a member was struck off or a similar order to that proposed here was made where the person concerned had misappropriated funds from their employer or from a trust of which they were a trustee.

The Tribunal records that the Former Member has promptly re-imbursed the company for slightly more than the amount she had misappropriated, and has expressed remorse for her actions and apologised to the employer, for which she should be given some credit. However, the Tribunal is concerned that during the hearing she referred to her conduct (sustained over 9 months) as a lapse of judgement and a mistake – there appeared to be no insight that the conduct was inexcusable and a gross breach of trust.

The Tribunal agrees that the penalty proposed is the only penalty that appropriately balances the factors which tribunals such as this are to take into account when determining penalty (*Roberts v Professional Conduct Committee for the Nursing Council of New Zealand* [2012] NZHC 3354) – among them the maintenance of professional standards, protection of the public and deterrence, the seriousness of the conduct and consistency with prior cases.

Integrity is a cornerstone of the profession. In virtually every case that misappropriation of funds has occurred, this Tribunal has held that the conduct is incompatible with membership of the Institute. This case is no exception, which the Former Member has acknowledged.

Pursuant to Rule 13.87(a) of the Rules of the New Zealand Institute of Chartered Accountants, the Disciplinary Tribunal finds that if Ciara Marie Britton had still been a member of the Institute her name would have been removed from the Institute's Register of Members.

COSTS

The Professional Conduct Committee seeks full costs of $12,173.

The Tribunal's general approach is that the starting point is 100% of costs, noting that the Institute already bears the costs up to the Professional Conduct Committee's Case Conference.

The Tribunal considers that the amount sought is fair and reasonable in the circumstances. It reflects the Former Member's full co-operation in the disciplinary process.

Pursuant to Rule 13.53 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 $12,173 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.

PUBLICATION AND NAME SUPPRESSION

The PCC sought publication of this decision on the CAANZ website, in *Acuity* magazine and in *The New Zealand Herald*, with the Former Member's name and location. It submitted that the names of third parties, including the complainant and his companies, should be suppressed,

The Former Member sought suppression of her name. She submitted that publication of it would have a disproportionate and highly prejudicial effect on certain family members. The Tribunal was provided with evidence from one of those persons as to the effect publication would have on them.

The first issue is, which Rules apply? The Former Member referred to Rules that were promulgated on 11 May 2020 (the 2020 Rules) and submitted that those Rules could not apply as the offending occurred before that time and the complaint was laid in April 2020. She submitted that the Rules that should apply are those which were promulgated on 26 June 2017 (the Previous Rules). However those Rules were superseded by Rules which were promulgated on 30 May 2019 (the 2019 Rules) which in all relevant respects are identical to the 2020 Rules.

The conduct giving rise to the charges took place between 1 June 2019 and 30 April 2020. The Previous Rules do not apply. Irrespective of whether the 2019 Rules or the 2020 Rules apply, the outcome will be the same.

General Principles

In order to provide for the public interest in open justice and transparency, freedom of speech and the maintenance of confidence in the professional disciplinary process, publication of a decision will be required in most cases – particularly where the case is sufficiently serious. This position was strongly reflected in the Previous Rules (Rule 13.44(1)(a)) and in the use of the expression 'exceptional circumstances' in the 2019 and 2020 Rules (Rule 13.55)(a)).

The public interest includes the interest in knowing the identity of a person found to have been guilty of the disciplinary offence, and avoiding impugning the reputation of other members.

As the Courts have stated in the disciplinary context, following an adverse disciplinary finding the probability must be that public interest considerations will require that the name of the practitioner be published in the preponderance of cases (*T v Director of Proceedings* (HC Christchurch CIV-2005-409-2244, Pankhurst J, 21.2.2006 at [42], cited with approval by the full High Court in *Daniels* v *Complaints Committee 2 of the Wellington District Law Society* [2011] 2 NZLR 850).

While the principle of open justice is fundamental, there will be circumstances in which the interests of justice require the general principle to be departed from, to the extent necessary to serve the ends of justice.

As noted in *Daniels*, the Tribunal must balance public interest considerations against those of the Member's private interests and, in this case, the interests of family members. The Tribunal considers that in conducting the balancing exercise regard should be had to the seriousness of the offending.

The Previous Rules

Rule 13.44(1)(a) provided that unless the Tribunal directed otherwise, its decisions were to be published with mention of the member's name and location.

Rule 13.62(b) of the Previous Rules, which is in identical terms to Rule 13.78(b) of the 2019 and 2020 Rules, provides that if the Tribunal considers that it is appropriate to do so, having regard to the interests of any person or to the public interest, it may, among other things, make an order prohibiting the publication of the name of the person to whom any hearing relates or any other person.

Under the Previous Rules, the Tribunal found guidance from the decision of the Appeals Council in *Qui* (21 May 2018) as to where the threshold applicable to *appropriate* lay. There the member pleaded guilty to a charge of negligence or incompetence in a professional capacity, as well as failing to respond promptly to communications from the Institute – much less serious charges than here. Among the grounds on which the member sought non-publication of her name were that the publication would bring shame to her particularly within the Chinese community and might cause damage to her reputation, her mental health would be affected, she had learned from her mistakes and there was little likelihood of reoffending.

The Appeals Council held that:

- Publication of name inevitably has an effect on reputation but that is not in itself a reason for not ordering publication.

- There would need to be compelling evidence of a highly prejudicial effect of publication on a member's health (physical or mental) in considering whether the prejudicial effect outweighs the public interest.

- Remorse and genuine learning from mistakes may well go to issues of penalty but, absent special circumstances, are of little relevance to the question of whether the member's name and location should be published.

The Appeals Council has also recently confirmed that the threshold for departing from the presumption in favour of publication under the Previous Rules is high and, although there is no onus or burden on the person seeking suppression, requires supporting evidence (though not necessarily expert evidence). The standard under the Previous Rules is closer to that in the criminal jurisdiction (extreme hardship) than the civil jurisdiction due to the public interest factors of transparency, accountability and public protection. It confirmed the Tribunal's approach in a recent case that there needs to be compelling evidence of a highly prejudicial effect of publication on the member or another person when considering whether the prejudicial effect outweighed the public interest.

The High Court has upheld the Appeals Council's recent analysis (refer *J v the Institute of Chartered Accountants Appeals Council & Another* [2020] NZHC 1566, at [77] - [80] and [84]).

Under the Previous Rules, the Tribunal proceeded on the basis that there needed to be special circumstances, or highly prejudicial effect (something significantly more than the normal consequences) of the publication on the member or their family members, if the private interests of the member and/or their family are to displace the public interests' considerations referred to above.

The 2019 and 2020 Rules (Current Rules)

Under the Current Rules, in the Tribunal's view the expression *appropriate* in Rule 13.78(b) must be interpreted in the context of Rule 13.55(a) which mandates that the Tribunal shall direct publication including name and location unless the Tribunal considers there are *exceptional circumstances* for not doing so.

The shorter Oxford Dictionary definition of exceptional is *unusual, not typical*.

What constitutes exceptional circumstances?

In *Wilkins & Field Limited v Fortune* (1998) 5 NZELC 95,793 the Court of Appeal treated exceptional circumstances as those which are *unusual, outside the common run, perhaps something more than special and less than extraordinary*.

However, the Supreme Court in *Creedy v Commissioner of Police* [2008] 3 NZLR 7 took the view that that formulation appeared to combine two different meanings – the first that of being unusual (the "exception to the rule") and the second and more stringent interpretation of somewhere between special and extraordinary. That Court, which was dealing with the ability of a person to bring a personal grievance claim out of time, preferred the first meaning for a number of reasons, including that it accorded with ordinary English usage. The Court at [32] cited with approval the following passage of the judgment of Lord Bingham of Cornhill in *R v Kelly* [1999] 2 All ER 13 (CA) who said, when construing a reference to *exceptional circumstances*:

> *We must construe "exceptional" as an ordinary familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or* ***special****, or uncommon. To be exceptional, a circumstance need not be unique, or unprecedented, or very rare, but it cannot be one that is regularly, or routinely, or normally encountered* [emphasis added].

Former Member's Submissions

The Former Member referred the Tribunal to four of its previous decisions where the Tribunal had directed that the Member's name and location be supressed (discussed below).

She submitted that the use of phrase *exceptional circumstances* was intended to provide clarity and was not intended to impose a higher threshold – it is an apt phrase to use to simply convey an exception to something that would otherwise apply. And the word *special* does not carry the same precision – it suggests something different or unique. She accepted that the threshold was not a low one.

The Former Member also accepted that her conduct was serious, which weighs in favour of publication. However this alone is not determinative and must be weighed together with other relevant considerations. The Rules required that there be, in general, qualifying exceptional circumstances overall - she submitted that those circumstances included the fact that she had resigned as a chartered accountant and would not be working again as one, she had made full reparations which was evidence of her acceptance and insight about her wrongdoing, there was no risk of reoffending and she was remorseful and still relatively young.

She submitted that a unique factor in this case was that, because of the nature of their work, the people who stand to be most affected by publication are close family members. If her name was published, it will not make any difference to her specifically, but it would have a detrimental effect on family members who are innocent and free of fault.

The PCC's Submissions

The PCC submitted that the use of the word *exceptional* was an elevation of *special*. The threshold was previously high but became a bit higher from May 2019. There is an increasing desire on the part of the public and the profession for transparency. Damage to reputation is an inevitable consequence of publication - in some cases, that damage could extend to other family members but that does not constitute an exceptional circumstance.

One of the family member's view as to the consequences is no doubt a genuine view but it is only a view. There is no evidence of the extent of any impact. Non-publication would be inconsistent with prior cases and it would be a highly unusual step to in effect strike off in secret a member found guilty of misappropriating funds.

The PCC submitted that publication would in fact impact the Former Member's reputation, even though she is no longer a member of the Institute. Although there was no previous history, the Tribunal cannot infer that there is little risk of reoffending and it is in the public interest that the Former Member's name be published.

The more serious the offending, the greater the public interest and the higher the threshold when balancing private interests against public interest considerations.

The PCC also referred to the Tribunal's decision in *Brown* (17 January 2019). In that case the member was found guilty of conduct unbecoming an accountant and there were some breaches of the Fundamental Principle of Integrity, but no misappropriation of funds. The member was censured and fined. The member sought name suppression on grounds not dissimilar to those in this case. That application was declined as there was no evidence of the extent of any adverse impact which publication might have on the member's son. In any event, that private interest factor was insufficient to outweigh the relevant public interest considerations.

Discussion and Decision

As the Tribunal's legal assessor directed, the more serious the offending, the more compelling must be the reason to supress publication of a member's name.

In the Tribunal's view, based on the Supreme Court's interpretation in *Creedy* (above), the use of the word *exceptional* in the Rules is not, as the PCC submits, an elevation of special. No higher threshold has been introduced. It considers that the principles applied by this Tribunal and the Appeals Council in terms of the relevant Previous Rules - special circumstances, and compelling evidence of a highly prejudicial effect - are equally applicable under the Current Rules.

As the legal assessor put it, *exceptional circumstances* are circumstances which amount to an exception to the usual and predictable or inevitable consequences of name publication. He noted that collateral damage to others is a normal consequence of publication. The Tribunal agrees.

Here there is no sound evidence, let alone compelling evidence, of highly prejudicial effect of publication of the Former Member's name on her family members. The only evidence is the view of the person who might be affected. Although the Tribunal accepts that view is genuinely held, it is subjective and, for reasons mentioned during the hearing, the Tribunal is not convinced that any impact would be highly prejudicial in the circumstances, and further is of the view that any impact could be mitigated with appropriate management.

As to the cases the Former Member referred to in support of the application for name suppression, in the Tribunal's view there is nothing in them that support the submission that the circumstances here are exceptional.

In *Member Y* (17 October 2016), a decision of the Appeals Council, the member ultimately pleaded guilty to conduct unbecoming an accountant, that conduct being the provision of information to a

third party, and the compilation of financial statements, which he knew or ought to have known were false and misleading. There was no misappropriation of funds and no personal financial gain to the member. In deciding to grant name suppression both the Tribunal and the Appeals Council considered a number of factors. The Appeals Council, after hearing from the member and others who would be involved with him in future, accepted that there was a minimal risk of repeat offending. The Appeals Council held that although no specific factor, or even a combination of some of them, would justify a decision not to publish the member's name and locality, all of the factors when taken together justified non-publication. It placed particular importance on the fact that the member was young, there was good prospects of rehabilitation and little risk of reoffending.

The position is quite different here. The charge and the offending is much more serious, and for the reasons stated above the Tribunal is not satisfied that the Former Member has sufficient insight into the nature of her offending. On the evidence before it, it is unable to form a view on the risk of reoffending. Also the number of factors involved in the balancing exercise are comparatively fewer.

In *Name Not Published* (29 June 2012), the Appeals Council reversed the Tribunal's decision to publish the member's name and locality. In that case the member was guilty of conduct unbecoming an accountant. On multiple occasions, he lent or invested substantial amounts of client monies over which he had control to companies in which he had a material financial interest. Transactions were not properly authorised or recorded. In granting name suppression, the Council took into account a combination of factors, being:

- The member's previous unblemished record and his extensive community service.
- The member's age (70 years) and evidence of a significant health problem.
- The fact that the member would not be practicing as a chartered accountant ever again.
- The fact that those business and community organisations with which he continued to deal were to be given details of the Tribunal's and Council's decision.

This is a different situation to that applying here. Here the only relevant factors apart from potential reputational damage to family members is the Former Member's relative youth, no previous misconduct and her expressed intention not to practice as a chartered accountant. However the Former Member may well again be in a position of trust and, absent publication of her name, those who may employ her would be unaware of her past conduct.

In *Name Suppressed* (26 June 2012), the member was convicted of shoplifting goods worth approximately $1,200. In that case, the Tribunal considered that having regard to the member's age, her remorse, the making of reparations and the payment of fines, the interests of justice and the public interest could be sufficiently served by publishing the decision without name and location and providing a copy of the decision to her current employer (who was aware of her offending). The Tribunal in that case also considered that the mitigating circumstances were such that removal of the member's name from the Register would be disproportionate, and instead imposed an 18 month suspension.

That case differs from the current one in a number of respects – not least that the offending here was calculated, sustained over a period of time and involved an abuse of trust. There is also the lack of insight referred to.

And finally, in *Name Withheld* (15 September 2015), the Tribunal determined that in view of the efforts the member has made in respect of rehabilitation and there being little public risk arising from the member's actions, name suppression was appropriate. However in that case the charge to which the member pleaded guilty was simply a breach of the Rules and the Institute's Code of Ethics. It involved failure to manage conflicts of interest appropriately. The Tribunal accepted that publication of the member's name would disproportionately damage the reputation of the member and their then employer. The circumstances in that case bear little relation to those here.

In the Tribunal's view, after conducting the balancing exercise required by *Daniels*, the circumstances put forward by the Former Member as reasons for non-publication of her name and locality do not meet the threshold of *exceptional circumstances* and in fact fall well short of what would be required for concluding that the Former Member's family's private interests outweigh the public interest considerations.

The application for suppression of name and location is declined.

The PCC seek that in addition to the default publication position, the Tribunal's decision be published in *The New Zealand Herald*. The charge and the conduct of the Former Member are at the most serious end of the spectrum. In all the circumstances the Tribunal considers that the protection of the public would not be adequately served if publication occurred only on the CAANZ website and in *Acuity*. It grants the PCC's request.

In accordance with Rule 13.55 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, in the official publication *Acuity* and in *The New Zealand Herald*, with mention of the Former Member's name and locality.

In accordance with Rule 13.78(b) the Tribunal orders that:

- **There be interim suppression of the Former Member's name pending any exercise of her right of appeal within 21 days following notification to her of this decision and while any such appeal awaits determination by the Appeals Council.**

- **The names of the Former Member's family and all third parties including the complainant and his companies, and any information which might identify them, be suppressed.**

RIGHT OF APPEAL

Pursuant to Rule 13.63 of the Rules of the New Zealand Institute of Chartered Accountants, the parties may, not later than 21 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 interim and permanent 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.

MJ Whale FCA
Chairman
Disciplinary Tribunal