SERIOUS, EXPLOITATIVE, SEXUAL MISCONDUCT
The disciplinary proceedings against James Gardner-Hopkins

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I INTRODUCTION

In the legal profession, misconduct of a sexual nature is nothing new, but it has rarely resulted in reporting or sanction. Victims often feared complaints would make no difference but could result in negative impacts for their own careers and reputations.[1]

This article traces the progress of the professional disciplinary proceeding by the National Standards Committee (No 1) (the Standards Committee) against James Gardner-Hopkins for serious sexual misconduct against five summer clerks while a partner at Russell McVeagh.[2]

Mr Gardner-Hopkins misconduct was, as the High Court noted, "properly regarded as serious, exploitative, sexual misconduct."[3] The "profession's penalty response to egregious behaviour of the kind Mr Gardner-Hopkins exhibited in 2015 is rightly in the spotlight".[4]

The decisions issued in the course of the proceeding include the New Zealand Lawyers and Conveyancers Disciplinary Tribunal (the Tribunal)

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1 See for example New Zealand Law Society Working Group *Report of the New Zealand Law Society Working Group* (December 2018) at 30. Distrust in the process also continues to be a significant factor as a barrier to reporting (at 40). Women lawyers are much more likely to experience sexual harassment than men lawyers, and younger women are more likely to do so than women lawyers over 40 years old (at 28). Māori lawyers and particularly Māori women lawyers, are subjected to sexual harassment at even higher rates: 40 per cent of Māori lawyers have experienced sexual harassment in the last five years compared with 27 per cent on average, and 46 per cent of female Māori lawyers vs 40 per cent of all female lawyers (at 26).

2 *National Standards Committee No 1 v Gardner-Hopkins* [2021] NZLCDT 21 (the liability decision); *National Standards Committee No 1 v Gardner-Hopkins* [2022] NZLCDT 2 (the penalty decision); *National Standards Committee (No 1) of the New Zealand Law Society v Gardner-Hopkins* [2022] NZHC 1709 (the appeal decision); and *National Standards Committee (No 1) of the New Zealand Law Society v Gardner-Hopkins* [2022] NZHC 2350 (the leave decision).

3 The appeal decision, above n 2, at [103].

4 At [107].

liability and penalty decisions, the High Court appeal on penalty, and the High Court's related rejection of Mr Gardner-Hopkins' application for leave to appeal to the Court of Appeal. The article also makes a brief detour to a related decision in the Environment Court.[5]

II THE MISCONDUCT

The Tribunal found that, in December 2015 while he was a partner at Russell McVeagh, Mr Gardner-Hopkins committed six instances of misconduct against five separate young women, who were summer clerks at the firm (the complainants). Five of the instances of misconduct were by intimate non-consensual touching of four summer clerks, at a firm end-of-year Christmas function. The sixth incident involved Mr Gardner-Hopkins engaging in a prolonged and intimate interaction at a level "only just short of sexual intercourse"[6] with a fifth summer clerk, at his home during a team function.

The effect on the women victimised by Mr Gardner-Hopkins' conduct was described as "incalculable," with far-reaching effects on their careers.[7] The impacts included some complainants leaving the profession, and others changing to a different area of law. Two of the group of those who gave evidence left Aotearoa, one specifically because of the misconduct.[8]

A Charges 1 to 5 – Misconduct at firm Christmas party

In each of the events relating to charges 1 to 5, the touching by Mr Gardner-Hopkins was not consented to and was unwelcome. These incidents took place in connection with a firm Christmas party on 18 December 2015. Each of the allegations were established, and Mr Gardner-Hopkins' claims that the conduct was accidental were rejected by the Tribunal.

Charge 1 related to an incident when Mr Gardner-Hopkins touched Ms A, a summer clerk with whom he had never previously interacted.[9] Without courtesies such as introducing himself, asking her name or in other ways treating her as a person, he immediately embarked on "physical invasion", placing his hand below her hip, on or below her underwear line, and told her to drink alcohol, then "nuzzled" into her face.[10] The Tribunal accepted Ms A's

5 *Port of Tauranga Ltd v Bay of Plenty Regional Council* [2022] NZEnvC 92.
6 The liability decision, above n 2, at [74].
7 At [15].
8 See also the penalty decision, above n 2, at [15]; and the liability decision, above n 2, at [185].
9 The liability decision above n 2, at [47].
10 At [117].

account.[11] Mr Gardner-Hopkins accepted he had put his hand around Ms A's waist, but denied sexual intent, and said any movement of his hand to the front of her hip and pubic area was accidental.[12] He denied that he had attempted to kiss her, saying he might have leaned in because of loud music. His recollection was hazy due to his consumption of alcohol and the passage of time.[13]

Charge 2 related to misconduct against Ms B. The Tribunal found that Mr Gardner-Hopkins made no attempt to relate to her as a person, showed little to no respect for her, put his arm around her waist and pulled her away from her group. He repeatedly leaned in to put his mouth near her ear, and moved his hands up and down her body until he touched her breast with his hand.[14] The Tribunal accepted Ms B's account.[15] Mr Gardner-Hopkins had suggested his conduct was "energetic dancing" and leaning in to be heard, and that if he touched Ms B's breast it was accidental (even though he admitted intentionally touching her breast later in the evening – charge 5).[16]

Charge 3 related to further non-consensual touching of a third victim, Ms C. The Tribunal found that Mr Gardner-Hopkins touched her bottom deliberately. He continued to move his hand on her bottom. After having both hands around her waist, he moved one of his hands up under one of her breasts in a "caressing" motion.[17] Mr Gardner-Hopkins claimed that he had no recollection, and also that any touching would have been accidental.[18] He suggested, despite a lack of recall, that he might have been encouraging her to finish her drink because the bar was about to close. The Tribunal accepted Ms C's evidence.[19]

Charge 4 related to Mr Gardner-Hopkins putting his arm around Ms D in a tight clasp, moving his hand on her bottom for around five seconds and kissing her on the cheek.[20] This incident was also witnessed by Ms C. Mr Gardner-Hopkins claimed not to recall the incident and denied any

11 At [116].
12 At [45]–[46].
13 At [46]–[48].
14 At [121].
15 At [121].
16 At [50].
17 At [124].
18 At [54].
19 At [124].
20 At [127].

sexual intent. He referred to medical evidence about his left hand, which was unpersuasive.[21] The Tribunal found the charge established.[22]

Charge 5 related to Mr Gardner-Hopkins' conduct outside the party venue. The Tribunal found that while outside the venue waiting for taxis, he put his arm on Ms B's waist and pulled her, so she was facing him. She had a red wine stain on her t-shirt. Mr Gardner-Hopkins used his hand to trace the red wine stain across to her breast. He then left his hand on her breast while saying "what happened here"?[23] Mr Gardner-Hopkins tried to get into the taxi with her, asking her a number of times to go home with him, and if he could go home with her, or to a nightclub called El Horno. Other witnesses present were so concerned they intervened to stop him getting in the taxi.[24] There were at least three witnesses to this event. Mr Gardner-Hopkins denied trying to get Ms B to go with him and said he was highly intoxicated with a hazy memory of the incident. He described touching of Ms B's top as a joke.[25] Other witnesses described his conduct as creepy, sleazy and inappropriate.[26]

B Charge 6 – Further misconduct during function at home

A few days after the firm Christmas party, Mr Gardner-Hopkins engaged in a sixth incident of misconduct, this time with a summer clerk at an evening team function at his home. By the late hours, the party was smaller and those remaining were using the pool and sauna, and drinking whiskey. While in the sauna, Mr Gardner-Hopkins and Ms K, a summer clerk who he worked closely with, began kissing and intimate touching. This incident was observed by Mr Z and by his brother-in-law Mr Y. The behaviour "evidenced a prolonged and intimate interaction at a level that can fairly be described as only just short of sexual intercourse."[27]

Mr Gardner-Hopkins accepted the incident took place. He was asked to describe in detail exactly what had occurred but the Tribunal considered it was "not necessary to record" this in the liability decision, and indeed the detail of

21 At [158]–[167]. Referred to in this article below at heading "*Proof of the charges and whether touching 'accidental'*"
22 At [127]–[128].
23 At [61].
24 At [129]–[130].
25 At [63].
26 At [64]–[66].
27 At [74].

it was later suppressed.[28] It did describe Mr Gardner-Hopkins' claims that Ms K initiated the kissing and sexual conduct, that he was the one to bring it to an end, and that Ms K had deliberately attempted to get him drunk by pouring him "heavy pours" of whiskey.[29] Afterwards, Ms K said she was feeling unwell and she stayed overnight in a different room.[30]

C Other conduct

The liability decision refers to additional conduct outside of the charges, including an incident in mid-January 2016, as well as other conduct reflecting on Mr Gardner-Hopkins' attitude towards women and a sexualised environment fostered in his team. Following the charge 6 incident, Mr Gardner-Hopkins had a conversation with Russell McVeagh's Chief Executive, who referred to Ms K having a "drinking problem/vulnerability".[31] Despite this, in mid-January 2016 Mr Gardner-Hopkins went out drinking with team members, including Ms K, at El Horno bar where those attending reached "high levels of intoxication".[32] Although it does not appear to be referred to in the Tribunal decision, in the appeal decision the High Court referred to Mr Gardner-Hopkins later having kissed Ms K in front of colleagues.[33]

The Tribunal summarised other inappropriate conduct that was not the subject of charges:[34]

> The evidence, which was accepted by Mr Gardner-Hopkins, in summary included that he (along with other senior counsel); failed to intervene to stop a practice of sharing images by email of a female lawyer - where, for example her G string was visible, and commented on - along with other images; had a one-night stand with a junior lawyer of another firm at a conference; and kissed a prospective client[35] at a social occasion right in front of Mr Z. Mr Z regarded this as inappropriate given that Mr Gardner-Hopkins was married or at least in a long-term relationship at the time.

28 The liability decision, above n 2, at [74]; and the penalty decision, above n 2, at Appendix 2.

29 The liability decision, above n 2, at [76]. The Tribunal's assessment of those explanations by Mr Gardner-Hopkins is addressed below at heading "*Proof of the charges and whether touching 'accidental'*".

30 At [77].

31 At [81].

32 At [82].

33 The appeal decision, above n 2, at [82].

34 The liability decision, above n 2, at [139]–[141].

35 Mr Gardner-Hopkins talked about "mutual attraction" with the client whom he knew well, which "... on one night eventuated in a kiss...": see the liability decision, above n 2, at [139] and n 25.

> The other example of culture, provided by Ms X, a solicitor in the team, and Mr Z was a collection (kept by Mr Z on his cellphone) of "JGH" sayings, particularly (sexualised) double entendre. This list appears to have been the source of some pride to the practitioner and his team.
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> Some of the sayings from this list were apparently used in the summer clerk skit - making fun of Mr Gardner-Hopkins. The list has now been destroyed by Mr Z so we are unable to comment further on its contents, however it reinforces not only the impression of the "laddish" atmosphere accepted by Mr Gardner-Hopkins, but also, in our view, the somewhat sexualised and objectified view of women, which he does not accept.

III THE TRIBUNAL PROCEEDINGS

A Beginning

Concerns regarding Mr Gardner-Hopkins' conduct were raised within Russell McVeagh in December 2015.

While briefly summarised in the liability decision, the Tribunal did not consider the firm's response to the complaints in detail – noting that its task in considering Mr Gardner-Hopkins' personal liability was a different one.[36] Further context can be found in Dame Margaret Bazley's independent review of Russell McVeagh (the Bazley Report), which observed that the firm had a two-page long policy called "Harassment in the Workplace", which in theory would have guided the firm's response to any allegations of sexual harassment. However, the Bazley Report concluded that the firm did not follow that policy in relation to the incidents at the Christmas party and the incident at Mr Gardner-Hopkins' home.[37]

The Bazley Report records that the working day after the Christmas party one of the complainants, Ms A, reported the incident relating to charge 5 to the Human Resources Manager in the Russell McVeagh Wellington office, although she did not at that stage provide the name of the partner or of Ms B

36 See the liability decision, above n 2, at [7] and [22]. On the issue of the firm culture at Russell McVeagh at the relevant time, the Tribunal exercised caution. While it took into account the culture of Mr Gardner-Hopkins' team, and the general "work hard play hard" culture, it made "no definitive assessment of the firm's culture as a whole", noting that this was not the focus of its inquiry, it had heard limited evidence on this, and that the firm was not separately represented before the Tribunal and had no opportunity to respond to specific evidence about broader cultural issues.

37 Dame Margaret Bazley *Independent Review of Russell McVeagh: March–June 2018* [the Bazley Report] at 22. The Bazley Report refers to the Christmas party incidents (now charges 1–5) as "Incident one" collectively, referred to the incident involving Ms K (now charge 6) as "Incident two".

(the victim of the conduct in charge 5).[38] The Human Resources Manager informed the Chief Executive, but there was apparently no follow up with Ms A.

Shortly after the incident, Mr Z reported the incident involving Ms K (charge 6) to Human Resources.[39] The liability decision records an initial denial by Mr Gardner-Hopkins that anything took place with her, and in a later conversation with the Chief Executive on 22 December 2015, denied anything had happened but acknowledged "it all looks really bad".[40]

In January, the Chief Executive and Board members revisited the incident giving rise to charge 6 with Mr Gardner-Hopkins.[41] On 3 and 4 February 2016, the summer clerks met with the Human Resources Director and explained "in general terms" what had happened at the Christmas party.[42] They were informed that the firm was taking action, but not what it was. The Bazley Report noted that the firm did not investigate each allegation,[43] and the reason for the departure of Mr Gardner-Hopkins was largely unrelated to the conduct at the Christmas party, and more so regarding the incident involving Ms K (charge 6).[44]

The Bazley Report was critical of the firm's response to the incident, describing the response as having been "managed poorly," citing issues of process, poor communication with staff, a failure to follow the relevant policy, the lack of an independent, external investigation, and inadequate support for the complainants.[45]

In early 2016 Mr Gardner-Hopkins was required to leave the Russell McVeagh partnership. When he left to become a barrister, the firm communicated this to its staff in a positive light, with his contributions described in "glowing terms."[46] Mr Gardner-Hopkins continued to work with Russell McVeagh on legacy files,[47] and went on to become the President of the Resource Management Lawyers' Association. Despite being informed

38 This was on 21 December 2015, according to the Bazley Report, above n 37, at 22.
39 The Bazley Report, above n 37, at 23-24, and the liability decision, above n 2, at [79].
40 The liability decision, above n 2, at [79]–[80].
41 At [84].
42 The Bazley Report, above n 37, at 22.
43 At 22.
44 At 23–24.
45 At 26–28.
46 The liability decision, above n 2, at [86].
47 The Bazley Report, above n 37, at 29.

of those concerns, Russell McVeagh did not make a report to the New Zealand Law Society (NZLS). At the time, the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) required "a lawyer who has reasonable grounds to suspect that another lawyer has been guilty of misconduct" to make a confidential report to NZLS at the earliest opportunity.[48]

Mr Gardner-Hopkins' conduct was brought to the attention of the NZLS as a complaint in 2018 after the complainants obtained legal advice. Following investigation, charges were filed in the Tribunal by the National Standards Committee in November 2020.

B Liability

The Tribunal delivered its liability decision in July 2022. It characterised its liability decision as affirming: [49]

> …. what has always been the case, namely that indecent, unconsented or unwelcome touch by a lawyer on another, breaches the standards of conduct expected of a member of the profession. Intimate non-consensual touch connected with the workplace, on someone that the lawyer has power over, has always been unacceptable.
>
> This is the case whether the lawyer intentionally touches the subordinate, or has failed to self-manage to the extent that the lawyer's conduct is inappropriately disinhibited. The profession expects of its members that those who work with lawyers are respected and safe. A basic behaviour expected of lawyers towards those they work with is that they are respectful and do not abuse their position of power. There is no place for objectification of women or indeed any person, by those in the profession of law.

The key issues addressed by the Tribunal were: a) whether the conduct was "professional" or "personal" in its nature (that is, falling within subs 7(1)(a) or (b) of the Lawyers and Conveyancers Act 2006); b) proof of the charges and whether the touching alleged was, in the instances Mr Gardner-Hopkins

48 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), r 2.8. The threshold for reporting had since been lowered and is required where a lawyer "has reasonable grounds to suspect that another lawyer may have engaged in misconduct": Rules 2.8–2.10, amended and replaced on 1 July 2021, by r 5(1) of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Amendment Rules 2021.

49 The liability decision, above n 2, at [172]–[173].

claimed, accidental or deliberate; and c) whether the conduct was misconduct or merely unsatisfactory conduct (separately or cumulatively).[50]

1 Professional, not (merely) personal, conduct

The Tribunal referred to the statements of the full court of the High Court in *Orlov*, that (a) and (b) of s 7(1) covered the full spectrum of misconduct.[51] It noted the difference in thresholds with (b) carrying a higher threshold to find misconduct, involving an assessment that — at the time it occurred — the conduct reflected on the fitness or suitability of the lawyer to continue in practice.[52] Mr Gardner-Hopkins claimed that his conduct was personal (s 7(1)(b)) rather than professional (s 7(1)(a)).[53]

The Tribunal accepted the Standards Committee submission that the conduct was "professional" and found the lower threshold applied. It found the conduct took place at firm-sponsored team building events at a time when Mr Gardner-Hopkins was providing regulated services within the meaning of s 7(1)(a).[54] There was a culture of "work hard, play hard", long working hours, and expected socialising outside work hours. The Tribunal set out a careful analysis, noting the firm paid for events, that the events were seen as being part of firm cohesion, and that these were not events attended by Mr Gardner-Hopkins "as a private individual."[55]

2 Proof of the charges and whether touching "accidental"

Mr Gardner-Hopkins denied the charges of misconduct. In relation to the incidents at the Christmas party, he claimed touching was accidental (charges 1 to 4) and that he lacked sexual intention. On all charges 1 to 4, he denied his conduct amounted to misconduct. He admitted the lesser alternative of

50 The Tribunal also ruled on admissibility of evidence: see the liability decision, above n 2, at [136]–[150].

51 At [92], citing *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2014] NZHC 1987, [2015] 2 NZLR 606 at [102].

52 The liability decision, above n 2, at [95].

53 At [96]. Ultimately the Tribunal considered that either way, Mr Gardner-Hopkins' behaviour was "out of control" and whether viewed under (a) or (b) of s 7(1), his actions met the threshold of misconduct. The Tribunal found that Mr Gardner-Hopkins' conduct justified a finding that Mr Gardner-Hopkins was not, at the relevant time, a fit and proper person, or was otherwise unsuitable to engage in practice as a lawyer (at [171]).

54 At [98]–[108].

55 At [107]. The Tribunal also held, that even applying with higher threshold under s 7(1)(b), it would have found the conduct was, both separately and cumulatively, such that Mr Gardner-Hopkins was not at the relevant time a fit and proper person or was otherwise unsuited to engage in practice as a lawyer (at [171]–[176]).

unsatisfactory conduct for charges 1, 4 and 5, but not for charges 2 and 3.[56] In relation to his conduct at the function at his home, Mr Gardner-Hopkins admitted the incident took place, but denied misconduct and submitted his conduct was at the lesser level of unsatisfactory conduct. Impliedly, Mr Gardner-Hopkins denied the alternative charge 7, which alleged the cumulative effect of charges 1 to 5 amounted to misconduct.[57]

The case progressed, following interlocutory arguments, to a liability hearing before the Tribunal. The liability hearing took place over a week in May 2021 over which time interim name suppression was in place. The Tribunal considered that given the serious nature of the allegations, strong evidence was required to prove the charges,[58] and set out its reasoning and findings for each charge.

On charge 1, the Tribunal accepted the evidence of Ms A as a "careful, reflective and straightforward witness".[59] In contrast to Mr Gardner-Hopkins she was sober during the incident. The Tribunal was satisfied Mr Gardner-Hopkins had acted in a manner that would reasonably be regarded by lawyers of good standing as "disgraceful or dishonourable"[60] *and also* consisted of a reckless contravention of r 12,[61] so that both potential pathways to misconduct for "professional" conduct were met.[62]

As to charge 2, the witness Ms B was described by the Tribunal as "clear and credible" and it accepted the core of the allegation including that Mr Gardner-Hopkins' hand contacted her breast.[63] The Tribunal found Mr Gardner-Hopkins' actions were misconduct. While he claimed the contact with Ms B's breast was accidental, the Tribunal noted that he had imposed himself in her personal space despite not knowing her or her name, and that if his conduct was not disgraceful it was certainly a reckless breach of r 12.[64]

56 At [179]–[180] and [182]. It is unclear at what point Mr Gardner-Hopkins made admissions as to unsatisfactory conduct.

57 At [183]–[184].

58 At [110], referring to *Z v Dental Complaints Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [105].

59 At [116].

60 Lawyers and Conveyancers Act 2006, s 7(1)(a)(i).

61 Section 7(1)(a)(ii).

62 The liability decision, above n 2, at [117] and [120]. Rule 12 of the Rules provides: "A lawyer must, when acting in a professional capacity, conduct dealing with others, including self-represented persons, with integrity, respect and courtesy".

63 The liability decision, above n 2, at [121].

64 Lawyers and Conveyancers Act, s 7(1)(a)(ii).

The conduct the subject of charge 3 as alleged by Ms C was established, and found to be misconduct, either "as a disgraceful intrusion into Ms C's personal space and intimate touching of her body, or as a reckless breach of Rule 12…".[65] The touching was ongoing, and "not an inoffensive brushing or jostling."[66]

The conduct alleged in charge 4 relating to Ms D was also established, was not accidental, and amounted to misconduct as either disgraceful conduct or a reckless breach of r 12. The Tribunal noted that the conduct was witnessed by Ms C and that Ms D immediately complained about it to Ms B.[67]

The Tribunal considered the conduct the subject of charge 5 to be the most serious and blatant of that night, and shocking to those who witnessed it. The Tribunal had "no hesitation" in finding that conduct to be disgraceful and/or dishonourable and certainly a reckless breach of r 12.[68]

Finally, on charge 6, Mr Gardner-Hopkins admitted the conduct alleged but denied it amounted to misconduct. The complainant Ms K did not give evidence. Instead, the Tribunal dealt with that charge based on agreed facts, evidence from other witnesses, and the evidence of Mr Gardner-Hopkins. It found the conduct both disgraceful and dishonourable, and noted that it would also be a reckless breach of r 12. The Tribunal observed, as to Mr Gardner-Hopkins' suggestion that he felt pursued by Ms K that:[69]

> In our view, who initiated the contact is irrelevant. Given the enormous power imbalance between the partner and head of the team, and the summer clerk in that team, conduct which comprised intimacy only just short of sexual intercourse, can only be characterised as disgraceful and dishonourable.

Mr Gardner-Hopkins claimed an absence of intention, particularly sexual intention, and he suggested the touching was accidental in respect of charges 1 to 4. He also called expert evidence regarding his left hand to support his submission that a historical injury was consistent with his explanation of accidental touching.

Four summer clerks (the victims of the misconduct in charges 1 to 5), and other witnesses who were present for some of these incidents, were required to

65 The liability decision, above n 2, at [125].
66 At [124]–[126].
67 At [127]–[128].
68 At [129]–[131].
69 At [134].

give evidence and be cross-examined. Ultimately the Tribunal analysed their evidence and accepted it, with the evidence of each complainant found to be honest and compelling.[70]

The Tribunal found Mr Gardner-Hopkins' explanations were unreliable.[71] It rejected his suggestion, in relation to charges 1 to 5, that "the intimate touching of these young women on that evening" was accidental.[72] The Tribunal found it was highly unlikely he could have inadvertently touched four different young women, in an intrusive and intimate manner, completely accidentally.[73] It noted he had not withdrawn and apologised as would be expected if the touching were accidental.[74]

The Tribunal observed that Mr Gardner-Hopkins' evidence had evolved over the course of the process from the Standards Committee to the Tribunal. First, Mr Gardner-Hopkins denied the conduct took place at all. He then made some admissions after the exchange of evidence from eyewitnesses. It was only after Mr Gardner-Hopkins heard the complainants' evidence and cross-examination during the hearing that he "accept[ed] the honesty of the evidence that had been given against him".[75] The author notes that prior to the hearing Mr Gardner-Hopkins would have already received written evidence from the complainants.[76]

The Tribunal took into account "the fact that, as his evidence evolved, concessions as to particular behaviour were only made when inescapable" and that the "failure to make prompt concessions occurred despite Mr Gardner-Hopkins' frank acknowledgment of poor memory and intoxication".[77] Mr Gardner-Hopkins' suggestion that reduced functionality in his left hand explained the intimate touching was "not tenable".[78] The expert accepted that there was nothing in his injury that would prevent him from reaching out and putting his arm around someone, or touching a body part, nor any impediment to his finger that would prevent him knowing where his hand was in space.[79]

70 At [160]–[162].
71 At [166].
72 At [168].
73 At [169].
74 At [170].
75 At [163].
76 Affidavits in support are required to be filed at the time of the filing of charge as part of the Tribunal process.
77 The liability decision, above n 2, at [167].
78 At [158].
79 At [152]–[157].

The Tribunal found the charges of misconduct in charges 1 to 6 established under s 7(1)(a) (that is, at a time when Mr Gardner-Hopkins was providing regulated services).[80] In the alternative, the Tribunal recorded that if it were wrong in its finding that s 7(1)(a) applied, then it would have found misconduct proven on the alternative basis under s 7(1)(b) (conduct unconnected with the provision of regulated services), even with the higher applicable threshold. The Tribunal's alternative finding reflects the principle that ss 7(1)(a) and (b) cover the "full spectrum" of misconduct.[81]

C The Tribunal decision on penalty

1 The outcome

The penalty hearing took place in December 2021, more than six months after the liability hearing. The penalty decision was delivered in January 2022. The Tribunal ordered suspension for two years, censure, and payment of costs of the Standards Committee and the Tribunal.[82]

The Tribunal did not address the question of compensation for victims, who clearly suffered emotional harm, and may have incurred financial loss through obtaining legal advice and/or counselling.

It is not known from the penalty decision what the victims' views were on this issue, or if their views were sought by the Standards Committee or Tribunal. Victims will not always welcome awards of compensation, but from the Tribunal's penalty decision it is not clear whether the issue was raised or contemplated.

The Tribunal undoubtedly has the power to order compensation for loss in the form of emotional harm, as well as for financial loss. Under the Lawyers and Conveyancers Act 2006 (the LCA) the Tribunal may order compensation to a person who has suffered loss "by reason of any act or omission" of the

80 No finding was required on charge 7 (an alternative charge which alleged misconduct on a cumulative basis), however the Tribunal would have found misconduct on a cumulative basis: the liability decision, above n 2, at [183]–[184].

81 *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal*, above n 52, at [102].

82 The penalty decision, above n 2, at [16]–[17]. Suspension was deferred by some three weeks to allow Mr Gardner-Hopkins to represent a charitable trust on a pro bono basis in early February 2022. Various suppression orders were made relating to medical and personal matters, as well the evidence given regarding the detail of charge 6, and the suppression orders made previously to protect the complainants were confirmed. See the penalty decision, above n 2, at Appendix 2.

practitioner, in an amount that does not exceed that prescribed by regulations.[83] The phrase "by reason of" suggests only a modest causative link is required between the acts of the practitioner and the loss suffered.[84] Loss in the form of emotional harm is an accepted ground for compensation. As the Court of Appeal noted, in declining leave to appeal from the High Court decision in *Hong*:[85]

> Whether compensation for emotional harm is "loss" for the purposes of compensation payable under s 156(1)(d) of the Lawyers and Conveyancers Act is a question of law. The High Court was not made aware of any authority on the issue, meaning it may be a question of general or public importance.[86]
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> However we consider the Judge's reasoning in finding that emotional harm can constitute loss for the purposes of compensation to be compelling. The Judge considered the plain meaning of "loss" includes the emotional harm caused to a client whose trust and confidence is breached by his or her lawyer.[87] This meaning is consistent with s 156(1)(d) and the general purpose of the Act which is to maintain public confidence in the legal profession and to ensure clients are properly protected as well as general law.[88]

In the 2022 decision *Nelson Standards Committee v Downing and Reith*, there was no dispute that injury to feelings, including stress, distress, loss of dignity, anxiety and humiliation can be compensated.[89] In that decision the Tribunal

83 Lawyers and Conveyancers Act, ss 242(1)(a) and 156(d). Regulation 32 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008 provides that the maximum amount of compensation a Standards Committee may order pursuant to s 156(1)(d) of the Act is $25,000.

84 Duncan Webb, "Liability Issues for Lawyers under the Lawyers and Conveyancers Act" (2008) 14 NZBLQ 290 at 295.

85 *Hong v Auckland Standards Committee No 5* [2021] NZCA 85 at [33]–[34].

86 *Hong v Auckland Standards Committee No 5* [2020] NZHC 2613.

87 *Hong v Auckland Standards Committee No 5* [2021] NZCA 85.

88 *Hong v Auckland Standards Committee No 5* [2020] NZHC 744 at [97].

89 *Nelson Standards Committee v Downing and Reith* [2022] NZLCDT 21 at [23]. The principles the Tribunal referred to as providing helpful guidance can be summarised as: there must be a causal connection between the action of the practitioner and the damages sought, actual cause need not be proven; the award of damage is to compensate for the injury not punish the practitioner; the conduct of the practitioner may however exacerbate or mitigate injury and this is relevant; the assessment is specific and personal to the person who suffered harm (the eggshell skull principle); there is no requirement for medical evidence or diagnosis; injury to feelings is a real loss (at [26]). See also *Auckland Standards Committee 4 v O'Boyle* [2021] NZLCDT 27 for another example of a Tribunal case awarding complainant compensation.

discussed emotional harm compensation, setting out relevant principles, and the use of a 'bands' analysis to identify the appropriate level of compensation order.

2 *Further evidence*

During the penalty hearing Mr Gardner-Hopkins had the opportunity to address the Tribunal further and he gave oral evidence. The Tribunal recorded that "Mr Gardner-Hopkins accepted the Tribunal's findings and directly apologised to the victims for the conduct as found."[90] He also provided material from a therapist and a professional coach.

There is no reference to any further material being produced from the complainants during the penalty stage as to the impacts upon them. The Tribunal specifically referred to the impacts described by one complainant during the liability hearing.[91] While there is no specific provision for a "victim impact statement" in the LCA, s 239(1) provides for the Tribunal to receive information to assist it. Further, s 252 allows the Tribunal (subject to the applicable rules and regulations) to determine its own procedure. There is also precedent for the admission of documents before a disciplinary tribunal that describe the effect on victims as "information to assist" the disciplinary tribunal.[92]

3 *Assessment of the conduct*

The Tribunal considered the seriousness of the misconduct when examining aggravating features.[93] The key matters referred to were the number of instances of touching, the power imbalance, the impact on the women, that there was a pattern of Mr Gardner-Hopkins failing to observe boundaries with women after he had consumed alcohol,[94] and that there was a sexualised culture within his team.

90 The penalty decision, above n 2, at [26].

91 At [15].

92 See, for example *Bennett v Professional Conduct Committee of the Medical Council of New Zealand* [2022] NZHC 876 at [84], where the High Court confirmed the relevance of Victim Impact Statements in professional disciplinary proceedings.

93 The penalty decision, above n 2, [9]–[18].

94 This was a reference to the liability decision, above n 2, at [149] where the Tribunal held that: "[a]lthough we have not given great weight to the generalised comments about team culture, where there were specific examples in the peripheral or contextual evidence, we did attribute some weight, particularly as to the issue of intent, or recklessness as to conduct around women. That is an important element of one of the grounds of misconduct found. Mr Gardner-Hopkins' pattern of failing to observe boundaries with females after he had consumed alcohol must be relevant to our assessment of the described incidents before us."

4 Mitigation

As to matters of mitigation, the Tribunal took into account consequences already incurred: "removal from a prestigious and lucrative partnership", a loss of status, "a reputational and emotional toll", the loss of professional associations, loss of clients, being "uninvited" from professional events, and a significant drop in income.[95] The Tribunal also considered that to "practice without the support of colleagues is a high price to pay",[96] despite Mr Gardner-Hopkins having tendered references from (presumably supportive) colleagues.

The Tribunal then considered "changes made and future risk", ultimately concluding, in summary, that "Mr Gardner-Hopkins has, albeit belatedly and with a little less enthusiasm than we might have wanted to see, taken positive steps to reflect, face up to and deal with the factors that led him to this point".[97] The Tribunal referred (after referring to his acceptance of the findings and apology) to Mr Gardner-Hopkins having a different personal life in 2021 than in 2015. Specifically, that he had a different partner and a young baby, different priorities, was taking parenthood seriously, and had "significant daily responsibilities for his baby."[98] The Tribunal considered this to be a "protective factor". It would be reasonable to question how much weight could be placed on these factors as protective: Mr Gardner-Hopkins' former partner was upstairs while he committed the misconduct the subject of charge 6, and it is not clear that becoming a parent necessarily reduces one's risk of sexual misconduct. While Mr Gardner-Hopkins not attending functions with alcohol would reduce situational risk, it is reasonable to question whether, in other respects, the change to his family situation is genuinely protective in relation to sexual misconduct.

The Tribunal noted that Mr Gardner-Hopkins had tendered material from a psychologist who had worked with Mr Gardner-Hopkins for six months in 2018 without much engagement from him, and then "for the last 12 months".[99] She indicated that by 2021 he had achieved "early remission of problematic drinking" — a finding based on his self-reporting — and had planned a transition to a new, Auckland-based psychologist for psychological

95 The penalty decision, above n 2, at [21]–[22].
96 At [23].
97 At [39].
98 At [27].
99 At [31].

support and monitoring of alcohol use.[100] The psychologist noted there was "still considerable work to be done".[101] The Tribunal acknowledged "these relatively recent changes" but considered these ought to be viewed in the context of having occurred "within the threat of losing his right to practice" and "very belatedly".[102]

Mr Gardner-Hopkins also provided material from a professional coach of people "who are accused of inappropriate or abrasive behaviour in workplaces,"[103] in support of a submission that "he is not a risk to anyone."[104] Despite accepting that the coach was not a forensic psychiatrist qualified to make a risk assessment as to future sexual misconduct, the Tribunal indicated it had found that material helpful. The Tribunal accepted the submission of counsel for Mr Gardner-Hopkins that he had "implemented strategies to ensure he does not put himself into situations where his behaviour may depart from the standards he expects from himself."[105] While the detail of these strategies is not set out in the decision, it may have related to the intended ongoing counselling.

5 The question of fitness and starting point of strike-off

Counsel for Mr Gardner-Hopkins sought a penalty short of suspension and submitted that a record of censure was a serious matter. The Standards Committee submitted that strike-off was appropriate, and submitted as to general deterrence that:[106]

> Denunciation is necessary not just to maintain the public's confidence in the profession, but to reinforce to current and aspiring lawyers that sexual assault and/or sexual exploitation will not be tolerated – that there is real accountability for such misbehaviour, and that the effect on victims will not be minimised.

The Tribunal noted that at the time of the misconduct Mr Gardner-Hopkins was not a fit and proper person to be a lawyer and agreed that accordingly

100 At [28] and [30]–[33].
101 At [34].
102 At [33].
103 At [36]–[37].
104 At [36].
105 At [38].
106 At [50].

strike-off must be the starting point,[107] but it considered that there were "other principles to be weighed against that",[108] and went on to refer to consistency in penalty, the purpose of strike-off and suspension, and to the requirement that the penalty imposed should be the least restrictive outcome available in the circumstances.

6 Comparison with other cases

Under the heading of consistency, the Tribunal considered two earlier judgments, *Daniels* (a High Court appeal) and *Horsley* (a Tribunal decision), which involved exploitive but consensual sexual relationships with clients, accepting the submission for Mr Gardner-Hopkins that his misconduct fell at a lower level than in those cases. The Standard's Committee had submitted Mr Gardner-Hopkins' offending was more serious, noting the multiplicity of incidents (and complainants), while *Daniels* and *Horsley* each involved only one victim.[109] The Tribunal then referred to a Standards Committee decision of 25 October 2018 (*ZTUVK*), stating that:[110]

> We also note that from the practitioner's perspective, these proceedings have occurred against the background of other practitioners, who have conducted themselves in similarly reprehensible ways, having been dealt with at Standards Committee level, with much lesser consequences and away from the public eye. The particular case which was put to us, a Standards Committee decision which resulted in a lawyer, who had behaved in a similar fashion to Mr Gardner-Hopkins, being fined $12,500 with a finding of Unsatisfactory Conduct, departs considerably from our view of the gravity of such conduct, and is in our view plainly wrong. *The Tribunal is not bound by these lesser penalties, but in seeking to achieve overall justice, we do not entirely ignore them.*

Although the Tribunal indicated that it did not "entirely ignore" this "plainly wrong" decision of a Standards Committee, the relevance of that decision to achieving "overall justice" was not identified, except perhaps that "consistency"

107 At [51].

108 At [51].

109 The penalty decision, above n 2, at [60] and [56], citing *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850 (HC); and *Canterbury Westlands Standard Committee v Horsley* [2014] NZLCDT 47. The High Court did not agree.

110 The penalty decision, above n 2, at [61] (emphasis added), referring to ZTUVK Notice of determination by Standards Committee, 25 October 2018.

appears to have been a key factor in deciding to impose suspension rather than strike-off.[111] Not only is that decision not binding, even if the practitioner in *ZTUVK* had been a co-offender, on well-established criminal justice principles an earlier too-lenient sentence is not a proper basis to reduce another's sentence.[112] As the Court of Appeal noted in *Kulu v R,* it would be inappropriate to take an "over-lenient sentence as its benchmark" as this would in effect be saying "where you have one wrong sentence and one right sentence, [the] Court should produce two wrong sentences".[113] Instead, a court must "…strike a balance between maintaining public confidence in the administration of justice on the one hand, and not amplifying the injustice of one manifestly inadequate sentence by adding another." [114]

7 Stopping short of strike-off

In considering the purposes of strike-off and suspension, the Tribunal highlighted the "recently acquired insight" by Mr Gardner-Hopkins, his acceptance of the liability findings, and noted that although he had not yet initiated a therapeutic relationship with a psychologist as recommended, a suspension could be utilised to do so.[115] The Tribunal considered the principle of the least restrictive outcome as weighing against strike-off and held that "having regard to the lapse in time, and the cases discussed above, we can stop short of either strike-off or the maximum suspension period".[116] In doing so, the Tribunal referred to "the principle that maximum penalties must be reserved for the most serious of cases".[117] In going on to fix a two year suspension, the Tribunal referred to "professional consequences already suffered" by Mr Gardner-Hopkins, the consistency principle, and "the initial steps he has personally taken to address the psychological factors discussed in the hearing and his misuse of alcohol" as well as his prior good record.[118]

111 At [72].

112 See for example *R v Rameka* [1973] 2 NZLR 592 (CA) at 593.

113 *Kulu v R* [2022] NZCA 284 at [33].

114 At [33] (footnotes omitted).

115 The penalty decision, above n 2, at [64].

116 At [71]. The maximum period of suspension is three years.

117 The High Court disagreed with reserving the maximum suspension period, noting that "[W]e also agree with the Tribunal's assessment that the starting point should be strike-off for misconduct such as Mr Gardner-Hopkins' in 2015 and with Mr La Hood's submission that strike-off—as the most serious sanction—is not just to be reserved for the worst possible case. : see the appeal decision, above n 2, at [101].

118 The penalty decision, above n 2, at [72].

Both consistency (including the comparative seriousness of other cases), and the approach of "reserving" the maximum penalty for the worst cases, were matters addressed, and criticised, by the High Court on appeal.

The Tribunal did not elaborate on how it took into account the lapse of time, but referred (in a footnote) to the time that elapsed between the investigation and filing of charges and noted that COVID-19 lockdowns had delayed the penalty hearing.[119] The Tribunal did not refer to the time taken to the liability hearing specifically, which is perhaps unsurprising as this period was not lengthy and reflected Mr Gardner-Hopkins' exercise of his right, albeit unsuccessfully, to challenge the evidence in a full hearing. Arguably there were also factors connected to the misconduct, both intrinsic to the conduct and in the surrounding circumstances, that risked contributing to delay, including through his responsibility for the "laddish culture"[120] and normalisation of sexualised behaviour fostered in his team in 2015. In this case however, despite those potential barriers, complainants raised the conduct both with Russell McVeagh in 2015 and with NZLS in 2016.[121] In the face of a lack of proper support being provided to them, four of the summer clerks obtained their own legal advice and made complaints in 2018.[122]

In some cases, disciplinary tribunals will consider, as mitigating factors, matters connected to delay, such as periods a professional is subject to an interim suspension or had voluntarily stopped practise.[123] However, those factors were not present here: Mr Gardner-Hopkins had the benefit of name suppression until after the liability hearing and appears to have continued in his practice throughout the proceedings before the Tribunal.

Delay was relevant to the period over which Mr Gardner-Hopkins was able to engage in rehabilitation and demonstrate efforts to change, and those efforts were taken into account by the Tribunal. However, if the Tribunal decision intended to indicate the mere fact of delays was a mitigating factor *of itself*, this reasoning could reasonably be questioned. There are good public policy

119 At [74] and n 21.

120 At [17].

121 The Bazley Report, above n 37, at 37.

122 The Bazley Report, above n 37, at 27 concluded that: "the summer clerks should have been offered specialised counselling and independent legal representation once the firm had sufficient information about the incidents."

123 See for example *Professional Conduct Committee v Rosie* 294/Nur09/141P at [136].

arguments that a delay in commencement in proceedings[124] and legitimate delays through the Tribunal process, ought not to result in "discounts", unless these are logically connected and pertinent to the purposes of disciplinary sanctions.[125] While such delays may allow a person time to rehabilitate or change, it is their rehabilitative steps/change, and the impact of those steps on future risk, that are pertinent to the purposes of the disciplinary sanction, rather than the mere lapse of time.

While the passage of six years from the misconduct afforded ample opportunity to develop insight and engage in rehabilitative steps, Mr Gardner-Hopkins acted belatedly, in the context of the threat of losing the ability to practice, "with a little less enthusiasm"[126] than would be preferred and left "considerable work to be done".[127] The mere effluxion of time could be regarded as less telling as to risk and rehabilitation in circumstances where his insight and the steps to address risk came only toward the end of the process and after a liability finding. While it would have been open to it, the Tribunal does not appear to have expressed scepticism over the genuineness of his insight although it did note the timing of his late apology and acceptance of liability, after a full hearing and adverse liability decision.

The lapse of time does not appear to have been considered relevant in the sense of any change to accepted standards over that timeframe: the Tribunal expressed the conduct as that which has always been unacceptable.[128]

The Tribunal set out recommended actions for Mr Gardner-Hopkins to take before being reinstated by the Practice Approval Committee including to address his use of alcohol, his "poor understanding of professional boundaries,"[129] mentorship and personal support. No conditions were recommended to prevent Mr Gardner-Hopkins from being in a position of employing or supervising junior lawyers, or from working with vulnerable people.

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124 Perhaps particularly in cases involving sexual allegations as delayed complaints are not uncommon in such a context, or when delay has been contributed to by failure(s) to report to the disciplinary body.

125 There may of course be cases where undue delays in the proceeding caused by the prosecuting agency can be considered in determining issues such as fairness and applications for stay/dismissal. There is no suggestion that in this case the delays were of a nature to raise such issues.

126 The penalty decision, above n 2, at [39].

127 At [34].

128 Refer the liability decision, above n 2, at [172]. The appeal decision, above n 2, refers to a "quite profound change in attitude towards sexual harassment over the last decade" (at [96]), but that change pre-dates Mr Gardner-Hopkins' conduct.

129 The penalty decision, above n 2, at [67].

IV AN ASIDE IN THE ENVIRONMENT COURT

Port of Tauranga v Bay of Plenty Regional Council is an interesting offshoot of the disciplinary proceedings.[130] The case considered the circumstances where someone suspended by the Tribunal from legal practice can appear before the Environment Court under a general right of representation pursuant to s 275 of the Resource Management Act 1991 (RMA) and exceptions to the restrictions under ss 21 and 24 of the LCA.

Ngā Hapū o Ngā Moutere Trust (the Trust) applied for Mr Gardner-Hopkins to appear in the Environment Court as an "advocate" under s 275 of the RMA and s 27(1)(b)(ii) of the LCA.[131] Counsel for the Trust had whānau commitments such that he was unable to appear at the hearing, and several lawyers with RMA experience had been approached but had not accepted the brief.[132] There was some urgency: the application related to a hearing scheduled for mid-July 2022.

The application was heard on 26 May 2022, four months after the penalty decision and the week prior to the High Court appeal (but was not later referred to in the High Court appeal). While those appearing took a neutral position in relation to the application,[133] and there was no contradictor to assist (neither the NZLS nor the Standards Committee were parties or called upon), the Environment Court embarked upon a careful analysis of the relevant legislation and assessment of the application.

Chief Judge Kirkpatrick analysed ss 242(1)(e) and 244 of the LCA, and concluded that both applied and were not limited by the general provision in s 275 of the RMA, nor by the exemptions in s 27(1)(b) of the LCA.[134] However, there remained a discretionary power to a judge in any case, to allow a person to represent another person under s 27(1)(b)(ii) of the LCA, with the fundamental principle being that such discretion may be exercised where the allowance would better serve the interests of justice.[135]

130 *Port of Tauranga Ltd v Bay of Plenty Regional Council*, above n 5.

131 As the Chief Judge noted at paragraph [23]: "Under s 275 of the RMA the Environment Court routinely hears from family members or neighbours or friends who have been chosen by an otherwise unrepresented party to speak for them and, for that purpose, to advise them about the conduct of their case. There is almost always no problem with that and it is clearly within what is contemplated under s 27(1)(b)(i) and (c) of the LCA."

132 *Port of Tauranga Ltd v Bay of Plenty Regional Council*, above n 5, at [4]–[5].

133 At [6].

134 At [20].

135 At [21].

In assessing the application, His Honour noted that Part 7 of the LCA (concerned with the regulation of lawyers) does not address how its provisions operate with the Part 2 provisions (which regulate non-lawyers):[136]

> There remains a gap in relation to a person who has been a lawyer but who is suspended from practice and so, for the time being, is not a lawyer because they no longer hold a current practising certificate.[137] In particular, there is a gap as to how findings of misconduct by the Tribunal warranting suspension of a lawyer from practice are to be treated when considering the provision of legal services.

Importantly, the Tribunal findings were a relevant consideration in the exercise of the Environment Court's discretion in considering an application under s 275. The Chief Judge noted:[138]

> The existence of the Tribunal's order suspending Mr Gardner-Hopkins from practice is a key difference between his position and that of any person who is not subject to such an order. If Mr Gardner-Hopkins were to appear before the Court on behalf of others, then given his previous work people would likely regard his role as rather different from that of the usual s 275 representative and might ask what recognition and effect the Court was giving to the Tribunal's order. Those people would include not only the other parties to the proceedings, the media and the public generally, but also the complainants whose interests have been the subject of the Tribunal's decisions and the basis for its order. In light of that, the Tribunal's order must be a relevant consideration when assessing whether the general right under s 275 of the RMA to represent other persons in proceedings before the Court is an exception to or otherwise displaces the order made by the Tribunal.
>
> The Environment Court should, on the bases of upholding the rule of law and of judicial comity, always try to ensure that all relevant legal rights and obligations, including any penalty imposed by another court or tribunal of competent jurisdiction, are recognised and given effect as far as possible within its own jurisdiction. A penalty should be considered in the context in which it was imposed. This will normally include consideration of the victims or complainants of the misconduct that has been penalised. In this case, in terms of the decision of the Tribunal on penalty, it extends to include

136 At [25].
137 Lawyers and Conveyancers Act, ss 6 "lawyer" and 39(5).
138 *Port of Tauranga Ltd v Bay of Plenty Regional Council*, above n 5, at [26]–[27].

> the effect on the reputation of the legal profession. Those considerations point against granting the Trust's application and in support of refusing to allow Mr Gardner-Hopkins to act as an advocate for or otherwise represent the Trust at the hearing of these proceedings.

Ultimately, balancing the interests of justice of the Trust that sought to have Mr Gardner-Hopkins appear, against the interests in upholding the penalty imposed in the Tribunal, the Court concluded that "it was difficult to accept that there is no lawyer available to act".[139] The Court held that while the preference of the Trust as to who it would choose to act for it was a relevant factor, it was insufficient to displace "the application of a disciplinary order to protect the complainants, the public generally and the reputation of the legal profession."[140] The application was refused.

V THE HIGH COURT APPEAL

A Outcome

The Standards Committee appealed to the High Court from the Tribunal's penalty decision, submitting that Mr Gardner-Hopkins ought to have been struck-off, or at least suspended for the maximum period of three years.[141] Mr Gardner-Hopkins filed a cross-appeal and submitted that the Tribunal ought to have imposed a suspension shorter than two years.[142] The appeal hearing took place before a full court of the High Court on 30 to 31 May 2022, with judgment delivered on 20 July 2022. Ultimately the two-year suspension was replaced with a three-year suspension.[143]

B Comparison with other cases and professional, financial consequences

The Court held that the Tribunal erred in assessing the case as less serious than *Daniels* or *Horsley*, and in accepting the financial and professional consequences to Mr Gardner-Hopkins as mitigating factors.[144] Importantly, the Court held that consequences such as the loss of a lucrative partnership, and connection

139 At [31].
140 At [31].
141 The appeal decision, above n 2, at [4].
142 At [5].
143 At [113].
144 At [112].

with the profession, were examples of the "inevitable consequences"[145] of Mr Gardner-Hopkins' actions, rather than mitigating factors.

C Changes made/future risk

In assessing "changes made/future risk," the Court considered matters including the Tribunal's acceptance that Mr Gardner-Hopkins had achieved "early remission" of his problematic drinking, with ongoing planned monitoring of lowered alcohol use.[146] The Court did not directly address the Standards Committee's submission that little weight ought to have been put on the material as it was based on self-reporting. The Court also considered the fresh evidence adduced by Mr Gardner-Hopkins on appeal, from a consultant psychiatrist who had been treating him since March 2022. Her opinion was that Mr Gardner-Hopkins still had work ahead of him but was now internally motivated to engage and address his treatment goals.[147]

The Court considered Mr Gardner-Hopkins' case to be different to the majority of misconduct cases in that it was not "conduct *in the course of his practice* or dealing with clients", and it was his "*personal behaviour* towards (young) women" that was of particular concern.[148] The Tribunal had found that his was misconduct under s 7(1)(a) (in a professional capacity, that is while carrying out regulated services); a finding which was not challenged on appeal. The Court's emphasis on the conduct being "personal behaviour" and not "in the course of his practice" is, therefore, unexpected.

At first blush, the Court's comments might appear to suggest that the Court disagreed with the Tribunal's finding that Mr Gardner-Hopkins' conduct was captured by s 7(1)(a). However, the writer suggests caution in drawing any such inference: the High Court did not hear argument on the issue and has not set out any analysis on this point. The comments were made in the context of the Court's assessment of the seriousness of, or risk of repetition of, the conduct. It may suggest the Court viewed those matters as detracting from the seriousness of the conduct or the risk of repetition. It is however also possible that the Court was expressing a reservation as to the Tribunal finding the conduct was captured by s 7(1)(a) (while carrying out regulated services). As s 7(1)(b) begins where s 7(1)(a) ends, and in the absence of an appellate

145 At [64].
146 At [77].
147 At [81] (and [36]).
148 At [84] (emphasis added).

authority on the issue as determined by the Tribunal, the writer suggests that professional regulatory bodies (here the Standards Committee) will continue to exercise caution in assessing whether conduct falls into one category or the other, and use alternative charges.

The writer notes however that whether conduct falls under s 7(1)(a) or (b), and/or whether it is committed against summer clerks rather than clients, does not, of itself, define the seriousness of the conduct. Subsections 7(1)(a) and 7(1)(b) are different pathways to proof of the matter: misconduct. If the same conduct was targeted at clients rather than summer clerks, would the Court have viewed it as automatically more serious? It is likely any such assessment would require a case-specific consideration of all relevant factors including the particular power dynamics, any vulnerabilities of the clients and the impacts of such misconduct on them.

The Court considered the frequency of misconduct and noted that no further complainants had come forward. It also considered that given "the high-profile nature of the proceeding, it is likely they would have done so if such incidents had occurred."[149] This is a surprising comment given that it is known complaints are rare, and that the high-profile nature of the case (and the difficulty of the process in general) could deter potential further complainants. It is also a conclusion inconsistent with the findings of the NZLS Working Group Report, which noted that 57 per cent of those harassed took no further steps.[150] Further, it does not recognise that Mr Gardner-Hopkins had his name suppressed until after the misconduct hearing. While the Tribunal and the Court were required to proceed on the basis of the available material which was limited to the six incidents,[151] such comments fail to recognise known obstacles to the making of a complaint.

The Court referred to conduct outside of the six charges. On the one hand, the Court stated that it considered that the "only past conduct of any particular relevance in Mr Gardner-Hopkins' case is the misconduct in issue itself,"[152] a finding in response to the submissions for the Standards Committee that his behaviour in fostering a highly sexualised work environment, and later

149 At [78].
150 New Zealand Law Society Working Group, above n 1, at 30.
151 As well as the "other conduct" referred to above.
152 The appeal decision, above n 2, at [83].

(after the incidents) kissing Ms K in front of colleagues were relevant matters.[153] However, the Court was willing to accept positive references that before and after the misconduct Mr Gardner-Hopkins had "acted appropriately towards" other women.[154] The Court also accepted a reference from a woman who had worked with Mr Gardner-Hopkins over the period 2004–2009 as evidence that "offensive behaviour towards women did not seem to be embedded or part of his character at that time."[155] The probative value of such material might reasonably be doubted: the fact a person has not committed sexual misconduct against another colleague who has provided a positive reference does not necessarily tend to show he is of a diminished risk. Even in cases of serial sexual misconduct, it would be exceptional to have behaved sexually inappropriately with all colleagues within a particular group (here, women). Further, it is unclear what positions these women held in relation to Mr Gardner-Hopkins, or their relative vulnerability. Given that Mr Gardner-Hopkins did not have the power or status of partnership at the firm until 2009, it would be reasonable to place less weight on such references.[156]

Connected to consideration of conduct relevant to the decision, and in its earlier assessment of the aggravating features of the misconduct, the Court expressed "reservations" about the Tribunal's reliance on the "laddish culture" of the team to support its conclusion the conduct was not out of character, and commented that it did not "significantly inform the seriousness of the conduct giving rise to the charges."[157] This narrower approach to the relevance of other inappropriate conduct by Mr Gardner-Hopkins outside of the charges, can be contrasted with the recognition in *Z v Dental Complaints Committee,*[158] that due to the purpose of disciplinary proceedings, it is "likely that in many cases different evidence will come before the Tribunal, which is addressed to wider aspects of a practitioner's conduct than the strict regime of a criminal trial would allow."[159] The Tribunal had earlier emphasised that there "is no place

153 The appeal decision, above n 2, at [82]. This conduct is referred to in more detail at the heading "Other conduct" above.

154 At [78].

155 At [79].

156 It is not clear from the decisions referred to in this article whether Mr Gardner-Hopkins employed any staff in role as a barrister after exiting Russell McVeagh, or the extent to which he has been responsible for supervising junior staff or engaging with client lawyers in that role.

157 The appeal decision, above n 2, at [61].

158 *Z v Dental Complaints Committee*, above n 59, at [128]–[130].

159 At [130].

for objectification of women or indeed any person, by those in the profession of law."[160] It is perhaps surprising then that the High Court did not regard as relevant to assessing Mr Gardner-Hopkins' character that he was willing to act as he did in objectifying women, and that he encouraged such a culture in his team over a period of time.[161]

D Strike-off as a starting point

In *Daniels v Complaints Committee 2 of the Wellington District Law Society,* a full court of the High Court centred the focus of the question of strike-off on fitness and propriety, noting that "[i]n the end, however, the test is whether a practitioner is a fit and proper person to continue in practice. If not, striking off should follow."[162]

The High Court in the appeal decision held that a finding that a practitioner, by reason of their conduct is not a fit and proper person, "does not automatically lead to an order for strike-off."[163] The appeal decision proceeds on the basis that the Tribunal or Court may exercise a discretion in favour of suspension rather than strike-off even where a practitioner is currently not fit and proper.[164]

In Mr Gardner-Hopkins' case, that discretion was exercised particularly because of recent, belated steps towards insight and rehabilitation that may prove to render him fit in future. The decision to suspend rather than strike-off appears to hinge primarily on the attitude and assessed potential of the practitioner for rehabilitation, with the High Court noting that when determining whether to strike-off: "[i]n some cases, it will be apparent the practitioner is not able or willing to change or address his or her behaviour sufficiently so they will remain unfit to practise law."[165]

The Court concluded that Mr Gardner-Hopkins' misconduct "[t]aken in context and overall… warranted the most serious response available short of strike off, so that a suspension of three years was required."[166] This ought not

160 The liability decision, above n 2, at [173].
161 The team who attended his home on the evening of the charge 6 misconduct.
162 *Daniels v Complaints Committee 2 of the Wellington District Law Society*, above n 110, at [22].
163 The appeal decision, above n 2, at [43].
164 At [43].
165 At [50].
166 At [112].

to be read as a finding that the misconduct itself warranted only suspension, as the Court stated that the conduct was:[167]

> …not that of a fit and proper person. Had the Tribunal or this Court been considering his case much closer to the time *the misconduct would have justified striking off: that* is what the twin protective disciplinary aims of protection of the public and of the profession's reputation would have required.

Accordingly, the seriousness of the misconduct *itself* would have justified strike-off and not merely the end penalty of suspension as the "most serious response short" of it. In the time that had passed since the misconduct the rehabilitative work by Mr Gardner-Hopkins was the "the principal factor" favouring suspension rather than striking off as the end penalty.[168]

E Current fitness to practise and future risk assessment

The Standards Committee submitted that Mr Gardner-Hopkins could not be regarded as currently "fit and proper," and that the Tribunal impliedly did not consider he was.[169] The Court accepted that a finding as to current fitness was required.[170]

The Court also referred to the Supreme Court decision in *New Zealand Law Society v Stanley*,[171] and considered it "must undertake a forward-looking exercise."[172] *Stanley* involved an application for a practising certificate, a necessarily forward-looking exercise, whereas a disciplinary proceeding also involves purposes that relate to past conduct.[173] However, the Court considered that the assessment of whether Mr Gardner-Hopkins is now "fit and proper" required an assessment of the risk he posed of future misconduct or harm to the profession and must be "a forward-looking exercise".[174]

The Court appears to have based its assessment of fitness on future fitness

167 At [104] (emphasis added). This comment also reveals the extent to which delay was a factor in the outcome.
168 At [109].
169 At [66].
170 At [74].
171 *New Zealand Law Society v Stanley* [2020] NZSC 83, [2020] 1 NZLR 50.
172 The appeal decision, above n 2, at [75].
173 See, by contrast, the Tribunal comments in the liability decision, above n 2, at [175] that: "We do not regard that decision as assisting us greatly in this assessment. The evaluation of 'fit and proper' for admission to the Bar is a prospective, forward-looking exercise, as was held by the Court."
174 The appeal decision, above n 2, at [75].

should rehabilitative efforts continue. The Court did not consider what might happen if Mr Gardner-Hopkins were to fail to continue his current rehabilitative course, or if his rehabilitation proved unsuccessful in mitigating any risk of future misconduct.

The Court did not explicitly set out its own view on *current* fitness but concluded that the evidence before the Tribunal and the fresh evidence before the Court supported the submission that "Mr Gardner-Hopkins has taken and is continuing to take appropriate steps to address the risks identified by the Tribunal."[175]

F Outcome

The High Court disagreed with the Tribunal in its assessment of the seriousness of the offending in *Daniels* and *Horsley,* noting that those cases involved consensual conduct, whereas here charges 1 to 5 involved non-consensual conduct. In addition to those matters the Court also considered that given a change in societal attitude towards sexual harassment, and the importance of the need to maintain the confidence of the public, older authorities such as *Daniels* and *Horsley* were not useful comparators.[176]

While the Court disagreed that the maximum penalty ought to be reserved for the worst case[177] (a factor given weight by the Tribunal in stopping short of strike-off), the Court nevertheless concluded that strike-off was not required and that "a penalty of suspension will ensure Mr Gardner-Hopkins' future compliance with his professional obligations."[178] The period of suspension was however increased to the maximum period of three years.

VI APPLICATION FOR LEAVE TO APPEAL

On 8 September 2022, the High Court heard, and on 13 September 2022, dismissed, Mr Gardner-Hopkins' application for leave to appeal the decision of the High Court to increase his term of suspension.[179] Mr Gardner-Hopkins argued that the High Court had erred "in finding that personal circumstances of a practitioner are irrelevant as mitigating features in disciplinary proceedings when considering penalty."[180] The High Court considered it had merely repeated

175 At [88].
176 At [98]–[99].
177 At [101].
178 At [111].
179 The leave decision, above n 2.
180 At [6].

the orthodox position that mitigating personal factors are given less weight in disciplinary proceedings than on sentencing because of the protective purpose of such proceedings, and held that "[w]e do not consider it raises a question of law. And to the extent we are wrong in that, it does not raise a matter of general or public importance."[181] The High Court went on to refer to the public interest in finality of the proceeding, particularly for the complainants:[182]

> Lastly, as far as the interests of justice are concerned, we think there is much in Mr La Hood's point about finality. The events giving rise to these proceedings took place almost seven years ago. Because Mr Gardner-Hopkins contested the disciplinary charges the five young women concerned were required to give evidence at the liability hearing. They have been trying to move on with their lives. Keeping these proceedings alive prevents them from doing that. This serves to confirm the conclusion we have, in any event, reached.

The proceedings may not yet be at an end. While leave to appeal has been refused by the High Court, it is not known whether Mr Gardner-Hopkins will apply to the Court of Appeal for leave.[183]

VII CONCLUSION

These proceedings highlight the vital importance of ongoing work to remove barriers to the making of complaints, and to continue efforts to improve the process for those who, by making complaints, enable the profession to regulate conduct and maintain public confidence. While the participation and testimony of the complainants in this case has ensured that serious misconduct was appropriately reported, the delay in the proceeding has required them to be involved in a process that has extended some seven years since the misconduct (and may yet extend longer). There may also have been potential for further engagement with complainants, particularly at the penalty stage of the Tribunal process in relation to information on victim impact, and consideration of compensation.

The different approaches in the Tribunal and High Court illustrate difficulties and potential pitfalls in assessing potential future fitness and risk

181 At [12].

182 At [16].

183 At the time of writing this article, the period for filing a leave application for the Court of Appeal had not lapsed.

and weighing this against the purpose of disciplinary sanctions, including denunciation, for serious sexual misconduct. The Environment Court decision highlights a gap between Parts 2 and 7 of the LCA in the regulation of lawyers who are suspended from practice.

Where a practitioner is, by reason of their misconduct, not fit and proper to practice, strike-off is the starting point. These cases give rise to a number of questions. Where the misconduct is serious, should the discretion to stop short of strike-off be exercised sparingly having regard to the purposes of disciplinary sanctions? Is it sufficient that a practitioner who is not currently fit shows insight (however late) and is taking steps to address identified risks? Are there risks inherent in relying upon self-reporting, and difficulties in assessing future risk?

In Mr Gardner-Hopkins' case, his evidence "evolved," and concessions as to particular behaviour were only made when "inescapable". His admission to liability only came after an adverse decision against him, and the apology during the penalty hearing months later. These circumstances did not prevent a finding that he had sufficient insight, and may with further rehabilitation, meet the fit and proper threshold.

This series of cases also raises questions as to the proper assessment of the seriousness of sexual misconduct, the risk of further sexual misconduct, and the breadth of material relevant to those assessments, including other inappropriate conduct and the fostering of a sexualised workplace.