

IN THE BARRISTERS DISCIPLINARY TRIBUNAL

BETWEEN

The Bar Council

Applicant

and

Vivien Chan Man-wai

Respondent

Tribunal: Mr. Kumar Ramanathan SC, Ms. Jolie Chao and Dr. James Chiu

Date of Hearing: 2nd November 2024

Representation: Applicant: Mr Marc Corlett (instructed by Messrs Wilkinson & Grist)

Respondent: In Person

Date of Handing Down Decision: 29th of November 2024

DECISION ON SENTENCE AND COSTS

A. INTRODUCTION

1. The Respondent pleaded not guilty to 5 complaints lodged against her by the Applicant. After 6 days of hearing, by a decision handed down on 14th March 2024 the Tribunal found her not guilty of Complaints 1-3, but found her guilty of Complaints 4 and 5.
2. The parties filed their respective submissions on sentencing and mitigation. After hearing the parties respective oral submissions on mitigation and

sentence on 2nd November 2024, the Tribunal reserved its decision and reasons to be handed down. This we now do.

B. SUBMISSIONS AND ADDITIONAL ARGUMENTS

3. Complaints 4 and 5 pertain to the Respondent engaging in conduct which was prejudicial to the administration of justice or otherwise diminish public confidence in the administration of justice, contrary to Paragraph 4.1(b)(iii) of the Bar Code. The two Complaints are interlinked in that the former relates to the Respondent posting on her Facebook account an article by one Madam Peck, which was highly critical of a former Chief Justice of Hong Kong whilst Complaint 5 was the Respondent posting her personal comment on that article.
4. For the Applicant, Mr. Corlett submitted that the conduct of the Respondent on the facts of this case do not warrant a sentence of suspension or striking off. He suggested that pursuant to section 37 of the Legal Practitioners Ordinance (Cap 159) the Tribunal could consider censure, penalty and costs.
5. The Respondent submitted a total of 7 letters, 3 from barristers and 4 from solicitors, as part of her plea in mitigation. She also filed her submission in response to the Applicant's Statement of Costs, but did not file any written submissions in mitigation. In it, *inter alia*,
 - (a) she repeated and persevered with her complaint against the Applicant, the Bar Association as well as the Tribunal for their refusal to entertain her application for disclosure of various documents;
 - (b) she further asked for the costs of the adjourned hearing on 5th December 2022;

- (c) she contended that the costs of translation should not be borne by her, as it was the Applicant who chose to instruct a non-bilingual Counsel to prosecute the Complaints and to appoint a Chairman of the Tribunal who was non-bilingual as well;
 - (d) she argued that the Complaints against her were unprecedented as they relate to postings on a Counsel's personal Facebook account, and accordingly the costs should not be on an indemnity basis but on a party-party basis;
 - (e) she took general issue with the hourly rates, manpower and the number of hours claimed in the Applicant's Solicitors costs, essentially asking for the costs to be assessed by the Taxing Master.
6. At the hearing on 2nd November 2024, Mr. Corlett took issue with a number of points raised in the Respondent's Reply Submission on Costs:
- (a) Paragraph 9: he pointed out the Tribunal was constituted by the Convenor of the BDT and not by the Applicant. He pointed out that it was not until 15th November 2022 that the Respondent for the first time informed the Tribunal and the Applicant that she would be representing herself. Further, that was also the first time she indicated and that she wanted the hearing to be conducted in Chinese. He pointed out that if this had been intimated at an early stage, then the constitution of the Tribunal and the choice of Counsel chosen to prosecute the Complaints would have been different so that all would be bilingual;
 - (b) Paragraph 14: he submitted that the fact the Complaints related to posts from the personal Facebook account of the Respondent was not relevant and was not a sound basis for costs to be awarded on a party-party basis;

- (c) Paragraph 15: the Applicant noted that the Respondent was wholesale disputing all items in the Applicant's Statement of Costs. In this regard he pointed out that the Tribunal had a broad discretion as to the award of costs;
 - (d) Mr. Corlett further pointed out that the Applicant had a duty under section 5 of Barristers Disciplinary Tribunal Proceedings Rules (Cap 159P) to respond to the Complaints within 14 days from the date of dispatch of the documents by the Applicant to the Respondent . He argued that the Respondent singularly failed to do so. It was only in the morning of the hearing on 5th December 2022 that she indicated that she would challenge the chain of evidence and would dispute both the fact that the posts were from her Facebook account and that she was the one who posted it;
 - (e) It was further contended that because the Respondent chose not to comply with her duty that the hearing had to be adjourned. In such circumstances it was argued that it would not be appropriate to visit the costs of the adjournment on the Applicant.
7. In her reply, the Respondent began by complaining that it was only today she became aware that the Tribunal was constituted by a Convenor and that she had all along *"been enquiring about the panel constitution but they would not reveal it to me until today."* She then demanded to know the identity of the Convenor.
8. When the Tribunal asked her whether at anytime previously she had asked for that information, she backtracked and confirmed that she had not. The Tribunal declined her request as not being relevant to the issue of mitigation or sentence.

9. The Respondent then pressed on with her complaint about the constitution of the Tribunal, arguing that she was never consulted on the matter and that the whole process was unfair and unjust to her. She appeared to contend that when it was known that she would be conducting the hearing in Chinese that fairness required that the constitution of the Tribunal and the counsel prosecuting "*could have been altered.*"
10. She proceeded to repeat her complaint about not being granted her requests for discovery by either the Applicant or the Tribunal. She then claimed that at the hearing she was "*ambushed*" by the Applicant deciding to call a witness that then occasioned the adjournment on 5th December 2022.
11. When asked by the Tribunal about what costs was she claiming for the costs of the adjourned hearing, the Respondent claimed that she had sought legal advice from three different Counsel. She argued that in the circumstances she should have to only bear her costs occasioned by the adjournment and not that of the Applicant.

C. DECISION

12. The Tribunal has taken into account all the letters of mitigation submitted by the Respondent portraying the Respondent as a responsible, hardworking and dedicated lawyer. We take into account that she has a clear disciplinary record. She is the breadwinner of the family and is apparently a single mother raising a teenage daughter.
13. We would observe the actions of the Respondent in respect of Complaints 4 and 5 of which she was convicted were deliberate and premeditated. They are serious charges as the particulars refer to an article, which casts serious

imputations and innuendoes on the integrity and fairness of a former Chief Justice of Hong Kong.

14. The Respondent has added to the gravity of the article by adding her personal comment, which endorses the views, imputations and innuendoes contained in the article. The combination of both these actions is clearly likely to diminish public confidence in the administration of justice.
15. The Respondent is an experienced practitioner having commenced her legal career in the Department of Justice in 1998 for many years before joining private practice at the Bar. This is not a case of an inexperienced barrister making an error of judgment or someone acting impulsively.
16. She clearly espoused and embraced strong views concerning the 2019 protests and disturbances, and the two posts the subject matter of Complaints 4 and 5, are perhaps a reflection and manifestation of those views. We are however not concerned with her personal or political views. We take the view that the social unrest in 2019 and the strong emotions and sentiments that they generated within Hong Kong civil society may perhaps explain the Respondent's actions, but they do not excuse them.
17. We would observe that throughout the investigations by the Applicant into the Complaints and in the course of the Tribunal hearings, the Respondent has adopted what can only politely be described as an antagonistic, uncooperative and at times belligerent attitude towards her own professional body, and at times even with this Tribunal.
18. We would further observe that the Respondent has shown no signs of regret or remorse for her actions. On the contrary, even after we had convicted her

of Complaints 4 and 5, she continued to make attacks against the Applicant, claiming unfair and unjust treatment by it. In particular, she continued her tirade against the former Chairman of the Special Committee for Discipline, effectively accusing him of *mala fides*.

19. It is unfortunate that the Respondent has adopted such an approach and attitude towards her own professional body. We only hope that with time, and with the conclusion of these proceedings, she will indulge in some introspection of her actions. By such introspection she hopefully comes to accept the error of her actions and to also temper her attitude towards her own professional body.
20. The Tribunal is satisfied that the facts underlying Complaints 4 and 5 do not warrant a suspension or striking-off from practice of the Respondent, as they do not involve any element of dishonesty or monetary loss to the public.
21. In all the circumstances, the Tribunal is of the view that the appropriate sentence in this case is to ORDER:
 - (a) The Respondent be censured in accordance with section 37(a) of the Legal Practitioners Ordinance (Cap 159).
 - (b) The Respondent pays a penalty of \$40,000 into the general revenue for her deliberate and uncooperative attitude throughout these proceedings.
 - (c) The Respondent pays the Applicant's costs of and incidental to these proceedings, including the costs of and occasioned by the adjournment on 5th December 2022, to be taxed, if not agreed, on a party-party basis.

- (d) The Complaints, the Decision and the Decision on Costs and Sentence be published by way of a Bar Circular and also to be published on the Bar's website in the part that is accessible by the public generally for a period of 3 months, and thereafter be removed therefrom.
- (e) By sending a copy of the Decision to the Registrar of the High Court and the District Court, the Chief Judge of the High Court, the Chief District Judge, the Chief Magistrate, all members of the Barristers Disciplinary Tribunal Panel, the Department of Justice (the Secretary for Justice, the Civil Litigation Unit and the Director of Public Prosecutions), the President of the Law Society, the Director of Legal Aid, the Administrator of the Duty Lawyer Service and the Official Receiver's Office.
- (f) Without prejudice to sub-paragraph (d) hereinabove, a copy of the Complaints, the Decision and the Reasons for Sentence and Costs be kept in the Bar Secretariat and copies of the same be made available to the public on request and upon paying reasonable copying charges as decided by the Bar Council.

22. It shall be a term that all orders made pursuant to the Decision herein be stayed pending the expiration of the period for lodging an appeal to the Court of Appeal as prescribed in section 37B(1) of the Legal Practitioners Ordinance (Cap 159), and if an appeal were lodged within the prescribed period, such stay be extended pending the disposal of the appeal.

Dated the 29th day of November 2024



Kumar Ramanathan SC

Chairman of the Barristers

Disciplinary Tribunal



Ms. Jolie Chao

Member



Dr. James Chiu

Member

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Vivien Chan Man-wai	Respondent

Tribunal:

**Mr. Kumar Ramanathan SC, Ms. Jolie Chao and
Dr. James Chiu**

Dates of Hearing:

**5th & 7th December 2022,
19th, 20th and 21st June 2023 and 2nd August 2023,
2nd November 2024**

Date of Handing Down Decision:

29th November 2024

DECISION

Dated this 29th day of November 2024.