

LCRO 111/2017

CONCERNING

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of the [Area] Standards Committee

BETWEEN

VJ

Applicant

AND

NH

Respondent

The names and identifying details of the parties in this decision have been changed.

DECISION

Introduction

[1] Ms VJ has applied for a review of a decision by the [Area] Standards Committee to take no further action in respect of her complaint about Mr NH, who is a lawyer, arising from his obligation to pay child support.

Summary

[2] In 2001 Ms VJ had a child. Mr NH has paid child support in the past, and Ms VJ has an expectation that he will continue to do so.

[3] In her complaint to the New Zealand Law Society Lawyers Complaints Service (Complaints Service) dated 24 April 2017, Ms VJ said Mr NH had failed to meet his obligations at law to pay child support in full and on time. Ms VJ says Mr NH's payments are in arrears, and sought the support of the New Zealand Law Society (NZLS) in reminding him of his obligations to pay in full on time.

[4] Ms VJ also provided a copy of an Australian decision in which a lawyer's conduct was found to be misconduct because he had not cooperated in an inquiry by the relevant Law Society which related to whether he had filed tax returns over a number of years. The investigator in that case made inquiries aimed at ascertaining whether that lawyer had filed tax returns, and what he was doing about child support payments. If he had not filed tax returns or paid child support, she wanted an explanation. Ms VJ relies on that case in support of her contention that a failure to file tax returns or pay child support could constitute professional misconduct in New Zealand.

[5] Ms VJ, who lives in Australia, says Mr NH's case has been referred to the New Zealand Inland Revenue Department (IRD) for collection and arrears. Mr NH lives and works in New Zealand.

[6] Ms VJ's complaint was referred to the Early Intervention Process by NZLS. Mr NH was contacted by the Complaints Service, advised of the complaint, and its likely outcome. He was invited to respond, did not, and the Committee determined the complaint without input from him.

[7] The Committee's view was that Ms VJ had an adequate and appropriate alternate remedy to address her concerns, which was through the IRD process. Noting that the conduct did not occur in the course of Mr NH providing regulated services, the Committee did not consider that there was evidence of misconduct on Mr NH's part, and decided to take no further action pursuant to s 138(1)(f) of the Lawyers and Conveyancers Act 2006 (the Act). The Committee observed that Mr NH would be obliged to disclose any fitness to practice issues in his application for a practising certificate, and that the Complaints Service would retain a copy of the complaint as part of his professional record.

[8] Ms VJ applied for a review of that decision. Her supporting reasons are:

I believe that the committee has erred in exercising its discretion not to take action in relation to the complaint for the following reasons. Firstly, contrary to the finding, there is no remedy available to the complainant through the IRD. The IRD collect child support as a debt to the Crown and the Complainant has no influence over the recovery of arrears or monthly payments (S128, Child Support Act 1991). It is noted that: as a barrister Mr NH has no wages or salary from which automatic deductions can be made under the child-support act; the IRD have been unable to enforce regular monthly payments for the several years that it has been accountable (with the notable exception of when Mr NH was an employee of the IRD and meeting his child-support obligations was required as a condition of his employment); and despite maintaining chambers in the CBD and asserting that he owns no assets, Mr NH has (somewhat implausibly) returned an income of between \$33,000 – \$45,000 PA for every year over the last decade, other than the first year the Complainant moved to

Australia, (when presumably he believed his income would no longer be disclosed for child-support purposes and he returned an income of over \$175,000). Secondly, even if there were other remedies available to the complainant, this does not address or resolve the fundamental issues that the Committee is required to consider, and that is whether the conduct constitutes unsatisfactory conduct under section 12 of the Lawyers and Conveyancers Act 2006. It is difficult to reconcile Mr NH's sustained and systemic flouting of his legal obligations to make monthly child-support payments (conduct which also falls within the definition of Domestic Violence under the Domestic Violence Act 2005) with his professional obligations.

[9] Ms VJ seeks, as an outcome:

that the Law Society set and enforce an expectation that Solicitors and Barristers, including Mr NH, comply with their legal obligations, including any obligations to pay child support, and that a sustained or systemic failure to do so may jeopardise their practising certificate. That the Law Society not tacitly condone domestic violence or a sustained and systemic flouting of the law.

Review hearing

[10] Ms VJ attended an applicant-only review hearing by telephone on 29 August 2017. Mr NH was not required to attend and did not exercise his right to do so.

Nature and scope of review

[11] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:¹

... the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.

The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to “any review” ...

... the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[12] More recently, the High Court has described a review by this Office in the following way:²

¹ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

² *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

Discussion

[13] Ms VJ's application for review expands on her complaint. Ms VJ contends Mr NH has been evading or avoiding his obligation to pay tax on income he earns, as well as his obligation to pay child support, which would be calculated on the basis of his income. Ms VJ says Mr NH has followed a pattern of avoiding his child support payments for over 10 years. She says withholding financial support is a form of domestic violence.

[14] The factual matrix is quite different from that set out in the Australian decision Ms VJ provided. In that case, the lawyer concerned had admitted to not filing tax returns at all for a three-year period. On Ms VJ's evidence, that is not Mr NH's position. He has filed tax returns. It is not the function of this Office, or a Standards Committee, to audit Mr NH to ascertain whether those are correct, or to stand over him to ensure he pays in full on time under threat of losing the ability to practise law.

[15] If Mr NH had been filing false tax returns, that would not be a matter over which this Office would exercise jurisdiction in the first instance. As Ms VJ reasonably acknowledged, Committees, and this Office, lack the jurisdiction and the resources to address complaints of this type.

[16] Ms VJ's frustration over what she sees as Mr NH's unwillingness to contribute financially to the fullest extent possible is evident in her application for review. She does not believe him. She does not trust him. She does not have access to information that would enable her to be satisfied that he is not flouting the system. She said at the review hearing she just wants to be paid. She has tried the IRD and the Ombudsman without success. Ms VJ has turned to this Office seeking a clear statement that lawyers should meet their legal obligations.

[17] In a normative sense, that point appears uncontroversial. People, including lawyers, should meet their legal obligations.

[18] That does not mean that on the available evidence Mr NH's conduct is to be the subject of an adverse disciplinary finding. The evidence is insufficient to raise fitness to practice issues in circumstances where Mr NH's conduct was unconnected with the provision of regulated services. The complaint does not arise from the

provision of regulated services by Mr NH. There is no evidence of conduct on the part of Mr NH that falls within the definitions of misconduct or unsatisfactory conduct in ss 7 and 12 of the Act.

[19] Although for slightly different reasons from the Committee, having regard to all the circumstances of the case, I too consider that further action on Ms VJ's complaints is unnecessary and inappropriate.

Decision

Pursuant to ss 211(1)(a), (b) and 138(2) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is modified to record that further action is not necessary or appropriate for the reasons set out above.

DATED this 31st day of August 2017

D Thresher
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Ms VJ as the Applicant
Mr NH as the Respondent
[Area] Standards Committee
The New Zealand Law Society