

**CONCERNING**

An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006

**AND**

**CONCERNING**

a determination of the Auckland Standards Committee

**BETWEEN**

**Mr Jedburgh**

of Wellington

Applicant

**AND**

**Mr Aberdeen**

of Auckland

Respondent

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

**DECISION**

**Application for review**

[1] An application was made by Mr Jedburgh (the applicant) for a review of a decision by Standards Committee 1 on his complaint against Mr Aberdeen (the practitioner).

[2] The complaint arose out of proceedings in the Employment Relations Tribunal involving the applicant's son. The practitioner represented the employer. The applicant's wife appeared as a witness for their son. It is undisputed that in the course of cross-examining the applicant's wife, the practitioner had asked her whether, in a telephone conversation with X, the employer's restaurant manager, she had referred to her son as "*my drop kick of a son*". It is also undisputed that the practitioner did not question the restaurant manager on this issue.

[3] The applicant, who is also a lawyer, considered the question and the comment to have been gratuitous. The essence of his complaint is that the practitioner went too far

and that his question was gratuitous, and intentionally offensive. In the applicant's view it is understood to be that the practitioner breached the professional standards applicable to lawyers, and amounted to unsatisfactory conduct.

[4] The practitioner's explanation to the Standards Committee did not provide a full context for the comment. The Standards Committee noted that the practitioner referring to section 160 of the ERA had relied on the robust nature of proceedings before the Employment Relations Authority, and no insult had been intended. The Committee determined that the practitioner's conduct did not amount to unprofessional conduct, and it resolved (by a majority) to take no further action pursuant to section 138(2) of the Lawyers and Conveyancers Act.

[5] The applicant was dissatisfied with the determination. He pointed out that the practitioner had not explained the relevance of the offending question, and had not attempted to prove by evidence that the telephone conversation had taken place.

### **Review hearing**

[6] A review hearing took place on 22 October 2009, and was personally attended by the practitioner and his counsel, Ms YY. The applicant participated by telephone.

[7] The practitioner produced a written apology addressed to the applicant and to his wife and son. He read this out at the beginning of the review hearing; it was an unreserved apology for the hurt caused, and stated that no offence had been intended.

[8] The applicant reiterated the complaint. He said he felt angry at the hurt that had been caused to his wife and son. He said the apology was appreciated, but he was not willing to accept it, and he reiterated this position at the end of the review hearing.

### **Applicable standard**

[9] This review relates to conduct that occurred in an investigation meeting on 30 April and 1 May 2009. The complaint is therefore to be considered pursuant to the Lawyers and Conveyancers Act 2006, and in particular, section 12 which requires lawyers to meet a standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer. That general obligation is further extended by the *Lawyers: Conduct and Client Care Rules*. Chapter 13 of these Rules sets out the conduct required of lawyers as officers of the court; Rule 13.10.2 is pertinent to the present complaint. This states:

“A lawyer cross-examining a witness must not put any proposition to the witness that is either not supported by reasonable instructions or that lacks foundation by reference to credible information in the lawyer's possession.”

[10] The central question for the review was whether the practitioner fell below the standard of professional conduct that is expected of lawyers. In particular the question is whether the proposition put by the practitioner to the applicant's wife breached the above Rule.

[11] The practitioner was asked to explain the context for the proposition he had put to the applicant's wife, and to explain why he had not sought to prove this in subsequent evidence. In response the practitioner said that on the morning of the hearing the applicant's wife had provided notes that had not formed part of the pleadings, adding (to some extent reiterating his response to the Standards Committee) that it was not necessarily unusual in employment tribunal proceedings that matters not pleaded were nevertheless raised. These notes included information about her interactions with X, the employer's manager, in which she described X in negative terms. The applicant's wife was a witness in the proceeding and it seems that the notes indicated the evidence she would give. The practitioner said that much of her evidence involved allegations that X had been rude and aggressive to her in their telephone conversations.

[12] The practitioner explained that X was sitting next to him while the applicant's wife was giving her evidence, and that throughout X continuously denied what was being said by the applicant's wife. The practitioner said that X remarked to him that in one telephone conversation between them the applicant's wife had apologised to X for having a drop kick of a son and had been apologetic about his behaviour. The practitioner said that X contested the evidence being given by the applicant's wife and had suggested to the practitioner that he should ask the applicant's wife about that discussion. This is how the practitioner came to put the question to the applicant's wife in his cross examination of her.

[13] When the practitioner raised this during cross-examination the applicant's wife denied having made such a statement to X. Notwithstanding the denial, the practitioner did not pursue this line of questioning when X was giving her evidence.

[14] The applicant pointed out that the practitioner could have questioned X on this matter and his failure to do so prevented the allegation being tested under cross examination. It is an integral part of his complaint that the question had no relevance to the proceedings and that no attempt was made by the practitioner to prove by evidence that the conversation had taken place.

[15] The practitioner considered that the proposition he put to the applicant's wife was justified on the basis that the credibility of her evidence was in issue. He explained that

he did not pursue the matter subsequently when examining X as there was no reason to pursue it further. He said that the principal issue before the Tribunal was the ERA application that had been made by the applicant's son concerning unfair dismissal, and this was his focus. The practitioner added that no issue had been taken at the time by counsel acting for the applicant's son about the manner of his cross examination of the applicant's wife.

[16] The practitioner accepted that the remark was hurtful, but denied that the question to the applicant's wife had been gratuitous.

[17] Submissions were made by both the practitioner and the applicant on procedural matters, including the procedures of the Standards Committee. However, the review process may also (and generally does) include a review of the evidence and it is not necessary to show that there was a procedural flaw. Pursuant to sections 204(c) & (d) of the Lawyers and Conveyancers Act 2006 the Legal Complaints Review Officer may exercise all of the powers of a Standards Committee for the purpose of review or enquiry into a complaint, or any aspect of the manner in which the complaint was handled or investigated. The basis of the review application in this case indicated that a hearing should be arranged and the practitioner be required to explain the circumstances surrounding his questioning of the applicant's wife during cross examination.

[18] In closing submissions the practitioner again referred to section 160 of the Employment Relations Act which he submitted empowered the Authority to follow such procedures as it considers appropriate. He further submitted that neither the barrister representing the applicant's son, nor the Authority, took any exception to the line of questioning which, he submitted, *"fully reflects the robust nature of an Employment Relations Authority investigation meeting."* The practitioner added *"... this one-off question, based on instructions, was in the middle of a conflict ridden investigation hearing where the complainant's wife's credibility as a witness was very much in question."*

[19] The applicant's submissions questioned this, and added *"If it was the case that (his wife's) credibility was a serious issue in the case, why didn't (the practitioner) lead evidence of the supposed conversation from his witness (X) who gave evidence after (the applicant's wife) in the proceedings?"*

[20] Both parties offered their views on what constituted a *'reasonably competent lawyer'*. Further submissions from both parties were also considered although not all have been specifically referred to.

## Considerations

[21] The essential question for the review is whether the practitioner's cross examination of the applicant's wife amounted to '*unsatisfactory conduct*' as defined in section 12 of the Act. As noted, the required standard set out in section 12 of the Act is enlarged in the Rules, and Chapter 13 of the Rules particularly governs Lawyers as officers of court. I considered whether there had been a breach of the Conduct and Client Care Rules, and in particular whether the practitioner's cross examination of the applicant's wife included a proposition that was either "not supported by reasonable instructions" or "lacked foundation by reference to credible information in the lawyer's possession", such that there had been a breach of Rule 13.10.2.

[22] Having considered all of the information in respect of the complaint I accept the practitioner's explanation concerning information and instructions he received from X during the time that the applicant's wife was giving her evidence, notwithstanding that he was unable to produce a note documenting the advice. The proposition put to the witness did not, in these circumstances, lack a proper foundation, and was supported by reasonable instruction. In the circumstances I accept that it was relevant to challenging the credibility of the witness' evidence. There is nothing in the circumstances of the case to suggest that a gratuitous proposition was put to the witness by the practitioner. In this light the practitioner's questioning of the applicant's wife as witness arose within the proper context of the proceedings and fell within the parameters of Rule 13.10.2.

[23] The applicant particularly highlighted the fact that the practitioner had not made any attempt to prove by evidence that the conversation in issue had taken place. The practitioner's explanation was that it was unnecessary to pursue this matter and that his focus was on the principal issue before the Tribunal.

[24] I accept that the main issue before the Tribunal related to the application by the applicant's son for unjustified dismissal, and that the credibility of the applicant's wife as witness was not a 'serious issue' in this case, noting further that the practitioner was made aware of the contentious evidence of the witness on the day of the hearing which left little opportunity for a fuller prior briefing. Furthermore a lawyer's duty is to act in the best interests of his or her client, and in this case the practitioner acted for the employer and was entitled to represent his client's interests as he considered appropriate. It is difficult to see that the practitioner had a duty to pursue the line of questioning suggested by the applicant.

[25] This does not of course address the hurtful nature of the proposition. I have already noted the written apology that has been proffered by the practitioner and rejected by the applicant. The applicant submitted that the practitioner's apology was offered somewhat late, and that the practitioner had not previously acknowledged the hurt that this had caused his wife and son. The practitioner's letter to the Standards Committee had stated that he had not intended to causes distress. However, mention should also be made of the fact that the parties were, prior to the review, offered the opportunity of mediation pursuant to section 201 of the Lawyers and Conveyancers Act 2006. The mediation process would have created the opportunity to the parties to resolve these matters face to face. The practitioner was willing to participate in the mediation but the applicant refused. In all of the circumstances it is difficult to see what more could be done to ameliorate the situation.

[26] For the above reasons I am unable to find any basis for the complaint that the practitioner breached the applicable rules of professional conduct. There will be no order as to costs.

### **Decision**

Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 I confirm the decision of the Standards Committee.

**DATED** this 29<sup>th</sup> day of October 2009

---

Hanneke Bouchier  
**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:

Mr Jedburgh as Applicant  
Mr Aberdeen as Respondent and Ms YY as Counsel  
The Auckland Standards Committee  
The New Zealand Law Society