

LCRO 137/2016

CONCERNING

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

AND

CONCERNING

a determination of [City] Standards Committee [X]

BETWEEN

Ms HA

Applicant

AND

Ms TY

Respondent

DECISION

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

Introduction

[1] Mr UP acted for Ms HA in relation to an employment dispute with [ABCD] New Zealand Limited (ABCD), for whom Ms TY acted.

[2] Ms HA's complaint is that Ms TY did not fulfil her professional obligations with regard to discovery.

[3] The Standards Committee (the Committee) conducted a thorough investigation and issued a comprehensive determination in which it determined to take no further action in respect of Ms HA's complaints.

[4] Mr UP applied on behalf of Ms HA for a review of the determination.

[5] Ms TY is represented by Ms WO/Ms CA.

Discovery

[6] This decision is not the place to embark on a treatise on the importance of discovery in litigation and the lawyer's obligations in respect thereto. It is sufficient to note that discovery forms an important part of the pre-trial process and "a lawyer's duties to the Court attach to ... pre-trial matters as much as to conduct in the trial itself".¹

[7] The author of the text referred to goes on to say "The duty of a lawyer to ensure proper discovery might be considered an aspect of the duty not to mislead the Court. It is a positive duty and an ongoing one".

[8] The importance of this duty is reflected in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) relating to discovery² which include a positive obligation on a lawyer to:³

advise the client of the scope of the client's obligations in respect of discovery, including the continuing nature of those obligations up to and including the time of final judgment

[9] A lawyer may not delegate this duty to others.⁴

The Standards Committee determination.

[10] Counsel for each party provided extensive submissions. Having considered these the Committee reached the view that Ms TY had fulfilled her obligations.

[11] The Committee said:⁵

The Committee noted that Ms TY's affidavit confirmed that she advised [ABCD] of its discovery obligations and the steps taken by [ABCD] to comply with those obligations. While legal professional privilege precluded Ms TY from specifically detailing to the Committee the advice she provided to [ABCD], the Committee was satisfied that Ms TY had liaised with [ABCD] regarding its discovery obligations and ensured that [ABCD] understood and fulfilled those obligations.

Review on the papers

[12] The parties have agreed to the review being dealt with on the papers. This review has been undertaken on the papers pursuant to s 206(2) of the Lawyers and Conveyancers Act 2006 (the Act), which allows a Legal Complaints Review Officer

¹ Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at 370.

² Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 13.9.

³ Rule 13.9.1.

⁴ Above n 1 at 371.

⁵ Standards Committee determination (2 May 2016) at [44].

(LCRO) to conduct the review on the basis of all information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

[13] I record that having carefully read the complaint, the response to the complaint, the Committee's decision and the submissions filed in support of and in opposition to the application for review, there are no additional issues or questions in my mind that necessitate any further submission from either party. On the basis of the information available I have concluded that the review can be adequately determined in the absence of the parties.

The grounds for review

[14] Mr UP submits that the Committee committed an error in making its determination that "goes to the heart of the Committee's decision (including credibility), to the point that the Committee's determination cannot be relied upon".⁶

[15] The error identified by Mr UP is that Ms TY herself did not provide any direct statement to the Committee and consequently the Committee was "in the unsatisfactory position of relying on the hearsay statements of counsel for Ms TY".

[16] Mr UP is correct. There is no affidavit or direct evidence on the Committee file from Ms TY. The Committee has relied upon the extensive submissions from Ms TY's counsel as to what advice was provided to [ABCD].

[17] Section 151(1) of the Act enables a Committee to receive in evidence any statement, whether or not the statement would be admissible in a court of law and a Standards Committee may rely on counsel to only put forward statements on behalf of her client which counsel is satisfied is correct. The apparent error in the Committee's decision in referring to an affidavit by Ms TY does not affect the veracity of information provided by her counsel and it was in order for the Committee to accept it.

[18] Mr UP's submission that the Committee's determination is "unreliable" is puzzling, and is not accepted.

Review

A sense of proportion

[19] Ms HA and her counsel pursued issues relating to discovery throughout the proceedings prompting Chief Judge [XX] at one stage to say "questions of document

⁶ Letter in support of application for review UP to LCRO (14 June 2016) at [25].

disclosure in this case have reached the point where it is necessary to stand back and reclaim a sense of proportion”.⁷

[20] Ms HA exercised to the full, remedies available to her through the Employment Court. That was the appropriate forum in which for her to pursue remedies.

[21] Section 138(1)(f) of the Act provides that, in these circumstances, a Committee may decline to take further action in respect of a complaint. The complaint was made following conclusion of the litigation. Section 138(1)(f) in itself presents reasonable grounds for declining to consider the matter further. Nevertheless, the Standards Committee did carefully consider the issues and produced a fully reasoned determination.

Court orders

[22] On 4 December 2014, the Court issued an Order directing precisely what discovery was to be made and how electronic records should be searched. On 11 January 2015, the HR manager for [ABCD] (Ms BD) swore an affidavit in which she deposed she understood the obligations imposed on [ABCD] and that the results of computer searches had been provided to Ms TY to review. In none of the many applications before the Court relating to discovery has the Court taken issue with the conduct of Ms TY.

Privilege

[23] A disturbing aspect of this review is Ms TY’s claim to privilege in respect of the advice provided to [ABCD]. Whilst it is acknowledged that communications between Ms TY and her client are privileged it is difficult to comprehend how [ABCD] would be detrimentally affected by waiving privilege to any such communication. Production of such advice would have put a speedy end to the complaint and this review.

[24] On 28 July 2016, this Office requested Ms TY to provide evidence that [ABCD] had been requested to waive privilege and had declined to do so. In reply Ms WO provided an affidavit from Ms [BD] which, Ms WO said, addressed the issue. That is not the case.

[25] Ms BD’s affidavit refers to the general issue of privilege in the context of the proceedings between Ms HA and [ABCD]. She does not specifically refer to the advice provided to her or any other employee of [ABCD] by Ms TY in accordance with the

⁷ *HA v [ABCD] New Zealand Ltd* [Year] NZEmpC XX at [24].

requirements of r 13.9. She says instead “[ABCD] is not therefore prepared to waive its right to privilege over its legal advice, particularly in the context of this contentious litigation”.

[26] In the absence of a statement from Ms TY or the production of any evidence, the inference could be drawn that she did not actively fulfil the requirements of r 13.9. However, that is not sufficient to support an adverse finding against her.

[27] This Office has the authority to require Ms TY to provide her file.⁸ However, I am not prepared to take this step. It is anticipated the files are voluminous and it would still be open to Ms TY to assert she fulfilled her obligations verbally and made no file notes of any such conversation.

[28] One of the purposes of the Act is to protect the public. Ms HA has availed herself of the remedies available to her before the Employment Court. She does not need further protection.

[29] In conclusion therefore, the assertions made by Ms HA have not been rebutted definitively. However, a lawyer is not required to positively prove compliance with the Rules and an adverse finding must be supported by evidence on the balance of probabilities. Evidence to that degree does not exist and the circumstances and facts of this matter do not justify further intervention.

Interlocutory judgment (no 15) of Chief Judge [XX]

[30] It is acknowledged that a Tribunal must reach an independent view of matters before it.⁹ However, that does not mean that judgments or decisions in other fora must be ignored altogether. The question is how much weight is to be accorded to those other judgments or decisions.¹⁰

[31] The very same matters that are now complained of were before the Employment Court in a challenge to a determination of the Employment Relations Authority. The following comments by the Chief Judge are pertinent to this issue:¹¹

... As Ms RB QC has submitted, the plaintiff’s allegation that the defendant’s solicitor has failed to discharge her disclosure obligations, is not supported by the sort of evidence that the Court would expect to have before it to establish such a serious allegation of professional misconduct ...

⁸ Lawyers and Conveyancers Act 2006, s 147.

⁹ *Dorbu v Lawyers and Conveyancers Disciplinary Tribunal* HC Auckland CIV-2009-404-7381, 11 May 2011 at [21].

¹⁰ *Deliu v National Standards Committee* [2014] NZHC 2739 at [89].

¹¹ *HA v [ABCD] New Zealand Ltd (No 15)* [Year] NZEmpC XXX at [X] and [XX].

...

Having disposed formally of those applications, it is necessary to say something also about the serious allegations levelled by the plaintiff and her lawyers against the defendant and, particularly, its solicitor. These are serious allegations of professional failure and misconduct. In spite of that, the evidence to support those allegations is, at best, meagre and in most instances non-existent. The Court would have been required to have drawn untenable inferences which it had been unprepared to do, given the high standard of proof required to establish such serious allegations of professional misconduct.

[32] It is disturbing that Ms HA has brought the very same matters before the Committee and now pursues this matter on review. The comments made by the Chief Judge are clear and there is no reason why those should not have been accepted as a definitive decision on the allegations. However, Ms HA has now caused Ms TY to incur further costs and expended the resources of the complaints and disciplinary process in continuing to pursue this matter.

Decision

[33] For the reasons set out above, the determination of the Standards Committee is confirmed pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006.

Costs

[34] Counsel for Ms TY seeks costs. The parties are invited to make submissions as to costs by no later than 25 February 2018.

DATED this 25th day of January 2018

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 HA as the Applicant
Ms TY as the Respondent
Ms UC as the Applicant's representative
Ms WO/Ms CA as the Respondent's representative
[City]Standards Committee [X]The New Zealand Law Society