

CONCERNING

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

AND

CONCERNING

a determination of the Canterbury-Westland Standards Committee 2 of the New Zealand Law Society

BETWEEN

G CRIEFF
of Christchurch
Applicant

AND

S TONGUE
of Christchurch
Respondent

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

DECISION

[1] Mr Crieff complained to the New Zealand Law Society in respect of certain delays on the part of Ms Tongue in providing legal services. The matter was considered by the Canterbury-Westland Standards Committee 2 which on 28 September 2009 issued a determination of the matter. In that determination the Committee made a finding of unsatisfactory conduct on the part of Ms Tongue, reprimanded her and imposed an order for costs. Mr Crieff had sought compensation, however the Committee declined to make such an order. Mr Crieff seeks a review of that aspect of the determination. With the consent of the parties this review has been conducted on the papers. I have taken into account all of the material that was before the Standards Committee and the application for review and accompanying material provided by Mr Crieff. Ms Tongue indicated that she relied on the material she had placed before the Committee and did not seek to make further submissions. I observe that some of these matters concern a company in which Mr Crieff appears to have an interest, but for convenience I will refer only to Mr Crieff.

Background

[2] Mr Crieff sought Ms Tongue's assistance in relation to performance issues he was having with an employee around April 2008. A retainer was entered into and initial assistance and advice was provided. In September 2008 that employee made a personal grievance against Mr Crieff. Mr Crieff sought Ms Tongue's further assistance. Ms Tongue responded giving some advice as to what steps Mr Crieff should take. On 22 December 2008 Mr Crieff sought Ms Tongue's assistance again stating that the employee's advisor had not heard from Ms Tongue for some time and indicating that a response was required by the other side by 12 January 2009. That email was followed up by Mr Crieff the next day by an email to another member of Ms Tongue's firm with a request that it be responded to, Ms Tongue was copied into that email. On 5 January 2009 Mr Crieff again emailed another member of Ms Tongue's firm with a request that the matter be followed up, Ms Tongue was copied into that email also. Mr Crieff did not receive any response to these emails. As a result he retained a different advisor. With the assistance of that advisor a settlement was reached with the employee under which Mr Crieff paid the employee \$2000.00. Legal costs were also incurred. It is these sums that Mr Crieff considers Ms Tongue should have to pay.

The decision

[3] The Standards Committee declined to order Ms Tongue to pay any compensation. The Committee considered that it had a discretion whether or not to make such a payment and in declining to exercise that jurisdiction it took a number of matters into account. In particular it considered as relevant: Ms Tongue's ready acknowledgement of her shortcomings; her apology; the fact that the conduct was at the lower end of the scale of unsatisfactory conduct; Ms Tongue's firm had acknowledged that its systems were lacking; the firm has indicated that improvements have been made; and the loss suffered was not caused by Ms Tongue's failures. The Committee also noted that it did not have the jurisdiction to order a refund of fees for work which is not the subject of the proceedings before it.

Consideration

[4] I express some reservations in respect of the relevance of some of the matters taken into account by the Committee. A central purpose of the Lawyers and Conveyancers Act 2006 is to protect the consumers of legal services and conveyancing services (s 3). In light of this there is a strong policy reason to provide compensation to any person who has suffered loss by reason of a failure by a lawyer and the conduct of the lawyer has been found to be unsatisfactory. Wider matters (such as an apology and the seriousness of the wrongdoing) must be of limited relevance if any at all. I acknowledge however that the power to order compensation is

discretionary and some wider matters will be relevant in exercising that discretion. This might include such matters as contributing conduct by the complainant or the fact that mitigating steps have been taken which reduced the loss (although those factors were not present here).

[5] I also note that the Committee was correct in its view that it did not have the jurisdiction to order a refund of fees for work which is not the subject of the proceedings before it. It would, however, be open to a Committee to treat legal fees that were incurred as a consequence of the lawyer's failure as a loss in respect of which compensation could be payable.

[6] For the Committee to have the power to make an order of compensation s 156(1)(d) of the Lawyers and Conveyancers Act 2006 must be satisfied. That section provides:

where it appears to the Standards Committee that any person has suffered loss by reason of any act or omission of [lawyer] order the [lawyer] to pay to that person such sum by way of compensation as is specified in the order ...

The Committee considered that the loss in this case was not caused by any act or omission of Ms Tongue and declined to order compensation.

[7] Mr Crieff, in his application for review considered that the Committee had erred in that it failed to meet his losses which he considers were attributable to Ms Tongue's failure to represent him.

[8] There is no evidence that this is the case. While it is clear that Mr Crieff settled the employment grievance and incurred legal costs in doing so there is no evidence that this would not have occurred if Ms Tongue had acted diligently. I also observe that even had Ms Tongue acted diligently legal costs would have been incurred in resolving the employment dispute. Those costs cannot be said to be attributable to any failure on Ms Tongue's part.

[9] In so far as there is a suggestion that Mr Crieff's subsequent legal advisor was not an expert in employment law and failed to get the best outcome, this cannot be visited on Ms Tongue. The payment made to the employee in the dispute was one which was made by agreement after mediation. No evidence has been provided by Mr Crieff as to why or how Ms Tongue's failures were causative of the need to settle the amount (other than the bare assertion that because of the delay the settlement was necessary to avoid court action). It is clear that the employee had made the personal grievance claim against Mr Crieff and it was likely that some costs in defending or settling that grievance would occur. On the evidence which was before the Committee

and is now before me it appears more likely than not that had Ms Tongue acted diligently Ms Crieff would have suffered the same losses.

[10] Where a claim for compensation is made it is for the claimant to establish a causal link between the lawyer's breach and the loss suffered. In this instance no such link has been established. The Complaints Committee was correct to decline to order Ms Tongue to pay a sum to Mr Crieff by way of compensation.

Decision

The application for review is declined pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 and the decision of the Canterbury-Westland Standards Committee 2 is confirmed.

DATED this 13th day of November 2009

Duncan Webb
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:

- Applicant
- Respondent
- Respondents firm as a related party
- The Canterbury-Westland Standards Committee 2
- The New Zealand Law Society