

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

DL

Applicant

AND

AN APPLICATION FOR REVIEW OF A PROSECUTORIAL DECISION

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

DECISION

Introduction

[1] Mr DL has applied for a review of a decision by the [Area] Standards Committee.

[2] The Committee determined that Mr DL's conduct should be considered by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal pursuant to s 152(2)(a) of the Lawyers and Conveyancers Act 2006 (the Act).

[3] Mr DL was suspended from practice in [Date].¹ The Committee received evidence to suggest he had continued to do work for clients while he was suspended.² Mr DL's application for review proceeds on the basis that he did nothing to breach terms of his suspension.

[4] Mr DL seeks an order from this Office quashing the Committee's decision.

¹ [Area]Standards Committee v DL

² Letter DL to RN (24 October 2014).

Committee Process

[5] On receipt of information concerning conduct on the part of Mr DL the Committee exercised its function pursuant to s 130(c) of the Act, which provides for a Committee:

to investigate, of its own motion, any act, omission, allegation, practice, or other matter that appears to indicate that there may have been misconduct or unsatisfactory conduct on the part of a practitioner or any other person who belongs to any of the classes of persons described in s 121.

[6] Section 121 defines who New Zealand Law Society (NZLS) can receive complaints about. The list includes lawyers and former lawyers, such as Mr DL. Thus, on [Date] the Committee commenced an investigation of its own motion into matters involving Mr DL that appeared to indicate that there may have been misconduct or unsatisfactory conduct on his part. That investigation resulted in information being provided to the Committee by Mr RN who had assumed responsibility for a proceeding Mr DL had acted in and Ms VH who had been Mr DL's instructing solicitor. Having considered that information, the Committee made the decision to lay charges against Mr DL which is the subject of this review. The Committee did not, and was not obliged to, provide reasons for that decision.³

Review

[7] Mr DL's application for review was received by this Office on [Date]. Its general thrust is referred to above: Mr DL denies there has been misconduct or unsatisfactory conduct on his part, and sets out in his review application his account of who did what and when.

[8] On [Date] the Committee provided this Office with a copy of the proceedings filed in the Tribunal, noting that those were on hold pending this determination on review.

[9] On the [Date] both parties confirmed their consent to this review being determined in their absence, and in the absence of their representatives and witnesses, pursuant to s 206(2) of the Act, in circumstances where it appears to me that the review can be adequately determined in the absence of those people.

³ *Orlov v New Zealand Law Society* [2013] NZCA 230, [2013] 3 NZLR 562 at [98].

Role of this Office on Review of Decisions to Prosecute

[10] The role of this Office on review has been discussed in a number of decisions including decisions from this Office in relation to reviews of Committee decisions to lay charges to the Tribunal regarding practitioner conduct.

[11] In *Orlov v New Zealand Law Society* the Court of Appeal determined that there was no threshold test to be met before matters could be referred to the Tribunal.⁴ The Court explained that:⁵

The protection to the practitioner once afforded by the threshold test [in the Law Practitioners Act] is thus now met by other means. The oversight of the LCRO should also assist in protecting the resources of the Tribunal and prevent it from being overwhelmed by petty or trivial cases.

[12] Previous decisions from this Office have emphasised the need for this Office to proceed with caution when considering whether or not to interfere with a determination by a Standards Committee to refer a matter to the Tribunal.⁶

[13] It has been noted that it will only be in exceptional cases that a decision to prosecute will be reversed on review.⁷

[14] Given the grounds set out in Mr DL's review application, it is relevant to note that this Office is not required to consider all of the evidence relating to the complaint, although if there were no evidence, that could well give rise to concern on review.⁸

[15] Relevant principles that might apply to decisions being reversed by Review Officers were discussed in *FF v Wellington Standards Committee 2* and include situations where a decision to prosecute was:⁹

- (a) Significantly influenced by irrelevant considerations.
- (b) Exercised for collateral purposes unrelated to the objectives of the statute in question (and therefore an abuse of process).
- (c) Exercised in a discriminatory manner.
- (d) Exercised capriciously, in bad faith, or with malice.

⁴ Above n 3, at [53] and [54](d).

⁵ At [54](d).

⁶ *AE* – Decision to prosecute LCRO 93/2013 and 338/2013 at [31].

⁷ *Poole v Yorkshire* LCRO 133/2009, *EG & EH v Auckland Standards Committee 1* LCRO 163/2011 and 164/2011 at [4]; *JR v QL* LCRO 108/2012 at [18].

⁸ *OJ v PT* LCRO 168/2011 at [6].

⁹ *FF v Wellington Standards Committee 2* LCRO 23/2011 at [49] – [51].

[16] In that case the LCRO observed:¹⁰

[50] ... it was noted in the *Rugby* decision that “if the conduct was manifestly acceptable then this might be evidence of some improper motivation in the bringing of the prosecution”.

[51] While I do not necessarily agree that this might constitute evidence of some improper motivation in the bringing of the prosecution, I do agree that the decision to prosecute should be set aside if the conduct was manifestly acceptable.

[17] This is an approach that has been described elsewhere as appearing to be:¹¹

... consistent with the general stance adopted in common-law jurisdictions, where a very restrictive approach to the reviewability of a decision to prosecute has been emphasised since, the prosecutor’s function is merely to do the preliminary screening and to present the cases.

[18] These principles, while not necessarily exhaustive, provide guidance to this Office on the approach a Legal Complaints Review Officer (LCRO) can be expected to adopt when proceeding with a review of a decision to prosecute. It is an approach that is consistent with the cautionary approach commended by her Honour Winkelmann J in *Deliu v Hong* where she noted:¹²

In my view 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 judgement without good reason. (citations omitted)

[19] The Court of Appeal in *Orlov v New Zealand Law Society* observed that the decision to lay charges:¹³

... does not determine the outcome of the complaint. It only determines which body should be seized of it. The decision is procedural in nature and occurs at a very preliminary stage of what is a comprehensive statutory process involving several checks and balances, in what the legislature saw as a more responsive regulatory regime.

[20] It is accepted that the Court of Appeal in *Orlov* was addressing an application for a judicial review of a Standards Committee determination, but it has been noted that

¹⁰ At [50] – [51].

¹¹ *PA v Standards Committee* LCRO 267/2014 at [42].

¹² *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [41].

¹³ Above n 3, at [50].

“... the observation that the decision is procedural in nature still holds good in respect of a review by this Office”.¹⁴

[21] The Committee’s power to refer a practitioner to the Tribunal derives from s 152(2) of the Act. The Committee may make a referral, if it considers that concerns have arisen in a professional context which, if proven, could lead to a finding of misconduct. The Committee need only be satisfied that the conduct in question, if proven, is capable of constituting misconduct. It does not fall to the Committee to determine whether the conduct in question is misconduct.

[22] The issue for consideration on review is whether there is any proper basis for interfering with the Standards Committee decision. It is not part of the role of this Office on review to decide whether or not the evidence is sufficient to support a finding of misconduct. It is enough that there is some evidence to support a complaint that is of sufficient gravity to warrant referral to the Disciplinary Tribunal.

[23] The Court noted in *Orlov* that the Tribunal is the forum best suited to hear and investigate charges involving “complex issues of law or fact or to be likely to result in a significant precedent”.¹⁵ There is a need to protect the Tribunal’s resources where a case may be “petty or trivial”.¹⁶

[24] The Act defines two conduct standards: misconduct and unsatisfactory conduct. Conduct that does not fall within either of those definitions does not require a disciplinary response. Misconduct is the more serious of the two, and can ultimately lead to the Tribunal striking a practitioner off.

[25] The jurisdiction of this Office and Standards Committees extends only to unsatisfactory conduct. The jurisdiction of the Tribunal extends to both standards. That places the Tribunal in a position to consider both standards in relation to the conduct that is the subject of charges framed and laid by the Committee when confronted with a complaint in which “the spectre of misconduct” is raised.¹⁷

[26] Significantly, when directing a complaint to the Tribunal for consideration, s 158 does not require a Standards Committee to provide reasons. Reason must be given “only when a standards committee makes a finding of unsatisfactory conduct or

¹⁴ *BD and GA* Application for review of prosecutorial decision LCRO 186/2013 at [52].

¹⁵ Above n 3 at [54](h).

¹⁶ At [54](d).

¹⁷ LCRO 125/2015 (Unpublished decision).

determines to take no further action".¹⁸ However, this Office is obliged to provide reasons on review.

[27] I have taken all of these considerations into account on review and conclude that the decision of the Standards Committee is confirmed.

Analysis

[28] Mr DL does not say the events disclosed in the Committee's inquiry did not occur. Essentially he says he did not do work. He explains that at the time his suspension order took effect he had a number of cases outstanding that he passed on to other lawyers. In doing so, Mr DL says he provided copies of various pleadings, witness briefs and "additional information that would assist in the conduct of the client's case".¹⁹

[29] Mr DL refers to a particular case he describes as "reasonably complex", in which he was instructed to represent Ms ZM before the Auckland High Court. Mr DL says the pleadings were complete before he was suspended. While he was suspended Mr DL says Mr RN had conduct of the file, and it was Mr RN who prepared and filed all the Court documents that might otherwise appear from emails and other correspondence to have been Mr DL's handiwork.

[30] Mr DL describes assisting Mr RN through discussion and the supply of information from his files. He says Ms ZM filed the memorandum as to costs, although he does not specifically deny any involvement in the preparation of that.

[31] Mr DL's review application is effectively his defence to the charges laid by the Committee after it made the decision. The review application sets out issues of fact that Mr DL seeks to have determined in his favour. If he succeeds he may avoid the consequences of being found to have breached the suspension order. He will need to rely on Mr RN's support. There is documentary evidence on Ms VH's file that tends to contradict the position Mr DL maintains on review. If Mr DL maintains his position to the Tribunal, there is likely to be cross examination.

[32] The matters Mr DL raises on review are properly left for consideration by the Tribunal.

¹⁸ Above n 18, at [30].

¹⁹ Memorandum DL to LCRO (18 July 2016).

[33] If it is proven that Mr DL acted as the documentary evidence suggests he did, there remains a question as to whether what he did falls within the definitions in the Act, such that the conduct is regulated under the Act. While that question may appear to be a reasonably straightforward one to answer, the application of definitions depends on the facts proven. It is appropriate for the Tribunal to consider the conduct, and determine whether Mr DL sufficiently distanced himself from legal practice during the period of his suspension or not.

[34] Having considered the information that is available on review, it appears that there is prima facie evidence of conduct by Mr DL that may breach the suspension orders. The charges may not be proven to the requisite standard. However, if the Tribunal is satisfied that Mr DL breached the suspension orders, it may be persuaded that he is no longer a fit and proper person to practice, or it may conclude some other outcome is appropriate.

[35] I have been unable to identify any evidence of impropriety in the Committee's decision making process. There is no evidence that it was influenced by irrelevant considerations significantly or otherwise, that the decision to prosecute is an abuse of process, discriminatory, or capricious, or that the Committee acted in bad faith or with malice.

[36] I am unable to identify any other reason to depart from the Committee's decision.

[37] In the circumstances, the Committee's decision is confirmed.

Costs

[38] Mr DL has applied for a review. He has not been successful in having the decision quashed. While the documents were voluminous, the review was straightforward. Mr DL gave consent to the review being determined in his absence.

[39] Pursuant to s 210 of the Act and the LCRO's Costs Orders Guidelines, Mr DL is ordered to pay costs on review of \$900 to NZLS within 30 days of the date of this decision.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed.

DATED this 26th day of October 2016

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:

Mr DL as the Applicant
[Area] Standards Committee
The New Zealand Law Society