

LCRO 166/2014

**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**

**RD**

Applicant

**AND**

**TS**

Respondent

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

**DECISION**

**Introduction**

[1] Mr RD has applied for a review of the determination by [Area] Standards Committee that Mr RD had breached an undertaking given to NZ Police and this amounted to unsatisfactory conduct.

**Background**

[2] Mr RD was instructed to defend a client against a charge of assaulting a child. On 7 August 2012 disclosure was provided by the Police by personal delivery to Mr RD. The disclosure included a DVD recording of an interview with the child allegedly assaulted.

[3] The officer who delivered the disclosure form completed a report form in which he/she recorded:

As requested I personally delivered the documentation for Mr RD on Tuesday 7 August 2012 at the [Town] Police Station. I read him the Regulations and explained them to him. He acknowledged that he fully understood them.

[4] The “receipt and acknowledgement” included an undertaking by Mr RD as follows:

**I HEREBY UNDERTAKE** in accordance with the Evidence Regulations 2007 to:

- a) keep and place the DVD record in safe custody;
- b) will not part with possession of the DVD until it is returned to the Police.
- c) return the DVD record to the [City] District Child Protection Team as soon as practicable after the criminal proceedings have been determined (or earlier).

[5] The undertaking included eight further paragraphs which reflected provisions of reg 26 of the Evidence Regulations 2007 which govern the use and protection of material such as the DVD to ensure that it would be viewed only for the purposes of the defence and that no unauthorised copies were made.

[6] Mr RD says that “at the end of March 2013 it was clearly obvious the trial would not proceed” and an arrangement was reached with the Police whereby the charges were withdrawn on 11 June 2013.<sup>1</sup>

[7] Mr RD did not return the DVD and when requested to do so by the Police on 7 August 2013 he replied:

Sorry i have not got it it went in the rubbish with most of the file my client wanted to see it but he did not you should have asked me weeks ago

[8] The matter was followed up by Detective Senior Sergeant TS, the officer in charge of the District Child Protection team who asked for “assurances that it has not and cannot fall into the wrong hands”.<sup>2</sup>

[9] Mr RD replied:<sup>3</sup>

...

As for the DVD I watched it within days of getting it I have a DVD viewing machine in my office at home but it would not play on that machine. It would not play on the DVD in my bedroom so i watched it on the high quality one in my living room.

The DVD has never left my home. It was never on the file.

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<sup>1</sup> Letter RD to Lawyers Complaints Service (11 December 2013).

<sup>2</sup> Email TS to RD (22 August 2013).

<sup>3</sup> Email RD to TS (5 September 2013).

At about the time i discussed the withdrawl [sic] of the charges with the Crown Prosecutor my client asked to see the DVD.

I looked for it and could not find it. It may well be somewhere in my house but so far it has not turned up.

At this point in time I can not [sic] return it to you.

I also am unable to locate a DVD of my sons [sic] wedding in [Country]. He has now sent me another one.

...

[10] On 8 September, Mr RD advised Mr TS that he had located the DVD and it was subsequently returned to the Police.

### **The Complaints and the Standards Committee determination**

[11] Mr TS complained to the Lawyers Complaints Service on NZ Police letterhead. He listed five areas of concern:<sup>4</sup>

1. Mr RD's [sic]<sup>5</sup> inability to correctly and safely possess and then return in an appropriate and timely fashion a child witness DVD containing sensitive information
2. His statement more than once to Police that this DVD had been disposed of – *"put in the rubbish"* is unacceptable
3. His statement as to the DVD's disposal was clearly not correct when the DVD was later located and returned by Mr RD
4. Police have no comfort that if we had not pursued the return of the DVD with Mr RD, that the item would have been returned when later located by him
5. Police will be objecting to providing Mr RD a Lawyers Copy in any future dealings and need to express our displeasure of his conduct in this occasion

[12] The Standards Committee "was satisfied that the wording of the undertaking clearly set out the obligation on Mr RD"<sup>6</sup> and referred to rule 10 of the Conduct and Client Care Rules.<sup>7</sup>

[13] The Committee was also concerned "Mr RD's response to the complaint, in reference to the obligations of the Police officers involved, showed a lack of insight".<sup>8</sup>

[14] It determined that Mr RD's conduct amounted to unsatisfactory conduct and imposed a fine of \$1,500. It ordered Mr RD to pay costs in the sum of \$500.

<sup>4</sup> Letter TS to Lawyers Complaints Service (30 October 2013).

<sup>5</sup> Mr TS has misspelt Mr RD's name throughout correspondence to which Mr TS has taken objection.

<sup>6</sup> Standards Committee determination (27 May 2014) at [11].

<sup>7</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

<sup>8</sup> Above n 5, at [12].

## The application for review

[15] Mr RD has applied for a review of the Standards Committee decision and put forward the following reasons for his application:<sup>9</sup>

- 1 The decision of the Standards committee was unfair and unreasonable in the circumstances
- 2 I requested an oral hearing but such request was unreasonably denied
- 3 I consider the committee was biased against me and this is supported by various comments contained in the decision,
- 4 I was found guilty against the weight of evidence
- 5 After being found guilty I was denied the opportunity of making submission in mitigation of penalty. This is not only a breach of the rules of natural justice but contrary to the Bill of Rights
- 6 The original complaint was brought by a police officer who was annoyed by a flippant comment and was upset that the charge against my client was dismissed
- 7 I deny that I breached an undertaking. I kept the DVD in a safe place..it never left my house. At no time did I part with possession of the DVD while it was in my possession. I returned the DVD to the police when requested although I do concede it may have been a little late.
- 8 A fine of \$1500 plus costs of \$500 was manifestly excessive in the circumstances
- 9 In almost 50 years of criminal practice. I have never been the subject of a complaint from the opposition police officer, I suspect the complainant did not have the authority of his superior officer to lodge the complaint

## Review

### *Procedure*

[16] The review progressed by way of an applicant only hearing in [City] on 13 July 2017.

[17] The hearing was conducted by Mr Vaughan acting as a delegate duly appointed by the Legal Complaints Review Officer (LCRO) pursuant to cl 6 of sch 3 of the Lawyers and Conveyancers Act 2006. The LCRO has delegated Mr Vaughan to report to me and the final determination of this review as set out in this decision is made following a full consideration of all matters by me after receipt of Mr Vaughan's report and discussion.

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<sup>9</sup> Application for Review, Part 7.

## Nature and scope of review

[18] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:<sup>10</sup>

... 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.

[19] More recently, the High Court has described a review by this Office in the following way:<sup>11</sup>

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.

[20] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee’s determination, has been to:

- (a) Consider all of the available material afresh, including the Committee’s decision; and
- (b) Provide an independent opinion based on those materials.

### *The undertaking*

[21] Regulation 26 of the Evidence Regulations 2007 and the request for an undertaking in terms of the Regulations reflect the extreme sensitivity of the content of the DVD. The police officer who delivered the DVD to Mr RD recorded that the

<sup>10</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

<sup>11</sup> *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

requirement of the Regulations had been explained to Mr RD before he was asked to give the undertaking.

[22] Mr RD has not been asked whether he had previously acted for person where similar restrictions were imposed, and/or he had given similar undertakings in the past. However, Mr RD advised that he had been practicing for 55 years in the criminal jurisdiction and he cannot have been unaware of the particular requirements for the care and protection of such evidence.

[23] At the review hearing, Mr RD acknowledged that his responses to the police had been flippant and should not have been made. At the time the remarks were made, he displayed a lack of recognition or acknowledgement of the seriousness relating to the material evidenced by the Regulations and then a lack of acknowledgement of his obligations pursuant to the undertaking.

[24] Rule 10.3 of the Conduct and Client Care Rules provides:

A lawyer must honour all undertakings, whether written or oral, that he or she gives to any person in the course of practice.

[25] The authors of the text *Ethics, Professional Responsibility and the Lawyer* comment on this rule in the following way:<sup>12</sup>

The reasons for the rule, which requires the strict adherence to undertakings, are pragmatic. Undertakings are common throughout legal practice, and the continued efficient working of legal practice requires that such undertakings be honoured regardless of other supervening circumstances. The additional reason for the strict application of the rule is to maintain the legal profession's integrity. Members of the profession must be seen as wholly trustworthy in that, once they have undertaken a particular course of action, they can be depended on to act accordingly. That the duty to honour undertakings is strict means even when a lawyer has erred or made an oversight, circumstances have changed radically, or for the lawyer to adhere to the undertaking will cause hardship, the lawyer must still adhere to the promises made.

[26] The wording of the undertaking is clear and the facts are undisputed. Mr RD did not return the DVD as required by the Regulations and as he had undertaken to do.

[27] I also have reservations that the manner in which Mr RD kept and viewed the DVD would meet his obligations either. This was part of Mr TS's complaint, although the return of the DVD has been the focus of the Standards Committee determination.

[28] The Police sought and obtained undertaking so that there was a consequence if he did not meet his obligations. Mr RD gives the impression that he still did not

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<sup>12</sup> Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3<sup>rd</sup> ed, LexisNexis, Wellington, 2016) at [15.9.1].

acknowledge the seriousness with which a breach of an undertaking is viewed when he submits:

- (a) His failure to return the DVD “may have been a minor breach of a regulation”.<sup>13</sup>
- (b) No harm had been done.<sup>14</sup>
- (c) The police officer “took an over serious view of the matters”.<sup>15</sup>
- (d) The complaint was a result of “sour grapes – [his] client should never have been charged”.<sup>16</sup>
- (e) The Police should have requested return of the DVD at an earlier time.<sup>17</sup>

[29] At the review hearing Mr RD acknowledged that he had breached his undertaking. The finding of unsatisfactory conduct stands.

### **Penalty**

[30] The Standards Committee imposed a fine of \$1,500 and ordered Mr RD to pay costs of \$500. Mr RD expected to be given the opportunity to make submissions on penalty and one of his grounds for review was that his request for an oral hearing had been denied.<sup>18</sup>

[31] The request for an oral hearing has been satisfied by the review hearing but s 153(1) of the Lawyers and Conveyancers Act 2006 (the Act) establishes the presumption that Standards Committee hearings are to be conducted on the papers. In addition, the notice of hearing issued by the Lawyers Complaints Service invited Mr RD to make submissions on penalty “in the event that there is a finding of unsatisfactory conduct”.<sup>19</sup> It does not seem that Mr RD responded to this invitation.

[32] At the review hearing Mr RD advised:

- (a) He is semi-retired.
- (b) He acts pro bono for many clients.

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<sup>13</sup> Submitted by Mr RD at the review hearing.

<sup>14</sup> Above n 9.

<sup>15</sup> Above n 9.

<sup>16</sup> Letter RD to Legal Complaints Service (11 December 2013).

<sup>17</sup> Above n 12.

<sup>18</sup> In his response to the complaint Mr RD “reserved the right to make submissions before any penalty is imposed”.

<sup>19</sup> Notice of hearing 29 April 2014.

- (c) When rendering accounts he charges modest fees.
- (d) As a result, his income is limited and he finds the costs of his annual practising certificate significant. In the circumstances, he considered a fine of \$1,500, coupled with the order for costs, to be “manifestly excessive”.

[33] In *Kaye v Auckland District Law Society* the High Court held that:<sup>20</sup>

as a matter of principle ... the [Law Practitioners Disciplinary Tribunal] ought to take into account a practitioner’s ability to pay when determining the quantum of the costs orders. Costs should not be punitive.

[34] There is no reason why that principle should not apply to Standards Committees and this Office.

[35] Mr RD did not take the opportunity provided by the Lawyers Complaints Service to inform the Committee of his circumstances, but he has now made those circumstances known to this Office, albeit in a generalised manner.

[36] In *Workington v Sheffield* the Legal Complaints Review Officer (LCRO) observed that:<sup>21</sup>

The function of a penalty in a professional context was recognised in *Wislang v Medical Council of New Zealand* [2002] NZAR 573 is to punish the practitioner, as a deterrent to other practitioners, and to reflect the public’s and the profession’s condemnation or opprobrium of the practitioner’s conduct. It is important to mark out the conduct as unacceptable and deter other practitioners from failing to pay due regard to their professional obligations in this manner.

[37] In the present instance, all of these objectives are met by the finding of unsatisfactory conduct. In addition, Mr RD will be visited with the consequences of his conduct, as Mr TS has advised the Police will object to providing disclosure to Mr RD in the future. In this way, the public protection objective of the Lawyers and Conveyancers Act will be achieved.

[38] The finding of unsatisfactory conducts must, however, be reinforced, and the manner in which this is achieved is by way of a penalty. The off-hand manner in which Mr RD was almost dismissive of his obligations warrants the imposition of a censure. This has been given careful consideration and in the end, it is considered that Mr RD will acknowledge the finding of unsatisfactory conduct, at this stage of his career, is in itself, serious enough to constitute a censure in itself by his peers.

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<sup>20</sup> *Kay v Auckland District Law Society* [1998] 1 NZLR 151 (HC) at 157.

<sup>21</sup> *Workington v Sheffield* LCRO 55/2009 at [65].



[39] Having considered all of these factors and accepting Mr RD's submissions as to his circumstances, a fine of \$500 will serve to reinforce the finding of unsatisfactory conduct.

[40] The imposition of costs by the Standards Committee in the sum of \$500 stands.

#### **LCRO costs**

[41] Where a finding of unsatisfactory conduct is upheld on review, it is usual that an applicant is ordered (pursuant to s 210(1) of the Act) to pay the costs of the review. In accordance with the guidelines issued by this Office, such an order would amount to \$1,200. However, to award costs against Mr RD would fail to recognise Mr RD's circumstances which have been taken into account in this decision when reducing the fine imposed by the Standards Committee.

[42] In the circumstances, there will be no order for payment of LCRO costs by Mr RD.

#### **Other matters**

[43] This decision does not specifically address all of the grounds of review set out by Mr RD in support of his application (refer [15] above). However, given Mr RD's acceptance at the review hearing that he had breached the undertaking, a number of the grounds for review fall away. The remaining grounds have been addressed where necessary.

**DATED** this 4<sup>TH</sup> day of August 2017

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**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 RD as the Applicant  
Mr TS as the Respondent  
[Area] Standards Committee  
New Zealand Law Society