

CONCERNING

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

AND

CONCERNING

a determination of the National Standards Committee

BETWEEN

DV
of Auckland

Applicant

AND

WE
of Auckland

Respondent

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

DECISION

Background

[1] In November 2009 the Applicant lodged a complaint with the Complaints Service concerning remarks made on the "ABM" website about him. "ABM" is a web site which provides comprehensive information to the X community in New Zealand and both the Applicant and the Respondent advertised on that site. The site incorporated a facility whereby comments could be posted by persons who had access to the site and various comments had been posted on that site which the Applicant alleged were defamatory, and had been lodged by a person employed by the Respondent (Mr WD).

[2] The Applicant attributes those comments as being responsible for the fact that he no longer received instructions from clients through that website whereas previously he had been receiving six to seven sets of instructions per month through that medium.

[3] He also complained that the action of the Respondent in providing the Complaints Service with a list of cases which the Respondent says raised issues about the Applicant's competence, was malicious and an abuse of Law Society processes.

[4] The Respondent responded to the complaint and confirmed the following:

- 1) That he did not direct or permit the comments on the website to be made;
- 2) That he did not permit or direct an employee to post any comments on the website;
- 3) That Mr WD had never been employed by his practice;
- 4) That he was not responsible for the comments made by Mr WD.

He accordingly denied the allegations.

[5] With regard to the list of cases provided, the Respondent noted that his complaint was based on the Applicant's general incompetence and inability to comprehend the basic principles of law.

[6] On 27 July 2010 the National Standards Committee issued its decision. It determined to take no further action in respect of the complaint pursuant to section 138 (2) of the Lawyers and Conveyancers Act 2006. This section provides that a Standards Committee may decide not to take any further action on a complaint if, having regard to all the circumstances of the case, any further action is unnecessary or inappropriate.

[7] The Committee particularly took note of the following:

- 1) There was no evidence of malice in the Respondent's complaint;
- 2) There was a lack of evidence to support the claim that the Respondent made his complaint to avoid defamation proceedings or was a party to the posting of the defamatory comments;
- 3) The cross complaint made by the Applicant appeared to have been only in response to the original complaint made by the Respondent

[8] The Applicant has applied for a review of this decision.

Review

[9] The review proceeded by way of an Applicant only hearing on 5 July 2011.

[10] During the hearing I requested that the Applicant provide me subsequently with the material that was posted on the website. This was provided by a letter dated 21 July and

included translations of comments posted on the website by Mr WD about the Applicant and Mr DW who had previously been part of the Applicant's chambers.

[11] Mr DW issued defamation proceedings against the Respondent and Mr WD. In a reserved judgement in respect of those proceedings, Judge Hubble commented that "in my judgement these words are obviously defamatory. The emotive content indicates malice and I cannot see how a defence of fair comment, honest opinion or truth could possibly be raised. (DW & others against WE and BK) WD CIV 2010-004-XXXX at para 4).

[12] By any measure the comments would seem to offend against Rules 10 and 10.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (Client Care Rules) which requires that "a lawyer must treat other lawyers with respect and courtesy".

[13] Although the Respondent was named as a defendant in those proceedings, Mr DW discontinued against him. In a reserved judgement as to costs by Judge B M Wilson QC on 26 April 2010, Judge Wilson noted that at the time the proceedings were issued by Mr DW there was no evidence that the Respondent knew of, let alone authorised, the publication of the defamatory material by Mr WD (para 48). He goes on to say that "the very form of the translated words as set out in the affirmation of Mr WD makes the proposition that [the Respondent] had anything to do with it is very unlikely. It was printed in the X language in a website. There is no evidence that [the Respondent] understood the X language or read the website. These factors increased the level of unlikelihood" (para 49).

[14] The question for the Standards Committee however differed from that which was necessary to determine in connection with the defamation proceedings. The Committee needed to investigate to what extent the Respondent was associated with the website postings. If Mr WD were employed by him, as stated by Judge Hubble (refer para 3 of judgement 8 March 2010) then the Standards Committee has to determine to what extent a lawyer as employer should control or be responsible for the actions of an employee in these circumstances.

[15] The Respondent denies that he has ever employed Mr WD. An examination of the website postings nevertheless reveals a connection with the Respondent that seems to contradict that denial. For example, a posting 8 December 2008 states "I am the practice manager of [WE ABN] Lawyers". The same statement was made in a posting on 26 January 2009.

[16] In addition, the Applicant states that a photo on the website showed the Respondent and Mr WD standing together, giving the impression that Mr WD was a part of the Respondent's practice.

[17] An examination of the Respondent's financial records such as his payroll or any invoices for payment from Mr WD, would determine the veracity of the Respondent's statements as to Mr WD's employment status.

[18] The website advertises the business of WE ABN Lawyers. The Applicant suggests that it is likely that the website was paid for by the Respondent, which is a reasonable assertion. It would be assumed that if this is correct, the Respondent would (or should) have a large measure of control over what was posted on that website by persons associated with the Respondent's practice otherwise. Whether that was possible or not is also relevant.

[19] These questions and a number of others need to be addressed. The decision of the Standards Committee was made pursuant to section 138(2) of the Lawyers and Conveyancers Act. This enables a Committee to determine to take no further action if "in the course of the investigation of the complaint" it forms the view that further action is unnecessary or inappropriate. This indicates that such a decision may take place after an initial decision has been made to inquire into the complaint.

[20] From my review of the Standards Committee file, there has been minimal, if any, inquiry undertaken by the Committee. The complaint was sent to the Respondent for his reply. He replied denying the Applicant's allegations in the manner briefly summarised in paragraph [4] above and the matter then seems to have proceeded to the Committee for a decision.

[21] The Complaints Service of the New Zealand Law Society and/or a Standards Committee, has significant powers to assist it in investigations, as well as the power to require the person complained about to attend before it and to produce and provide various documentation. In this instance, I would describe the inquiry into the complaint as superficial, comprising, it would seem, of a single response from the Respondent. No steps appear to have been taken to investigate any further, or to corroborate the allegations of the Applicant or the denials of the Respondent.

[22] The reasons provided by the Committee for its decision do not relate in the main to the content of the website postings or address why the Respondent has no responsibility in respect of those. The Committee did record that there was no evidence that the Respondent was a party to posting the defamatory comments, but no investigation had

been undertaken by the Complaints Service and it is difficult to ascertain what the Committee's decision was based on and why it should prefer the Respondents denials and statements in preference to the allegations made by the Applicant.

[23] Accordingly, it is my decision that this aspect of the complaint should be returned to the Standards Committee for it to inquire into the complaint, and in particular to establish what degree of association with or control over the postings was exercised or was possible by the Respondent. The actions of the Respondent when becoming aware of the postings are also relevant. Should the Committee determine that the Respondent did have association with and/or control over the postings, or fail to take any steps to have them removed once he became aware of the postings, the Committee would then necessarily have to consider whether the conduct of the Respondent constituted a breach of Rule 10, 10.1 or any other of the Client Care Rules.

[24] The other aspect of the complaint which requires comment is the complaint by the Applicant about the Respondent's act of sending to the Complaints Service the list of cases in which negative judicial comment had been made about the Applicant,.

[25] The initial correspondence from the Respondent was sent in response to a notification in LawTalk that the Applicant had made application for approval to practice on his own account. The purpose of such a notification is to enable any practitioner to bring to the attention of the Law Society the existence of any information or matter that the Society should take into account when considering that application. Any response to such a notification need not be treated as a formal complaint, although I do note that the respondent subsequently asked for it to be treated as such.

[26] In addition, this is the same issue as has been addressed by me in BC v YT LCRO 215/2010 (available on the LCRO website). In that decision, I refer to the mandatory obligation of a Practitioner to report misconduct (Rule 2.8) and the discretion to report unsatisfactory conduct (Rule 2.9). Those Rules provide that such reports are confidential reports, and although the Respondent requested that his letter be treated as a formal complaint, the Complaints Service could, and perhaps more properly should, have treated this aspect of the letter as confidential. However it was treated, the relevance of these comments is that while the Applicant has his views as to why the list was provided, it can equally be considered that the Respondent was complying with this obligations under these Rules.

[27] As noted in the LCRO 215/2010 decision at paragraph 34 "if a Practitioner makes use of the process for the purpose of waging a personal vendetta, or for vexatious

reasons, then the provisions of Rule 2.10 will apply and a Practitioner will expose himself to the consequences of breaching that rule”.

[28] Accordingly, the decision of the Standards Committee in respect of this aspect of the complaint will be confirmed.

Decision

[29] The aspect of the Standards Committee decision relating to the postings on the ABM website is reversed. In all other respects, the decision of the Committee is confirmed

Orders

[30] Pursuant to section 209 of the Lawyers and Conveyancers Act 2006 the Standards Committee is directed to undertake an inquiry into the complaint made by the Applicant in respect of the ABM postings to determine what degree of association and/or control was exercised by the Respondent or was possible in connection with those postings, regardless of whether the author of those postings was an employee or not. Further inquiry also needs to be undertaken to confirm or otherwise the respondent's denial that Mr WD was employed by him. If the Committee determines that the Respondent did have an association with or control over the postings, or did employ Mr WD, then Committee will need to determine whether or not the Respondent has breached the provisions of Rules 10 or 10.1 of the Client Care Rules or any other applicable rules.

DATED this 17th day of August 2011

Owen Vaughan

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 DV as the Applicant
Mr WE as the Respondent
The National Standards Committee
The New Zealand Law Society