

LCRO 194/2015
56/2016

CONCERNING

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

AND

CONCERNING

a determination of the [city] Standards Committee [X]

BETWEEN

TB

Applicant

AND

HN LTD

Respondent

DECISION

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

Introduction

[1] Mr TB has applied for a review of [city] Standards Committee [X]'s decision that there had been unsatisfactory conduct on his part.

[2] Mr TB was appointed by HN Limited (HN) and KW Limited (KW) to determine a dispute between them through arbitration. Mr TB issued his award five years after the arbitration hearing. The arbitration agreement between HN and KW provided for the award to be issued within 40 days of the arbitration hearing, or otherwise as might be advised by Mr TB. HN was dissatisfied with the delay, and the way in which Mr TB managed the parties' expectations about delivery of the award.

[3] HN laid complaints to the Arbitrators and Mediators Institute of New Zealand (AMINZ), of which Mr TB was a member, and to the New Zealand Law Society (NZLS) because he is a lawyer.

[4] Mr TB argues two points on review.

[5] First, that the Law Society does not exercise jurisdiction over the quasi-judicial aspect of arbitrator's conduct.

[6] If it is correct that the Committee lacked jurisdiction, the Committee's decision, and the orders it made would be a nullity.

[7] Second, if NZLS does have jurisdiction, the principle of double jeopardy precluded NZLS from exercising its statutory functions to regulate Mr TB's conduct because AMINZ was also exercising its disciplinary functions.

[8] If the principle were to apply, the determination that there was unsatisfactory conduct on Mr TB's part could be reversed, or confirmed. If the latter, the orders made by the Committee could be reversed, modified or confirmed.

Did NZLS have jurisdiction to consider and determine HN's complaint about Mr TB?

[9] The Standards Committee considered it had jurisdiction over the complaint pursuant to the Lawyers and Conveyancers Act 2006 (the Act) on the basis set out in the decision.

[10] The nub of Mr TB's argument is that he was not appointed as an arbitrator because he was a lawyer; he was appointed because of his abilities as an arbitrator. It is implicit in that argument that the two regimes, NZLS and AMINZ, are not only entirely independent of one another, but mutually exclusive.

[11] It is implicit in that line of argument that lawyers acting as arbitrators could choose to contract out of the Act's provisions, some of which are mandatory, by voluntarily subscribing to a private body such as AMINZ. Although such an option could well be a lawyer's preference, from a consumer perspective the logic is unappealing.

[12] The Act prescribes NZLS' regulatory functions.¹ Those include controlling and regulating the practice by barristers of the profession of law; upholding the fundamental obligations imposed on lawyers who provide regulated services; and monitoring and enforcing the provisions of the Act, and any regulations and rules made under it, that relate to the regulation of lawyers.

[13] Mr TB was a barrister, and therefore a lawyer as defined by the Act, when he was appointed as an arbitrator.² Arbitration services, and any work that is incidental to

¹ Section 65.

² Section 6.

arbitration services, fall within the definition of legal work under the Act. The term “arbitration services” is not defined by the Act, nor is the decision-making aspect of an arbitration process singled out as excluded by the Act.

[14] Legal services means services that a person provides by carrying out legal work for any other person. There is no compelling logical basis on which to exclude the decision-making aspect of the services provided by a lawyer as arbitrator from the ambit of legal services which engage the protective mechanisms of the Act. By providing arbitration services for HN and KW, and by doing work incidental to that, the legal work Mr TB did, in the course of his appointment as an arbitrator, falls logically within the definition of legal services, and is regulated under the Act.

[15] That conclusion is reinforced by one particular decision of this Office, LCRO 191/2015, in which the LCRO exercised jurisdiction over an arbitrator. While that decision is not binding on me, and jurisdiction was not specifically argued, I have found paragraphs [25]–[43] helpful in guiding the approach a LCRO might adopt in addressing complaints made about lawyers acting as arbitrators.

[16] I conclude that arbitration services include the decision-making aspect of the service a lawyer provides, and the lawyer’s conduct in the course of providing arbitration services falls within the scope of the Act’s disciplinary mechanisms. However, the Act is not to be used as a means to challenge an arbitrator’s award. Committees and this Office are confined to considering lawyers’ conduct, service and fees in the context of professional standards.

[17] In my view the Committee had, and this Office has, jurisdiction to exercise its statutory functions in considering and determining HN’s complaint.

Should the principle of double jeopardy be applied?

[18] The first aspect to consider is whether the delay of five years between the arbitration hearing and the delivery of Mr TB’s award is conduct that calls for a disciplinary response under the Act. Mr TB accepts the delay was unacceptable. It was simply a product of pressure of work.

[19] There is no reason to take a different view to the Committee. A five-year delay was unsatisfactory. Delay of five years in Mr TB providing arbitration services to HN falls within the definitions of unsatisfactory conduct in ss 12(a), (b) and (c) of the Act. The determination of unsatisfactory conduct is confirmed.

Orders

[20] The Committee imposed a censure of Mr TB, and made the following orders:³

- a. Mr TB is to cancel the fees rendered in relation to his arbitral services, and refund the sum of \$10,033.74 to HN, pursuant to ss 156(1)(f) and 156(1)(g) of the LCA;
- b. Mr TB is to pay the sum of \$5,941.00 to HN as compensation for the costs incurred in pursuing the award, pursuant to s 156(1)(d) of the LCA;
- c. Mr TB is to pay the sum of \$6,341.00 to HN as compensation for the costs and expenses incurred in relation to the complaint, pursuant to s 156(1)(d) of the LCA;
- d. Mr TB is to formally apologise to HN, pursuant to s 156(1)(c) of the LCA;
- e. Mr TB is to pay a fine of \$7,500 to the New Zealand Law Society, pursuant to s 156(1)(i) of the LCA; and
- f. Mr TB is to pay the sum of \$1,000 to the New Zealand Law Society in respect of the costs and expenses of and incidental to the inquiry, pursuant to s 156(1)(n) of the LCA.

AMINZ Orders

[21] Mr TB has also been penalised by AMINZ pursuant to its rules. The AMINZ Tribunal imposed a censure, fine and costs. At or shortly after the AMINZ disciplinary hearing, Mr TB resigned from membership, and therefore could not be suspended or expelled. The timing of his resignation is noted, and no adverse inference is drawn from that. AMINZ also published its decision to its members. Mr TB's evidence at the review hearing was that news of the AMINZ decision regarding his delays had become public knowledge, although the decision itself was only available to AMINZ members. Publication in that context related only to duties AMINZ owed to its members and the wider profession of arbitrators.

[22] At paragraph [74] of its decision the AMINZ Tribunal recognised a balance between the need for AMINZ members, and the public they serve, to be aware of the outcome of its disciplinary processes, so that they would be educated as to the consequences of failure to comply with AMINZ ethical rules, and able to guide users on making an informed choice of arbitrator. AMINZ noted Mr TB's interests in having his reputation as an arbitrator and in other fields of practice protected, and that Mr TB's litigation practice "may well be harmed by publication".

[23] AMINZ convened a second hearing, and then ordered publication in its online newsletter to members, and through its website to current members, that is, not to the

³ Standards Committee decision (1 March 2016) at [23](a)–(f).

public at large. The Tribunal did not accept that publication in full would be punitive, but rather wanted to ensure that its disciplinary processes were open and transparent, at least in so far as its members are concerned. The Tribunal considered publication was essential because of Mr TB's past history of an earlier delay, which was dealt with leniently, the "sheer scope of the delay and the number of unmet promises", and the prospect that AMINZ members might find out from a release by the NZLS that Mr TB had failed in his duties as an arbitrator.

[24] AMINZ publication was not concerned with the public interest more broadly, but Mr TB's name was published to AMINZ members consequent on the outcome of, and orders made in, its disciplinary process.

[25] Although I do not consider this Office is bound to adapt its decisions to take into account AMINZ decision or orders, the circumstances are such that it would be unfair to Mr TB to disregard them completely.

Censure

[26] A censure is a rebuke of a professional person for conduct that falls below a proper professional standard. It reflects the profession's and the public's opprobrium and is a blemish on the professional record of a lawyer held by NZLS pursuant to the Act.

[27] While protesting the jurisdiction of the NZLS, Mr TB recognises that his conduct was unsatisfactory.

[28] The Committee considered a censure was an appropriate response in the circumstances.

[29] The purposes of the Act include maintaining public confidence in the provision of legal services, protecting consumers and recognising the status of legal profession. A lawyer has an obligation to act in a timely manner consistent with the terms of the retainer. The terms of the arbitration agreement promised delivery of the decision to HN and KW within 40 days. Promises of revised delivery dates were not met.

[30] Independently of any censure AMINZ imposed, it is appropriate to impose a censure which reflects opprobrium on the part of the legal profession and public for delay and unmet promises.

[31] The censure pursuant to s 156(1)(b) of the Act is confirmed.

Apology

[32] Mr TB was directed to formally apologise to HN. As I understand the position, Mr TB apologised to the parties when he delivered his award. That was entirely proper in the circumstances. I can see no purpose in him being ordered to formally apologise again, particularly at this late stage. Mr TB is of course free to apologise if he wants to, again.

[33] The order pursuant to s 156(1)(c) that Mr TB apologise is reversed.

Fine

[34] The Committee ordered Mr TB to pay a fine of \$7,500 to the NZLS.

[35] The maximum fine pursuant to the Act is \$15,000.

[36] The AMINZ Tribunal ordered Mr TB to pay a fine of \$7,000, where the maximum permitted fine is \$10,000.

[37] In both cases the fine goes to the body exercising jurisdiction.

[38] A fine is a punishment.

[39] The AMINZ decision notes that the fine as imposed was intended to cover the whole of the default set out in its decision, which included the delay and the unfulfilled promises of earlier delivery.

[40] Those were essentially the same concerns that were reflected by the Committee in its decision.

[41] There is nothing objectionable in the Committee having imposed a fine as a penalty in favour of the professional body that regulates lawyers. The calculation of a fine is always a difficult exercise. It appears the Committee and the AMINZ Tribunal each independently considered that a fine of between \$7,000 and \$7,500 fairly reflected the nature and seriousness of the conduct.

[42] It is important to note that Mr TB does not take issue with the AMINZ decision. If he did, his plea for a reduction in the fine to go to the NZLS may well have been greeted with less enthusiasm. However, Mr TB says he has paid everything he owes AMINZ including the \$7,000 fine.

[43] Fairness is an essential aspect of natural justice, and is fundamental to the exercise of discretion under the Act. Viewed in totality, Mr TB is facing a total fine of

\$14,500. That amount is only \$500 short of the maximum that could be imposed pursuant to the Act. Although Mr TB's conduct was thoroughly unacceptable, it is a long way short of the type of conduct that might attract the maximum fine. Overall, a fine of \$14,500 does not fairly reflect the nature and seriousness of the conduct.

[44] In circumstances where Mr TB has already paid a fine of \$7,000 to AMINZ, the fine pursuant to s 156(1)(i) of the Act is reduced to \$500. Mr TB can pay that amount to the NZLS within 28 days of the date of this decision.

Cancellation of Fees and Refund

[45] Mr TB was ordered to cancel all of his fees in relation to the arbitral services he provided to HN, and refund \$10,033.74 to that company. The cancellation and refund do not apply to KW, which was not a party to the complaint.

[46] Mr TB says that he did not charge any fee for the work he did after the hearing in reaching his decision and writing his award.

[47] Mr TB was not responsible for any delay of any significance before the arbitral hearing. Orders for cancellation of fees made pursuant to s 156(1)(f) must relate to the work that has been done, and that is the subject of the proceedings before the Committee. Mr TB did not charge for the work he did after the arbitration hearing. The work done before the delay occurred, and for which Mr TB has been paid, was not the subject of proceedings before the Committee. There was nothing wrong with that work. Mr TB's fees for the work he did that was not the subject of the complaint cannot be cancelled by an order made under s 156(1)(f). The order to cancel fees is reversed.

[48] As the refund was to give effect to the order made under s 156(1)(f), that order is also reversed.

[49] The orders that Mr TB cancel his fees and refund \$10,033.74 to (HN) are both reversed.

Compensation

[50] Mr TB was ordered to pay compensation to HN under two headings. First, the costs to HN of pursuing the award after the arbitration hearing.

[51] Second, for the costs and expenses that HN incurred in relation to the complaint.

[52] HN should not have had to pay any costs for pursuing the award. It should have been delivered in 40 days. It was not. Mr TB is responsible for that delay. It appears that (HN) has suffered loss by reason of Mr TB's delay. Mr TB should compensate (HN) for the costs of pursuing the award. It is assumed that the whole of the \$5,941 is related solely to the legal costs HN incurred pursuing the award. That being the case, Mr TB is ordered to pay \$5,941 compensation to HN pursuant to s 156(1)(d) of the Act.

[53] However, the position on counsel's costs in the complaint and review process is different. Parties to complaint and review processes are generally expected to bear their own costs. The sound policy reason that supports that position is that lawyers should not benefit from the disciplinary process other than in very unusual circumstances. No such circumstances exist in the present matter.

[54] The order that Mr TB pay HN compensation of \$6,341 is reversed. Mr TB is ordered to pay \$5,941 compensation to HN pursuant to s 156(1)(d) of the Act.

Costs

[55] Mr TB was ordered to pay \$1,000 in costs to the NZLS in respect of the costs and expenses incidental to the inquiry into his conduct.

[56] There is no reason to reverse that order. It is confirmed.

Costs of review

[57] Section 210 of the Act provides the LCRO with discretion to order costs on review. The LCRO's Costs Orders Guidelines provide for an unsuccessful lawyer to pay costs of \$1,200 for a straightforward review where the lawyer has requested that he attend a hearing in person.

[58] Mr TB is therefore ordered to pay costs on review of \$1,200.

Summary

[59] The Committee's determination that there has been unsatisfactory conduct pursuant to ss 12(a), (b) and (c) of the Act is confirmed.

[60] Mr TB is censured and ordered to:

- (a) Pay compensation to HN of \$5,941 for its costs incurred in pursuing the award.
- (b) Pay a fine of \$500 to the NZLS.
- (c) Pay costs to the NZLS of \$1,000.
- (d) Pay costs on review of \$1,200.

Publication

[61] A LCRO may direct such publication of decisions as the LCRO considers necessary or desirable in the public interest.

[62] I am conscious that there is a risk in publication of Mr TB's name because publication does raise issues of double jeopardy, given evidence that news of his conduct has spread beyond AMINZ members.

[63] It is also relevant that publication is a protection for the public.

[64] AMINZ would have suspended Mr TB in any event. Given its interests in protecting its brand, it seems unlikely AMINZ would grant membership status again without Mr TB providing some kind of guarantees around availability and timeliness.

[65] Of course Mr TB could provide arbitration services without being a member of AMINZ or a lawyer.

[66] However, Mr TB has said he will not provide arbitration services at all for a fixed period. His undertaking in that regard is relied upon.

[67] Mr TB, it appears, has ample other work to consume his time, and there is no suggestion of any other conduct on his part outside his arbitration practice from which the public should be protected.

[68] In the circumstances, this decision will be published in the usual way, with identifying features of all parties removed.

Decision

[69] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination that there has been unsatisfactory conduct on Mr TB's behalf is confirmed.

[70] Pursuant to s 211(1)(a) and (b) and 156(1) the orders made by the Committee are confirmed, modified and reversed so that Mr TB is censured and, within 28 days of the date of this decision, ordered to:

- (a) Pay compensation to HN of \$5,941 for its costs incurred in pursuing the award.
- (b) Pay a fine of \$500 to the NZLS.
- (c) Pay costs to the NZLS of \$1,000.

[71] Pursuant to s 210 Mr TB is ordered to pay costs on review of \$1,200 within 28 days of the date of this decision.

DATED this 12TH day of June 2017

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 TB as the Applicant
HN Ltd as the Respondent
Ms K as the Representative for the Applicant
Mr R as the Representative for the Respondent
[city] Standards Committee 1
New Zealand Law Society