

LCRO 207/2016

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

YN

Applicant

AND

NEW ZEALAND POLICE

Respondents

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

DECISION

Introduction

[1] Ms YN has applied for a review of a decision by the Standards Committee which found that her part in a breach of security at the District Court cells was unsatisfactory conduct pursuant to s 12(b) of the Lawyers and Conveyancers Act 2006 (the Act).

Background

[2] On 4 February 2016 Ms YN represented Mr DL in a criminal matter. Mr DL was sentenced to a term of imprisonment, and held as a prisoner in the Court cells pending transfer.

[3] Ms YN and Mrs DL went to the cells at the same time. As well as being Mr DL's mother, Mrs DL was an employee of the Department of Corrections (Corrections), and known as such by Ms YN. Mrs DL was off duty at the time, and not in uniform.

However, given her role in Corrections, she was concerned about her son's safety, and wanted to speak to a colleague about Mr DL being segregated from other prisoners. She explained this to Ms YN before they reached the first of several security measures that are in place to restrict comings from and goings to the cells area where prisoners are held, and the interview rooms used by authorised visitors are located.

[4] The first security measure is a physical barrier created by a high wire fence, the entrance to which is a gate with a digital lock. That gate and fence regulate access between the door to the cells area and public car park area.

[5] Although on Ms YN's evidence each of them could have gone through independently, she and Mrs DL passed through the security gate at the same time.

[6] The next physical barrier is a locked external door that leads to a small foyer. A push-button buzzer is provided to enable anyone who has got as far as the outside of the external door to make contact with the police custody officer.

[7] Having passed through the security gate at more or less the same time, Ms YN and Mrs DL arrived at the external door at the same time. On Ms YN's evidence each of them could have gone through that door independently. That is not what had happened, and it is not helpful to speculate whether or not Mrs DL would have been admitted if she had not been with Ms YN.

[8] The buzzer button was pushed, a conversation with the custody officer followed. There is a dispute over who said what to the custody officer. Whatever was said, the outcome was that Ms YN passed through the external door and into the foyer with Mrs DL in her wake.

[9] The foyer is small, with several doors opening to it: the external door, the door to the cells area and the doors to the interview rooms. The interview rooms are also small, perhaps just big enough for two people to sit on the visitor side.

[10] Neither visitor was wearing any kind of uniform. Neither visitor was displaying any form of identification. Neither visitor was asked by the custody officer to produce evidence of identity before being admitted to the foyer.

[11] The custody officer believed from the exchange she had with the two visitors that Mrs DL was a probation officer. Probation officers, it seems, do not wear uniforms, although on-duty prison officers do. On Ms YN's account she introduced herself as a

lawyer and Mrs DL as a prison officer. Mrs DL says she said she was a corrections officer.

[12] Neither visitor identified Mrs DL as the mother of a prisoner being held in the cells.

[13] The custody officer locked the door between the foyer and the cells, and went to the interview room. The interview room Ms YN went into has a door between it and the foyer, and is divided in two by security glass which separates the visitor part from the prisoner part. The glass is not soundproof.

[14] Ms YN seated herself in the interview room, and Mrs DL remained standing in the interview room doorway chatting with her. Ms YN asked the custody officer if she could see Mr DL. Mrs DL asked the custody officer if she could see her colleague, another member of Corrections staff. The custody officer left and attended to both of those requests.

[15] A Corrections staff member ushered Mr DL to the interview room and left him there. Mrs DL spoke briefly to her son before Ms YN pushed Mrs DL out into the foyer, and pulled the interview room door closed with Mrs DL on the outside.

[16] Shortly afterwards, Mrs DL's colleague told the custody officer that Mrs DL was Mr DL's mother. The police officer completed a written report in relation to the incident the next day. Shortly after, police laid a complaint about Ms YN's part in events to the New Zealand Law Society Lawyers Complaints Service (Complaints Service).

Complaint

[17] Police say Ms YN entered the cells area at about 10.40 am and asked to see her client Mr DL. They say she was accompanied by a female, and that Ms YN represented to the police custody officer that female was Mr DL's probation officer. Ms YN is said to have asked for the female to accompany her to the interview with Mr DL. Police granted permission and both visitors were, together, admitted to see Mr DL.

[18] Police say Ms YN was in the interview room for approximately 19 minutes and the other female for approximately eight minutes.

[19] During or shortly after the visit in question police say it came to the custody officer's attention that the person she thought was a probation officer was in fact Mr DL's mother, and not a probation officer at all.

[20] Police say they made enquiries which shed no light on "the misrepresentation by Ms YN", such that her conduct might be explained or exonerated.

[21] Police say they are concerned that the dishonest and unprofessional conduct they describe falls short of the standards required of lawyers, and consider the matter is a serious breach that warrants in disciplinary action.

Ms YN's reply

[22] Ms YN provided a detailed response in which she disputed much of what was in the complaint. Ms YN says she has worked in the [Town] Court for over 20 years. She says she had known Mrs DL as a prison officer for several years, and that Mrs DL is familiar with all the access points to and from the Court cells area. Ms YN says that after Mr DL's hearing she went to see her client, and it was entirely coincidental that her visit occurred at the same time as Mrs DL went to the cells area.

[23] Ms YN says Mrs DL told her she wanted to arrange for her son to be segregated, and she was going to speak with a colleague about that.

[24] Ms YN says they walked together to the cell area. She says she introduced Mrs DL to the custody officer as a prison officer, and was corrected by Mrs DL saying she was a Corrections officer. She says she knows she would not have introduced Mrs DL as a probation officer and says it is "completely absurd to say I would have introduced her to anyone in her place of work as something she's not".

[25] Ms YN says the door was opened, she and Mrs DL entered the foyer and the custody officer "stuck her head through the door" to find out who the visitor wanted to see, as is customary. Ms YN told the custody officer that she wanted to see her client. Mrs DL told the custody officer she wanted to see her work colleague, and while she waited, stood in the doorway to the interview room talking to Ms YN.

[26] The custody officer left, Mr DL was brought to the interview room at 10.46 am, and he was locked in.

[27] Ms YN denies having asked if Mrs DL could accompany her to her client's interview, denies permission was granted for her and Mrs DL together to see Mr DL

and, relying on surveillance photographs, disputes the timing alleged by police. She notes that her client was placed in the interview room at 10.46 am, and that it was at that point that Mrs DL spoke briefly to him, before Ms YN was able to push Mrs DL out and shut the door. She says there was a 22 second window during which Mrs DL spoke briefly to her son. Mrs DL's statement confirms that, and it is consistent with the security footage.

[28] Ms YN says she did not deliberately allow Mrs DL access to the cells area. Mrs DL had her own access in her capacity as a Corrections officer. She would not have mistakenly introduced Mrs DL as a probation officer, when she knows perfectly well that she was, and is, a prison officer.

[29] Ms YN did not say she had told the custody officer Mrs DL was the prisoner's mother, and acknowledged she had been in the interview room when Mrs DL had spoken to her son.

Committee's decision

[30] The Committee's view was that Ms YN's conduct was unsatisfactory because she:

- (a) Knew Mrs DL was Mr DL's mother.
- (b) Was aware that prisoners' family members are excluded from contact with prisoners.
- (c) Facilitated Mrs DL's entry to the cells and her meeting with Mr DL.

[31] The Committee considered Ms YN had deliberately misled police, and her lack of candour was inconsistent with her obligation to conduct her dealings with police with integrity. The Committee found that Ms YN had knowingly facilitated a prohibited meeting between Mrs and Mr DL.

[32] The Committee imposed a fine of \$5,000 on the basis that Ms YN's conduct was serious, reflected badly on the profession and potentially strained relations between criminal lawyers and police. Ms YN was also ordered to apologise to police and pay costs of \$500 to the Complaints Service.

Application for review

[33] Ms YN applied for a review on the grounds that the Committee had made factual errors and its reasoning was flawed. She alleged conflict of interest on the part of a Committee member. Ms YN says she did not explain her intentions because the Committee did not ask her to. Ms YN denies misrepresenting the facts, and acting in concert with Mrs DL. Ms YN says Mrs DL was acting according to her own agenda. Ms YN denies any wrongdoing.

Review hearing

[34] Both parties attended a review hearing in [Town] on 25 July 2017. Ms YN was represented by Mr TH. Mr HN appeared for police.

[35] After the review hearing I visited the cells area in the absence of both parties.

Nature and scope of review

[36] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:¹

... 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.

[37] More recently, the High Court has described a review by this Office in the following way:²

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

¹ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

² *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

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.

[38] 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.

Review issue

[39] The overarching issue on review is whether there is good reason to form a different view to that formed by the Committee.

Discussion

[40] Assisting in a deliberate breach of court security is a very serious allegation for a lawyer to face. The more serious the allegation, the higher the standard of proof that must be satisfied before an adverse finding can be made.

[41] At its heart, the complaint by police is that Ms YN's conduct was lacking in integrity; police allege she was deliberately dishonest. As the authors of *Ethics, Professional Responsibility and the Lawyer* say:³

Actions that reflect on the practitioner's integrity will usually amount to misconduct.... If it can be shown that a practitioner has intentionally misled ... a third party, this is likely to be misconduct.

[42] Standards Committees and this Office lack jurisdiction over misconduct. Misconduct is a matter for the New Zealand Lawyers and Conveyancers Disciplinary Tribunal, although a lack of integrity could fall within the definition of unsatisfactory conduct. Committees and this Office have jurisdiction over unsatisfactory conduct.

[43] When she was acting in a professional capacity, rule 12 of the Lawyers Conduct and Client Care Rules⁴ required Ms YN to conduct her dealings with others, including police, with integrity, respect and courtesy.

³ Duncan Webb, Kathryn Dalziel, Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at 112.

[44] The position taken by police is that, knowing Mrs DL was Mr DL's mother, Ms YN misled the custody officer into allowing her in to the secure area by saying she was a probation officer.

[45] Ms YN's evidence at the review hearing was that she was alert to the fact that Mrs DL was her client's mother, but she was focused on her own business, namely meeting with her client. She did not turn her mind to whether there was any difficulty in Mrs DL being where she was, or doing what she had said she intended to do. Mrs DL had told Ms YN that she wanted to speak to one of her colleagues. The point Ms YN makes is that Mrs DL could have got to where she wanted to be, and done what she wanted to do, without any assistance at all from Ms YN.

[46] The brief communication between mother and son in the interview room was concluded by Ms YN excluding Mrs DL from the interview room almost immediately. The window of 22 seconds is supported by the security footage. That is consistent with the amount of time it would have taken for Ms YN to register Mr DL's arrival, get up, push Mrs DL out of the doorway, and close the door to exclude her. No professional standards issue arises from that conduct on Ms YN's part.

[47] The more difficult issue relates to how Mrs DL came to be in a position to speak to her son. There is no dispute that Ms YN knew Mrs DL was her client's mother and was not on duty.

[48] There is also no dispute that Ms YN did not say to the custody officer that Mrs DL was Mr DL's mother. If she was going to say anything, it is curious that she did not mention that relationship. Instead, on her own account, she described Mrs DL with reference to her employment status, even though, as Mrs DL was off duty, she presumably had no business being in the secure area.

[49] Ms YN says she was just being polite and courteous. In that sense she was facilitating. She was facilitating communication between the custody officer and Mrs DL, rather than facilitating a mother's access to her prisoner son, in the reprehensible sense contended for by the police, and accepted by the Committee.

[50] Ms YN did not have to say anything, but she did. She said at the review hearing that if she found herself in a similar situation again she would not be in such a rush to be courteous.

⁴ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[51] As far as Ms YN knew, Mrs DL wanted to go to the cells area to see her colleague, another Corrections officer. Assuming, as appears to be the case, that Mrs DL knew the number, she could quite easily have got through the gate, passing the first level of security, without any assistance from Ms YN. That done, Mrs DL could have pressed the buzzer herself. She could have attempted to negotiate her way in with the custody officer. It is not helpful to speculate whether or not she would have met with success.

[52] The point is that it was not part of Ms YN's role to enforce security at the cells. The custody officer's statement accepts deficiencies in carrying out that role, but attributes responsibility to Ms YN on the basis that she deliberately misled the custody officer, and the custody officer believed her. Ms YN says that is not correct.

[53] The burden of proof in disciplinary proceedings is the balance of probability.

[54] Ms YN's explanation for her conduct is that she was concentrating on her own job, not thinking about what Mrs DL might have in mind, and was being helpful.

[55] Ms YN has been doing the same job for over 20 years. While that could increase the risk of complacency in professionalism, it could just as easily increase the likelihood that Ms YN makes a habit of being courteous, particularly to police.

[56] Courtesy is essential to the development and maintenance of the relationships that Ms YN's everyday work relies on. *Ziems v Prothonotary of the Supreme Court of NSW*⁵, cited in *Auckland Standards Committee no.1 v Murray*⁶ explains:

... a barrister is more than [her] client's confidant, adviser and advocate, and must therefore possess more than honesty, learning and forensic ability. [She] is, by virtue of a long tradition, in a relationship of intimate collaboration with the judges, as well as with [her] fellow-members of the Bar, in the high task of endeavouring to make successful the service of the law to the community. That is a delicate relationship, and it carries exceptional privileges and exceptional obligations. If a barrister is found to be, for any reason, an unsuitable person to share in the enjoyment of those privileges and in the effective discharge of those responsibilities, [she] is not a fit and proper person to remain at the Bar.

Yet it cannot be that every proof which [she] may give of human frailty so disqualifies [her]. The ends which [she] has to serve are lofty indeed, but it is with [people] and not with paragons that [she] is required to pursue them. It is not difficult to see in some forms of conduct, or in convictions of some kinds of offences, instant demonstration of unfitness for the Bar. Conduct may show a defect of character incompatible with membership of a self-respecting profession; or, short of that, it may show unfitness to be joined with the Bench

⁵ *Ziems v Prothonotary of the Supreme Court of New South Wales* [1957] HCA 46; (1957) 97 CLR 279 at 298.

⁶ *Auckland Standards Committee No.1 v Murray* [2014] NZLCDT 88 (16 December 2014).

and the Bar in the daily co-operation which the satisfactory working of the courts demands. A conviction may of its own force carry such a stigma that judges and members of the profession may be expected to find it too much for their self-respect to share with the person convicted the kind and degree of association which membership of the Bar entails. But it will be generally agreed that there are many kinds of conduct deserving of disapproval, and many kinds of convictions of breaches of the law, which do not spell unfitness for the Bar; and to draw the dividing line is by no means always an easy task.

[57] None of the people involved in these events is expected to be a paragon. Durable professional relationships, based on a level of trust between lawyers and police, are essential to the working of the courts. Beyond speculation, the only evidence of Ms YN's intentions comes from her. There is no rational explanation for deliberately putting her relationships with police at risk. In *Auckland Standards Committee v Murray*, Ms Murray's conduct was incompatible with her continued membership of the profession. Unlike Ms Murray, who was convicted of a criminal offence relating to her having given restricted materials to a prisoner that subsequently resulted in her being struck off, Ms YN had much to lose and apparently nothing to gain from her client and his mother being in the same place at the same time.

[58] There is no evidence of Ms YN having been charged with any offence arising from her part in there being communication between Mrs DL and her son after he had been sentenced.

[59] On balance, I consider it is more likely that Ms YN acted out of courtesy and inadvertency, than that she deliberately assisted Mrs DL gaining access to the cells so she could see her son. That view is reinforced by Ms YN having taken immediate steps to exclude Mrs DL from the interview room when Mr DL arrived.

[60] Ms YN's conduct alone does not demonstrate unfitness for the bar, or show a defect of character incompatible with membership of a self-respecting profession. If dishonest intention is not assumed, as it is by police, the evidence does not prove any defect of character on Ms YN's part that suggests she may be unfit to join in the daily co-operation which the satisfactory working of the courts demands.

[61] Given the serious nature of the allegation, the evidence does not satisfy the high standard of proof required for an adverse finding to be made against Ms YN. The evidence is not such that the matter should properly be considered by the Tribunal. In the circumstances, it is not necessary to consider any of the other matters raised, including Ms YN's concerns regarding bias on the part of a member of the Committee. Further action on the complaint is not necessary or appropriate.

Decision

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

DATED this 2nd day of August 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:

Ms YN as the Applicant
Mr TH as the Applicant's Representative
Mr WN as the Respondent's Representative
[Area] Standards Committee
New Zealand Law Society