

LCRO 211/2015

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

SM

Applicant

AND

NH

Respondent

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

DECISION

Introduction

[1] Mr SM has applied for a review of a decision by the Area Standards Committee (the Committee) to take no further action in respect of his complaint concerning the conduct of Mr NH.

[2] The Committee's decision was based upon s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act), which allows a Standards Committee to take no further action on a complaint if it is considered unnecessary or inappropriate to do so.

Background

[3] Mr NH is a lawyer as defined by the Act. He has also been engaged to conduct independent reviews under the Accident Compensation Act 2001 (ACA) at various times.¹

[4] Prior to his appointment as an independent reviewer under the ACA, Mr NH was employed by ACC as a Clinical Advisor.² He was in that role in 2007.

2007 – the first ACC review

[5] During 2007 Mr SM applied to review a decision that ACC had made on 2 February 2007 (first ACC review) declining him cover. ACC's process at the time for dealing with review applications it received was to administratively process the review through its review unit, and to forward a review file to an independent reviewer.³ At that stage Mr NH was employed by ACC, so he had a role case managing the file for the first ACC review.

[6] In that role, Mr NH generated administrative correspondence and documentation in preparation for the first ACC review hearing. In amongst those materials Mr NH's name appears as the ACC contact person. ACC is referred to as an "interested party" for the review hearing, and Mr NH as the responsible ACC employee.⁴ His name also appears as the signatory to ACC correspondence sent in early 2007.

[7] There is no evidence of Mr NH having attended the first ACC review hearing. ACC's records indicate another ACC employee attended that hearing and made submissions.⁵ A decision on the first ACC review was issued on 22 May 2007. Mr NH was not the decision-maker. Mr SM did not succeed in obtaining cover under ACC.

2011 – The second ACC review

[8] Mr SM continued to have a relationship with ACC. On 14 December 2011 ACC declined a claim Mr SM had made for weekly compensation. He applied to review that decision (the second ACC review). ACC processed that in the usual way

¹ Letter NH to LCRO (2 November 2015).

² Above n 1.

³ See Letter Firm B to SM (16 April 2015); annexure M to Mr SM's application for review to the LCRO. The discussion in this decision under "Background" is taken largely from the Firm B letter.

⁴ Above n 3.

⁵ Above n 3.

and forwarded a review file to Firm A. Firm A is an agency that allocates reviews of determinations by ACC to independent reviewers.

[9] Firm A received the second ACC review in February 2012. Firm A randomly allocated the second ACC review file to an independent reviewer to conduct an ACC review hearing. By chance, that reviewer was Mr NH.

[10] Mr SM challenged Mr NH's jurisdiction to conduct the second ACC review, and says he referred him to the materials from the first ACC review bearing Mr NH's name.⁶

[11] The ACC review hearing took place on 2 May 2012, and Mr NH issued a decision on 9 May 2012 (the 2012 decision). Mr SM's challenge to Mr NH's jurisdiction is mentioned early in the 2012 decision. Mr NH recorded that he knew of no reason which would preclude him from hearing the second ACC review. Mr NH also recorded the following in the 2012 decision:⁷

I am entirely satisfied that I can bring an independent mind to this dispute, and I have no conflict of interest that I am aware of.

[12] Mr SM again did not succeed in obtaining ACC cover in the second ACC review.

[13] Mr SM raised concerns with ACC before, during and after the second ACC review about Mr NH's involvement in it and complained to the Minister responsible for ACC about Mr NH's involvement in the first and second ACC reviews. The Minister asked Firm B, which had replaced Firm A, to investigate those concerns and report to her (the Firm B report).⁸

[14] Firm B reviewed the available history of the first and second ACC reviews, focussing upon whether Mr NH complied with his statutory obligation to act independently when he heard and decided the second ACC review.

[15] Firm B noted that Mr NH's involvement in the first ACC review was limited and administrative only. Firm B acknowledged however that Mr NH's involvement in "issuing the letters in regards to the 2007 review ought to have been disclosed in 2012".

⁶ Evidence of SM at review hearing.

⁷ See annexure G to Mr SM's application for review to this Office.

⁸ Firm B replaced Firm A as the delegated authority to carry out ACC reviews.

[16] Firm B spoke to Mr NH as part of its investigation and he advised that at the time he heard the second ACC review, he had “no specific recollection of involvement in [the first ACC review]”. Firm B was unable to locate any other of Mr SM’s ACC files between the first and second ACC reviews in which Mr NH may have been involved.

[17] Firm B also acknowledged in its report that Mr SM’s concerns raised “a significant operational matter” which was capable of improvement. That comment appears to be directed towards Firm A/Firm B’s internal record-keeping systems, and the need for those to maintain clear and accessible records of individuals’ previous involvement in reviews so that Firm B could monitor reviewers’ involvement. That in turn would assist in ensuring claims were not allocated to a reviewer who had disclosed any previous involvement in a particular claim other than as a reviewer.⁹

[18] Finally, in its report to the Minister, Firm B expressed the view that “the statutory requirement for the reviewer to act independently when conducting [the second ACC review] has been adhered to”.

The complaint

[19] Mr SM complained to the Lawyers Complaints Service in a letter dated 22 August 2015.

[20] The substance of Mr SM’s complaint was that:

- Mr NH was involved in the first ACC review as a Clinical Advisor employed by ACC.
- He sent correspondence to Mr SM in that capacity in February 2007.
- By 2012 Mr NH was employed by Firm A as a reviewer.
- As a reviewer Mr NH was obliged to notify any conflicts of interest that may be present in cases in which he is carrying out a review hearing.
- As part of that, when appointed to conduct a review hearing Mr NH is obliged “to do due diligence and discover any previous involvement he

⁹ Pursuant to s 139 of the ACA, ACC has a statutory duty to ensure the independence of the reviewer appointed, and must not allocate a claim to a reviewer who discloses to the Corporation any previous involvement in the claim other than as a reviewer.

might have had”, to notify them and then withdraw from hearing the case.

- Mr NH heard and decided a review in May 2012 in circumstances where he should have disclosed his earlier involvement in the first ACC review.
- In not doing so Mr NH has “perverted justice”.

[21] Mr SM asks that Mr NH be struck off, tried and imprisoned for perversion of justice and fraud for this conduct.

Standards Committee Process

[22] Mr SM’s complaint was assessed by the Lawyers Complaints Service’s Early Intervention Process. This process involves an initial assessment of the complaint by a legal standards officer to see whether any response might be required from the lawyer complained about. The process is designed to identify complaints in which there are no obvious professional conduct issues. Rather than delay matters by seeking a response, the complaint is put directly before a Standards Committee for it to make a determination. The legal standards officer does not provide a report or opinion; the matter is simply fast-tracked to a Standards Committee.

[23] For completeness I would add that if a Standards Committee takes a different view and concludes that a response is necessary, it would ask the lawyer complained about to provide a response. Mr NH was not asked to provide any response by the legal standards officer or the Standards Committee.

[24] The Committee considered Mr SM’s complaint and delivered its decision on 9 September 2015. The Committee noted the following:¹⁰

- The Firm B report found that Mr NH was not involved, other than administratively, in the first ACC review.
- The Firm B report concluded that “the statutory duty for the reviewer to act independently when conducting [the second ACC review] has been adhered to”.
- Mr NH has not breached his professional obligations.

¹⁰Standards Committee decision (9 September 2015) at [2]–[4].

[25] The Committee determined Mr SM's complaint on the basis that further action was not necessary or appropriate pursuant to s 138(2) of the Act.

[26] Mr SM disagreed with that determination and applied for a review.

Application for review

[27] Mr SM's application for review, dated 20 October 2015, relies on the following grounds:

- The Firm B report is not "evidence" upon which the Committee ought to have relied. It was completed by someone "with vested interest in hiding his employee's conspiracy to pervert justice".
- The Committee failed to consider other documents provided as part of Mr SM's complaint.¹¹
- The annexures clearly show Mr NH's involvement in both the first and second ACC reviews.

[28] Mr NH responded to the review application as follows:

- Although he processed Mr SM's first ACC review in 2007 as an ACC employee, he now has no recollection of doing so.
- He was appointed an ACC reviewer and presided over and made a decision in the second ACC review. Because a disclosure was not made by him at that time about his involvement in the first ACC review, he presumes that he had no recollection of it then either.
- As an ACC review officer he is not acting in his capacity as a legal practitioner.
- Mr SM challenged Mr NH's decision in the second ACC review and raised the issue of conflict of interest, but this was unsuccessful with the District Court Judge observing that such an issue ought to have been pursued by way of judicial review.

¹¹ Being the annexures to Mr SM's application for review to this Office.

Review Hearing

[29] Mr SM attended a review hearing in Auckland on 12 July 2016. Mr NH was not required to attend, and the review hearing proceeded in his absence.

Mr SM's submissions

[30] Mr SM repeated his concerns about a lack of integrity on Mr NH's part, and maintains his challenge to the independence of the Firm B report. He says the evidence shows that Mr NH was involved in the first ACC review in 2007, and the second ACC review in 2012, and the decision records that Mr NH did not disclose his involvement at that time.

[31] Mr SM says Mr NH knew he had worked for ACC and therefore must have known that there was a possibility of a conflict. He says Mr NH should have checked there was no conflict before he accepted the appointment to conduct an independent review under the ACA.

[32] From that basis Mr SM argues that Mr NH's failure to disclose his prior involvement is evidence that Mr NH lacked independence in carrying out his statutory role under the ACA. Mr SM believes a breach of statutory duty is a criminal offence, and says that commission of a criminal offence by a lawyer is a serious disciplinary matter. On that basis Mr SM considers Mr NH should face misconduct charges before the New Zealand Lawyers and Conveyancers Disciplinary Tribunal (the Tribunal).

Nature and Scope of Review by the LCRO

[33] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:¹²

... 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,

¹² *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

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.

[34] More recently, the High Court has described a review by this Office in the following way:¹³

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.

[35] 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.

Analysis of Review Grounds

[36] First, Mr SM objects to the Firm B report being relied upon as evidence by the Committee and in this process of review. This Office regulates the conduct of lawyers pursuant to the Act. It has no statutory jurisdiction under the legislation that governs ACC. As an inquiry has been carried out, and no comment adverse to Mr NH has been made, that is where, evidentially, the matter of Mr NH's independence sits. There is evidence of Mr SM having previously been advised that the process to query Mr NH's independence if he wishes to challenge the findings of the Firm B report is by judicial review to the High Court. That process is separate from the jurisdiction exercised by this Office under the Act which is considered in greater detail under the Analysis heading below.

[37] The second aspect of Mr SM's application is an objection to the Committee's process saying it failed to consider the annexures he had provided with his complaint.¹⁴ As Mr SM correctly says, the annexures clearly show Mr NH's involvement in both the first and second ACC reviews. However, the conclusion that Mr NH lacked independence in the second review does not flow logically from the fact that his name

¹³ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

¹⁴ Above n 11.

appears on materials associated with the first review. He could have been involved in the first ACC review and still be able to act independently in conducting the second ACC review. Non-disclosure does not lead inevitably to the conclusion that Mr NH was partisan. As Mr NH's involvement in the first review was predominantly administrative, given the passage of time, his memory lapse does not give rise to a professional standards issue in the circumstances described by Mr SM.

Analysis

[38] An ACC Reviewer is a statutory appointment. The role of an ACC Reviewer is that of a statutory decision-maker. ACC reviewers review ACC's decisions when challenge is brought by claimants, employers and self-employed persons.¹⁵ Mr NH says that a legal qualification is not a prerequisite for appointment as an ACC reviewer: not all reviewers are lawyers. That suggests that, when lawyers conduct review hearings as ACC Reviewers they are not providing legal services regulated under the Act. The Act defines regulated legal services and legal work broadly. None of the Act's definitions appear to readily apply to the role of statutory decision-makers carrying out ACC reviews.

[39] However, there are limited circumstances in which a lawyer who is not providing regulated services may still be subject to discipline under the Act. This category of conduct is defined in s 7 of the Act as misconduct. Relevantly that section provides:

7 Misconduct defined in relation to lawyer and incorporated law firm

- (1) In this Act, **misconduct**, in relation to a lawyer or an incorporated law firm,—
 ...
 (b) includes—
 ...
 (ii) conduct of the lawyer or incorporated law firm which is unconnected with the provision of regulated services by the lawyer or incorporated law firm but which would justify a finding that the lawyer or incorporated law firm is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer or an incorporated law firm.

[40] Decisions about and findings of misconduct can only be made by the Tribunal, following a referral there by either a Standards Committee or by this Office.¹⁶

¹⁵ Accident Compensation Act 2001, s 134.

¹⁶ Lawyers and Conveyancers Act 2006, s 152(2).

[41] The approach on review is to consider whether the actions of Mr NH could engage the misconduct provision referred to above. If so, then I may either frame and lay appropriate charges before the Tribunal, or direct a Standards Committee to do so.¹⁷ Section 7(1)(b)(ii) regulates the personal conduct of lawyers. It is generally engaged where there is “moral obloquy” by a lawyer that renders the lawyer not a fit and proper person to be in practice as a lawyer.¹⁸

[42] It is not my function to make a finding that there has been misconduct. I am only required to conclude that there is evidence to warrant consideration by the Tribunal.

[43] Mr SM has alleged that Mr NH either failed to do due diligence at the time of the second ACC review to ascertain whether there were any potential conflicts of interest, or that Mr NH knew that he was conflicted when he heard and decided the second ACC Review.

[44] Mr NH has said that he now has no recollection of his involvement in the first ACC review, and he presumes that this was the position at the time he heard and decided the second ACC review, the implication being that if he had recalled it he would have disclosed it.

[45] Mr NH says he had no idea that the potential for conflict may have existed at the time that he heard and decided the second ACC review in 2012. Objectively he has nothing to gain from deliberately continuing to act as an ACC reviewer in the face of a conflict. There is good reason to accept Mr NH’s evidence on the point, and no good reason not to.

[46] Mr SM argues that at the very least Mr NH ought to have done due diligence to ascertain whether he had had previous dealings with him whilst an employee of ACC. Even if there were merit in that submission, my view is that such due diligence would only have revealed his administrative involvement in the first ACC review, over five years previously. It is far from clear that disclosure of his limited involvement in the first ACC review leads logically to the conclusion that he lacked independence when conducting the second ACC review. Based on the evidence, rather than speculation and inference, the logic does not stretch that far. There is no evidence of conduct that could bring Mr NH before the Tribunal.

¹⁷ Section 212.

¹⁸ *Orlov v NZLCDT* [2014] NZHC 1987, [2015] 2 NZLR 606 at [106].

[47] None of Mr NH's conduct engages the misconduct provisions of the Act. Without such engagement, there is no basis for a disciplinary finding against him.

[48] For completeness I note that although the regulations require NZLS to notify a complaint to the practitioner concerned,¹⁹ Mr NH does not object to having missed the opportunity to comment at that early stage, and no substantive issue arises from that diversion from the usual process.

Decision

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

DATED this 20th day of July 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:

SM as the Applicant
NH as the Respondent
The Area Standards Committee
The New Zealand Law Society

¹⁹ Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008, reg 9(1)(c).