

CONCERNING

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

AND

CONCERNING

a determination of Auckland Standards Committee

BETWEEN

MRS MC

Applicant

AND

MR AD

Respondent

Background

[1] Mrs MC was made redundant by BAA in April 2002. She lodged a Statement of Problem with the Employment Relations Authority. The Authority found that Mrs MC had not made out a personal grievance.

[2] Mr AD is legal counsel for BAA.

[3] Mrs MC challenged the Authority's determination and sought a hearing de novo in the Employment Court. With regard to the particular issue with which this review is concerned, namely whether the issue of bullying was before the Authority, Judge Couch found at paragraph 38 of his Judgment:

that no action was commenced in the Authority or the Court in relation to a personal grievance that Mrs [MC]'s employment was affected to her disadvantage by bullying within the 3 year period after the grievance was raised. It follows therefore that the incorporation of a claim based on that personal grievance in the amended statement of claim was contrary to s114(6) and that the Court has no jurisdiction to determine it.

[4] Leave to appeal that Judgment to the Court of Appeal was declined.

The Standards Committee determination

[5] Mrs MC has applied for a review of the determination by the Standards Committee to take no further action in respect of her complaint against Mr AD. Mrs MC had lodged a complaint which raised 22 points. Three of these related to actions by Mr AD. They were as follows:-

- (i) that in responding on 4 June 2002 to a letter from Employment Dispute Services, Mr AD made no mention of an allegation of bullying being made outside the 90 day requirement;
- (ii) that in para 2(x) of the Statement of Reply dated 13 January 2003 Mr AD alleged that BAA issued a notice of redundancy on 14 March 2002; and
- (iii) that in the same Statement of Reply Mr AD made no mention of workplace bullying being raised outside the 90 day requirement.

[6] Mrs MC complaint is that Mr AD failed to acknowledge to the Court that the issue of bullying was before the Authority, leading to the finding that because bullying was not put before the Authority, the Court could not address this issue. She describes this as an abuse of process.

[7] The Committee noted that the conduct complained of occurred prior to 1 August 2008 and consequently the deliberations of the Standards Committee were governed by section 351 of the Lawyers and Conveyancers Act 2006. This section provides as follows:

If a lawyer ... is alleged to have been guilty, before the commencement of this section, of conduct in respect of which proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act 1982, a complaint about that conduct may be made, after the commencement of this section, to the complaints service established under section 121(1) by the New Zealand Law Society.

The Act commenced on 1 August 2008.

[8] The standards to be applied to a consideration of whether proceedings could have been commenced under the Law Practitioners Act 1982 were correctly identified by the Committee. The Committee determined that the conduct did not reach the relevant threshold and determined to take no further action in respect of the complaint.

The review

[9] Mrs MC applied for a review of that determination and an applicant only hearing was scheduled for 18 July 2012. As he is entitled to, Mr AD attended the hearing together with Mr AC as his support person. Mr AC had appeared as counsel for BAA on instructions from Mr AD in the various proceedings.

Preliminary matters

[10] Mrs MC requested permission to record the hearing. Section 206(1) of the Lawyers and Conveyancers Act 2006 provides that every review conducted under the Act is to be conducted in private. This Office records its hearings but requires to retain control over the dissemination of recordings of the hearings. I therefore declined Mrs MC's request to record the hearing. She may apply to this Office for a copy of the recording but will need to provide reasons in support of such an application. If a copy of the recording is provided to Mrs MA following her request, a copy will be made available to Mr AD.

[11] Mrs MC's application for review misstated the determination of the Standards Committee. In part 7 of her application she noted that the Standards Committee determination recorded that the conduct of Mr AD occurred prior to the commencement of the Lawyers and Conveyancers Act 2006 "and that section 351(1) of the Act precludes complaints about conduct that occurred before 1 August 2008."

[12] That is not a correct record of the Standards Committee determination. The determination noted as follows:

Section 351(1) of the Act precludes complaints about conduct that occurred before 1 August 2008 unless the alleged conduct is such that proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act 1982.

[13] Consequently, conduct prior to 1 August 2008 can be considered providing that proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act 1982.

[14] What was not recorded in the Standards Committee determination is that section 351(2)(b)(ii) provides that no person is entitled to make a complaint under the Act in respect of regulated services delivered more than six years before the commencement of the section ie, before 1 August 2002. This is of some relevance to the matters referred to by Mrs MC.

[15] In her application, Mrs MC refers to a memorandum filed by Mr AC dated 6 November 2006. That memorandum is dated 6 November 2008.

[16] Finally, in her review application, Mrs MC noted that in a letter dated 30 November 2010 Mr AC advised that he had at all times acted upon instructions from Mr AD. Mrs MC had filed an application for review of a determination by the Standards Committee in respect of a complaint by her against Mr AC, but she has since withdrawn that application. I perceive that Mrs MC may consider by reason of Mr AC's statement, that Mr AD was therefore responsible for all of Mr AC's conduct. That is not the case. In the same way as a solicitor should not accept the advice of a barrister uncritically¹, a barrister can not escape criticism on the basis that he acted on the instructions of his instructing solicitor. This statement is not intended in any way to constitute an adverse comment on Mr AC's conduct, but merely to reinforce the notion that it is Mr AD's conduct only, and not that of Mr AC, which is under review.

Scope of review

[17] In his response to this Office following receipt of the review application, Mr AD noted that:

the role of the LCRO is one of review and not rehearing – and the review is, therefore, limited to the original complaint filed and requires the applicant to demonstrate an error.

[18] The statement made by Mr AD that the review is limited to the original complaint filed is correct. However the latter part of that statement, namely that the applicant must demonstrate an error, is not.

[19] Section 203 of the Lawyers and Conveyancers Act provides that the LCRO may review all the aspects, or any of the aspects of any enquiry carried out by a Standards Committee in relation to the complaint. In addition, Winkelmann J in *Deliu v Hong* stated that:

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.²

[20] Consequently, it is open to me to review all matters relating to the complaint,

¹ *Ridehalgh v Horsefield* [1994] Ch 205, 307

² [2012] NZAR 209 (HC), paragraph 41.

the investigation and the Standards Committee determination.

The Issue

[21] Notwithstanding the observations above as to the extent of the review, the issue for consideration in this review is limited. Mrs MC asserts that Mr AD submitted to the Employment Court that the issue of bullying had not been raised before the Authority, and that therefore it was not appropriate for the Court to consider the issue of bullying. She alleges, that by reason of the submissions, Mr AD's conduct constituted an abuse of process. Perhaps more relevantly, if correct, it could be considered to be misleading the Court.

[22] In the first instance, the submissions referred to by Mrs MC were filed by Mr AC. There is no evidence as to what input Mr AD had in preparing these submissions and the comments made in [16] above are relevant in this regard. However, if I considered that was important, I could have sought information from both Mr AD and Mr AC. I have not done so for the reason that it is unnecessary.

[23] The issue raised by Mrs MC was fairly before the Court when it issued its Judgment. That is apparent from Judge Couch's judgement.

[24] Mrs MC sought leave to appeal to the Court of Appeal. That was declined. Mrs MC does not consider that the Employment Court was correct but clearly the Court of Appeal did not consider that her position had merit.

[25] It would be completely inappropriate for the Complaints Service or this Office to operate as a de facto appeal from the Employment Court. If Mrs MC's contention were correct, then the Employment Court would presumably have accepted her submissions and it, or the Court of Appeal, would have granted leave to appeal. Neither court accepted her submission. Consequently, there is no reason to consider that Mrs MC's continued assertions are correct.

[26] As a result, there are no grounds to consider that Mr AD's conduct constituted unsatisfactory conduct.

Decision

Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006, the determination of the Standards Committee is confirmed.

DATED this 31st day of July 2012

O W J 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:

MC as the Applicant
AD as the Respondent
The Auckland Standards Committee
The New Zealand Law Society