

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

OB

Applicant

AND

LC

Respondent

DECISION

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

Introduction

[1] Mr OB has applied for a review of a decision by the [Area] Standards Committee to take no further action in respect of his complaint concerning Mr LC's conduct because Mr OB did not have sufficient personal interest in the subject matter of the complaint.

Background

[2] Mr LC acted for G, a protected person.

[3] Ms B, who says she is a friend of G, instructed Mr K as her lawyer. It appears that Ms B wanted G to be able to smoke in a place where smoking was restricted or prohibited.

[4] Counsel, including Mr LC and Mr K, appeared before Judge I at a third judicial conference in the X Court on [date]. It appears Mr K was unable to explain Ms B's position to the Court to the satisfaction of Judge I. Matters went awry.

[5] Judge I wrote to the New Zealand Law Society (NZLS) recording his concerns about Mr K's conduct, and touching briefly on an exchange that had occurred between Mr LC and Mr K in Court. The Standards Committee that considered Judge I's concerns decided Mr K's conduct warranted a determination of unsatisfactory conduct. That determination was reversed on review, with Mr K being represented by Mr OB. Mr OB's complaint about Mr LC's conduct followed.

Complaint

[6] Mr OB's complaint about Mr LC refers to a transcript of the X Court hearing and suggests Mr K's conduct was entirely beyond reproach. The only attachment to Mr OB's complaint that progressed to the Committee in support of Mr OB's comments was an affidavit sworn by Ms B on 19 March 2014 in defence of Mr K.

[7] Ms B says she was seated at the back of the court in the public seating area during a judicial conference and observed the events that were to become the subject of Mr OB's complaint about Mr LC's conduct. Ms B says Mr LC began to speak during the hearing and Mr K asked him to stand up if he wanted to address the court. Ms B says Mr LC made "outlandish accusations" against Mr K which appear to have included Mr K being drunk or at least smelling of alcohol while he was in court.

[8] Mr LC says that as an officer of the court, he "felt entitled to take whatever steps are necessary to ensure that the Judiciary was kept safe", because Mr K had shouted at Judge I, failed to sit at appropriate times, and behaved disrespectfully and aggressively towards the Court and other counsel, himself included. Mr LC's view is that Mr K's conduct prevented the Court from functioning properly. He generally denies his conduct was improper, and considers his response to Mr K's conduct was appropriate.

[9] Mr LC attached a copy of a letter written by Judge I to NZLS and copied to him, in which there is no criticism of Mr LC. His Honour's view was that Mr LC's remonstrations with Mr K were proper from "counsel who wanted the court to be able to function in a manner that the issues could be explained and ruled upon". His Honour expressed the view that whatever had caused Mr K's behaviour should be addressed to enable him to properly fulfil his professional duties.

[10] Mr OB provided further submissions expressing his own views about how the complaint should be resolved.

[11] Mr LC provided a limited response.

Standards Committee decision

[12] The Committee considered the available materials, noted that Mr K was aware Mr OB had made a complaint and formed the view that that Mr OB lacked a sufficient personal interest in the subject matter of the complaint. In the circumstances, the Committee decided to take no action on the complaint pursuant to s 138(1)(e) of the Lawyers and Conveyancers Act 2006 (the Act).

Application for review

[13] Mr OB applied for a review on the grounds that the Committee:

- (a) breached its statutory duty to actually consider the complaint, *Deliu v Lawyers Complaints Service of the New Zealand Law Society* [2012] NZHC 2582 and/or breached natural justice in not giving any reasons as to the merits of the complaint;
- (b) acted unreasonably in allowing the respondent to escape any liability for his inarguable unprofessional behaviour;
- (c) took into account the irrelevant consideration of Mr K not making a complaint when the issue for it to determine was the respondent's alleged misconduct or unsatisfactory conduct, *Deliu v Hong* [2012] NZHC 158;
- (d) failed to take into account relevant considerations namely the evidence and/or actual facts in issue in the complaint and/or its own motion statutory power under s 130 of the Lawyers and Conveyancers Act 2006; and
- (e) the Lawyers Complaints Service wrongly withheld evidence from the Committee (which it thus failed to take into account).

[14] Mr OB would like the matter returned to a different Standards Committee for reconsideration, or for this Office to determine the complaint on the basis that Mr LC's conduct was unsatisfactory.

[15] Mr LC confirmed he did not wish to add to the materials he had provided to the Committee, except to the extent of any comments Judge I may provide.

Review on the papers

[16] Mr LC confirmed his agreement to the review being determined on the papers early on. Although Mr OB initially wished to be heard, on [date] he agreed to this review being dealt with on the papers. In the circumstances, this review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

[17] I record that having carefully read the complaint, the response to the complaint, the Committee's decision and the submissions filed, there are no additional issues or questions in my mind that necessitate any further submission from either party. On the basis of the information available I have concluded that the review can be adequately determined in the absence of the parties.

Recusal

[18] [text removed]. I am unable to identify any basis on which a fair minded lay observer might perceive a real possibility of bias that might lead me to decide any aspect of this review other than on its legal and factual merits.¹ As LCROs are not entitled to pick and choose their cases, and an LCRO has a statutory duty to conduct reviews I have determined this review on the basis that follows.

Nature and scope of review

[19] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:²

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

¹ *Saxmere Co Ltd v New Zealand Wool Board Disestablishment Co Ltd* [2009] NZSC 72, [2010] 1 NZLR 35.

² *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

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.

[20] More recently, the High Court has described a review by this Office in the following way:³

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.

Discussion

Review Grounds

One to four

[21] Review grounds one to four essentially constitute an objection to the Committee having formed the opinion that Mr OB lacked sufficient personal interest in the subject matter of the complaint and thus that it would take no further action on his complaint about Mr LC's conduct.

[22] Mr OB has not said what his personal interest in the subject matter of the complaint is. He is presumed to share the public's interest in having its confidence in the provision of legal services maintained, but Mr OB is not a consumer of legal services provided by Mr LC. He is a lawyer who, along with other lawyers, is presumed to consider that recognition of the status of the profession is important. Beyond the general interest Mr OB shares with other lawyers and the general public, no personal interest on his part is apparent. On that basis, the Committee's view on that point appears unobjectionable.

[23] There is no mention in the decision of the Committee considering that an own motion inquiry pursuant to s 130 of the Act might be warranted. However, this Office has no power to direct a Committee to commence an inquiry of its own motion, so any concern based on that consideration cannot be advanced on review.

Five

[24] The fifth review ground is that the Complaints Service withheld evidence, including the X Court's transcript, from the Committee. The key point to note in this

³ [Citation deleted].

respect is that the Committee was aware of the transcript and other materials, and the reasons why the transcript in particular might be considered confidential. The Committee exercised its discretion in respect of the transcript and whether inquiry was appropriate in the circumstances. It could not rationally be argued that the Complaints Service had the last word about whether the Committee might consider the transcript. The Committee could have reviewed it, and the other evidence, if it had considered Mr OB's complaint and the other materials disclosed evidence of any disciplinary issue that warranted further inquiry. For the reasons that follow, there is no reason to interfere with the exercise of that discretion.

Discussion

[25] The primary question on review is whether there is reliable evidence of conduct on the part of Mr LC that warrants a disciplinary response.

[26] In this case, the allegations against Mr LC are that he told Mr K "to sit like a dog", "extravagantly accuses [Mr K] of abusing the Judge", "falsely accuses [Mr K] of drinking", "with undue hyperbole accuses [Mr K] of appalling and disgusting behaviour" and "falsely accuses [Mr K] of an assault in the form of attempted punch". Mr OB's concern is particularly focussed on the allegations of drinking and seeking to punch Mr LC.

[27] Mr LC does not deny telling Mr K to sit. While Mr LC's comment may well have been firmly put, the first person that would have offended would have been Mr K. There is no evidence from him. Mr OB was not present at the time. His dog allegory, which, if true, could be offensive, is unpersuasive rhetoric.

[28] Mr LC believes he painted a reasonably accurate picture of Mr K's conduct in abusing Judge I. Judge I's account was not dissimilar. Mr K, who was also present at the time, has made no comment in support of Mr OB's complaint. With no support from Mr K, Mr OB's characterisation of Mr LC's comments as extravagant does not withstand scrutiny.

[29] Mr LC says, based on what he smelled, Mr K had been drinking. With no comment from Mr K, the accuracy of Mr LC's olfactory observations cannot be assessed on review. That said, there is nothing to indicate Mr LC's comment lacked good faith, or was not based on his honest belief at the time.

[30] There is no evidence of Mr K having denied that his conduct was appalling or disgusting, or that there was no basis for Mr LC's perception that he might be at physical risk. Mr K is a lawyer. He must be taken to understand how the system

works, including his obligation to cooperate with any disciplinary inquiry. Mr K has already been through that process. There is no good reason for this Office to seek his input to satisfy the evidential deficiencies in Mr OB's complaint, when Mr OB could have approached him directly to seek his support or he could have made his own complaint.

[31] It seems to me that Mr LC did what he considered professionally appropriate at the time. As Mr OB was not present at the time, and Mr K has not chosen to involve himself further in the disciplinary process, there is no reliable evidence that satisfies me that Mr LC's conduct fell below a proper standard. That is primarily because Mr OB lacks any personal interest in the subject matter of the complaint.

[32] In the circumstances, there was good reason for the Committee to conclude the complaint process as it did. The application for review does not disclose any evidence that might suggest further inquiry is necessary or appropriate. It follows that the decision is confirmed.

Decision

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

DATED this 9th day of January 2018

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:

OB as the Applicant
LC as the Respondent
MV as the Related Person
[Area] Standards Committee
The New Zealand Law Society