

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of [A South Island] Standards Committee

**BETWEEN**

**MS AX**

Applicant

**AND**

**MR ZM**

Respondent

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

**DECISION**

**Introduction**

[1] Mr ZM is an in-house lawyer working in Dunedin for [Organization A], which is a registered union. At the relevant time, Ms AX lived in the North Island and was a member of [Organization A]. Mr ZM provided Ms AX with legal advice as a result of her membership entitlements with [Organization A].

[2] The majority of the legal work Mr ZM did related to an employment dispute Ms AX had with her employer. During the course of her dispute, it emerged that Ms AX had tape recorded conversations with members of the employer's staff. When the employer became aware of the existence of the recordings, it wrote to her expressing its disappointment.

[3] In the course of taking instructions from Ms AX, Mr ZM became aware of the tape recordings and asked Ms AX to provide him with a copy. For a number of reasons Ms AX was reluctant to part with a copy of the tapes, although she offered alternative means by which he might listen to the tapes. Mr ZM and Ms AX were unable to reach agreement over how she would provide him with the content of the tapes. Mr ZM considered it necessary to access the material on the tapes and was concerned that

Ms AX appeared resistant to providing him with access. He took his concerns to [Organization A], and ultimately [Organization A] exercised its discretion to cease funding Ms AX's legal work. As a consequence, Mr ZM advised Ms AX that he was unable to continue acting for her.

[4] Ms AX wanted [Organization A] to continue funding her legal representation. She believed that Mr ZM had breached his professional obligations to her because he had some personal prejudice against her which was evidenced by him refusing to agree to her proposals regarding the tapes, losing his temper with her and making inappropriate comments. She also wanted a copy of her notes from Mr ZM, but said she had been not provided with them. In Ms AX's opinion, Mr ZM had deliberately stymied her chances of accessing another lawyer through [Organization A].

[5] Ms AX laid wide ranging complaints, some of which were about Mr ZM's conduct, with [Organization A] and New Zealand Law Society (NZLS).

#### **Standards Committee determination**

[6] Having considered Ms AX's complaints against Mr ZM, the Standards Committee addressed her concerns under three headings:

- a. Was Mr ZM's conduct while he represented Ms AX of the standard of competence and diligence that a member of the public is entitled to expect of a reasonable and competent lawyer?
- b. Was Mr ZM's decision to cease acting for Ms AX one that he was entitled to make in all the circumstances?
- c. Has the Committee jurisdiction to grant Ms AX the remedy she seeks if she is entitled to a remedy?

[7] The Committee correctly considered it had no jurisdiction to grant Ms AX the main remedy she sought, which was to direct [Organization A] to provide her with another lawyer. The Committee then considered the first and second issues in the context of the Lawyers and Conveyancers Act 2006 (the Act) and the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care Rules) 2008 (the Rules).

[8] The Committee considered the written information provided, and found there was insufficient evidence to support a finding that Mr ZM had lost his temper with Ms AX. It also considered that while there had been delays in progressing resolution of Ms AX's dispute with her employer, overall Mr ZM's conduct of the matter had not fallen below

the standard of competence and diligence that a member of the public is entitled to expect of a reasonable and competent lawyer pursuant to s 12(a) of the Act.

[9] At the point the retainer ended, the Committee's view was that Mr ZM had good cause to terminate the retainer in accordance with Rule 4.2(c) of the Rules, although he could have communicated his reasons for refusing to continue to act more clearly.

[10] The Committee's determination dated 10 August 2012 records that the Committee had investigated the complaint, and decided pursuant to s 152(2)(c) of the Act that in all the circumstances further action would be inappropriate.

[11] Ms AX was dissatisfied with the determination and applied for a review.

### **Review Application**

[12] The essence of Ms AX's review application is that Mr ZM did not have good cause to terminate the retainer with her because she did not refuse to provide him with the material on the tapes. She says that by refusing to complete his retainer he favoured his employer's interests over hers, thereby breaching his duty to act in her best interests. She is also concerned that Mr ZM failed to protect her confidential information, and refused to provide her with other relevant information.

[13] Ms AX is also critical of the Standards Committee in two particular respects. She says the Committee should have directed her and Mr ZM to resolve their complaint by negotiation, conciliation or mediation because they had both agreed that was a way forward. She also considers the Committee was wrong to find that the retainer ended because she did not trust Mr ZM, when, in her view, he lacked trust in her.

[14] Ms AX sought four outcomes on review:

- a. The continuation of the retainer on the basis that there was no good cause for Mr ZM to stop acting.
- b. Compensation for the loss of her confidential notes.
- c. Costs for having to bring the review application; and
- d. A refund of her fees (presumably the \$30.67 fee for lodging the complaint) if it is not possible to compensate her for the loss of her confidential notes.

### **Jurisdiction**

[15] Ms AX's review application raises a jurisdictional issue, which relates to the way in which an in-house lawyer's professional obligations are moderated by the specific provisions of Chapter 15 of the Rules.

[16] Rule 15.3 limits the extent to which an in-house lawyer must comply with the provisions of the Act and the Rules, and says:

An in-house lawyer must, in that capacity, comply with the provisions of the Act and these rules, apart from chapter 4 (availability of lawyers to the public) and chapter 9 (fees).

[17] Mr ZM's position as an in-house lawyer under the Rules is that he is exempt from complying with the whole of Chapter 4, which includes the obligations he would otherwise have owed to Ms AX at the termination of the retainer. The Standards Committee's determination is therefore modified to remove reference to Rule 4.2(c), and paragraphs 10 to 16 of the determination which relate to Mr ZM's conduct at the end of the retainer.

[18] Coincidentally, removing those paragraphs also meets Ms AX's concern that the Committee had wrongly found she lacked trust in Mr ZM.

### **Review Issues**

[19] Ms AX's complaint that Mr ZM failed to protect her confidential information arises from her request for copies of her file when the retainer ended. Ms AX produced a copy of a "track and trace" receipt showing that a courier parcel had been lodged and paid for in [city].<sup>1</sup> Ms AX says that she did not receive her confidential documents, that they are somewhere in the public realm, and she has suffered humiliation and distress as a consequence.

[20] At some stage it became apparent that Ms AX had not received the documents, enquiries were made of the courier, and Ms AX says the courier was unable to confirm the location of the parcel. Ms AX's point was that the documents could not have gone astray if her signature had been required before the courier could deliver the parcel, and Mr ZM's failure to attend to that basic protection should result in an adverse professional disciplinary finding against him.

[21] Mr ZM said that he had produced hard copies of relevant information from his physical and electronic files, and gave these to a courier for delivery to Ms AX's

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<sup>1</sup> NZ Post receipt (31 December 2010).

address. During the complaints process he produced a copy of the covering letter, which was properly addressed to Ms AX.<sup>2</sup> Mr ZM's evidence was that he had gone into the office specifically to attend to Ms AX's request. He had personally typed the letter, enclosed the documents and delivered the parcel to the courier for onward transmission to Ms AX.

[22] Although the letter was properly addressed, I accept that Ms AX may not have received it and that the courier may be unable to locate it. Failure to receive documents is unfortunate, especially when the documents are confidential. I observe that in some cases it will be best practice for lawyers sending confidential documents by courier to require a signature on delivery. However, I also accept that Mr ZM believed the "track and trace" option would be a secure delivery option for the documents, and I consider that belief was a reasonable one.

[23] There is nothing in the circumstances that raises a professional conduct issue for Mr ZM, so that aspect of Ms AX's complaint will receive no further attention on review.

[24] Ms AX was also concerned that Mr ZM had refused to provide her with information that predated his involvement with her matters. There is no evidence of any professional failing by Mr ZM in this regard. If Ms AX still requires copies of the documents in question, she can request copies from [Organization A]. That aspect of Ms AX's complaint will also receive no further attention on review.

[25] Ms AX's criticisms of the Standards Committee relate to its findings and the action it took on receiving her complaint. Ms AX says that on receiving her complaint, the Committee should have directed her and Mr ZM to mediation.

[26] Ms AX's criticism fails to recognise that the Committee has a statutory discretion to choose the process it considers appropriate to determine complaints. Parties indicating a willingness to attend mediation does not mean the Committee must conclude that mediation is appropriate. There are three reasons why a committee must not direct parties to mediation. A committee must not direct parties to explore mediation if it considers such a direction would not contribute constructively to resolving the complaint, mediation would not be in the public interest or mediation would undermine the urgent nature of the complaint.<sup>3</sup> It is for the committee to exercise its discretion. There is nothing untoward in the Committee deciding to investigate Ms AX's complaint, in preference to directing the parties to consider mediation, negotiation or conciliation. That aspect of Ms AX's review application will

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<sup>2</sup> Letter ZM to AX (31 December 2010).

also receive no further attention on review.

[27] The only remaining issue that falls to be determined on review is whether there is any good reason to interfere with the Committee's finding that Mr ZM's conduct while he represented Ms AX met the standard of competence and diligence that a member of the public is entitled to expect of a reasonable and competent lawyer in accordance with s 12(a) of the Act.

### **Review Hearing**

[28] Both parties attended a review hearing in [city] on 11 April 2014, and Mr TG attended as counsel for Mr ZM.

### **Role of the LCRO on Review**

[29] The role of the Legal Complaints Review Officer (LCRO) on review is to reach her own view of the evidence before her. Where the review is of an exercise of discretion, it is appropriate for the LCRO to exercise particular caution before substituting her own judgement for that of the Standards Committee, without good reason.

### **Scope of Review**

[30] The LCRO has broad powers to conduct 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. The statutory power of review is much broader than an appeal, and gives the LCRO discretion as to the approach to be taken on any particular review and the extent of the investigations necessary to conduct that review.

### **Discussion**

[31] At the review hearing Ms AX traversed a wide range of issues of concern to her arising from her involvement with her former employer and [Organization A]. In discussing Mr ZM's conduct, Ms AX said she believed he was prejudiced against her from early on in their professional relationship, and that throughout the time they worked together he lacked trust in her. She referred to threats she said he had made

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<sup>3</sup> Lawyers and Conveyancers Act 2006, s 143.

to refuse to act, or continue to act, for her if she tape recorded any conversation she had with him, said that he had refused to pass on information she was entitled to, and inferred that his attitude to her had soured the relationship she had with [Organization A]. Ms AX also said that Mr ZM had lost his temper with her, and told her that she annoyed him.

[32] Mr ZM denied being prejudiced towards Ms AX or threatening to stop acting if she taped conversations. He said that her lack of trust in him resulted in him losing confidence in the integrity of her instructions, and he denied improperly withholding information. He explained that [Organization A] relied on him exercising his professional judgement when he gave advice that enabled [Organization A] to exercise its discretion in deciding whether or not it should continue funding members' legal costs. He also denies losing his temper or telling Ms AX she annoyed him. He says that Ms AX had asked him if he found her annoying and he indicated he did not. In general he maintained that he had acted professionally throughout.

[33] The Committee made its findings after inquiring into Ms AX's complaints. The decision records that the Committee made reference to the extensive written materials the parties had provided and found that Ms AX's complaints were without merit.

[34] I have considered the materials provided by the parties on review, and heard further from them at the review hearing. There is no suggestion in any of Mr ZM's conduct or correspondence that suggests he acted in a manner that was anything but professional. Although I acknowledge Ms AX's view that Mr ZM's comments to her are at odds with what he recorded in his correspondence, there is no independent evidence to substantiate Ms AX's assertions that Mr ZM lost his temper or made any inappropriate comment to her.

[35] The standard of proof on review is the balance of probabilities to be applied flexibly, with more serious allegations requiring a higher degree of substantiation. Any allegation of professional failing by a lawyer is to be treated seriously. Ms AX has provided no compelling evidence that supports the allegations she makes that Mr ZM failed to act in her best interests during the course of the retainer. The weight of evidence strongly suggests Mr ZM acted professionally and appropriately. Taking into account all of the material provided, I have found no reason to interfere with the Committee's findings, or its decision to take no further action under s 152(2)(c) of the Act.

## **Orders**

[36] As there has been no determination that Mr ZM's conduct was unsatisfactory under s 152(2)(b), there is no power to make any orders under s 156.

### **Costs**

[37] Section 210 of the Act provides a wide discretion to order costs on review.

[38] Ms AX was entitled to apply for a review and to be heard in person. Her conduct during the review provides no grounds on which to base an order that she pay costs.

[39] Mr ZM did not apply for a review, or request a hearing in person. He has done nothing to add to the costs of this review, and there is no adverse outcome as a result of review. There is no reason to order him to pay costs.

[40] No costs orders are made on review.

### **Decision**

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

**DATED** this 23<sup>rd</sup> day of April 2014

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Dorothy 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 AX as the Applicant  
Mr ZM as the Respondent  
Mr TG as counsel for the Respondent  
[A South Island] Standards Committee  
The New Zealand Law Society