LCRO 260/2010

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the National Standards Committee
BETWEEN	**FT** of Auckland Applicant
AND	**THE NATIONAL STANDARDS COMMITTEE** Respondent

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

Background

[1] This is an application for review of a decision by the National Standards Committee to lay charges against FT before the New Zealand Lawyers and Conveyancers Disciplinary Tribunal.

[2] Briefly, the facts are that FT and another lawyer have commenced a number of proceedings related to, or lodged a number of complaints against, Justice Harrison. The proceedings and complaints allege discrimination, bias and racism.

[3] A request for intervention was made directly to Justice Randerson in his capacity as Chief High Court Judge.

[4] On 18 December 2009 Justice Randerson wrote to the President of the New Zealand Law Society to advise the Society of the actions of FT and the other lawyer with regard to Justice Harrison, to take whatever action the Society considered appropriate.

[5] On 28 April 2010, the Lawyers Complaints Service advised FT that the National Standards Committee had determined to commence an investigation into his conduct of its own motion pursuant to section 130(c) of the Lawyers and Conveyancers Act 2006.

[6] On receipt of this FT wrote directly to Justice Randerson and posed a number of questions, which were subsequently described by the Judicial Conduct Commissioner as "disrespectful and impertinent".

[7] These comments were made by the Judicial Conduct Commissioner in the notification of the outcome of his investigation into a complaint lodged by FT against Justice Randerson. The Judicial Conduct Commissioner found that none of the complaints made by FT about Justice Randerson had any substance, and that a number of them were vexatious in nature.

[8] Following a hearing attended by FT, the National Standards Committee determined "that the intemperate manner in which the allegations were made against Randerson J and the making of the allegations seemingly without a substantial basis by [FT] was capable of meeting, and (if proven) sufficient to meet a threshold test of misconduct, as defined by section 7(1)(b)(ii) of the Lawyers and Conveyancers Act", and pursuant to section 152(2)(a) of the Act determined that the matter be considered by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal.

[9] FT has applied for a review of that decision.

[10] In submissions filed by FT prior to the hearing, he stated that he had but one submission, namely that the LCRO either "rule that it is perfectly acceptable in a purported Western democratic society that I can potentially be disbarred for misconduct (as I was not providing regulated legal services) for having the audacity to complain to legitimate authorities about a judicial officer and you allow the prosecution to go ahead or you rule that I have a human right to air any grievances I have about their Honours in an appropriate forum and as such I cannot face punitive sanctions as a result". He emphasised that he was not seeking any other ruling from this Office.

[11] This is a misrepresentation of the issue. The determination of the Standards Committee was that FT had made allegations against Randerson J in an intemperate manner and which were seemingly without basis. It was not a determination that FT be charged with misconduct by reason of the fact that he had lodged a complaint per se.

[12] The review hearing was held in conjunction with two other hearings, one of which was closely related to this review. FT appeared for himself accompanied by a colleague. UQ appeared for the National Standards Committee.

Recusal

[13] At the commencement of the review hearing, FT sought that I recuse myself from this hearing and the other two hearings to take place at the same time. This application was made on the grounds of bias.

[14] In support of this application for recusal, FT referred to a previous decision issued by me in which FT was also the applicant. The respondent in that case was the brother of the LCRO who FT refers to as "my superior" – in the terminology of the Act I am the Deputy LCRO. He submits in that decision I have ignored his main complaint, which raises a concern on his behalf that I will not properly fulfil my functions in these proceedings.

[15] I did not consider that this constituted any basis for recusal and declined FT's application. If FT considered that the decision in the prior matter was defective, then he had remedies available to him to seek redress in respect of that decision. If, following the issue of this decision and the decisions in respect of the other two matters heard at the same time, FT considers that those decisions are also defective, then he has remedies available to him in respect of those decisions.

[16] FT raised this matter again when providing further written submissions subsequent to the first day of the hearing and complains that I have provided no reasons for declining to recuse myself. The reason is simply as provided in the preceding paragraph – namely that I did not consider there was any strength in his application. It is difficult to see what further reason need be provided.

[17] UQ has subsequently referred me to a Court of Appeal decision (*Taylor v The Queen* [2010] NZCA 628) where the Court applied earlier authorities that the giving of earlier adverse rulings, even adverse findings of credibility, will only "in the rarest of circumstances" (*Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495 at [98] CA) call for recusal. This is supportive of the view that I have taken.

[18] In his written submissions provided following the first hearing, FT also refers to what he considers to be evidence of predetermination on my behalf in respect of this matter and the related complaint by Justice Randerson concerning Justice Harrison. This arose because I saw no reason why these two matters should be deferred while

further material was agreed between FT and UQ in respect of the third matter being dealt with at the same time. That matter is not related to the complaints concerning Justices Randerson and Harrison. However, as both FT and UQ had understood all three matters were to be deferred, that is how they proceeded. FT has therefore indicated that he makes no accusation of bias in that regard.

Scope of review

[19] FT then raised the preliminary issue as to the scope of a review by the LCRO. This was a submission made more particularly in connection with the unrelated application to be heard on the same day, but it is nevertheless a submission that affects all three applications for review.,

[20] In a number of previous decisions, the LCRO has had cause to consider the question as to whether a decision to lay charges before the Disciplinary Tribunal, is a determination which is subject to review by the LCRO.

[21] In *Poole v Yorkshire* LCRO 133/09, the LCRO came to the conclusion that a decision by a Standards Committee to lay charges before the New Zealand Lawyers and Conveyancers Disciplinary Tribunal was a decision which was subject to review. That is not in question.

[22] The LCRO went on to note that "it must be stated at the outset that it will only be in exceptional cases that a decision to prosecute will be reversed on review." He then identified four situations in which a decision to prosecute may be revisited. These situations were identified in *Kumar v Immigration Department* [1978] 2NZLR 553 and in *Polynesian Spa Limited v Osborne* [2005] NZAR 408. Both of these decisions were referred to by the FT and UQ during the course of the hearing.

[23] In *Poole v Yorkshire*, at [21], the LCRO noted that "the cases cited above indicate the kinds of basis upon which a decision to prosecute might be revisited. They include situations in which the decision to prosecute was:

(a) significantly influenced by irrelevant considerations;

(b) exercised for collateral purposes unrelated to the objectives of the statute in question (and therefore an abuse of process);

(c) exercised in a discriminatory manner;

(d) exercised capriciously, in bad faith or with malice

[24] FT considers that the LCRO was wrong in applying the principles derived from these decisions for the reason that the decisions referred to involve applications for judicial review and that the LCRO should not restrict himself or herself to the grounds available on a judicial review application.

[25] In identifying the situations in which a decision to prosecute may be revisited in *Poole v Yorkshire*, the LCRO did not assert that the list was exhaustive. In [23] the LCRO notes that if "conduct was manifestly acceptable then this might be evidence of some improper motivation in the bringing of the prosecution."

[26] While I do not necessarily agree that this might constitute evidence of some improper motivation in the bringing of the prosecution, I do agree that the decision to prosecute should be set aside if the conduct was manifestly acceptable.

[27] To that extent therefore, the review to be conducted by the LCRO is not as limited as FT suggests it could be.

[28] In coming to its decision the Standards Committee is not required to determine whether a prosecution will succeed or not. Rather, it involves a consideration as to whether the allegations made by FT are (if proven) capable of meeting a threshold test of misconduct. This is referred to in *Mr Rugby v Auckland Standards Committee* LCRO 67/2010, where the LCRO described the role of the Committee as being "to do the preliminary screening and to present the case."

[29] It is relevant therefore, to give consideration to the material considered by the Standards Committee to consider whether the matters considered by the Committee were capable of supporting that decision.

The review

[30] During the course of the hearing, FT frequently stated that he held the view that he was to be the subject of a charge merely because he has exercised his right to lodge a complaint about a Judge, or, as he put it, that he has "had the audacity to complain". This is a misrepresentation of the Standards Committee determination. The Standards Committee determined to lay charges because of the intemperate manner in which the allegations were made, and also because the allegations were seemingly without substantial basis. I note that the Complaints Service made this point clear in its letter of 22 July 2010 to FT where UP stated that "the Committee acknowledges that the raising of a complaint against a Judge in the appropriate forum

and in the appropriate manner is of itself unlikely to raise any ethical and/or disciplinary issues."

[31] A review of the allegations made by FT in his complaint to the Judicial Conduct Commissioner reveal a multitude of allegations, none of which were found to have any substance by the Commissioner, and a number of which he identified as being vexatious.

[32] In referring to the comments of the Judicial Conduct Commissioner, I am mindful of the recent High Court decision of *Dorbu v The Lawyers and Conveyancers Disciplinary Tribunal* [CIV 2009-404-7381]. In that decision Brewer J held that findings of a Judge as to conspiracy were insufficient proof of the participation of the charged lawyer in the conspiracy. Instead, the Judge considered that it was incumbent on the Tribunal to itself consider the evidence and form its own view as to the culpability of the lawyer [this decision will be more fully addressed by me in LCRO 261/2010], but suffice to say for the purposes of this decision, I have not relied to any great extent on the comments of the Judicial Conduct Commissioner. However, his comments give support to the view that the decision of the Standards Committee was not unreasonable, irrational or without foundation. That is all that is required.

[33] One does not have to examine the language used in the complaint or subsequent correspondence from FT to Justice Randerson in any great detail to identify language which could readily be considered to be intemperate. They include the words "conspiracy", "corruption", "personal crusade" and "personal vendetta" as recorded in [20] of the Judicial Conduct Commissioner's determination dated 2 July 2010.

[34] FT does not consider this to be the case. While he concedes that his language may be colourful, he does not accept that it is derogatory or insulting. He also submits that the matter becomes a question of form over substance – namely that he is entitled to make the allegations about a Judge providing the complaints are expressed in appropriate language. I cannot disagree with that. Charges are not being laid against FT that he has complained about a Judge. The Standards Committee's decision was that he made allegations in an intemperate manner and seemingly without a substantial basis.

[35] The Committee focussed on four allegations made by FT against Justice Randerson in his letter of 27 May 2010. These were that Justice Randerson had:

- conducted a secretive and unlawful investigation;

- used his judicial office in a gross abuse of taxpayer money;
- did so for an improper motive, i.e to protect a fellow judge from legitimate complaints; and
- attempted to obstruct the course of justice by interfering with sub judice matters.

[36] None of the submissions made by FT at the review hearing improved the evidential basis for these allegations. FT has acknowledged the lack of evidence to support his allegations in his email of 26 July 2010 to the Complaints Service. Instead, he argues that, provided the allegations are made in good faith, then he is released from the need to provide any evidence to support his allegations. To determine whether that then entitles FT (or any other person) to make the allegations he has, and in the manner he has, or whether they were made in good faith, is not the function of this Office.

[37] The Judicial Conduct Commissioner has recorded that FT had not supported the allegations with any persuasive factual evidence. He described them as "wild and overly dramatic assertions – but essentially no more than assertions." It is quite appropriate for the Committee to consider that it is open to the Tribunal to find that a person who makes such unfounded assertions (if the Tribunal finds them to be such) is not a fit and proper person to engage in practice as a lawyer.

[38] FT will be able to argue before the Tribunal otherwise on the basis of the cases he has presented.

[39] The Committee has formed the view, that FT's conduct is such that it is capable of meeting a threshold test of misconduct, and even if I were not to restrict myself as set out in previous decisions of this Office, I would concur with the Committee.

[40] FT argues that because his statements were made outside of his professional capacity (or more accurately that he was acting as a non-lawyer) he is free of any professional standards obligations. He cites a number of cases from international jurisdictions in support of this submission. However, I need look no further than section 7 (1)(b)(ii) of the Lawyers and Conveyancers Act, which defines misconduct as being conduct unrelated to the provision of regulated services which would justify a finding that a lawyer is not a fit and proper person to engage in practice as a lawyer. This makes it clear that a charge of misconduct in New Zealand can be brought in respect of a lawyer's conduct which is unrelated to the provision of legal services. Charges in

these circumstances have been successfully brought before the Tribunal - (see for example *Waikato Bay of Plenty District Law Society v Baledrokadoka* [2002] NZAR 197). In *H (a law practitioner) v Auckland District Law Society* [1985] 1 NZLR 8, the Court noted at [23] that *"it is clear that misconduct by a professional man outside his professional activities and in his private life can, in some circumstances, render him liable to discipline by a professional tribunal."* Similarly, in Australia, the Supreme Court has held that a lawyer convicted of involuntary manslaughter was conduct of such a serious nature that the disciplinary body was required to take action. (*Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 297 (HCA). The combined weight of the plain wording of the Act, and these authorities, leaves me in no doubt that the charges may properly be brought before the Tribunal, notwithstanding FT's submission that he was acting as a non-lawyer.

[41] The office of the LCRO is an inappropriate forum to consider any evidence that FT wishes to advance in support of his allegations against Justice Randerson. In hearings before the Tribunal, witnesses can be called, and cross examined on the evidence which they provide. In this way, all evidence that is relevant to the proceedings can be properly adduced and assessed by the Tribunal. LCRO proceedings do not provide the opportunity for this to take place, and indeed, it is not the role of the LCRO to undertake this exercise. FT is elevating the role of the LCRO beyond its function.

[42] FT advances a defence of freedom of speech, referring to a number of cases in other jurisdictions. He considers that the jurisprudence in New Zealand relating to this is "immature" and "New Zealand is a non-democratic nation and does not deserve to call itself that because it is no different from third-world countries where lawyers that dare speak out against the system face personal retribution." He considers that the "LCRO is in a unique position to show the courage necessary to change that abhorrent mentality." It seems to me that again, FT is elevating the role and function of the LCRO to that of the Tribunal. It is not the role of the LCRO to consider and make determinations on possible defences. That is the function of the Tribunal.

[43] FT himself accepts that the Tribunal is the appropriate forum for the matters he raises to be argued. In his letter to this office of 26 April 2011 he says:- "Moreover, I do not think that the substantive allegations against me are appropriately dealt with by this body as I reserve the right to defend myself on the merits in the New Zealand Lawyers and Conveyancers Disciplinary Tribunal which is the appropriate trial jurisdiction should these allegations be allowed to advance that far."

[44] Having read and heard the submissions of both FT and UQ I have no hesitation in concurring with the determination of the Standards Committee that these are matters are matters which should properly be addressed before the Tribunal.

[45] FT has appealed to the LCRO to protect him from vindictive prosecution by the Standards Committee. He urged me to consider the cases that he has referred to in his application to the United Nations Human Rights Council. Having reached my decision for the reasons set out above, I do not consider that it is necessary for me to consider those cases in any detail. FT will have the opportunity of presenting that material to the Tribunal.

Decision

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

Costs

[47] The National Standards Committee's determination to lay charges has been upheld. This review application was one of three to be heard at the same time. The hearings occupied a large part of one day and part of a second day. The review involved matters of some complexity. In the circumstances, it is appropriate that an order for costs be made against FT. Pursuant to section 210(1) of the Lawyers and Conveyancers Act FT is ordered to pay the sum of $800 by way of costs, such sum to be paid to the New Zealand Law Society within 30 days of the date of this decision.

DATED this 21st day of October 2011

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Owen 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:

FT as the Applicant
The National Standards Committee as the Respondent

UQ as Counsel for the Respondent
The New Zealand Law Society