LCRO 261/2010

CONCERNING an application for review pursuant to section193 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] On 16 September 2009 UO provided the Law Society with a list of cases in which he considered FT had shown showed a "brazen disrespect bordering on insolence for our judges, courts and fellow practitioners" and in which he considered FT had shown gross incompetence, had been derelict in his duties, had abused legal and Court processes and misled the Court.

[2] This was processed by the Auckland branch of the Complaints Service as a complaint by UO.

[3] On 29 June 2010, the Complaints Service advised FT that the matter would from thenceforth be investigated by the National Standards Committee as an own motion investigation.

[4] In a reply email, FT pressed for the files opened by the Auckland branch to be closed and on 23 August the National Standards Committee issued a determination to

take no further action pursuant to section 138 (2) of the Lawyers and Conveyancers Act 2006 in respect of the complaint processed by the Auckland branch,

[5] FT then made submissions in which he addressed all complaint files at that time being considered by the Committee. With regard to this matter, he provided details of numerous instances in which he considered New Zealand lawyers had fallen short of the level of competence required. He questioned why those lawyers should not also be pursued by the Complaints Service.

[6] On 1 October, the Complaints Service issued a Notice of Hearing which advised that the own motion investigation 3103 was to be the subject of a hearing before the National Standards Committee on 4 November. In that notice, the Complaints Service advised that any submissions which FT wished to make were to be made by 15 October and should address any matter of fact or law that FT considered should be taken into account concerning:

a) The nature of the alleged conduct itself;

b) The possibility that the National Standards Committee may make a determination that the complaint or matter, or any issue involved in the complaint or matter, be considered by the Disciplinary Tribunal;

c) The appropriate orders the National Standards Committee may make under section 156 of the Lawyers and Conveyancers Act 2006 in the event that there was a finding of unsatisfactory conduct;

d) The possibility of publication in the event of a finding of unsatisfactory conduct.

[7] Instead of making written submissions, FT sought to appear before the Committee in person. This was agreed to and the hearing was rescheduled for 8 November.

[8] The hearing commenced with an interchange between FT and the Chair of the Committee, in which FT asked what it was that he was being charged with so that if he wanted to plead guilty, what it was that he would be pleading too.

[9] The Chair responded by noting that FT had not been charged with anything, and that the hearing was part of the Standards Committee inquiry. He stated that the inquiry was whether there were materials before the Committee that might lead the Committee to refer the matter to the Disciplinary Tribunal. The Chair observed that FT

had shown serial incompetence in his professional obligations and duties before various fora. FT was then provided with the opportunity to address the Committee with regard to the various decisions referred to.

[10] Having concluded the hearing, the Committee issued its determination in respect of this matter. Its determination was "that [FT]'s conduct as demonstrated in the cases listed...illustrated a pattern of incompetence in FT's professional capacity of such a degree or so frequent as to reflect on his fitness to practice or as to bring the profession into disrepute and that pursuant to section 152(2)(a) of the Lawyers and Conveyancers Act 2006, the matter should be considered by the New Zealand Lawyer and Conveyancers Disciplinary Tribunal."

[11] FT has applied for a review of that determination.

Application for Review

[12] FT submits the following grounds in support of his application:

a) breach of natural justice - particulars;

b) breach of natural justice - no files;

c) the merits;

d) abuse of process.

[13] Because the Standards Committee dealt with a number of files relating to FT at the same time in respect of which he made generic submissions, the three Applications for review arising out of those decisions have proceeded together through this Office. A review hearing was held over the course of two days in respect of the three applications. FT appeared for himself, and UQ appeared for the Standards Committee. As a result of the way in which this matter has proceeded, large portions of my decisions in the other two matters are relevant to this decision and for the sake of completeness I will incorporate those parts in full in to this decision.

Recusal

[14] 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.

[15] In support of the 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.

[16] 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 the decisions are also defective, then he has remedies available to him in respect of those decisions.

[17] 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.

[18] 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.

[19] In his written submissions provided following the first day of the hearing, FT also refers to what he considers to be evidence of predetermination on my behalf in respect of this matter and the related complaints about Justices Randerson and Harrison. This arose because I saw no reason why those two matters should be deferred while further material was agreed between FT and UQ in respect of this matter. This 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

[20] FT then raised the preliminary issue as to the scope of a review by the LCRO. 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 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 to apply 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. At [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 FT's conduct is 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.

Review

[30] Unfortunately, FT's subsequent written submissions and oral submissions to the review hearing, were not presented with reference to the grounds for review identified in his submissions of 26 April, and I have found it necessary to try and relate the content of subsequent written submissions and the oral submissions to his submissions of 26 April to provide a structure to this decision.

[31] In his submissions to this Office FT did not refer specifically to the question he asked of the Committee, as to why the numerous other lawyers whom he considers have fallen short of the level of competence required have not also been pursued by the Complaints Service. Implicit in this questioning, is a suggestion by FT that he is being singled out for prosecution due to mala fides on the part of the Committee, or its members, or members of the Complaints Service towards him.

[32] This was identified by the LCRO in *Auckland Standards Committee 1 of the New Zealand Law Society v* [X] LCRO 166/09 as the doctrine of selective prosecution, a doctrine which has its origins in the United States, and which has not been recognised in New Zealand courts. As was noted in that decision, it is not appropriate for this tribunal to import that doctrine into its jurisdiction and instead this tribunal should refer to recognised principles of New Zealand law.

[33] FT also invokes the doctrine of res judicata. At FT's urging, the Committee formally determined to take no further action with regard to the complaint files commenced by the Auckland branch of the Complaints Service, which had treated this file as a complaint by UO. The reason given for making this determination was that the

matter had been subsumed into the National Standards Committee own motion investigation. No determination as to the substance of the complaint had been made, and to that extent the matter is not res judicata at all. FT's argument is technical in nature and without logic.

Breach of Natural Justice - particulars

[34] The first submission made by FT in his letter of 26 April 2011 is that the National Standards Committee should be obliged at least to file draft "charges" because it was unclear to him what the allegations were. FT was not <u>charged</u> with anything before the Standards Committee. The hearing before the Standards Committee was part of an investigation into the matters raised in the various decisions referred to.

[35] A Standards Committee is obliged to send particulars of the complaint or matter to the person to whom the complaint or inquiry relates and invite that person to make a written explanation in relation to the complaint or matter (section 141 Lawyers and Conveyancers Act). If a Committee determines to lay charges before the New Zealand Lawyers and Conveyancers Disciplinary Tribunal, section 154 of the Act requires the Committee to frame an appropriate charge and lay it before the Tribunal. It must also give written notice of its determination and a copy of the charge to the person to whom the charge relates.

[36] FT confuses the separate requirements in his submissions and when he submits that the Standards Committee should be obliged to file draft "charges" it is difficult to know whether he is submitting that he had not been provided with particulars of the matters under investigation, or he means that the Committee should be providing the charges to be laid before the Tribunal. However, in his later submissions to this Office, he raised the specific argument that the Complaints Service had not provided him with sufficient particulars of the matters into which it was inquiring.

[37] This question was addressed in *Auckland District Law Society v The New Zealand Law* Practitioner*s Disciplinary Tribunal and O* HC Auckland, HC 237/94 and in 84/94, 27 April 1995, which considered the similar requirements of section 101(3)(a) of the Law Practitioners Act 1982.

[38] In its decision, the Court criticised the Law Practitioners Disciplinary Tribunal for paraphrasing words used in the Act. In its decision, the Tribunal had cited a passage from *H (a law practitioner) v Auckland District Law Society* [1985] 1NZLR 8 at 21 as follows:

> In our view, the Legislature clearly intended that persons who ultimately found themselves charged before the Tribunal should first have been notified by their District Law Society of the charge against them (meaning full particulars of the charge) and give them an opportunity to reply before the District Law Society took the first step in the disciplinary process; that is, to lay the charges at all and, if so, whether locally or nationally.

[39] The Court made the following comment at page 8 of the decision:-

> The words in round brackets are not part of the citation. It appears that the Tribunal inserted them to explain what it considered to be the meaning of the expression "charge against them".

[40] The Court observed that section 101(3)(a) required the District Law Society to send particulars of "the complaint" not "the charge" as is recorded in H, and agreed with "the observations made by the full Court in *Wihapi v Hamilton District Law Society* [1992] 3NZLR 367 at 373 that the requirements of section 101(3)(a) should be observed and a failure to observe the direction is very likely to result in any decision and the consequences of any decision being set aside".

[41] The Court went on to say (at page 9):

> It will be a question of fact in every case whether the particulars of the complaint have been sent to the person complained against. In some cases sending a copy of the letter of complaint will be sufficient. In other cases the Council or the committee will be required separately to identify the particulars of the complaint intended to be considered in a manner that will enable the practitioner to give an explanation in answer to the identified complaints.

[42] The answer to the question is provided from an examination of the correspondence with FT.

[43] At the end of the hearing on the first day, it was agreed that the parties would file a comprehensive set of the information and particulars provided to FT about the complaint and the matters which were the subject of investigation. This set of correspondence was provided by UQ under cover of his letter dated 14 June. It included correspondence provided by the Auckland branch of the Standards Committee as well as the Complaints Service. I note in particular:-

(a) A letter dated 22 October 2009 from the Auckland branch in which it noted that the issues of complaint included the following:

- that you have demonstrated gross incompetence in your conduct of litigation;
- that you have misled the Court, been derelict in your duties and abused Court processes;

(b) The Notice of Hearing dated 8 March 2010 issued by the Auckland branch referred to "the allegations of incompetence, misleading the Court, dereliction of duties and abuse of Court processes encompassed in the judicial comments collated by [UO] as set out in the attached summary".

(c) The letter of 29 June 2010 from the National Standards Committee identified the correspondence to which it was referring in its investigation of the matter.

(d) The letter of 1 October 2010 from the National Standards Committee under cover of which the Notice of Hearing was sent, referred to the fact that "the own motion investigation is the one you were notified of by the Society's letter of 29 June 2010 and encompasses the matters that were formally contained in files..." This included file number 1806 which was the file relating to this matter.

(e) By letter dated 27 October 2010, UO was again advised what the subject matter of the Standards Committee hearing would be. With reference to this matter the letter referred to "other cases where your conduct/competency is allegedly in question".

[44] FT argues that because the National Standards Committee indicated that it was to commence the investigation anew and had determined to take no further action in respect of the files opened by the Auckland branch, the National Standards Committee could not then rely on or refer back to any particulars provided by the Auckland branch.

[45] When the bundle of correspondence provided is considered, it would be flying in the face of reality if I were to hold that the correspondence previously provided by the Auckland branch could not then be referred to by the National Standards Committee. Merely because the National Standards committee had determined to take no further action on the file opened by the Auckland branch, does not somehow mean that all of the material in that file becomes nonexistent. There is no reason why it can not be referred to and identified by the National Standards Committee in its correspondence with FT.

[46] FT was afforded the opportunity to address the Committee in person. He did not provide any written submissions. After the initial exchange with the Chair, he then proceeded to elaborate on some of the cases to show that his conduct could not be considered to be incompetent. He had also previously provided various comments to

the Complaints Service in respect of each of the decisions referred to from which the Committee had compiled a summary of his responses to each case.

[47] FT also came prepared, and commenced to adopt the same course of action at the LCRO hearing. The fact that he was ready and able to do so, is proof in itself, that he understood that his actions in the conduct of each case was under scrutiny and in each decision, it is quite clear what aspect of his conduct is in question.

[48] In his written submissions of 17 June, FT referred extensively to an article by the Chair of the Committee about his experiences as the Disciplinary Commissioner of the International Criminal Court published in NZ Lawyer on 10 June 2011. Having obtained and read a copy of the article for myself, I have treated this as being of interest only. The legislation and case law of New Zealand provides sufficient guidance for the decision that I am required to make.

[49] Overall, I am satisfied that the Complaints Service has fulfilled its obligation to provide sufficient particulars of the matters under investigation such as to enable FT to be ready to address the matter before the Standards Committee.

[50] Having dealt with the requirement to provide particulars of the matters under investigation, I will now deal with the requirement to lay charges.

[51] I understand that following a determination to lay charges before the Tribunal it is the practice of the Standards Committee to defer framing charges until the 30 day review period expires or a review is completed.

[52] Section 154 provides as follows:-

> If a Standards Committee makes a determination that the complaint or matter be determined by the Disciplinary Tribunal, the Standards Committee must –
>
> (a) frame an appropriate charge and lay it before the Disciplinary Tribunal by submitting it in writing to the chairperson of the Disciplinary Tribunal; and
>
> (b) give written notice of that determination and a copy of the charge to the person to whom the charge relates; and
>
> (c) if the determination relates to a complaint, give both written notice of that determination and a copy of the charge to the complainant.

The sequence of events envisaged by the section by reference to the order in which they are laid out, is that the charges are framed and submitted to the Tribunal, and written notice of the determination and a copy of the charges are delivered to the person to whom the charges relate.

[53] While section 158 provides that notice of a determination by a Standards Committee of the kind referred to in section 152(2)(b) or (c) must be given **forthwith**, there is no similar indication of any timeframe provided in section 154. If it were to be considered that the charges should be provided at the same time as the notice of the determination, then this would delay delivery of the notice of determination as it takes time to prepare a case for the Tribunal, and to formulate the charges. This would in itself be unfair to a practitioner, and be unworkable, given the present requirement that any application for review be lodged within 30 working days after the determination is made.

[54] In the circumstances, the practical solution is for matters to be dealt with as they are at present, namely by the immediate delivery of the notice of determination, followed in due course by delivery of the charges after expiry of the review period, or completion of any review.

[55] The effect of a breach of natural justice on a decision to prosecute was addressed in *Polynesian Spa Limited v Osborne* [2005] NZAR 408 where Randerson J noted that "consistent with the general approach of the Courts to the review of prosecutorial discretion, failure to comply with any residual fairness obligation is most unlikely to result in a successful application for a judicial review, given the availability of the subsequent trial process and the Court's jurisdiction to prevent abuse of process". The same principles can be applied to charges laid by a Standards Committee before the Lawyers and Conveyancers Disciplinary Tribunal.

Beach of Natural Justice - No Files

[56] FT submits that the Committee was required to obtain and review the Court files relating to each of the cases identified and then question him in detail as to his conduct in each case. Inherent in this submission is a submission that the Committee was not entitled to rely on the comments of the Judges made in each of the decisions as the basis for its determination to lay charges.

[57] He cites in support of this, 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.

[58] In so doing, FT is attributing the role of the Tribunal to the Standards Committee and the LCRO. When he states in his letter of 1 July, that “the judgements themselves cannot be proof of my incompetence” he seems to be suggesting that the Committee has to be satisfied that the allegations are “proved.” That is not the case.

[59] All that the Committee has to be satisfied of, is whether the conduct in question (if proved) is capable of constituting misconduct. It does not need to determine whether the conduct in question is misconduct or not and does not therefore have to undertake the process identified in *Dorbu*.

[60] In coming to a view as to whether the conduct is capable of constituting misconduct, it is perfectly reasonable for the Committee to rely on the comments of the Judges in each case. An assessment of a lawyer’s competency must necessarily involve an assessment of the quality of the proceedings drafted and filed, and the conduct of the case. It would be nonsensical to discount the views of the very persons who are required to consider and pronounce on the merits of the proceedings and the arguments put forward by counsel.

[61] Even if FT had embarked on a full and detailed explanation of his conduct in each matter, it could not be said that his conduct was “manifestly acceptable”, given the comments made by the Judge in each case. The Committee was therefore quite in order to determine that “if proven” the matters referred to are capable of constituting misconduct.

[62] The Standards Committee must be careful not to express an opinion as to whether FT’s conduct constitutes misconduct. To do so would be to prejudice the Tribunal hearing. Instead, the Committee’s role is to lay charges and prosecute these before the Tribunal. In that process, it will be required to consider what is necessary to support the charges, and the Tribunal will need to form its view as to what is required to find the charges proven.

[63] The comments of Randerson J in *Polynesian Spa Limited v Osborne* referred to in [53] above are equally as applicable here.

The Merits

[64] FT has provided details of his qualifications, his experience and cases where he has been involved as counsel. These are provided in support of his contention that he is not incompetent.

[65] Whilst this information may be relevant to proceedings before the Tribunal, it is of limited, if any, relevance to the decision made by the Standards Committee. The Standards Committee and the LCRO are not required to come to a decision as to FT's competence or not. All that is required is that the Standards Committee is satisfied that FT's conduct is capable, if proven, of constituting misconduct. The charges to be laid will need to be proven, and the information provided by FT as to his competence, will be able to be presented in his defence.

Abuse of Process

[66] Under this heading, FT again raises the allegation that the complaint by UO was an abuse of process because it was either fraudulent or grossly reckless. FT laid a complaint against UO making these allegations. The matter has been the subject of a Standards Committee decision and review by this Office. Those decisions and that complaint are not open for reconsideration in this review. This review is a review of the decision of the National Standards Committee following an own motion investigation. It is not another review of the Standards Committee decision in respect of UO's complaint and the submission made by FT has no relevance to this review.

[67] I record that in his submissions of 26 April, FT noted that this submission (abuse of process) dovetailed into his next submission, and was related to the conclusion of his third submission. I cannot ascertain any "next" submission in the letter of 26 April, and the third submission to which he refers is the one headed "the merits". The connection is not explained by FT and is not apparent to me.

[68] In summary, I do not consider that the arguments raised by FT are sufficient for me to reverse the decision taken by the Standards Committee to lay charges before the Tribunal.

Decision

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

Costs

[70] 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