

CONCERNING

An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of the [XYZ] Standards Committee

BETWEEN

GL
Applicant

AND

JS
Respondent

DECISION

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

Introduction

[1] This is an Application by GL for a Review (Review) of a decision of the [XYZ] Standards Committee (decision) dated 14 August 2013. In that decision the Standards Committee determined to take no further action on GL's complaint against JS, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (LCA).

Background

[2] JS is a senior barrister practising in [city]. He also has an interest in firearms, and is licensed to own and use a firearm under Category "B" of the Arms Act 1983. To maintain that endorsement he must spend a minimum amount of time at a shooting range.

[3] In March 2013 JS visited his local shooting range on his way to work. He had with him an air pistol. When he had finished at the range, he put the pistol in a side pocket of his work briefcase.

[4] After leaving the shooting range JS went to his office. There he secured his briefcase with the pistol still in the side pocket.¹

[5] Later that morning he went to the local Court building, taking with him a number of files. He put the files into his briefcase, but forgetting that the pistol was still in the side pocket, he omitted to remove it.

[6] At the Court building he went through the normal security screening process. The usual objects such as loose-change, his phone and a pen were surrendered and the briefcase conveyed through an x-ray scanner. The security officer observing the x-ray scanner apparently saw the pistol but neither said nor did anything about it, and allowed JS to pass through security unimpeded. JS – oblivious to the fact that his pistol was still in his briefcase – left the security station and went about his business in the Court building.

[7] JS returned to his office. Later that same day he went back to the Court building, taking his briefcase with the pistol still in the side pocket; again, overlooked by him. At the security station JS put his briefcase on the x-ray scanner belt, but this time opened the side pocket. He saw the butt of the pistol and immediately notified a security officer. The pistol was secured without incident. JS went about his business, and as he was leaving the building he retrieved the pistol and went back to his office.

[8] JS said that he was embarrassed by his lapse. He describes it as an “oversight” and says that had he remembered that the pistol was in his briefcase, on arrival at his office he would have locked it in a filing cabinet. JS has also apologised to the security personnel about the incident. The Police were aware of the incident but took no steps. JS continues to hold a firearms licence.

[9] The Court security team conducted its own internal investigation into the incident (i.e. the first visit when the pistol was let through) in conjunction with Court’s management; this investigation was directed to how that incident had happened. The investigation did not look at whether JS had intentionally taken a pistol to Court in his briefcase. That would have been a matter for the Police and as indicated they did not take any steps.

[10] There was some publicity about the incident, which JS says resulted in him being the brunt of jokes. He has received considerable support from colleagues (including lawyers and police officers).

¹ In his letter to the Lawyers Complaints Service JS at [5] refers to “securing” his briefcase on arrival at his office; at [6] he refers to his briefcase “sitting beside (his) desk”. By “securing” his briefcase I infer him to mean that it was within his private office.

[11] JS emphasises that the incident was unintentional and arose as a result of oversight by him. He denies that he was (or would ever be) a threat to the processes of the Court.

Complaint

[12] Having read about the incident, GL (who does not know JS) sent an email to the Lawyers Complaints Service (LCS) lodging “a formal complaint” and asserting that he was “obliged to report” the conduct under rule 2.8 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules). His email suggests that although JS might have an innocent explanation for the incident “there is a prima facie case for ... (a) finding of at least unsatisfactory conduct in terms of negligence and embarrassment to profession (sic) as a whole”.²

[13] It would seem however that no one else in the profession shared GL’s concerns about “embarrassment” to it, as no other complaints about the incident have been received.

[14] Responding to his email, the LCS informed GL that his confidential rule 2.8 report would be referred to the National Standards Committee (Committee) for it to decide the next steps.

[15] However in an email to the LCS dated 30 April 2013 GL confirmed that he was in fact making a complaint against JS, rather than submitting a confidential rule 2.8 report. The difference is that a confidential rule 2.8 report potentially triggers a Standards Committee’s “own motion” powers under s 130(c) of the LCA, whereas a complaint means that the complainant is involved in the process from the outset and the respondent is aware of who the complainant is. It is fair to say that GL’s initial email to the LCS was unclear about exactly what he intended.

[16] In summary then GL complains that JS’s actions amount to unsatisfactory conduct at the very least; he considers a finding of misconduct would not be out of the question. He describes “bringing a weapon to Court is beyond cavil a serious matter”.³ He says that if a defence lawyer brings a weapon to Court it can give the impression that the lawyer is “a common thug no better than the very defendants in the dock which they represent”. He refers to the bad press which, he says, defence lawyers tend to receive being portrayed on occasions as amoral advocates for guilty people. GL asserts that the incident has “harmed the legal profession”. Beyond that bald assertion GL has not provided any evidence to corroborate the “harm”.

² Email GL to LCS (18 April 2013).

³ Email GL to LCS (13 May 2013).

[17] In further correspondence with the LCS GL refers to two occasions in which the District Courts general manager has referred to the incident involving JS, and in which he described the actions as “serious” and the security breach as “significant”.

JS’s response

[18] As well as setting out the facts as outlined above, in his detailed response to the complaint dated 16 June 2013 JS invited the Committee to take no further action on the complaint, on the basis that:

- the subject matter was trivial;
- the complaint was frivolous;
- GL did not have sufficient personal interest in the subject matter of the complaint; and
- in all the circumstances further action was unnecessary or inappropriate.

[19] In response, GL emphasised what he considered to be the seriousness of the incident and argued that it warranted, at the very least, a formal investigation by the LCS.

Standards Committee processes

[20] It is pertinent to note that Standards Committees are made up of practising lawyers, familiar with lawyers’ duties and obligations and the pressures under which lawyers often find themselves. Standards Committees must also include a lay member. This format allows for a range of views – legal and non-legal – to be considered. The process is flexible and robust.

[21] Here, the Committee conducted its hearing on the papers, and decided to take no further action on it pursuant to s 138(2) of the LCA. Section 137 of the LCA allows a Standards Committee to take no further action on a complaint pursuant to s 138, as an alternative to inquiring into a complaint. A Standards Committee may dismiss a complaint at the early pre-inquiry stage if having regard to all the circumstances of the case, the Standards Committee considers that further action is unnecessary or inappropriate.

Issues summarised by the Committee

[22] After summarising the parties respective positions the Committee expressed its concern about the bringing of a weapon into the Courthouse. It went on to accept JS’s explanation of the incident, and considered that the separate security investigation into the incident was focussed on procedure rather than JS’s culpability. The Committee

believed that it had sufficient material before it with which to carry out its conduct analysis.

[23] Issues arose as to whether the conduct was:

- Unsatisfactory and connected with the provision of regulated services (s 12(a) or (b) of the LCA).
- Unsatisfactory but not connected with the provision of regulated services (s 12(c) of the LCA).
- Misconduct under s 7(1)(a) of the LCA (disgraceful or dishonourable conduct whilst providing regulated services).
- Misconduct under s 7(1)(b)(ii) of the LCA (conduct unconnected with the provision of regulated services justifying a finding that the lawyer is not a fit and proper person to practice as a lawyer).

[24] GL had contended that if the conduct was not misconduct, then it was unsatisfactory conduct occurring in connection with the provision of regulated services (going to Court as a lawyer with files).

[25] The Committee however took the view that the conduct was unconnected with the provision of regulated services.

[26] In determining to take no further action the Committee was influenced by “the lack of intention on JS’s part”.⁴ It considered that the conduct was not capable of reaching the definition of “misconduct”⁵ and that it was not capable of breaching an identifiable rule and so could not be characterised as unsatisfactory conduct either.

Review

[27] In his application for review GL challenges the Committee’s finding that the incident did not engage the “regulated services” provisions of the LCA. He further claims that the Committee erred in being influenced by JS’s explanation that he had no intention to carry a weapon into a Courthouse, asserting that the act itself – whether or not it was unintentional – calls for a disciplinary response, and that the Committee’s failure to sanction JS was “plain wrong”.

Hearing on the papers

[28] Both the practitioner and the complainant have consented to this Review being undertaken on the papers pursuant to s 206 of the LCA. This process allows a Legal

⁴ Standards Committee decision dated 14 August 2014 at [23].

⁵ Lawyers and Conveyancers Act 2006, s 7(1)(b)(ii).

Complaints Review Officer (LCRO) to conduct the Review on the basis of all the information available if the LCRO considers that the Review can be adequately determined in the absence of the parties.

[29] In *Deliu v Hong* the High Court made the following observation about the role of the LCRO:⁶

In my view 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. 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.

Discussion

[30] I have had the benefit of considering all of the material that was provided to the Committee, as well as GL's submissions filed as part of his Review.

Does the incident amount to misconduct?

[31] I propose to consider, first, the question of whether this incident amounts to "misconduct". The misconduct tests in s 7 of the LCA differ according to whether regulated services are being provided at the relevant time. If they are being provided, the conduct must reach the threshold of being "disgraceful or dishonourable". If the conduct complained about occurred whilst regulated services are not being provided, then it must be such as to justify a finding that the lawyer is not a fit and proper person to practice as a lawyer.

[32] Both tests contemplate serious behaviour by a lawyer. They imply behaviour which is deliberate, reckless, or dishonest. Real culpability must be involved. Inadvertent, isolated behaviour would generally not meet these tests. If it did, this would put a premium on isolated and unintentional oversight by a lawyer. Given the lower standard of "unsatisfactory conduct" it cannot have been Parliament's intention to capture all lapses as misconduct.

[33] In the present case, it is beyond doubt that JS's actions were unintentional, and arose because he simply forgot about the pistol. Had it been confiscated on his first visit to the Court building the matter would have, in all probability, ended there. It appeared only to gain traction because the first screening was lax in some way and JS was able to enter and travel around the Court building with a pistol in his briefcase (albeit that he had forgotten about it).

⁶ *Deliu v Hong* [2012] NZHC 158 at [41].

[34] This is clearly not misconduct on either of the two s 7 tests. It is not necessary for me to look at the “regulated services” issue as part of this analysis; misconduct is simply not engaged at all.

Regulated services

[35] The remaining question is whether the conduct is unsatisfactory under any of the s 12 LCA limbs. Depending upon whether regulated services are being provided, the tests for unsatisfactory conduct differ.

[36] The regulated services definitions of unsatisfactory conduct are contained in s 12(a) and (b) of the LCA, as follows:

...

- conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer;
- conduct that would be regarded by lawyers of good standing as being unacceptable, including conduct unbecoming... or ... unprofessional conduct.

[37] The non-regulated services definition is contained in s 12(c) and is “conduct consisting of a contravention of [the LCA], or of any regulations or practice rules made under [the LCA] that apply to the lawyer ..., or of any other Act relating to the provision of regulated services” [other than misconduct].⁷

[38] The Committee considered that “the act of entering the Courthouse itself was not conduct that fell under the definition of regulated services ... but was conduct unconnected with regulated services”.⁸ Is this correct?

[39] “Regulated services” is comprehensively defined in the LCA. Relevantly for this case this includes “legal work” carried out by a lawyer for any other person. Legal work includes work in connection with proceedings or anticipated proceedings, giving legal advice in other matters, preparing legal documents and things incidental to the above.⁹

[40] JS explains that the first visit to the Court building was because he “had to go to the ... Court building to make some enquiries”.¹⁰ For this he needed to take a number of files for which he needed his briefcase. Although not described as such, a ready inference is that these were client files having some connection with matters in the Court.

[41] JS does not expand upon what he meant by having to “make enquiries” but again a reasonable inference is that the client files he took with him involved issues about

⁷ There is a further definition in s 12(d) but that is not relevant to the present case.

⁸ Above n 4 at [11].

⁹ Above n 5, ss 6 and 7.

¹⁰ Letter JS to LCS (16 June 2013).

which he needed to make enquiries on behalf of those clients; whether of Court staff, other lawyers or (e.g.) prosecuting agencies then present in the Court precinct.

[42] Therefore, it seems to me that JS was going to the Court building in connection with and for the purpose of legal work he was performing on behalf of clients. He was not going there to pay a social visit. It is artificial to suggest, as the Committee appears to have done, that regulated services involves identifiable legal work on behalf of a client being performed at exactly the same time as the behaviour complained about. To engage in such a detailed analysis every time the “regulated services” question is asked would be unnecessarily time-consuming and distracting. Common sense would suggest that a lawyer who is going to Court with client files to make enquiries on behalf of those clients, is performing regulated services as they make their way to and from the building for that purpose.

[43] This view is strengthened by the different unsatisfactory conduct tests in s 12(a) and (b). Both involve the provision of regulated services, but s 12(a) is directed towards competence and diligence in the work performed, whereas s 12(b) captures more general conduct which is “unacceptable”, “unbecoming” or “unprofessional”.

Unsatisfactory conduct?

[44] Having determined that JS was performing regulated services at the relevant times, the next question is whether the conduct (taking a pistol to the Court building) was unsatisfactory? The appropriate test is that found in s 12(b): was it “unacceptable”, “unbecoming” or “unprofessional”?

[45] I have already indicated that it is beyond doubt that JS’s actions were unintentional and isolated.¹¹ No one could seriously challenge that; GL certainly does not. His position is that the incident is so serious that a strict liability approach is called for.

[46] I cannot agree with this approach. A series of careless acts by a lawyer might give rise to conduct being described as “unacceptable”, “unbecoming” or “unprofessional”, as it may reveal an underlying problem. There is no suggestion that JS is routinely careless. He is entitled to rely upon that good record. It provides insight into his approach to his professional duties and obligations.

[47] At worst, this incident was unfortunate. It had none of the hallmarks of conduct which is “unacceptable”, “unbecoming” or “unprofessional”.

¹¹ Above at [33].

[48] Although wrong to conclude that JS was not providing regulated services, the Committee was nevertheless right to conclude that the totality of the circumstances of this case were such that further action was unnecessary or inappropriate.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the Standards Committee's decision is:

- i. reversed as to the finding that regulated services were not being provided;
and
- ii. confirmed as to the finding that the conduct was not unsatisfactory.

DATED this 30th day of October 2014

R Maidment
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:

GL as the Applicant
JS as the Respondent
The [XYZ] Standards Committee
The New Zealand Law Society
Secretary for Justice