

CONCERNING

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

AND

CONCERNING

a determination of the [City] Standards Committee

BETWEEN

MR OL

Applicant

AND

MS EV

Respondent

DECISION

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

Background

[1] Mr OL applied for a review of a decision of [City] Standards Committee dated 14 December 2012 in which the Committee decided under s138(1)(f) and (2) of the Lawyers and Conveyancers Act 2006 (the Act) to take no further action in respect of Mr OL's complaints against Ms EV.

[2] Ms EV was a Personal Assistant (PA) employed by a firm of lawyers, one of whom acted for Mr OL's former wife in Family Court proceedings involving Mr OL. EV was also a personal friend of his former wife, and they would socialise together.

[3] Essentially Mr OL's complaint is that Ms EV blurred the boundaries between her friendship and her employment obligations, by being indiscreet with information that was sensitive, personal and confidential to Mr OL's former wife, and, by extension, to him. He is also concerned that Ms EV had sworn an affidavit in support of his former wife's relationship property claim against him which contained evidence that was false.

[4] He says that she is a legal PA so it is for the Standards Committee to hold her to account.

Standards Committee Decision

The Standards Committee focussed its consideration on whether Ms EV's alleged conduct had occurred while she was providing "regulated services" under the Act.

[5] On the basis of the evidence before it, the Committee concluded that further action was unnecessary or inappropriate in respect of Ms EV's alleged indiscretions, because they were "not part of her work activities and are the sorts of actions that occur as part of social life".¹

[6] The Committee also considered that Mr OL's concerns about the contents of Ms EV's affidavit were matters best dealt with by the Judge in the Family Court. As the Committee considered that the Family Court proceeding was "an alternative and more appropriate remedy"² that was available to Mr OL, the Committee decided it should take no further action on that aspect of Mr OL's complaint.

[7] Mr OL objected to the way in which the Standards Committee had dealt with both aspects of his complaint, and applied for a review.

Reasons for review

[8] In his review application Mr OL repeated his original complaints, and asked for the "correct outcome"³ on review.

Role of the LCRO

[9] 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 judgment for that of the Standards Committee, without good reason.

Scope of Review

[10] 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.

¹ Standards Committee Decision dated 14 December 2012 at [3].

² Above n 1 at [6].

³ Application for review dated 21 January 2013 at [8].

Review Hearing

[11] Mr OL attended a review hearing in Auckland on 20 May 2014. Ms EV was not required to attend, and the hearing proceeded in her absence.

Review issue

[12] The only issue on review is whether the Standards Committee's decisions to take no further action were reasonable in the circumstances. For the reasons discussed below, the Committee's decision is modified to record that further action in respect of all aspects of Mr OL's complaint is unnecessary and inappropriate pursuant to s 138(2) of the Act.

Discussion

Sections 11 and 14 – Non-Practitioner Employee Conduct

[13] Ms EV was an employee but not a practitioner at the time of the conduct Mr OL complains of. Sections 11 and 14 of the Act regulate conduct by employees of lawyers and law firms, who are not practitioners. Section 11 regulates more serious conduct that falls within the definition of employee misconduct. Mr OL's complaints do not fall within the definition of employee misconduct.

[14] Less serious conduct is regulated by s 14 which defines unsatisfactory conduct by lawyers' employees in the following way:

In this Act, **unsatisfactory conduct**, in relation to a person who is not a practitioner but who is an employee of a practitioner or an incorporated firm,—

(a) means **conduct of the person in the course of his or her employment** by the practitioner or incorporated firm that would, if it were conduct of a practitioner, be unsatisfactory conduct under section 12...; and

(b) includes conduct consisting of a contravention of this Act, or of any regulations or practice rules made under this Act that apply to the person, or of any other Act relating to the provision of regulated services (not being a contravention that amounts to misconduct under section 11).

(emphasis added)

[15] For a finding against Ms EV to be made under s 14, therefore, the conduct complained of must be "conduct of the person in the course of... her employment".

Allegation 1 - False Affidavit

[16] When Ms EV swore an affidavit she did so in her capacity as a witness in a Court proceeding, not as an employee of the firm. In the circumstances the provisions of s 14 are not engaged, so it is unnecessary and inappropriate to take any further action in respect of that aspect of Mr OL's complaint. The Committee could have rejected jurisdiction over that aspect of the complaint, and although my reasons differ slightly from those of the Committee's, the outcome is the same, in that no further action will be taken.

[17] Pursuant to s 211(1)(a), the Committee's decision is modified to record that further action in respect of this aspect of Mr OL's complaint is unnecessary and inappropriate pursuant to s 138(2) of the Act.

Allegation 2 - Indiscretion

[18] There are two aspects to Mr OL's complaints about Ms EV being indiscreet. First, he alleges she was profligate with sensitive personal information gained in the course of her employment. Second, he says she used her employer's computer for her personal business, thereby jeopardising the security of her employer's clients' information.

[19] Both of these matters highlight serious concerns that have to be managed. As an employee of lawyers, Ms EV's employer can expect her to conduct herself in a way that is consistent with her good faith obligations to her employer. If she fails to do so, she may face consequences through her employment relationship, and in some circumstances under the relevant provisions of the Act.

[20] However, neither aspect of Mr OL's complaint about Ms EV's alleged indiscretion engages the provisions of s 14 of the Act. Although the information he is concerned about may have come to Ms EV because of her work as a PA, his concern is that she was profligate with it outside her workplace; not in the course of her employment. The other aspect of his complaint was that Ms EV used her work computer for a personal purpose by allegedly disseminating information he believes came to Ms EV because she was employed by lawyers. Again, if the allegation is correct, that is not evidence of conduct in the course of her employment, but of conduct associated with a frolic of her own.

[21] Those findings are consistent with the Committee's categorisation of Ms EV's conduct as appearing in the context of social interactions, with no evidence of any link to her employment or her employer.

[22] The Committee went further than it needed to by considering whether Ms EV had been providing regulated services in her capacity as a lawyer's PA, and deciding to take no further action on the basis that she was not.

[23] Again, although my reasons differ from those of the Committee's, the outcome is the same. There are good reasons to confirm the Committee's decision that further action with respect to Ms EV's alleged indiscretions is unnecessary or inappropriate pursuant to s 138(2) of the Act.

Outcome

[24] Pursuant to s 211(1)(a), the Committee's decision is modified to record that further action in respect of all aspects of Mr OL's complaint is unnecessary and inappropriate pursuant to s 138(2) of the Act.

Costs

[25] The LCRO has a broad discretion under section 210 of the Act to make such orders as to the payment of costs and expenses as the LCRO thinks fit, after conducting the review.

[26] Ms EV has done nothing to add to the costs of the review. If what Mr OL says is correct, her conduct may have been injudicious, but that is not a matter which is regulated by this Office.

[27] In the circumstances it would be inappropriate to make an order that Ms EV pay costs on review.

[28] Mr OL was entitled to bring his application. He was genuine in his concerns and did nothing to exacerbate the costs of his review application. There is no reason to make an order for costs against him.

[29] In the circumstances no order for costs will be made on review.

Decision

Pursuant to s 211(1)(a) the decision of the Standards Committee is modified to record that further action in respect of all aspects of Mr OL's complaint is unnecessary and inappropriate pursuant to s 138(2) of the Act.

DATED this 26th day of May 2014.

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:

Mr OL as the Applicant
Ms EV as the Respondent
The [City] Standards Committee
The New Zealand Law Society