

LCRO 317/2012

CONCERNING

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

AND

CONCERNING

a determination of the [Standards Committee X]

BETWEEN

MS AP
Applicant

AND

[STANDARDS COMMITTEE X]
Respondent

DECISION ON COSTS APPLICATION

[1] On 15 August 2013 I issued a decision confirming [Standards Committee X's] decision to prosecute Ms AP in the Lawyers and Conveyancers Disciplinary Tribunal. This followed Ms AP's application for review of the Committee's decision.

[2] At that time I did not deal with a costs application made by the parties. Ms AP was unsuccessful in her review application, and Mr CF, on behalf of the Standards Committee, asks that his costs application be considered. The Standards Committee seek an award of costs of \$2,400.

[3] Ms AP was invited to respond to the application and I have considered her submissions. Ms AP opposes the making of an Order for costs against her.

[4] The discretion to award costs is conferred by s 210 of the Lawyers and

Conveyancers Act 2006 (the Act). This provides that:

The Legal Complaints Review Officer may, after conducting a review under this Act, make such order as to the payment of costs and expenses as the Legal Complaints Review Officer thinks fit.

[5] There is no restriction on that discretion, and costs awards may be made against, or in favour of, a lawyer vis a vis the New Zealand Law Society for payment in favour of the lawyer (or in the case of a conveyancer, by or against the New Zealand Society of Conveyancers). I consider that this provision is included for the purpose of making it clear that there is authority to make Orders against those bodies, notwithstanding that they may not otherwise be considered to be a party to the proceedings.

[6] The discretion is clearly wide enough to make inter-parties costs Orders, although this Office has been cautious about making costs awards against lay review applicants. This may happen where some aspect of the conduct of the lay applicant justified such an Order where this has resulted in cost incurred by the other party. An example of inter-parties costs having been made against a lay applicant occurred when a lay applicant specifically sought a hearing but then failed to appear, with the result that the practitioner's personal attendance was for no useful purpose. It would be extremely rare for costs to be awarded against a lay applicant merely for lodging the application for review, given that this is a right provided by the Act (this is reflected in [11] of the LCRO Costs Orders Guidelines) which intends to enhance the rights of consumers to complain about the conduct of lawyers.

[7] The Guidelines set out the circumstances where costs Orders would be considered, and there it is stated that a lawyer applicant who is unsuccessful in his or her review application could expect to contribute to the costs of the review. The levels of contribution are also included, with the rider that costs may be increased where a party has acted vexatiously, frivolously, improperly, or unreasonably in bringing, continuing, or defending the review.¹ Where the conduct of a party falls into one or more of the above categories during the course of the review, then the exposure of that party to an award of costs increases.

[8] The matter under review in this case was a decision of the Standards Committee to prosecute Ms AP. She was informed of the limited grounds available for review, and

¹ LCRO Costs Orders Guidelines at [13].

focused her review application predominantly on allegations of bias against named individuals in the Standards Committee. Ms AP sought costs against the Standards Committee.

[9] Standards Committees are the original decision makers, and are not therefore a party to the review, although they are routinely notified of applications for review of a prosecutorial decision. Only seldom does a Standards Committee elect to participate in any way, and the attendance by any Standards Committee member or representative is rare.

[10] However, where allegations of bias are made against Committee members, individuals named are given the opportunity to comment on those allegations. Such was the case here, and each of the four individuals cited in Ms AP's allegation responded in full, each setting out the circumstances of their prior association with Ms AP, and denying any bias. I did not consider it necessary to seek further information from them, or the Standards Committee's participation.

[11] When Ms AP commented on those submissions she provided additional information, and also added two further names to her list of individuals involved in the alleged conflict, extending the allegation to the Standards Committee as a whole being conflicted. In reply, the Legal Standards Officer wrote to this Office to advise that it saw no purpose in further correspondence unless I sought further information (which I did not).

[12] A review hearing was scheduled because Ms AP wanted to be heard on her application, as she was entitled. This Office was then informed that further submissions would be provided by Mr CF acting for the Standards Committee. Mr CF's submissions were received, and included an application for costs against Ms AP on the ground that her review application was of a frivolous nature, also making reference to the "extraordinary allegations of bias"² levelled against members of the Standards Committee who were all noted to be lawyers voluntarily giving up their time to participate in the disciplinary machine.

[13] Mr CF attended the review hearing, as did Ms AP.

[14] Ms AP's review application was unsuccessful and my decision particularly noted

² Mr CFs submissions to LCRO (22 June 2013) at [38b].

that there was no foundation to the bias allegations. Mr CF (as counsel for the Standards Committee) sought costs on the basis that his attendance “was necessitated because of the nature of the extraordinary allegations levelled against members of [Standards Committee X], and Mrs CG”,³ which were serious and found to have no foundation.

[15] Ms AP was invited to respond to the costs application and did so by email on 20 September 2013. She referred to costs incurred by the Applicant (referring to herself) in the hours spent in research and compiling information, and in travel in respect of the application. She advised that she has not been in paid employment since 2011 and has no current income. She referred to principles relevant to costs, also noting the right of an Applicant to seek a review. In a further submission Ms AP questioned the necessity for Mr CF’s attendance at the review hearing.

[16] An overriding question for an LCRO when reviewing a Standards Committee’s decision to prosecute where bias is alleged, is whether the decision was in any way tainted. Where there is evidence of bias having possibly tainted a prosecutorial decision, the review would result in a quashing of the decision and a redirection back to the Committee under s 209 of the Act. For that reason named individuals are invited to respond to allegations of bias. However, materially, in undertaking their regulatory functions, members of a Standards Committee do not come under the scrutiny of this Office. The focus of a review is on the decision itself.

[17] An important consideration in the matter of costs is whether it was necessary for the Committee (or individual members) to be represented because if it was not necessary, it would be unprincipled for this Office to make a costs Order. As noted a Standards Committee is not a ‘party’ to a review by this Office of a prosecutorial decision, although may properly be considered ‘an interested party’. In this light the necessity for the Standards Committee, or its members, to have legal representation must be questionable. The focus of review by this Office is on the decision itself, not the decision maker (either the Committee collectively or its members individually) whose conduct in the exercise of regulatory functions cannot be the subject of a disciplinary finding by this Office.

³ Email from Mr CF to LCRO (24 September 2013).

[18] Mr CF's costs application cites the vexatious nature of Ms AP's bias allegations and the want of a proper foundation for them. The file indicated that the responses to the allegations were provided by the Committee members, apparently before Mr CF's assistance was sought. No further information was sought by this Office but when a hearing was scheduled, further submissions were voluntarily provided by Mr CF. His attendance at the subsequent review hearing appears to have been the result of a decision of the Committee. Given that the attendance (by or on behalf of the Standards Committee) was not sought, I have some difficulty in finding a proper basis for the award of costs sought by the Standards Committee. While it may have incurred some costs in relation to answering Ms AP's allegations, such costs would generally be borne by the New Zealand Law Society.

[19] Given that Ms AP was unsuccessful in her review application, there is however a proper basis for awarding costs against her, but not on an inter-parties basis. The question is whether an award should exceed the range set out in the LCRO Guidelines. Such may be the case where grounds of review are shown to be vexatious. The key ingredient for a matter to be considered vexatious is that it has no realistic prospect of success, such as allegations instituted without sufficient ground and serving only to cause annoyance. This may include allegations that are mistakenly considered to have a good prospect of being upheld, and brought for a proper, if misplaced, motive.

[20] My impression in this case is that Ms AP may genuinely hold her views about bias, built on an accumulation of negative personal experiences and impressions about the Committee (and some members or associated persons) which she perceived as having influenced it in the decision to prosecute her on this occasion. However, she provided no reasonable support for the allegations she made, and there was never any realistic prospect of the allegations finding any firm foundation. In that light Ms AP's allegations against the Standards Committee members might properly be described as vexatious. Additional attendances by this Office were necessitated, which inevitably added to the usual costs of a review.

[21] Having carefully considered the entirety of the circumstances, it is my view that the costs Order should be made, and that there is a proper basis for a small increase to the \$900 that would otherwise be applied for a straight forward review. I consider that Ms AP should pay the sum of \$1,200 towards the costs of the review.

Outcome

Pursuant to s 210 of the Lawyers and Conveyancers Act 2006 Ms AP is ordered to pay the sum of \$1,200 to the New Zealand Law Society within 30 days of the date of this decision.

DATED this 25th day of November 2013

Hanneke Bouchier
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 AP as the Applicant
[Standards Committee X] as the Respondent
Mr CF as the Respondent's representative
The New Zealand Law Society