

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of the [Area] Standards Committee

**BETWEEN**

**RA**

Applicant

**AND**

**ZA**

Respondent

**DECISION**

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

**Introduction**

[1] Mr RA has applied for a review of a decision by the [Area] Standards Committee to take no further action in respect of his complaint concerning Ms ZA's conduct. The key issue on review is whether there is good reason to substitute my judgement for that of the Committee.

**Background**

[2] Acting for himself, Mr RA applied for judicial review of a decision by the New Zealand Association of Counsellors Incorporated.<sup>1</sup> Ms ZA acted for the Association. Mr RA alleges dereliction of duty on Ms ZA's part in the course of the judicial review proceeding. Mr RA considers Ms ZA did not conduct herself according to professionally acceptable standards of integrity, respect and courtesy by failing to respond to emails he sent during the proceeding, being late in complying with timetabling directions issued by the Court, and by not complying with a direction to

---

<sup>1</sup> [High Court Decision A].

correspond directly with him over admissibility of evidence. He infers that the “persistent and extreme nature” of Ms ZA’s omissions suggest “something more nefarious” than inadvertency or forgetfulness.<sup>2</sup> Mr RA wanted Ms ZA to demonstrate her remorse for the way she treated him in the course of the proceeding, and to provide him with a written apology.

[3] The Committee, which is comprised of lay and lawyer members, considered each of the emails Mr RA had provided, and considered it was able to address his concerns without the need for a response from Ms ZA with reference to lawyers’ customary litigation practice. The Committee considered the conduct of concern to Mr RA was explicable, explained its view of that conduct and concluded that Ms ZA had not breached professional standards.

[4] Mr RA does not accept that is a valid conclusion. He considers action should be taken on his complaint. In his application for review Mr RA says the complaint process, and in particular Ms ZA not being required to respond to his complaint, represents a failure on the Committee’s part to fulfil its regulatory functions. He relies for support on his experience in a complaint process in which he laid complaint against another practitioner. That Committee adopted a different approach. He considers the process and decision under review evidence a lack of natural justice, bias, predetermination, illogicality and incompetence on the Committee’s part. He believes the Committee side-stepped the professional standards issue and misdirected itself.

[5] Based on his suspicion there was covert communication between Ms ZA and the Committee, from which he was excluded, Mr RA believes Ms ZA compellingly and unduly influenced the Committee. He considers her barely minimal engagement with him, and leisurely approach to compliance with Court timetabling, are cumulative evidence of her disrespect and discourtesy towards him in contravention of rule 12 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[6] Mr RA believes Ms ZA disregarded the “legislation that governs her practice”. He contends that the way she conducted the proceeding on her client’s behalf, by delaying and refusing to communicate with him, unfairly deprived him of a meaningful opportunity to participate in the proceeding, and that Ms ZA thereby failed to facilitate the administration of justice. He says her conduct of the matter created challenges for him in progressing his proceeding.

[7] Mr RA believes Ms ZA took advantage of him because he was a self-represented litigant. Mr RA wants to see Ms ZA brought to account and suggests

---

<sup>2</sup> Complaint, 7 October 2013.

he should be compensated for the stress she caused to him. He considers the Committee would benefit from further training, and invites this Office to refer his complaint back to a different Committee for reconsideration. He wants Ms ZA to explain herself.

### **Review hearing**

[8] Both parties attended an applicant only review hearing by telephone on 20 June 2017.

### **Nature and scope of review**

[9] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:<sup>3</sup>

... the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.

The Review Officer has broad powers to conduct his or 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. These powers extend to “any review” ...

... 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.

[10] More recently, the High Court has described a review by this Office in the following way:<sup>4</sup>

A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO’s own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee’s determination.

[11] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee’s determination, has been to:

---

<sup>3</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

<sup>4</sup> *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

- (a) Consider all of the available material afresh, including the Committee's decision and the parties' comments at the review hearing; and
- (b) Provide an independent opinion based on those materials.

## Analysis

*Is there good reason to substitute my judgement for that of the Committee?*

[12] Mr RA alleges deficiencies in the Committee's process and decision for various reasons.

[13] The Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008 set out the procedure followed by the complaints service on receipt of a complaint. Clause 9 says complaints must be acknowledged in writing, referred to a Committee as soon as reasonably practicable, and notification provided, with a copy of the complaint, to the person or firm to whom the complaint relates. That person or firm must be advised of his, her or its right to make a written submission to the Committee.

[14] Although lawyers have a duty to cooperate in the course of the complaint process,<sup>5</sup> the regulations do not require a lawyer to reply, in advance of a complaint being referred to a Committee. Committee procedures must accord with the provisions of the Act, regulations and practice notes, and Committees must act in accordance with the rules of natural justice.

[15] It is not legitimate to compare the process in Ms ZA's case with any other complaint process. While there are recurring themes in the complaints that Committees consider, each one is unique, and each Committee exercises discretion in deciding how to dispose of each one. Nowhere is there an absolute rule prohibiting a Committee from determining a complaint without the practitioner concerned having provided a response at such an early stage. The purpose of notifying the complaint to the practitioner is to enable the practitioner or firm to exercise her, his, or its, right to respond. Once it has received a complaint a Committee has three choices. It can decide to inquire into the complaint, it can direct the parties to explore alternative methods of resolving the complaint or it can do as the Committee did here, and decide to take no action on the complaint and inform the parties that is its proposed course as soon as practicable.

---

<sup>5</sup> *Hart v Auckland Standards Committee 1 of the New Zealand Law Society* [2013] NZCA 673.

[16] Although Mr RA believes the Committee adopted the wrong course of action, the Regulations did not prevent the Committee from adopting the procedure it did. As deciding to take no action was an exercise of discretion on the part of the Committee, it is appropriate for me to exercise some particular caution before substituting my own judgement for that of the Committee. There would have to be good reason for me to do so.

[17] Mr RA says breach of natural justice, bias, predetermination, illogicality, incompetence, side-stepping the professional standards issue and the Committee misdirecting itself are all good reasons. He also believes Ms ZA's conduct calls for a disciplinary response.

[18] The allegations of breach of natural justice, bias and predetermination spring from Mr RA's suspicions about the Committee having decided not to ask Ms ZA for a response, and are fuelled by his experience with a different complaint about another practitioner before a different Standards Committee. Mr RA was told that the complaint that is the subject of this review would go to NZLS' Early Resolution Service. He objected, expressing his view that the complaint was not suitable, and concerns that he may not be taken seriously envisaged and the prospect that his complaint might not be referred to a Committee.

[19] Having read the decision he came to believe that either the Committee did not obtain a response from Ms ZA, or that she did reply but her communication was kept from him.

[20] The only evidence of communication with Ms ZA on the Committee's file before the decision was made is her confirmation that she accepts the Committee's indication of its intention to take no further action on Mr RA's complaint. There is no evidence of Ms ZA having provided any substantive response to the Committee, although she was offered an opportunity to do so.

[21] Building on his procedural objections, Mr RA elevates his concerns about a perceived lack of fairness to allegations of bias, incompetence and failure to fulfil regulatory functions on the part of the Committee. His suspicions are exacerbated by the Committee having referred to *Re Collier* as evidence to support his suspicion of secret communications between the Committee and Ms ZA.<sup>6</sup>

[22] Although Mr RA would have had a copy of the [High Court Decision A], he did not provide a copy in support of his complaint. He did refer to that proceeding.

---

<sup>6</sup> *Re Collier (A Bankrupt)* [1996] 2 NZLR 438; and where the Standards Committee refers to this case.

[23] As with most, if not all, High Court decisions, [High Court Decision A] is reported, and publicly available. As it is a public record of the proceeding, and potentially (but not actually) includes a record of unacceptable conduct on Ms ZA's part in the course of that case, it is assumed that the Committee considered the [High Court Decision A] decision.

[24] Paragraphs [35], [36] and footnote 9 of [High Court Decision A] record that Mr RA relied on *Re Collier* as authority supporting his application to the High Court for costs.

[25] In the circumstances, it is significantly less likely that the Committee's reference is evidence of secret communications between the Committee and Ms ZA, and far more likely that it reflects the fact that the Committee read the [High Court Decision A] decision and saw *Re Collier* referred to in it. It is not unreasonable to assume lawyer members of the Committee may have been aware of *Re Collier* in any event, since it is a longstanding authority on lay litigant costs.

[26] As Mr RA had not provided a copy of the [High Court Decision A] decision to the Committee, it may well have assisted him, and perhaps helped to diffuse some of the suspicions he airs on review about the complaint process, to know if the Committee had that decision before it, or in mind, when it considered his complaint.

[27] There would be no actual unfairness to Mr RA in the Committee having referred to the [High Court Decision A] decision, if indeed it did, because as plaintiff he had a copy of the decision, was aware of its contents and could have referred the Committee to anything in it that he considered might be relevant to his complaint. There is nothing in that decision that speaks adversely to Ms ZA's conduct towards Mr RA. Without establishing the point conclusively, [High Court Decision A] adds weight to the proposition that inquiry into alleged conduct on Ms ZA's part may not have been warranted.

[28] Mr RA also contends the decision is illogical. The genesis of this concern appears to be the Committee's treatment of what Mr RA describes as hypocrisy on Ms ZA's part. Mr RA's argument is essentially that Ms ZA is subject to a virtually absolute obligation to comply to the letter with timetabling directions made by the Court in the proceeding, because she is an officer of the Court. He sensibly accepts there may be extenuating circumstances in some cases. However, as Mr RA did not maintain his objection to delays in the court process, and waived his opportunity to delay the hearing to avoid any possible prejudice, it is difficult for him to now progress those concerns through the complaint and review processes.

[29] Nonetheless, Mr RA says Ms ZA's failures were professionally unacceptable, and prejudicial to him.

[30] Ms ZA is subject to no absolute obligation of compliance. If the Court considered her conduct had reached a point where a response was warranted, as the Committee observed, the Court was best placed to attend to that. If there was unfairness to Mr RA in the proceeding, he could have accepted the Court's offer of adjournment. He did not.

[31] Although Mr RA finds the suggestion of flexibility in the timing of the litigation process unpalatable, the reality is that there often is some degree of flexibility in complying with timetabling directions. If the opposing party does not raise objection to the Court, minor delay may pass without note, or be excused.

[32] Although Mr RA says his interests were prejudiced, he was successful as plaintiff. He also acknowledges that Ms ZA's primary obligations were not owed to him.

[33] Ms ZA had an obligation to protect, subject to her overriding duties as an officer of the High Court and to her duties under any enactment, the interests of her client. Any obligations she may owe elsewhere, such as conducting her dealings with Mr RA with integrity, respect and courtesy must be viewed from that perspective.

[34] In ascertaining whether conduct is consistent with maintaining proper professional standards of integrity, respect and courtesy, in the context of the Rules, it is relevant to have regard to the particular ethical standards associated with the role of lawyer. As Professor Webb explains, there is a distinction between professional standards and the standards expected of ordinary citizens:<sup>7</sup>

The professional rules of lawyers demand they act in a way which in normal life would be considered wrong. While such problems may arise in other areas (such as a doctor's duty of confidence) they arise most frequently for lawyers whose tasks as advocate and adviser frequently place them in difficult situations. The role of a lawyer then is strongly differentiated in the sense that there is a strong divide between the conduct expected of them as lawyers and the conduct expected of them as ordinary citizens.

[35] Mr RA says he expected common courtesy from Ms ZA. Rule 12, however, did not require common courtesy of Ms ZA, in the sense of that which might be expected of ordinary citizens. Rule 12 required Ms ZA to conduct herself in a way that was consistent with professionally appropriate standards of integrity, respect and courtesy. Ms ZA was obliged to act in the best interests of her client. There is no

---

<sup>7</sup> Duncan Webb, Kathryn Dalziel, Kerry Cook *Ethics, Professional Responsibilities and the lawyer* (3<sup>rd</sup> ed, LexisNexis, Wellington, 2016) at [2.4].

reason to accept that she did not, even if that meant Mr RA felt slighted. It is not unreasonable to assume that Ms ZA's instructions were consistent with her limiting her communications to minimise her client's costs, and for efficiency. The evidence contained in Mr RA's complaint, coupled with that reasonable assumption, does not support a finding that Ms ZA lacked integrity, or was disrespectful or discourteous towards him in her professional capacity.

[36] It follows that Mr RA's concerns that the Committee was incompetent, sidestepped the professional standards issues and misdirected itself are not well supported.

[37] Ms ZA responded to Mr RA's application for review, but her response made no attempt to account for the conduct on her part that Mr RA had complained about. Ms ZA's instructions from her client are protected by privilege. It is not necessary to enquire of her client whether it is prepared to waive its privilege so that Ms ZA can answer Mr RA's allegations because on the face of Mr RA's complaint, the evidence does not support a finding that Ms ZA was derelict in carrying out her obligations to the Court or her client.

[38] Without wishing to detract from the authenticity of Mr RA's feelings of grievance, litigation is idiosyncratic. In that unique environment, it is not the case that any aspect of Ms ZA's conduct towards Mr RA, or otherwise, constituted a breach of professional standards of respect or courtesy.

[39] There was no reason for the Committee to have taken action on his complaint. There is no good reason to substitute my judgement for that of the Committee and there are good reasons not to. In the circumstances, the decision is confirmed.

## **Decision**

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

**DATED** this 27<sup>th</sup> day of June 2017

**D 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 RA as the Applicant  
Mr ZA as the Respondent  
Mr TA as a Related Person  
[Area] Standards Committee  
The New Zealand Law Society