

CONCERNING

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

AND

CONCERNING

a determination of [North Island] Standards Committee [X]

BETWEEN

ES

Applicant

AND

VO

Respondent

Introduction

[1] This review involves a consideration of whether the Lawyers Complaints Service has jurisdiction to consider complaints about the conduct of a former employee of a lawyer which takes place at a time when the former employee is no longer employed by a lawyer. The facts relating to this complaint are somewhat unique.

Background

[2] Mr VO is a registered legal executive who was previously employed by [Firm X]. At the time he was employed by that firm he was involved in establishing a trust called the [Trust name] for a client. The trustees of that trust were Ms TT, Mr ES (her husband) and Mr VO.

[3] Mr VO left [Firm X] and set up a company called [Company name]. He continued to provide advice¹ to Ms TT when she separated from Mr ES.

[4] Ms TT held the power of appointment and removal of trustees of the [Trust name] and when she and Mr ES separated, she instructed Mr VO to remove Mr ES from the title of a property owned by the Trust. This was supported by a deed terminating Mr ES's appointment as a trustee.

¹ I have not referred to this as "legal advice" deliberately as that is a decision for another body.

[5] Mr VO prepared A & I forms to effect this which were signed by himself and Ms TT. He did not obtain a signature from Mr ES as was required.

[6] The A & I forms were provided to Mr FX of [Firm Y] who completed the registration.² Mr ES has complained about the conduct of Mr VO.

Does the Lawyers Complaints Service have jurisdiction to consider the complaint?

[7] The Standards Committee declined to consider the complaint on the grounds that at the time the conduct took place, Mr VO was not employed by a lawyer or a law firm. Mr ES has applied for a review of that determination on the basis that a complaint may be made about the conduct of a “former employee”³ and it is unchallenged that Mr VO was previously employed by [Firm X], a law firm.

[8] The Standards Committee did not provide any reasons to support its determination to decline jurisdiction. This was unfortunate as it has resulted in an application for review which now has to be addressed by this Office.

[9] The Standards Committee was correct to decline jurisdiction. It is unchallenged that Mr VO is a former employee of a law firm. Section 132(1)(a)(iii) of the Lawyers and Conveyancers Act provides that any person may complain about the conduct of a former employee of a practitioner or incorporated law firm. Consequently, the issue becomes one of determining whether the conduct complained about must occur at a time the person complained about was employed by a lawyer or law firm, or whether conduct which occurs at a time when the former employee is no longer employed by a law firm may still be the subject of complaint.

[10] Section 152(2) of the Act provides that if a Standards Committee determines to inquire into a complaint it may either lay a charge before the Lawyers and Conveyancers Disciplinary Tribunal (LCDT), determine there has been unsatisfactory conduct on the part of the person complained about, or determine to take no further action.

[11] Section 241 of the Act provides that after hearing a charge, the LCDT may make orders pursuant to s 242 if it is satisfied that a former employee:

- (a) has been guilty of misconduct; or

² Mr ES has made a separate complaint about Mr FX which is also subject to review.

³ Lawyers and Conveyancers Act 2006, s 132(1)(a)(iii).

(b) has been guilty of unsatisfactory conduct that is not so gross, wilful or reckless as to amount to misconduct; or

(c) has been guilty of negligence or incompetence in his or her professional capacity of such a degree or so frequent as to reflect on his or her fitness to practise, or as to bring his or her profession into disrepute; or

(d) has been convicted of an offence punishable by imprisonment and the conviction reflects on his or her fitness to practise or tends to bring his or her profession into disrepute.

[12] Subsection (d) has no relevance to the present circumstances.

[13] Misconduct by non-lawyer employees of a law firm is defined in s 11 of the Act. Section 11(a) refers to conduct “of the person in the course of his or her employment”. Mr VO’s conduct did not take place in the course of his employment by a lawyer and consequently subsection (a) does not apply.

[14] Section 11(b) refers to conduct “which is unconnected with his or her employment by the practitioner or incorporated firm but which would justify a finding that the person is not of good character or is otherwise unsuited for employment by a practitioner or incorporated firm”.

[15] It is worth noting here that under the previous paper based registration process it would not have been necessary to have Mr ES execute the transfer and I am prepared to accept that the failure to obtain Mr ES’s signature in this instance reflected either a lack of knowledge or an oversight on Mr VO’s part as to what is required in the electronic registration regime. The conduct complained of is not something that reflected on Mr VO’s character.

[16] Unsatisfactory conduct by non-lawyer employees is defined in s 14. That section refers to “a person who is not a practitioner but who is an employee of a practitioner ...”. The emphasis here is that the conduct is of a person who **is** an employee, not **was** an employee. In addition, s 14(a) refers to conduct which takes place in the course of employment by a practitioner or an incorporated firm and s 14(b) identifies further conduct which is included within the conduct referred to in s 14(a).

[17] Consequently, I conclude that Mr VO’s conduct, taking place as it did at a time when he was not employed by a practitioner, cannot constitute unsatisfactory conduct in terms of s 14.

[18] The last situation in which the Tribunal may make orders against a former employee is contained in s 241(c) which refers to a finding that the person has been “guilty of negligence or incompetence in his or her professional capacity ... of such a

degree or so frequent as to reflect on his or her fitness to practise or as to bring his or her profession into disrepute". It is difficult to accept that Mr VO's "professional capacity" or the profession to be brought into disrepute, could be anything other than his capacity as a law firm employee or the profession of legal executives. If I am wrong in this regard, I do not consider the conduct complained about to be of such a degree or so frequent as to bring s 241(c) into operation.

[19] Having carried out this analysis I reach the conclusion enunciated by the Standards Committee, that there is no jurisdiction to consider the complaint against Mr VO under the Lawyers and Conveyancers Act. I note the Committee referred to a possible breach of s 35 of the Act which provides that a person who is not an authorised person who provides conveyancing services commits an offence against the Act. I concur with that observation but that is not an issue to be addressed by the Standards Committee or this Office on review.

Decision

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

DATED this 13th day of March 2015

O W J 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:

Mr ES as the Applicant
 Mr VO as the Respondent
 Mr ZH as the Respondent's counsel
 [North Island] Standards Committee [X]
 New Zealand Law Society