

LCRO 33/2015

**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 [X]

**BETWEEN**

**HS**

Applicant

**AND**

**[AREA] STANDARDS COMMITTEE [X]**

Respondent

**DECISION**

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

**Introduction**

[1] Mr HS has applied for a review of a decision by the [Area] Standards Committee [X] (the Committee), in which findings of unsatisfactory conduct were made against him.

[2] This followed the Committee initiating an own-motion investigation into Mr HS's conduct in making complaints about lawyers on the other side of litigation in which Mr HS was acting.

**Background**

[3] Mr HS was acting for a Charitable Trust, [GTK]. [GTK] was the respondent in personal grievance proceedings brought against it by a former employer (Ms C).

- [4] Mr HS's wife was a trustee in [GTK].
- [5] Mr HS became involved in a later stage of the proceedings.
- [6] Initially Mr K acted for Ms C. He became unable to act and was replaced by Mr M. Both are barristers. Law firm Y initially acted as instructing solicitors, but they were replaced by law firm Z.
- [7] The proceedings were bitterly fought, and involved the Employment Relations Authority, the High Court and the Employment Court.
- [8] During the passage of the case through those jurisdictions, Mrs HS made several complaints against Mr K and Mr M. It would appear that most of those complaints were dismissed.
- [9] Whilst he was still acting for Ms C, Mr K also made a complaint against Mr HS. A Standards Committee dismissed that complaint.
- [10] Mr HS then made complaints about Mr M and the two partners in law firm Z (the partners).
- [11] Those complaints concerned aspects of Mr M's representation of Ms C, and whether he had been a party to improper allegations being made against Mr HS in the course of the employment litigation. In relation to the partners, the complaints were that they had not maintained a proper oversight of the case.
- [12] The complaints were extensive. The [Area] Standards Committee [X] was charged with the responsibility of considering those complaints.
- [13] Mr HS's complaints against Mr M and the partners were all dismissed by the Committee on 17 September 2014 (the complaints decision).
- [14] In the course of its complaints decision, the Committee made the following observations about Mr HS's complaints:<sup>1</sup>

[30] From the information available to the Committee, it is apparent that Mr HS has endeavoured to bully, harass and intimidate Ms C through obsessive repetitious allegations, complaints and threats of complaints against her legal advisers. In the Committee's view, Mr HS's conduct in this regard is reprehensible in that he is involved in the [personal grievance] proceedings and there were clearly reasonable grounds for the allegations made by Ms C. In the Committee's view, the allegations against [Mr M the partners] are baseless and they have no case to answer.

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<sup>1</sup> Standards Committee determination, 17 September 2014 at [30]–[31] and [33]–[36].

[31] ... In the Committee's view [the allegation against Mr M and the partners that they were in breach of rule 2.3] is an unwarranted scurrilous attack without any apparent justification of any kind. Again, the allegation is baseless.

...

[33] In the Committee's view, the continuing plethora of unjustifiable baseless allegations, including petty trifling claims, appear to indicate unprofessional conduct on the part of Mr HS. In particular, there appears to be a complete lack of respect and courtesy by Mr HS in making these allegations against his professional colleagues with apparent disregard for Rules 10, 1 and 13, which oblige a practitioner to promote and maintain proper standards of professionalism in the practitioner's dealings, not to engage in conduct that is misleading, to treat other lawyers with respect and courtesy, and to treat others involved in court proceedings with respect. Furthermore, in lodging complaints without any apparent justification, it appears that he has breached rule 2.10 in that he has used or attempted to use the complaints process for an improper purpose.

[34] In conducting himself in the manner that he has, Mr HS appears to have lost sight of the fact that as a lawyer, he has an obligation and a duty to be independent and exercise independent professional judgement on a client's behalf. It seems that Mr HS has allowed his relationship with his client to cloud his judgment and compromise his independence.

### **Decision**

[35] ... In the Committee's view the complaints are vexatious and not made in good faith. ...

[36] The Committee takes a dim view of Mr HS's conduct. In the Committee's view it indicates that there may have been unsatisfactory conduct or misconduct on his part. Accordingly, the Committee considers it appropriate to commence and own motion investigation into his conduct pursuant to s130(c) of the Lawyers and Conveyancers Act 2006. ...

[15] Mr HS did not apply to this Office to review the complaints decision.

### **The Standards Committee's own-motion investigation**

[16] Having initiated an own-motion investigation in its complaints decision, through the New Zealand Law Society Complaints Service (Complaints Service), the Committee wrote to Mr HS on 26 September 2014 and said:

The Committee considered that your conduct in the matter, as set out in the decision indicated that there may have been misconduct or unsatisfactory conduct on your part....

The matters of concern to the Committee include the following:

- a) That in making unsubstantiated and baseless allegations and claims against fellow practitioners you have failed to maintain proper standards of professionalism and have failed to treat those practitioners with respect and courtesy in breach of any or all of Rules 2.10, 10, 11 and 13 of the Rules of Conduct and Client Care.

[17] Mr HS responded on 10 October 2014. In simple terms, he submitted that he believed that he had “sufficient basis to complain”, and that he had not acted in bad faith.

[18] The Committee resolved to set its own-motion investigation down for a hearing on the papers, and notified Mr HS of this by letter through the Complaints Service dated 7 November 2014. Mr HS was invited to make additional submissions.

[19] Attached to the Committee’s letter was a notice of hearing (the Notice), which included the following:

3. Submissions should address any matter of fact or law the party believes should be taken into account concerning the following alleged conduct:
  - a) That in making unsubstantiated and baseless allegations and claims against fellow practitioners you have failed to maintain proper standards of professionalism and have failed to treat those practitioners with respect and courtesy in breach of any or all of Rules 2.10, 10, 11 and 13 of the Rules of Conduct and Client Care.

[20] Mr HS provided detailed submissions in response to the Notice, dated 20 November 2014.

[21] In his submissions responding to the Notice, Mr HS raised the issue of natural justice. He referred to the complaints decision as appearing:

to give a clear indication of predetermination in this matter and therefore a breach of Natural justice as required by both common law and section 142 of the Lawyers and Conveyancers Act 2006.

[22] He said further:

2. Paragraph 30 [of the complaints decision] makes the affirmative statement my conduct was “reprehensible” through “obsessive repetitious allegations, complaints and threats of complaints.... A view has already been formed.
3. Paragraph 31 asserts my submissions [about Mr M and the partners are] a “scurrilous attack without any apparent justification of any kind”.
4. At paragraph 33 the committee asserts “the continuing plethora of unjustified and baseless allegations, including petty and trifling claims, appears to indicate unprofessional conduct on the part of Mr HS”.
5. Then at paragraph 34 “In the committees view the complaints are vexatious and are not made in good faith” i.e. “bad faith”. My motives are already determined.
6. Given these observations it is my submission that the above opinions militate against this committee hearing this matter or making any findings it already having expressed a view and being both the accuser and the judge.

[23] In the balance of his submissions, Mr HS:

- (a) Notes that his wife, as a trustee of [GTK], had made most of the complaints against the two barristers and the partners, and that she was entitled to do so in her own right and could not be prevented from doing so. Mr HS submitted that her actions in this regard should not translate into conduct issues on his part.
- (b) In relation to the complaints that he made, Mr HS submitted that he made them in good faith believing that he had a proper evidential basis for doing so.

### **The Standards Committee's own-motion decision**

[24] The Committee delivered its decision on 30 January 2015 (the own-motion decision).

[25] In the course of its own-motion decision, the Committee said the following:<sup>2</sup>

In resolving to commence an own motion investigation, the Committee was satisfied that the making of allegations by Mr HS against lawyers involved in litigation, in which he has an interest for an opposing party, which are baseless, and in respect of one allegation an unwarranted scurrilous attack, in respect of [the partners] are offensive,

- a) amount to the use of the disciplinary process for an improper purpose,
- b) do not promote and maintain proper standards of professionalism,
- c) do not ensure that the reputation of the legal profession is preserved.

[26] In dealing with Mr HS's submission that the Committee had pre-determined the outcome of its own-motion investigation, the Committee said:<sup>3</sup>

[17] ... [T]he Committee was entitled to commence an own motion investigation into [Mr HS's'] conduct, fully consider the points made by Mr HS in his response to the allegations and provide a further opportunity to make full submissions in support of his opposition to a finding of unsatisfactory conduct or misconduct.

[18] Mr HS has taken up that opportunity and provided full submissions.

[27] After summarising Mr HS's submissions the Committee held:<sup>4</sup>

Mr HS's conduct was likely to unnecessarily trouble, vex, annoy, distress and cause stress to the lawyers complained about. The complaints were misconceived and designed to disrupt other proceedings. They also

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<sup>2</sup> Standards Committee determination, 30 January 2015 at [13].

<sup>3</sup> At [17]–[18].

included a volume of extraneous and speculative material which it was necessary to sift through to ascertain if there was any validity to the complaints.

[28] The Committee determined that Mr HS had breached rr 2.10, 10 and 11 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), and that this was unsatisfactory conduct pursuant to s 12(c) of the Lawyers and Conveyancers Act 2006 (the Act).<sup>5</sup>

[29] By way of penalty the Committee fined Mr HS \$5,000 and ordered him to pay costs of \$2,000 to the New Zealand Law Society.

### **Application for review**

[30] Mr HS filed an application for review on 9 February 2015. In summary, Mr HS disagrees with the Committee's conclusions regarding:

- (a) his motivation for making the complaints;
- (b) the effect those complaints would have had on Mr M and the partners;
- (c) the effect those complaints would have had on any of the parties to the employment proceedings;
- (d) he relies on the submissions he made to the Committee during its own-motion investigation.

[31] Mr HS filed further written submissions dated 22 November 2017, which summarise the points he made to the Committee and in his application for review when he lodged that with this Office.

[32] Mr HS is adamant that in making his complaints against Mr M and the partners, he has not breached any of the conduct rules. He was not motivated by bad faith, had no ulterior motive and considered that he had a reasonable evidential basis for making the complaints.

[33] The Committee advised this Office that it did not wish to respond to Mr HS's application for review.

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<sup>4</sup> At [25].

<sup>5</sup> At [26].

## Nature and scope of review

[34] 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>6</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.

[35] More recently, the High Court has described a review by this Office in the following way:<sup>7</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.

[36] 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:

- (a) consider all of the available material afresh, including the Committee’s decision; and
- (b) provide an independent opinion based on those materials.

## Statutory delegation and hearing in person

[37] As the Legal Complaints Review Officer (LCRO) with responsibility for deciding this application for review, I appointed Mr Robert Hesketh as my statutory

<sup>6</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

<sup>7</sup> *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

delegate to assist me in that task.<sup>8</sup> As part of that delegation, on 24 November 2017 at Hamilton, Mr Hesketh conducted a hearing at which Mr HS appeared in person.

[38] The process by which a Review Officer may delegate functions and powers to a duly appointed delegate was explained to Mr HS by Mr Hesketh. Mr HS indicated that he understood that process and took no issue with it.

[39] Mr Hesketh has reported to me about that hearing and we have conferred about the own-motion investigation and decision, the application for review and my decision. There are no additional issues or questions in my mind that necessitate any further submissions.

### **Analysis**

[40] A point raised by Mr HS in his submissions to the Committee responding to its Notice, was that because of the language used by the Committee in its complaints decision, it had predetermined the outcome of any own-motion investigation into his conduct in making the complaints.

[41] The Committee dismissed this submission by saying that it was entitled to commence an own-motion investigation, and that Mr HS had been given appropriate opportunity to respond to the issues under investigation, and had done so.

[42] Mr HS did not advance his predetermination argument as part of his application for review.

[43] The jurisdiction to commence an own-motion investigation is found in s 130(c) of the Act. It is helpful to set out the relevant parts of that provision:

#### **130 Functions of Standards Committees**

The functions of each Standards Committee are ...

...

(c) to investigate of its own motion any act, omission, allegation, practice, or other matter that appears to indicate that there may have been misconduct or unsatisfactory conduct on the part of a practitioner ...

[44] Own-motion investigations can arise in a number of ways. The confidential reporting provisions of rr 2.8 and 2.9 are triggers for an own-motion investigation. The conduct of a lawyer during a Committee's inquiry can also give rise to a separate own-motion investigation; for example, if a lawyer refuses to comply with a production

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<sup>8</sup> Lawyers and Conveyancers Act 2006, sch 3, cl 6.



requirement made by the Committee under s 147 of the Act. Anonymous correspondence to the Complaints Service about a lawyer's conduct may also trigger an own-motion investigation.

[45] The threshold for commencing an own-motion investigation is conduct by a lawyer "that appears to indicate that there may have been misconduct or unsatisfactory conduct".<sup>9</sup> In other words, that the lawyer has a case to answer.

[46] Plainly a decision to commence an own-motion investigation is not a decision about the merits of that investigation. It is a step towards that outcome.

[47] The process at the heart of all decision-making, whether by Committee or Court, involves:

- (a) an allegation;
- (b) an opportunity to be heard;
- (c) consideration by the decision-maker of any submissions (factual and/or legal); and
- (d) is followed by a decision about the merits of the allegation.

[48] An own-motion investigation is no different from any other inquiry commenced by a Committee. It is only after consideration of all of the facts, which includes giving affected parties an opportunity to make submissions, that the Committee will make its determination about the conduct.

[49] This process is fundamental to ensuring that the parties receive a fair and impartial hearing. It is at the heart of natural justice requirements.

[50] The process when followed ensures that the inquiry and decision-making chain is transparent at every step. It gives the parties comfort that their submissions will be considered before a decision is made. It also satisfies the fundamental requirement that decision-makers must not predetermine the outcome of a matter they are considering.

#### *The complaints decision*

[51] The decision to initiate an own-motion investigation was made at the end of the Committee's complaints decision. In the course of its complaints decision, the

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<sup>9</sup> Lawyers and Conveyancers Act, s 130(c)

Committee was scathing of Mr HS's conduct in making the complaints against Mr M and the partners. In the complaints decision, the Committee describes Mr HS's conduct in the following ways:

- (a) "lamentable and offensive"<sup>10</sup>
- (b) "bully, harass and intimidate (Ms C) through obsessive repetitious allegations, complaints and threats of complaints against her legal advisers"<sup>11</sup>
- (c) "reprehensible"<sup>12</sup>
- (d) "baseless"<sup>13</sup>
- (e) "unwarranted scurrilous attack without any apparent justification of any kind ... baseless"<sup>14</sup>
- (f) "continuing plethora of unjustifiable and baseless allegations, including petty trifling claims"<sup>15</sup>
- (g) "The Committee takes a dim view of Mr HS's conduct".<sup>16</sup>

[52] The Committee noted that the conduct it had described "appeared to indicate unprofessional conduct on the part of Mr HS" and that "it appears he has breached rule 2.10".<sup>17</sup>

[53] In my view the Committee went too far in singling out Mr HS's conduct for condemnation in its complaints decision.

[54] It may be that the Committee was concerned about what had become a difficult and deeply unpleasant dispute between lawyers and their clients. Aspects of that dispute, as set out in the complaints decision, reflected little credit on some of the parties.

[55] However, the Committee's role was to inquire into Mr HS's complaints and make a determination as to whether the complaints revealed conduct breaches by Mr M and the partners.

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<sup>10</sup> Standards Committee determination, above n 1, at [27].

<sup>11</sup> At [30].

<sup>12</sup> At [30].

<sup>13</sup> At [30].

<sup>14</sup> At [31].

<sup>15</sup> At [32].

<sup>16</sup> At [36].

<sup>17</sup> At [33].

[56] The Committee completed that task and found that Mr M and the partners had not breached any of their professional obligations.

[57] But, as indicated, in my view it went much further. The language used by the Committee throughout its decision to describe Mr HS's conduct, is the language of conduct breaches. It is not language describing possible or even suspected breaches.

[58] Although it might be argued that the Committee balanced that by indicating that this "appeared to indicate unprofessional conduct by Mr HS", the earlier language used describes the conduct in unambiguous terms. I regard this as having contaminated every part of the process that followed, including the decision to initiate an own-motion investigation.

[59] In my view, by the time the Committee recorded in its decision its intention to commence an own-motion investigation, its collective mind had already assessed and judged Mr HS's conduct, and had done so using the strong language of conduct breaches.

[60] However, Mr HS did not apply to this Office to review that decision.

*The own-motion investigation, hearing and decision*

[61] The Committee's Notice of Hearing adapts the language of s 130(c) of the Act by referring to Mr HS's "alleged conduct", and inviting submissions from him on the specifics alleged. Although s 130(c) refers to conduct "that appears to indicate that there may have been [conduct breaches]", in my view nothing turns on the Committee's use of the word "alleged" in the Notice. It is synonymous with the language of the section.

[62] It could be argued that the Committee, by its Notice, was acting consistently with the obligation to bring natural justice to its investigation. It allowed Mr HS opportunity to make submissions directed to the very rules breaches identified.

[63] Mr HS took advantage of that and made extensive submissions, including that the Committee had predetermined its investigation.

[64] In dismissing that submission, the Committee's description of an own-motion investigation process cannot be faulted. It said:<sup>18</sup>

[T]he Committee was entitled to commence [an own motion investigation into [Mr HS's] conduct, fully consider the points made by Mr HS in his response to the allegations and provide a further opportunity to make full submissions

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<sup>18</sup> At [17].

in support of his opposition to a finding of unsatisfactory conduct or misconduct.

[65] In my view, however, that is not an accurate description of the process adopted and followed by the Committee.

[66] A troubling aspect of the Committee's own-motion decision is to be found at para [13], referred to above at [25].

[67] In that paragraph the Committee is recorded as saying that "in resolving to commence an own-motion investigation, the Committee *was satisfied* [that Mr HS had committed three rules breaches]" (emphasis added).

[68] That is the language of predetermination. The Committee has said that when it resolved to commence its own-motion investigation, it was already satisfied that Mr HS had committed various rules breaches. In my view the language of the complaints decision corroborates the conclusion that the Committee had predetermined the outcome of its own-motion investigation.

## **Result**

[69] The result of this significant procedural flaw is that the Committee's determination in the own-motion investigation, must be reversed. A further consequence is that the finding of unsatisfactory conduct is also reversed, as are the fine and costs it ordered Mr HS to pay.

[70] I have given consideration as to whether I should remit the own-motion investigation to another Committee, for it to consider afresh. Ordinarily that would follow.

[71] However, I consider that because of the language used by the Committee in its complaints decision, a fair and impartial observer might be concerned that the complaints decision does not provide a sufficiently impartial platform from which a different Standards Committee can bring a fresh view to the own-motion investigation. The concern might be that, although different, a Standards Committee would inevitably be influenced by the strength of the earlier Committee's condemnation of Mr HS's then and still unexamined conduct.

[72] I further note that these events occurred in mid-June 2014. A fresh own-motion investigation would take place almost four years after those events, and in my view this is inconsistent with the obligation to have matters dealt with expeditiously.

**Decision**

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

**DATED** this 1<sup>st</sup> day of December 2017

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**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:

Mr HS as the Applicant  
[Law Firm A] as a Related Entity  
[Area] Standards Committee [X] as the Respondent  
The New Zealand Law Society