

CONCERNING

An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of the Waikato Bay of Plenty Standards Committee No. 1

BETWEEN

KJ
Of North Island
Applicant

AND

WN
of North Island
Respondent

DECISION

Background

[1] The review Applicant is Ms KJ who sought a review of a Standards Committee decision which declined to uphold her complaints against Law Practitioner Mr WN (the Practitioner).

[2] The circumstances surrounding the complaint were somewhat unusual in that the Applicant had her lead provider contract terminated by the Legal Services Agency (LSA) which left her in the position of having outstanding LSA files - and secondary providers (her staff members) - who she could no longer supervise as a lead provider. She sought some support from local practitioners to take over the files and staff. The Practitioner responded to her call. He was willing to take over one staff member, and act as lead provider to another secondary provider who remained in the Applicant's employment.

[3] A problem arose when the LSA refused to approve invoices that were submitted by the Practitioner. One lot of invoices related to work done by the staff member who was to transfer to the Practitioner's firm for services that had been

provided during the month prior to the transfer. Although the Practitioner had been nominated as the lead provider and forwarded certifications accordingly, the LSA was unwilling to pay these invoices until it had received verification as to the Practitioner's supervision.

[4] Another lot of invoices related to services provided by a staff member (as a secondary provider) who had remained in the employ of the Applicant but under the lead provider supervision of the Practitioner. It appears that the LSA refused to pay those invoices as the secondary provider was still employed by the Applicant.

[5] The Applicant was of the view that the LSA was acting in breach of its own policies in refusing to meet the invoices that had been submitted by the Practitioner. She contested its reasons for declining to pay.

[6] At some point the Applicant proposed that the Practitioner might pay the amounts due (from Legal Aid) from his own resources pending the matter being resolved with the LSA. The Practitioner declined. Moreover, he was unwilling to pursue to the matter with the LSA himself, as he did not want to prejudice his own provider contract with them.

[7] The Applicant laid complaints with the New Zealand Law Society, alleging that the Practitioner had breached Rules 2, 10 and 10.7. The Standards Committee perceived that there was no complaint, and believed this was a matter that ought to be referred by the Council (presumably the New Zealand Law Society Council) to discuss with the LSA. The Standards Committee concluded that the matter did not fall within its jurisdiction, and pursuant to section 138(2) of the Lawyers and Conveyancers Act 2006, the Committee declined to take no further action.

[8] The Applicant sought a review of the decision. She contended that the Committee was wrong to have decided that there was no complaint. In her view it was clear she had made a complaint and that the Standards Committee had jurisdiction to consider it. She also questioned the Committee's reference to the matter being referred by the Council to discuss with the LSA, and questioned whether the New Zealand Law Society had any jurisdiction to intervene.

[9] A review hearing was held on 30 November 2011, attended by the Applicant and the Practitioner, each accompanied by a support person.

Considerations

[10] The Applicant was right to say that she had filed a complaint; the Standards Committee ought to have dealt with the matter as a complaint.

[11] In these circumstances the review issue was whether there was prima facie evidence of conduct on the part of the Practitioner that raised disciplinary concerns, and if so, whether the complaint should be referred back to the Standards Committee for its consideration.

Further background

[12] The Applicant explained the background to the complaint and she helpfully produced a booklet of copied correspondences which cover the period of their initial contact to the deterioration of the relationship. It is not necessary to traverse the entire correspondence which may be summarised as follows. In early May 2010 the Applicant alerted the Practitioner to some difficulty with the LSA's attitude towards paying for services provided by two lawyers who were still in her employment, while providing legal aid services under the supervision of the Practitioner; she referred to a similar situation that had been experienced by another law firm who had taken over one of her staff members. The Applicant noted that invoices were due to be submitted (if they had not already been submitted) and she expected that the Practitioner would notify her of the income and if necessary she could assist in drafting an application to the LSA. She explained to the Practitioner that the LSA policy did not require a secondary provider to be employed by, or indeed be in the same chambers as, the lead provider who supervised their work, informing him that she had already drafted a reconsideration for the other law firm and would be happy to do the same for him.

[13] By mid-June there were clearly problems with the LSA when it declined to pay the secondary provider invoices and in a further lengthy letter the Applicant offered to provide an analysis to help the Practitioner "navigate the waters". A further letter along the same lines followed.

[14] The Practitioner responded that he did not intend to pursue her fight with LSA, as he was mindful of his own relationship with the Agency. However, the Applicant continued to press the Practitioner to become involved in resolving the LSA's refusal to pay the invoices.

[15] In July the Practitioner informed the Applicant that invoices she had forwarded to him for sending on to the LSA were being returned, the LSA having made it clear they would not pay, and he wanted to avoid problems with the Agency.

[16] In reply the Applicant reminded the Practitioner that wilful or reckless contravention of the rules (presumably professional Rules of Conduct) exposed him to disciplinary sanction, adding that she was required by Rule 2.8 to report to the Law Society at the earliest opportunity if she had reasonable grounds to suspect misconduct. She explained to the Practitioner that this placed her in a difficult position and she would appreciate his early clarification on matters she had raised.

[17] The Practitioner took exception to what he perceived to be a threat and in July he wrote to the local district Law Society, enclosed the Practitioner's letter, and sought guidance from the society as to what he should do.

[18] By a letter of the same date the Applicant sent a complaint to the Complaints Service alleging that the Practitioner had refused to take appropriate steps to obtain payment for work done on his instructions by barristers employed by her; had failed to uphold the Rule of Law; and had succumb to unlawful pressure from a Government Agency instead of referring issues for appropriate adjudication according to law. The complaints alleged that the Practitioner's actions were in breach of his obligations under Rules 2, 10 and 10.7 of the Rules of Conduct and Client Care (the Rules).

The Rules cited by the Applicant

[19] Rule 2. This Rule requires a lawyer to uphold the rule of law and to facilitate the administration of justice. The Applicant alleged that the Practitioner's conduct amounted to a breach of the rule insofar he was obliged to ensure that she received payments from the LSA that were due to her. The complaint concerned the Practitioner's reluctance to pursue, or assist her pursuit against the LSA for what she considered to be an unlawful refusal to meet her invoices; the Practitioner had not upheld her right to be treated according to the LSA policy.

[20] The essence of this complaint appears to be based on the Applicant's perception that the Practitioner had an obligation to protect her against any potential breaches by the LSA of its own policies. This cannot be right. It is the responsibility of the LSA to act in accordance with its policies. I can see no basis for holding the Practitioner responsible for ensuring that the LSA complied with its policies. I also noted that the Applicant eventually, contacted the LSA herself to challenge its

decision, and it is understood that these matters are now being resolved. I have some difficulties seeing any basis for the complaint under Rule 2 of the Rules.

[21] The other breaches alleged by the Applicant were Rule 10 (“a lawyer must promote and maintain standards of professionalism in the lawyer’s dealings”) and Rule 10.7 which governs the situation of a lawyer who instructs another lawyer being responsible to pay the other lawyer’s account.

[22] Dealing first with Rule 10.7, the circumstances surrounding the Practitioner’s involvement did not indicate that the Applicant was instructing the Practitioner, but rather that the Practitioner had acceded to a request by the Applicant to take over her LSA files that she was no longer in a position to supervise as lead provider. I can see no contractual relationship having arisen between the parties and I therefore can see no basis for the application of Rule 10.7.

[23] Rule 10 generally requires a lawyer to maintain standards of professionalism. The question I explored with the Practitioner was whether he might have been more helpful in challenging the LSA’s refusal to pay the invoices in the light of the Applicant’s advice that the refusal was against the LSA policy.

[24] The Practitioner conceded that he would possibly have been more helpful but for the stance that the Applicant took when he initially declined to have any further involvement. He referred to the Applicant’s threat to lodge a complaint against him to the New Zealand Law Society which was in his view offensive in circumstances where he had tried to lend a helping hand. As a result he felt somewhat disinclined to provide further support to the Applicant.

Discussion

[25] With the benefit of hindsight the Applicant would have realised that the details of the exchange had not been worked out, but at the same time it could not have been anticipated that the secondary provider invoices would not be met by the LSA. It is clear that the Applicant was under significant financial pressures when the invoices remained unpaid by the LSA as she continued to have responsibilities to her employees for wages for providing legal aid work. I understand that the Applicant was in fact correct in the position she took with regard to the LSA’s non-payment.

[26] The review hearing provided an opportunity for both views to be aired. The Applicant acknowledged that the Practitioner was one of the few colleagues that

were willing to provide assistance to her at a time that she experienced extreme difficulties and was under an enormous amount of stress. She also acknowledged that she may have dealt better with matters.

[27] The Practitioner acknowledged he could have been more helpful, and may well have been persuaded to do more but for the stance then taken by the Applicant. For that reason he declined to offer to the Applicant the apology she had sought.

[28] Having considered all of these matters it seemed to me that the situation, as it unfolded, was not one that ought to give rise to an adverse disciplinary finding against the Practitioner. There is no evidence of any conduct that raises disciplinary concerns. It is appropriate to uphold the Standards Committee decision to take no further action.

Decision

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

DATED this 13th day of April 2012

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:

KJ as the Applicants
WN as the Respondent
The Waikato Bay of Plenty Standards Committee 1
The New Zealand Law Society
Secretary of Justice (redacted)