

CONCERNING

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

AND

CONCERNING

a determination of the [City] Standards Committee [X]

BETWEEN

KC

Applicant

AND

LF

Respondent

DECISION

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

Introduction

[1] KC has applied for a review of the Standards Committee decision in which the Committee determined to take no further action in respect of KC's complaint against LF.

Background

[2] LF is a barrister. He is also a child support review officer for the Inland Revenue Department.

[3] In August 2011 LF was to conduct a review of KC's child support payments. Before the review commenced, KC observed a recording device on the table. He objected to the review being recorded and turned the device off. LF switched it back on. KC raised further objection to the review being recorded following which LF terminated the hearing.

The Complaint and the Standards Committee Decision

[4] On the 26th of August 2011, KC lodged a complaint with the New Zealand Law Society Complaints Service.

[5] He made complaint that:

- (1) LF had engaged in unethical and improper conduct by commencing to tape a hearing that KC was involved in, without advising KC that the proceedings were being taped.
- (2) LF had retained private and confidential records which he was not entitled to do.
- (3) LF had refused to allow him the opportunity of a fair hearing.

[6] In response to KC's complaint LF submitted that:

- (1) At the time of conducting the review, he was not providing regulated services pursuant to s 9 of the Lawyers and Conveyancers Act 2006 (the Act).
- (2) The role of a review officer was purely administrative and not judicial.
- (3) The manner in which a child support review officer conducts a hearing is a matter for the Commissioner of the Inland Revenue, and does not fall within the jurisdiction of the Law Society Complaints process to scrutinise or oversee.

[7] In its decision delivered on the 31 January 2012, the Committee determined to take no further action in respect to KC's complaint. The Committee concluded that:

- (1) The Committee did not have jurisdiction to consider a complaint against the Commissioner of the Inland Revenue (CIR).
- (2) Rule 10.8 of the Client Conduct and Client Care Rules¹ (the Rules) did not require the consent of the other party to the recording of a meeting.
- (3) Concerns regarding storage of information secured at a Child Support Review hearing, should be best addressed by the CIR.

¹ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

Application for Review

[8] KC filed an application to review the Committee's decision on the 5 March 2012.

[9] He submits that the Committee erred in its decision to take no further action and contends that:

- (1) The purpose of rule 10.8 of the Rules is to prevent unauthorised recording.
- (2) A lawyer does not have to be providing regulated services to invoke the professional disciplinary process.
- (3) LF's actions constituted an unlawful search and seizure and contravened the Bill of Rights.

[10] LF provided response to KC's review application. He submits that:

- (1) Rule 10.8 does not require a lawyer to obtain a party's consent to making a tape recording.
- (2) He was not providing regulated services in the course of conducting the review hearing.
- (3) An administrative review hearing does not involve a review officer engaging with parties in the sense that a lawyer engages with clients.
- (4) A review officer's duties are purely administrative.
- (5) Even if determination was made that he was engaging in professional activity whilst performing the functions of a review officer, no breach of rule 10.8 had occurred.

[11] KC provided further response to LF's submissions. It is not necessary to traverse those in detail. In large part they simply stand as record of KC's disagreement with, and objection to, the submissions filed by LF.

[12] I have noted however KC's further emphasis in those submissions on argument that a lawyer is bound at all times by the Rules of professional conduct, and his contention that a breach by a lawyer of the Rules, if established, must attract a professional sanction.

Role of the LCRO on Review

[13] The role of the Legal Complaints Review Officer (LCRO) on review is to reach his own view of the evidence before him. Where the review is of an exercise of discretion,

it is appropriate for the LCRO to exercise particular caution before substituting his own judgement for that of the Standards Committee, without good reason.²

Review on the Papers

[14] The parties have consented to this review being undertaken on the papers pursuant to s 206 of the Act. This process allows a Legal Complaints Review Officer to conduct the review on the basis of all the information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

Analysis

[15] The pivotal issues to address are:

- (1) Can LF's conduct, in the course of conducting a child support review, attract a professional disciplinary sanction?
- (2) What does the term professional activity, as applied in rule 10.8, encompass?
- (3) Did LF breach rule 10.8?

Can LF's conduct, in the course of conducting a child support review, attract a professional disciplinary sanction?

[16] The Act establishes a disciplinary process to promote good governance of the legal profession and, importantly, to promote consumer protection for members of the public.

[17] The disciplinary process allows for two adverse disciplinary findings to be made against lawyers. In the most serious cases, a disciplinary inquiry may result in a lawyer being found guilty of misconduct. In less serious cases, a finding of unsatisfactory conduct may be reached. A number of adverse consequences may flow from either of those findings.

[18] There is no suggestion in the present case that the complaint under consideration could reasonably attract a finding of misconduct. Misconduct findings are reserved for those situations where there is most serious breach.

[19] Section 12 of the Act, defines conduct which is deemed to be unsatisfactory:

unsatisfactory conduct, in relation to a lawyer or an incorporated law firm, means—

² *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [40]-[41].

(a) conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer; or

(b) conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that would be regarded by lawyers of good standing as being unacceptable, including—

(i) conduct unbecoming a lawyer or an incorporated law firm; or

(ii) unprofessional conduct; or

(c) conduct consisting of a contravention of this Act, or of any regulations or practice rules made under this Act that apply to the lawyer or incorporated law firm, or of any other Act relating to the provision of regulated services (not being a contravention that amounts to misconduct under section 7); or

(d) conduct consisting of a failure on the part of the lawyer, or, in the case of an incorporated law firm, on the part of a lawyer who is actively involved in the provision by the incorporated law firm of regulated services, to comply with a condition or restriction to which a practising certificate held by the lawyer, or the lawyer so actively involved, is subject (not being a failure that amounts to misconduct under section 7).

[20] Three of the four grounds which provide a jurisdictional basis to establish a finding of unsatisfactory conduct, require the offending lawyer to have been engaged in providing regulated services at the time the conduct complained of occurred.

[21] “Regulated services” includes:

(i) legal services;

(ii) conveyancing services; and

(iii) services that a lawyer provides when undertaking the work of a real estate agent.

[22] “Legal services” are services that a person provides by carrying out legal work for any person.³

[23] “Legal work” includes:

(a) the reserved areas of work;

(b) advice in relation to any legal or equitable rights or obligations;

(c) the preparation or review of any document that -

(i) creates, or provides evidence of, legal or equitable rights or obligations; or

³ Lawyers and Conveyancers Act 2006, s 6.

- (ii) creates, varies, transfers, extinguishes, mortgages, or charges any legal or equitable title in any property;
- (d) mediation, conciliation, or arbitration services; and
- (e) any work that is incidental to any of the work described in paragraphs (a) to (d).

[24] LF argues that his work as a child support review officer does not fall within the definition of regulated services.

[25] KC counters that LF's role as a review officer cannot be sensibly separated or distanced from his role as a practising lawyer. He maintains that LF, as a practicing lawyer, is subject to the professional disciplinary regime and that it is not open to LF to argue that he can take his lawyer's hat off when fulfilling his duties as a review officer, and thereby shun his professional obligations.

[26] Many lawyers carry out work which is not related to the provision of regulated services. A number occupy roles as members of tribunals or other decision making bodies. By way of example, many hold warrants as tenancy adjudicators and dispute referees but their roles as decision makers in those jurisdictions are quite separate and distinct from the role they play in their private legal practice.

[27] In those roles, lawyers are not acting for clients, providing legal services, or carrying out legal work in the manner as described in the Act. They are fulfilling the role of decision makers, and their functions are prescribed by the legislation which establishes the jurisdiction in which they operate.

[28] Parties who are disaffected with the way in which a decision maker has conducted a hearing may raise their concerns with the person responsible for managing the particular jurisdiction or alternatively can pursue a complaint with the government department charged with the responsibility of managing the particular jurisdiction, in this case, the Inland Revenue Department. Dissatisfaction with outcome can be remedied in many jurisdictions, through an appellate process.

[29] I do not agree with KC's submission that LF was providing regulated services whilst performing his duties as a child support review officer. That submission, if accepted, would extend the reach of the legal complaints service into quite unanticipated territory and would fetter a number of tribunals and decision making bodies with a layer of extraneous supervision that the Act simply does not anticipate or provide for.

[30] The processes and procedures of a child support review hearing are under the control of the CIR. KC's complaint is essentially a complaint about process, which has been elevated to a complaint about conduct.

What does the term professional activity engage in terms of rule 10.8?

[31] I do not ignore argument that the rule which KC considers has been breached (r 10.8 of the Rules) refers to a lawyer acting in the course of their professional activity. In their decision, the Standards Committee did not consider the meaning of "professional activity". The phrase is not defined in the Rules.

[32] When considering a complaint made against a practitioner, it would be difficult to consider the scope of the phrase professional activity without reference to the regulated services provisions in the Act.

[33] Before becoming immersed in argument as to the extent to which LF's work as a review officer is captured by the term professional activity, it is necessary to consider whether LF breached rule 10.8. If he didn't, no further analysis is required.

Did LF breach rule 10.8?

[34] Whilst I have concluded that LF was not providing regulated services, that is not the end of the matter. Section 12(c) allows for a finding of unsatisfactory conduct to be made without requirement for the offending conduct to have occurred whilst the lawyer has been providing regulated services.

[35] A breach of the Rules may attract an adverse disciplinary finding.

[36] Rule 10.8 provides that a lawyer must not, in the course of his or her professional activity, make a video or sound recording of any person without first informing the person of the lawyer's intention to do so.

[37] KC urges that a purposive approach to interpretation be adopted when considering the meaning of the section. He argues that the purpose of the section is to prohibit lawyers from taping parties unless those parties provide their consent.

[38] He suggests that assistance be drawn from the Interpretation Act 1999, to clarify the meaning of the section.

[39] Reference is commonly made to principles of statutory interpretation and guidance sought from the Interpretation Act where there is ambiguity or uncertainty as to statutory meaning.

[40] There is no such problem here. Rule 10.8 is clear. A lawyer must not, in the course of his or her professional activity, make a sound recording of any person without first informing that person of their intention to do so.

[41] To place the construction on the section that KC prefers would be to distort the ordinary meaning of the words.

[42] The section does not impose obligation on a lawyer to obtain permission to record, rather, it imposes obligation on a lawyer to inform that a recording is being made. A lawyer is free to make a sound recording of any person, even in the face of that person's objection.

[43] The purpose of the rule appears to be to prohibit lawyers from making secret recordings in the course of their professional activities.

[44] KC relies on *Hamed v R*⁴ and submits that LF's actions constituted an unreasonable search and seizure. *Hamed* is distinguishable. It concerned a covert recording made on private land. LF's recording was not covert. The tape recorder was clearly visible to KC. The proceedings were not recorded.

[45] KC may argue that LF breached the rule as the recording device had, he says, been activated before the review hearing commenced. I see little merit in that argument. KC was alerted to the presence of the recorder immediately he entered the room and KC was advised of LF's intention to record the proceedings, before the review commenced.

[46] Having found no breach of r 10.8, there is no need to consider further the issues arising from the phrase, "professional activities".

[47] I agree with the Standards Committee, that KC's concerns regarding storage of taped materials and criticism that he failed to receive a fair hearing, are matters to be addressed by the CIR.

Conclusion

[48] If I had concluded that LF had breached rule 10.8, I do not accept KC's submission that a breach, if established, must automatically attract a disciplinary sanction.

[49] Importantly, the legislation does not provide that a breach of the Rules must result in a penalty being imposed. That approach, if followed, would overlay the

⁴ *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305.

disciplinary process with a rigidity and inflexibility that is not sanctioned by the legislation.

[50] After receiving a complaint, the Standards Committee may, at first step, exercise its discretion to take no action, or no further action on a complaint.⁵

[51] If the Committee does decide to proceed with inquiry into a complaint, after completing its investigation, the Committee may elect to take no further action with regard to the complaint or any matter or issue involved in the complaint.⁶

[52] In conducting a review, the LCRO may exercise any of the powers could have been exercised by the Standards Committee in the proceedings.⁷

[53] In *W v Auckland Standards Committee 3 of the New Zealand Law Society*⁸ the court considered the scope of the discretion vested in a Standards Committee and noted that “there are no hard and fast rules and that the discretion vested in the Standards Committee to decide what action (if any) to take is to be exercised flexibly as appropriate to the circumstances”.⁹

[54] The seriousness of the conduct is a significant factor when assessing appropriate penalty. Offences at the more serious end of the spectrum, for example breaches of undertakings or failing to comply with trust accounting regulations, will generally attract a professional sanction even in the presence of factors which present as exculpatory for the practitioner.

[55] KC’s complaint must be considered in context. His concerns regarding the recording device were notified to LF before the hearing commenced. The discussion as to whether LF was entitled to tape the proceedings or not lasted, it could be reasonably inferred from the information on the file, a matter of seconds rather than minutes. The hearing was promptly terminated. Even if it was established that some recording had taken place, the incident viewed in its context, should not attract a professional sanction.

[56] I see no basis to depart from the Committee’s decision.

⁵ Above n 3, s 138.

⁶ Above n 3, s 152(2)(c).

⁷ Above n 3, s 211(b).

⁸ *W v Auckland Standards Committee 3 of the New Zealand Law Society* [2012] NZCA 401 [2012] NZAR 1071.

⁹ Above n 8 at [48].

Decision

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

DATED this 21st day of November 2014

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:

KC as the Applicant
LF as the Respondent
The [City] Standards Committee
The New Zealand Law Society