

**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**

**OP**

Applicant

**AND**

**[The Trust]**

Respondent

**DECISION**

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

**Introduction**

[1] Mr OP has applied for a review of a decision by the [City] Standards Committee [X] which found that actually or potentially misleading the respondent's lawyer, Mr SJ, constituted unsatisfactory conduct on Mr OP's part pursuant to s 12(b) of the Lawyers and Conveyancers Act 2006 (the Act).

**Background**

[2] Mr OP acted for Ms LM in an employment matter against her employer the Trustees of the [(the Trust)]. Ms LM believed the Trust wanted her to resign. In January 2011 Mr OP raised a personal grievance against the Trust on Ms LM's instructions, and began an attempt to negotiate an exit package. Based on Ms LM's instructions, Mr OP formulated a claim for reimbursement pursuant to s 123(1)(b) of the Employment Relations Act 2000 (ERA). The claim for reimbursement was based on Ms LM losing earnings if the Trust coerced her into resigning without her having secured commensurate employment elsewhere.

[3] The Trust instructed Mr SJ.

[4] By 8 February 2011, Ms LM had been in touch with her former employer, [XX], with a view to resuming employment there. Ms LM sent an email to Mr OP advising him that [XX] had told her she could return, and had suggested a start date. She told Mr OP that the offer of employment was confidential to her, and instructed him not to disclose it to the Trust. Although Mr OP did not notice it at the time, Ms LM also sent a copy of that email to the Trust's [info@\[The Trust\]co.nz](mailto:info@[The Trust]co.nz) email address.

[5] Mr OP continued his attempts to negotiate an exit package for Ms LM without success. With the prospect of future employment by [XX], Ms LM instructed Mr OP to seek compensation for hurt and humiliation pursuant to s 123(1)(c) of the ERA rather than reimbursement pursuant to s 123(1)(b).

[6] In his affidavit, Mr OP accepts that, in discussions with Mr SJ, he is likely to have said that the total compensation claimed would cover any loss of earnings. This comment was based on the disparity between Ms LM's earnings from the Trust and what she might have been paid by [XX].

[7] On 19 February 2011 Ms LM sustained serious injuries in a road accident. She was hospitalised and unable to communicate or work for some time. Mr OP continued to receive instructions from time to time from Ms LM and her attorney.

[8] On 28 February 2011 Mr SJ contacted Mr OP to find out whether Ms LM had secured another job. Mr OP said he did not know. He did not know, because Ms LM had not told him before her accident whether she had accepted the offer of employment from [XX]. However, they both knew she had not resigned from her employment with the Trust.

[9] By 18 March 2011 it was apparent to Mr OP that Mr SJ was aware Ms LM had been in discussions with [XX]. Mediation was discussed but did not proceed because of Ms LM's injuries.

[10] On 2 May 2011 Mr SJ told Mr OP he had a copy of Ms LM's 8 February email and a payslip addressed to Ms LM issued by [XX].

[11] The Trustees terminated Ms LM's employment on the grounds of fraud.

[12] On 10 May 2011 Mr OP raised a personal grievance on Ms LM's instructions alleging unjustified dismissal and seeking remedies.

## **Complaint process**

[13] In February 2012 the Trust laid a complaint to the New Zealand Law Society Lawyers Complaints Service (the Complaints Service) saying Mr OP had deliberately misled Mr SJ and protracted negotiations, knowing Ms LM had secured alternate employment.

[14] Mr OP said that Ms LM had instructed him not to disclose that she had an offer of alternate employment. He said he was obliged to act in accordance with her instructions, and to protect information that was confidential to her. He denied any professional wrongdoing.

[15] The Committee considered that Mr OP had two choices when Mr SJ asked if Ms LM had secured employment elsewhere. He should have either given an honest answer, or told Mr SJ he was instructed not to respond. Mr OP had done neither, and the Committee formed the view that Mr OP's duty to Ms LM did not justify a falsehood to another practitioner. The Committee was also critical of Mr OP for having failed to put right his misdirection.

[16] The Committee concluded that conduct on the part of Mr OP misled, or had the potential to mislead, Mr SJ. On that basis the Committee held that Mr OP's conduct would be regarded by lawyers of good standing as unacceptable, unprofessional and unbecoming a lawyer. The Committee imposed a fine of \$500, and costs of \$500.

## **Review**

[17] Mr OP applied for a review on the grounds that there were deficiencies in the Committee's process, and the complaint lacked a proper factual basis.

## **Review hearing**

[18] Mr OP attended a review hearing in Auckland on 19 July 2017. The Trust was not required to attend, and this review was determined in the Trust's absence with the trustees' consent.

## **Review issue**

[19] In the course of the review hearing Mr OP's concerns about the Committee process were discussed and resolved, leaving only the factual basis of the decision to be considered on review.

[20] The issue on review is whether Mr OP misled Mr SJ.

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

[21] 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>1</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.

[22] More recently, the High Court has described a review by this Office in the following way:<sup>2</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.

[23] 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:

[24] Consider all of the available material afresh, including the Committee’s decision; and

[25] Provide an independent opinion based on those materials.

### **Analysis**

[26] At the heart of the Trust’s concerns is the contention that Mr OP was dishonest in the course of without prejudice negotiations. It is relevant to note that as

<sup>1</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

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

Mr OP acted for Ms LM, and did not act for the Trust, he owed only limited obligations to the Trust and to its lawyer. Those included the obligations imposed by rule 12 of the Lawyers Conduct and Client Care Rules,<sup>3</sup> and in particular the requirement that Mr OP conduct his dealings with others with integrity. In the context of the rules, the Trust's complaint is an attack on Mr OP's integrity.

[27] The Committee considered the Trust was correct, and that Mr OP had deliberately misled Mr SJ.

[28] Dishonesty is a very serious allegation. As the authors of *Lawyers' Professional Responsibility* put it:<sup>4</sup>

The making of knowingly false statements, whether written or oral, by a lawyer to third parties, such as other lawyers, is prima facie professional misconduct.

[29] A false statement undermines "a lawyer's claim to the requisite integrity".<sup>5</sup> The authors of *Ethics, Professional Responsibility and the Lawyer* say that:<sup>6</sup>

Actions that reflect on the practitioner's integrity will usually amount to misconduct ... Lying to, or intentionally deceiving, another practitioner will, in most circumstances amount to misconduct. Care must be taken to ensure the dishonesty is not an honest mistake or erroneous recollection, which would not usually be a disciplinary offence ... If it can be shown that the practitioner has intentionally misled another practitioner ... or a third party, this is likely to be misconduct.

[30] It is relevant to note that Committees and this Office lack jurisdiction over misconduct, but can make determinations of unsatisfactory conduct, and that the more serious the allegation, the higher the standard of proof necessary to reach an adverse finding.

[31] As the backbone of the Trust's conduct complaint is that Mr OP deliberately misled Mr SJ by concealing the fact that Ms LM had secured another job, it follows that if Ms LM had not secured another job, Mr OP could not conceal it. If that is so, the fundamental premise on which the complaint relies is absent and the complaint cannot be sustained.

[32] The only evidence the Trust has put forward to support the contention that Ms LM had secured another job is her email of 8 February 2011 and an incomplete

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<sup>3</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

<sup>4</sup> G E Dal Pont *Lawyers Professional Responsibility* (6<sup>th</sup> ed, Thomson Reuters, Sydney, 2016) at 806.

<sup>5</sup> At 807.

<sup>6</sup> Duncan Webb, Kathryn Dalziel, Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3<sup>rd</sup> ed, LexisNexis, Wellington, 2016) at 112.

payslip from [XX]. Neither of those is particularly compelling evidence that Ms LM had, in fact, secured another job.

[33] The evidence on Mr OP's part is that Ms LM had approached [XX] looking for work, and been offered work by [XX]. The buoyant tone of her 8 February email suggests she was seriously considering [XX]'s offer. However, the evidence does not extend to Ms LM having accepted employment there or elsewhere. She was still an employee of the Trust when she was hospitalised and unable to work. The most that can be said on the evidence is that Ms LM had taken steps to minimise her risk of unemployment if she were to resign from her employment with the Trust, which she did not in fact do.

[34] The short point is that the Trust has not proved the key fact on which its complaint relies. The evidence is not sufficient to support the contention that Mr OP misled Mr SJ or otherwise lacked integrity in conducting his dealings with the Trust or Mr SJ.

[35] As the materials available on review do not disclose any other professional standards issue that calls for a response, the determination that there has been unsatisfactory conduct on the part of Mr OP is reversed. Without a determination of unsatisfactory conduct, there is no basis on which to order Mr OP to contribute to the Trust's costs, and the orders made by the Committee pursuant to s 156 fall away.

## **Decision**

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

**DATED** this 21<sup>st</sup> day of July 2017

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**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 OP as the Applicant  
[The Trust] as the Respondent

Mr SJ as the Representative for the Respondent  
[City] Standards Committee [X]  
New Zealand Law Society