

LCRO 87/2014

CONCERNING

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

AND

CONCERNING

a determination of the Standards Committee

BETWEEN

MS FH

Applicant

AND

MR GJ

Respondent

Application for review

[1] On 28 April 2014 this Office received from Ms FH an application for review of the determination by the Standards Committee dated 14 March 2014.

The Complaint and the Committee's determination

[2] By letter dated 23 October 2012 Mr HK lodged a complaint with the New Zealand Law Society (NZLS) on behalf of his client (Mr GJ) about Ms FH.¹ The complaint related to Ms FH's involvement in the drafting and filing of a notice of claim in which she pleaded the tort of deceit. The complaint was that Ms FH had breached rule 13.8 of the Conduct and Client Care Rules.² In brief the complaint arose from a disagreement in respect of a contract between Mr GJ and Ms FH's client, Mr IL, regarding non-completion of building work within the agreed contractual timeframe.

[3] The Committee determined that in being a party to the filing of the notice of claim Ms FH breached rules 13, 13.8 and 13.8.1 of the Rules and in particular:

- (a) In breach of r 13.8.1, Ms FH failed to take reasonable steps to ensure reasonable grounds existed for pleading the tort of deceit in the notice of claim.

¹ Despite having the same surname, there is no indication the parties are related.

² Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

- (b) In breach of r 13.8, by pleading the tort of deceit without reasonable grounds Ms FH attacked Mr GJ's reputation without good cause; and
- (c) In breaching one or both of the above rules, Ms FH breached r 13 of the Rules, in that the overriding duty of a lawyer in litigation is to the court.

[4] The Committee determined that the above breaches of the Rules constituted unsatisfactory conduct on the part of Ms FH and made the following orders:

- (a) Pursuant to s 156(1)(b) of the Act, Ms FH was censured.
- (b) Pursuant to s 156(1)(i) of the Act, Ms FH was ordered to pay a fine of \$3,500 to the NZLS; and
- (c) Pursuant to s 156(1)(n) of the Act, Ms FH was ordered to pay \$1,000 to the NZLS in respect of its costs.

The matters for this Office to consider

[5] In her application to this Office, Ms FH accepted that she had breached the Rules as determined by the Committee. However, Ms FH contends that the orders made by the Committee are unduly harsh, and the making of those orders is in contradiction to what she describes as the "protective function" of the Committee, which she claims "aids the improvement of all practitioners."³

[6] In support of her contention that the order of censure is unduly harsh, Ms FH submits that the Committee failed to take into account the fact that she had only been in practice for some six months when the complaint was made. Ms FH's first practising certificate was issued by the NZLS on 3 April 2012 and Mr GJ submitted his complaint about Ms FH's conduct on 23 October 2012. Ms FH argues that her "breach was due to her lack of experience rather than any disregard to [her] duties."⁴

[7] Ms FH further believes that it is a function of the Committee to not only ensure professional standards are maintained, but it also plays a role in the development of practitioners. As such, Ms FH believes that the appropriate orders for the Committee to make should focus on assisting her to address her professional shortcomings, rather than disciplining her.

The scope of a review

³ Application for review supporting reason at [9].

⁴ Above n 3 at [11].

[8] A review is not limited to the matters raised by the review applicant:⁵

... the Review Officer [has a] 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 reach his or her own view on the evidence before her.

[9] In her review application Ms FH said that she did not wish to apply for a review of the finding of unsatisfactory conduct, but only wished to have the penalties imposed reviewed.

[10] For the sake of completeness I confirm that I have considered the detail of the complaints, and the evidence relating to Ms FH's culpability. This is addressed in some more detail later in this decision but I confirm I have reached the same conclusion as the Standards Committee, and accordingly the findings of unsatisfactory conduct stand.

Ms FH's response to the complaint

[11] Mr JM responded to the complaint on behalf of Ms FH and correspondence from the Complaints Service was in the main directed to, and replied by, Mr JM. For that reason, throughout this decision, I have not differentiated between comments by Mr JM, and Ms FH. I have not been able to locate any formal appointment of Mr JM by Ms FH to represent her with regard to the complaint, although I note that the proceedings issued against Mr GJ and HK in response to the complaint (alleging abuse of process and malicious prosecution) refers to Mr JM responding to HK's correspondence as "Head of [Law Chambers X]"⁶, the chambers where Ms FH was engaged as a litigation barrister. In her review application Ms FH refers to the penalties imposed as being a percentage of her "total annual salary"⁷, so it would appear she was employed by Mr JM.

[12] On 1 November, Mr JM advised HK that proceedings were to be issued against Mr GJ and HK alleging that Mr GJ (and HK) were guilty of abuse of process in filing the complaint to the NZLS and alleged that they had committed the tort of malicious prosecution. A copy of the proceedings were sent to HK by fax and subsequently by post.

[13] In early correspondence with the NZLS, Mr JM reiterated his view that the complaint was abusive.

⁵ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 AT [41].

⁶ Statement of claim dated 1 November 2012 at [5].

⁷ Above n 3 at [10].

Procedural issues

[14] During the course of the Standards Committee investigation, various procedural issues were raised which require to be addressed.

[15] In addition to filing proceedings against Mr GJ and HK after the complaint was made, Ms FH also laid a complaint with the Police. The police complaint acknowledgement records the complaint as being that of "Theft (over \$1,000)." Ms FH requested the Committee to defer consideration of Mr GJ's complaint about her until these had been disposed of. The Committee nevertheless continued with its consideration of the complaint and its determination.

[16] The disciplinary process, and specifically, the complaint in this matter, concerned Ms FH's adherence to proper and required professional standards. That was not the focus of either the police complaint, or the civil proceedings filed by Ms FH, and it was entirely appropriate for the Committee to continue with its consideration. I have some serious concerns, that a complaint about a lawyer should generate such responses from the lawyer about the client and his counsel. The part of the Act relating to complaints and discipline is intended to provide a legitimate avenue for the public to pursue complaints about lawyers, and I have serious reservations about conduct which is intended to discourage the pursuit of complaints. Ms FH would do well to reflect on the appropriateness of such a response, which would have a sobering effect on a member of the public making a complaint about a lawyer.

[17] Ms FH also objected to Mr GJ's request that submissions on a related complaint by Mr JM about HK be taken into account in considering this complaint about her. At [25] of its determination, the Standards Committee recorded that it had not taken those submissions into account in considering this matter, and accordingly there can be no objection to the Committee's procedure in this regard. I have not reached any conclusion as to whether Ms FH's request was a legitimate request, but there is no need for me to do so in this review.

[18] Finally, Mr JM suggested that the complaint was not that of Mr GJ, but HK.⁸ The Committee did not accept that contention,⁹ and that is of no moment, as any person may complain about the conduct of a lawyer.¹⁰

What was the basis for the finding of unsatisfactory conduct?

⁸ Email JM to Legal Complaints Service (25 October 2013).

⁹ Standards Committee determination dated 14 March 2014 at [34].

¹⁰ Lawyers and Conveyancers Act 2006, s 132(1).

[19] At the time of the conduct complained of, Ms FH was employed as a barrister in [Law Chambers X]. Ms FH acted for Mr IL, in respect of a contractual dispute between Mr IL and Mr GJ, arising from a contract between the parties under which Mr GJ was to carry out building work to a property owned by Mr IL. Mr GJ failed to complete the works within the contractual timeframe and attempts by the parties to resolve the matter were unsuccessful. Proceedings on behalf of Mr IL were subsequently filed in the [City] District Court. Although the cover sheet of the proceedings named Mr KO as counsel and Mr LP as the instructing solicitor, paragraph 1F of the notice of claim named Ms FH as Mr IL's lawyer.

[20] The notice included a claim that Mr GJ's conduct in representing to Mr IL that the contracted works would be completed by a particular date amounted to the tort of deceit.

[21] Following receipt of the complaint, the Committee sought clarification from both Mr KO and Mr LP as to the basis on which the tort of deceit was pleaded and the identity of the barrister instructed. Those attempts were unproductive:

- (a) Mr LP stated that the framing of the pleadings were a matter for [Law Chambers X] and that [Law Chambers X] was instructed, with the Head of Chambers, Mr JM, having responsibility for allocating the instruction to the appropriate barrister; and
- (b) Mr JM stated that the pleadings spoke for themselves, were supported by the police complaint and were *sub judice*.

[22] On 26 March 2013, the Committee commenced own motion proceedings into the conduct of Messrs KO and LP and it continued its inquiry into the conduct of Ms FH.

[23] At the request of the Committee to clarify her role in the drafting of the notice of claim and the basis for the tort of deceit alleged, Ms FH advised that:

- (a) She was responsible for the drafting, revising and finalising of the notice of claim.
- (b) The basis for the pleading of the tort of deceit spoke for itself; and
- (c) She was obeying client instructions, there was nothing to indicate that her client's version of events was inaccurate, and it was not her role to act as a filter for her client's grievances.

[24] The Committee resolved to determine the complaint on the papers and both parties provided submissions in respect of the complaint.

The pleading of the tort of deceit

[25] Although Ms FH does not dispute the Committee's finding of unsatisfactory conduct against her, in order to consider whether the Committee's orders were unduly harsh it is necessary to consider Ms FH's conduct in some detail.

[26] In pleading the tort of deceit, it was necessary for Ms FH to demonstrate that:

- (a) Mr GJ represented the completion date for the work to Mr IL, knowing that the work would not be completed by that date, or not believing that it would be, or was careless as to whether the work would be completed by that date.
- (b) Mr IL entered into the agreement for Mr GJ to do that work relying on Mr GJ's statement that the work would be completed by that date.

[27] The allegation of the tort of deceit against Mr GJ unquestionably brings his character into question. Such an attack on the character of another person is a serious allegation. Rule 13.8 provides:

Reputation of other parties

13.8 A lawyer engaged in litigation must not attack a person's reputation without good cause in court or in documents filed in court proceedings.

13.8.1 A lawyer must not be a party to the filing of any document in court alleging fraud, dishonesty, undue influence, duress, or other reprehensible conduct, unless the lawyer has taken appropriate steps to ensure that reasonable grounds for making the allegation exist.

13.8.2 Allegations should not be made against persons not involved in the proceeding unless they are necessary to the conduct of the litigation and reasonable steps are taken to ensure the accuracy of the allegations and, where appropriate, the protection of the privacy of those persons.

[28] Rule 13.8 makes it very clear the allegation of the tort of deceit against Mr GJ should not have been made unless Ms FH had taken appropriate steps to ensure that reasonable grounds existed for making that allegation. Neither the Standards Committee nor this Office have been presented with any evidence from Ms FH of the steps she took to ascertain whether such reasonable grounds did exist. Ms FH has merely argued that she had no reason to disbelieve her client's version of events, that she was acting on her client's instructions and it was not her role to filter her client's

grievances. It therefore appears that Ms FH took none, or no adequate steps, to ascertain whether a pleading of the tort of deceit was supportable. The extent to which she was involved in the drafting of the notice of claim is such that she should have done so.

[29] It is also concerning that Ms FH believed that it was not her role to “filter my client’s grievances.” Even a junior lawyer is expected to understand that his or her overriding obligation is to the court, and not to his or her client. The importance of this is reflected in Chapter 13 of the Rules, “Lawyers as officers of court”, where it is stated “The overriding duty of a lawyer acting in litigation is to the court concerned.” The courts expect lawyers to advise their clients on their legal positions and to not file proceedings that contain, wholly or in part, allegations of serious wrongdoing that are without foundation.

[30] Ms FH clearly did not appreciate her professional obligations to refrain from attacking a person’s reputation without good cause. It is also of concern that not only did Ms FH not understand the relevant professional obligation, but that when she was confronted with a complaint about her conduct she reacted by instructing counsel to file proceedings against Mr GJ and his lawyer, Mr HK, in respect of that complaint. Ms FH claimed that the complaint filed on behalf of Mr GJ was “frivolous, vexatious and thereby an abuse of process” and that by filing that complaint Mr GJ and HK had committed the tort of malicious prosecution against Ms FH.

The Committee’s Orders

[31] There is no doubt that the Committee had authority to make the orders. It is also acknowledged that Ms FH’s conduct was not deemed sufficiently serious to require a prosecution before the Disciplinary Tribunal.¹¹ The broad question is whether, in the circumstances, those orders were appropriate. More specifically, should the Committee have made orders that focussed on improving Ms FH’s understanding of her professional obligations, rather than being disciplinary in nature.

The functions of the Committee

[32] The purposes of the regulatory regime created by the Lawyers and Conveyancers Act 2006 includes (in s 3) the maintenance of public confidence in the provision of legal services and to protect consumers of legal and conveyancing services. Section 120 of the Act sets out the purposes of the complaints and

¹¹ Lawyers and Conveyancers Disciplinary Tribunal.

disciplinary framework and focuses on the need for an expeditious resolution of complaints and prosecutions. The functions of the Committee are stated in s 130 of the Act:

130 Functions of Standards Committees

The functions of each Standards Committee are (subject to any limitations imposed on the committee by or under this Act or the rules that govern the operation of the committee) —

- (a) to inquire into and investigate complaints made under section 132:
- (b) to promote, in appropriate cases, the resolution of complaints by negotiation, conciliation, or mediation:
- (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 or any other person who belongs to any of the classes of persons described in section 121:
- (d) to intervene, in the circumstances prescribed by this Act, in the affairs of practitioners or former practitioners or incorporated firms:
- (e) to make final determinations in relation to complaints:
- (f) to lay, and prosecute, charges before the Disciplinary Tribunal.

[33] While it is clear that competence of practitioners is an important part of the regulatory regime, this is achieved primarily through the educational requirements for admissions and continued practice. Although a Standards Committee is entitled to make an order that a practitioner undergo further training (s 156(1)(m) of the Act) this is not the focus of the complaints and disciplinary process.

[34] This Office in *AM v ZM* noted:¹²

The function of a penalty in a professional context was recognised in *Wislang v Medical Council of New Zealand* [2002] NZAR 573 as being:

- a. to punish the practitioner;
- b. as a deterrent to other practitioners; and
- c. to reflect the public's and the profession's condemnation or opprobrium of the practitioner's conduct.

[35] The professional development of the lawyer is not a key part of either the Committee's functions or the function of the penalties it can impose. Nonetheless, the Committee had the power to make an order, pursuant to s 156(1)(m), that Ms FH undergo practical training or education. Ms FH believes that this was an appropriate order for the Committee to make following the finding of unsatisfactory conduct.

¹² *AM v ZM* LCRO 48/2010 at [53].

[36] Ms FH submits that the Committee failed to properly consider the fact that she was a junior practitioner, and had only obtained her practising certificate some six months before the complaint was lodged against her, essentially pleading lack of experience played a large part in her drafting of the notice of claim in the manner which she did.

[37] I note that as Ms FH had only obtained her first practising certificate some six months before the complaint was made about her conduct, it is likely that she had completed a Professional Legal Studies course within the year before the complaint was made. A key part of that course is the professional responsibilities of a lawyer in respect of their dealings with the court, their clients and others. I am therefore somewhat surprised that Ms FH did not understand her professional obligations in respect of drafting pleadings and do not believe that an order for Ms FH to attend a further such course would be appropriate.

Censure

[38] The Committee censured Ms FH. It was empowered to do so and it is my view that Ms FH's unsatisfactory conduct warranted a rebuke from the Committee. It is immaterial whether this rebuke took the form of a reprimand or a censure. The meaning of the terms "reprimand" and "censure" were considered by the Court of Appeal in *The New Zealand Law Society v B*.

[39] The Court decided that the two terms are synonymous:¹³

This is apparent from a range of definitions of the two words, including those in *Black's Law Dictionary*, the *Oxford English Dictionary*, the *Oxford Dictionary of Synonyms and Antonyms* and *Roget's Thesaurus*, as well as the interchangeable use of the two words in professional disciplinary legislation. (Footnotes omitted).

[40] The Court went on to say:¹⁴

Both words envisage a disciplinary tribunal, here a Standards Committee, making a formal or official statement rebuking a practitioner for this or her unsatisfactory conduct. Censure or reprimand, however expressed, is likely to be of particular significance in this context because it will be taken into account in the event of a further complaint against the practitioner in respect of his or her ongoing conduct. We therefore do not see any distinction between a harsh or soft rebuke; a rebuke of a professional person will inevitably be taken seriously.

[41] The Committee commented that the censure was required to impress upon Ms FH the importance of her professional obligations. Ms FH has submitted that this comment indicates that she had, in her words, "blatantly disregarded" her professional

¹³ *The New Zealand Law Society v B* [2013] NZCA 156, [2013] NZAR 970 at [39].

¹⁴ At [39].

duties. I do not read the Committee's words in this way. Ms FH admits her understanding of her professional obligations was less than it ought to have been.

[42] In addition, Ms FH presumably had ready access to advice from Mr JM as Head of Chambers. There is no indication she sought advice which tends to indicate that she did not have any sense of disquiet at all about including the allegations in her pleadings which is somewhat disturbing.

[43] It is relevant in this regard, that Ms FH does not submit that the pleadings were either drafted, or approved, by anyone other than herself, and she takes full responsibility for their final format. This in itself is a reason to ensure that the findings are supported by penalties which have a serious impact on Ms FH's awareness of her obligations as a lawyer.

[44] It is my view that it was appropriate for the Committee to censure Ms FH, pursuant to s 156(1)(b) of the Act.

The fine of \$3,500

[45] Ms FH has advised this Office that the fine of \$3,500 equates to ten per cent of her total annual salary and, implicitly, it should have been less. Pursuant to s 156(1)(i) of the Act, the Committee was empowered to order Ms FH to pay a fine not exceeding \$15,000. I note that the Committee took as a starting point a fine of \$5,000 which is at the lower end of fine spectrum, as being appropriate for a breach of this nature. The Committee then reduced the fine to \$3,500 to reflect the fact that Ms FH was a junior practitioner and the fact that Ms FH was a new practitioner was taken into account by the Committee.¹⁵

[46] The ability of a practitioner to meet an order to pay (whether costs or a fine) is clearly a relevant consideration to be taken into account in imposing it.¹⁶ It is therefore appropriate to take into account the assets and income of Ms FH. Ms FH has said that the fine amounts to more than 10 per cent of her annual salary. She does not provide details of her assets or any other income. I can therefore only proceed on the basis that there is no other material information. I accept that the imposition of a fine of \$3,500 is significant to Ms FH in light of her income but again, consider that such a fine is required to reinforce the seriousness with which the Committee (and I) view Ms FH's apparent lack of appreciation of the obligations of a lawyer when drafting proceedings.

¹⁵ *H (a law practitioner) v Auckland District Law Society* [1985] 1 NZLR 8 (HC).

¹⁶ *Kaye v Auckland District Law Society* [1998] 1 NZLR 151(HC).

[47] The Committee further noted that as Ms FH had not provided an explanation for the breach or displayed contrition, it could not justify a further reduction. When the Committee sought further explanation from Ms FH, she failed to provide any meaningful explanation. Merely stating that the pleadings spoke for themselves is inadequate. The evidence before me shows that Ms FH has not demonstrated any contrition for her actions and, in fact, when she was provided with a copy of the complaint, Ms FH's response was to issue proceedings against Mr GJ and HK. It is my view that there are no mitigating factors to warrant a further reduction in the fine.

[48] On review, considerable caution needs to be exercised in revisiting orders imposed by a standards committee and it would need to be shown that some error or failing to take into account a critical matter had occurred.¹⁷ I do not think that is the case here.

Non-disclosure of Ms FH's name

[49] The Committee determined that it was not in the public interest for Ms FH's name to be published, and that an anonymised summary of its determination would be appropriate. The finding of unsatisfactory conduct results from the failure to acknowledge the requirements of certain of the Conduct and Client Care Rules, which must be adhered to when drafting proceedings. It is my view that this finding and the penalties imposed, are sufficient to ensure Ms FH complies with her obligations in this regard in the future, and it is not necessary for the protection of the public, that Ms FH be identified by name. I therefore confirm the Committee's determination with regard to publication of an anonymised summary of the facts. In accordance with this Office's usual practice, an anonymised summary of this decision will also be published on the website of this Office.

Decision

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

DATED this 7th day of August 2015

O W J Vaughan
Legal Complaints Review Officer

¹⁷ *McCoan v General Medical Council* [1964] 3 All ER 143.

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Ms FH as the Applicant
Mr GJ as the Respondent
Mr MS as the Representative for the Respondent
Mr JM as a related person as per section 213
The Standards Committee
The New Zealand Law Society