

LCRO 93/2015  
94/2015  
142/2015

**CONCERNING**

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

**AND**

**CONCERNING**

determinations of [City] Standards Committee

**BETWEEN**

**QAB**

Applicant

**AND**

**PAC, OAD AND NAE**

Respondents

**DECISION**

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

**Introduction**

[1] Mr QAB has applied for reviews of three Standards Committee determinations to take no further action in respect of complaints by him and Mr MAF about Mr PAC, Mr OAD and Ms NAE. The three reviews have been completed together as the conduct complained about arises out of the same set of facts and the respondents were jointly represented.

**Background**

[2] It is not necessary to recite the facts giving rise to these complaints in any detail as they are well known to the parties.

[3] In brief, Mr QAB and Mr MAF were convicted and sentenced to periods of imprisonment but their convictions and sentences were quashed on appeal due to a miscarriage of justice. The miscarriage had arisen because the prosecuting lawyer (Ms NAE) did not present the full record of Judge [X]'s sentencing indication to the trial Judge. Judge [X] had noted that evidence was to be provided by a person (L) who had agreed to give evidence against Mr QAB and Mr MAF in return for amendments to charges against him.

### **The complaints**

[4] Mr QAB and Mr MAF's complaint is expressed simply:<sup>1</sup>

Mr PAC, Mr OAD and Ms NAE all knowingly, recklessly, produced a document with the intention to deceive the Standards Committee.

[5] The document referred to is a letter dated 19 May 2009 from Mr PAC to the Lawyers Complaints Services replying to an earlier complaint by Mr QAB against the three lawyers in which he said:

[28] Neither the trial Judge, nor any of the many experienced counsel and accused involved, enquired whether the transcript of the sentencing indication was available and whether it could be provided, despite the obvious verbatim portion recorded at para 6 of Mrs NAE's letter of 21 August 2007.

[29] The Judge's sentencing notes were a public document and readily available to both the trial Judge and defence counsel had they requested it.

### **The Standards Committee determinations**

[6] The Standards Committee determined to take no further action against any of the lawyers. Relevant portions of the Standards Committee determinations are included below:

Ms NAE:<sup>2</sup>

Notwithstanding Mrs NAE's extensive involvement, as counsel aware of Judge [X]'s full notes, and being responsible for their redaction, it would not have been reasonable to expect her to have had a detailed recollection of the lengthy discussions recorded in the transcript, in the context of Mr PAC's submissions which were being made to the Standards Committee in May 2009, some 21 months after the relevant exchanges in Court had occurred. The complaint presumes that she was so aware, including as to the exchanges referred to, and the submissions on her behalf were knowingly made with the intent of misleading the Committee to the view that no such requests for the full sentencing notes had been made.

<sup>1</sup> Letter from QAB and MAF to Lawyers Complaints Service (5 June 2013) at 8.

<sup>2</sup> Standards Committee decision, at [37](e).

Mr PAC:<sup>3</sup>

Mr PAC had no basis for knowing, and neither Mrs NAE nor Mr OAD advised him, that any request had been made, formally or informally, for disclosure of the full transcript of Judge [X]'s sentencing notes. It follows that Mr PAC could not have provided any different account of that situation than he did and cannot be charged with having deliberately misled the Court of Appeal or the Committee.

It is relevant to this aspect that Mr QAB also appears to have had no recollection of any such request, during the course of trial, but has sought to rely on the transcript which later became available.

Mr OAD:<sup>4</sup>

Mr OAD was, at all times, junior counsel in the criminal proceedings. As the Committee concluded in its determination of 17 November 2010, Mr OAD was not involved in the redaction of Judge [X]'s sentencing notes, nor indeed had he read them at the time of Mrs NAE's letter of 21 August 2007, or the hearing on that date. He therefore had no reason to appreciate that Mrs NAE's letter was misleading as to the content of Judge [X]'s notes.

## **Application for review**

### **Procedural issues**

#### *Delegated powers/the telephone hearing/witnesses*

[7] A review hearing was conducted by telephone on 30 May 2017. The parties in attendance were Mr QAB, Mr KAH for the respondents, and Mr Vaughan acting as a delegate duly appointed pursuant to clause 6 of schedule 3 of the Lawyers and Conveyancers Act 2006 (the Act):

- (1) With the prior approval of the Minister of Justice, the Legal Complaints Review Officer may, from time to time, delegate to any person holding office under the Legal Complaints Review Officer any of the functions or powers of the Legal Complaints Review Officer under this Act (including this power of delegation).

[8] The final determination of this review is made after full consideration of all matters by myself following discussion with Mr Vaughan.

[9] Mr QAB declined requests by the Review Officer for the review to be completed on the material to hand, and consistently objected to this review being conducted by way of a telephone hearing. He demanded a hearing in person where he

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<sup>3</sup> At [32](iv).

<sup>4</sup> At [43](a).

proposed to call witnesses. These demands were declined, and in a minute dated 13 February 2017 (attached to this decision) Mr Vaughan recorded that the hearing would proceed by telephone and no further evidence would be accepted.

[10] Persons familiar with the Legal Complaints Review Office (LCRO) will know that it is standard procedure for this Office to request and receive Standards Committee files in full. That has occurred in this instance.

[11] At the commencement of the telephone hearing Mr QAB was asked to advise what further he could provide other than what was already available to the Review Officer.<sup>5</sup> Mr QAB declined to respond to the enquiry. Instead he submitted that Mr Vaughan was “jumping the gun” and procedural issues should be dealt with first. The procedural issue Mr QAB was referring to was the conduct of the hearing by way of telephone. Mr QAB repeated his objections in this regard.

[12] Mr QAB also demanded answers to questions about an application for a transcript of a hearing conducted by this Office in 2011 concerning the same parties.<sup>6</sup> Mr Vaughan declined to respond to that question as it was not an issue which related to this review. In addition, that matter is presently before the Court by way of an action for non-party disclosure.

#### *Telephone hearings*

[13] On 13 February 2017 Mr Vaughan directed that this matter would proceed by way of an applicant-only hearing by telephone and the parties would receive a Notice of Hearing in due course.

[14] The hearing was scheduled to take place on 30 May 2017. On 25 May 2017 Mr QAB wrote to this Office and made the following comments/submissions:

No new submissions are being made regarding the above. QAB does not accept that a telephone conference is in the power of the LCRO and they are no[t] complying [with] the requirements of natural justice.

[15] Mr QAB then quoted from the Guidelines for Parties to Review provided by this Office. The paragraphs referred to by Mr QAB are included here with the portions quoted by Mr QAB underlined:

27. The LCRO may conduct the review as he or she sees fit, but at all times the principles of natural justice apply. Hearings conducted by the LCRO

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<sup>5</sup> This Office had on a number of occasions requested the parties to consent to the reviews being completed on the basis of material to hand. Mr QAB declined to consent.

<sup>6</sup> LCRO 216/2010 and 253/2010.

are not court hearings. They will be conducted with as little formality as is consistent with a proper consideration of the review.

...

30. A hearing will usually be conducted nearest to the District Court that is most convenient in all of the circumstances. Where the Applicant and Respondent are located in different towns or cities the preferences of the parties may be sought but the LCRO will finally determine the most convenient location.

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38. If parties do agree to a hearing on the papers, the LCRO will commence the review on the papers and issue the decision in due course. If either of the parties does not agree to this process, arrangements will then be made for a hearing in person. This may be a hearing to be attended by both parties (see above), or an Applicant-only hearing (see below).

[16] Finally, Mr QAB advised he was “suffering from dementia ... is under medical treatment [and] has a stutter” which would mean a “phone conference would constitute to a lack of understanding and clarity”.

[17] Mr QAB argues that the Guidelines do not provide for hearings to take place by telephone. The substantive point to be noted is that the Guidelines do not have any legal effect on the legislation governing the administration of this Office. Whilst it is accepted that the Guidelines reflect this Office’s view and understanding of the legislation, they are not to be regarded as exhaustively defining the operation of this Office.

[18] At the time the Guidelines were prepared in 2008 at the commencement of the operation of this Office, there was no historical data to provide an indication of the volume of applications that would be received. As the workload of this Office has increased beyond its resources, it has become necessary to measure each direction given for the conduct of a review against the test of an effective use of resources. One of the resources available is the telephone and Mr Vaughan had advised Mr QAB on more than one occasion that he did not consider anything further could be achieved through a hearing in person and that no additional evidence would be accepted. However, Mr QAB exercised his right to personally address the Review Officer and that has been provided.

[19] Section 206(5) of the Act provides:

Subject to this Act and to any rules made under this Act, the Legal Complaints Review Officer may regulate his or her procedure in such manner as he or she thinks fit.

[20] The Courts and other quasi-judicial offices are bound to follow the rules of natural justice and a wide variety of hearings are held by video link and/or telephone to suit specific instances. There is no reason why this Office should not be able to follow that lead.

[21] A hearing in person does not necessarily mean a hearing “in the physical presence” of that person. All that is required is for the Review Officer to be able to hear from the party/parties and for the party/parties to be able to hear each other and the Review Officer.

[22] Mr QAB indicated that the witnesses he wished to bring to the hearing would provide evidence of requests being made for the transcript of the Court proceedings which the respondents had advised the Standards Committee had not occurred. However, when a transcript of the Court hearing was obtained it became clear that the statement in Mr PAC’s letter was not correct and that has been accepted by all parties and the Standards Committee. Nothing further can be gained by having a witness confirm what is already known and accepted.

[23] A review by the LCRO is not the same as a court hearing where witnesses are called and cross-examined. It is an inquisitorial process directed by the Review Officer.<sup>7</sup> That principle, coupled with the authority provided in s 206(5) of the Act, provides complete authority for the Review Officer to direct that the hearing required by Mr QAB be heard by telephone and with no witnesses required or allowed.

[24] Mr QAB has referred to a previous LCRO hearing in 2010 where the Review Officer allowed a witness to give evidence on behalf of the respondent lawyers. That was an unusual occurrence and the reason the LCRO allowed evidence to be called is not apparent. However, the conduct of each review is regulated by the Review Officer as he or she sees fit as provided for by s 206(5) and the manner in which other reviews have been conducted sets no precedent for the present review.

[25] Mr QAB did not provide any medical certificates as to his advised state of health. Mr Vaughan confirms that in the course of the telephone hearing Mr QAB spoke clearly and lucidly and made it quite clear that he held to his demands for the hearing to be conducted in person and that he required witnesses to attend to give evidence. Mr QAB spoke with no apparent indication of a stutter and Mr Vaughan says he had no difficulty in understanding him. Mr QAB was not disadvantaged by the hearing being conducted by telephone.

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<sup>7</sup> *Zhao v The Legal Complaints Review Officer* [2012] NZHC 3247 at [58].

[26] Having been advised the hearing was going to continue Mr QAB stated he was not going to make any further oral submissions and terminated the telephone link. He had also previously advised he did not intend to provide any written submissions.<sup>8</sup>

[27] In summary Mr QAB had been advised on several occasions that no further evidence would be accepted and that the hearing would proceed by telephone. Mr QAB was not disadvantaged by these decisions, and provision was made to hear directly from Mr QAB. He chose not to make full use of that facility. All information and evidence required to complete this review is available.

## **Review**

### *The transcripts*

[28] Although the parties will be thoroughly familiar with the facts giving rise to the complaints it is helpful for an understanding of this decision to identify the two transcripts referred to.

[29] The first transcript which features in this review is the transcript of Judge [X]'s sentencing indication remarks. These are the notes that were in the possession of Ms NAE and of which she provided a summary only to the trial Judge.

[30] The second transcript is the transcript of the trial in which requests were made for a transcript of the sentencing indication remarks. This transcript did not become available to Mr QAB until late November 2010 and was not made available to the respondents until 14 December 2010.

### *The complaint*

[31] Mr QAB's complaint<sup>9</sup> needed to be specific as there have been three previous complaints arising out of the same fact situation in respect of which substantive Standards Committee determinations have been issued. In addition, there have been eight previous review applications conducted by this Office<sup>10</sup> arising out of the same fact scenario. The specific complaint repeated here is that:

Mr PAC, Mr OAD and Ms NAE all knowingly, recklessly produced a document with the intention to deceive the Standards Committee.

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<sup>8</sup> Letter from Mr QAB to LCRO (25 May 2017).

<sup>9</sup> The complaint was made by Mr QAB and Mr MAF. The review application is by Mr QAB alone.

<sup>10</sup> Five review applications by Mr QAB and three by Ms NAE.

[32] The document in question is the letter dated 19 May 2009 referred to in [5].

[33] After Mr QAB succeeded in obtaining a full transcript of the trial (the second transcript) it was accepted by all parties that requests had been made for the transcript. Mr QAB has canvassed the evidence provided by the second transcript which proves that a number of people had made direct and indirect requests during the trial for Judge [X]'s full sentencing notes. Mr PAC's statement to the Lawyers Complaints Service was incorrect. Mr QAB says this was knowingly and recklessly misleading.

[34] Evidence on a balance of probabilities is required to establish that the lawyers were aware that the statements to the Standards Committee were not true or were reckless as to whether they were true or not. This is a difficult proposition to establish. The important fact to note is that the second transcript did not become available until some 21 months after the letter to the Standards Committee was written.

[35] The evidence Mr QAB relies on to support his complaint is nothing more than what is established by the second transcript:

- (a) Requests had been made during the trial for the first transcript.
- (b) Mr JAI and Judge [IAB] debated how Judge [X] may have come to his sentencing indication.
- (c) Mr MAF's counsel had sought to have L's evidence ruled inadmissible or that the charges should be stayed.

Mr QAB also observes that the respondents would have read the Judge's decisions.

[36] None of this goes to the state of knowledge or intention of the respondents in May 2009. The only manner in which Mr PAC could have expressed his comments differently, would have been to preface his response to the complaints by noting that it was "to the best of the lawyers' recollection" that there had been no request for the transcript of the sentencing indication comments.

[37] Even if his response to the Standards Committee had been expressed in that manner the information before the Standards Committee would not have been any different. The transcript proving that Mr PAC's submission to the Standards Committee was incorrect did not become known until after the Standards Committee had issued its decision.



[38] I endorse the reasoning provided by the Standards Committee for determining to take no further action on this complaint on the grounds that:

- (a) It was not reasonable to expect Ms NAE to have a detailed recollection of all exchanges during a trial which had taken place some 21 months earlier.
- (b) Mr PAC had no way of knowing anything different from what he had been told by those present at the trial.
- (c) Mr OAD was junior counsel during the trial and the same can be said for him as for Ms NAE.

[39] There is little more that can be said. There is no evidence which can be relied on to make an adverse finding against any of the lawyers.

[40] The Standards Committee dealt with the complaints in somewhat more detail than was necessary in that the critical element is the state of knowledge of the lawyers at the time the May 2009 letter was provided. I have addressed that issue in this decision. However, I also endorse all of the additional comments made by the Standards Committee.

### **Decision**

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determinations of the Standards Committee in respect of all three lawyers are confirmed.

**DATED** this 13<sup>th</sup> day of June 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 QAB as the Applicant  
Mr PAC, Mr OAD and Ms NAE as the Respondents  
Mr LAG as a Related Person  
[City] Committee [X]  
The New Zealand Law Society