

LCRO 1/2016
87/2016
88/2016

CONCERNING

resolutions of [Area] Standards
Committee [X]

BETWEEN

GV

Applicant

AND

**[AREA] STANDARDS
COMMITTEE [X]**

Respondent

DECISION

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

Introduction

[1] Ms GV has applied for the review of three resolutions by [Area] Standards Committee [X] (the Committee). The resolutions were passed in relation to complaints by Ms RG and Mr WB:

Complaint by RG (xxxxx)

[2] On 23 June 2015, Ms RG complained that a legal entity, [ABC Trust], established by Ms GV was contacting her clients to invite them to attend hui where Ms GV would be giving an overview of Waitangi Tribunal claims where the interests of Ms RG's clients and Ms GV's clients coincided. Ms RG also complained Ms GV had contacted one of her clients directly "and told them to 'dump' her because she [Ms GV] was a better lawyer."

[3] On 16 November 2015, the Committee resolved:

- a) to inquire into the complaint pursuant to section 137 of the Lawyers and Conveyancers Act 2006; and
- b) to call for copies of all files relating to the work Ms GV had undertaken for the [ABC Trust] from 2014 to the date of the resolution, including any matter that related to the [Inquiry A]. These were to be provided pursuant to section 147 of the Act.

[4] On 22 April 2016, the Committee resolved to appoint Mr BP to undertake an investigation of the complaints by Ms RG.

Complaints by WB (xxxxx and xxxxx)

[5] Mr WB complained, on behalf of New Zealand Maori Council and the [X] District Maori Council of the New Zealand Maori Council, that Ms GV was conflicted when accepting instructions to act as the lawyer for either the New Zealand Maori Council and/or the [X] District Maori Council and that she had breached her obligations on numerous occasions to the New Zealand Maori Council. This complaint relates to Ms GV's conduct both as a lawyer for, and a member of, the respective Councils.

[6] On 29 March 2016, the Committee resolved:

- a) to inquire into the complaints pursuant to s 137 of the Lawyers and Conveyancers Act 2006; and
- b) to appoint an investigator to investigate the complaints.

[7] The Committee advised that Mr BP had been appointed to undertake the investigation of these complaints.

Application for review

[8] Ms GV applied for a review of the November 2015 resolution relating to the complaint by Ms RG. The grounds for review submitted by Ms GV were:

- (a) the decision was irrational;
- (b) the request for documentation of files amounted to a "fishing" expedition and there were no grounds to believe any improper conduct had occurred;
- (c) the resolution infringed the rights of her clients to an unreasonable degree;
- (d) the resolution placed demands on her practice that could not be justified; and
- (e) the decisions must have been made based on irrelevant material.

[9] Ms GV instructed Mr FL to act for her in relation to the review. On 2 December 2015, Mr FL wrote to the Lawyers Complaints Service referring to the resolution. He said:

The [ABC Trust] handles the claims of 25 hapu of around 3000 to 5000 individuals each. It covers a land area from [South] to almost as far north as [North]. This demand will encompass an enormous number of documents. The documents cover multiple issues that cannot possibly have anything whatsoever to do with Ms RG's complaints.

The documents you have requested also include a vast number of privileged and confidential documents. The release of these documents is offensive to Ms GV's clients and they have expressly objected to her handing them over.

Ms GV's clients are particularly concerned given that Ms RG is involved in this matter and is representing clients who are taking an adverse position on issues dealt with in those documents. Ms GV's clients see this as a fishing expedition by Ms RG to obtain their private information.

Ms GV also objects to the decision to inquire into the complaint.

[10] Following receipt of Mr FL's letter, the Committee reconsidered its requirement for Ms GV to forward copies of the files. In a letter to this Office 22 March 2016, the Legal Standards Officer advised:

The Committee considered this matter again at its meeting on 15 December 2015 and determined that it was appropriate to appoint an investigator to investigate the issues raised by the complaint. As part of this process, the Committee has determined that the investigator should be directed to liaise directly with Ms GV and Ms RG in relation to the issues raised and the Committee's direction under section 147 of the LCA.

The Committee has also determined that the investigator should offer to attend at Ms GV's practise to review the relevant files, and to commence the review by examining any files which relate directly to the judicial conference of 30 June 2015 and related meetings referred to in the complaint, and any matters which are directly related to the persons named in the complaint. The Committee expects that this guidance will be sufficient to clarify and refine the scope of its previous direction.

[11] A copy of the appointment of Mr BP as the investigator was provided.

[12] The Committee subsequently advised in a letter to this Office dated 22 April 2016:

[Area] Standards Committee [X] ("the Committee") considered this matter at its meeting of 18 April 2016 [sic] and resolved to withdraw the requirement at paragraph (b) its letter of 16 November 2016 [sic] for you to provide copies of all files specified in the letter.

The Committee considers that the direction of 16 November 2016 [sic] has been superseded by its instructions to Mr BP, including its instructions regarding the steps that should be followed in advance of the review, if any, of any relevant file.

[13] On 7 April 2016, the Review Officer (Mr Vaughan) invited Ms GV to withdraw her application for review if the Committee withdrew its request for copies of her files. However, on 4 May 2016, Ms GV declined to withdraw her application for review

insofar as it related to the decision to inquire into the complaint. She also referred to the fact that she had lodged an application to review the resolution to appoint an investigator.

[14] The review in respect of this file therefore becomes a review of:

- (a) the resolution to inquire into the complaint; and
- (b) the appointment of an investigator.

[15] Ms GV applied for a review of the resolution of the Committee in respect of the complaints by Mr WB and advanced the same reasons for the applications as advanced by her in support of the application to review the resolutions passed in respect of the complaint by Ms RG.

Delegation

[16] When received, these review applications were assigned to Mr Vaughan, who at that time was a duly appointed Deputy Legal Complaints Review Officer (LCRO). An applicant only hearing took place with Mr FL in Wellington on 19 July 2016 in which all issues raised by these reviews were canvassed.

[17] Mr Vaughan's warrant as Deputy Legal Complaints Review Officer expired in February 2017, but he has now been appointed as a delegate to this Office by the LCRO pursuant to cl 6 of sch 3 of the Act. The LCRO has delegated Mr Vaughan to report to me and the final determination of this review as set out in this decision is made following a full consideration of all matters by me after receipt of Mr Vaughan's report and discussion.

Review

Jurisdiction

[18] The immediate issue to address in these reviews is whether this Office has jurisdiction to review the resolutions of the Committee. At the review hearing Mr FL traversed responses to the complaints. This review does not involve any consideration of the matters complained about by Ms RG and Mr WB — it is a review of the resolutions referred to above.

[19] Mr FL argued in his submissions dated 13 July 2016, that there was "no case to answer" and the "decision to launch an investigation is irrational". He submits that "it is particularly artificial" to say there is no determination requirement order or direction".

This is with reference to s 194(1) of the Act which stipulates the matters which may be subject to review.

[20] Mr FL has submitted on behalf of Ms GV:

- (a) The decision to investigate the complaints “could only have been reached by taking into account irrelevant matters not related to the complaints”. In this regard Mr FL was referring to a previous decision by the Committee to lay a disciplinary charge against Ms GV before the Lawyers and Conveyancers Disciplinary Tribunal. The Tribunal did not find the charges proved and the inference from Mr FL’s submission is that Ms GV believes the Committee is biased against her because of the “failure” before the Tribunal.
- (b) That previous decisions of this Office (the appointment of an investigator is not a determination, requirement, order or direction) are wrong, “is the necessary inference from decisions of the High Court in relation to the meaning of s 253 and the Supreme Court in relation to the appeal provisions for the Court of Appeal”.

The LCDT proceedings

[21] In a letter to this Office dated 12 June 2017, the Committee denies bias on behalf of its members and it is difficult to reach the view that a Committee would expend time and resources investigating complaints against Ms GV merely because it had been “unsuccessful” in previous proceedings against her.

[22] The Complaints Service points out that Ms GV has not referred to any direct evidence to support her allegations and the Committee rejects them.

[23] Ms GV’s “conviction” that the Committee is biased against her is insufficient to support this allegation and the Committee rightly objects to the unsupported aspersions against its integrity. Serious allegations such as these must have some real evidence before they are made and Ms GV and Mr FL have not provided any.

Previous LCRO decisions

[24] Prior to the hearing, Mr Vaughan referred Mr FL to three earlier decisions of this Office in which the jurisdiction of this Office was considered with reference to

ss 194 and 195 of the Act.¹ In particular, the LCRO has held in those decisions, that a decision to appoint an investigator is not a determination or requirement, order made or direction given by, a Standards Committee given pursuant to s 194, and is therefore not subject to review.

[25] In his submissions Mr FL refers to the judgment of the High Court in *GV v Wellington Standards Committee* where Justice Collins said:²

The words “any order or decision” found in s 253(1) of the Act are at least equivalent to, or possibly even broader than the words “any judgment, decree or order” found in s 66 of the Judicature Act 1908.

[26] Mr FL submits:

The analogy with Ms GV’s High Court matter is a strong one. A principled exercise of the Committee’s powers under ss 137 and 138 required it to take no action if there was no case to answer on the face of the complaint. That, Ms GV submits, was the case in respect of the complaint by Ms RG. In accordance with the decision of the High Court, the determination to take further action and to appoint an investigator must be susceptible to review.

[27] In this regard, the following statement by Justice Collins must also be noted:³

Professional disciplinary proceedings draw on procedures and principles found in both the criminal and civil jurisdictions. It is unusual for a defendant in a disciplinary proceeding to argue that there is no case for them to answer. There is, however, authority for recognising that in appropriate cases a practitioner may submit at the close of the prosecution case that there is no case to answer.

[28] The stark difference between the proceedings under scrutiny by Justice Collins, and the resolutions under review here, is that the submission by Ms GV there was no case to answer in the proceedings before the Tribunal came at the end of the prosecution case.

[29] In the matter under review here, the Committee has not completed its investigation. The whole of the “prosecution case” has not been made out. The time for a submission there is no case to answer to be made would be on completion by Mr BP of his investigation and, as noted above, Ms GV will have the opportunity to comment on Mr BP’s report. The submission there is no case to answer is one to be made to the Committee. It is premature to be making an application to this Office now.

¹ *Lydd v Maryport* LCRO 164/2009 (19 October 2009), *OI v CAZ* LCRO 279/2011 (23 July 2012) and *XI v North Island Standards Committee* LCRO 77/2013 (5 July 2013).

² *Hall v Wellington Standards Committee* [2012] NZHC 1723, [2012] NZAR 790 at [26].

³ At [14].

Zhao v NZLS

[30] Mr FL says:

the LCRO notes that its approach “is consistent with the principle that judicial review of merely administrative steps in the process is not generally available until the conclusion of the process”. However, there is plenty of authority going the other way. In *Zhao v New Zealand Law Society* [2012] NZAR 894, Kos J noted that, “even at a preliminary stage a power to investigate and recommend may “go off the rails”, such that it is necessary that a court quash the decisions”.

[31] Mr FL argues that even at this early stage, the resolution to appoint the investigator should be set aside. He refers to the comments by Kos J noted above. His Honour also noted however, that “where processes leading to a final decision are not completed, review remains discretionary and will be exceptional.”⁴

[32] His Honour also cited as an example of exceptional circumstances where review would be appropriate, the situation where “the Society would not now exercise its powers in accordance with the law.”

[33] Mr Zhao had been interviewed by a panel as to his suitability for practise as a solicitor on his own account. The panel had provided a report to the Society in which it recommended that Mr Zhao not be approved to practise on his own account.

[34] Ms GV’s challenge is not on the same basis as Mr Zhao’s, in that Mr BP has not commenced the task of interviewing Ms GV, or providing a report to the Standards Committee.

[35] Kos J referred to the decision in *Marlborough Aquaculture Ltd v Chief Executive, Ministry of Fisheries* in which Ronald Young J identified bias on the part of an investigator, as an example of a situation where a power to investigate and recommend should be set aside.⁵

[36] In the present case, Ms GV seeks to challenge the appointment of an investigator. There has been no suggestion of bias on the part of Mr BP. Her challenge is to the resolution to appoint an investigator *per se*, and not to the appointment of Mr BP.

[37] I do not consider the judgment in *Zhao* provides any support for Ms GV’s application.

⁴ *Zhao v New Zealand Law Society* [2012] NZHC 2169, [2012] NZAR 894 at [67].

⁵ *Marlborough Aquaculture Ltd v Chief Executive, Ministry of Fisheries* [2003] NZAR 362 (HC).

The practical reality

[38] Mr FL says:

Ms GV also submits that it is artificial to ignore the practical reality of the Committee's determinations. The purpose of appointing the investigator is to require Ms GV to engage with that investigator and to provide the investigator with documents.

[39] The "practical reality" of this Office accepting jurisdiction to review a resolution of the Committee to appoint an investigator is that this Office would thereby be interfering with the role of the Committee at a stage when no determination of a complaint has been made.

[40] Any person may complain about a lawyer's conduct.⁶ The role of the Committee is to assess the strength of the complaint and either inquire into the complaint, give a direction to refer the matter to mediation or determine to take no further action on the complaint.⁷ That is not a role this Office should assume.

[41] In the present instance, the Committee has determined to inquire into the complaints and appoint Mr BP to act as an investigator. Ms RG's complaints include complaints that Ms GV has contacted her clients directly. Her complaints are founded on information received from her clients. Ms GV denies that she has made direct personal contact with Ms RG's clients.

[42] The decision by the Committee to appoint an investigator was reasonable. The Committee cannot merely accept Ms GV's denials. To do so would be abdicating the Committee's responsibility to form an independent view of the complaints. To do this, it needs further information.

Mr WB's complaints

[43] To properly understand and determine Mr WB's complaints, the Committee must have a full understanding of the varied and complex issues raised. A detailed investigation of the issues, followed by a full report from Mr BP, will help the Committee understand and reach a view on the complaints.

[44] Such a step may favour Ms GV, as in the course of dealing with Mr BP she will presumably meet with him in person. This will enable her to convey her views directly and ensure that the Committee does receive all information relevant to the complaint. She would also have the opportunity to comment on Mr BP's report. In this manner,

⁶ Lawyers and Conveyancers Act 2006, s 132(1).

⁷ Section 137.

she can ensure the Committee is fully appraised of all information Ms GV wishes to put before it.⁸

Orlov v NZLS

[45] None of the submissions from Mr FL or the Lawyers Complaints Service refer to this judgment of the Supreme Court.⁹ However, the principles enunciated in the judgment are equally applicable to this review. Mr Orlov had applied for leave to appeal to the Supreme Court against a judgment of the Court of Appeal in judicial review proceedings which:¹⁰

challenged procedural decisions of the respondent Standard Committees not to deal with complaints themselves, but to lay charges against [Mr Orlov] before the New Zealand Lawyers and Conveyancers Disciplinary Tribunal.

[46] The principle followed by the Court was that “the court would not normally permit judicial review proceedings to be heard ahead of the statutory proceedings other than in exceptional cases”.¹¹ The Court held it was not necessary in the interests of justice if the point in issue can be taken on appeal after the substantive proceeding is concluded.¹²

[47] Ms GV has a statutory right to apply for a review of a determination of a complaint by the Committee. The Committee has not yet made a determination. It may very well decide, having completed its investigation, to take no further action on the complaints against Ms GV.

[48] It is also important to take notice of s 142(3) of the Act which enables a Standards Committee to regulate its procedure in such manner as it thinks fit, subject to the requirement that it must exercise its powers consistently with the rules of natural justice.¹³

[49] The Act requires a Standards Committee to provide a copy of the investigator’s report to Ms GV and the rules of natural justice dictate that Ms GV must be given the opportunity to respond to any matters raised in the report.¹⁴ If this Office were to intervene in procedural decisions by a Standards Committee as to whether,

⁸ Lawyers and Conveyancers Act 2006, s 153(1) establishes the presumption for Standards Committee hearings to be conducted on the papers.

⁹ *Orlov v NZLS* [2013] NZSC 94.

¹⁰ At [1].

¹¹ At [6].

¹² At [5].

¹³ Lawyers and Conveyancers Act, s 142(1).

¹⁴ Section 149(1).

and how, a complaint is investigated, it would constitute a serious block on the statutory right of the Committee to regulate its own procedure.

[50] The Supreme Court judgment in *Orlov*, and the provisions of the Act, support a finding that this Office should not interfere with the resolutions passed by the Committee. Its investigation, and the statutory right of the complainants to complain about Ms GV's conduct, has already been seriously interfered with by the process adopted by Ms GV of challenging the resolution by way of review.

[51] It is pertinent also to note the comment of the Supreme Court in *Orlov* where it is said:¹⁵

in our view, there is no prejudice to the applicant in requiring him to go through the disciplinary hearing process before seeking to raise his objections to the respondents' process on an application for leave to appeal in this Court. It is a straightforward application of the statutory procedure.

[52] The same can be said of these applications for review.

Decision

[53] The resolutions of the Committee to inquire into the complaints, are confirmed. The applications for review of the resolution to appoint an investigator are declined.

[54] Inasmuch as it is necessary to do so, the resolutions of the Committee are confirmed pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006.

DATED this 18th day of December 2017

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:

Ms GV as the Applicant
 Mr FL Counsel for the applicant
 [Area] Standards Committee [X] as the Respondent
 The New Zealand Law Society

¹⁵ *Orlov v NZLS*, above n 9, at [7].