

CONCERNING

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

AND

CONCERNING

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

BETWEEN

ZM

Applicant

AND

KT

Respondent

DECISION

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

Introduction

[1] Mr ZM applied to review of a decision by the [Area] Standards Committee [X] (the Committee) to take no further action in respect of his complaint concerning the conduct of the respondent, Ms KT.

[2] The [Area] Standards Committee [X] (ASCX), in the process of making inquiry into a number of conduct issues engaging Mr ZM, made request of Mr ZM to provide his file.

[3] That request was made pursuant to s 147 of the Lawyers and Conveyancers Act 2006 (the Act).

[4] That section is commonly relied on by a Standards Committee when it decides, in the course of a conduct inquiry, that it requires further information from the practitioner.

[5] Mr ZM did not comply with the s 147 request.

[6] In due course, charges were laid with the New Zealand Lawyers and Conveyancers Disciplinary Tribunal (the Tribunal).

[7] One of the charges was that Mr ZM had failed to comply with the s 147 request.

[8] Ms KT was, at the relevant time, employed by the New Zealand Law Society as a Legal Standards Officer. She had assisted the [Area] Standards Committee with its investigations into the conduct inquiry engaging Mr ZM. Her authority to assist the Committee arose under s 184(1) of the Act.

[9] At the direction of the Committee, she was instructed to write to Mr ZM and make request for his file, and copies of bank records and invoices.

[10] The Tribunal hearing proceeded in the absence of Mr ZM.

[11] The Tribunal delivered its decision on 26 November 2014.

[12] Mr ZM was struck off the roll of barristers and solicitors pursuant to s 242(1)(c) of the Act.

[13] Mr ZM filed his complaint against Ms KT with the Complaints Service on 16 March 2015. Together with the complaint pursued against Ms KT, Mr ZM brought complaints against six other practitioners who had been involved either in the initial Committee inquiry, or with the prosecution of the charges before the Tribunal. None of the complaints filed were upheld. Mr ZM sought a review of each of the Committee decisions (four in total) with the Legal Complaints Review Office (LCRO).

[14] All four applications were scheduled to be heard on 24 November 2017. There was inevitably a considerable degree of overlap with the applications.

[15] Mr ZM did not appear at the scheduled hearing.

[16] I determined, despite Mr ZM's non-appearance, that each of the review applications should be dealt with.

[17] Because of the significant overlap in the matters engaged by the individual reviews, I have, in delivering the four decisions, replicated where appropriate, significant parts of my decision.

[18] At the nub of the complaints brought against the practitioners, was argument that the s 147 notice had not been properly issued. It was argued that the notice was ultra vires.

[19] The complaint against Ms KT was that she had, when sending the s 147 notice, exceeded her lawful authority by making request of Mr ZM to provide information that he was not required to provide.

[20] After the Tribunal had delivered its decision, Mr ZM sought to both appeal and judicially review the Tribunal's decision. Those proceedings were consolidated.

[21] Mr ZM also applied to the court to have counsel who had drafted the charges, and prosecuted the charges in the Tribunal, excluded from appearing in the review and appeal proceedings.

[22] In the course of delivering his decision on the application to exclude counsel, the presiding Judge noted that it was irrelevant to the proceedings before him to consider the validity or otherwise of the s 147 notice, but noted that:¹

what is relevant from the submission is that it is certainly reasonably arguable that the notice was valid. Putting it another way, the notice is not so demonstrably invalid as to give rise even to speculation that Ms [LG] might have recognised that it was.

[23] The appeal and review applications were before the court in March 2016.

[24] On the third day of the hearing, counsel for Mr ZM advised the court of terms on which Mr ZM was prepared to resolve the proceedings.

[25] In a minute issued on 12 April 2016, the presiding judge recorded an agreement reached whereby the proceedings would be adjourned on the basis that:²

- (a) the parties would engage in the merits of a rehearing;
- (b) Mr ZM would pay into a nominated trust account, the sum of \$154,835.89 before 23 September 2016; and
- (c) if funds were not paid by due date, Mr ZM would discontinue his application for judicial review, and formally abandon his appeal.

[26] In his decision, the judge gave indication that he considered that the charges should be the subject of a fully defended hearing, that determination being reached on the back of indication that it may have been appropriate for the Tribunal to have allowed an application for adjournment that had been advanced by Mr ZM.

¹ *ZM v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2XXX] NZHC XXXX at [26].

² *ZM v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* HC Auckland CIV-2XXX-XXX-XXXX, [Date]at [2].

[27] The judge's minute notes at [69] that if the matter was to be returned to the Tribunal, evidence would not be led in respect to two of the charges (including the charge of failure to comply with the s 147 notice) and application would be made to withdraw two charges.

[28] The agreement reached then ensured that the issue as to the validity or otherwise of the notice would not be considered further either by the court or the Disciplinary Tribunal.

[29] Mr ZM did not pay funds into a nominated account as he had agreed to do.

[30] The matters returned to the court. On 26 September 2016, the appeal and application for judicial review were struck out. Counsel were invited to provide memoranda on costs.

[31] In a costs decision delivered on 23 November 2016, costs were awarded to the defendants.

The Review Process

[32] Mr GM, for Mr ZM, filed an application to review the Committee's decision to take no further steps in respect to the complaint against Ms KT, on 2 November 2015.

[33] Grounds advanced in support of the review, were that the Committee's decision was:

unreasonable, failed to take into account relevant considerations, took into account irrelevant considerations and/or was based in an error of law or otherwise should be reviewed as per *Deliu v Hong*.

[34] Ms KT was invited to provide response to the application. She advised that she relied on the submissions that had been put before the Committee. She indicated that she would agree to the application being dealt with on the papers, and noted that she considered that the grounds of review had been very broadly stated, and no specifics or particulars provided in support of those grounds.

[35] On 7 November 2016, Mr ZM, through his counsel, was asked to give indication as to whether he would agree to the matter being determined on the papers.

[36] No response was received.

[37] Further request was made on 8 June 2017 and 13 July 2017.

[38] On 13 July 2017, Mr GM advised that he was no longer instructed to represent Mr ZM.

[39] Further attempts were made to obtain a response from Mr ZM.

[40] On 10 October 2017, a minute was issued in which I:

- (a) detailed the attempts that had been made to contact Mr ZM;
- (b) advised that the matter would be set down for hearing on Friday 24 November 2017; and
- (c) directed that Mr ZM was to provide a brief synopsis of his review grounds, 7 days prior to the hearing.

[41] In an email to the Legal Complaints Review Office of 22 October 2017, Mr ZM advised that:

- (a) he objected to the hearing proceeding as he did not have legal representation;
- (b) Mr GM, his former counsel, was unable to represent him; and
- (c) he was not able to personally advance his review, as he had insufficient knowledge of the disciplinary process.

[42] A comprehensive response to the issues raised by Mr ZM was provided in a further minute of 31 October 2017.

[43] On 16 November 2017, a case manager emailed Mr ZM in the following terms:

Dear Mr ZM, This is a courteous reminder about the hearing in the above matters scheduled for Friday, 24 November 2017 at [9.30 am], Auckland District Court, hearing room 8.1. We will expect the synopsis identifying your review ground today before [5 pm] as directed in the Review Officer's minute dated 31 October 2017.

[44] No response was received to that correspondence.

[45] On the morning of the hearing, at around 7 am, Mr ZM emailed the LCRO to advise that:

- (a) his former counsel had not provided his files, to enable him to represent himself;
- (b) he was residing overseas and could not easily appoint counsel;

- (c) he had been domiciled in the [Continent] for several years;
- (d) no New Zealand based counsel he had contacted would agree to represent him because of his prior involvement with Mr GM; and
- (e) he invoked article 6 of the European Convention on Human Rights which, says Mr ZM, protects his right to a public hearing, and the right to access legal representation.

[46] Mr ZM appears to be advancing argument that his difficulties in obtaining legal representation should provide him with a continuing immunity against the responsibility of advancing the reviews that he has initiated.

[47] I am uncertain as to the extent that the European Convention of Human Rights engages proceedings before the LCRO, but I have confidence that any preservation of a party's rights accorded under that convention would not extend to providing a party with indefinite respite from the responsibility of pursuing their own claims on grounds that:

- (a) they were unable to uplift their files from previous counsel; and
- (b) they were unable to instruct counsel because of a reluctance of counsel to take on their case.

[48] Mr ZM has had ample opportunity to instruct counsel and to make arrangements to uplift his file. Any difficulties he may have in securing his file from his previous counsel cannot be responsibly advanced as grounds for indefinite delay.

[49] Mr ZM would be aware of that, and to invoke article 6 of the European Convention of Human Rights at last minute (on the morning of the hearing) presents as an attempt to delay the proceedings.

[50] From 7 November 2016 to 14 September 2017, the Review Office made attempts to contact Mr ZM. No response was received.

[51] Mr ZM was only prompted to respond when advised that the matter had been set down for a hearing.

[52] His response was to advise that he did not consent to a hearing proceeding. That response was not couched in the form of a request for adjournment, but rather advanced by argument that his rights would be infringed, if the hearing was to proceed without him having the benefit of legal representation.

[53] The review application, filed by Mr ZM's then counsel, did not particularise the basis of Mr ZM's objections to the Committee's decision.

[54] The review grounds advanced ("the decision failed to take into account relevant considerations, took into account irrelevant considerations") had all the hallmarks of an application that had been filed to preserve a party's position. It echoed the approach adopted in the criminal jurisdiction on occasions, when a party's appellate rights are preserved by the filing of an appeal which records the grounds as argument that the court had "erred in fact or law".

[55] It is unhelpful to advance a review application in this fashion.

[56] The process of determining professional conduct complaints is a different process to that involved in conventional court proceedings.

[57] Mr ZM initiated the complaints.

[58] The complaints were made not against lawyers who had represented him or with whom he had had professional dealings, but rather lawyers who had been engaged in the process of inquiring into, and prosecuting, conduct complaints that he was then facing.

[59] In advancing argument, as he appears to be doing, that his rights are being infringed if the review hearings proceed, Mr ZM appears to have a degree of indifference to his obligations to advance the complaints that he himself has instigated.

[60] Mr ZM's reputation is not at issue in the complaints. It is the reputation of those practitioners against whom he makes accusation of having breached their professional obligations.

[61] It can reasonably be expected that if a practitioner brings a conduct complaint against another practitioner, that the practitioner advancing the complaint has a proper understanding of the nature of the complaint made.

[62] It is a serious matter to bring a complaint against a professional colleague. A decision to do so should not be lightly made. It is so obvious as to approach the trite, to emphasise that a lawyer would be expected to fully comprehend the nature of a conduct complaint being made against another lawyer.

[63] Similarly, it could reasonably be expected that if a lawyer elects to challenge a Standards Committee decision through the review process (as they are entitled to do) that they would, in exercising that right, be clear about the grounds on which they wish

to challenge the decision, and able to articulate those grounds in their review application.

[64] Simple argument that the decision is “unreasonable” and suggestion that the Committee has “erred” is totally inadequate.

[65] The complaints process, with its consumer protection objectives, is designed to ensure that lay persons are able to initiate and proceed their complaints and reviews, without need for the assistance of legal counsel.

[66] It is expected of lay applicants that they identify their grounds of review, and any information relied on, when they file their review.

[67] The LCRO review guidelines (given to all parties) direct that an applicant is to provide with their review:

- (a) a clear statement of the reasons for seeking the review (i.e. why you considered the Standards Committee decision to be wrong or unfair);
- (b) a statement of the remedy or remedies you are seeking; and
- (c) all relevant information (statements and/or documents) which you rely upon and which were not supplied to the Standards Committee.

[68] In advancing argument that he “was not knowledgeable enough in the matters before the LCRO”, Mr ZM is either arguing for the proposition that he lacks the knowledge to run a review case, or alternatively, he lacks an understanding of the issues engaged by his conduct complaint.

[69] Neither argument is compelling.

[70] It would be expected that Mr ZM, as a qualified lawyer, would be able to manage the process of conducting a review in a forum where the process is designed to accommodate lay applicants.

[71] If it is the case that Mr ZM places reliance on argument (as he suggested in his correspondence) that the issues involved in the review were of such complexity that he required the assistance of legal counsel, that would hint at the unpalatable possibility that Mr ZM pursued conduct complaints against a number of practitioners without having an understanding of what his complaints were about.

[72] Mr ZM gives no indication in his correspondence of his intention to engage legal counsel in the future, or suggestion as to how he proposes to advance his

applications. Rather, he appears to place total reliance on argument that his rights are being infringed if his inability to advance his applications in his own time, does not act as a permanent stay on this office from dealing with the applications. It is argument at odds with the statutory obligations of this office to ensure that review applications are dealt with expeditiously.

[73] Mr ZM's argument that he has been unable to engage alternate counsel is unconvincing. He would have known for a considerable period of time that Mr GM would have been unable to represent him. As noted in my first minute, he appeared initially to be advancing argument that the progressing of his applications should be indefinitely delayed until such time as Mr GM was in a position to represent him.

[74] Absent from Mr ZM's submission, is any consideration for the position of the practitioners who are the subject of his conduct complaints.

[75] It is burdensome for a practitioner to labour under the yoke of a disciplinary enquiry, and it would be a complete abrogation of the responsibilities of this office to allow these reviews to drift indefinitely without any prospect of being brought to resolution.

[76] Mr ZM did not appear at the hearing and advised this office at the very last minute of his intention not to do so. That approach was consistent with the indifferent response Mr ZM has provided to this office's attempts over many months to assist in progressing his applications.

[77] Mr ZM raises no reasonable procedural grounds which could properly persuade me that it was appropriate to adjourn the proceedings. Surprisingly, Mr ZM did not, in either of his communications with the Review Office, make request for an adjournment, rather he simply advanced argument that he had been unable to obtain legal representation. He seems to have proceeded on the basis that expressing reasons as to why he was unable to appear was sufficient in itself to guarantee an indefinite adjournment.

[78] His failure to take steps to advance his reviews and appear at the scheduled hearing can, in these circumstances, properly lead to only one outcome, a direction that the review application be dismissed, and the decision of the Committee affirmed.

[79] Before doing so, I will briefly consider, on the basis of the information before me, the merits of the review application.

[80] That assessment proceeds on the basis, as has been noted, of a failure by Mr ZM to particularise his objections to the Committee's decision, despite request made of him to file submissions.

[81] On the information before me it is difficult to see how the complaint lodged against Ms KT could have resulted in a conduct finding being entered against her.

[82] At the heart of the complaints that Mr ZM progressed against the various practitioners, was argument that his disciplinary inquiry had been contaminated at first step by the Committee issuing a s 147 notice which was defective.

[83] As best can be established from the initial complaint, the notice is challenged on grounds that it required Mr ZM to provide information that he was not obliged to provide, or alternatively, that there had been procedural deficiencies in the manner in which the notice had been issued.

[84] To the extent this complaint engaged Ms KT, it was contended that she had wilfully broken the law, and or knowingly made a false statement in issuing the s 147 notice.

[85] I do not propose to address the accusation that the s 147 notice was defective, except to note that the power of a Committee to request information from a practitioner is understandably wide ranging. It is difficult to see how a disciplinary body could appropriately and responsibly complete inquiries into conduct matters if it did not have available to it extensive powers to require the party who was the subject of the complaint, to produce any documents or information that had relevance to the complaint.

[86] A Committee may, at any time, require a practitioner to produce for inspection "all books, documents, papers, accounts or records which are in the possession or under the control of the source of information and which are reasonably necessary for the purposes of the inquiry or investigation".³

[87] It is difficult, considering the breadth of inquiry that this provision allows for, to see how the s 147 notice issued by the Committee exceeded the Committee's authority, or, as is argued for Mr ZM, that invoices and bank records in his possession could not properly be the subject of a s 147 request.

[88] Mr ZM had opportunity to challenge the notice at the Tribunal hearing.

³ Lawyers and Conveyancers Act 2006, s 147.

[89] I accept that he subsequently argued that he was unable to attend the hearing and should have been granted an adjournment. But an opportunity to have a court consider the notice argument had been afforded him by the proceedings he brought seeking both an appeal and judicial review of the Tribunal's decision.

[90] Mr ZM's opportunity to have the inquiry returned to the Tribunal was thwarted by his failure to comply with indication to the court that he would pay an agreed sum into a nominated trust account.

[91] But in any event, if the matter had returned to the Tribunal, agreement had been reached, as has been noted, that the s 147 charge would be withdrawn.

[92] The Tribunal decision remains the last word on the s 147 notice issue.

[93] Mr ZM's argument relies not only on accusation that the s 147 notice was defective, but that Ms KT had an improper motive, or failed to apply reasonable diligence, by issuing a notice that enabled charges to be put before the Tribunal that were built on a defective foundation.

[94] There is not a shred of evidence to support suggestion that Ms KT acted with improper purpose. To the extent that the s 147 notice has been the subject of scrutiny, neither the Tribunal nor the court identified any deficiencies with the notice, let alone any hint of improper conduct on the part of Ms KT.

[95] Nor is it the case that if there had been an error with the notice of the type complained of, an error of that nature, if established, would not automatically prove the egregious conduct that is alleged (wilful breaking of the law and making false statements). There is no evidence to suggest that Ms KT had not acted in good faith when carrying out her duties

[96] As noted, the limited extent to which I am able to address the merits on review (in the face of Mr ZM's decision to take no part in the proceedings, and his failure to particularise his review grounds), necessarily requires a degree of caution when addressing the merits of the review application, but in fairness to Ms KT, in view of the seriousness of the conduct complaints made, it is appropriate to record that the evidence produced to support the complaints appears to fall demonstrably short of establishing any reasonable basis for the serious allegations made.

[97] Mr ZM's failure to provide acceptable explanation for his failure to attend the review hearing, considered from the context detailed in this decision, provides proper grounds to dismiss the application for review and to confirm the Committee's decision.

Decision

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

DATED this 29TH day of November 2017

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 ZM as the Applicant
Ms KT as the Respondent
Mr RX as the Representative for the Respondent
[Area] Standards Committee [X]
New Zealand Law Society