

LCRO 40/2018

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

RS

Applicant

AND

DL

Respondent

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

DECISION

Introduction

[1] Dr RS has applied for a review of a decision by the [Area] Standards Committee [X] (the Committee) to take no further action in respect of her complaint concerning the conduct of the respondent, Mr DL.

Background

[2] In February 2017, Mr DL had been instructed to act for Dr RS in an employment matter. At the time Mr DL was instructed, Dr RS had proceedings before the Employment Court.

[3] In February 2013, [BF] University of [City] (the University) issued proceedings in the Employment Relations Authority (the Authority), alleging that Dr RS had breached confidentiality in respect of a settlement she and the University had entered into in 2014. The University sought a compliance order.

[4] Mr DL says that he was instructed by Dr RS to advise the Authority and the University that Dr RS would not be challenging the University's application for a compliance order.

[5] It is Dr RS's contention that she provided no such instructions to Mr DL and that he had acted without authority.

[6] On 3 March 2017, the Authority made orders by consent, recording that Dr RS had breached the terms of the record of settlement of 24 July 2014.

[7] Dr RS subsequently sought to challenge the order in the Employment Court. At the heart of her challenge was argument that Mr DL had acted without instructions. This directly put in issue the question as to whether Mr DL had compromised Dr RS's position before the Authority and frustrated her ability to challenge the University's application for a compliance order.

[8] In responding to Dr RS's challenge to the Authority's determination, the University contended that Dr RS's application constituted a waiver of the professional privilege she had in respect to her communications with Mr DL, particularly those communications that occurred around the time Mr DL communicated to the Authority his understanding that Dr RS was consenting to the order being sought.

[9] On 18 September 2017 Mr DL forwarded correspondence to the Employment Court in which he advised that he understood it to be the case that Dr RS had put his conduct in issue before the Court. Mr DL advised that he wished to be provided with opportunity to address the Court.

[10] Dr RS contended that Mr DL had breached privilege in his correspondence to the Court, and further, that he had advised the Court that she consented to a compliance order being made, when she had provided no such instructions.

[11] On 7 December 2017, the Employment Court delivered an interlocutory judgment in respect to the privilege argument.

[12] In April 2018, Mr DL gave evidence to the Employment Court concerning instructions he had received from Dr RS.

The complaint and the Standards Committee decision

[13] Dr RS lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 11 December 2017. The substance of her complaint was that:

- (a) Mr DL had breached privilege; and
- (b) she had suffered loss as a consequence of the breach.

[14] The complaint was initially dealt with through the Complaints Service Early Intervention process. Mr DL was not required to provide a response to Dr RS's complaint.

[15] The Committee approached the complaint by a consideration of the question as to whether it had jurisdiction to intervene in a matter that was before the Employment Court.

[16] The Committee delivered its decision on 7 February 2018 and determined, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act), that no further action on the complaint was necessary or appropriate.

[17] In reaching that decision, the Committee concluded that argument as to whether Mr DL had breached privilege was more appropriately addressed by the Employment Court. The Committee considered that "the complaints process does not afford Dr RS an alternative forum to litigate these matters".¹

Application for review

[18] Dr RS filed an application for review on 6 March 2018.

[19] She submits that:

- (a) the privilege breach complained of did not relate to a matter before the Employment Court, but the Law Society had nevertheless decided to ask the Employment Court to deal with the issue; and
- (b) the Employment Court had directed Mr DL to attend a hearing, but it was uncertain as to whether this hearing would deal with the privilege issue.

[20] Dr RS, in support of her review application, provided a comprehensive background of the circumstances leading to the breakdown of her employment relationship with [BF] University. Much of that material, whilst providing a broader context, has little relevance for this particular review.

[21] Mr DL was invited to comment on Dr RS's review application.

¹ Standards Committee determination, 7 February 2018 at [10].

[22] He submits that:

- (a) he was engaged by Dr RS to review the proceedings she had filed in the Employment Court;
- (b) he had not agreed to file a further amended statement of claim on her behalf;
- (c) on 2 March 2017 he became aware that the University had issued proceedings in the Authority alleging that Dr RS had breached a confidential record of settlement;
- (d) on Dr RS's instructions, he advised counsel for the University and the Authority that the compliance order would not be challenged;
- (e) Dr RS had incorrectly alleged that he did not have instructions to confirm her consent to the compliance order;
- (f) on 7 December 2017, the Employment Court specifically considered the issue as to whether he had breached any privilege owed to Dr RS and had concluded that he had not disclosed any information concerning instructions received from Dr RS;
- (g) his 18 September 2017 correspondence to the Employment Court registry did not amount to a breach of privilege. That correspondence did no more than alert the Employment Court to the fact that he was aware that Dr RS had made various assertions about his professional conduct, and that in respect to that discrete matter, he wished to be heard by the court;
- (h) Dr RS had, by her actions, waived privilege;
- (i) in any event, he did not disclose any information until the Employment Court had directed that it was appropriate for him to do so;
- (j) he had provided evidence to the Employment Court in 9 April 2018, this following a direction from the Court that Dr RS had waived all privilege with respect to his instructions leading up to consenting to the compliance order;

- (k) Dr RS has presented no evidence to the Committee, or to the Legal Complaints Review Officer, that could reasonably give rise to an allegation of breach of privilege; and
- (l) Dr RS has made baseless allegations that were unsupported by facts or evidence.

Hearing

[23] An applicant only hearing proceeded on Friday 21 June 2019.

[24] At the conclusion of that hearing, I provided Dr RS with a brief summary of the arguments she had advanced during the course of the hearing and invited her to confirm that the summary provided accurate account of her position.

Nature and scope of review

[25] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:²

... 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.

[26] More recently, the High Court has described a review by this Office in the following way:³

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.

² *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

³ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

[27] 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:

- (a) consider all of the available material afresh, including the Committee's decision; and
- (b) provide an independent opinion based on those materials.

Analysis

[28] At the review hearing, Dr RS advised that she considered that Mr DL's correspondence of 18 September 2017 amounted to a "minor breach of privilege".

[29] She submitted however that Mr DL had committed an egregious breach of privilege prior to 18 September 2017, when he had, she contended, provided the University's lawyer Mr NP, with a copy of her file.

[30] It would present as an unusual step for Mr DL to have unilaterally made a decision to provide a copy of Dr RS's file to opposing counsel.

[31] Dr RS did not raise this allegation in her initial complaint, nor am I able to identify reference to it in the voluminous submissions filed by her in support of her review application.

[32] This Office may only review complaint material that has been before a Standards Committee. It is an Office of review; not an agency which deals with first-instance complaints.

[33] I am therefore unable to deal with argument that Mr DL released Dr RS's file to Mr NP, as part of Dr RS's application for review.

[34] To the limited extent that Dr RS identifies specific grounds on which she seeks to lay challenge to the Committee decision, she argues that the privilege breach complained of did not relate to the matter before the Employment Court.

[35] I have difficulty understanding the position advanced by Dr RS.

[36] In her initial complaint, Dr RS specifically identifies her concern as being prompted by Mr DL's discussions with the University's lawyer and his correspondence to the Employment Court of 18 September 2017. Dr RS, in describing the nature of the privilege breach she says has occurred, states that "DL has breached my privilege by

corresponding with [BF] University's representatives and with the Employment Court about my matter, claiming I have waived privilege when I have not".

[37] Clearly, Dr RS's complaint was that Mr DL had breached her privilege by making request of the Court to be provided opportunity to respond to concerns he understood Dr RS had raised about his conduct.

[38] Mr DL's retainer was on foot for a relatively short period of time.

[39] He was instructed in February 2017. The retainer ended around 15 March 2017.

[40] Whilst Dr RS's complaint that Mr DL had breached privilege focuses on the correspondence Mr DL forwarded to the Employment Court on 17 September 2017, the question as to whether Dr RS had waived privilege in respect to elements of her communications with Mr DL, was put squarely before the Employment Court in December 2017.

[41] In seeking to challenge the consent order made by the Authority, Dr RS argued that Mr DL had given her consent without having authority to do so.

[42] It was the University's view that in advancing this argument, Dr RS was waiving the professional privilege she had in respect to her communications with Mr DL.

[43] The focus understandably, was on the communications between Dr RS and Mr DL immediately preceding the steps taken by Mr DL to advise the Authority of the instructions he says he had received from Dr RS.

[44] In an email to the Authority of 3 March 2017, Mr DL had said:

I act for the respondent, RS. My instructions are that Ms RS does not oppose the applicant's application for a compliance order. Accordingly, if the applicant and the Authority are agreeable, a compliance order may be issued by consent.

[45] The Employment Court gave careful consideration to the question as to whether Dr RS had, in advancing argument that Mr DL was responsible for orders being made without her consent, waived privilege over her communications with Mr DL.

[46] The Court noted, that Dr RS was concerned that Mr DL may be invited to give evidence in a general way which engaged matters that went beyond those touching directly on her communications with him, prior to Mr DL dispatching his email of 3 March 2017.

[47] The Court observed that Dr RS's broader concerns may have been prompted by Mr DL's correspondence to the Employment Court of 18 September 2017.

[48] The Court concluded that "Dr RS has waived privilege in her communications with Mr DL that resulted in his email to the authority of 3 March 2017".⁴

[49] Further, the Court noted that any conclusion which allowed opportunity for Dr RS to claim privilege over her communications with Mr DL, while shielding those communications from scrutiny, would be an abuse of process.

[50] The Court did not, in its 7 December 2017 decision, address Mr DL's correspondence of 18 September 2017, noting that this correspondence did not form any part of its decision.

[51] However, the issue as to the nature of the instructions provided to Mr DL was back before the Employment Court on 7 April 2018, at which time Mr DL confirms that he gave evidence to the court concerning the instructions he had received from Dr RS.

[52] Mr DL says that he provided the Court with appropriately redacted documents, including email correspondence, file notes and his letter of engagement. Mr DL says that the documents he provided to the Court were made available in accordance with the Court's direction of 7 December 2017 that Dr RS had waived privilege in respect to the instructions leading up to the consenting to the compliance order.

[53] Legal professional privilege, when properly asserted by the person whose privilege it is, provides an absolute prohibition on disclosure.⁵

[54] But legal professional privilege must be properly invoked. It does not relate to "files" but to particular communications which meet the requirements of s 54 of the Evidence Act 2006, being those communications, which are intended to be confidential and made in the course of and for the purpose of the person obtaining professional legal services, or legal advice being given in providing such services.

[55] In circumstances where a client (privilege holder) is pursuing a conduct complaint against a lawyer, privilege is taken as being waived to the extent necessary to enable the lawyer to defend him/herself.⁶

⁴ *RS v Vice-Chancellor of the [BF] University of [XXXXX]* [2017] NZEmpC 154 at [44].

⁵ *B v Auckland District Law Society* [2004] 1 NZLR 326 (PC), *Complaints Assessment Committee v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 447 (CA).

⁶ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 8.4(g).

[56] In *Lawyers' Professional Responsibility*, the learned author said:⁷

A client who institutes proceedings against a lawyer for breach of duty (whether contractual, tortious or equitable), or to recover costs paid, is treated as having waived the right to confidentiality (and legal professional privilege) in relation to the matters he or she has put in issue by pursuing the claim. This is premised on grounds of procedural fairness; lawyers unable to adduce evidence pertaining to the retainer because of confidentiality would find it almost impossible to defend their actions... The same is true for a lawyer defending a disciplinary charge complaint, depending on the jurisdiction under statute and/or in professional rules...

[57] Dr RS had indicated to the Court that she considered that Mr DL had failed to adequately communicate with her and had taken the serious step of confirming instructions to the Authority, when he had not in fact been provided with instructions to do so.

[58] These alleged shortcomings were relied on by Dr RS to establish argument to have the compliance order set aside.

[59] Mr DL is correct when he says that Dr RS had put his conduct squarely in issue.

[60] The question is, whether Mr DL, in seeking opportunity to have his side of the story put to the Court, breached any duties or obligations owed to his client.

[61] A careful examination of Mr DL's correspondence of 18 September 2017, indicates that Mr DL did not disclose any specific information relating to the retainer. He does not refer to instructions received or any matters pertaining to his letter of engagement, or to advice provided. What he seeks, is a direction from the Court to allow him opportunity to respond to the criticisms that he is aware have been made of him.

[62] Mr DL's correspondence, whilst clear in its indication that he is seeking guidance from the Court, cannot however, be seen to be entirely "neutral" in its expression of his position. The fact that he seeks an opportunity to provide response to Dr RS inevitably carries inference that he disagrees with the position that he understands Dr RS has put before the Court. He is then putting himself in conflict with his former client.

⁷ GE Dal Pont *Lawyers Professional Responsibility* (6th ed, Thomson Reuters, Sydney, 2017) at [10.90].

[63] In my view, it would have been preferable for Mr DL to have left it to the Court to determine whether it needed to hear from him. Whilst it was understandable that he felt concerned that criticisms had been made of his conduct which he considered were entirely lacking in substance, it was for the Court to consider whether Dr RS had waived privilege.

[64] It was understandable that Mr DL felt the need to respond to the criticisms made, but he overreached in writing to the Court in the manner he did. As noted, legal professional privilege, when properly asserted, provides an absolute prohibition on disclosure.

[65] But I am not persuaded, considering the context in which Mr DL decided to forward his email to the Court, that Mr DL's conduct meets the threshold of amounting to conduct that requires or merits a disciplinary response.

[66] Dr RS was arguing that the consent order should be set aside on grounds that Mr DL had acted without instructions. It was, in my view, inevitable that the Court would need to hear from Mr DL.

[67] It was equally inevitable, that the University would (as it did) argue that Dr RS could not seek refuge from disclosing information, by argument that her communications with Mr DL were privileged.

[68] Mr DL's correspondence was measured and temperate. I accept that he wrote to the Court with genuine purpose to ascertain whether the Court was prepared to hear from him. As an Officer of the Court, it was understandable that he was anxious to provide a response to Dr RS's criticisms of him.

[69] Whilst Mr DL was, in this instance, responding to criticism that he understood had been put before the Court, I think it relevant to consider in the context of this particular case, the approach adopted by the conduct rules in respect to issues of waiver of privilege, in circumstances where a conduct complaint is being advanced against the lawyer.

[70] Whilst not entirely analogous, the principle that a party advancing a complaint against a lawyer cannot assert privilege to frustrate the lawyer's ability to defend him or herself does provide example of how argument for absolute privilege may be eroded in circumstances where the matters over which the privileges asserted, are the subject of dispute between lawyer and client.

[71] It may have been the case that Mr DL's correspondence of 18 September 2017 amounted to what could be described as a technical breach of privilege in the sense that he is conveying that his view of his instructions differs from Dr RS's, but I am satisfied that the degree of oversight exercised by the court in respect to the privilege argument, provided safe assurance that Dr RS's position had not been compromised.

[72] The Court, both in delivering its decision of 7 December 2017 and in the subsequent hearing at which Mr DL gave evidence, was clearly best placed to consider the issue as to whether Dr RS had waived privilege, or whether Mr DL had breached privilege.

[73] It is clear that the Employment Court provided careful oversight of the process. There is no indication from the Court that it considered Mr DL had breached any obligations owed to Dr RS.

[74] Dr RS herself acknowledged that if Mr DL had breached her privilege in writing to the Court, the breach was a minor one.

[75] Dr RS submits that Mr DL acted without instructions.

[76] Mr DL says that he acted at all times on the instructions of his client.

[77] That issue is not capable of determination in this jurisdiction. Dr RS advises that the matter remains to be determined by the Court.

[78] I see no grounds which could persuade me to depart from the Committee's decision.

Anonymised publication

[79] Pursuant to s 206(4) of the Act, I direct that this decision be published so as to be accessible to the wider profession in a form anonymising the parties and bereft of anything as might lead to their identification.

Decision

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

DATED this 27th day of June 2019

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:

Dr RS as the Applicant
Mr DL as the Respondent
[Area] Standards Committee [X]
New Zealand Law Society