LCRO 65/2019

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	**PT** 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 PT has applied for a review of a decision by the [Area] Standards Committee [X] (the Committee) which made a finding of unsatisfactory conduct against her pursuant to s 12(b) of the Lawyers and Conveyancers Act 2006 (the Act).

[2] The New Zealand Law Society (NZLS) received a confidential report made under r 2.8 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) that dealt with two matters involving conduct on the part of Ms PT (the report). The Committee requested information from Ms PT, considered the report and the information Ms PT had provided, and formed the view that Ms PT's conduct in respect of one of those matters – sending herself an email attaching confidential information – would be regarded as unacceptable by lawyers of good standing. A finding of unsatisfactory conduct was made. The Committee ordered Ms PT to pay a fine and costs pursuant to s 156 of the Act.

[3] Ms PT invites this Office to reverse the determination of unsatisfactory conduct.

Background

[4] Ms ZM was sole principal of DB (the firm) until Ms PT joined her and they formed a business partnership (the partnership). The partnership endured for several years.

[5] Ms PT had a physical file in her office that related to a complaint made to the NZLS around 2014 regarding conduct on the part of Ms ZM (the complaint). The complaint included an allegation that Ms ZM had breached her fiduciary duty to a client of the firm. NZLS concluded its statutory process under the Act with a confidential determination that it would take no further action on the complaint. It is assumed that the Committee gave written notice of its decision in the usual way pursuant to s 158 the Act. There is no evidence of any application having been made to this Office for a review, so that appears to have exhausted the jurisdiction of the Act.

[6] However, until the statutory limitation period passed, Ms PT says there remained a risk that the client might bring a civil claim against her and Ms ZM as partners in the firm.

[7] At some point Ms PT decided she would leave the partnership and commence practice as a barrister.

[8] By early 2018 Ms PT and Ms ZM had sought independent legal advice about the partnership.

[9] Ms PT instructed [Law Firm A].

[10] Ms ZM instructed [Law Firm B].

[11] Although there had been discussions, Ms PT and Ms ZM had not settled on the details of the partnership split. For example, although there is a sense in the materials that the partnership was drawing to a close, it is not entirely clear whether Ms ZM and Ms PT had agreed the date on which the partnership would cease trading.

[12] That aside, on 4 July 2018 a confrontation occurred, which resulted in Ms PT agreeing to absent herself from the office. About that time Ms PT came across the file relating to the complaint. Ms PT decided to leave the complaint file in Ms ZM's office. Ms PT's evidence is that she did not copy anything from the file, took nothing from it, put it in Ms ZM's office and marked it confidential.

[13] After the confrontation, arrangements were made for Ms PT to work at home, initially on her own laptop, then from a work laptop. Ms PT sent or copied all of her communications to Ms ZM.

Thursday 12 July 2018

[14] At 2.30am on 12 July 2018 Ms PT sent two documents from her work email address to her personal email address. The document of particular concern to Ms ZM was the Standards Committee decision determining the complaint (the 2014 decision). Ms PT is unable to recall what the other document was, but she accepts that she forwarded the 2014 decision from the firm's server by email to herself at her personal email address (the email).

[15] It is not clear from the materials whether Ms PT sent or copied the email to Ms ZM, or whether Ms ZM simply noticed Ms PT had sent it to herself. It is safe to assume from what followed that Ms ZM was particularly sensitive about the 2014 decision, because having discovered the email Ms ZM promptly sought advice from [Law Firm B], and gave instructions which resulted in [Law Firm B] sending an email to [Law Firm A].

[16] For Ms ZM, [Law Firm B] referred to Ms PT having accessed the firm's network and "transferred to her personal email address copies of material relating to" the complaint 2014 decision. Ms ZM's position was that there was no legitimate reason for Ms PT "to need or hold the material", and the only possible explanation was that Ms PT intended to use the 2014 decision against Ms ZM. [Law Firm B] required undertakings by 1pm that day from Ms PT including that she had deleted the material, and that she had not and would not disclose it to any other person, failing which they were "instructed to take action without notice".[1]

[17] Ms PT and her lawyer discussed the situation. Ms PT confirmed her instructions to her lawyer in writing at 4.16pm, and later that evening (8.37pm), through her lawyer, Ms PT expressed her regret to Ms ZM, provided an unreserved apology, gave undertakings along the lines of those requested and confirmed she had complied with those, including by deleting the email. From Ms PT's perspective, the giving of and immediate and ongoing compliance with her undertakings should have been "the end of the matter".[2]

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[1] I take that to mean Ms ZM would apply to the High Court ex parte for orders in the nature of an interim injunction.
[2] 20 November 2018.

13 July to 3 September 2018

[18] Although it later became apparent that was not the end of the matter from Ms ZM's perspective, it appears that the immediate crisis, "action without notice" whatever form that might have taken, was averted. Ms ZM's lawyers say Ms PT "resigned as a partner in the firm DB to practice as a barrister" on 13 July 2018.[3] With only two partners, necessarily the partnership's business would be wound up, and the partnership would, at some point, be finally dissolved. It is not clear how far the partners had got with the processes of dissolution and winding up by early September 2018, but on 3 September 2018 [Law Firm B], on instructions from Ms ZM, made a confidential report to NZLS pursuant to r 2.8 (the report) covering two issues.

Own Motion Inquiry

[19] The Committee's view was that the report disclosed conduct by Ms PT that appeared to indicate there may have been misconduct or unsatisfactory conduct on her part. The Committee decided to exercise its function pursuant to s 130(c) of the Act to investigate of its own motion Ms PT's conduct with respect to both aspects of the report, one of which was a client matter, the other was sending herself the email.

[20] The client matter relayed concerns over the extent to which Ms PT had communicated with a client, and perhaps created expectations about the work she had done or would do. It appeared the client may have been billed for work Ms PT had yet to complete.

[21] It is relevant to note at this point that the report and Ms PT's response satisfied the Committee there was no reason to take further action.

[22] A review of those materials provides no basis on which modify or reverse the Committee's decision in that regard. There was no complaint from the client about the fees, and without the information that process might generate, on review, there is no reason to form a different view from the Committee. Ms PT has not applied for a review of that aspect of the decision. Insofar as it deals with the client matter, that aspect of the decision is confirmed.

[23] The other aspect of concern set out in the report arose from Ms PT having sent the email. As there has never been any dispute about Ms PT having sent the email, the Committee was left with the task of working out whether that was conduct which should attract a disciplinary response within the framework of the Act.

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[3] Confidential Report to NZLS, 3 September 2018.

[24] Counsel for Ms PT provided a detailed reply, the relevant parts of which are referred to in the Background section above. Ms PT believes the materials were the 2014 decision and another document, but not the entire complaint file relating to the 2014 decision. Ms PT says she had seen all of that information previously, and was familiar with it.

[25] Ms PT says she did not act for Ms ZM but supported her in practical, emotional and financial ways, including by them instructing two QCs. The file Ms PT had in her office, and the email file for electronic documents contains records of the assistance Ms PT provided to Ms ZM. Ms PT said the same materials were held in Ms ZM's office in hard copy, but also in electronic form in her email folder on the firm's IT system.

[26] Ms PT says she sent herself the email because its attachments may have been relevant to the partnership split, and describes her reaction when Ms ZM's lawyers raised concern, with reference to her immediate apology, the undertakings she gave Ms ZM and her deletion of the email and attachments. Ms PT rejected any suggestion that she sent herself the email for any improper purpose, and says the matter was strictly civil, between her and Ms ZM. Ms PT's view was that the entire issue was resolved in July 2018 in accordance with the rules that govern partnerships.

[27] Ms PT gave her assurance that she had no sinister intentions, and, as mentioned above, counsel submits the undertakings should have been the end of the matter. For a number of reasons, Ms PT's conduct is said not to have been unsatisfactory or misconduct as defined in the Act, including that the conduct "did not occur at a time Ms PT was providing regulated services", so did not fall within the definitions in s 12(a) or (b), and is not a contravention of s 12(c) of the Act.

[28] It was submitted Ms PT had not breached any of her fundamental obligations under the Act, had not broken the law, failed in her duties to clients, or breached her duties to the court. Relying on a process of elimination, counsel repeats the submission that this "is simply a civil matter" between the partners. Sending the email is said to be "unconnected with the provision of regulated services" and "not the sort of conduct which would justify a finding that Ms PT is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer".

[29] The Committee was encouraged to take no further action.

Committee's decision

[30] The Committee's view was that sending the email was conduct unbecoming a lawyer pursuant to s 12(b) of the Act for the reasons set out in the decision. As this decision proceeds to a different conclusion on the basis set out under the Discussion heading below, it is not helpful to set out the Committee's reasoning in any detail. Suffice to say, the Committee grappled with the facts and law, and said at paragraph [41]:

> The confidential information did not belong to Ms PT. She should not have taken it and had no right to use it.

[31] Before concluding Ms PT's conduct "would be regarded as unacceptable by lawyers of good standing", at paragraph [42] and [43] the Committee said it:

> … was of the view… that Ms PT's action in deliberately sending that material to herself was unacceptable. The fact that she apologised and gave an undertaking after Ms ZM discovered that it had been taken does not change the fact that it was wrong to take it.

And

> … did not consider that it would have been appropriate for Ms PT to use that confidential information for any purpose during the course of subsequent negotiations with Ms ZM.

[32] The Committee made a determination of unsatisfactory conduct and imposed the orders referred to above.

Application for review

[33] Ms PT applied for a review. She confirms she:

> emailed materials relating to a complaint that had been made to the NZLS relating to Ms ZM to [her] personal email address.

[34] Ms PT repeated the information she had given to the Committee and says it incorrectly found that she had "provided legal expertise or legal services to Ms ZM" in respect of the complaint, and that she could not and did not provide Ms ZM with legal services. She refers to r 5 of the Rules and its sub-rules.

[35] Ms PT says the complaint alleged "Ms ZM had breached her fiduciary duty" and caused the complainant loss, and the Committee's characterisation of the complaint was incorrect. Ms PT says the complaint raised issues for her and Ms ZM because, if the complaint were correct, they as partners could both be pursued in equity for damages.

[36] Ms PT addresses the Committee's characterisation of the information as confidential in the following way:

> a. The information was confidential to both Ms ZM and me: I had and still have a right to access that information, particularly if the complainant decides to renew her complaint in another forum, such as the High Court. I was a partner at the time that this occurred, and I am entitled to access all information of the firm relating to the time I was a partner. I am technically still in possession of some of the information, although not in written form, because I can remember it.
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> b. Information is not capable of "ownership" as it is not property (see *Dixon v R* [2015] NZSC 147). The issue is solely whether I have a right of access to the information and I have a right of access.

[37] Ms PT says when she sent the email to herself she believed the information was confidential to the partnership, and that in winding up the partnership, there would have to be an accounting between the partners. Ms PT expected the information would be relevant in the negotiations between her and Ms ZM.

Review Hearing

[38] Ms PT and her support person attended a review hearing by audio visual link on 23 July 2019. The Committee was not required to attend and did not exercise its right to do so.

Discussion

[39] The Committee's main concern was that the information Ms PT sent to herself by email was confidential, did not belong to Ms PT and she had no right to take or use it. It is not clear exactly what, other than the 2014 decision, Ms PT emailed to herself. The report does not say, and Ms PT cannot recall. The best place to start then is by clarifying the position of the 2014 decision under the Act.

[40] The Act was amended in 2012. Since that time, ss 158(2A) and 213(2A) have obliged Standards Committees and this Office to give written notice of determinations not only to the lawyer who is the subject of a complaint, but also to related persons. Where a person, such as Ms ZM, practices in partnership with another person (such as Ms PT), the partners are related persons.

[41] So, the Standards Committee was obliged to send written notice of the 2014 decision to Ms ZM and Ms PT. It follows logically that a statutory obligation to send written notice of a decision gives rise to, at the very least, to the associated expectations that a related person, such as Ms PT, will receive and may hold that decision. The Committee's view that Ms PT should not have had the 2014 decision is

therefore not accepted, nor are the contentions that she should not have taken it and had no right to use it.

[42] On the basis of s 158, it is illogical to suggest Ms PT could not keep her own copy of the 2014 decision, electronically or otherwise. Aside from vague references to other materials that Ms ZM could have identified if they were truly of concern to her, taking the 2014 decision from the firm's IT system is the conduct that is at the heart of this aspect of the report. There is no other conduct on the part of Ms PT in the report that could possibly constitute unsatisfactory conduct on her part.

[43] As the Committee was obliged to send the 2014 decision to Ms PT, it follows that she could have shared it with her lawyer. As everyone has a right to seek legal advice, that cannot be unsatisfactory conduct.

[44] Ms PT thought about using the 2014 decision but did not. Ms PT could have fantasised as much as she wanted to about all the possible uses the 2014 decision might have. Everyone has the right to freedom of thought.[4] It is difficult to see how thinking about possible uses could be unsatisfactory conduct, even though it was clearly Ms PT's thinking that troubled the Committee.

[45] In a regulatory context, Ms PT's machinations (if any), like Ms ZM's fears about the future, are irrelevant to the conduct. The regulatory regime under the Act responds to conduct that has occurred.

[46] Sending herself a copy of the 2014 decision cannot constitute unsatisfactory conduct (or misconduct) on the part of Ms PT because the Committee was obliged to send it to her, she had, if not a corresponding right to receive and hold it, at least an expectation that she could have it. She did not use it.

[47] Although there are other difficulties with the decision under review,[5] once those simple realities are accepted, the logic of the Committee's decision falls away. There is no proper basis on which to say Ms PT's conduct in sending herself a copy of the 2014 decision was unsatisfactory or misconduct pursuant to any of the definitions in the Act.

[48] Nonetheless, after she was told Ms ZM had taken issue with her sending herself the email, rather than aggravating an already tense situation, Ms PT's response was placatory and deferential. She effectively withdrew, apologised and within hours had given and performed undertakings that may not have been strictly necessary, but

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[4] New Zealand Bill of Rights Act 1990, s 13.
[5] For example, it confuses the definition of "legal services" with the definition of "legal work".

seem to have been willingly given. Those are not the behaviours of an irresponsible business partner, former or present, lawyer or otherwise.

[49] For the foregoing reasons, the Committee's view that Ms PT's conduct in relation to the email was unbecoming a lawyer is unsustainable and is reversed. Further action is not necessary or appropriate. The orders made pursuant to s 156(1) fall away.

Decision

[50] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination of unsatisfactory conduct made by the Standards Committee in respect of the client matter is confirmed.

[51] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination of unsatisfactory conduct made by the Standards Committee in respect of Ms PT sending herself the email is reversed.

[52] Pursuant to s 211(1)(b) and 138(2) of the Lawyers and Conveyancers Act 2006 this review is determined on the basis that further action in relation to the subject matter of the Committee's own motion investigation is not necessary or appropriate.

DATED this 5TH day of August 2019

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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 PT as the Applicant
[Area] Standards Committee [X]
The New Zealand Law Society