

CONCERNING

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

AND

CONCERNING

a determination of the Wellington Standards Committee [X]

BETWEEN

TQ

Applicant

AND

FW

Respondent

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

DECISION

Introduction

[1] Mr TQ has applied for a review of a decision by the Wellington Standards Committee [X] to take no further action in respect of his complaint concerning the conduct of the respondent, Ms FW.

Background

[2] Mr TQ's lawyer in family matters is Ms JP.

[3] Mr TQ is sole director of "TQ Holdings Limited" (the company).¹ The company was represented by a lawyer in an employment dispute involving allegations of theft against Mr WA. The company subsequently retained the services of XX Services (XX), a human resources consultancy firm.

¹ Evidence of TQ at review hearing.

[4] Ms FW is Ms RT's lawyer in family matters concerning her two children with Mr TQ (the children).

[5] Ms FW also acts for Mr WA in an employment dispute that involves Mr TQ.

[6] Mr TQ says that Ms RT and Mr WA have a "close relationship",² and are friends.³ Ms FW says both her clients are Brazilian, and that Ms RT referred Mr WA to her for legal advice.

[7] Among a range of broader concerns, Mr TQ considers Ms FW has intertwined Ms RT and Mr WA's matters creating what he perceives to be a conflict of justice or law, and that she has acted where there is a conflict of interest. Mr TQ set out his concerns in a complaint to the New Zealand Law Society (NZLS).

The complaint and the Standards Committee decision

[8] Mr TQ lodged a complaint involving Ms FW's conduct in both matters with NZLS on 7 September 2015. The substance of Mr TQ's complaint was that the approach taken by Ms FW, who had been acting against him in family law matters since June 2015, was not in the best interests of the children. Mr TQ says Ms FW has gained no ground for the children.

[9] With respect to the employment matter, Mr TQ said Ms FW had commenced acting in September 2015, and that her conduct of employment matters on behalf of Mr WA "has become harassing".

[10] Mr TQ believes it is impossible for Ms FW to act for both of her clients, and to maintain the necessary degree of separation between them. He considers Ms FW should adopt a more professional approach, choose one case to work on, and maintain clear boundaries.

[11] In support of his complaint Mr TQ attached samples of some of the correspondence that had passed between Ms FW and Ms JP.

Family matters

[12] Mr TQ's position is that when he and Ms RT separated, they arranged to share the care of their children on a three-day rotation basis. However, as at June 2015, Mr TQ's view was that over the previous two years since separation, the children

² Email TQ to NZLS (14 September 2015).

³ Above n 1.

had primarily been in his care,⁴ and that the “current care regime” is that he has “custody”.⁵ He says Ms RT has “a diagnosed mental illness” and hints at alcohol-related issues.⁶

[13] Mr TQ says that Ms FW was first instructed on 10 June 2015.⁷ The correspondence he has provided between Ms JP and Ms FW traverses contact arrangements for the children, their safety and guardianship issues. Mr TQ contends Ms RT behaves abusively and inappropriately towards the children, and that her behaviour had been deteriorating. Proceedings were afoot in the Family Court, with a hearing and roundtable meeting being mentioned.

[14] Mr TQ expanded his complaint on 22 September 2015, based on further correspondence from Ms FW over contact, conveying Ms RT’s instructions and concerns over the children’s safety while in Mr TQ’s care. He says communication between him and Ms RT has deteriorated since Ms FW became involved.⁸

Employment matter

[15] On 31 August 2015 Ms FW wrote to the company. In that letter Ms FW confirms that Mr WA had instructed her to provide advice to him. It appears Mr WA’s role had been the subject of a restructuring process, and that he had been offered amended terms of employment by the company. Ms FW requested information from the company in order to advise Mr WA on his employment and wages position.⁹

[16] On 17 September 2015 Mr TQ sent an email to NZLS reporting Ms FW had communicated “sensitive and confidential” information directly with the company at its main reception area, despite being told that XX are acting for the firm, and despite her having personal contact details for Mr TQ. He contends there was no need for her to have communicated in that way and says he has blocked her emails from his company’s email address.

[17] The correspondence of concern to Mr TQ arises from a letter he sent to Mr WA dated 14 September 2015 on behalf of the company, raising disciplinary concerns. Mr TQ alleged Mr WA had stolen company property, and gave notice of a disciplinary meeting.

⁴ Letter JP to FW (16 June 2015) at 4.

⁵ Timeline of Events prepared by TQ (23 September 2015).

⁶ Above n 5.

⁷ Above n 5.

⁸ Above n 5.

⁹ Mr TQ’s evidence at the review hearing was that while the company had provided that information to the Wages Inspector, it had never provided it to Ms FW or Mr WA.

[18] Apparently on Mr WA's instructions, Ms FW had responded on 15 September vehemently denying the theft allegations, and asserting that the items belonged to Mr WA, not to the company. Ms FW sought to reschedule the meeting to 17 September to enable her to take proper instructions from Mr WA, who she said was on sick leave, and so that arrangements could be made for an interpreter to attend with Mr WA if the company was to pursue the theft allegations. That letter was addressed to "The Director" at the email address [email address] and fax number [fax number], both of which Mr TQ says are accessible by company staff.

[19] Mr TQ also sent a copy of a letter from XX to Ms FW dated 3 September 2015 which related to the restructuring of Mr WA's role and whether Mr WA had accepted it. The letter refers to implications for immigration if Mr WA did not accept the role.

[20] Mr TQ says that Ms RT has been assisting Mr WA by translating his instructions to Ms FW. Mr TQ believes that "both matters have been mixed and intertwined" since then.¹⁰ He believed Ms RT was living with Mr WA,¹¹ and had been told that they both attend meetings with Ms FW, inferentially together at the same time. He expresses concern that they are sharing "personal family information and confidential business information" with Ms FW, and, again inferentially, with one another. Mr TQ considers it is unethical and prejudicial for Ms FW to allow her clients to impart shared information to her. He considers there "is a distinct likelihood that private and personal information is being passed between the parties in a manner that is unacceptable to the interests of justice", inferentially in Ms FW's presence.

Lawyer's response

[21] On 5 October NZLS contacted Ms FW and advised her of the complaint, and the Committee's preliminary view that it would take no further action, and the reasons for that, which are set out in the decision referred to below. Ms FW was invited to respond, and indicated she did not wish to do so.

Standards Committee Decision

[22] The Standards Committee delivered its decision on 5 October 2015. The Committee noted that Ms FW is acting for Ms RT and Mr WA, that the two are connected and that there are associated disputes with Mr TQ. The Committee considered the conflict of interest rules and relevant duties, noting that Mr TQ's

¹⁰ Above n 5.

¹¹ Although at the review hearing he firmly expressed the view that they are no more than friends.

complaint could not be met with a decision directing Ms FW not to work for clients who might have overlapping interests.

[23] With respect to the duties owed by Ms FW to Mr TQ, the Committee noted rule 12 and was satisfied that there was no evidence of Ms FW having breached her duty to treat Mr TQ with integrity, respect and courtesy. The Committee did not consider there was any evidence of Ms FW having harassed Mr TQ. In the circumstances, no further action was necessary or appropriate, in the Committee's view.

[24] Mr TQ disagreed with the decision, and applied for a review.

Application for review

[25] Mr TQ wishes to have the decision reviewed and "all elements considered".

[26] Mr TQ contends the Committee failed to recognise the repeatedly harassing nature of Ms FW's conduct in family and employment cases, demonstrated by the number of letters Ms FW has sent to him and the crossover between her two clients' matters. He says the other letters also display a lack of courtesy.

[27] Mr TQ attaches selected correspondence as evidence of Ms FW having conflated her two client's matters, and says she is making untrue claims in the family and employment matters.

[28] Mr TQ says that Ms FW having sent letters to all his staff demonstrates a lack of respect, courtesy and integrity towards him, and says she has made "untrue claims in the family case", which further demonstrates her lack of integrity. He highlights a number of different email addresses Ms FW has used to contact him.

[29] Mr TQ refers to comments conveyed apparently on Mr WA's instructions including a reference to "repeated behaviour by the employer" as a cause of Mr WA's headaches and nausea.

[30] Mr TQ refers to comments conveyed apparently on Ms RT's instructions including the latter's concerns over safety issues when the children are in Mr TQ's care.

[31] Mr TQ refers to Ms FW's assertion that Mr WA had apparently been "ejected from his accommodation", which Mr TQ (but not Ms FW in her letter) says is the accommodation he had been in while working for the company.

[32] Mr TQ says Ms FW's behaviour and claims in the matters have inflamed the current situation. He considers her approach is wrong, and does nothing to further a positive outcome for the children.

Lawyer's response

[33] Ms FW submits that Mr TQ appears to have accepted there is no conflict of interest, but pursues his allegation of harassment. She contends she has treated him with integrity, respect and courtesy. She refers to her instructions, and says her clients' evidence will be tested as to their veracity if either matter progresses to a hearing. Ms FW correctly says that is her clients' right, just as it is Mr TQ's right to make opposing claims.

[34] Ms FW says she predominantly practices in family and employment disputes. She refers to proceedings issued by Ms RT in the Family Court, in which she was initially represented by other counsel, and the change of representation to Ms FW. Ms FW says at that stage the proceeding was awaiting the allocation of a date for a hearing at which the parties' evidence would be tested.

[35] With respect to her having directed correspondence to the reception email for the company, Ms FW says that on 8 October 2015 she was advised that the company's legal representative had no further instructions. She referred to the information sought for Mr WA, says the company had not provided it, and relies on her obligations to her client, particularly with respect to any costs claim against the company.

[36] Ms FW says she has not entwined her clients' claims, and refers to correspondence from Ms JP to the Family Court airing Mr TQ's concerns.

[37] Ms FW says that she has done no more than progress her clients' instructions in each case, and provides correspondence in support, some of which replicates that provided by Mr TQ. She attributes the amount of correspondence to failures on Mr TQ's part to respond on his own behalf or on behalf of the company, and says that the circumstances required her to make repeated requests. Ms FW provided copies of correspondence, including correspondence from Mr TQ as company director, to Mr WA, and correspondence sent on behalf of the company maintaining the position that the employer has acted at all times in a fair and reasonable way. That correspondence includes a letter dated 8 October 2015, when the company had instructed the lawyer to act in respect of the theft allegations against Mr WA, advising Ms FW that the company's lawyer was no longer able to assist for lack of instructions.

Mr TQ's reply

[38] Mr TQ maintains the view that Ms FW has a conflict of interest, saying that the intertwining of her two clients' cases, and her acting for both parties, "is not in the best interests of justice". He remains dissatisfied with her having communicated other than through XX, the company's nominated representative. He says that he kept his communications with Ms FW to a minimum, because of "the cases being confused and the inflammatory nature" of Ms FW's correspondence.

[39] Mr TQ provided a further letter from Ms FW dated 24 November 2015, raising a personal grievance against the company, that included reference to Mr WA having lost his living accommodation at short notice. He says Ms FW's comments are untruthful.

Ms FW's response

[40] Ms FW absolutely refutes the allegation that she has been untruthful in any way. She confirmed her position that there is no conflict of interest and notes an absence of reply from XX, following her response to its letter to her of 3 September 2015. She confirms that she corresponded directly with the company in circumstances where its representatives were no longer corresponding with her.

[41] Ms FW makes reference to her professional obligations to her clients, and contends she has complied with those at all times, such that there is no basis for an adverse finding against her.

A further instalment from Mr TQ

[42] On 13 September 2016 Mr TQ sent further information for consideration on review. That was provided to Ms FW for her information and she was advised that she was not required to respond.

[43] Mr TQ contends that Ms FW has continued to harass him and "appears to be very emotive in dealing with a family and employment case". He maintains "the cases are a conflict of interest, and not in the best interests of the law". He remains of the view that Ms FW has intertwined the cases, used one to "inflate" the other, and questions her integrity, given the concerns he raises.

[44] Mr TQ refers to unresolved issues in the employment dispute, including it seems, the company's representation, and to Ms FW having knowledge in one of her client's matters that affects another of her clients. He attaches further correspondence.

Review hearing

[45] Mr TQ attended an applicant only review hearing in [South Island] on [Date]. Ms FW was not required to attend, and the hearing proceeded in her absence with her consent.

Nature and Scope of Review

[46] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:¹²

... 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.

[47] More recently, the High Court has described a review by this Office in the following way:¹³

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.

[48] 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:

¹² *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

¹³ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

- (a) Consider all of the available material afresh, including the Committee's decision and all of the further information provided on review; and
- (b) Provide an independent opinion based on those materials.

Analysis

[49] I have carefully considered all of the information available on review, including the evidence and submissions put forward by Mr TQ at the review hearing.

[50] Mr TQ's concerns relate to an alleged conflict of interest, and Ms FW's conduct of matters on behalf of her clients. He expresses concern that Ms RT's and Mr WA's evidence represent a conflict of law or justice. Mr TQ's complaint and his evidence indicate that he misapprehends both what is required of a lawyer acting for her clients, and how evidence is tendered and tested in family and employment proceedings. His complaint and review application proceed from the perspective of a person whose interests conflict with those of Ms FW's clients.

[51] There is no suggestion that Ms FW has at any stage provided advice or assistance to Mr TQ. At various stages he and his company have had independent advice and representation, sometimes from lawyers.

[52] In her role as Ms RT's lawyer, Ms FW owes obligations first to the Family Court, and second to Ms RT. Any professional obligations she might owe elsewhere, for example to Mr TQ, rank behind those.

[53] In her role as lawyer for Mr WA, Ms FW owes obligations to Mr WA, and if and when proceedings are commenced, to the Employment Relations Authority. Any professional obligations she might owe elsewhere, for example to Mr TQ, rank behind those.

[54] Lawyers owe certain limited obligations to third parties. On the present facts, for the purposes of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, Mr TQ is a third party. As the Committee mentioned, rule 12 obliges Ms FW to treat Mr TQ with integrity, respect and courtesy. None of the evidence Mr TQ has provided suggests that she has done otherwise. The evidence he relies upon as demonstrating a lack of integrity is simply a conflict between the instructions Ms FW has received from her clients, and Mr TQ's position in his disputes with those two people. Those conflicts are over facts, not as Mr TQ puts it, law or justice.

[55] Mr TQ has produced no evidence whatsoever of any conflict between the interests of Ms FW's clients: Ms RT and Mr WA. The fact that Mr TQ considers there is a conflict which is contrary to the interests of justice is no more than a reflection of the fact that Ms FW is meeting her obligations to her clients, putting forward their cases for them, and not serving Mr TQ's interests. He says he understands that she is not required to.

[56] Ms FW's professional obligations to act in her clients' best interests require her not to act in his interests if those interests conflict with those of her clients, which in some respects they do.

[57] From Ms FW's apparent diligence in attending to her clients' matters spring Mr TQ's allegations of harassment. There is evidence of some repetition, but Ms FW has answered all of the concerns raised by Mr TQ on the basis that her persistence is a product of his unresponsiveness. There is no proper basis on which to say she has been untruthful. Her responses are cogent and provide a reasonable basis for her conduct.

[58] One of Mr TQ's concerns is that Ms FW did not communicate with XX. He says she knew from previous dealings that XX was the company's human resources consultant. Mr TQ says that as Ms FW knew from her dealings with Ms RT's matter that he was away overseas for five weeks, she should have corresponded with XX rather than sending a letter imposing a 10 day deadline she knew he could not meet in Mr WA's matter.

[59] Mr TQ's concern appears to arise from alleged failures by the company to respond to requests for information in Mr WA's dispute in the employment jurisdiction. Mr TQ says the company has never provided the information Mr WA requested. He contends that it was enough for the company to allow the Labour Inspector to have access to the company's records. Mr TQ says the company is not obliged to provide the information requested by Ms FW on behalf of her client. It appears Mr WA disagrees. Those are arguments that should properly be addressed in the employment jurisdiction.

[60] XX is not a lawyer for the purposes of the Act. If it were, and Ms FW knew it was representing the company in the matter of Mr WA's personal grievance, perhaps Ms FW could be criticised for having directed her correspondence to the company and not XX.¹⁴ However, XX is not a lawyer. Ms FW was under no obligation to conduct

¹⁴ Rule 10.2 et seq preclude a lawyer from communicating directly with another lawyer's client except in certain limited circumstances.

herself according to the company's convenience. It appears her instructions from Mr WA were to require a response in 10 days and she did. If anything, her conduct is a clear example of her not having intertwined her clients' matters. No professional conduct issue is raised.

[61] Mr TQ said at the review hearing that his lawyer and the Court appointed lawyer for the children were critical of Ms FW for her conduct of matters on Ms RT's part. Mr TQ says Ms FW was verging on tears when Ms RT's application failed. I would expect to see any such complaint supported by first-hand evidence from those that Mr TQ says support his concerns, which it was not.

[62] I explained to Mr TQ that this Office exercises a review function. A review hearing is not the time to raise a fresh complaint. Nor is it a means by which third parties are encouraged to mount and maintain ambulatory collateral attacks on an opposing party's lawyer in litigation.

[63] Mr TQ is misguided in his attempts to use the complaint and review processes under the Act to advance issues that largely present as a reflection of his participation in adversarial processes. His concerns lack objectivity, independence, and the necessary evidential foundation required to advance a proper professional complaint. It would be unprincipled to allow the process of review to be used by dissatisfied third parties to insert a wedge, and to seek to drive that between a client and his or her lawyer apparently acting in his or her client's best interests and on their instructions.

[64] I have carefully considered all of the information available on review. Mr TQ has failed to provide any evidence of any conduct by Ms FW that comes close to falling below a proper standard of professionalism.

[65] There is no good reason to take any further action with respect to Mr TQ's complaints about Ms FW's conduct, and there are many good reasons not to.

[66] In all the circumstances, the Committee's decision is confirmed.

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 September 2016

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:

TQ as the Applicant
FW as the Respondent
Z as a Related Party as per s 213
The Wellington Standards Committee X
The New Zealand Law Society
Secretary for Justice