LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2021] NZLCRO 205

Ref: LCRO 236/2020

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	**TB** Applicant
AND	**APPLICATION FOR REVIEW OF A PROSECUTORIAL DECISION**

DECISION

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

Introduction

[1] In a determination dated 9 November 2020, the [Area] Standards Committee [X] (the Committee) determined that the conduct of Mr TB, a lawyer practising in [City], was such that it should be considered by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal (the Tribunal).

[2] The Committee's determination was made pursuant to s 152(2)(a) of the Lawyers and Conveyancers Act 2006 (the Act).

[3] The prosecution determination followed an own motion investigation carried out by the Committee, which had been triggered by a report dated 20 September 2018 from Mr TB's former employers, the law firm [Law firm B] (the reporting letter).

[4] Draft charges have been framed by the Committee and a copy given to Mr TB.

[5] Through his counsel Mr CK QC, Mr TB has applied to review the Committee's prosecution determination.

[6] The facts are relatively straightforward although they span five separate events over a three-year period.

[7] The Committee's own motion investigation file runs to some 2,900 pages. A lot of the material on that file is duplicated. Messrs CK and TB will be more familiar than most with all of that material.

[8] Nevertheless, it is important for me to set out the factual and procedural background which led to the Committee's prosecution determination, in some detail. This is largely because the Committee's prosecution determination was not accompanied by reasons, which is entirely conventional.[1]

[9] I have concluded that the Committee's prosecution determination was one that was reasonably open to it, on the facts as they emerged over the course of its inquiry.

Background

[10] As indicated above, the background facts concern five separate events said to have occurred in February 2015 (the summer clerks lunch), May 2017 (the May 2017 lunch), May to July 2017 (the emails), December 2017 (the December 2017 Christmas party) and on 9 February 2018 (the February 2018 lunch).[2]

[11] Only the May 2017 lunch, May to July 2017 emails and February 2018 lunch were described in the reporting letter. The events comprising the February 2015 summer clerks lunch and December 2017 Christmas party emerged during the course of the Committee's inquiry.

[12] The February 2015 summer clerks lunch occurred whilst Mr TB was employed by the law firm [Law firm A], based in that firm's [city] office.

[13] The 2017 and 2018 events occurred whilst Mr TB was employed by [Law firm B].

[14] Since the middle of 2018, Mr TB has been employed as a consultant with the law firm [Law firm C].

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[1] Lawyers and Conveyancers Act 2006, ss 152, 158.

[2] Another event said to have occurred on 1 February 2018 featured during the Committee's inquiry, but is not the subject of a draft charge. For context only I will refer to that event from time to time in this decision.

[15] As of now, Mr TB has been practising commercial law for almost 40 years. He had held senior partnership and management roles in law firms (including for several years at [Law firm B], where he had returned from [Law firm A] in 2015).

[16] Mr TB was (and very probably remains) highly regarded as a sound and competent commercial lawyer. He is also known to be sociable and outgoing.

February 2015 summer clerks lunch

[17] In February 2015, Mr TB invited two female summer clerks employed by [Law firm A] to have lunch with him. He said that this was to thank them for their work with the law firm, and to offer any advice they might want about their future careers in the law.

[18] The lunch, at a [city] restaurant, included alcohol.

[19] The trio left there early to mid-afternoon and went to a nearby bar, where more alcohol was consumed.

[20] During the course of the afternoon one of the summer clerks received messages from the [Law firm A] partner in whose team she was working, asking where she was and when she would be returning to the office.

[21] She mentioned these to Mr TB, concerned that the partner might consider her to be unreliable.

[22] Mr TB suggested that she need not worry about the messages and that he would take responsibility for the summer clerks' absence.

[23] On leaving the bar late in the afternoon to return to the [Law firm A] offices, the trio walked past a recently opened adult store. Mr TB went into the store. The two summer clerks followed him.

[24] They all remained in the store for about five minutes. Mr TB said that he spent most of that time speaking to the owner. He was interested in what the owner had to say because the store had recently opened and had generated some controversy, so he wanted to see how the owner was coping and how the business was generally getting on.

[25] The trio arrived back at the [Law firm A] office shortly before 5pm.

[26] One of the summer clerks reflected on the afternoon's events and became worried that her absence from the law firm for an entire afternoon, drinking at a restaurant and a bar, might impact upon her ability to commence a career in law.

[27] This summer clerk spoke to her mother, including telling her about the visit to the adult store. Her mother telephoned an [Law firm A] partner whom she knew, and spoke about her daughter's concerns.

[28] The partnership was concerned about Mr TB's behaviour, which it said involved encouraging summer clerks to take an afternoon off work, drinking with them throughout the afternoon and visiting an adult store with them.

[29] Accordingly, [Law firm A] raised the matter with Mr TB by way of a formal employment investigation.

[30] Mr TB provided his explanation for those events, saying that it was known he was taking the summer clerks out for lunch, and that there was nothing untoward about the afternoon's activities.

[31] Mr TB and [Law firm A] resolved their employment issue about those events following a mediation under the auspices of the Employment Relations Act 2000. Beyond that the matter was not taken any further.

[32] By March 2015, Mr TB had taken up employment again with [Law firm B].

May 2017 lunch

[33] On a Friday during May 2017, Mr TB hosted a lunch for one of [Law firm B]'s corporate clients (S Ltd) at a [City] restaurant.

[34] Three of S Ltd's employees attended the lunch, together with Mr TB and Ms JQ, then an associate at [Law firm B].

[35] The group consumed alcohol with their lunch, and then moved to a nearby bar where more alcohol was purchased.

[36] It is said that Mr TB became increasingly intoxicated during the lunch and later at the bar.

[37] Ms JQ said that at the bar after lunch, Mr TB became "overly friendly" towards her and "very touchy", including stroking her hair and shoulder, and patting her knee. She said that this made her uncomfortable.

[38] S Ltd employees did not witness this conduct, but acknowledged that the group had been drinking. They reported the lunch as being “jovial” and “gregarious”.

[39] The afternoon’s events drew to a close at around 4:30 pm, and Ms JQ drove Mr TB back to the [Law firm B] offices.

[40] Ms JQ mentioned the events to a colleague at work on the following Monday.

May – July 2017 emails

[41] At this time, Ms EF was in her first year of post-admission employment, as a solicitor with [Law firm B]. She was not part of Mr TB’s team in the law firm.

[42] Ms EF was ambivalent about continuing a career in the law, and not completely happy working at [Law firm B].

[43] In the early part of 2017, Mr TB asked Ms EF to assist him with a particular piece of work. Inter-team work such as this was not uncommon.

[44] Mr TB became aware that Ms EF was reflecting on her employment options.

[45] After the work had been completed, and between about May and July 2017, Mr TB and Ms EF exchanged numerous emails.

[46] Ms EF did not reply to all of Mr TB’s emails.

[47] The emails included Mr TB attempting to arrange coffee or dinner meetings with Ms EF.

[48] Comments in some of Mr TB’s emails included “just the two of us”, a reference to oysters, and saying that he promised “not to bite. Well not hard.”

[49] In one email Mr TB referred to his wife being away, and suggesting they meet during that time.

[50] Ms EF was concerned about the nature of some of Mr TB’s comments and spoke to others in [Law firm B] about it.

[51] The May – July 2017 conduct was the subject of an employment investigation by [Law firm B]. Mr TB was represented in that investigation by a Mr MN from the law firm [Law firm D].

[52] Mr TB's response was that he was endeavouring to speak to Ms EF about her employment and offer some mentoring and career advice.

[53] The investigation resulted in [Law firm B] issuing Mr TB with a written final warning, dated 31 August 2017. The particular employment issue was Mr TB's contravention of the law firm's Bullying and Harassment policy in connection with his interactions with Ms EF.

December 2017 Christmas party

[54] [Law firm B] held a Christmas party for staff at a bar in [City], during December 2017. Later in the evening some of the group, including Mr TB and Ms NG, then an associate at [Law firm B], moved to another bar next door.

[55] Ms NG and others from [Law firm B] were dancing. Mr TB made a number of attempts to dance with Ms NG. At one point he put his hand down the back of her dress, and on her skin.

[56] Ms NG then left the Christmas party. She subsequently discussed the events with colleagues at [Law firm B].

9 February 2018 lunch

[57] Ms JQ and Mr TB had been working on a difficult project on behalf of S Ltd during the latter part of 2017 and the early part of 2018.

[58] Mr TB, Ms JQ and employees from S Ltd had lunch at a [City] restaurant on 9 February 2018.

[59] It is said that Mr TB ordered and consumed a number of glasses of wine and became intoxicated.

[60] Nevertheless, at the conclusion of the lunch he drove himself and Ms JQ back to [Law firm B]'s offices, and spent the rest of the afternoon working there including receiving and sending emails.

[61] At the relevant time, [Law firm B] had a Drug and Alcohol Free Workplace Policy prohibiting the consumption of alcohol in the work environment during working hours to an extent that compromised a person's ability to "physically and mentally perform their duties in a safe and efficient manner."

[Law firm B] investigation

[62] By various means, the May 2017 lunch and the 9 February 2018 lunch came to the attention of the Board of [Law firm B] during March 2018.

[63] As well as those two events, there was an allegation that Mr TB was intoxicated whilst working at the firm's offices during the afternoon of 1 February 2018.

[64] The law firm regarded these three events as potentially raising disciplinary issues under Mr TB's contract of employment.

[65] The law firm then took a number of steps. First, on 7 March 2018, it notified Mr TB of the allegations that had been made. Secondly, on 8 March 2018 a decision was made (and conveyed to Mr TB) suspending his employment pending further investigation of the allegations. Thirdly, counsel was instructed to represent the law firm.

[66] Significantly, on about 15 March 2018, [Law firm B] appointed a Mr VB to carry out an investigation into the three events.

[67] Initially, and briefly, Mr MN acted for Mr TB in connection with the investigation. However, he was replaced by a Mr PY from the law firm [Law firm C].[3]

[68] Mr VB's investigation included interviews with a number of people either directly or indirectly involved in the three events, including Mr TB.

[69] Mr VB issued a "final report" (the VB report) dated 20 May 2018, to the Board of [Law firm B].

[70] The VB investigation and report were focused on disciplinary issues that might arise in the context of Mr TB's employment, in particular in relation to the treatment of staff, health and safety, and the firm's drug and alcohol policy.

[71] Mr VB found breaches by Mr TB of the firm's drug and alcohol policy.

[72] In relation to the May 2017 lunch, Mr VB said that he found, on the balance of probabilities, that Mr TB's behaviour towards Ms JQ "offended and upset her [but he was] not able to conclude that this was inappropriate."

[3] Mr PY continued to act for Mr TB until approximately the end of June 2018, when he left [Law firm C] to take up employment elsewhere. Mr MN resumed acting for Mr TB at that point; however Mr PY was once again retained and appeared on Mr TB's behalf in the Employment Relations Authority in December 2018. Nothing whatsoever turns on this. I am simply recording it for continuity purposes.

[73] Mr TB was given an opportunity to comment on the VB report, which he did through Mr PY.

[74] In June 2018 [Law firm B] terminated Mr TB's employment

[75] Mr TB took up employment with the [City] law firm [Law firm C] later in 2018, and he remains employed there.

[76] After his dismissal from [Law firm B], Mr TB raised a personal grievance against the firm in relation to its management of the May – July 2017 emails involving Ms EF for which he had received a final written warning. He subsequently issued proceedings in the Employment Relations Authority (ERA) in connection with that personal grievance. That claim was dismissed by the ERA in a decision dated 22 March 2019.[4]

[77] As well as raising the above personal grievance, Mr TB raised two others against [Law firm B] in connection with his suspension in March 2018 and dismissal in June 2018. However, those matters were settled.

Reporting letter

[78] The relevant part of [Law firm B]'s reporting letter sent to the New Zealand Law Society Complaints Service (Complaints Service) said:

> Mr TB is a former partner and former chair of [Law firm B] of long tenure, who was more recently employed by the firm as a Consultant, from March 2015 to 14 June 2018. For approximately 6 years leading up to March 2015, he was a Consultant with [Law firm A] and [City]. Mr TB's employment was terminated by [Law firm B] on 14 June 2018 after a conduct complaint was made by a female associate which was investigated by VB, a former Member of the Employment Tribunal and Employment Relations Authority. Mr VB's findings, coupled with [Law firm B]'s own view of Mr TB's conduct, caused significant damage to the trust and confidence that the firm needed to have in him as a senior lawyer – including in relation to his judgement and whether he could be trusted to act appropriately towards staff.
>
> *Conduct conclusions*
>
> The conclusions regarding the conduct allegations made against Mr TB by the female Associate are set out below. The Board of [Law firm B] is content that these conclusions were reached on a fair and reasonable basis:
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> 1. That Mr TB touched the female Associate at a client lunch in the way that she described, which was: while "very inebriated" he started to get "very touchy" and "overly friendly" towards her, including sitting very close to her and stroking her hair, stroking her shoulder, and patting her knee – which made her feel embarrassed, very uncomfortable and very

[4] *TB v [Law firm B]* [2019] NZERA 174.

awkward. Context for this conduct is the Associate being new to the firm and relatively new to New Zealand.

2. That Mr TB was an active participant in a drinking session at that same lunch in breach of the firm's alcohol policy (4 bottles of wine, 4 IPAs and 4 whiskeys were purchased – with several drivers in the party of five) and he then drove home from the office.

3. That Mr TB drank heavily at another client lunch, and also in breach of the firm's policy, upon which occasion there was one bottle and 6 additional glasses of wine purchased for 3 people, with the same female Associate having one glass only. There was no business case for the quantity of alcohol ordered and Mr TB admitted to then driving back to the office with both the Associate and the client in his vehicle, despite her offering to drive or get an Uber, which the firm views as a significant health and safety issue for all concerned.

4. [The 1 February 2018 event].

In addition to the above, at the time of his dismissal, Mr TB was subject to a final written warning that had been issued in August 2017. That warning arose from his conduct towards another young female employee of the firm (a first-year lawyer), which involved him making repeated requests for lunch or dinner in 13 emails, including an invitation for dinner on a Saturday night, referring to his wife being away and 'baching', and saying that he 'promised not to bite – well not hard'. This conduct was established on the face of those emails.

Initial Committee processes

[79] Upon receipt of the reporting letter, the Committee resolved to commence an own motion investigation into its contents, pursuant to s 130(c) of the Act (the inquiry).

[80] Mr TB was informed of this in a letter from the Complaints Service dated 24 October 2018. The letter identified the following as the subject of the inquiry:

> whether or not your actions towards two [Law firm B] female employees (one a then first-year lawyer, and the other an Associate) in 2017 and 2018 breached your professional duties as a lawyer and, if so, whether it warrants a disciplinary response.

[81] In order to progress its inquiry, the Committee sought additional information from [Law firm B] including a copy of the VB report.

[82] During this time (i.e. late 2018) the ERA hearing was concluded, and the decision reserved. The Committee thus resolved to defer its inquiry until the ERA had delivered its determination in the employment proceedings.

[83] Some two months later, in March 2019, the Committee resolved to continue with its inquiry.

[84] On 29 April 2019 the Committee appointed a barrister practising in [City], Ms WL, as an investigator to assist with its inquiry.

[85] Ms WL's terms of reference directed her to inquire into whether Mr TB:

a. engaged in conduct in relation to [Ms EF] (between May 2017 and July 2017) and/or [Ms JQ] (on 12 May 2017):

    i. that would be regarded by lawyers of good standing as being unacceptable [pursuant to s 12(b) of the Act];

    ii. that consists of a contravention of any provision of the Act or of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 [s 12(c) of the Act and rr 10 and 10.1 of the Rules];

    iii. that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable [pursuant to s 7(1)(a)(i) of the Act];

    iv. that consists of a wilful or reckless contravention of any provision of the Act or of the Rules [pursuant to s 7(1)(a)(ii) of the Act]; and/or

    v. that would justify a finding that Mr TB is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer [pursuant to s 7(1)(b)(ii) of the Act].

b. consumed alcohol and/or was intoxicated and/or suffering the effects of alcohol consumption (including on 12 May 2017, 1 February 2018 and 9 February 2018):

    i. at a time when he was providing legal services to clients;

    ii. whilst responsible for the supervision of employees of law firms at which he was a partner or senior member; and/or

    iii. during the course of his professional dealings.

[86] In the course of interviewing witnesses about the May 2017 lunch and 9 February 2018 lunch, reference was made to the events at the December 2017 Christmas party involving Ms NG. Ms WL accordingly interviewed Ms NG about that as part of her investigation.[5]

[87] The scope of Ms WL's investigation was extended by the Committee in August 2019, after she was informed about the February 2015 summer clerks lunch by a witness she was interviewing.

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[5] Ms NG was initially interviewed about her knowledge of the May – July 2017 emails. Ms WL's interview also dealt with the December 2017 event. In her investigation report Ms WL describes the December 2017 event as having occurred in 2016. I anticipate that this is a typographical error. Ms NG's witness statement refers to the [Law firm B] Christmas party in December 2017.

[88] Ms WL provided an interim report to the Committee dated 5 November 2019, to which she attached copies of statements from the 24 witnesses she interviewed during the course of her investigation.

[89] Although Ms WL grouped the witnesses according to the February 2015 summer clerks lunch, May 2017 lunch and the May – July 2017 emails, relevant witness statements also covered the December 2017 Christmas party and 1 February 2018 event.

[90] Mr TB was not interviewed by Ms WL, although his name was included on a list of potential witnesses attached to Committee's instrument appointing Ms WL as investigator.[6]

[91] On 29 January 2020, the Committee provided Mr TB, through Mr CK, with a copy of Ms WL's interim report and attached witness statements, and invited Mr TB to provide a written response.

[92] The Committee also gave Mr TB an opportunity to be to be interviewed by Ms WL, if he wished. Through Mr CK he declined that opportunity.

[93] Finally, in relation to the Committee's inquiry processes, it formally resolved to set the matter down for a hearing on the papers, and notified Mr TB of this on 13 July 2020.

Notice of Hearing

[94] The Committee issued a Notice of Hearing dated 19 August 2020, in which it set out the conduct issues it had identified, and invited submissions from Mr TB on those issues.

[95] The Notice of Hearing was a detailed and substantial document, and rather than repeat its contents in the body of this decision, I annex it as a schedule.

Substantive responses by Mr TB to the Committee's inquiry

[96] Mr TB provided a response to the Committee's initial advice about its inquiry, in a letter dated 7 December 2018. In summary he said:

(a) The reporting letter was a "one-sided and inaccurate account of events."

[6] Appendix A to the Instrument of Appointment (20 April 2019).

(b) The reporting letter excluded a copy of the draft VB report on which Mr TB had made a number of pertinent comments.

(c) Mr TB has "never had [his] conduct as a lawyer challenged in this way … nor [has he] ever been the subject of any formal complaint in relation to [his] conduct as a lawyer."

(d) There were no reasonable grounds upon which an investigation could proceed.

(e) There were at that time concurrent personal grievances involving [Law firm B], one of which was shortly scheduled to be heard by the ERA. The reporting letter was a retaliatory step by [Law firm B].

(f) Mr TB asked the Committee to defer further inquiry pending the outcome of the employment matters.

[97] By about May 2019 Mr TB instructed Mr CK to act for him in connection with the Committee's inquiry.

[98] Mr CK and the Complaints Service exchanged several pieces of correspondence over the course of the Committee's inquiry. This included Mr CK providing comprehensive responses on Mr TB's behalf, to the matters raised by the Committee.[7]

[99] A summary those responses is as follows:

24 September 2019 letter

(a) Mr TB accepted that his conduct in relation to the May 2017 lunch and the emails was inappropriate and that Ms JQ and Ms EF may have been upset and embarrassed by that and may have felt that the conduct was disrespectful and discourteous.

(b) Mr TB wished to apologise to Ms JQ and Ms EF.

(c) Mr TB accepted the findings in the VB report, including one "which could be viewed as being partially in favour of Mr TB in respect of the matters relating to Ms JQ."

[7] See Mr CK's letters to the Committee dated 24 September 2019, 16 March 2020 and 21 October 2020.

(d) Mr TB accepted that, at least in some respects, his emails to Ms EF were inappropriate both as to the number of emails and their contents. He accepted that Ms EF considered that some were inappropriate and that she was uncomfortable about them.

(e) Nevertheless, Mr TB was unaware that his emails were affecting Ms EF in this way, and that was not his intention.

(f) There is no disagreement that Mr TB was principally motivated to support and assist Ms EF both as to her then employment at [Law firm B], and her future career development. He was endeavouring to boost her morale and emphasise her abilities.

(g) In relation to the May 2017 lunch, Mr TB denied that the alcohol he consumed "jeopardised his physical and mental fitness to perform his duties in a safe and efficient manner". He denied that he was unfit to drive and said there was no evidence to support that conclusion.

(h) Alcohol-related issues referred to in the VB report were essentially employment issues and did not amount to unsatisfactory conduct or otherwise breach any conduct rule.

(i) Mr CK made reference to a determination of a Standards Committee, cited as *ZTUVK*.[8] Mr CK submitted that the Committee in that case made findings of unsatisfactory conduct (allegations of excessive alcohol consumption in a work social setting, coupled with unwanted sexual behaviour by Mr X), and the same outcome was justified in Mr TB's case.

(j) Mr TB acknowledged that his conduct in relation to Ms JQ and Ms EF breached rr 10 and 10.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) and was thus unsatisfactory conduct, deserving of a fine.

[8] [Unnamed] Standards Committee, 25 October 2018. The Committee directed anonymised publication of a summary of its determination, saying that there is a public interest in doing so "to reiterate the seriousness with which Standards Committees take reported instances of sexual harassment by lawyers." The determination is referred to as *ZTUVK*.

(k) Mr TB had a clean disciplinary record, enjoyed a long career and was well regarded. He had been married for 29 years and had three adult children.

(l) In relation to the February 2015 summer clerks lunch, those events were (as at September 2019) over four years old. The summer clerks lunch had been agreed by [Law firm A]. Neither of the summer clerks indicated that they were uncomfortable with any of the afternoon's events.

16 March 2020 letter

(m) The investigator appointed by the Committee interviewed a witness (Ms Y) whose view about the events surrounding the May – July 2017 emails was that Mr TB had been trying to help Ms EF, and that his intentions were good. This has been acknowledged by [Law firm B] and confirmed in a letter of support that had been written by Mr TB's wife (Ms SR).[9]

(n) The Committee's investigator does not express any view as to whether or not Mr TB may have breached the Act or the Rules.

(o) Mr VB was also interviewed by the Committee's investigator. In relation to the May 2017 lunch, he told the investigator that he "did not find that on the balance of probabilities that [Ms JQ] had been touched in the way complained of [although he] made the finding that she was clearly uncomfortable with [Mr] TB's behaviour." Mr VB said that there was no independent evidence corroborating Ms JQ's account, and Mr TB had denied touching her in the way described.

(p) Mr CK submitted that the Committee "would be justified in making a decision not to take any of the matters in respect of Ms JQ or Ms EF any further pursuant to [s 138 of the Act]."

(q) Issues concerning Mr TB's alcohol consumption "are essentially employment issues".

(r) Mr TB's employer at [Law firm C] confirmed that there had been no issues whatsoever involving Mr TB (who had made full disclosure about

[9] Standards Committee file, p 1893 (29 September 1999).

the circumstances surrounding his departure from [Law firm B]), and that younger lawyers at [Law firm C] had "been grateful for mentoring and learning opportunities that Mr TB's experience has provided."

(s) In relation to the December 2017 Christmas party, Mr TB "was unaware that that matter had caused any concern until he read Ms NG's statement to Ms WL."

[100] Mr CK responded to the Notice of Hearing on behalf Mr TB, in his letter to the Standards Committee dated 21 October 2020. He submitted:

(a) Earlier submissions were to be read together with matters now advanced in responding to the Notice of Hearing.

(b) Mr TB confirmed that his conduct in relation to the May 2017 lunch and the May – July 2017 emails was unsatisfactory, but it fell short of misconduct. Accordingly, a referral to the Tribunal was unnecessary.

(c) Mr TB's previously good professional record was relevant.

(d) Assessment of Mr TB's conduct must take place by reference to the pre-1 July 2021 amendments to the Rules (and the Act).

(e) In relation to the February 2015 summer clerks lunch, Mr TB's more detailed explanation was provided in Mr CK'S letter dated 24 September 2019, and Mr TB's own response to [Law firm A]'s employment investigation.

(f) Both summer clerks were at lunch with Mr TB with the law firm's approval. There was no compulsion that the summer clerks either drink alcohol or "as to where they went that day." Moreover, there is no evidence that Mr TB was impaired by alcohol when he drove the summer clerks back to the law firm.

(g) In relation to the May 2017 lunch, it is to be noted that "others present at the lunch stated that they had not observed anything untoward or inappropriate in Mr TB's conduct".

(h) In relation to the May – July 2017 emails, "Mr TB strongly denies that his communications … whether in intent or effect, were of a 'sexually harassing' nature."

(i) In relation to the 9 February 2018 lunch, "there is no evidence that Mr TB's ability to drive … was actually impaired [or that his] consumption of alcohol on the dates referred to in the [Notice of Hearing] had any adverse effect on [Mr TB's] clients or his professional work."

(j) Mr TB does not accept that his conduct amounted to any of the definitions of misconduct in s 7 of the Act, but he would accept a finding that his conduct was unsatisfactory; specifically that it would be regarded by lawyers of good standing as being unacceptable, including conduct unbecoming a lawyer or unprofessional conduct which constituted a breach of the Rules.

(k) None of the conduct occurred during the provision of legal advice or "legal work", or in the course of carrying out "reserved areas of work, as defined in s 6(a) – (d) of the Act.

(l) "The conduct occurred on social occasions with other lawyers, legal colleagues or clients or in relation to endeavouring to assist a legal colleague with her career and problems she was having in [[Law firm B]]".

The Standards Committee determination

[101] A little over two years after opening its inquiry, on 9 November 2020 the Committee determined that:

> After inquiring into file 18310 and conducting a hearing on the papers the National Standards Committee (No 1) determined, pursuant to section 152(2)(a) of the Lawyers and Conveyancers Act 2006, that the matter and any and all issues involved in the matter should be considered by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal.

Application for review

[102] On Mr TB's behalf, on 17 December 2020 Mr CK filed an application to review the Committee's determination. He submitted:

(a) No clients' interests have been adversely affected by the matters investigated by the Committee, and nor have those matters adversely affected Mr TB's professional work.

(b) Mr TB has offered to apologise to Ms JQ and to Ms EF "for any upset or embarrassment caused to them".

(c) [Law firm B] accepted that Mr TB's motivation in attempting to meet with Ms EF was "to support and assist her and that he did not have any ulterior motives." This is inconsistent with the Committee describing the emails as being "of a sexually harassing nature."

(d) Mr TB's conduct was less serious than the practitioner in a Standards Committee determination *ZTUVK.* The Committee in that matter made findings of unsatisfactory conduct.

(e) The independent investigator appointed by [Law firm B] was unable to be satisfied on the balance of probabilities about contact between Mr TB and Ms JQ at the May 2017 lunch.

(f) In relation to the December 2017 Christmas party, this had not been drawn to Mr TB's attention at the time and if it had been, he would immediately have apologised to Ms NG.

(g) The alleged conduct in relation to Ms JQ and Ms EF was not at the level of misconduct.

(h) A finding of misconduct could only be on the basis of a conclusion by the Tribunal that Mr TB's conduct would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable, or that it consisted of a wilful and reckless contravention of the Act or the Rules, or that he was not a fit and proper person or was otherwise unsuited to practice as a lawyer.

(i) Consequences could include suspension or an order striking him off.

(j) It cannot be said that Mr TB is a person, who, by reason of his alleged conduct, is not a fit and proper person to be a lawyer. His conduct, viewed overall, does not warrant striking off. He is unlikely to reoffend.

(k) Mr TB has acknowledged his conduct errors to the extent of accepting a finding of unsatisfactory conduct. He has a very good disciplinary record.

[103] Mr CK also attached his several letters to the Committee on Mr TB's behalf, and indicated that he relied on their contents in support of the review application.

[104] As well, Mr CK attached letters of support that had been written on Mr TB's behalf and provided to the Committee.

[105] By way of outcome, Mr CK asked for a finding of unsatisfactory conduct, as well as suppression of Mr TB's name.

Submissions in response from the Standards Committee

[106] In a letter to the Case Manager dated 30 April 2021, the Complaints Service advised that the National Standards Committee 1 had resolved "to abide [by] the decision of the LCRO".

[107] In that letter, the Complaints Service provided a copy of the draft charges. These were subsequently given to Mr CK, on Mr TB's behalf, by the Case Manager and with the Committee's consent.

Nature and scope of review

[108] The nature and scope of a review was discussed by the High Court in 2012, which said of the process of review under the Act:[10]

> [39] … [T]he 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.
>
> [40] 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" …
>
> [41] … [T]he 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.

[109] In a later decision, the High Court described a review by a Review Officer in the following way:[11]

> [2] … A review by [a Review Officer] is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the [Review Officer's] own opinion rather than on deference to the view of the Committee.

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[10] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 (citations omitted).
[11] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475.

…

> [19] … A “review” of a determination by a Committee dominated by law practitioners, by the [Review Officer] who must not be a practising lawyer, is potentially broader and more robust than either an appeal or a judicial review. The statutory powers and duties of the [Review Officer] to conduct a review suggest it would be relatively informal and inquisitorial while complying with the principles of natural justice. The [Review Officer] decides on the extent of the investigations necessary to conduct a review in the context of the circumstances of that review. The [Review Officer] must form his or her own view of the evidence. Naturally [a Review Officer] will be cautious but, consistent with the scheme and purpose of the Act … those seeking a review of a Committee determination are entitled to a review based on the [Review Officer’s] own opinion rather than on deference to the view of the Committee. That applies equally to review of a [decision] under s 138(1)(c) and (2) [of the Act].
>
> [20] … While the office of the [Review Officer] does not have the formal powers and functions of an Ombudsman, it can be expected to be similarly concerned with the underlying fairness of the substance and process of the Committee determinations in conducting a review.
>
> [21] A review by the [Review Officer] is informal, inquisitorial and robust. It involves the [Review Officer] coming to his or her own view of the fairness of the substance and process of a Committee’s determination.

[110] Given those directions, my approach on this review has been to:

(a) independently and objectively consider all the available evidence afresh;

(b) consider the fairness of the substance and process of the Committee’s determination;

(c) form my own opinion about all of those matters.

Hearing in person

[111] The review application was progressed before me at an applicant only hearing in [City] on 24 June 2021. Mr TB appeared together with his counsel Mr CK.

[112] Prior to the hearing Mr CK filed a written synopsis of his submissions together with a short bundle of documents.

[113] At the commencement of the hearing Mr CK raised an issue concerning the Standards Committee file. Briefly, he drew my attention to a letter written to the Complaints Service by [Law firm B], dated 9 November 2018, which included a link to a Dropbox file said to contain documents relevant to the Committee’s investigation.[12]

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[12] Page 1585 of the Standards Committee’s file.

[114] Those documents did not appear to have been included in the paper version of the Committee's file.

[115] I arranged for the Case Manager to obtain those documents from the Complaints Service. They were provided to Mr CK together with an opportunity for him and the Committee to make submissions if they wished.

[116] There were some technical issues in connection with the format in which the documents were stored, however as between the Case Manager, the Complaints Service and Mr CK those issues were resolved.

[117] No further submissions have been received.

[118] I record that I have carefully read the Standards Committee's investigation file. I have also read Mr TB's review application and the submissions which accompanied that. Finally, as well as hearing from Mr CK, I also heard directly from Mr TB.

[119] There are no additional issues or questions in my mind that necessitate any further evidence, information or submissions from any of the parties.

Discussion

Mr CK'S submissions

[120] I deal first with Mr CK'S submissions. He provided written submissions in advance of the hearing and made extensive oral submissions at the hearing itself.

[121] I mean no discourtesy to Mr CK by summarising those submissions, relatively briefly. In doing so, I am largely capturing the oral submissions made at the hearing.

[122] Mr CK was critical of the Committee's absence of reasons for its prosecution determination. He drew attention to s 204 of the Act, which relevantly provides:

> **Power to obtain information**
>
> The Legal Complaints Review Officer may –
>
> (a) make inquiries of, and request explanations from, a Standards Committee as to –
>
> (i) the handling of any inquiry or investigation, or any aspect of any inquiry or investigation, that has been conducted by that Standards Committee or by an investigator on behalf of that Standards Committee; or

(ii) the reasons for any final determination of that Standards Committee.

…

[123] Mr CK submitted that the lack of any reasons for the prosecution determination, coupled with the fact that the Committee did not respond to the three separate sets of submissions that he provided on Mr TB's behalf, has left Mr TB in the dark as to Committee's reasoning.

[124] Reference was made by Mr CK to the Review Officer's decision in *FF v Wellington Standards Committee 2*[13], in which principles were discussed which might justify reversal of a prosecution determination. I discuss this decision further below.

[125] Mr CK's point was that, in order to assess whether any of the principles in *FF v Wellington Standards Committee 2* applied, it was essential to see some explanation (reasons) for a prosecution determination.

[126] Mr CK next submitted that Mr TB was a highly respected, competent commercial lawyer of some 38 years' experience. The consequences to him personally of the matters being considered by the Tribunal included embarrassing publicity together with the potential that he might be suspended or even struck off.

[127] Mr CK submitted that, when comparison is made with *ZTUVK,* in which the Committee considered conduct issues arising out of allegations of sexual harassment by a lawyer, the conduct described in that determination was more serious than the allegations faced by Mr TB.

[128] In *ZTUVK* the Committee found the conduct to be unsatisfactory, and not justifying a prosecution determination.

[129] Mr CK submitted that Mr TB wanted to apologise to the complainants, and still wishes to do so. He accepts that his conduct in relation to the complainants can properly be described as unsatisfactory. He acknowledges that they were upset by his conduct, and further acknowledges that he has been chastened by the complaint and inquiry process.

[130] Since July 2018, he has been employed by [Law firm C], which is a well-respected and established [City] law firm. It was said that no issues, of any description whatsoever, have arisen whilst Mr TB has been employed there.

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[13] LCRO 23/2011 (27 September 2011) at [48].

[131] In those circumstances, Mr CK submitted, the prosecution determination was an unnecessary overreach.

[132] In relation to the February 2015 summer clerks lunch, Mr CK submitted that no complaint had been made about Mr TB's conduct at the time.

[133] Moreover, although Mr TB would now characterise the brief visit to the adult store as being "unwise" or "a bit of giggle", both that visit and the earlier lunch at which the three drank alcohol, were lawful activities.

[134] Mr CK also emphasised the letter that had been written to the Committee, on Mr TB's behalf, by his wife. He submitted that Ms SR's observation was that it was her husband's nature to assist younger lawyers, and that an illustration of this was his dealings with Ms EF.

[135] In relation to the 9 February 2018 lunch (charge 5), about which it has been alleged that Mr TB was intoxicated at a work-related lunch, drove back to the office and worked there for the afternoon, Mr CK submitted that there was no cogent evidence that Mr TB was intoxicated, apart from what Ms JQ had said. For his part, Mr TB does not accept that he was intoxicated.

[136] Mr CK also made the point that, at worst, the 9 February 2018 lunch was an employment matter and did not justify the intervention of the lawyers' disciplinary machinery.

[137] Finally, Mr CK submitted that none of the matters which are the subject of the draft charges, individually or collectively, justify consideration by the Tribunal. He submitted that there was a conceptual difficulty with charge 6, which seemed to suggest that if individual charges only amount to unsatisfactory conduct, collectively they might still amount to misconduct.

[138] Mr TB continues to acknowledge that his conduct (with the exception of the February 2018 lunch) would amount to unsatisfactory conduct and Mr CK urged me to make that finding, accordingly.

Analysis

Approach to prosecution review applications

[139] In considering applications to review a prosecution determination, Review Officers in a number of earlier decisions observed "that the general position in common law jurisdictions is to take a very restrictive stance in respect of the reviewability of a

decision to prosecute, observing that the prosecutor's function is merely to do the preliminary screening and to present the case".[14]

[140] Those cases identified principles, discerned from various judgments, which might justify reversal of a prosecution determination. These include cases in which the decision to prosecute was:

(a) significantly influenced by irrelevant considerations;

(b) exercised for collateral purposes unrelated to the objectives of the statute in question (and therefore an abuse of process);

(c) exercised in a discriminatory manner;

(d) exercised capriciously, in bad faith, or with malice.

[141] In addition, it was noted in the *Rugby* decision that "[i]f the conduct was manifestly acceptable then this might be evidence of some improper motivation in the bringing of the prosecution".[15]

[142] However, in *Orlov v New Zealand Law Society* the Court of Appeal commented:[16]

> [25] … The existence of a right [to review a Committee's decision to prosecute] is now settled.
>
> …
>
> [50] … [T]he prosecutorial analogy is not entirely apt. Unlike a prosecutor, the Standards Committee can only reach its determination after first conducting an inquiry and holding a hearing (albeit usually on the papers). Further, while the Standards Committee has the power to regulate its own procedure, the Act also expressly requires that in exercising and performing its duties, powers and functions, a Standards Committee must do so in a way that is consistent with the rules of natural justice. … A further important consideration is the existence of the statutory right of review to [a Review Officer].

[143] Subsequently, the High Court emphasised, when considering a Review Officer's decision to dismiss an application to review a prosecution determination, that a Review Officer must bring to their assessment of such a determination a robust and independent judgement as to the fairness of the substance and process of that determination.[17]

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[14] See *Rugby v Auckland Standards Committee* LCRO 67/2010 (12 July 2010) at [3], and *FF v Wellington Standards Committee 2* LCRO 23/2011 (27 September 2011) at [48].
[15] At [5].
[16] *Orlov v New Zealand Law Society* [2013] NZCA 230, [2013] 3 NZLR 562.
[17] *Zhao v Legal Complaints Review Officer* [2016] NZHC 2623.

[144] In that decision, Fogarty J held the following:

> [21] … I agree that the summary in *FF v Wellington Standards Committee No 2* is too narrow. (citation omitted)
>
> …
>
> [23] The purpose of the review by the LCRO is to form a judgment as to the appropriateness of the charge laid in the prosecutorial exercise of discretion by the Standards Committee. It is as simple as that. ... I agree ... that "a review by the LCRO (should be) 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. I agree also there is room in that review for the LCRO to identify errors of fact.
>
> …
>
> [25] [T]he dictum of *FF v Wellington Standards Committee No 2* … is out of date. … [A] critical question for [a Review Officer] is whether the degree of gravity of the matter should justify the Standards Committee exercising the power to refer it to the Tribunal.

[145] It seems clear from the above that the review by a Review Officer of a prosecution determination should not be approached any differently from other types of review applications dealt with by Review Officers.

[146] Cases which describe the extent of a Review Officer's jurisdiction, such as *Deliu v Hong*[18] and *Deliu v Connell*[19] (discussed by me above at [108]–[109]), do not distinguish between review applications which challenge a prosecution determination, and other types of review applications.

[147] Moreover, *Zhao v Legal Complaints Review Officer* does not create a special category of prosecution review.[20]

[148] As I have said above at [110], the approach with any review application is to independently consider the evidence, the fairness of the Committee's substantive decision and the process by which it arrived at that decision.

[149] Nevertheless, I do not understand Mr TB's review application to challenge the process by which the Committee made its prosecution determination (for example, delay). The challenge is to the determination itself, which is described as an overreach.

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[18] [2012] NZHC 158, [2012] NZAR 209.
[19] [2016] NZHC 361, [2016] NZAR 475.
[20] [2016] NZHC 2623.

Charges

[150] There are six proposed charges.

[151] Charges 1 to 4 deal with December 2015 the summer clerks lunch, the May 2017 lunch, the May – July 2017 emails and the December 2017 Christmas party. Each is said to be misconduct.

[152] The fifth charge relates to the 9 February 2018 lunch and is said to be unsatisfactory conduct.

[153] Charge 6 is laid as an alternative. It is that if individual findings on two or more of charges 1 – 5 amount to unsatisfactory conduct only, then the cumulative effect of all of the charges demonstrates a pattern of conduct that would reasonably be regarded by lawyers of good standing as being disgraceful or dishonourable, and thus misconduct; or, that the cumulative conduct forms a pattern of behaviour justifying a finding that Mr TB is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer.

[154] Charge 6 further pleads that if the pattern of conduct is not found to be misconduct, then it amounts to unsatisfactory conduct.

Lack of reasons

[155] The Committee, in the determination under review, did not provide any reasons for its prosecution determination.

[156] That is entirely conventional and consistent with the statutory framework.

[157] However, Mr CK was critical of the Committee's failure to provide reasons and he urged me to take into account the Committee's failure to do so. He submitted that I should exercise my power under s 204 of the Act, and request an explanation from the Committee as to:[21]

> the reasons for any final determination of [the Committee].

[158] First, I have considerable reservations about criticising a Standards Committee for failing to provide reasons as part of a prosecution determination, when the legislation makes it explicitly clear that reasons are not required to be given.

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[21] Section 204(a)(ii) of the Act.

[159] I consider that there is a sound basis for the exception, in prosecution determinations, to the general rule of decisions being supported by discernible reasons.

[160] The Act provides for two categories of conduct which may attract disciplinary sanction – misconduct and unsatisfactory conduct.[22] The former is the more serious and can lead ultimately to a practitioner being struck off by the Tribunal.[23]

[161] Standards Committees may only make findings about the lesser category of unsatisfactory conduct.[24] When confronted with a complaint, including an own motion investigation,[25] in which the spectre of misconduct is present, a Standards Committee may direct it to be considered by the Tribunal.[26] Thereafter the Committee must frame and lay any appropriate charge with the Tribunal and give a copy of the charge to the practitioner and any complainant.[27]

[162] Significantly, when directing a complaint to be considered by the Tribunal, a Standards Committee is not obliged to provide reasons. This is evident from the language of s 158 of the Act, which requires reasons to be given only when a Standards Committee makes a finding of unsatisfactory conduct or determines to take no further action on a complaint.

[163] I acknowledge that it is generally a fundamental tenet of natural justice that decision-makers provide reasons. At first blush it may seem inconsistent with that principle that a Committee with a statutory power of decision-making is not obliged to provide reasons for a decision it makes.

[164] In *Orlov v New Zealand Law Society* the Court of Appeal gave careful consideration to the question as to whether a Standards Committee was required to provide reasons for a prosecution determination, and concluded that "it is clear from s 158 that a Standards Committee is not required to give reasons for a decision made under s 152(2)(a) to refer a matter to the Tribunal."[28]

[165] Further, the Court noted that if Parliament had intended that a Committee be required to provide reasons for a prosecution determination, then it would have expressly said so.[29]

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[22] Sections 7 and 12.
[23] Section 244.
[24] Section 152(2)(b).
[25] Section 130(c).
[26] Section 152(2)(a).
[27] Section 154.
[28] *Orlov v New Zealand Law Society* [2013] NZCA 230, [2013] 3 NZLR 562 at [98].
[29] At [99].

[166] It is also important to note that in *Orlov* the Court of Appeal held that there is no threshold test to meet before a Standards Committee makes a prosecution determination.[30]

[167] Moreover, because Standards Committees may not make findings that particular behaviour is misconduct, a determination to prosecute is not merits-based. In effect, when directing the prosecution of a practitioner a Standards Committee is saying, "this behaviour may constitute misconduct; if so, only the Tribunal may determine that question".

[168] Furthermore, the Tribunal may make that determination only after charges have been laid and a hearing conducted in that forum. The hearing will include parties giving evidence and being cross-examined — indeed, a traditional first-instance hearing procedure.

[169] It is only at the conclusion of that process that a merits-based decision about a lawyer's conduct may be made by the Tribunal.

[170] I conclude, therefore, that it would be wrong for a Review Officer to adversely comment on or otherwise draw any inferences one way or another about the lack of any reasons for a Committee's prosecution determination.

[171] For essentially the same reason – that a Committee is not obliged to provide reasons for a prosecution determination – it seems to me that it would be an unusual step, inconsistent with the statutory framework, for a Review Officer to request from a Committee an explanation for its reasons for a prosecution determination.

[172] That being said, I accept that a Review Officer may, in an appropriate case, consider it necessary to make inquiries of or request an explanation from a Standards Committee about its inquiry or investigation.[31]

[173] However, I do not consider it necessary to make those inquiries of the Committee in the present matter, for the following reasons.

[174] Section 154 of the Act relevantly provides as follows:

> (1) If a Standards Committee makes a determination that the … matter be determined by the Disciplinary Tribunal, the Standards Committee must—

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[30] At [53].
[31] Section 204(a)(i) of the Act.

> (a) frame an appropriate charge and lay it before the Disciplinary Tribunal by submitting it in writing to the chairperson of the Disciplinary Tribunal; and
>
> (b) give written notice of that determination and a copy of the charge to the person to whom the charge relates;
>
> …

[175] In my view the language of s 154 is clear. When written notice of a prosecution determination is issued by a Standards Committee to a lawyer, it must be accompanied by a copy of the charge which has been laid with the Tribunal.

[176] The rationale for such an interpretation (quite apart from what appears to be the clear statutory language), is that the simultaneous issue of a prosecution determination and copy of the charge gives the lawyer some indication of what issues will be before the Tribunal.

[177] This, in a sense, is a substitute for the Committee not having to provide reasons for its prosecution determination. The appropriate charge/s will give clear indication of the conduct identified by the Committee following its inquiry, which it considers requires testing before the Tribunal.

[178] Further, I observe that the draft charges, prepared in this matter by the Committee, particularise the facts said to give rise to professional breaches by Mr TB.

[179] Moreover, the more detailed facts behind the charges are well-known by Mr TB (whether or not he agrees with them). All of the issues were thoroughly ventilated through both the in-house processes adopted by [Law firm A] and [Law firm B]. In the latter case an independent investigator was appointed. As well, the Committee's inquiry included the appointment of an investigator.

[180] A considerable number of witnesses were interviewed across both processes. Those witness statements were all given to Mr TB at the time.

[181] Mr TB himself was interviewed as part of the [Law firm B] investigation. Although offered an opportunity to do so, Mr TB declined to be interviewed by the investigator appointed by the Committee.[32]

[182] As well, Mr CK has provided comprehensive responses to all of the issues that are the subject of the draft charges.

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[32] Nothing turns on that and I regard it as a neutral factor.

[183] For those reasons, I do not consider it necessary to exercise the s 204 power and request an explanation from the Committee as to the reasons for its final determination, or for any explanation as to its inquiry, given the comprehensive investigation process it undertook and in which Mr TB was fully engaged.

The conduct:

Regulated services?

[184] It is not entirely clear from Mr CK's submissions responding to the Committee's Notice of Hearing, whether Mr TB accepts that he was providing regulated services on each of the occasions now reflected in the draft charges.

[185] That issue was not raised as part of the review application lodged by Mr TB, nor pursued at the hearing itself.

[186] Given that Mr TB has accepted, virtually since Mr CK began acting for him in May 2019, that at least some of events revealed unsatisfactory conduct on his part, it seems to be the position that Mr TB accepts that he was providing regulated services on those occasions (the May 2017 lunch and the emails).

[187] Nevertheless, in responding to the Notice of Hearing Mr CK emphasised that none of the conduct occurred during the provision of legal advice, legal work or in the course of reserved areas of work as those are all defined in s 6(a) – (d) of the Act.

[188] However, the question is whether the conduct occurred at a time when Mr TB was providing regulated services, including (as I now explain) whether the conduct was connected with the provision of regulated services.

[189] The issue is whether conduct said to have been committed by a lawyer and which occurs in a social setting, is capable of disciplinary inquiry and a conduct finding.

[190] Out of an abundance of caution, I will proceed on the basis that this issue requires a finding by me.

[191] The Act makes provision for conduct that is unsatisfactory in s 12 and conduct that is misconduct in s 7.

[192] Misconduct can include conduct that occurs whilst a lawyer is providing regulated services,[33] as well as conduct by a lawyer that is unconnected with the provision of regulated services.[34]

[193] As to conduct said to be unconnected with the provision of regulated services and which amounts to misconduct, this would arise if, for example, the conduct would justify a finding that the lawyer is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer.

[194] Sections 12(a) and (b) of the Act define "unsatisfactory conduct" as including "conduct of [a] lawyer ... that occurs when [they are] providing regulated services".

[195] "Regulated services" are relevantly defined in s 6 of the Act as follows:

> (a) in relation to a lawyer or an incorporated law firm, –
>
> (i) legal services; and
>
> (ii) conveyancing services; and
>
> (iii) services that a lawyer provides by undertaking the work of the real estate agent.

[196] "Legal services" are also defined in the Act as meaning "services that a person provides by carrying out legal work for any other person."

[197] The expression "regulated services" has been given a broad interpretation by the High Court, to include conduct which is *connected with* the provision of legal services.[35] This is to be contrasted with conduct which involves "purely personal actions."[36]

[198] Significantly, it has been held that "conduct 'that occurs at a time when the lawyer is providing regulated services' … does not require there to be a subsisting lawyer/client relationship with a particular client."[37]

[199] I am satisfied that the conduct in question (summarised in draft charges 1 – 5) is conduct which is captured by the unsatisfactory conduct provisions in s 12(a) and (b) of the Act.

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[33] Section 7(1)(a) of the Act.
[34] Section 7(1)(b)(ii) of the Act.
[35] See *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2014] NZHC 1987 at [97] and following. This approach has been followed in the Tribunal: see *Canterbury Westland Standards Committee 2 v Eichelbaum* [2014] NZLCDT 68 at [30].
[36] See *Auckland Standards Committee 1 v Fendall* [2018] NZLCDT 26 at [44].
[37] See *Mr A v Canterbury Westland Standards Committee 2* [2015] NZHC 1896 at [60].

[200] With the exception of the May – July 2017 emails, each of the other matters involved Mr TB in a social setting with either colleagues, or colleagues and clients, pre-approved by the law firms and paid for by them.

[201] The core business of a lawyer and the law firm for whom they work is the provision of regulated services. Social events for staff and clients occur in that context: they reward, promote harmony, contribute to job satisfaction and recognise the value of clients to a law firm.

[202] This was not Mr TB in his personal life. There was an inextricable link between Mr TB as a lawyer, and each of the social events.

[203] In relation to the May – July 2017 emails, again there is an inextricable link between Mr TB as a lawyer and Ms EF as a lawyer. On Mr TB's account, his sole motivation in persistently trying to arrange to have either dinner or a coffee with Ms EF, was to discuss employment and career-related issues, including difficulties she was experiencing at the time at [Law firm B].

[204] Again, this was not Mr TB in his personal life.

[205] Given the broad interpretation of "regulated services" as including conduct connected with the provision of regulated services, I have little hesitation in concluding that all of the events described in the draft charges, are captured by regulated services.

[206] It follows that conduct which occurs in such a setting is amenable to a Committee inquiry and a finding of unsatisfactory conduct, pursuant to either of ss 12(a) or (b) of the Act, as well as a finding of misconduct by the Tribunal under s 7(1)(a)(i) of the Act

[207] If I am wrong about that, and this was not a situation in which Mr TB was providing regulated services or engaging in conduct connected with the provision of regulated services, then it would seem to me that his conduct in relation to all of the events described in the draft charges could be caught by either s 12(c) or s 7(1)(b)(ii) of the Act.

[208] Section 12(c) omits reference to conduct occurring whilst regulated services are being provided. It says that unsatisfactory conduct means:

> conduct consisting of a contravention of this Act, or of any regulations or practice rules made under this Act that apply to the lawyer…, (not being a contravention that amounts to misconduct under section 7) …

[209] In *EA v ABO* LCRO 237/2010 (29 September 2011), the Review Officer said at [31]:

> … a lawyer may be exposed to a finding of unsatisfactory conduct if his or her conduct is in breach of the Act, or any of the Rules or Regulations, even if he or she is not providing regulated services. Each of the Rules are clear as to the circumstances in which it applies. In some cases there cannot be a requirement that the conduct in question take place while providing regulated services. For example, Rule 2.8 requires a lawyer to report instances of misconduct. The application of this Rule cannot be restricted to circumstances where a lawyer is providing regulated services. Other Rules are specifically prefaced with words indicating that the lawyer must be providing regulated services before the Rule is to apply – see for example Rule 3 which commences with the words "in providing regulated services to a client...". It is important therefore to examine each Rule to determine the circumstances in which it is to apply.

[210] Between February 2015 and February 2018, when these events occurred, the Act and Rules contained no statutory or regulatory provision directed specifically towards sexual harassment. The professional rule that is probably most relevant to the conduct in question is r 10 of the Rules, which provides:

> A lawyer must promote and maintain proper standards of professionalism in the lawyer's dealings.

[211] Though it sits within the rules that regulate lawyer conduct and client care, r 10 of the Rules is arguably wide enough to encompass conduct by a lawyer that does not occur at a time the lawyer is providing regulated services.

[212] In my view r 10 of the Rules captures Mr TB's conduct across all of the events when looked at under s 12(c) of the Act.

My independent assessment of the conduct:

ZTUVK

[213] Mr CK cites this decision of a Standards Committee to support his argument that when the conduct of the lawyer in that case is compared to Mr TB's conduct, it could not possibly be said that Mr TB's conduct is more serious and warrants assessment by the Tribunal.

[214] *ZTUVK* was, and very probably remains, a significant Standards Committee decision. It has provided guidance to successive Standards Committees grappling with the difficult issue of when the regulated services provisions of the Act are triggered by a lawyer's conduct.

[215] Purely social settings have presented greatest difficulty. It could fairly be said that in most social settings involving a lawyer and their colleagues, little is done by way of giving legal advice or carrying out other "legal work" as that is conventionally understood.

[216] In my view what may have been problematic in 2018, when the anonymised summary of *ZTUVK* was published by the Standards Committee, is less so now.

[217] However, Mr CK's reliance on *ZTUVK* is to compare similar conduct, and contend for a similar outcome.

[218] As a first point, it must be observed that Standards Committees are not bound by each other's decisions. There is a very practical reason for this: Standards Committee decisions are presumptively confidential unless a publication order is made (as occurred in *ZTUVK*). One Standards Committee will not therefore know how another Standards Committee may have dealt with an issue.

[219] That being said, it is reasonable for a lawyer to expect that a Standards Committee might try and achieve consistency with the published decisions of another Standards Committee, in circumstances where the two sets of facts might be said to be roughly comparable.

[220] I therefore turn to consider the facts in *ZTUVK*.

[221] There were two incidents. Both occurred in a law firm social setting. The protagonist was Mr X, then a partner.

[222] The first incident involved Mr X touching a female lawyer's leg and telling her that she was "very attractive." The female lawyer was upset, and departed.

[223] Mr X was spoken to by senior lawyers and the firm. He could not recall the incident but did not deny that it had taken place. He described an "alcohol-induced memory loss or blackout".[38]

[224] The second incident also occurred in a work-related social setting, at an external venue. Mr X is said to have "directed unwanted attention towards a non-lawyer female employee of the firm".[39]

[225] Mr X pinched the employee's bottom on two separate occasions (leaving a bruise after the first occasion). Later, Mr X asked the employee if she was going to join

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[38] *ZTUVK* at [5].
[39] At [6].

him. Later, he grabbed her wrist "and forcibly squeezed her hand against his groin while saying 'this is for you'".[40] A male colleague intervened and removed Mr X.

[226] Mr X was described as being "visibly intoxicated … slurring his speech and walking unsteadily".[41] Upon inquiry by the firm's partners, Mr X did not deny these events but again said he had no recollection of them.

[227] Mr X resigned from the firm, took steps to ensure his conduct would not be repeated and took time out from the law. He explained that at the relevant times he had "experienced and intense personal crisis [which] had a profound impact on his well-being and mental health", and was receiving counselling from a clinical psychologist.[42]

[228] By a majority, the Committee held that Mr X's conduct occurred at a time when he was providing regulated services.

[229] The Committee unanimously held that the conduct was unsatisfactory. The majority was satisfied that Mr X's conduct:[43]

> would be regarded by lawyers of good standing as being unacceptable [s 12(b) of the Act] [and was] a breach of r 10 of the Rules, being a failure to promote and maintain proper standards of professionalism in his dealings as a lawyer.

[230] The Committee held that neither incident, whether on a regulated services basis or not, was "sufficiently serious to amount to [misconduct under either of ss 7(1)(a)(i) or 7(1)(b)(ii) of the Act."[44]

[231] The Committee relied on the following particular facts to support their conclusions:[45]

> (a) Mr X sexually harassed two employees, by inappropriately touching them and by making inappropriate sexual comments to them;
>
> (b) Mr X allowed himself to become so heavily intoxicated that he had no recollection of the incidents and his unacceptable behaviour towards both employees;
>
> (c) Mr X accepts his conduct is unsatisfactory; and
>
> (d) Mr X accepts his conduct was wilful, and his intoxication did not obviate intent.

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[40] At [8].
[41] At [7].
[42] At [20].
[43] At [53]–[54].
[44] At [53] and [58].
[45] At [59]. The Committee adopted the definition of sexual harassment in s 62 of the Human Rights Act 1990.

[232] Several pages could be devoted to a close analysis of the facts in *ZTUVK*, and the facts in the present matter. On one view of the conduct in the second incident, Mr X's behaviour could be said to be far more invasive and aggressive, than any of the conduct of which Mr TB stands accused.

[233] On another view of the conduct, it could be said that Mr TB's behaviour extended over a far greater period of time and involved two internal disciplinary inquiries by two law firms (the February 2015 summer clerks lunch and the May – July 2017 emails), where he was explicitly informed as to the significant departures from standards normally expected of someone in his position.

[234] I leave to one side the issues referred to by the Committee as to Mr X's circumstances at the time because, arguably, mitigation such as he advanced is not relevant to culpability.

[235] On yet another view of the matters, it might be said that Mr X was extended considerable mercy by the Committee, in circumstances where it could be argued that the conduct did warrant assessment by the Tribunal as to whether s 7 of the Act had been breached.

[236] My task is to review the determination of the Committee in the current matter, having regard to all of the material that was before it. A close comparison with *ZTUVK* does not materially assist me in that task. Whilst there are similarities between the two cases, there are also differences.

Charge 6: conceptual difficulty?

[237] I next deal with the submission made by Mr CK at the hearing where he argued that there was a conceptual difficulty in elevating separate incidents of unsatisfactory conduct to a collective level of misconduct. He submitted that if conduct is deemed to be unsatisfactory, it remains so.

[238] Draft charge 6 raises the possibility of collective findings of unsatisfactory conduct, amounting to misconduct.

[239] Whilst this is an interesting argument, it is not necessary for me to resolve it. Indeed, the argument is one that may only be resolved by the Tribunal as it has the statutory function of deciding what amounts to misconduct under the Act.

[240] Having said that it is not necessary for me to resolve the argument, and treading warily given that it is a matter that Mr CK would undoubtedly raise before the Tribunal, I do not share Mr CK's existential concern about the issue.

[241] It seems to me that a pattern of behaviour by a lawyer involving separate unsatisfactory conduct breaches, can give rise to a reasonable apprehension that the overall conduct would be seen as disgraceful or dishonourable. Or, if it was unconnected with the provision of regulated services, that the lawyer would rightly be regarded as unfit to engage in practice as a lawyer.

[242] There seems little doubt that draft charges 1 – 5 involve what could be said to be a pattern, or patterns, of conduct by Mr TB. I discuss this further below.

[243] In conducting a review of a Standard Committee's decision or determination, a Review Officer may do essentially one of four things. First, the Review Officer can confirm the Committee's decision or determination. Secondly, the Review Officer may modify the decision or determination. Thirdly, the Review Officer may reverse the decision or determination.[46]

[244] The fourth option permits a Review Officer to refer a matter back to a Standards Committee, with specific directions as to reconsideration.[47]

[245] A Review Officer has no power to make any orders in connection with charges that have been framed and laid by a Standards Committee. Self-evidently, this is because once a charge has been laid (by having been submitted in writing to the chairperson of the Tribunal), the Tribunal assumes jurisdiction for dealing with the charge (or charges).[48]

[246] In the present case, draft charges only have been framed by the Standards Committee. If that remains the position, then the Tribunal presently has no jurisdiction to deal with issues arising from the charges, given that they have not been submitted in writing to the chairperson.

[247] Nevertheless, the charges framed by a Standards Committee, whether draft or not, do not form part of its prosecution determination. The determination brings the Committee's investigation and inquiry process to an end.

[248] Section 154 of the Act provides for necessary post-prosecution determination events (framing and laying a charge).

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[46] See generally s 211 of the Act.
[47] Section 209 of the Act.
[48] Section 154(1)(a) of the Act.

[249] Therefore, it seems to be the case that in reviewing a prosecution determination, a Review Officer in possession of a copy of draft charges cannot give directions as to whether a particular charge ought to be submitted in writing to the Chairperson of the Tribunal.

[250] Nevertheless, charges framed by a Committee, whether in draft or laid with the Chairperson of the Tribunal, provide valuable assistance in carrying out a review. They assist a Review Officer to, as the authorities cited have directed, independently consider the evidence, the fairness of the Committee's substantive decision and the process by which it arrived at that decision.

[251] The draft charges, very roughly, identify two categories of conduct by Mr TB. The first can be said to be, generally, conduct of a sexual nature (the February 2015 summer clerks lunch, the May 2017 lunch, the emails and the December 2017 Christmas party). Three of these events involved an alleged over-consumption of alcohol by Mr TB (the exception being the emails).

[252] The second category of conduct, represented by draft charge 5, refers to Mr TB being in breach of [Law firm B]'s alcohol policy in that he consumed alcohol in a work setting, and then drove a vehicle when intoxicated.

[253] I add at this point, that I do not agree with Mr CK's submission that a charge of that nature is more appropriately left to be dealt with in the context of employment law.

[254] I am not suggesting that the conduct represented by charge 5 would ordinarily justify consideration by the Tribunal. I am merely observing that there can be professional disciplinary consequences for conduct which also falls foul of employment obligations.

[255] With the exception of the emails charge, all of the draft charges have as a common theme, over-consumption of alcohol by Mr TB.

[256] Two of the Act's underpinning principles are maintaining public confidence in the provision of legal services and consumer protection.[49]

[257] If the over-consumption of alcohol by a lawyer in a regulated services setting has the effect of eroding public confidence in the provision of legal services or undermining consumer protection, then this may invite disciplinary inquiry if not sanction.

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[49] Sections 3(1)(a) and (b) of the Act.

[258] This might arise, for example, where it could be said that the safety or well-being of colleagues, clients or others was compromised.

Alcohol consumption

[259] In my view, with the exception of the May – July 2017 emails, four of the five draft charges include circumstances in which it could be said that the safety of staff, clients or others was compromised as a result of Mr TB's over-consumption of alcohol.

[260] The three lunches involved Mr TB driving either immediately after the lunch (the February 2015 summer clerks lunch and the 9 February 2018 lunch when Mr TB drove back to the office), or within a short time of the lunch ending (the May 2017 lunch, when Mr TB drove home from the office).

[261] I acknowledge that Mr TB denies being intoxicated or otherwise unfit to drive a vehicle on all three of these occasions; nevertheless, this is a contestable issue. Ms JQ says otherwise in relation to the May 2017 lunch and the 9 February 2018 lunch.

[262] Secondly, as to compromising others' well-being, the February 2015 summer clerks lunch was lengthy, involved consumption of alcohol over several hours and caused the summer clerks to be conflicted about loyalties and concerned about their futures.

[263] It was said by one of the summer clerks that Mr TB's response when told that her supervising partner was asking as to her whereabouts, was "who cares about [that partner]?" A similar comment was repeated when the supervising partner made further enquiries of the summer clerk.

[264] Later, when the supervising partner contacted Mr TB directly by text message, Mr TB asked the summer clerks "how do you spell fuck off?"

[265] Public confidence in the provision of legal services is hardly enhanced by this conduct.

Sexual behaviour:

[266] The February 2015 summer clerks lunch, the May 2017 lunch, the May – July 2017 emails and the December 2017 Christmas party all involved what might be described as conduct of, or bordering on, a sexual nature.

February 2015 summer clerks lunch

[267] It could arguably be said that this conduct breaches the requirements of courtesy and respect towards colleagues, and revealed a lack of professionalism by Mr TB in his dealings with the summer clerks. They might reasonably have expected that a very senior practitioner, a peer of their immediate responsible-partners, might avoid initiating non-work related topics of a sexual, and personal, nature.

[268] By its nature, an adult store has a singular emphasis with visible merchandise to match.

[269] It would rightly present as unwise for someone in Mr TB's position to assume that much younger females would be unfazed by a visit with him to such a retail outlet.

[270] As well, there are troubling issues involving power, boundaries and messaging when a senior male lawyer invites two young female summer clerks to visit an adult store with him. Again, this does little to foster public confidence in the legal profession.

[271] It cannot be discounted that this conduct by itself, let alone in conjunction with the conduct of a sexual nature described in the other draft charges, might reasonably be regarded by lawyers of good standing as being disgraceful or dishonourable.

May 2017 lunch

[272] In relation to the May 2017 lunch, I do not overlook that there appears to be a dispute between Mr TB on the one hand, and Ms JQ on the other hand, as to whether Mr TB touched her in the way she described (or at all).

[273] Ms JQ's allegation is that Mr TB was stroking her hair, rubbing her shoulders and patting her knee.

[274] Mr VB, in his report, felt unable to come to a conclusion one way or the other about the touching incidents. Mr VB's conclusions were based on interviews only.

[275] Nevertheless, Mr VB found that Mr TB's conduct during the lunch (including at the bar and possibly even as the parties returned to [Law firm B]'s offices), made Ms JQ embarrassed, and may have been regarded by her as disrespectful and discourteous.

[276] Significantly, Mr TB accepts that his conduct at the May 2017 lunch was inappropriate and that it did cause, or may have caused Ms JQ to be upset and embarrassed, and may have been regarded by her as disrespectful and discourteous.

[277] Mr TB has freely acknowledged that whatever he did (short of touching Ms JQ) amounted to, effectively, a breach of r 10 of the Rules.

[278] Touching in the manner described by Ms JQ, would likely be regarded as – at a minimum – unprofessional, disrespectful and discourteous contrary to r 10 of the Rules.

[279] If it were to be found that Mr TB touched Ms JQ in the manner she has alleged, then it would be open to conclude that this was behaviour of a sexual nature.

[280] In that event, the spectre of misconduct is raised: specifically, would lawyers of good standing reasonably regard this as disgraceful or dishonourable?

[281] Self-evidently, that is not a question that is within my statutory remit to answer. I can say with certainty that it would rightly be seen by a reasonable Standards Committee as unsatisfactory conduct.

[282] Whilst the conflict as to precisely what took place remains unresolved, and on one view of the facts the conduct may engage consideration as to whether it is misconduct, I consider that the proper place for that issue alone to be tested is in the context of a hearing where parties (including others present) are cross-examined; the Tribunal.

May – July 2017 emails

[283] Mr TB has acknowledged that his conduct in connection with the emails, was inappropriate and amounted to unsatisfactory conduct. He has accepted that Ms EF was, or may have been, upset and embarrassed by the content of some of the emails and may have regarded his conduct as disrespectful and discourteous.

[284] Mr TB has also accepted that "at least in some respects, his emails … were inappropriate, in terms of their number and the wording he used."[50]

[285] That being said, Mr TB rejects any suggestion that he was intending to engage in sexual banter with Ms EF. His intention, from beginning to end of the email exchanges, was pastoral.

[286] Nevertheless, in my view a reasonable construction to put on some of the emails sent by Mr TB to Ms EF, was that he was seeking to engage her in flirty, if not

[50] Letter from Mr CK to the Standards Committee (24 September 2009) at [13].

sexual, banter. Saying “I promise not to bite, well not too hard” does not leave much room for a pastoral explanation.

[287] Again, the issue of Mr TB’s position as a senior male lawyer, and a peer of Ms EF’s supervising partner and the dynamic associated with that, instantly demonstrates that chatter of the nature Mr TB engaged in in some of his emails was not only inappropriate, but revealed a troubling lack of judgment and appreciation of boundaries.

[288] By itself, and as Mr TB acknowledges, this was undoubtedly unsatisfactory conduct pursuant to r 10 of the Rules. It might also reach the level of being disgraceful and dishonourable.

[289] Whatever doubts there might be about that, it would seem to me that in conjunction with the other sexualised conduct, the pattern reasonably engages a serious consideration as to whether or not the totality of that conduct would reasonably be regarded by lawyers as disgraceful or dishonourable.

December 2017 Christmas party

[290] Ms NG described Mr TB’s attentions, specifically on the dance floor during the 2017 Christmas party, as being unwanted. She did not want to dance with him despite his urging; she certainly did not want him to touch her bare skin on her lower back.

[291] Whether, of itself, it could be said that this conduct was of a sexual nature is also contestable. It was certainly unwelcome and unwanted, and Ms NG was discomfited by it. It was conduct which undoubtedly crossed reasonable social and professional boundaries.

[292] However, it was once again combined with Mr TB apparently overindulging in alcohol.

[293] It would seem to me that, viewed objectively, this was unsatisfactory conduct at the very least, and that Mr TB failed, in a very fundamental way, to treat Ms NG with the courtesy and respect required by r 10 of the Rules.

[294] It might reasonably be said that this was part of a pattern of conduct involving overindulgence in alcohol and blurred boundaries with female colleagues. This engages a consideration of whether it amounts to misconduct by itself, or collectively with other similar behaviour.

Conclusion

[295] A Standards Committee's power to refer a practitioner to the Tribunal derives from s 152(2) of the Act. The Standards Committee may make a referral if it considers that concerns have arisen which, if proven, could lead to a misconduct finding.

[296] A Standards Committee need only be satisfied that the conduct in question, if proven, is capable of constituting misconduct. It does not fall to the Standards Committee to determine whether the conduct in question is misconduct.

[297] The issue I am required to consider is whether there is any proper basis for interfering with the Committee's decision to refer Mr TB's conduct to the Tribunal for prosecution.

[298] As Fogarty J held in *Zhao*, I must robustly come to my own view of the fairness of the substance and process of the Committee's prosecution decision.[51]

[299] I have given all of the material on the Standards Committee file careful consideration.

[300] The matters raised in that material are, in my view, proper ones for the Tribunal to consider. They require careful assessment of all of the evidence, and matching that evidence against the legislative standards of misconduct and unsatisfactory conduct to see which, if any, has been engaged by the alleged conduct.

[301] Only the Tribunal may carry out that function and determine the gravity of that conduct.

[302] I see no reason to interfere with the Standards Committee's prosecution determination.

Decision

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

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[51] *Zhao v Legal Complaints Review Officer* [2016] NZHC 2623 at [23].

Costs on review

[304] When a Committee's adverse finding is upheld by a Review Officer, costs will be awarded in accordance with the Costs Orders Guidelines of this Office. It follows that Mr TB is ordered to pay costs in the sum of $1,200 to the New Zealand Law Society by 5pm on Friday 28 January 2022, pursuant to s 210(1) of the Act.

Enforcement of money order

[305] Pursuant to s 215 of the Act, I confirm that the money order made by me in [304] above, may be enforced in the civil jurisdiction of the District Court.

Anonymised publication

[306] Pursuant to s 206(4) of the Act, this decision is to be made available to the public with the names and identifying details of the parties removed.

DATED this 13TH day of December 2021

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R Hesketh
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 TB as the Applicant
Mr CK QC as the Applicant's Representative
[Area] Standards Committee [X]
New Zealand Law Society

ANNEXURE – LCRO 236/2021 Decision

[Area] Standards Committee [X]

In the matter of Part 7 of the Lawyers and Conveyancers Act 2006

and

In the matter of an investigation commenced by the [Area] Standards Committee [X], of its own motion, concerning the conduct of TB

Notice of Hearing of file: 18310

1. This matter is to be the subject of a hearing before the [Area] Standards Committee [X] (**Committee**). The hearing is to be conducted on the papers, which means that the Committee's determination will be made on the basis of the written evidence, correspondence and submissions before the Committee.

2. As a preliminary matter the Committee is mindful of privacy and confidentiality considerations, including:

    a. a written request by [Law firm B] for the identity of its affected employees and clients to not be disclosed unnecessarily;

    b. the operation of non-publication orders made by the Employment Relations Authority in related proceedings involving Mr TB.

3. This Notice therefore refers to the 5 employees concerned by their respective initials and does not disclose any other personal identifying information concerning them[1]. Any written responses to this Notice are to adopt the same method of referring to the employees concerned. The Committee also emphasises that this is a confidential process before a standards committee under Part 7 of the Lawyers and Conveyancers Act 2006 (**Act**)[2].

4. You are entitled to make written submissions to the Committee in response to this Notice. Submissions may be made directly or by your legal representative. Any submissions should be delivered to the Committee by email - [email address] - no later than **4:00PM, 16 October 2020**.

5. Submissions should address any matters of fact or law that the party believes should be taken into account concerning the Committee's investigation, having particular regard to:

    a. sections 3, 4, 7, 12, 95, 107, 130, 132, 138, 139 and 152 – 158 of the Act;

[1] Please contact the Lawyers Complaints Service if you are both unable to recognise the identity of the person(s) concerned and if you wish to make written submissions concerning Mr [TB]'s alleged conduct towards that person(s).

[2] See section 188 of the Lawyers and Conveyancers Act 2006; regulations 30 and 31 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008; and related case law such as *Rabson v New Zealand Law Society* [2017] NZHC 2153 at [12] and [21].

b. the Preface to[3], and rr 10, 10.1, 11, 11.3 and 12 of, the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (**Rules**);

c. *Orlov v The New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2014] NZHC 1987 at [106] to [112];

d. *Orlov v New Zealand Law Society* [2013] 3 NZLR 562 at [5] – [25] and [47] – [55];

e. *Young v National Standards Committee* [2019] NZHC 2268 at [42] – [58].

6. Without limiting the scope of submissions provided in response to this Notice, submissions should specifically address each of the matters outlined in paragraphs 7.– 15. below.

7. First, whether on Wednesday 18 February 2015, Mr TB (as an employee Consultant at [Law firm A]):

    a. facilitated the consumption of alcohol (by personally providing alcohol and purchasing further alcohol at the restaurant), by himself as well as then summer clerks Ms K and Ms L, during lunch which he initiated at an external venue, followed by further drinks at a liquor and coffee shop;

    b. at a time when he was affected by alcohol, drove Ms K and Ms L back to [Law firm A]'s offices;

    c. facilitated Ms K and Ms L to accompany him to an "adult shop" when they were not aware it was an adult shop;

    d. encouraged Ms K and Ms L to ignore requests from a partner of the firm to return to the office to work, asserting to Ms K and Ms L that he (Mr TB) would take responsibility for their absence.

8. Second, whether at a client lunch on Friday 12 May 2017, Mr TB (as an employee Consultant at [Law firm B]) repeatedly touched the hair, shoulder and leg of employee solicitor, Ms D, in circumstances where Mr TB knew or ought to have known that such touching was not welcome.

9. Third, whether between Wednesday 10 May 2017 (including Friday 12 May 2017[4], being the same date as the client lunch referred to in paragraph 8. above) and Wednesday 12 July 2017[5], Mr TB (as an employee Consultant at [Law firm B]) engaged in email correspondence of a sexually harassing nature with then employee solicitor, Ms BB.

10. Fourth, whether at [Law firm B]'s Christmas party in December 2017, Mr TB (as an employee Consultant at [Law firm B]) repeatedly touched employee solicitor, Ms B, including by putting his arms around her and placing his hand down the back of her

[3] See *Stewart v Legal Complaints Review Officer* [2016] NZHC 916 at [54] – [62]; *Wilson v Legal Complaints Review Officer* [2016] NZHC 2288 at [43]; and *Q v Legal Complaints Review Officer* [2012] NZHC 3082 at [54] – [59].

[4] Refer email from Mr TB to Ms BB on Friday 12 May 2017 at 9:00PM – [Ms BB's first initial] *not sure whether you will get this but I am at a loose end tomorrow night* [Saturday] *so if you are free why don't we try [restaurant] for dinner and those first two dishes. My shout. Let me know. Cheers TB.*

[5] Refer email from Mr TB to Ms BB on Wednesday 12 July 2017 at 3:26PM – [Ms BB's first initial] *I really would like to meet to say a few things before you go. Over dinner for preference. I promise not to bite. Well not hard. Do you have any time soon. I am baching at the moment so could do 13/7 – 17/7 inclusive. Cheers.*

dress and underneath the "slip" Ms B was wearing under the dress (so that he was touching Ms B's skin), in circumstances where Mr TB knew or ought to have known such touching was not welcome.

11. Fifth, whether on Friday 9 February 2018, Mr TB (as an employee Consultant at [Law firm B]):

    a. facilitated the consumption of a significant quantity of alcohol at a client lunch with employee solicitor, Ms D (Ms D being the same person as referred to in paragraph 8. above);

    b. at a time when he was affected by alcohol, drove Ms D and the client from the lunch venue to [Law firm B]'s offices.

12. Whether any, or all, of the conduct outlined in paragraphs 7. – 11. above occurred "at a time when" Mr TB was providing regulated services (as that phrase has been construed and applied in case law[6]) for the purposes of subsections 7 (1)(a) and 12 (b) of the Act.

13. Whether, if any or all of the conduct outlined in paragraphs 7. – 11. above occurred at a time when Mr TB was providing regulated services, that conduct would, individually or collectively, amount to misconduct or unsatisfactory conduct on the part of Mr TB being conduct that:

    a. in the case of misconduct:

        i. would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable;

        ii. consists of a wilful or reckless contravention of any provision of the Act or of any regulations or practice rules made under the Act that apply to Mr TB or of any other Act relating to the provision of regulated services;

    b. in the case of unsatisfactory conduct:

        i. would be regarded by lawyers of good standing as being unacceptable, including conduct unbecoming a lawyer or unprofessional conduct;

        ii. consists of a contravention of the Act, or of any regulations or practice rules made under the Act that apply to Mr TB, or of any other Act relating to the provision of regulated services;

14. Whether, if any or all of the conduct outlined in paragraphs 7. – 11. above was unconnected with the provision of regulated services, such conduct would, individually or collectively, amount to misconduct or unsatisfactory conduct on the part of Mr TB being:

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[6] See: *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2014] NZHC 1987; *Canterbury Westland Standards Committee 2 v Eichelbaum* [2014] NZLCDT 68; *A v Canterbury Westland Standards Committee 2* [2015] NZHC 1896; *Deliu v National Standards Committee* [2017] NZHC 2318; *Wellington Standards Committee 2 v Hay* [2018] NZLCDT 1; *Auckland Standards Committee 1 v Fendall* [2018] NZLCDT 26; and *Young v National Standards Committee* [2019] NZHC 2268.

a. in the case of misconduct, conduct which would justify a finding that Mr TB is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer;

b. in the case of unsatisfactory conduct, conduct that consists of a contravention of the Act, or any regulations or practice rules made under the Act that apply to Mr TB, or of any other Act relating to the provision of regulated services.

15. Submissions should also address any matters of fact or law the party believes should be taken into account concerning:

    a. any mitigating factors;

    b. the possibility the Committee may make a determination that the matter, or any issue involved in the matter, be considered by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal under subsection 152 (2)(a) of the Act;

    c. the possibility the Committee may make a determination that there has been unsatisfactory conduct on the part of Mr TB under subsection 152 (2)(b) of the Act;

    d. the possibility the Committee may make a determination that the Committee take no further action with regard to the matter, or any issue involved in the matter, under subsection 152 (2)(c) of the Act;

    e. the appropriate orders the Committee may make under section 156 of the Act, if there is a finding(s) of unsatisfactory conduct;

    f. the possibility the Committee may make an order for payment of costs under subsection 157 (2) of the Act;

    g. the possibility of publication of the determination or a summary of the determination (facts, outcome and orders) under subsection 142 (2) of the Act.

16. If the Committee wishes to direct publication of the identity of the lawyer to whom the matter relates, you will be given a separate opportunity to make submissions on that issue.

YN
Legal Standards Solicitor
____
for and on behalf of the [Area] Standards Committee [X]

Date: 19 August 2020

To: TB, by senior counsel
ZG, on behalf of the partnership of [Law firm B]
HM, on behalf of the partnership of [Law firm A]
QH, on behalf of the partnership of [Law firm C]
New Zealand Law Society I Te Kāhui Ture o Aotearoa