BEFORE THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2011] NZLCDT 32

LCDT 004/011

IN THE MATTER of charges under the Lawyers and Conveyancers Act 2006 laid by AUCKLAND STANDARDS COMMITTEE 3

AND

IN THE MATTER of ANTHONY VINCENT RAM, of Auckland, Lawyer

TRIBUNAL
Chair:
Mr D J Mackenzie

Members:
Ms R Adams
Mr G McKenzie
Ms C Rowe
Mr W Smith

HEARING
District Court, Auckland on 16 November 2011

REPRESENTATION
Mr P Collins, for the Standards Committee
Mr A Ram, self-represented.

REASONS FOR TRIBUNAL DETERMINATIONS OF 16 NOVEMBER 2011

[1] Mr Ram faced four charges of misconduct laid against him by the Standards Committee:

(a) Charge 1 alleged that Mr Ram had provided regulated services to persons other than his employer.

(b) Charge 2 alleged that he had, as a consequence of providing those services, practised on his own account when not entitled to do so.

(c) Charge 3 alleged that Mr Ram had deceived and misled the Courts and fellow practitioners regarding his status as a person entitled to practise on own account.

(d) Charge 4 alleged that his responses to a judge on certain questions regarding security for costs were misleading.

[2] In his formal response to the charges and affidavit in defence filed with the Tribunal, Mr Ram denied all of the charges. The charges were set down for a defended hearing over two days, 16 and 17 November 2011.

[3] By a joint memorandum of 9 November 2011, the parties proposed a means of disposing of the charges, whereby Mr Ram would plead guilty to two of the charges (Charges 1 and 2), and the Standards Committee would seek leave to withdraw the remaining two charges (Charges 3 and 4).

[4] The Tribunal's position where it receives joint proposals from the parties as to a suggested disposal of charges, including sanction, is that it will need to be satisfied that there is an appropriate reason for the proposal, and that the purposes of the Lawyers and Conveyancers Act 2006 ("LCA") are adequately met by the proposal.

[5] For the Standards Committee, Mr Collins advised the Tribunal at the hearing that the reason for the proposed withdrawal of Charge 3 was that it related to the same circumstances as formed the basis for Charges 1 and 2, to which Mr Ram had intimated a guilty plea. The Tribunal accepted that the conduct covered by Charge 3 was effectively reflected in the substance of Charges 1 and 2.

[6] So far as Charge 4 was concerned, Mr Collins indicated that a review of the evidence subsequently filed, including the defence affidavit of Mr Ram, indicated that Mr Ram may have been foolish in providing what was described as a *"confused"* response when questioned by the Judge, but not necessarily guilty of misconduct.

[7] The Tribunal accepts that once all evidence is in and has been assessed by the prosecution, it is a proper exercise of prosecutorial discretion to seek withdrawal of a charge in the circumstances which were applicable in this case. Mr Ram had

indicated he would plead guilty in respect of misconduct at the core of the charges. The charges sought to be withdrawn either dealt with misconduct of the same nature as covered by the charges which were proceeding, or involved less serious matters that may not have reached the misconduct threshold.

[8] Accordingly the Tribunal granted leave to the withdrawal of Charges 3 and 4. Mr Ram, of course, had consented to the withdrawal in the joint memorandum of 9 November.

[9] Mr Ram then pleaded guilty to Charges 1 and 2. We note that before he did that the Tribunal questioned Mr Ram about his understanding of the effect of such a plea. The Tribunal was concerned that Mr Ram's submissions dated 14 November, 2011, subsequent to the joint memorandum of the parties dated 9 November, appeared to indicate that he maintained his view that he had a right to practise as he had for a range of "employers".

[10] Mr Ram confirmed he understood the position. He also said that he considered there would be value in the Tribunal noting the parameters applicable to the right of a practitioner who was not approved to practise on own account to provide regulated services when employed. Mr Ram noted that his submissions were intended to support his application for permanent name suppression, not any continuing denial by him that he had breached relevant regulatory provisions.

[11] The Tribunal, being satisfied that Mr Ram clearly understood the position, and the effect of his guilty plea, then accepted his plea in respect of Charges 1 and 2.

[12] The Standards Committee sought a censure and an order under S.241(g) LCA prohibiting Mr Ram from practising on his own account, whether in partnership or otherwise, until authorised by this Tribunal to do so. Mr Ram accepted that the penalties sought were appropriate.

[13] The joint memorandum of 9 November indicated that the parties had reached an agreement on costs. The Standards Committee indicating to the Tribunal that it had given Mr Ram some concession on quantum and had also arranged payment over time, recognising that Mr Ram would be facing a relatively substantial burden at a time his employment as a lawyer was uncertain.

[14] Standards Committee costs to be paid by Mr Ram were $28,000. The costs to be certified under S.257 LCA, payable by the New Zealand Law Society, were also to be reimbursed to the Law Society by Mr Ram.

[15] The Tribunal censured Mr Ram, noting that the applicable restrictions on commencing practise on his own account were designed to ensure public protection and to preserve public confidence in the legal profession, key elements of the statutory purposes of the disciplinary regime under LCA. The Tribunal noted that Mr Ram had undertaken various mandates for persons he considered, incorrectly, to be his employers and thus persons to whom he could provide regulated services under his "in-house" practising certificate. This all took place within a short time of his admission to practice, and his inexperience showed, attracting an investigation

which resulted in the charges to which he pleaded guilty. This episode highlights the need for the controls which exist on the right to practise on own account, and the value in new practitioners aligning themselves with experienced practitioners who can provide quality professional guidance and oversight.

[16] The Tribunal also made an order against Mr Ram in terms of S.241(g) LCA, as referred to in paragraph 12 above. When Mr Ram does seek to practise on his own account he will have to apply to this Tribunal, which will be looking to see if Mr Ram has practised in accordance with applicable requirements in the interim, has acquired requisite experience, meets applicable criteria to be allowed to practise on his own account, and fully understands his professional obligations. A key element in assisting Mr Ram's ability to meet these requirements will be Mr Ram securing competent supervision and quality mentoring in the interim.

[17] By consent, Mr Ram is ordered to pay the Standards Committee costs of $28,000. We note the agreement between the Committee and Mr Ram that reasonable time be given to Mr Ram to meet this obligation.

[18] Costs under S.257 LCA are certified at $7,600. These costs are payable by the New Zealand Law Society to the Crown. Mr Ram has agreed to reimburse these costs to the Law Society, and, by consent, the Tribunal so orders. Mr Collins confirmed that a similar time payment arrangement would be available to Mr Ram to complete this reimbursement.

[19] Mr Ram sought permanent suppression of his name. The Standards Committee opposed the application. The Tribunal declined Mr Ram name suppression. To allow suppression of name the Tribunal has to be satisfied that it is proper to do so having regard to the interests of any person and to the public interest. S.240(1)(c) LCA specifically acknowledges that the discretion extends to a "person charged".

[20] In *R v Liddell* [1] the Court of Appeal declined to lay down any code to govern the exercise of a discretion conferred by Parliament in terms which are unfettered by any legislative prescription. It said that the starting point must always be the importance of freedom of speech recognised by S.14 NZ Bill of Rights Act, the importance of open judicial proceedings, and the right of the media to report court proceedings. The prima facie presumption as to reporting is in favour of openness.

[21] Factors to be taken into account in deciding whether the prima facie presumption should be displaced include;

(a) Whether the person whose name is suppressed is found guilty or not. If not guilty, the court may more readily apply the power to prohibit publication, notwithstanding that the public has an interest in "acquittals" also. In this case of course, Mr Ram has acknowledged that he is guilty of misconduct.

(b) Adverse impact upon the prospects for rehabilitation of a person found guilty. While Mr Ram is guilty of misconduct under S.9(1) LCA [a lawyer

[1] [1995] 1 NZLR 538, 546-7

providing regulated services to the public while an employee other than in accordance with the exceptions provided in that section] and S.30 LCA [practising on own account contrary to that section], the Tribunal notes that Mr Ram now accepts that he made an error of interpretation and exercised poor judgment. There is no suggestion of dishonesty or similar serious matters, so if a future employer recognises the true nature of the misconduct it may well be accepted as simply an inexperienced practitioner's mistake, something acknowledged by Mr Ram, who is now going to seek quality supervision and mentoring from a practitioner of integrity. In those circumstances publication is unlikely to affect rehabilitation, but in any event we record that the Tribunal has a view that an employer should always be entitled to know the professional disciplinary history of a prospective employee, which militates against suppression.

(c) The public interest in knowing the character of a person seeking name suppression. This is important in our jurisdiction given the public protection emphasis of LCA.

(d) Circumstances personal to the person appearing to face charges, his or her family, or partners or employees of such person, and impact on financial and professional interests. Distress, embarrassment, and adverse personal and financial consequences often attend charges, so some damage out of the ordinary, and disproportionate to the public interest in open justice in the particular case is required to displace the presumption in favour of reporting. While we accept that some of the factors noted may arise in Mr Ram's case, there was nothing before us which outweighed the requirement for openness regarding the proceedings.

[22] In *T v Director of Proceedings*[2] Panckhurst J, hearing an appeal from a decision of the Health Practitioners Disciplinary Tribunal, noted that the balance between publication and suppression varied between the time of an interim pre-hearing application and a decision on the charge. He noted that following a finding of misconduct, the factors making it desirable to suppress a name needed more weight than they may have required pre-hearing.

[23] After weighing up all matters regarding the competing public versus private interests inherent in Mr Ram's application for permanent name suppression, the Tribunal concluded that there was nothing before it which outweighed the public right to know about this matter. Accordingly the Tribunal declined the application.

[24] Regarding the persons for whom Mr Ram acted in matters which lead to the charges (including those withdrawn), and the various legal practitioners involved, the names of such persons and practitioners are permanently suppressed, as requested by the Standards Committee and Mr Ram in their joint memorandum of 9 November 2011.

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[2] High Court, Christchurch 21 February 2006 CIV-2005-409-002244

[25] We refer to Mr Ram's comment that he would appreciate the Tribunal indicating its view of the application of certain requirements applicable to practitioners working "in- house" for an employer. While the Tribunal does not want to get into the position of providing what is effectively legal advice, we note that in considering such matters the Tribunal would expect to have regard, inter alia, to the following matters;

(a) S.9(1) LCA, which provides a statutory misconduct charge where a practitioner provides regulated services to the public while an employee, other than as provided by one of the listed exceptions, or as permitted by S.10(3) LCA.[3]

(b) Chapter 15 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 ("CCR"), which notes certain rules applicable to in-house lawyers, including those employed as such, as distinct from a practitioner contracted for services, who of course would not be restricted by S.9 LCA, which is limited to employees.

(c) Whether there were multiple contemporaneous or short term sequential employment engagements of a practitioner by various employers. If there were, that may be indicative of a scheme or arrangement by an employee to extend his or her ability to provide services beyond that intended to be permitted by the in-house lawyer rules for a practitioner not qualified to practise on own account.

(d) The scope of the concept of "employer". When a company is involved, regulated services may be provided to companies in the same group. There is a definition of "group" in Chapter 15 CCR which is restricted to the meaning applied to that term in the Financial Reporting Act. The policy reason for that escapes us, given that it could rule out some related companies under the Companies Act, which we would have thought would fall into the same category.

(e) The fact that the in-house lawyer rules for employed practitioners are intended to be restrictive, both as to who may be provided with regulated services and the content of such services – for example S.9(1)(a) LCA restricts the ability of an in-house lawyer of an employer organisation or a union to provide legal services to a member of the organisation or the union, unless relevant to that person's membership of the organisation or union.

Dated at Auckland this 22nd day of November 2011

D J Mackenzie
Chair

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[3] Which provides that a lawyer who is both an employee and a lawyer practising on own account may provide legal services to the public in his or her capacity as a lawyer practising on own account.