

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

MB

Applicant

AND

PF

Respondent

DECISION

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

Introduction

[1] Miss MB has applied for a review of a decision by the [Area] Standards Committee [X] to take no further action in respect of her complaint concerning the conduct of the respondent, Ms PF.

Background

[2] In 2011 Ms PF was a legal aid lawyer.

[3] Miss MB applied for legal aid in relation to an appeal she wished to pursue against convictions for criminal offences.¹ Miss MB's appeal grounds included the competence and conduct of, and service provided by, her trial lawyer (not Ms PF), unfair trial process, failure by the Judge to apply the correct law, and prosecution witnesses perjuring themselves.²

¹ Crimes Act 1961, 1 offence pursuant to ss 240(1)(a) and 14 offences pursuant to 228(b).

² Notice of Appeal by Person Convicted, dated 14 September 2011.

[4] Ms PF was assigned lead provider for Miss MB's appeal on 26 October 2011. She prepared a summary of issues. She describes having received various communications from Miss MB beginning shortly after she was first instructed, seeking and being approved extensions of legal aid, and various steps she took in preparing the summary of issues.

[5] One example of Miss MB's correspondence to Ms PF is a fax she sent on 26 November 2011 explaining her view of how the trial should have been conducted, listing witnesses she believes should have been called, and providing information in support of her position. At the heart of her concern on that occasion appears to be the fact that she says she was not trespassed from certain WINZ offices, whereas the prosecution case appears to have proceeded on the basis that she had been, and that at least three of the witnesses who were called for the prosecution "committed perjury, perverted the course of justice and misled the judge".³

[6] Ms PF prepared a summary of issues dated 26 March 2012, and sent a copy of that to the Legal Services Agency (LSA). Miss MB objected to Ms PF not having first provided her with a copy of the summary of issues so that she could check it.

[7] Miss MB made a complaint to the LSA, to which Ms PF responded on 30 April 2012, and a complaint to the New Zealand Law Society (NZLS) on 29 March 2012.

The complaint and the Standards Committee decision

[8] Miss MB contended that Ms PF's summary of issues was materially inaccurate and says she should have sent it to her in draft first to check.

[9] Ms PF acknowledged that Miss MB did not have a draft before Ms PF sent her summary of issues to LSA. Ms PF says that for various reasons, she anticipated Miss MB would raise objections, so she was careful not to indicate that she would send a draft to Miss MB before she finalised her advice to LSA.

[10] Ms PF says her understanding was that as lead provider under a grant of aid she:⁴

... was obliged to submit a Summary of Issues [to LSA] which explained which grounds of appeal were, and were not, arguable on appeal, so that a determination could be made about a full grant of legal aid. Miss MB's anticipated objections to that Summary of Issues did not affect [Ms PF's] obligation to submit it in accordance with [her] assignment.

³ Letter MB to PF (26 November 2011).

⁴ Letter PF to Ministry of Justice (30 April 2012).

Ms PF says that in hindsight she could have sent Miss MB a draft with the advice that she would be submitting it within a few days.

[11] Ms PF says that despite her letter, Miss MB was still free to advance her grounds of appeal in person, or with assistance from another lawyer if she could get legal aid, in circumstances where the appeal Court would be unaware of Ms PF's views on the merits of the appeal. Ms PF referred to her correspondence to the LSA, which also responded to Miss MB's complaint, noted that she was obliged to advise the LSA on the merits of the appeal, and explained the process she had followed in preparing the summary of issues.

[12] The Committee identified three particular areas of complaint. That Ms PF did not send a draft of the letter for Ms MB's approval before sending it to LSA; did not obtain the original investigation file; and prepared a summary that did not submit all the grounds of appeal documents directly related to the charges.

[13] The Committee referred to Ms PF's response, noted that Miss MB had requested a draft, and that she had not provided one in advance of sending her opinion to LSA, that she had not obtained the full file from trial counsel, because trial counsel had already sent that to Miss MB at her request, and that she considered her summary of issues included all of the required information.

[14] The Committee considered that Ms PF had an obligation to LSA to provide a clear view on the prospects of success, and in doing so was required to be as objective and realistic as possible. The Committee did not consider Miss MB's view on Ms PF's opinion was relevant. Ms PF's analysis was described as "careful and comprehensive" and the summary of issues as "entirely appropriate".⁵ In all the circumstances, the Committee determined Miss MB's complaint on the basis that further action was not necessary or appropriate.

[15] Miss MB disagrees, and has applied to this Office for a review.

Application for review

[16] Miss MB's application for review proceeds on the basis that Ms PF's opinion was wrong. She says as a consequence of the wrong opinion, she was unable to obtain legal aid, and was compromised in her ability to advance her appeal. However, Miss MB says she represented herself, and that the "Court & Crown agreed criminal

⁵ Standards Committee decision at [4].

acts done to me would have caused miscarriage of justice”.⁶ She says Ms PF did not obtain all of the relevant documentation, but that after various attempts, she was able to obtain those, and they proved her innocence. Miss MB says all 20 of her grounds of appeal “were valid & proved my innocence, and a serious miscarriage of justice occurred”.

[17] She says Ms PF did not give a clear view on the prospects of success, was not objective and deliberately went directly against her clear instructions. She says Ms PF’s opinion was a shocking and totally inadequate analysis. She wants misconduct charges laid, compensation, costs, a written apology and a direction that Ms PF refund any money she received from legal aid to the LSA.

Practitioner’s Reply

[18] Ms PF relies on her response to the Committee, and her reply to the review application dated [Date], to which she attached a copy of the Court of Appeal judgment dated [Date].⁷ That judgment disposes of Miss MB’s appeal against her conviction after trial.

[19] Ms PF says that Miss MB’s appeal against conviction was dismissed, and that “the Court of Appeal is not in complete accord with Ms MB’s analysis of her grounds of appeal”. She mentions that an amicus was instructed to assist the Court, but he was unable to make contact with Miss MB. Ms PF notes that the appointment of amicus reinforces her proposition that her opinion was not “the last word on Miss MB’s ability to obtain assistance in respect of the appeal”.

[20] With respect to Miss MB’s contention that Ms PF did not return all her documents to her, Ms PF says that “almost all of the information that I had in respect of this case was obtained by fax from Miss MB, or via the case on appeal”,⁸ which Miss MB had provided to her on or about 17 April 2012.

Review Hearing

[21] After a number of unsuccessful attempts to have a review hearing proceed, the details of which are recorded in Minutes and Directions issued by this Office, Miss MB failed to attend a review hearing by phone on 7 December 2016. Ms PF was not

⁶ Application for review, Part 7.

⁷ *MB v R* [Year] NZCA [Case no.].

⁸ Above n 8.

required to attend. This review has therefore been determined, with Ms PF's consent and in Miss MB's absence.

Nature and Scope of Review

[22] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:⁹

... the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.

The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" ...

... the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[23] More recently, the High Court has described a review by this Office in the following way:¹⁰

A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[24] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to:

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

⁹ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

¹⁰ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

Analysis

[25] Ms PF provided a copy of the Court of Appeal's decision that Miss MB says exonerates her. Miss MB also wanted me to consider everything she had provided to the Court of Appeal to consider to enable it to reach its judgment. I do not consider that necessary, primarily because this Office has no jurisdiction to reconsider a decision made by the Court Appeal.

[26] It is also relevant to note that Miss MB's interpretation of the Court of Appeal's judgment cannot be reconciled with that decision. The Court of Appeal judgment refers to the primary area of dispute at the trial being Miss MB's state of mind when signing documents that did not accurately disclose her asset position. The primary ground of appeal, trial counsel error, was held to be unsustainable, as was Miss MB's general allegation of prosecution misconduct. The ground based on error of law by the trial Judge failed, as did the contentions that the District Court's criminal jurisdiction was excluded by the administrative process of the Social Security Appeal Authority, and that Miss MB was denied a fair hearing because she could not obtain public funding to assist her.

[27] As to the trial Judge's alleged failure to consider her brief of evidence, the Court of Appeal did not accept that and expressed the view that it was "not unfair to characterise many of Miss MB's answers as evasive, diversionary and implausible; taken together, they convey an adverse impression of a sustained practice of dishonesty". The Court concluded that "it was open to the Judge in these circumstances to reject her exculpatory explanations".¹¹ In the circumstances, the Court of Appeal dismissed Miss MB's appeal against conviction.

[28] Miss MB had sought to provide the Court of Appeal with more information. That desire echoes one of Miss MB's concerns over the advice Ms PF provided to LSA: that Ms PF's view was formed on the basis of insufficient relevant information. Miss MB has not identified what, in particular, she believes would have made the difference to Ms PF's analysis.

[29] As the Court of Appeal intimated, a deluge of irrelevant information was not going to assist Miss MB, particularly because the key element of the criminal charges related to Miss MB's intentions. On the basis of her own evidence, her defence and appeal were unsuccessful in that respect. The Court of Appeal's view accorded with that of the trial Judge. It is far from clear to me that anything more could have changed the facts Miss MB disclosed in her evidence. In particular, the fact that Miss MB, an

¹¹ Above n 7, at [30].

apparently literate person, completed forms that required her to disclose that she held bonus bonds, without disclosing her bonus bonds, knowing she had them. The fact that Miss MB may have been able to prove that she disclosed some sometimes, was not enough. She was obliged to disclose whatever she had when she filled in the form. The courts considered her conduct had been motivated by dishonesty.

[30] I have reviewed Ms PF's advice to the LSA with the benefit of the Court of Appeal's judgment. I have been unable to identify anything that was in that advice, but should not have been, or anything that was obviously omitted from that advice. There is no good reason to form the view that there was any deficiency in Ms PF's conduct or the service she provided. I accept that pursuant to her contract with LSA Ms PF was under an obligation to provide an objective independent opinion on the likelihood that Miss MB's appeal might succeed. Even if she were wrong in her opinion as to how the law applied to the facts, and it does not appear that she was, that would not give rise to a disciplinary concern in the circumstances of this review.

[31] I have carefully considered all of the additional material provided in the course of this review. Nothing in that material enables me to conclude that the Committee's decision that further action was not necessary or appropriate should be reversed or modified. The additional material only supports the conclusion that decision should be confirmed.

Decision

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

DATED this 12th day of December 2016

D Thresher
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Miss MB as the Applicant
Ms PF as the Respondent

[Area] Standards Committee [X]
The New Zealand Law Society
Secretary for Justice