

LCRO 100/2015

CONCERNING

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

AND

CONCERNING

a determination of the X Standards Committee X

BETWEEN

**TED FALEAUTO (EDWARD
GEORGE TANU (TED)
FALEAUTO JOHNSTON)**

Applicant

AND

GH

Respondent

DECISION

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

Introduction

[1] Mr Faleauto has applied for a review of a direction to publish his name, in the context of a summary of facts, outcome, and orders following Ms GH's complaints about his conduct and service. The direction was made by the X Standards Committee X pursuant to s 142(2) of the Lawyers and Conveyancers Act 2006 (the Act), with the prior approval of the Board of the New Zealand Law Society (NZLS) given on 25 February 2015, pursuant to reg 30 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008 (the Committee Regulations).

Background

[2] In July 2013 Mr Faleauto was in practise as a barrister sole. Mr Faleauto has not applied to review the Committee's decision, in which it concluded there had been unsatisfactory conduct on his part. He acknowledges he received money directly from Ms GH in advance of rendering an invoice, which the Committee concluded

contravened ss 110(2) and 112(1) of the Act, regs 9 and 10 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 (the Trust Account Regulations), and rules 9.3 and 14.2 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

[3] The Committee also concluded that Mr Faleauto had contravened rules 4.2, 7.1 and 10 by failing to complete the retainer he had entered into when he agreed to represent Ms GH's brother, and rule 14.4 by taking instructions directly from Ms GH and her brother, rather than through an instructing solicitor. The Committee noted, as part of the context, that Mr Faleauto was in the process of relocating overseas and setting up in practise outside New Zealand.

[4] Having concluded in its decision dated [Date] 2014 that there had been "high end" unsatisfactory conduct on Mr Faleauto's part, pursuant to s 12(c) for the contraventions of the Act, Trust Account Regulations and Rules identified above, the Committee censured Mr Faleauto pursuant to s 156(1)(b) and imposed other orders. The Committee recorded its findings of fact, the outcome of its enquiries, and the orders it had made pursuant to s 156(1). On that basis, the Committee invited both parties to provide written submissions in relation to publication of the facts of the matter and Mr Faleauto's name, and allowed 14 days in which to do so.

[5] The decision records that although Ms GH did not respond, Mr Faleauto filed submissions within the timeframe allowed. The submissions Mr Faleauto made argued that publishing his name would not be beneficial, and should be a last resort because his conduct was unintentional and would not be repeated.

[6] The direction to publish Mr Faleauto's name followed in a separate decision dated [Date] 2015, the NZLS Board having approved publication in February.

[7] Mr Faleauto contends his name should not be published, and applied for a review on 19 May 2015.

Review Application

[8] Mr Faleauto does not want his name published.

[9] In his application for review, Mr Faleauto referred to eight matters to be taken into account in considering publication of lawyers' names in the public interest. Those matters related back to the consumer protection and public confidence purposes of the Act, which include some of the factors that must be taken into account pursuant to

reg 30 of the Committee Regulations, the seriousness of the conduct dealt with by the Committee, and the practitioner's disciplinary record.

[10] Mr Faleauto repeated matters he had put before the Committee by way of background and mitigation. He confirmed that when he first met Ms GH he took and receipted \$500 to deal with her brother's case, said he believed he had filled in an "instructing solicitor form", and intended to charge more if the matter proceeded to a defended hearing. Mr Faleauto also said he had no record of Mr GH's court date, was unable to locate the file, and had lost track of the matter.

[11] Mr Faleauto said he mistakenly and unintentionally did not send the "instructing solicitor form" on that one occasion. He said he now knew he must have an instructing solicitor "prior to taking any money or instructions" and his error should not be taken as "an intentional flouting or flagrant and contumelious disregard of the rules".

[12] As to the \$500, Mr Faleauto admitted he had not issued an invoice for it but said taking it was an error, and that he had always believed he could take money for fees as long as he issued a receipt for it. Mr Faleauto did not consider he had taken the money in advance because he had already completed the work, and was therefore entitled to issue an invoice. He says he did not realise that "an invoice had to be issued under TAR10 even if the money had been earned". He says he has learned from his involvement in the complaints process, and attributes his errors to his unfamiliarity with private client work, his practise being primarily funded through legal aid.

[13] Mr Faleauto also minimised the significance of having lost the client's file, saying that was a unique event in circumstances where he was closing his practise to move overseas. He says the \$500 would not have covered him attending court in any event, and he does not have a "bad record of non-appearances".

[14] Mr Faleauto argued that publication of his name would not benefit the public or him, would be an unfair and excessive punishment and "to a slight degree make the public believe that justice is done". Mr Faleauto referred to and distinguished two previous incidents, one involving inadequate time recording, the other relating to a failure to respond to a client's inquiry. He does not consider he is a "danger to the public", said he has dealt with his failings, and characterises those as "generally ... technical and moderately serious, but not sufficient to require name publication".

[15] Mr Faleauto expressed concern about the likely damage to his reputation “for errors or mistakes which are not repeated, serious nor intentional”. He contended that “punishing counsel for an error which is not dishonesty, and not repeatable does not enhance public confidence”. He contends publication of his name would be unjust in all the circumstances. He submitted:¹

Publication should be reserved for dishonesty, and intentional, or negligent series of offending. Also for serious records of offending. Publication of name will not assist here as it was due to mistake and unfortunate loss of the file and shifting of office. They were one off errors under unique unrepeatable circumstances and not ones I will ever repeat.

[16] Ms GH has not participated in this review process.

Nature and Scope of Review

[17] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:²

[39] ... 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.

[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] ... 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.

[18] More recently, the High Court has described a review by this Office in the following way:³

[2] ... 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.

¹ Application for Review, dated 18 May 2015.

² *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

³ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

[19] 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 direction; and
- (b) Provide an independent opinion based on those materials.

Review Hearing

[20] Mr Faleauto attended a review hearing in Auckland on 22 November 2016. Ms GH was not required to attend and the hearing proceeded in her absence, with her consent.

Review Issue

[21] At its heart, the review issue is whether it is necessary or desirable in the public interest for Mr Faleauto's name to be published in the context of a decision recording several contraventions of the Act and Rules, and findings of unsatisfactory conduct, the facts surrounding which are essentially not in dispute.

Analysis

[22] Consideration of whether or not publication is necessary or desirable in the public interest is guided by the purposes of the Act, which are:⁴

- (a) To maintain public confidence in the provision of legal services ...
- (b) To protect the consumers of legal services ...
- (c) To recognise the status of the legal profession ...

[23] A direction as to publication under s 142(2) is a procedural step that a Committee should only take if it has obtained the prior approval of the NZLS Board. Both the Committee and the Board must take into account the relevant factors listed in reg 30(2)(a) to (e), which relate to the impact of publication on the interests and privacy of those named, when deciding whether to publish the identity of a lawyer who is the subject of a censure order.

⁴ Lawyers and Conveyancers Act 2006, s 3.

[24] This Office has the power to confirm, modify, or reverse any direction given by a Standards Committee.⁵ It is also noted that the Legal Complaints Review Officer (LCRO) has the discretion, independently, to direct publication of decisions as each LCRO considers necessary or desirable in the public interest, pursuant to s 206(4) of the Act.

[25] The exercise to be undertaken by a Committee, and on review, calls for interests to be weighed and balanced.

[26] Mr Faleauto says it is not in his interests for his name to be published. He is understandably, concerned about his reputation and the likely impacts on his practise. He is concerned about the proportionality of the effects of publication given his view of the seriousness of his conduct. He contends that publication of his name would be of little or no benefit to the public, and is not necessary to prevent a repeat of the conduct that the Committee found to have been unsatisfactory.

[27] There is always a risk that publication of a lawyer's name will affect that lawyer's reputation and practice. That alone is not sufficient to render publication not necessary or desirable in the public interest. Mr Faleauto argues, however, that those impacts would be disproportionate to his unsatisfactory conduct, particularly given the other penalties the Committee imposed, including a fine of \$5,000. At the review hearing Mr Faleauto said he is still paying off the fine, but has complied with the other orders made.

[28] Publication of a lawyer's name in the context of a Committee's decision informs the public about who did what, and when. The Committee directed publication of a summary of facts, together with the outcome, and orders it had made in relation to Mr Faleauto's conduct in 2013. Events have since moved on.

[29] Mr Faleauto says he has abandoned his attempts at setting up in legal practise overseas. He says he is focussing all of his professional energies on his practise in New Zealand. He describes that as 99 per cent legal aid, with virtually no private client work. He says he now knows, and is attentive to, his professional obligations in relation to what little private client work he does. In particular, Mr Faleauto says he is acutely aware of the requirement that he has an instructing solicitor for all private matters, and of the limitations on receiving payments directly for his fees.

⁵ Lawyers and Conveyancers Act 2006, s 211(1)(a).

[30] Very shortly before the review hearing Mr Faleauto attended two NZLS professional education events. On 10 September 2016 he successfully completed the NZLS “Stepping Up – foundation for practising on own account”.⁶ On 16 November 2016 he attended a Trust Account Supervisors Assessment Day run by the NZLS Trust Account Inspectorate team.⁷ At the review hearing on 22 November 2016 Mr Faleauto described that course as a “refresher” because he says he has previously completed a similar course.

[31] Broadly speaking Mr Faleauto accepts he is not well placed to contest the facts. He says that on reflection he is not confident that he misplaced the client’s file. He believes he may have given the bulk of it to Ms GH or her brother. Nonetheless, he accepts that the conduct that is the subject of Ms GH’s complaint contravened the Act, regulations and rules made thereunder. There is no real argument about what happened, or that the conduct was unsatisfactory. In any event any such argument would be beyond the jurisdiction of this Office on review.

[32] Mr Faleauto describes his own failures as negligent. However, he owes a duty to his professional colleagues to care enough about the relevant statutory and regulatory provisions, and the professional rules, to find out about, and comply with them. As with all lawyers, he is under a professional obligation in that regard. Knowledge of, and adherence to, the Act, regulations and rules made under it are professional obligations through which the status of the legal profession is recognised.

[33] Invoices and proper accounting are essential to the orderly operation of any business or professional practice. In addition, for barristers like Mr Faleauto, there are professional rules that make it difficult for money to change hands without the proper paperwork being provided.

[34] Mr Faleauto contends that publication of his name would be of little or no benefit to the public. It can be seen from the discussion above that is not the case. There is a real benefit to the public, particularly to consumers of legal services, in knowing that lawyers are familiar with the rules around taking money.

[35] Publication in circumstances where Mr Faleauto did not comply with a range of professional obligations, and contravened duties to his client and the court, is necessary to give effect to, and consistent with all three purposes of the Act. Publication is likely to assist in maintaining public confidence in the provision of legal

⁶Certificate “Stepping Up – Foundation for Practising on Own Account” (10 September 2016).

⁷Email from Continuing Legal Education to Mr Faleauto, 17 November 2016.

services, protecting the consumers of legal services, and recognising the status of the legal profession.

[36] Mr Faleauto does not say that publication of his name will have any impact on the interests or privacy of the complainant, Ms GH's brother (who was his client) or on Mr Faleauto's relatives, partners, employers, or associates. However, it is not necessary or desirable, nor would it be customary, in the public interest for anyone but the lawyer, in this case Mr Faleauto, to be identified in the summary of facts, outcome, and orders that the Committee publishes.

[37] Mr Faleauto has provided no good reason to reverse the Committee's direction. This decision records the steps Mr Faleauto has taken to educate himself on the Act, regulations and rules. That will be properly reassuring if he has absorbed, and abides by, those.

[38] In all the circumstances, the Committee's direction to publish Mr Faleauto's name is confirmed in the terms it was given.

[39] Publication of this decision is also directed identifying only Mr Faleauto. The names of the complainant, her brother and any other identifying features are to be removed. For completeness, the materials the Committee publishes should be linked to this decision. A direction to that effect is made pursuant to s 206(4) of the Act.

Costs

[40] Pursuant to s 210 of the Act, and the LCRO's Costs Orders Guidelines, the LCRO has a broad discretion to make orders for costs on review. The costs of the complaints and disciplinary processes under the Act are defrayed across all lawyers in New Zealand, unless an order to contribute to those costs is made by a Committee or this Office on review.

[41] Mr Faleauto's application for review has been unsuccessful. The Guideline amount is \$1,200 for a simple review and review hearing. There is good reason to order Mr Faliauto to contribute to the costs of this review. The Guideline amount is reduced by half to recognise the relative brevity of the review hearing in respect of this matter.

[42] Mr Faleauto is therefore ordered to pay \$600.00 to NZLS by 30 December 2016.

Decision

[43] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the direction to publish is confirmed.

[44] Pursuant to s 206(4) of the Lawyers and Conveyancers Act 2006 a direction is made to publish this decision including Mr Faleauto's name but not identifying the complainant, her brother and any other identifying feature, with a link between the materials the Committee publishes and this decision.

[45] Pursuant to s 210 Mr Faleauto is ordered to pay costs of \$600.00 to NZLS by 30 December 2016.

DATED this 29th day of November 2016

D Thresher
Legal Complaints Review Officer

In accordance with s213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr Faleauto as the Applicant
Ms GH as the Respondent
The X Standards Committee X
The New Zealand Law Society
The Secretary for Justice