

CONCERNING

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

AND

CONCERNING

a determination of the [City] Standards Committee [X]

BETWEEN

RX

Applicant

AND

GR

Respondent

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

DECISION

Introduction

[1] Miss RX has applied for a review of a decision by the [City] Standards Committee [X] in which the Committee determined her complaint against Mr GR on the basis that further action was not necessary or appropriate in all the circumstances.

Background

[2] In October 2008 Mr GR assumed conduct of Mr KL's employment matter from Miss RX. Miss RX's complaint against Mr GR is two-fold, she objects to Mr GR:

- (a) Having acted for Mr KL in his employment dispute, in circumstances where Mr KL's interests conflicted with those of a union for whom Mr GR was also acting. Miss RX says Mr GR encouraged Mr KL to settle his proceeding, because "collapsing" Mr KL's case assisted the union's case, without a commensurate benefit to Mr KL. She considers Mr GR was not independent and free from compromising influences or loyalties when he provided services to Mr KL.

(b) Treating her disrespectfully and discourteously at a judicial settlement Conference (JSC) which they attended. The JSC was convened in the course of Miss RX's proceeding to recover her fees from Mr KL. Mr GR represented KL at the JSC.

[3] Mr GR denies any wrongdoing in either respect.

[4] The Committee considered Miss RX's complaint, and, as mentioned above, decided further action was not necessary or appropriate in the circumstances outlined in its decision.

Application for Review

[5] Miss RX's application for review does not make specific reference to Mr GR's treatment of her at the JSC.

[6] However, in the course of this review, Miss RX asks this Office to form a number of views about the adequacy of the advice Mr GR gave to Mr KL, and about Mr GR's competence. Miss RX considers that Mr KL accepted less to settle his employment dispute than he should have, because of Mr GR's advice, which she believes lacked the necessary quality of independence and loyalty to Mr KL and his interests. Miss RX also believes that Mr GR's advice resulted in Mr KL making a complaint about the quantum of Miss RX's fees.

[7] Miss RX wants this Office to make findings that Mr GR's actions "constituted negligence and/or professional misconduct",¹ and that Mr GR's actions caused damage and loss to Mr KL, who was bankrupted, and to Miss RX. Miss RX wants Mr GR to indemnify her for the losses she sustained in acting for Mr KL.

[8] Miss RX's application for review proceeds on the basis that the Committee erred, and/or failed in its statutory responsibility, by dismissing her complaints. Miss RX says Mr GR's advice caused damage and loss to Mr KL, and to her. She says Mr GR's representation of Mr KL and the Union at the same time gave rise to a conflict of interest between Mr KL and the Union. Miss RX's view is that Mr GR "caused damage and loss to Mr KL and Miss RX for which there should be recompense".²

¹ Application for Review at Part 8.

² At Part 7.

Review Hearing

[9] Miss RX attended a hearing in Wellington on 7 November 2016. Mr GR was not required to attend, and the review hearing proceeded in his absence, with his consent.

Nature and Scope of Review

[10] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:³

... 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.

[11] More recently, the High Court has described a review by this Office in the following way:⁴

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.

[12] 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.

³ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

⁴ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

Review issue

[13] Miss RX has not focused her review application on the concerns she raised in her complaint about Mr GR's treatment of her at the JSC. Her primary focus is on recovering losses she attributes to his conduct. Central to Miss RX's view that Mr GR caused her losses is her view that his duties to his clients conflicted. That central failing, Miss RX believes, is at the root of decisions Mr KL made that ultimately brought him to bankruptcy.

[14] While this Office is not well suited to making determinations about complex questions of causation and foreseeability, the disciplinary issue Miss RX's complaint raises relates to conflicting duties. Lawyer's obligations to be independent, and the limits on acting when faced with conflicting duties, both appear in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the rules).

[15] The issue is whether the evidence available on review supports a finding that Mr GR acted in circumstances where Mr KL's interests conflicted with those of the Union, and that he therefore lacked independence in advising Mr KL.

Analysis

[16] At the review hearing Miss RX acknowledged the evidential difficulties presented by her distance from the relationship between Mr GR and his client. She appeared to accept that, from the perspective of the rules, she is a third party to whom Mr GR owes limited professional duties, including the obligation to treat other lawyers with respect and courtesy pursuant to rule 10.1. She also appeared to acknowledge that presented her with evidential difficulties that result in her complaint lacking a really firm evidential foundation.

[17] In the course of considering Miss RX's complaint the Committee considered the matters Miss RX had raised, including the conflict of interest issue raised, recognising the evidential impediment to Miss RX getting to the bottom of her concerns: she cannot access information that is confidential to Mr KL. From what she does know, however, Miss RX has formed the view that Mr GR "clearly has no understanding of Mr KL's case/claims". Ms RX considers Mr GR did not properly understand her view of Mr KL's case.

[18] Miss RX's argument relies on the assumption that Mr GR acted for Mr KL and the Union in circumstances where there was more than negligible risk that he may be

unable to discharge the obligations he owed to Mr KL or the Union.⁵ However, if that assumption were correct, Miss RX would still not be in a position to say, for example whether Mr GR had obtained prior informed consent from all of his clients, whether they had received independent advice, or whether, in fact, Mr GR had breached any of the duties he owed to his clients.

[19] Miss RX's conflict argument is also contingent on her view of where Mr KL's best interests lay at the time he agreed to settle his employment dispute. Clients settle cases for all sorts of reasons, not all of which can or should bear external scrutiny. Settlement on terms that Miss RX might consider less than favourable does not necessarily signal a deficiency in the advice Mr GR provided to Mr KL. Mr KL must be taken to have agreed to settle as he did for his own reasons.

[20] Miss RX voices her suspicions over the amount Mr KL eventually received in settlement from his former employer and speculates that Mr KL's ability to seek independent legal advice on the outcome he accepted in his employment dispute may have been compromised. Miss RX cannot back those suspicions with evidence.

[21] Miss RX doubts the wisdom of Mr GR not having recourse to her file when he assumed conduct of Mr KL's employment dispute from her, and emphasises that she made sure Mr KL knew her file was available. She refers to a "funder provider agreement", which she had obtained from Mr KL's employer with some difficulty. Again, Miss RX could not say when she made her complaint whether Mr GR had seen the document to which she refers, and if he did, whether he considered it was relevant. Mr GR says he obtained all the relevant information from the Employment Relations Authority, including the document to which Miss RX refers. Miss RX says she was so concerned that Mr KL's interests were not being properly served that she took the extraordinary step of writing directly to him, despite being aware he was by then represented by Mr GR.

[22] Miss RX's view of where Mr KL's best interests may have lain appears to be at odds with Mr GR's and Mr KL's. Their views were formed on the basis of information available to them at a time when Miss RX was no longer acting. While there does not appear to be any dispute that Mr KL was involved in matters relevant to a test case, it is difficult to see how it could have been in Mr KL's interests to have emptied his employer's coffers with the consequences Mr GR describes as the former employer being put into "statutory management (after many costly appeals)". Mr GR's view was

⁵ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 6.1.

that the wages claim against Mr KL's former employer was "never remotely tenable",⁶ has not been tested and will not be tested in the course of this review.

[23] Mr GR says Miss RX cannot identify the argument or arguments she was pursuing on behalf of Mr KL that undermined the Union's case. That is correct, and not surprising since Miss RX was not representing the Union, and Mr GR was.

[24] Paragraph redacted.

[25] On review, the evidential problems that beset both aspects of Miss RX's complaint remain unresolved, and there is no good reason to enquire further.

[26] That being the case, there is no good reason to form a different view to that formed by the Committee, and good grounds to adopt a similar view.

[27] In all the circumstances, the decision is confirmed.

Decision

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

DATED this 15TH day of February 2017

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 RX as the Applicant
Mr GR as the Respondent
Mr AB as a related person
[City] Standards Committee [X]
The New Zealand Law Society

⁶ Letter [Law firm] to Complaints Service (16 July 2013) at [28].