

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

BETWEEN

ZA

Applicant

AND

YB

Respondent

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

Introduction

[1] Mr ZA has applied for a review of the determination by [X] Standards Committee to take no further action in respect of Mr ZA's complaints about Mr YB.

Mr ZA's complaints

[2] Mr ZA made his complaint following a judgment of Kós J in which the determination of a complaint about Mr XC by the XX Standards Committee was quashed.¹ That followed an acknowledgement by the Standards Committee that it had breached the requirements of natural justice in the following manner:²

- (a) First, because of the participation of the Deputy Convenor of the Standards Committee, who was also the President of the XX Branch of the Society. He had written to Mr XC on two occasions in January and May 2014 in his capacity as Branch President, concerning income tax default issues Mr XC was arguing with the Inland Revenue Department about. In the course of the latter communication, the President suggested Mr XC had misled the Society in relation to his tax affairs.

¹ *XC v XX Standards Committee* [2015] NZHC 2100.

² At [17] & [19].

Then, on 27 May 2014 the President had made his own complaint about Mr XC on a different matter. That concerned a Yellow Pages advertisement in which Mr XC held himself out as having legal aid eligibility. The President described that as “a wilful attempt to mislead an unsuspecting public”.

...

[19] [T]he fact that the Standards Committee reached its determination by exchange of emails also amounted to a breach of natural justice. As Mr WD put it:

It is accepted that the concept of a hearing, under s 153 of the Lawyers and Conveyancers Act, is intended to ensure debate and exchange of views, between Standards Committee lawyer and lay members, from which an informed, well-considered and fair decision can emerge.

[3] The identity of the President and Deputy Convenor referred to is not revealed in the judgment.

[4] Mr ZA’s complaint reads:³

Based on the ATTACHED judgment of the Honourable Justice Kós I wish to make a complaint against, I believe, Mr YB of XX.

The reason why I qualify the respondent is because I am not certain that he at material times was President of the XX branch of the New Zealand Law Society and, especially, the Deputy Convenor of the XX Standards Committee/complainant against Mr XC.

If it was him, then I complain that:

1. It was disgraceful or dishonourable for him to have sat in judgment of Mr XC in breach of the apparent bias rule or, alternatively, it was incompetent for him not to have known better and recused;
2. He denied a colleague natural justice by holding an unfair “hearing” (if that term can be used) or, in the alternative, it was incompetent for him not to have understood the very Act, and indeed Practice Note, under which he operates;
3. As a consequence of his failings the profession has been brought into disrepute or in any event has had to waste legal fees on Mr WD’s et al and/or costs to Mr XC such that he should reimburse the profession.

I look forward to hearing from you

Kind regards,

ZA

The Standards Committee determination

³ Email ZA to VE (3 September 2015).

[5] The Standards Committee noted at the outset that the complaint related to the alleged conduct of Mr YB when acting in his capacity as a member of the XX Standards Committee, and that it did not occur in the course of providing regulated services.

[6] Having regard to the above, and having considered all of the material before it, the Standards Committee considered that it was not necessary or appropriate to take any disciplinary action in relation to the matters raised by Dr ZA.⁴

[7] At [9] of the determination, the Committee recorded that it “was satisfied that there was insufficient evidence to support a finding that Mr YB had acted in bad faith”.

[8] The Committee finally concluded that notwithstanding the Court having determined Mr YB should not have participated in the consideration of the complaint concerning Mr XC, “this alone was not sufficient to warrant the imposition of any disciplinary action”.⁵

Mr ZA’s submissions

[9] Mr ZA provided detailed submissions in support of his application. He submits that the Committee made three errors of law:

- (a) It proceeded on the basis that the correct legal test was whether or not Mr YB was providing regulated services. Mr ZA submits that the correct legal test is whether the conduct was “connected with” the provision of regulated services.
- (b) Even if the correct test is whether or not Mr YB was providing regulated services, ss 7(b)(ii) and/or 12 of the Lawyers and Conveyancers Act 2006 (the Act) allows for disciplinary and intervention even when lawyers are not providing regulated services.
- (c) The Committee wrongly applied a “bad faith” standard at [8] of its determination and that is not the threshold for disciplinary intervention.

[10] Finally, Mr ZA submits that the Committee failed to take into account a mandatory consideration in that it did not respond to all of the issues raised by Mr ZA in his complaint.

⁴ Standards Committee determination (26 January 2016) at [7]–[8].

⁵ At [9].

Review

[11] This review has been conducted with the consent of the parties on the material to hand.

Was Mr YB correctly identified as the lawyer complained about?

[12] Before addressing the matters raised on review by Mr ZA, it is necessary first to make some comment about the uncertainties surrounding the identity of the person referred to by Kós J in the judgment and in Mr ZA's complaint.

[13] Mr ZA was uncertain if he had correctly named the lawyer referred to in the judgment. In his response to the complaint Mr YB said "I record that I did not take part in the subject determination by the XX Standards Committee".⁶

[14] This statement is at odds with the acknowledgements by counsel for the Standards Committee that the President of the XX branch of the Law Society (who was also the Deputy Convenor of the Standards Committee) participated in the decision.⁷

[15] The only communication from Mr YB in relation to this review is an email following receipt of Mr ZA's detailed submissions. Mr YB advised he had nothing further to add.⁸

[16] Mr YB's statement to the Lawyers Complaints Service that he did not take part in the determination is inexplicable. He has not at any time asserted that he has been wrongly identified by Mr ZA as the person referred to by Kós J. If he had been wrongly identified by Mr ZA that would be an absolute response to the complaint. The Standards Committee itself identified that the Court was referring to Mr YB notwithstanding that the Court did not refer to him by name.⁹

[17] In view of the above I can only proceed on the assumption that Mr YB has been correctly identified as the person about whom Mr ZA complained. In light of the fact that counsel for the Committee acknowledged participation by the person identified as Mr YB in the Committee decision concerning Mr XC, I also proceed on the assumption that he did participate in the decision in some manner notwithstanding his statement to the contrary.

⁶ Letter YB to Lawyers Complaint Service (22 September 2015).

⁷ Above n 2, at [2].

⁸ Email YB to LCRO (19 August 2016).

⁹ Above n 4, at [9].

[18] The failure by the Committee or the Lawyers Complaints Service to obtain positive confirmation that Mr YB was the person referred to in the High Court judgment is an odd gap in the Committee's determination.

TF v VB LCRO 326/2012

[19] Before addressing Mr ZA's submissions I wish to first raise an issue referred by me in *TF v VB*. That review concerned a complaint by TF about VB. VB was a member of a branch of the New Zealand Law Society and TF was a practitioner within the area covered by that branch. VB was delegated by the branch to discuss certain matters with TF relating to TF's personal health. TF objected to this contact and raised a number of concerns:¹⁰

Mr TF's complaints were that:

- The question allegedly asked by Mr VB ... was without authority, in breach of the Lawyers and Conveyancers Act and pre-determined.
- Mr VB's call was outside the authority of the branch council under the Act.
- In making such a telephone call Mr VB had a conflict of interest and should not have undertaken the task of contacting Mr TF.
- Mr VB subsequently made light of the actions of the council in referring the matter to the Fitness to Practice Committee (FTCP) and the effect on Mr TF.
- Mr VB failed to respond to correspondence from Mr TF seeking reimbursement of costs associated with the reference to the FTCP.
- Mr VB attempted to persuade Mr TF from acting for a [particular client].
- Mr VB accessed court documents and the NZLS database without authority.

[20] The Standards Committee treated the complaints in the usual way and responded to the issues.

[21] I approached this matter differently on review and incorporate here a portion of that decision:

[10] ... However, I do not consider that a complaint about a member of a branch council of NZLS, acting in that capacity, should be addressed in this way.

¹⁰ *TF v VB LCRO 326/2012* 10 March 2015 at [7].

[11] ... Each branch is governed by rules relating to that branch which have been approved by the NZLS Council as required by clause 3.3 of the NZLS constitution.

...

[13] It is entirely inappropriate that a member of a branch of NZLS should be subject to a complaint about conduct arising in the course of carrying out functions required of him or her by virtue of his or her position on the branch council. Standards Committees are established primarily to consider the conduct of lawyers when conducting the practise of law. It is not the role of a Standards Committee to examine the conduct of members of bodies established pursuant to the Lawyers and Conveyancers Act and/or the constitution of NZLS.

...

[15] What is relevant, is that Mr VB was acting at the direction of, and as a representative of the council. If Mr TF has concerns that Mr VB exceeded his instructions or delegated authority, or acted improperly when carrying out those instructions, then his complaint should be directed to the branch council. Each branch of the Law Society is subject to oversight by NZLS and if Mr TF is unhappy with the manner in which the [x] branch council conducted its affairs or responds to a complaint, then he should direct his concerns to the NZLS Board.

[16] This approach is supported by the fact that Mr TF's complaints about Mr VB do not fit within the disciplinary provisions of the Act. After inquiring into a complaint, a Standards Committee has three options:

- (a) determine that the complaint or matter be considered by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal.
- (b) determine there has been unsatisfactory conduct on the part of the practitioner;
- (c) determine to take no further action.

[17] The charges that may be brought before the Tribunal are:

- (a) misconduct;
- (b) unsatisfactory conduct;
- (c) negligence or incompetence in the lawyer's professional capacity to the requisite degree;
- (d) that the lawyer is not fit to practice because he or she has been convicted of an offence punishable by imprisonment or his or her conduct is such that it tends to bring his or her profession into disrepute.¹¹

...

Conclusions

[35] Having traversed the conduct which can be the subject of attention by the Lawyers Complaints Service, I return to my comment that Mr VB's conduct is not conduct which should properly be the subject of a complaint to the Complaints Service. Mr VB was acting as a delegate of the branch council and

¹¹ Lawyers and Conveyancers Act 2006, s 241.

within the parameters imposed by the council. Any complaint about his conduct must therefore be directed to the council and/or NZLS as the parent body.

[36] The appropriate remedy for Mr TF was to direct his complaint to the branch council or NZLS. Infringement of human rights, breaches of privacy and other allegations inherent in Mr TF's complaints should be directed to the appropriate bodies. Pursuant to s 138(1)(f) of the Act there is therefore an adequate remedy available to Mr TF that it would be reasonable for him to exercise.

[22] The wrong acknowledged by the Committee leading to the quashing of the Standards Committee determination of the complaint about Mr XC was that Mr YB was part of the Standards Committee determining a complaint about Mr XC whilst there were live complaints made by Mr YB about Mr XC. Mr YB's position as President of the local branch of the New Zealand Law Society (NZLS) perhaps added to the weight of his complaints.

[23] Mr ZA submits that this conduct was connected with the provision of legal services and was incompetent or negligent to the necessary degree, such that a disciplinary outcome should follow.

[24] Following the approach in *TF*, Mr ZA's complaint should have been directed to NZLS. Section 126 of the Act requires NZLS to establish the Standards Committees and to appoint members. The Complaints Service and Standards Committees Regulations¹² contain detailed provisions relating to:

- The mode of appointing lawyer members to Standards Committees.
- The criteria to be applied in appointing lawyer members.
- Tenure of members.
- Resignation by members.

[25] Most importantly, reg 21 sets out the circumstances in which a member may be removed from membership of a Committee.

[26] The conduct complained of by Mr ZA related directly to Mr YB's fitness to continue as a member of the Standards Committee, and maybe to remain as President of the local branch. It is conceptually wrong for a Standards Committee to be required to consider a complaint about a member of another Standards Committee, which related directly to his conduct as a member of a Standards Committee. The correct body to which Mr ZA should have directed his concerns was NZLS.

¹² Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008.

[27] During the course of the review I drew the attention of the parties to the issues raised by me in *TF* and asked the parties to comment. Mr ZA responded:¹³

... I take it the LCRO expects the issue of connected to the provision of regulated services to be addressed. The *TF* decision is fatally flawed as it ignores the two High Court decisions most directly on point on this issue.

[28] The decisions Mr ZA refers to are *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal*¹⁴ and *Deliu v Lawyers Complaints Service of the New Zealand Law Society*.¹⁵

[29] Mr ZA's response is directed to the question as to whether or not a lawyer is providing "regulated services" when acting as a member of a Standards Committee. He submits that the correct test is whether or not the conduct under scrutiny was "connected" with the provision of regulated services, and I do not disagree with that.

[30] What I disagree with, is the assumption by Mr ZA that the actions of a lawyer as a member of a Standards Committee is conduct connected with the provision of regulated services. The immediate answer to this, is that a Standards Committee has non-lawyer members, whose conduct is clearly not connected with the provision of legal services. I do not therefore accept that conduct of a lawyer in his or her capacity as a member of a Standards Committee, is conduct connected with the provision of regulated services by that lawyer.

[31] To subject the conduct of lawyer members to the scrutiny of the disciplinary processes whilst not having jurisdiction to consider the conduct of non-lawyers, is neither logical or fair. Lawyer members of Standards Committees act in a voluntary capacity, and it is unfair to expose a lawyer to the risk that his or her professional record may be adversely affected by conduct when acting in that capacity unless there is some element of bad faith involved. I refer to further comments in this regard at [36] below.

[32] A Standards Committee cannot correct the wrong done to Mr XC by "maladministration".¹⁶ Mr XC took the correct step of seeking judicial review of the determination and any cost implications for him were addressed by the Court.

¹³ Email ZA to LCRO (18 May 2016).

¹⁴ [2014] NZHC 1987.

¹⁵ [2012] NZHC 2582.

¹⁶ Above n 1 at [39].

Breach of natural justice

[33] Mr ZA submits there is a mandatory obligation to consider and respond to every submission made by a complainant, or, in this case, an applicant. By not doing so, he submits, the Standards Committee breached the requirements of natural justice. I do not agree. In *R v Nakhla*¹⁷ the Court said:

As to the complaints in the motion that the Court did not deal with certain submissions ... it may be observed that a belief on the part of counsel ... that his argument has not been fully understood or adequately discussed is by no means uncommon ... The Court is not obliged in giving its reasons for judgment to discuss every aspect of argument.

[34] The Court went on to refer to the observations of Diplock LJ in *Hardwick Game Farm v Suffolk Agricultural Poultry Producers Assn Ltd*:¹⁸

In giving its reasons for judgment [a Court] is not composing a general lecture upon a legal topic: it is setting out as succinctly as the time available for preparation permits, those propositions of law which it considers are correct, and which are essential steps in the decision it has reached in the particular case. It is not obliged to state an answer to the arguments against the propositions of law which it accepts as correct and relevant to its decision whether such arguments have been addressed by counsel or not.

[35] Those principles apply equally, if not more so, to determinations by a Standards Committee (and this Office) where allegations and submissions by (in particular) complainants, are often made in a ‘scatter-gun’ manner and often without merit or substance. It would be an appalling misuse of the resources of Standards Committees and this Office, if the requirement is to specifically address every allegation and submission.

Bad faith

[36] Mr ZA refers to the “bad faith” threshold adopted by the Committee. He is correct to state that “bad faith” is not the threshold for disciplinary intervention, but in this case it is not inappropriate to adopt this threshold if a lawyer’s conduct as a member of a disciplinary body is to attract scrutiny by the disciplinary processes. By addressing this issue, I do not resile in any way from the principle that use of the disciplinary process is not an appropriate manner to address conduct of a lawyer as a member of a disciplinary body, nor that conduct in that capacity is not conduct connected with the provision of regulated services. However, s 185 of the Act exempts

¹⁷ *R v Nakhla (No 2)* [1974] 1 NZLR 453 at 456.

¹⁸ *Hardwick Game Farm v Suffolk Agricultural Poultry Producers Assn Ltd* [1966] 1 All ER 309 at 338.

a member of a Standards Committee (or other person referred to) from civil or criminal liability unless the person has acted in bad faith. It is not unreasonable to apply this test to conduct of a member of a Standards Committee.

Summary

[37] In summary therefore I concur with the Standards Committee determination to take no further action in respect of Mr ZA's complaint, albeit perhaps for different reasons. Mr XC's remedy was to apply to the Court (as he did) and if he was concerned about Mr YB's actions, he could raise the matter with NZLS as to whether or not Mr YB should remain a member of the Committee.

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

O W J Vaughan
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 ZA as the Applicant
Mr YB as the Respondent
XX Standards Committee
The New Zealand Law Society