IN THE COURT OF APPEAL OF NEW ZEALAND

CA26/2015
[2015] NZCA 569

BETWEEN	JEREMY JAMES MCGUIRE Appellant
AND	WELLINGTON STANDARDS COMMITTEE (NO 1) First Respondent
	THE LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL Second Respondent

Hearing:	20 October 2015
Court:	French, Venning and Asher JJ
Counsel:	Appellant in person T J Mackenzie for First Respondent P J Gunn for Second Respondent (appearance excused)
Judgment:	24 November 2015 at 11.30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant is ordered to pay the first respondent's costs for a standard interlocutory application on a band A basis with an uplift of 50 per cent together with usual disbursements in respect of the abandoned application for leave to adduce further evidence.

C The appellant is ordered to pay the first respondent's costs for a standard appeal on a band A basis with a 50 per cent uplift together with usual disbursements.

REASONS OF THE COURT

(Given by French J)

Background

[1] Mr McGuire is a barrister and solicitor. The first respondent, the Wellington Standards Committee (No 1) (the Standards Committee), is a standards committee of the New Zealand Law Society.

[2] In 2009 the Standards Committee laid two disciplinary charges of misconduct against Mr McGuire in the New Zealand Lawyers and Conveyancers Disciplinary Tribunal (the Tribunal).

[3] The two charges arose out of a bill of costs Mr McGuire had issued to a client who subsequently made a complaint to the New Zealand Law Society. The charges were that:

(a) in issuing the bill Mr McGuire had breached s 66 of the Legal Services Act 2000. Section 66 provided that a lawyer acting for a legally aided person may not take payment from that person without the consent of the Legal Services Agency; and

(b) in breach of s 161 of the Lawyers and Conveyancers Act 2006 (the Act), Mr McGuire had commenced proceedings against the client to recover the fees in question notwithstanding he had been notified by a Standards Committee that it had received a complaint from the client about the amount of the bill of costs. Section 161 states when a complaint about a bill has been made, no proceedings for recovery may be commenced or proceeded with until after final disposition of the complaint.

[4] On the second day of the hearing before the Tribunal, Mr McGuire's counsel advised the Tribunal an agreement had been reached between the parties. Under the agreement, the Standards Committee agreed to withdraw the first charge and "amend" the second charge to allege unsatisfactory conduct rather than misconduct.

[5] The Standards Committee duly withdrew the first charge and applied to the Tribunal for an order amending the second charge. The application was granted and Mr McGuire pleaded guilty to the following charge:

> The Wellington Standards Committee (No 1) **HEREBY CHARGES JEREMY JAMES McGUIRE** of Wellington, Barrister and Solicitor with unsatisfactory conduct in the provision of regulated services in that, in breach of section 161 of the Lawyers and Conveyancers Act 2006 he commenced proceedings to recover the amount of the bill of costs referred to herein notwithstanding that he had been notified that the Standards Committee had received a complaint that included complaint about the amount of a bill of costs.

[6] In a subsequent penalty decision, the Tribunal formally censured Mr McGuire.[1] It also ordered him to pay costs of $14,700.

[7] Dissatisfied with that outcome, Mr McGuire then issued judicial review proceedings in the High Court against the respondents, seeking, inter alia, declarations that the charges and the penalty decision were unlawful and should be set aside.

[8] The case was heard in the High Court by Mallon J.[2] The Judge ruled the Tribunal had erred in censuring Mr McGuire, but upheld its costs decision. She dismissed all the other grounds for judicial review advanced by Mr McGuire and a claim he had made for damages. As regards the costs of the judicial review proceeding, in a separate judgment the Judge awarded Mr McGuire costs against the Standards Committee in the sum of $14,700.[3]

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1 *Wellington Standards Committee (No 1) v McGuire* [2013] NZLCDT 41.
2 *McGuire v Wellington Standards Committee (No 1)* [2014] NZHC 3042.
3 *McGuire v Wellington Standards Committee (No 1)* [2015] NZHC 448.

[9] Mr McGuire now appeals Mallon J's decisions on several grounds. Before turning to address these, we record that, as it did in the High Court, the Tribunal abides the decision of the Court.

Grounds of appeal

Deficiencies in the process of the Standards Committee

[10] Mr McGuire was critical of various aspects of the process followed by the Standards Committee leading up to the Tribunal hearing. In his submission, notwithstanding the subsequent Tribunal hearing and his guilty plea, the deficiencies were such as to render the entire disciplinary proceeding void from the outset.

[11] Some of these alleged deficiencies were raised by Mr McGuire for the first time on appeal. All are without merit.

<u>Quorum</u>

[12] Mr McGuire alleged that, at the meeting when the Standards Committee resolved to refer matters to the Tribunal, it lacked a lay member and therefore did not have a quorum. This is factually wrong. Mr McGuire erroneously assumed a Mr Martin shown as being present at the meeting was a lawyer when in fact he was a lay member.

<u>Minutes of meetings</u>

[13] Mr McGuire complained about the adequacy of the minutes of the Standards Committee. The first set of minutes in question records that an inquiry will be held into the two complaints. The second set records the result of the inquiry. Mr McGuire submitted the minutes are too brief and suggested it was possible to infer a majority vote did not occur. There is no evidence to support that contention and we reject it. Mr McGuire also contended the minutes are confusing. We disagree and note Mr McGuire did not identify any prejudice to him resulting from any alleged confusion.

[14] A further contention made by Mr McGuire was that there is no evidence in the minutes of the Standards Committee having properly and carefully inquired into the two complaints. This submission, however, overlooks the content of the determination that was issued following the meeting and the evidence filed in the judicial review proceeding.

The Standards Committee invalidly delegated its powers

[15] Mr McGuire challenged the lawfulness of various actions taken by a complaints and standards officer in relation to the disciplinary proceedings against him. He submitted the officer in question, a Ms Rice, effectively usurped the role of the Standards Committee.

[16] The argument is without evidential foundation. All of the actions the evidence shows Ms Rice did undertake were administrative in nature and within the scope of a written delegation of authority made by the Standards Committee under s 184(1) of the Act.

[17] Mr McGuire further submitted that, even if that were so, the written delegation came to an end along with the Standards Committee itself once the membership of the Standards Committee that made the delegation changed. The term of appointment of one of the members ended on 30 June 2010 and therefore, in Mr McGuire's submissions, any actions taken by Ms Rice after that date, which included instructing counsel for the purposes of the Tribunal hearing and giving evidence, were ultra vires and unlawful. According to Mr McGuire, every time the membership changed, the new Standards Committee was required by law to sanction and ratify any decisions made by its predecessor in order for those decisions to remain valid. That extended not only to delegations but also to the decision to lay the charges in the Tribunal.

[18] In our view, those arguments are untenable. The Standards Committee is a statutory entity with statutory powers and obligations. It exists in its own right, independent of the individuals who might happen to be members of it from time to time. It does not cease to exist because of a change in membership of the Committee but continues as before.

[19] As regards the written delegation, it is, in any event, expressed to remain in force until revoked in writing by either party. There is no evidence of any written revocation and no evidence to refute Ms Rice's evidence that she was authorised to file an affidavit in the Tribunal.

Bias

[20] The client-initiated complaint was originally referred to a different Standards Committee, which for ease of reference we shall call the No 2 Standards Committee. The No 2 Standards Committee resolved of its own motion to investigate the matter of Mr McGuire issuing proceedings to recover the debt before the client's complaint had been resolved.

[21] A hearing was scheduled to consider both complaints but it never proceeded. Instead, the No 2 Standards Committee resolved to transfer the matters to the respondent Standards Committee. This was done at the request of Mr McGuire, who alleged the No 2 Standards Committee was biased.

[22] Mr McGuire contended the subsequent decisions made by the respondent Standards Committee were similarly tainted by bias because it did not conduct its own independent assessment.

[23] We agree with Mallon J that this submission is not made out on the facts. The respondent Standards Committee gave Mr McGuire an opportunity to be heard on the substance of the complaints. We also agree with the Judge that other allegations of bias made against Ms Rice and another complaints officer, Ms Wilson, are irrelevant because they were not the decision-makers.

Breach of natural justice in investigating own complaint

[24] As mentioned, the complaint about Mr McGuire issuing proceedings to recover the debt was initiated by the Standards Committee itself. In those circumstances, Mr McGuire contended it had a clear conflict of interest in then proceeding to investigate its own complaint. Failure to do so was, in Mr McGuire's submission, a breach of the rules of natural justice.

[25] However, the Act itself contemplates that a Standards Committee may investigate its own complaints. This is expressly provided for in s 130(c) of the Act, and is a complete answer to Mr McGuire's submission. As Mr Mackenzie submitted, Mr McGuire's argument rests on a fundamental misunderstanding of the inquisitorial role of standards committees.

<u>The Standards Committee did not give Mr McGuire a fair hearing</u>

[26] Mr McGuire contended he did not receive notice of any own motion complaint by the Standards Committee and was confused.

[27] It is correct the notice of hearing refers only to the client-initiated complaint. However, the own motion complaint is referred to in a letter that accompanied the notice. In his written submissions for the hearing, Mr McGuire acknowledged receipt of this letter. He also requested the Standards Committee take into account information he had previously supplied about the debt recovery proceeding, which it will be recalled was the subject of the own motion complaint. The evidence suggests if there was any confusion on his part it may have been as to whether he was addressing the own motion complaint of the No 2 Standards Committee or the own motion complaint of the respondent Standards Committee. Both complaints were, of course, identical.

[28] Mr McGuire also complained the notice of hearing generated a legitimate expectation there would be a further opportunity for submissions before the Standards Committee made a final determination. We are satisfied the notice of hearing is not capable of being interpreted in that way. It clearly states the decision would be made on the basis of the affidavit evidence and correspondence before the Standards Committee and that this material was to be filed no later than 24 March, which was before the date the Standards Committee made its determination. The notice says nothing about there being any further opportunity to be heard.

[29] In any event, as submitted by Mr Mackenzie, any issues were cured by referral to a fresh judicial process by the Tribunal, where the evidence shows Mr McGuire was intimately aware of the allegations against him.

The Tribunal had no power to change the charge from misconduct to unsatisfactory conduct

[30] Regulation 24 of the Lawyers and Conveyancers Act (Disciplinary Tribunal) Regulations 2008 states:

> **24 Amendment of or addition to charge**
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> (1) At the hearing of a charge, the Disciplinary Tribunal may of its own motion or on the application of any party, amend or add to the charge if the Tribunal considers it appropriate to do so.
>
> (2) The Disciplinary Tribunal must adjourn the hearing if it considers that the amendment or addition would—
>
> (a) take the person charged by surprise; or
>
> (b) prejudice the conduct of the case.

[31] Mr McGuire submitted that, although both the Tribunal and Mallon J described the charge of unsatisfactory conduct to which he pleaded guilty as an "amended" charge, that description was a misnomer and wrong. Under the Act, misconduct and unsatisfactory behaviour are separate and distinct charges. In his submission, it followed the change from one to the other could not therefore amount to an amendment within the meaning of reg 24, but correctly analysed constituted the laying of a new charge. The Tribunal had no jurisdiction to lay a new charge and therefore acted unlawfully. Mr McGuire accepted his argument stood and fell on the construction of reg 24.

[32] This point was never argued before Mallon J.

[33] We note too that Mr McGuire agreed to the change of charge at the time without raising any jurisdictional issue. Further, the written charge to which he pleaded guilty was headed "amended charge". He was represented by two very experienced senior counsel and told us he has no complaint about the quality of his legal representation. In exchange for his pleading guilty to a lesser charge, the Standards Committee agreed to withdraw the first charge. We accept it was an emotional and stressful time for Mr McGuire, but, in our view, that does not justify his attempts to renege on an agreement. It does not reflect well on him.

[34] In any event, we are satisfied that as a matter of statutory interpretation the argument is not correct.

[35] In our view, the interpretation of reg 24 must be informed by the Tribunal's powers under the Act, in particular s 241. It provides that:

> **241 Charges that may be brought before Disciplinary Tribunal**
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> If the Disciplinary Tribunal, after hearing *any* charge against a person who is a practitioner or former practitioner or an employee or former employee of a practitioner or incorporated firm, is satisfied that it has been proved on the balance of probabilities that the person—
>
> (a) has been guilty of misconduct; *or*
>
> (b) has been guilty of unsatisfactory conduct that is not so gross, wilful, or reckless as to amount to misconduct; or
>
> (c) has been guilty of negligence or incompetence in his or her professional capacity, and that the negligence or incompetence has been of such a degree or so frequent as to reflect on his or her fitness to practise or as to bring his or her profession into disrepute; or
>
> (d) has been convicted of an offence punishable by imprisonment and the conviction reflects on his or her fitness to practise, or tends to bring his or her profession into disrepute,—
>
> it may, if it thinks fit, make any 1 or more of the orders authorised by section 242.
>
> (Emphasis added)

[36] In light of this provision it is, in our view, clear the power to amend in reg 24 must include the power to amend the charge itself rather than be limited to amending the particulars of a charge. Such an interpretation is consistent with the powers of amendment exercised in the ordinary courts every day, both in their civil and criminal jurisdictions. In contrast, the restrictive interpretation advanced by Mr McGuire would unnecessarily hamstring the Tribunal for no useful purpose. Significantly, Mr McGuire was unable to support his submission by reference to any authority.

High Court wrong to uphold Tribunal's costs award

[37] Mr McGuire submitted Mallon J should have quashed the Tribunal's costs award and replaced it with an order awarding him indemnity costs. To a very large extent, his claim for indemnity costs rests on arguments we have already addressed and rejected.

[38] Other arguments raised by Mr McGuire appear to rest on the proposition that his conduct did not justify any disciplinary proceedings. We disagree. In any event, the fact remains he pleaded guilty to a charge of unsatisfactory conduct. It is not open to him through the guise of judicial review proceedings to attempt to resile from that decision and re-litigate the merits.

[39] In support of his claim for costs in the Tribunal, Mr McGuire also contended the Tribunal should have taken into account that the Standards Committee rebuffed his attempts to settle the matter amicably and that he was threatened by counsel acting for the Standards Committee with suspension or striking off, leaving him with no option but to defend the proceedings. Offers of settlement made by Mr McGuire, however, were made subject to the withdrawal of the complaints. The Standards Committee refused to do that and its position was vindicated by the guilty plea.

[40] In our view, the Tribunal's order was reasonable. The Standards Committee had sought costs of approximately $22,000. The Tribunal awarded the sum of $14,700. As noted by Mallon J, that sum appropriately reflected Mr McGuire's acceptance through his guilty plea that his conduct had been unsatisfactory.[4] It also appropriately reflected Mr McGuire's poor financial position at the time and the history of the matter, including the fact the Standards Committee had not proved either of the two original charges.

[41] Like Mallon J, we are unable to identify any reviewable error in the Tribunal's costs decision.

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[4] *McGuire v Wellington Standards Committee (No 1)*, above n 2, at [90].

The High Court Judge wrongly discounted costs to Mr McGuire

[42] It will be recalled that Mallon J awarded Mr McGuire costs in respect of the High Court proceeding in the same amount as had been awarded against him by the Tribunal. The Judge considered Mr McGuire was entitled to costs in the High Court because he had succeeded in having the Tribunal's censure quashed. However, she also considered any costs order needed to be reduced to reflect the significant number of other issues he had raised and that were in her assessment "completely without merit".[5]

[43] Justice Mallon took as her starting point the sum of $20,895, which the Standards Committee had calculated would be 2B costs for one statement of claim, one case management conference and normal trial steps, plus disbursements of $455.52. She then discounted that amount by approximately 31 per cent, arriving at a figure of $14,700.

[44] On appeal, Mr McGuire acknowledged an appeal against a costs decision is an appeal against the exercise of a discretion. He submitted Mallon J erred first in her calculations of scale costs and second in failing to take into account costs on an opposed interlocutory application.

[45] We do not accept those submissions. Contrary to Mr McGuire's assertion, Mallon J did expressly take the costs on the interlocutory application into account.[6] Mr McGuire did not succeed in the application and the Judge appropriately included it as part of her global reduction of 31 per cent.

[46] As for the alleged miscalculation of the scale costs, Mr McGuire's complaint was that the Judge failed to make any allowance for the costs involved in preparation of authorities. Mr Mackenzie explained that his schedule on which the Judge relied in reaching her figure of $20,895 did not allow for that step because the bundle(s) prepared by Mr McGuire were "a shambles".

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5 *McGuire v Wellington Standards Committee (No 1)*, above n 3, at [5].
6 At [10].

[47] Mr McGuire did not challenge the omission of the step in the High Court and, in our view, it is not an error such as would warrant interfering in the exercise of the discretion. In our view, the decision was one that was open to the Judge and was fair and reasonable.

Outcome of appeal

[48] None of the grounds of appeal has merit. The appeal is accordingly dismissed.

[49] As regards costs in this court, Mr Mackenzie sought increased costs both in relation to an abandoned interlocutory application and the substantive appeal.

[50] The interlocutory application in question was an application filed by Mr McGuire to adduce fresh evidence. To support his argument about the alleged lack of a quorum, Mr McGuire wished to adduce evidence from a law directory showing that all those present at the relevant meeting of the Standards Committee were lawyers. He persisted with the application despite being advised by Mr Mackenzie and the New Zealand Law Society that he had the wrong Mr Martin and despite being shown minutes of the Board of the New Zealand Law Society recording the appointment of Mr Martin as a lay member. It was not until the appeal hearing that Mr McGuire advised Mr Mackenzie he was withdrawing the application.

[51] We are satisfied that in those circumstances Mr McGuire has put the Standards Committee to unreasonable and unnecessary expense warranting an uplift of 50 per cent on scale costs.

[52] We are further satisfied an uplift of 50 per cent is also warranted in relation to costs on the substantive appeal. Mr McGuire raised numerous points to which the Standards Committee was required to respond. With the possible exception of the argument relating to reg 24, the arguments were plainly untenable and should not have been raised, especially by a legally qualified person. In addition, serious allegations were made without evidential foundation.

[53] We therefore make the following costs orders:

(a) The appellant is ordered to pay the first respondent's costs for a standard interlocutory application on a band A basis with an uplift of 50 per cent together with usual disbursements in respect of the abandoned application for leave to adduce further evidence.

(b) The appellant is ordered to pay the first respondent's costs for a standard appeal on a band A basis with a 50 per cent uplift together with usual disbursements.

Solicitors:
Wynn Williams, Christchurch for First Respondent
Crown Law Office, Wellington for Second Respondent