

**IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY**

**CIV-2012-419-0721
[2013] NZHC 2267**

BETWEEN PETER GERARD STOCKMAN
 Plaintiff

AND NEW ZEALAND ASSOCIATION OF
 COUNSELLORS INCORPORATED
 Defendant

AND ROBYN JOAN GALVIN
 Interested Party

Hearing: 14 March 2013

Appearances: Plaintiff in person
 E J Horner for Defendant
 J Goodall for Interested Party

Judgment: 2 September 2013

JUDGMENT OF PETERS J

This judgment was delivered by Justice Peters on 2 September 2013 at 4.30 pm
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date:

Solicitors: Morrison Kent, Wellington

Counsel: J Goodall, Auckland

Copy for: P G Stockman, Hamilton

Introduction

[1] The Plaintiff (“Mr Stockman”) seeks review of a decision made or communicated by the Defendant on 22 December 2011 (“Association”),¹ being a decision to exclude evidence filed in support of a complaint to the Association (“decision”). There is no dispute that the decision is subject to review.

[2] At the time of making the decision, the Association was considering a complaint that Mr Stockman had made to the Association by letter dated 14 June 2011 (“complaint”). The complaint concerned conduct of Ms Robyn Galvin, a member of the Association and the interested party to this application. A substantial part of Mr Stockman’s complaint concerned emails that Ms Galvin and a third party (“third party”) had exchanged in March 2011 (“emails”). Mr Stockman filed copies of the emails with the complaint. The effect of the Association’s decision was to exclude the emails as evidence.

[3] Mr Stockman issued these proceedings seeking review of the decision. The Association continued to determine the complaint notwithstanding the application for review. Mr Stockman declined to participate in further procedural matters relating to the complaint, pending determination of this application.

[4] The grounds on which Mr Stockman seeks review are that the decision was unreasonable and illegal. The Association denies these grounds but, if it is wrong in that, contends that no relief ought to be granted. Ms Galvin takes the same position.

Background

[5] Ms Galvin is a counsellor and was engaged to assist Mr Stockman and the third party. To that end she met the parties together on three occasions, in February and March 2011. The precise capacity in which she met them is not material to this decision, although may be material to future events. As I understand it, however, in respect of the first two meetings Ms Galvin was engaged to undertake joint counselling and on the third to act as a mediator. In addition, Ms Galvin had a

¹ Judicature Amendment Act 1972, s 4.

meeting with each of Mr Stockman and the third party prior to the third, “mediation”, session.

[6] It is common ground that no arrangements were made, or expected to be made, at the end of the third session for there to be future joint meetings. Again, however, that is irrelevant to this decision.

[7] After the third meeting, Mr Stockman accessed the third party’s private email account. To be specific, and quoting from his complaint, Mr Stockman:

... accessed [the third party’s] email account ... All this was reasonably innocuous until I accessed private email correspondence from [Ms Galvin] to [the third party] in the couple of days following our joint “mediation” session.

[8] The emails comprised an email from Ms Galvin, a response from the third party, a further email from Ms Galvin and another response from the third party. Mr Stockman annexed copies of the four emails as Appendix C to his complaint.

[9] On receipt of the complaint, the Association sought a response from Ms Galvin. Ms Galvin’s response was provided to the Association in September 2011 and comprised a letter from counsel for Ms Galvin to the Association dated 20 September 2011, a personal response from Ms Galvin and various other supporting documents.² In his letter, counsel for Ms Galvin referred to the emails on several occasions. Also, in the personal response to which I have referred, Ms Galvin acknowledged that she had sent and received the emails.

[10] Despite these acknowledgements Ms Galvin, through her counsel, objected to production of the emails. She contended that they were confidential communications and that neither sender nor recipient consented to their use. Ms Galvin also objected on the basis that Mr Stockman had procured the emails “unlawfully ... in breach of confidence”, submitted that the emails were irrelevant to the complaint because they were sent after counselling had concluded and submitted

² At the hearing of this matter I disclosed to Mr Stockman and counsel that Dr Gerald Maclaurin, who had written one of those supporting documents, is known to me. Neither Mr Stockman nor counsel objected to me determining the case and I saw no impediment to me doing so.

that, even if relevant, they would constitute a breach of Ms Galvin's right to natural justice because (paraphrasing) she was unable to disclose all relevant information.

[11] The Association referred the issue to its legal advisor. On 22 December 2012 the Association advised the parties of the decision, in the following terms:

The Initial Assessment Group has received an opinion from its barrister that the emails ... should not be admitted into the complaints process on the basis:

- (a) That the emails were obtained without the knowledge, consent or authority of either Ms Galvin or [the third party]; and
- (b) That as a matter of policy, the public interest of counsellors being able to communicate confidentially with clients outweighs the public interest of you being allowed to use [the emails] in your complaint.

[12] The Association did not disclose to Mr Stockman the opinion from counsel to which it referred.

[13] The Association asked Mr Stockman whether he wished to take his complaint further. If so, the Association proposed that he resubmit the complaint without referring to or attaching the emails. Alternatively the Association advised that the copy of the emails could be removed from the complaint.

[14] Mr Stockman declined to amend his complaint as the Association had proposed or to consent to the removal or exclusion of the emails. The Association then referred the complaint, without the emails, to its "Regional Ethics Team". Mr Stockman issued this proceeding and declined to participate in the Association's further consideration of the complaint. The Association completed its consideration of the complaint and imposed some sanctions upon Ms Galvin. I accept the submission of counsel for Ms Galvin that, in fact, the Regional Ethics Team considered the complaint but essentially that is a sub-committee of the Association and it is the Association which is subject to review.

Procedure

[15] Ms Susan Webb gave evidence on the Association's behalf, Ms Webb being the convener of the Association's Ethics Committee. Her evidence was to the following effect.

[16] The Association was registered as an incorporated society on or about 24 June 2007. It has approximately 2,500 members, all of whom are required to abide by the Association's Code of Ethics.

[17] The Constitution lists the objects of the Association. These include assisting clients to obtain services adequate to their needs and ensuring the establishment, maintenance and enhancement of professional standards.

[18] The Constitution vests management of the Association in an elected National Executive. Amongst other things the National Executive is required to appoint an Ethics Committee.³ That Committee is required to determine complaints against members "according to the rules established by the Ethics Committee, ratified by the National Executive and published by the [Association]" ("rules").⁴ The relevant iteration of the rules for the purpose of this proceeding is contained in a document, set out as a flowchart, referred to as "New Zealand Association of Counsellors Professional Codes and Guidelines Complaints Process".⁵

[19] The rules are general in nature. They are informative as to the general process by which a complaint is considered but they are not prescriptive. It is apparent from the rules that the procedure the Association will adopt to determine any given complaint will depend to some extent on the perceived gravity of that complaint.

[20] As I have said, the complaint was referred to the Regional Ethics Team ("Team"). This referral indicated that the complaint was perceived as one requiring determination and one which was unlikely to be resolved by correspondence alone. The rules anticipate that a complaint referred to the Team will require a meeting between the members of that Team and the complainant, and a separate meeting between the members of the Team and the member of the Association about whom the complaint has been made.

³ Constitution of New Zealand Association of Counsellors October 2010, r 11E1.

⁴ Ibid, r 11E3(a).

⁵ Affidavit of Susan Bridget Webb sworn 25 January 2013, at [8].

[21] The rules anticipate the possible outcomes from the Team's procedures. These are "the facilitation of resolution between the parties" and the identification of any necessary "remedial action". The Team may also refer the complaint to what is referred to as the Initial Assessment Group to consider whether further action may be required.⁶

Discussion

[22] There is no express provision in the Constitution or rules for exclusion of evidence filed with or in support of a complaint to the Association. The rules, such as they are, anticipate that a complaint will be considered and determined in its entirety but I do not place great weight upon that because the rules are so broad. It may be that in an appropriate case the Association does have power to exclude evidence filed in support of a complaint. That is a matter on which it is unnecessary for me to make any final statement. For present purposes I am willing to assume that the Association has power to exclude evidence if there is a proper basis for doing so.

[23] That said, I am satisfied that no proper basis for excluding the emails existed in this case and that the Association should not have excluded them as it did. I consider that it was unfair procedurally to exclude the emails and accordingly I am satisfied that a ground for review is made out.⁷ My reasons are as follows.

[24] First, there is no evidence that the third party has advised the Association that they assert confidentiality in the emails or that they object to their disclosure.

[25] Secondly, I am not satisfied that it is open to Ms Galvin to make a claim of confidentiality in respect of the emails. I accept that the emails were confidential to the third party. However, as I have said, there is no evidence that the third party has asserted that confidence or has objected to disclosure of the emails. Ms Galvin initiated the correspondence and I do not consider that it would be open to her to complain if the third party had shown the emails to Mr Stockman or had forwarded them to him. In its decision, the Association referred to the public interest that lies in

⁶ New Zealand Association of Counsellors Professional Codes and Guidelines Complaints Process, r 12B.

⁷ *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* [1998] NZAR 58 (CA) at 95.

a counsellor being able to communicate confidentially with a client. Such an interest may exist. In this case, however, the client has not asserted that interest. Moreover, one of Mr Stockman's complaints was that, in acting as she did, Ms Galvin breached her obligations to him.

[26] Thirdly, exclusion of the emails was largely pointless. Ms Galvin acknowledged that the emails had been sent. Moreover, Mr Stockman quoted some excerpts from Ms Galvin's emails in a different part of the complaint.

[27] To summarise, in my view it is for the Association to consider a complaint in its entirety, together with all evidence submitted in support of that complaint unless there is a proper basis for excluding the evidence. On the evidence before the Court I am not satisfied that there was a proper basis for exclusion in this case.

Relief

[28] Mr Stockman sought an order referring his complaint, with the emails, back to the Association for consideration. He submitted that the Association may have taken a different view of the complaint had it considered the emails in question.

[29] The Association and Ms Galvin opposed the grant of any relief, if a ground of review should be made out. They submitted that the complaint has now been addressed, that the Association has imposed some sanctions on Ms Galvin as a result of the complaint, and that no useful purpose would be served by making the order that Mr Stockman seeks.

[30] The fact of the emails, and their content, were a substantial part of Mr Stockman's complaint. It was Ms Galvin who took issue with the emails and it was her doing so which led to their exclusion. It is possible that the Association would have taken a different view of the complaint had the emails not been excluded and/or reached a different outcome. Given that, I propose to make the order Mr Stockman seeks. Any sanctions that have been imposed to date on Ms Galvin can be taken into account at a future time, if necessary.

[31] Counsel for Ms Galvin submitted that, if I were to grant relief, I should refer the matter back to the Regional Ethics Team. For the reason given above, I consider the appropriate course is to refer the matter back to the Association.

Name Suppression

[32] Mr Stockman sought suppression of his own name and those of the third party. I make an order suppressing the publication of the identity of the third party, and it is the need for such suppression that has led me to refer to them in the manner in which I have. I do not consider there is any basis for making an order for suppression of publication of Mr Stockman's name.

Costs

[33] In his submissions to me Mr Stockman sought an award of costs in his favour and also submitted that this was an appropriate case for an award of increased costs.

[34] Mr Stockman acknowledged that, as a general rule, a lay litigant is not entitled to costs, although may recover disbursements.⁸ However, he submitted that this was an appropriate case for an award of costs because his application for review arose from a sense of moral duty and concern for public welfare.

[35] Mr Stockman referred me to *Re Collier* which is to the effect that the Court may make an award of costs in favour of a lay litigant in exceptional circumstances. In that case, the Court of Appeal said that one such circumstance might be if a proceeding has been brought "without hope of any personal gain or advantage, but purely out of the concern for the welfare of the general public".⁹

[36] In *Re Collier* the Court gave two examples of when such an award might be appropriate. In the first, the plaintiff had challenged the validity of the 1946 general election.¹⁰ In the second the plaintiff had challenged the validity of a policy

⁸ *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 311at [7].

⁹ *Re Collier (A Bankrupt)* [1996] 2 NZLR 438 at 441.

¹⁰ *Simpson v Attorney-General* [1955] NZLR 271.

announcement purporting to dispense with the provisions of unrepealed superannuation legislation.¹¹

[37] I am not satisfied that Mr Stockman's application for review falls within those exceptional categories of case and I decline to make any award of costs in his favour. I do, however, allow Mr Stockman his disbursements in the proceeding, as those are defined in High Court Rules, r 14.12. Those disbursements are to be paid by the Association. If the disbursements cannot be agreed they are to be referred to the Registrar for resolution.

Result

[38] I remit the complaint back to the Association for consideration in accordance with this judgment.

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M Peters J

¹¹ *Fitzgerald v Muldoon* [1976] 2 NZLR 615.