

**LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE**

[2020] NZLCRO 72

Ref: LCRO 144/2018

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

BG

Applicant

AND

NH

Respondent

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

Introduction

[1] Mr BG has applied for a review of the determination by (City) Standards Committee (X) with regard to the complaints lodged on his behalf by his uncle, Mr EM.

[2] The Committee made a finding of unsatisfactory conduct against Mr NH for breach of r 14.4 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) by accepting instructions direct from Mr BG.

[3] In his application for review Mr BG seeks “an independent investigation and appropriate actions as per the misconduct”.

Background

[4] Mr NH is a barrister sole. In 2017 he accepted instructions direct from Mr BG to defend Mr BG against a charge of theft and to assist him with immigration matters.

[5] With regard to the criminal charge, Mr NH unsuccessfully sought a discharge without conviction for Mr BG.

[6] With regard to immigration matters, Mr NH was unsuccessful in his submission to Immigration New Zealand in support of Mr BG's application for a work visa.

[7] Mr BG returned to India.

[8] In September 2017 Mr NH received a letter from Mr EM which complained about the quality of Mr NH's representation of Mr BG in all respects.

[9] The letter concluded:

We believe that you have not only charged excessive unacceptable fees from Mr BG and at the same time totally misrepresented Mr BG and above all not adhered to your obligations as set out in the Rules of Conduct and Client Care for Lawyers.

[10] Mr NH communicated with Mr EM. He did not accept any of the complaints raised.

[11] Mr EM's response¹ included the following statement / comment:

Mr BG has stated that he had paid you approximately \$1,500 in total. This amount of refund can be accepted only if you accept the mistakes highlighted and issue a letter in this regard i.e. poor service apology letter.

This can potentially assist Mr BG when he reapplies to Immigration NZ.

[12] In his response,² Mr NH again denied all of the allegations but offered to refund the sum of \$1,500 to Mr BG.

[13] Mr BG declined the offer. On his behalf, Mr EM sought a 'substantive' response from Mr NH to the matters raised.

[14] Mr NH declined. In his final email to Mr EM he said:³

I would strongly advise that Mr BG should understand the reality that he can't use a lawyer's shoulder to prove his bona fide with any authority.

¹ Dated 26 September 2017.

² Mr NH, email to Mr EM (1 October 2017).

³ Mr NH, email to Mr EM (17 October 2017).

[15] Mr BG's complaint (made on his behalf by Mr EM) to the Lawyers Complaints Service (copied to the New Zealand Bar Association), followed, on 23 October 2017.

[16] The outcome sought by Mr EM on behalf of Mr BG was:⁴

Written apology of poor service rendered to Mr BG;

Letter confirming that applications were lodged with Immigration NZ as advised by Mr NH

Compensation for subjecting Mr BG through poor service causing mental harassment, financial loss and jeopardising his future in New Zealand.

The Standards Committee determination

[17] The Standards Committee identified the following issues to be addressed arising out of Mr BG's complaints:⁵

- (i) Whether Mr NH failed to act competently in respect of Mr BG's legal matters, including, failure to provide appropriate advice to Mr BG and/or failure to provide accurate information to Immigration New Zealand (INZ), and if so, whether he breached Rule 3 of the RCCC;
- (ii) Whether Mr NH misled or deceived the court when he advised in an application for a discharge without conviction that Mr BG held a partnership visa when he knew that this was incorrect, and if so, whether he breached Rule 13.1 of the RCCC;
- (iii) Whether Mr NH had an instructing solicitor and if not, whether he breached Rule 14.4 of the RCCC; and
- (iv) Whether Mr NH failed to charge a fee that was fair and reasonable in breach of Rules 9 and 9.1 of the RCCC.

[18] The Committee considered the steps taken by Mr NH with regard to the criminal charge and correspondence with Immigration New Zealand. It said:⁶

Looking at the matter as a whole, the Standards Committee considered that Mr NH acted in accordance with Mr BG's instructions and had no concerns about his competence.

[19] Mr NH initially sought diversion for Mr BG because the amount involved in the theft was small (\$180.72). The Committee noted:⁷

This request was rejected by the police prosecutor. Mr BG subsequently pleaded guilty and Mr NH advised that, on instruction, he applied for a discharge without conviction.

⁴ Complaint form (23 October 2017) at part 6.

⁵ Standards Committee determination (21 June 2018) at [6].

⁶ At [7].

⁷ At [8].

[20] The Committee also noted:⁸

Mr BG ... raised a number of concerns about the requests that Mr NH made to INZ on Mr BG's behalf.

He considered that there were:⁸

... contradictions in [the requests made by Mr NH] ... and asserted that, despite knowing that Mr BG was not in possession of a valid visa, Mr NH made several "*baseless claims/ applications*" with inaccurate information.

[21] In response "Mr NH advised that he acted on instructions from Mr BG and that whatever was included in the section 61 request was based on those instructions".⁹

[22] "The Standards Committee acknowledged the emotional distress associated with Mr NH's immigration status. However, on the basis of the information it ... received and reviewed, it did not consider there was evidence to indicate that Mr NH's actions had any detrimental impact on Mr BG's future in New Zealand."¹⁰

[23] The Committee determined to take no further action in respect of the legal advice provided by Mr NH with regard to both the criminal and immigration matters.

Misleading/deceiving the Court

[24] With regard to this issue Mr NH "explained that his use of the words 'partnership visa' in paragraph 17 of the application for discharge without conviction was a mistake".¹¹

[25] "The Standards Committee accepted Mr NH's explanation. There did not appear to be any intention on his part to mislead or deceive the court. Paragraphs 14, 15, and in fact the majority of paragraph 17 (except for the first sentence that uses the words 'partnership visa') of the application for discharge without conviction set out Mr NH's intention – to explain that Mr BG did not hold a visa and that his partner was eligible to support his application for a resident class visa under the partnership category."¹²

⁸ At [11].

⁹ At [12].

¹⁰ At [13].

¹¹ At [16].

¹² At [18].

No instructing solicitor

[26] “The Standards Committee concluded that Mr NH acted inappropriately in accepting direct instructions from Mr BG, in breach of rule 14.4 of the RCCC. Accordingly, the Standards Committee **determined**, pursuant to s 152(2)(b) of the Act, that there had been unsatisfactory conduct on the part of Mr NH pursuant to s 12(c) of the Act.”¹³

Fees

[27] Mr NH charged Mr BG the sum of \$1,500 for his services. As the fee was less than \$2,000 the Committee declined jurisdiction to consider the complaint about fees.¹⁴

[28] It noted however, “that if it did have jurisdiction to consider the fee then the amount charged by Mr NH did appear fair and reasonable for the level of service provided to Mr BG”.¹⁵

Orders

[29] With regard to the finding of unsatisfactory conduct against Mr NH for accepting instructions direct from Mr BG, the Committee ordered him to pay the sum of “\$500 for costs and expenses incidental to the inquiry and the hearing on the papers”.¹⁶

Mr NH’s application for review

[30] Mr BG’s application for review was supported by reasons provided by Mr EM. Mr EM submits that the Standards Committee has not “handled the issues raised fairly and independently. They have not followed the issues raised as per the sequence of events”.¹⁷

¹³ At [23].

¹⁴ Pursuant to reg 29(b) of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008,

¹⁵ Standards Committee determination at [26].

¹⁶ At [28].

¹⁷ Application for review, supporting reasons at [2].

[31] He says:

1. The fact that Mr NH did not have an instructing solicitor should have been dealt with by the Committee as the “first point”. It was the first point in Mr EM’s letter to Mr NH of 21 September 2017.¹⁸
2. The Committee failed to understand all of the issues raised in the complaint and “simply summarised all the issues highlighted under 4 points”.¹⁹
3. The Committee had “failed to accept that by not letting [Mr BG] know how to complain and by not dealing with [his] complaint promptly and fairly Mr NH had actually breached one of the rules based on fundamental obligations of lawyers, which are set out in s 4 of the Lawyers and Conveyancers Act 2006.”²⁰
4. The Committee paid no attention to the (acknowledged) fact that Mr NH had appeared in court for Mr BG in March and June 2017 and therefore was not permitted to continue without an instructing solicitor.
6. The “...Committee failed to consider all the issues of concern that were raised”.²¹
7. If the Committee had considered all of the material supplied it would not have reached the decision it came to.
8. Mr NH had failed to honour his commitments as set out in his terms of engagements such as his commitment to attend to affairs diligently.

[32] Mr EM also submitted that Mr NH had breached “one of the rules based on fundamental obligations of lawyers ... set out in s 4 of the Lawyers and Conveyancers Act 2006:

...whatever legal services your lawyer provides he or she must let you know how to make a complaint and deal with any complaint promptly and fairly.

He considers the Committee has failed to address that issue at all.

¹⁸ Mr EM refers to this point again in paragraph 10 of his letter providing supporting reasons for the application for review, noting that Mr NH had, by the time of his response to the complaint, appeared for Mr BG in the District Court.

¹⁹ Supporting reasons at [6].

²⁰ At [8].

²¹ At [13].

Review

Legal advice

[33] Mr EM's letter to Mr NH prior to the complaint²² raised dissatisfaction in some detail with Mr NH's advice and actions with regard to immigration matters.

[34] That letter was attached to, and formed part of, the complaint.

[35] It would seem that Mr NH responded by telephone to Mr EM, and in the following letter from Mr EM to Mr NH²³ he does not refer further to immigration matters, other than to assert that Mr NH had presented inaccurate information to Immigration New Zealand.

[36] The Committee did not consider that Mr NH's advice with regard to the immigration matters lacked competence.²⁴

[37] Mr NH's advice on immigration matters is not referred to in the reasons provided in support of the application for review. The emphasis in the application is on the fact that Mr NH acted without an instructing solicitor, and that he had not given Mr BG information about how to complain.

[38] There is little that can be said about the specific questions on immigration matters raised by Mr EM in his letter of complaint to Mr NH.

[39] The majority of matters raised in the letter of 21 September 2017 took the form of direct questions to Mr NH. It is not the role of a Standards Committee or this Office, to interrogate Mr NH about his knowledge of immigration matters and Mr NH has said that his correspondence with Immigration New Zealand was approved by Mr BG.

[40] The determination of the Standards Committee in this regard is confirmed.

No instructing solicitor

[41] In the application for review Mr BG (Mr EM) places considerable emphasis on the fact that Mr NH did not have an instructing solicitor.

[42] In response to the complaint,²⁵ Mr NH advised that Mr BG approached him directly and requested that he represent him with regard to the criminal proceedings.

²² Dated 21 September 2017.

²³ Mr EM, letter to Mr NH (26 September 2017).

²⁴ Standards Committee determination at [13].

[43] Mr NH says that he advised Mr BG that he was required to have an instructing solicitor, his fee would be \$3,500, and he required that amount to be deposited in the instructing solicitor's trust account before proceeding.

[44] He says that Mr BG told him that he was unable to pay that amount and that he "believe[d] that by taking direct instructions, [he] acted in the best interests of Mr BG and [that Mr BG] was fully aware that [he was] taking direct instructions from him".

[45] The Committee made a finding of unsatisfactory conduct against Mr NH in respect of this issue and in considering the appropriate orders to make, the Committee took into account the fact that Mr NH had since been approved by the New Zealand Law Society to accept instructions direct.²⁶

[46] Mr NH's response to the complaint is contradictory in that he initially says²⁷ there was an "understanding that no money shall be received in advance." In this regard, he is referring to the fact that he received no payments from Mr BG before he sought diversion on Mr BG's behalf. However, he advises²⁸ that he received \$800 from Mr BG on 3 March 2017, \$500 on 13 March 2017, and the balance of \$200 subsequently (invoiced 12 June 2017 – date of payment unclear).

[47] The majority (if not all) of his fee had therefore been paid in advance of his appearances in Court for Mr BG on 24 March and 29 June.

[48] One of the purposes of the rule is to protect client funds. This is achieved by virtue of the fact a solicitor has a trust account. A barrister does not and so any money paid by Mr BG in advance of services being provided was unprotected.

[49] Whether or not Mr BG was aware that Mr NH was acting without an instructing solicitor, does not release Mr NH from the requirements of r 14.4.

[50] The definition of 'misconduct' in s 7 of the Lawyers and Conveyancers Act 2006 includes a 'wilful or reckless' breach of the rules. Mr NH was clearly aware he was breaching the rules.

[51] In the text *Ethics, Professional Responsibility and the Lawyer* the authors state:²⁹

...the starting place must be that any breach of rules is a matter for concern.

²⁵ Mr NH, letter to Lawyers Complaints Service (28 November 2017).

²⁶ That does not include an ability to take instructions direct to act in a criminal matter.

²⁷ Issue 3 at point (iii).

²⁸ At (vii).

²⁹ Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at 105.

[52] A clear breach of the rules cannot be allowed to pass without some penalty being imposed. All lawyers are obliged to abide by the Rules and Mr NH cannot make his own decisions as to whether or not there are circumstances which he thinks justify not doing so.

[53] In the circumstances it is appropriate that a 'nominal' fine be imposed. Section 156(1)(i) of the Lawyers and Conveyancers Act 2006 enables a Standards Committee (and this Office by virtue of s 211(1)(b) of that Act) to impose a fine not exceeding \$15,000. A fine of \$500 is therefore 'nominal'.

[54] Pursuant to the sections referred to in the preceding paragraph, Mr NH is ordered to pay the sum of \$500 to the New Zealand Law Society by way of a fine, to mark Mr NH's breach of the rule.

[55] The order for payment of costs imposed by the Standards Committee is confirmed.

Client information

[56] The next issue referred to by Mr EM in the application for review, is the failure by Mr NH to include in his terms of engagement, information as to how to make a complaint. Mr EM says that the Standards Committee "failed to consider the issue totally".

[57] He is correct in this regard in that it is not one of the four issues addressed by the Committee. However, in response to a direct request from the Lawyers Complaints Service,³⁰ Mr EM provided the terms of engagement issued by Mr NH which comprise seven pages. On page 6 (at paragraph 4) there is a section headed 'complaints' which contains the information required by the rules.

[58] This aspect of Mr BG's complaint and review is therefore unsupported.

Fees

[59] The Standards Committee declined to consider Mr BG's complaint about Mr NH's fee as it was less than \$2,000. The Committee could not discern any 'special circumstances' to negate the effect of regulation 29(b).³¹

³⁰ Dated 26 October 2017.

³¹ Standards Committee determination at [25].

[60] Mr BG has not referred to his complaint about Mr NH's fees in the application for review, but it is appropriate to specifically confirm the determination of the Committee to decline jurisdiction pursuant to reg 29(b) of the regulations.

Summary

[61] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination of the Standards Committee is confirmed, but modified by the imposition of the fine of \$500 pursuant to s 156(1)(i) of the Act.

[62] This amount is to be paid to the New Zealand Law Society on the same basis as the costs order imposed by the Committee as set out in [29] of its determination.

DATED this 26th day of May 2020

O 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 BG as the Applicant
Mr NH as the Respondent
Mr EM as the Applicant's Representative
(City) Standards Committee (1)
New Zealand Law Society