

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

[2021] NZLCRO 049

Ref: LCRO 163/2020

CONCERNING

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

AND

CONCERNING

a decision of the [Area] Committee [X]

BETWEEN

DM

Applicant

AND

TN and EX

Respondents

DECISION

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

Introduction

[1] Mr DM has applied to review a decision by the [Area] Standards Committee [X] dated 14 July 2020, in which the Committee decided to take no further action on his complaints against his former lawyers Messrs TN and EX.

[2] The Committee's decision was made pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act). This section allows a Committee to take no further action on a complaint if it considers that further action would be unnecessary or inappropriate.

Background

[3] Between 20XX and June 20XX, Mr DM was employed by [ABC] New Zealand Ltd ([ABC]) and its predecessor.

[4] In February 20XX and during 20XX, Mr DM suffered workplace injuries, for which he was prescribed medication.

[5] Medical advice in relation to pain medication prescribed to Mr DM was that he should not drive commercial equipment or operate heavy machinery. Both were part of Mr DM's employment duties.

[6] In June 20XX, Mr DM was dismissed from his employment on grounds of medical unfitness.

[7] Mr DM consulted a Ms Z, a former lawyer then practising as an employment advocate, for advice about his dismissal.

[8] After learning that Ms Z was unwell and no longer working, in October 20XX Mr DM instructed Mr TN to act in a personal grievance against [ABC].

[9] In July 20XX, Mr TN referred Mr DM to Mr EX, because Mr TN was no longer doing work on legal aid.

[10] Through Mr EX, on 30 July 20XX, Mr DM applied to the Employment Relations Authority (the Authority) for leave to lodge notice of a personal grievance against [ABC], out of time (the leave application).¹

[11] The Authority heard the leave application during November and December 20XX and on X March 20XX, issued a determination declining to grant Mr DM leave to lodge notice of his personal grievance against [ABC], out of time.²

¹ Notice of a personal grievance must be given within 90-days of the relevant event (s 114(1) of the Employment Relations Act 2000). Pursuant to s 114(3) of that Act, the Employment Relations Authority may grant leave to bring a personal grievance outside the 90-day period.

² *DM v [ABC]* [20XX] NZERA XXX. Mr DM was represented by another lawyer in the leave application before the Authority, because Mr EX was a witness in the case.

Complaint

[12] Mr DM lodged his complaint about the conduct of Ms Z and Messrs TN and EX, in an email to the New Zealand Law Society Complaints Service (Complaints Service) dated 12 March 2020. He said:³

- (a) He had lost his job in June 20XX. After speaking to a lawyer in [City1], he was referred to Ms Z in [City 2] to act for him in a claim against his employer.⁴
- (b) Ms Z failed to lodge the notice of personal grievance and Mr DM was unable to contact her.
- (c) After learning that Ms Z had become unwell and was no longer practising and on the recommendation of the [City 1] lawyer, Mr DM spoke to Mr TN believing that he undertook work on legal aid.⁵
- (d) After a period of time, Mr TN told Mr DM that he was no longer doing legal aid cases, and referred him to Mr EX.⁶
- (e) Mr EX told Mr DM that because he was outside the 90-day period, he would need to file a leave application. He told Mr DM that this process could take as long as 12 months.
- (f) 18 months later Mr DM had not heard from Mr EX, and he discovered that Mr EX had not lodged the leave application with the Authority.⁷
- (g) Eventually, over two years after he first spoke to Mr EX, the Authority considered the leave application. However, it declined to grant leave because of the length of time that had elapsed.

[13] Mr DM said:

[F]rom start to finish it's over five years and the three solicitors have not done the job they were asked to do in good enough time. So I want to make a complaint about all three of them.

³ Because Mr DM is uncertain about the dates of some events, I have inserted those dates by reference to the Authority's determination which was reached after hearing evidence from relevant witnesses (including Mr DM), and which has not been appealed.

⁴ This was very soon after Mr DM had been dismissed from his employment and within the 90-day period.

⁵ This was in early October 20XX, a matter of some two weeks after the expiration of the 90 day period for giving notice of a personal grievance.

⁶ This was in approximately mid-20XX.

⁷ Mr EX lodged Mr DM's leave application with the Authority in July 20XX.

[14] The Complaints Service wrote to Mr DM and informed him that Ms Z had ceased practice as a lawyer in 20XX, and that there was “no jurisdiction in respect to her.” It requested further information from Mr DM about his dealings with Messrs TN and EX, which Mr DM provided.

Standard Committee processes

[15] Mr DM’s complaint was initially assessed as being suitable for the Complaints Service’s Early Resolution Process (ERP).

[16] That procedure involves a Standards Committee conducting an initial assessment of a complaint and forming a preliminary view as to outcome.

[17] If the Committee’s preliminary view is that the complaint appears to lack substance, a Legal Standards Officer (LSO) will contact the respondent lawyer and inform them of the Committee’s preliminary view, inviting a response from the lawyer.

[18] Any response is included in a file note, described as a “Call Log”, prepared by the LSO and provided to the Committee, which then completes its inquiry into the complaint.

[19] On 14 July 2020, the LSO spoke separately to Messrs TN and EX and informed them of the Committee’s preliminary view about Mr DM’s complaint. Both told the LSO that they were “willing to provide any information the Standards Committee required.”⁸

[20] The matter was then referred to the Committee for further consideration.

Standards Committee decision

[21] The Committee identified the issue to consider as being whether either lawyer had breached any of their professional obligations.⁹

[22] The Committee held that by the time that Mr DM had instructed the lawyers, the 90-day period for raising a personal grievance under the ERA, had expired. It noted that in order to proceed with a personal grievance, either [ABC] had to consent to the delay, or the Authority had to grant leave.¹⁰

⁸ From the ERP Call Log.

⁹ Standards Committee decision at [21].

¹⁰ At [22].

[23] The Committee observed that because [ABC] did not consent to the delay, that question fell to the Authority to determine. Ultimately, the Authority concluded that leave should not be granted largely on the basis that Mr DM had substantially contributed to the delays.

[24] Turning to consider whether the lawyers had also contributed to the delays in a way which raised professional conduct issues, the Committee referred to the Authority's conclusions and held that "it is not possible to determine what part of the delay might be attributable to either Mr TN or Mr DM."¹¹

[25] For that reason, the Committee held that there was "no clear evidence of either Mr TN or Mr EX being in breach of the Act or the [Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules)]". It said that a disciplinary finding against a lawyer required "a solid evidential basis to support it", and the lack of clarity around instructions and communications meant that there was insufficient evidence upon which to base a disciplinary finding against the lawyers.¹²

Review Application

[26] Mr DM filed his application for review on 14 August 2020. He said:

I am asking the LCRO to review the [Committee's] decision against the two lawyers who were working on my case for a combined [total] of three and a half years to get me leave to appeal. ... Another lawyer I asked said he could have got me leave to appeal in three months.

[27] Expanding on that, Mr DM said:

- (a) Mr TN told him that he had a good case against his employer but that because the time had expired for giving notice of a personal grievance, it was necessary to file a leave application with the Authority.
- (b) After 12 months Mr DN told Mr DM that he was no longer doing legal aid cases, and so he referred Mr DM to another lawyer (Mr EX).
- (c) Mr TN should have been able to lodge the leave application with the Authority, within that 12 month period.
- (d) Mr EX said that it can take up to 12 months to get leave from the Authority.

¹¹ At [29].

¹² At [31].

- (e) After six months Mr DM phoned Mr EX about progress and was told that Mr EX “had not got word back yet”. Six months later, again after Mr DM had telephoned Mr EX, Mr EX gave the same response and said that he would contact Mr DM as soon as he heard anything.
- (f) Five months later Mr DM spoke to Mr EX about losing his firearms licence. Mr EX said he could assist, but two weeks later Mr DM instructed another lawyer in [City 1] on that matter, and informed Mr EX.
- (g) Three months later Mr DM telephoned Mr EX about the personal grievance asking for an update. Mr EX said that Mr DM had told him to stop working on the matter. Mr DM said that this was only in relation to the firearms licence issue.
- (h) Mr EX said that he would start work again on the leave application. Two years later the Authority dealt with the matter and declined leave.

[28] Mr DM also attached a copy of the Authority’s leave determination, together with relevant comments about that decision.

Response by the lawyers

Mr TN

[29] In an email to the Case Manager dated 17 September 2020, Mr TN said that “the original Standards Committee decision and the [Authority’s] determination are self-explanatory.”

Mr EX

[30] In an email to the Case Manager dated 18 September 2020, Mr EX said:

- (a) He supported the Committee’s decision.
- (b) As he was a witness in the leave application before the Authority, Mr DM was represented by another lawyer.
- (c) He was first approached by Mr DM “shortly after 30 June 20XX, some 23 months after his dismissal in June 20XX. [By that time] Mr DM had been represented by [Ms Z], he had sought advice from an employment lawyer [at a law firm] and had been represented by [Mr TN].”

- (d) He found it difficult communicating with Mr DM, and believed that he had been instructed by him to stop work on the leave application.
- (e) In all other respects, Mr EX relied on the Authority's determination.

Review on the papers

[50] This review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

[51] In anticipation of that process being followed, on 8 October 2020 the parties were given an opportunity to make submissions as to whether they wished Mr DM's review application to proceed by way of a hearing in person, or a hearing on the papers.

[52] None of the parties made any submissions.

[53] On 11 November 2020 the Case Manager informed the parties that the review application would be dealt with on the papers.

[54] I record that having carefully read the complaint, the response to the complaint, the Committee's decision and the submissions filed in support of and in opposition to the application for review, there are no additional issues or questions in my mind that necessitate any further submission from either party.

[55] On the basis of the information available, I have concluded that the review can be adequately determined on the papers and in the absence of the parties.

Nature and scope of review

[56] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:¹³

... 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" ...

¹³ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

... 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.

[57] More recently, the High Court has described a review by this Office in the following way:¹⁴

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.

[58] 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.

Discussion

[59] I agree with the Committee's identification of the issues to be considered, as being whether either or both of Messrs TN and EX breached ethical or professional obligations owed to Mr DM as his lawyer.

[60] The following are specifically engaged: r 3 of the Rules, and s 12(a) of the Act.

[61] Respectively, they provide:

3 In providing regulated services to a client, a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.

12(a) [Unsatisfactory conduct means] conduct of the lawyer ... that occurs at a time when he ... is providing regulated services and is conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

¹⁴ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

Analysis

[62] Based upon the documents that Mr DM gave to the Complaints Service as part of his complaint, the following seems to have occurred in relation to his personal grievance claim:

- (a) Mr DM was dismissed from his employment in mid-June 20XX.
- (b) He promptly engaged Ms Z, then an employment advocate (albeit a former lawyer).
- (c) Ms Z was encouraging about the strength of a personal grievance, and spoke to Mr DM about the 90-day time limit for giving notice of that.
- (d) Arguably, the 90-day period expired in mid to late September 20XX.
- (e) By then, Ms Z had not taken any steps and Mr DM was unable to contact her.
- (f) Mr DM spoke to a lawyer on 25 September 20XX. That discussion revealed that Mr DM required legal aid. Because that lawyer did not do legal aid work, she referred Mr DM to Mr TM.
- (g) Mr TN and Mr DM met sometime between 25 September and 9 October 20XX.
- (h) Mr TN contacted [ABC] on 9 October 20XX saying he had “instructions to act for [Mr DM] in relation to his personal grievance”, and made request for Mr DM’s personnel file.
- (i) Mr TN also made a request of Ms Z on 9 October 20XX, to forward Mr DM’s file.
- (j) By then, the 90-day period for giving notice of a personal grievance, had arguably expired.
- (k) On 13 October 20XX, [ABC] told Mr TN that in its view, the 90-day period had expired. Mr TN responded on the same day saying “the 90-day issue (if in fact it is one) is separate to my request [for Mr DM’s personnel file].”
- (l) Mr TN referred Mr DM to Mr EX in June 20XX.
- (m) Mr EX wrote to [ABC] about Mr DM’s personal grievance, in August 20XX.

[63] As well as a potential personal grievance against [ABC], Mr DM was also involved in proceedings with ACC in connection with his injuries. He discussed this with Mr TN, who indicated that Mr EX could act on that matter as he had some expertise in it. Those discussions appear to have taken place during the middle part of 20XX.

[64] It is not entirely clear from the material before me what steps, if any, Mr TN took in relation to the personal grievance between October 20XX and June 20XX.

[65] In a handwritten file note dated 20 October 20XX, Mr TN has recorded the following:

Advised [Mr DM] that still a problematic PG in any event, and further delay would be problematic but the ACC claim is important and we should not jeopardise that. Also advised I am (or will) not be a legal aid provider in a month's time.

[66] Mr DM telephoned Mr TN's office on 1 April 20XX and spoke to the receptionist. The receptionist sent an internal email to Mr TN, as follows:

[Mr DM] called – he lost ACC case. Can you please go ahead on his work claim (he said you know what it's about). Please [telephone him] if required.

[67] Mr TN and Mr DM met on 21 June 20XX. Mr TN's file note of that meeting says:

[I am] no longer doing legal aid so [Mr DM] happy for me to talk to [Mr EX] about taking over the file. [Mr DM] still on a health benefit so will need legal aid.

[68] On 30 June 20XX, Mr TN emailed Mr EX asking whether he would be prepared to act for Mr DM on legal aid in relation to the personal grievance. On 1 July 20XX Mr TN forwarded Mr DM's file, to Mr EX.

[69] On 30 August 20XX, Mr EX wrote to [ABC] and, amongst other things, appears to have given notice of Mr DM's personal grievance.¹⁵

Authority's determination

[70] The Authority's determination may be supplemented to the material provided by Mr DM. As I have earlier observed, the Authority heard evidence on key events, including from Mr DM and Mr EX.

¹⁵ Only the first page of that letter has been supplied by Mr DM. I anticipate that Mr EX asked [ABC] to agree to an extension of the 90-day notice period. It is clear that [ABC] did not agree, because Mr EX lodged the leave application with the Authority in July 20XX.

[71] In summary, the Authority held:

Mr TN

- (a) Mr TN is referred to as “Lawyer C”.
- (b) Mr DM met with Mr TN on perhaps no more than two occasions; before 9 October 20XX and after [ABC] had forwarded Mr TN Mr DM’s personnel file.
- (c) “There was no evidence of [Mr TN] ever writing to or making calls to Mr DM or emailing him via his daughter.”
- (d) Mr TN informed Mr DM in June 20XX that he no longer did legal aid work.¹⁶
- (e) There is no evidence of Mr TN having applied for legal aid on Mr DM’s behalf before then.
- (f) “[Mr TN] did not give evidence. There was reference in correspondence to his file being passed on to Mr EX but documents which one might expect to see, such as notes of a meeting or phone calls with Mr DM, were not included.”

Mr EX

- (g) Mr EX informed [ABC] in September 20XX that Mr DM had been granted legal aid.
- (h) [ABC] did not respond to Mr EX’s request for them to consent to Mr DM lodging his personal grievance outside the 90-day time limit.
- (i) Mr EX did not follow up with [ABC] about that.
- (j) “At some point, possibly much later, Mr EX also had a discussion with Mr DM about working for him on a firearms matter Mr DM decided to engage a specialist in that area and told Mr EX to stop working on his claims. Mr EX took that to mean the firearms and employment matters. He closed his files. Mr DM says his intention was that Mr EX only stop on the firearms matter.”

¹⁶ The Member was not able to establish when Mr TN told Mr DM that he no longer did legal aid work, but from Mr TN’s file note, referred to by me at [67], it is clear that this discussion took place in June 20XX.

- (k) Mr EX said that he had a grant of legal aid to Mr DM on the personal grievance matter, so there was no reason for him not to pursue that. He would not have closed that file unless instructed by Mr DM to do so, and that was his belief.
- (l) The Member held that as part of the firearms discussion, Mr DM instructed Mr EX “to drop all his work.”
- (m) There were some brief telephone discussions between the two men during 20XX and 20XX, culminating in Mr DM confirming instructions to pursue the personal grievance. Legal aid was granted for this. The application for leave was filed.

Mr DM’s evidence before the Authority.

[72] In relation to Mr DM’s evidence, the Authority described it as “[problematic] in a case where there was only modest documentary evidence and Mr DM’s intent on pursuing his grievance is at issue.”¹⁷

[73] However, the Authority held that, following his dismissal, Mr DM “acted promptly” and gave instructions “to take the case to court”, which Ms Z said she would do. The Authority’s conclusion was that “Mr DM made reasonable arrangements to have [Ms Z] ... pursue his personal grievance claim.”¹⁸

[74] The Authority also noted that there was a period of some four years and 10 months between the expiration of the 90-day notice period, and the leave application being lodged.

[75] The Authority held:

[89] I am not satisfied that the long period between the expiry of the 90 days and the filing of this case can be adequately explained in a way that is not at least partially Mr DM’s responsibility. I do accept that there were other causes for parts of the period, including the need to apply for legal aid.

[90] However, there were extended periods, sometimes seemingly of more than a year, when Mr DM made no attempt to contact [Mr TN] or Mr EX. Although Mr DM’s knowledge of legal processes does not appear high, it should have been apparent to him that despite his wish to take [ABC] to court the case had not reached court despite years having passed.

...

¹⁷ At [51].

¹⁸ At [72]–[78].

[92] There were also aspects of the evidence which suggest that Mr DM had simply decided he had had enough of lawyers or legal processes. I cannot be satisfied that at all material times Mr DM was intent on pursuing his claim.

[76] I now turn to consider the conduct of Messrs TN and EX in the light of the above factual findings, measuring it against r 3 of the Rules and s 12(a) of the Act.

Mr TN

[77] I accept that Mr TN moved reasonably swiftly once instructed by Mr DM. He made prompt requests for Mr DM's personnel file and other relevant information, including making enquiries of a medical practitioner who had examined Mr DM at the request of [ABC].

[78] I am however troubled by what appears to have been a complete lack of any proactive steps being taken between October 20XX, and July 20XX when the file was passed to Mr EX.

[79] I use the word "file" with a degree of circumspection, because I share the Authority's view that there was, in fact, a distinct lack of any meaningful file to reflect a retainer of, by then, some 20 months.

[80] The Authority was unable to make any real findings about that period of time, because Mr TN did not give evidence before it. As well, the Authority did not find Mr DM's evidence about that (or any other) period of time, particularly helpful.

[81] But the reasonably stark feature of Mr TN's retainer is the lack of a meaningful file, and the lack of any progress.

[82] For example, although Mr TN passed the matter over to Mr EX at the end of June 20XX because he (Mr TN) no longer did legal aid work, there is no evidence of Mr TN ever having applied for legal aid on Mr DM's behalf.

[83] Amongst the very brief material that was on the file sent by Mr TN to Mr EX, were intra-office emails between Mr TN's receptionist and Mr TN, recording telephone messages that she had taken from Mr DM. Some of these make reference to Mr DM's ACC case, in which Mr EX was acting for Mr DM.

[84] As well, there is an email from Mr TN to (I assume) Mr DM's daughter referring to an unsuccessful attempt by Mr TN to telephone Mr DM, and a request for Mr DM to call him instead.

[85] Mr DM obviously telephoned Mr TN on 17 September 20XX (some 11 months after Mr TN was first instructed), inquiring about a legal aid form that he had filled out with Mr TN. There is nothing on the file to indicate how Mr TN responded to that, or indeed whether that application had ever been processed.

[86] I have already referred to Mr TN's 20 October 20XX file note recording the details of the meeting he had with Mr DM during which he referred to the "problematic PG" and that "further delay would be problematic."

[87] Mr TN also told Mr DM at this meeting that he would no longer be doing legal aid work "in a month's time" (i.e. from November 20XX), yet it was not until 21 June 20XX that Mr TN formally indicated that he would ask Mr EX to take the matter over.

[88] There is also a reference to Mr DM speaking to Mr TN's receptionist on 1 April 20XX asking Mr TN to "please go ahead on his work claim", and leaving a cell phone number for Mr TN.

[89] I observe that as well as leaving that message on 1 April 20XX, Mr DM advised Mr TN's receptionist at the same time that he had "lost his ACC case." This was followed by the request for Mr TN to go ahead on the work claim.

[90] This appears to be related to the discussion that Mr TN and Mr DM had during October 20XX. In his file note Mr TN said the following about the ACC claim:

Agreed it was best not to [proceed] at this time as difficulty crossing across [Mr DM's] ACC claim.

I rang [Mr EX] and discussed while [Mr DM] was in my office and [Mr EX] definitely agreed.

...[T]he ACC claim is important and we should not jeopardise that.

[91] There seems to have been advice given that Mr DM's personal grievance should be put on hold pending resolution of his ACC claim. There is no explanation for this strategy, but I am prepared to accept that there may have been some merit to it.

[92] Mr TN's file, as delivered to Mr EX, is silent as to when that advice was first given but I conclude that it was during the October 20XX meeting.

[93] Mr TN set out the detail of that meeting in a file note, so it is reasonable to assume that this was his practice, and that if there had been earlier discussions (including about the intersection between the ACC claim and the personal grievance) these too would have been recorded in writing.

[94] Allowing for the advice to put the personal grievance on hold, and corresponding instructions from Mr DM, it would seem that no criticism could attach to Mr TN for the period between October 20XX, and 1 April 20XX when Mr DM informed him (through his receptionist) that his ACC case had been unsuccessful.

[95] This does not adequately explain the lack of any action by Mr TN between the end of 20XX and October 20XX; and again between 1 April 20XX and 21 June 20XX when it was agreed that Mr EX would take over the personal grievance matter.

[96] As I have said above, there is nothing on Mr TN's file to fill in those blanks.

[97] It is noteworthy that in his October 20XX file note, Mr TN refers to "further delay" with the personal grievance as being "problematic."

[98] In my view some culpability for the delay to that point, must rest with Mr TN for at least the period between the end of 20XX, and October 20XX.

[99] Self-evidently if a litigant wishes to pursue a matter out of time, then time becomes of the essence because any and all delays must be satisfactorily explained to the relevant decision maker.

[100] There is no suggestion that during this time (the end of 20XX and October 20XX), Mr DM was himself responsible for the delay. Certainly, Mr TN has not made this claim.

[101] As well, there is the delay between 1 April 20XX when Mr DM, through Mr TN's receptionist, gave instructions to proceed with the personal grievance, and at the end of June 20XX when the file was handed over to Mr EX.

[102] Mr TN had told Mr DM during their October 20XX meeting, that in about a month's time he would no longer be doing legal aid work. It is difficult to understand why, despite the fact that there was agreement to put the personal grievance on hold pending the outcome of the ACC claim, Mr TN did not then begin the process of arranging for alternative representation for Mr DM in the personal grievance claim, in the event that that would be reactivated at some point.

[103] Indeed, Mr TN did nothing about that until June 20XX.

[104] Mr TN's brief response to Mr DM's review application was that both the Committee's decision and the Authority's determination were "self-explanatory".

[105] To some extent I agree with Mr TN, certainly in relation to the Authority's determination. The Authority was critical of the lack of any satisfactory file reflecting legal work carried out during Mr TN's retainer, including the lack of evidence about whether a legal aid application had been made.

[106] I am driven to the conclusion that Mr TN's conduct in acting for Mr DM, between the end of 20XX and October 20XX and again between 1 April 20XX and the end of June 20XX, fell short of the standard required of lawyers by r 3 of the Rules.

[107] In particular, I do not accept that Mr TN brought the necessary degree of competence and timeliness to Mr TDM's retainer, in circumstances where time was of the essence to bring a leave application, and this was simply not done.

[108] I am not saying that, had Mr TN done so, Mr DM would have been granted leave to lodge his personal grievance out of time. That is not a conclusion I am able to make. I suspect that if the Authority had harboured that view, a more detailed investigation of Mr TN's retainer would have been undertaken.

[109] It is not necessary for me to also consider whether Mr TN's conduct was a breach of s 12(a) of the Act. To some extent there is overlap between r 3 and s 12(a), and I regard a finding that Mr TN breached r 3 of the Rules adequately reflects his failures on this occasion.

[110] I further find this breach to be unsatisfactory conduct by Mr TN, pursuant to s 12(c) of the Act.

Mr EX

[111] Mr EX also appears to have acted with reasonable diligence when first instructed by Mr DM.

[112] He received Mr DM's file from Mr TN in early July 20XX, and by the end of August had written to [ABC] giving notice of Mr DM's personal grievance, and raising the issue of consent to that being lodged out of time.

[113] As well, Mr EX gave Mr DM appropriate advice about the time limit issue and the possibility that a leave application would need to be filed with the Authority.

[114] Mr EX also successfully applied for legal aid on Mr DM's behalf.

[115] In relation to both the material provided by Mr DM, and the Authority's determination, the trail goes somewhat cold until what the Authority Member found to

have been a critical discussion between Mr EX and Mr DM, about a firearms licence issue.

[116] Neither Mr EX nor Mr DM could be specific about when this discussion occurred.

[117] Piecing it together from the various sources, I conclude that this discussion took place sometime between the latter part of 20XX, and the middle of 20XX.

[118] I come to this conclusion because up until the latter part of 20XX, Mr EX appeared to be working diligently on Mr DM's behalf. From 1 July 20XX, Mr EX began preparations to move business premises, and this included putting closed files into storage. Amongst the closed files, was Mr DM's.

[119] It seems to be the position therefore that within a matter of some 6 to 8 months of first instructing Mr EX in the personal grievance matter, Mr DM instructed him to cease work, which Mr EX did.

[120] This is the effect of the Authority's factual finding on that issue. The Member had the benefit of seeing and hearing both Mr DM and Mr EX give evidence about that issue, and it would be wrong of me to come to a different conclusion in a papers-based hearing.

[121] One might ask the question as to why Mr EX had not pursued the leave application before, say, the end of 20XX or even early in 20XX. It was clear that [ABC] was not going to consent to the delay which by then was some two and a half years.

[122] It must have occurred to Mr EX that delay upon delay was not in Mr DM's interests. The Authority referred to Mr EX's concession that he did not pursue [ABC] about the consent issue, more diligently.

[123] Because I cannot fix with any precision the time of the firearms licence discussion – indeed, it could have been in the very early part of 20XX – I cannot say that a delay of two to three months after receiving Mr DM's personnel file and securing a grant of legal aid, is evidence that Mr EX failed to act for Mr DM competently, diligently and in a timely manner.

[124] When it became apparent that Mr DM was intent on pursuing his personal grievance (fixed by the Authority Member as being "not long before Christmas 20XX"), Mr EX obtained a further grant of legal aid and had the leave application filed with the Authority by the middle of 20XX.

[125] It appears from the Authority's decision, that nothing of any substantive or procedural significance turned on that delay.

[126] Although I have reservations about Mr EX's representation, particularly given his concession to the Authority Member that he could have pursued the consent issue with [ABC] more diligently, I cannot translate those reservations into a finding that Mr EX breached either or both of r 3 of the Rules and s 12(a) of the Act.

[127] I would observe that it would have been helpful – indeed prudent – for Mr EX to have made a file note of the firearms discussion during which he said Mr DM instructed him to cease all work, and to have followed that up with a letter to Mr DM confirming termination of the retainer.

[128] Questions of poor file management can themselves be the subject of a disciplinary finding, however this was not a matter identified by the Committee as being relevant to its inquiry. On balance, I am not persuaded that it is of sufficient moment in this case for me to direct to the Committee to separately inquire into it.

[129] I would, however, expect Mr EX to reflect on those matters.

Penalty

[130] I turn now to consider the question of penalty in Mr TN's case.

[131] I emphasise that my finding of unsatisfactory conduct against Mr TN, relates to his failure to prosecute Mr DM's personal grievance competently and in a timely manner, consistent with the terms of that retainer.

[132] Those terms included the fact that Mr DM was, by the time Mr TN was instructed, out of time for lodging his personal grievance and required either [ABC]'s consent or the Authority's leave. Time was, as I have expressed above, of the essence.

[133] I have not made a finding that Mr TN's breach of r 3 of the Rules, was causative of Mr DM's failure to get leave from the Authority.

[134] I consider that Mr TN's breach can be adequately met by the imposition of a modest fine. It is generally accepted that the starting point for a fine for a breach of ethical or professional obligations, is \$1,000, with a maximum being \$15,000.

[135] I give Mr TN credit for the fact that, when first instructed in September/October 20XX, he diligently applied himself to the task of obtaining relevant information and, it would seem, turning his mind to the delay issue. In many respects this was a text-book start to a case of Mr DM's nature.

[136] However, as I have been at pains to explain above, seemingly nothing was done to advance Mr DM's case in circumstances where delay added to delay might ultimately have compromised him. In my view this is the very antithesis of a lawyer's obligation to act in a "timely" manner, consistent with the terms of a retainer of that nature.

[137] Mr TN was obviously alive to the "problematic delay" when he met Mr DM in October 20XX, but I make no finding under r 3 of the Rules in relation to the period of time following that meeting, until 1 April 20XX because there was apparently agreement to put the personal grievance matter on hold.

[138] Further delay of some two and a half months until finally Mr EX was instructed towards the end of June 20XX, is also difficult to understand – particularly given that Mr TN had ceased doing any legal aid work in November the previous year.

[139] Overall this was an unjustifiable delay, in the circumstances of this retainer, and which reflected on Mr TN's competence, of approximately 12 to 13 months. This has to be seen in terms of a total delay, as recorded by the Authority, of four years and 10 months.

[140] In all of the circumstances, I consider that a fine of \$1,500 adequately meets the circumstances of this breach.

Costs on review

[141] When a finding of unsatisfactory conduct is made by a Review Officer, costs will be ordered in accordance with the Costs Orders Guidelines of this Office. It follows that Mr TN is ordered to pay costs in the sum of \$900 to the New Zealand Law Society by 5pm on Friday 30 April 2021, pursuant to s 210(1) of the Act.

Enforcement of money orders

[142] Pursuant to s 215 of the Act, I confirm that the money order made by me may be enforced in the civil jurisdiction of the District Court.

Decision

[143] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is:

- (a) reversed as to the finding to take no further action against Mr TN, and replaced with a finding of unsatisfactory conduct against Mr TN pursuant to r 3 of the Rules and s 12(c) of the Act.
- (b) confirmed as to the finding to take no further action against Mr EX.

Anonymised publication

[144] Pursuant to s 206(4) of the Act, this decision is to be made available to the public with the names and identifying details of the parties removed.

DATED this 9TH day of April 2021

R Hesketh
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 DM as the Applicant
Mr EX as a Respondent
Mr TN as a Respondent
Ms SG as a Related Person
[Area] Standards Committee [X]
New Zealand Law Society
Secretary for Justice