

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

[2020] NZLCRO 105

Ref: LCRO 164/2019

CONCERNING

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

AND

CONCERNING

a determination of the [Area] Standards Committee [X]

BETWEEN

SM

Applicant

AND

NL

Respondent

DECISION

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

Introduction

[1] Mr SM has applied for a review of a decision by the [Area] Standards Committee [X] to take no further action in respect of his complaint concerning the conduct of the respondent, Mr NL.

Background

[2] In 2008, Mr SM was involved in an employment dispute.

[3] The dispute went to the Employment Relations Authority (the Authority).

[4] The Authority ordered Mr SM to pay a sum in the vicinity of around \$4,000 to his employer. Mr SM's employer subsequently instructed a lawyer (Mr ES) to enforce the order obtained.

[5] In July 2010, Mr SM made a complaint to the Lawyers Complaints Service about Mr ES. The Standards Committee charged with conducting an investigation into the complaint, issued a decision in which it determined that it would take no further action in respect to Mr SM's complaint about Mr ES.

[6] In August 2011, Mr SM instructed Mr NL to act on his behalf in respect to proceedings issued for recovery of costs that had followed on from the employment proceedings, and to assist with preparing an application to review the Standards Committee decision.

[7] Mr SM became dissatisfied with the services provided and the fee charged by Mr NL. He terminated the retainer and made a complaint to the Complaints Service about Mr NL's conduct. That complaint was settled by an agreement reached between the parties.

[8] In February 2019, Mr SM was served with proceedings under the Domestic Violence Act 1995 (the "DVA proceedings"). The applicant in those proceedings was represented by Mr NL.

[9] Mr SM objected to Mr NL acting on the DVA proceedings on grounds that he had been a former client of Mr NL.

The complaint and the Standards Committee decision

[10] Mr SM Lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 7 March 2019. The substance of his complaint was that:

- (a) Mr NL had represented him in 2012 or 2013; and
- (b) he had made a complaint to the New Zealand Law Society Lawyers Complaints Service about the representation provided by Mr NL; and
- (c) that dispute had been settled on the basis of Mr NL refunding fees that had been charged to Mr SM; and
- (d) Mr NL had, in 2019, represented a client who had commenced DVA proceedings against Mr SM; and
- (e) Mr NL's decision to act against a former client was cynical.

[11] In his response to Mr SM's complaint, Mr NL submitted that:

- (a) Mr SM was not his client; and

- (b) he'd had no involvement with Mr SM since the termination of the retainer around November 2011; and
- (c) Mr SM had not raised concerns that Mr NL was conflicted when representing the party who had commenced the DVA proceedings against Mr SM; and
- (d) the DVA matters on which he had been instructed, were irrelevant to any work undertaken by him for Mr SM in the past.

[12] The Standards Committee identified what it described as the key issue for its investigation as being a consideration as to whether Mr NL breached his professional obligations by acting for the applicant in a DVA proceeding in which Mr SM was the respondent.

[13] The Standards Committee delivered its decision on 23 September 2019.

[14] The Committee determined, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) that no further action on the complaint was necessary or appropriate.

[15] In reaching that decision the Committee concluded that:

- (a) the relevant conduct rule to consider was r 8.7.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules); and
- (b) it was unable to identify any specific confidential information held by Mr NL from the previous retainer which, if disclosed, would be advantageous to the applicant in the DVA proceedings; and
- (c) Mr SM had failed to identify what, if any, confidential information held by Mr NL would prohibit him from acting; and
- (d) any confidential information acquired and held by Mr NL in respect to the previous retainer would be unlikely to affect the interests of Mr SM in the DVA proceedings; and
- (e) as Mr NL had not acted for Mr SM in approximately eight years, any knowledge Mr NL retained of Mr SM would be historic; and
- (f) it was open to Mr SM to make application to the court for orders preventing Mr NL from acting in the DVA proceedings.

Application for review

[16] Mr SM filed an application for review on 30 October 2019.

[17] He submits that:

- (a) following termination of his retainer with Mr NL in 2012, Mr NL retained a significant amount of sensitive information about Mr SM and
- (b) Mr NL's client in the DVA proceedings had advised Mr SM, that Mr NL held a "cynical" view of Mr SM; and
- (c) the prohibition on a lawyer acting against a former client detailed in r 8.7.1 of the Rules should properly include a sanction against a lawyer acting against a former client in circumstances where the former client has advanced a conduct complaint against the lawyer; and
- (d) the sensitive nature of the DVA proceedings contributed to Mr SM's sense of unease at Mr NL acting in those proceedings.

[18] Mr SM attached a number of documents (described by him as important) to his application. Mr SM considered that the documentation provided assisted in establishing his complaint.

Hearing

[19] The review was heard, by way of telephone conference, on Monday 22nd June 2020, with both parties in attendance.

Nature and scope of review

[20] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:¹

... 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" ...

... 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

¹ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

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.

[21] More recently, the High Court has described a review by this Office in the following way:²

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.

[22] 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

[23] Reduced to its essence, Mr SM's concerns when first articulated by him as a complaint against Mr NL, were that Mr NL was, when appearing as counsel for the applicant in the DVA proceedings, acting against him, when he had previously acted for him.

[24] Mr SM's concerns were exacerbated by the fact that:

- (a) At the completion of his retainer with Mr NL he had advanced a conduct complaint against Mr SM.
- (b) The DVA proceedings were proceedings of a particularly sensitive nature.

[25] It is understandable that Mr SM felt disquieted when he learnt that Mr NL was appearing as counsel in the DVA proceedings.

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

[26] Mr NL is not alone in thinking that once a lawyer has represented a client, that lawyer is, thereafter, prohibited from acting against the former client.

[27] Whilst it had been a number of years since he had been represented by Mr NL, Mr SM says that he retained a clear recollection of the time that Mr NL had been his lawyer. It was apparent from Mr SM's evidence at the review hearing, that Mr SM believed that the fact that Mr NL had been his lawyer, should, in itself, have been sufficient to subsequently prohibit Mr NL from representing a party who had initiated proceedings against Mr SM.

[28] Pivotal to lawyers' obligations as fiduciaries, are the duties of loyalty and confidence lawyers owe to their clients.

[29] The duty of loyalty requires a lawyer to act single-mindedly and disinterestedly in the interests of their clients.

[30] Loyalty to clients has been described as the hallmark of the legal profession.³ The idea that a lawyer will work to protect and promote the interests of his or her client to the exclusion of all others is at the root of the lawyer-client relationship.

[31] However, it is not the case that the duty of loyalty owed by a lawyer to their client continues after the termination of the retainer, such as to provide an impediment to the lawyer ever acting in proceedings engaging the former client.

[32] A lawyer's duty of loyalty to his or her client lasts for as long as the client retains the lawyer. However, once the retainer has been terminated the lawyer is no longer under a duty to act in the client's best interests, to disclose information to them, or to advise them.⁴ However, a lawyer has a continuing obligation to protect the former client's confidential information.⁵

[33] Attention then turns to the question as to whether Mr NL was prevented from representing his client in the DVA proceedings brought against Mr SM, as a consequence of him having acquired information in the course of representing Mr SM that could have been used to Mr SM's disadvantage in the DVA proceedings.

[34] The Committee properly identified r 8.7.1 of the Rules as the conduct rule of relevance to any inquiry as to whether a lawyer had breached a duty owed to a former

³ Lindsay Lloyd and Duncan Webb "Ethics for Solicitors – what's relevant in 2010?" (New Zealand Law Society Seminar, November 2010).

⁴ Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at [5.10.2].

⁵ *Torchlight Fund No 1 LP (in rec) v NZ Credit Fund (GP) 1 Ltd* [2014] NZHC 2552, [2014] NZAR 1486 at [19].

client when representing another client in proceedings brought against the former client.

[35] Relevantly, r 8.7.1 provides that:

A lawyer must not act for a client against former client of the lawyer or of any other members of the lawyers practice where—

- (a) the practice or a lawyer in the practice holds information confidential to the former client; and
- (b) disclosure of the confidential information would be likely to affect the interests of the former client adversely; and
- (c) there is a more than negligible risk of disclosure of the confidential information; and
- (d) the fiduciary obligation owed to the former client would be undermined

[36] In his initial complaint, Mr SM couched his complaint in general terms. He made no mention of, or identified any specific examples of, Mr NL possessing or using confidential information to his (Mr SM's) disadvantage.

[37] On review, Mr SM raises concern that Mr NL may have misused confidential information, but he fails to particularise the nature of this information in anything other than very general terms. He says that Mr NL was "holding a large volume of sensitive information regarding myself".

[38] Mr SM notes, that at the conclusion of his relationship with Mr NL, he had instigated a conduct complaint against Mr NL. Mr SM considered that the fact that he had previously made a complaint against Mr NL, was a factor that should be taken into account and given weight, when considering his complaint that Mr NL should not have acted in the DVA proceedings.

[39] I do not consider that any particular significance attaches to the fact that Mr SM had earlier filed a complaint against Mr NL. The fact that Mr SM complained about Mr NL, adds nothing to argument that Mr NL used confidential information he had acquired in the course of the retainer inappropriately.

[40] Mr SM argues that the lawyers' professional conduct rules should contain a specific provision preventing lawyers from acting against former clients in circumstances where the lawyer has been the subject of a conduct complaint from their former client.

[41] I accept that Mr SM considers it desirable that an amendment be made to the Rules, but my task is to consider Mr SM's complaint by reference to the conduct rules that are currently in place.

[42] In support of his contention that Mr NL was in possession of confidential information, Mr SM attaches various documents to his review application.

[43] I have carefully perused that documentation. It comprises:

- (a) A copy of the Standards Committee decision.
- (b) Mr NL's response to Mr SM's complaint.
- (c) Mr SM's response to Mr NL.
- (d) Correspondence from the Lawyers Complaints Service, recording details of settlement and Mr NL's agreement to refund fees to Mr SM.
- (e) Correspondence that Mr SM contends Mr NL had failed to disclose to the Ministry of Economic Development in 2012.
- (f) A record of a chambers hearing held in the [District] court in 20[XX].
- (g) Correspondence demanding payment of costs awarded by the Employment Relations Authority.
- (h) Correspondence from the Ministry of Economic Development concerning administrative matters arising from Mr SM entering into a no asset procedure.

[44] I accept that Mr SM considers this information to be of a sensitive nature, but it is frequently the case, that the information and knowledge lawyers acquire about their client's personal circumstances during the course of representing a client, is information that the client would consider to be sensitive.

[45] In the course of the Review hearing, Mr SM conceded that he was unable to precisely identify how the information he had detailed in the review application would have relevance to the DVA proceedings.

[46] Mr SM proceeded to explain that he was unhappy with how the DVA proceedings had been advanced in the Family Court. He was particularly critical of the fact that Mr NL had, he said, conversed privately with the judge at a point in the proceedings.

[47] It was explained to Mr SM that it was not the role of a Review Officer to monitor what had occurred in the course of a Family Court hearing and explained to

him that any concerns he had regarding the Family Court process should properly be addressed to the judge.

[48] I do not wish to diminish the concerns raised by Mr SM, and I formed a clear impression from him during the course of the review hearing that his concerns were genuinely held, but I would not consider the information Mr SM identifies as having been acquired by Mr NL during the course of the retainer, as being information of a particularly sensitive nature as contemplated by r 8.7.1.

[49] Nor do I consider that the information identified would, if disclosed in the course of the DVA proceedings,⁶ have been likely to have been seen by the presiding judge to have particular relevance or significance to the DVA application.

[50] The potential for this information to have had adverse consequence for Mr SM would have significantly diminished with the passage of time.

[51] The DVA proceedings were filed in February 2019. Mr NL had ceased acting for Mr SM around September 2011.

[52] It is important to note, as observed by the Standards Committee, that the provisions of r 8.7 are to be read conjunctively.

[53] A lawyer does not breach r 8.7 when acting against a former client, simply because they hold information confidential to the former client.

[54] A breach is triggered if a lawyer acts against a former client in circumstances where the lawyer holds information, the disclosure of which would be likely to adversely affect the interests of the former client, and there is a more than negligible risk that the information would be disclosed, and the fiduciary duty obligation owed to the former client is undermined.

[55] Mr SM provides no persuasive evidence to support argument that the information held by Mr NL compromised his position in the DVA proceedings.

[56] To the extent that he attempts to establish a link between information held, and the potential for an adverse outcome for himself, he places reliance on submission that Mr NL's client had informed Mr SM that Mr NL had a "cynical" view of Mr SM.

[57] Mr SM does not provide any direct evidence of what Mr NL's client may or may not have said to Mr SM, and the mere suggestion that Mr NL may have held an

⁶ There is no evidence of the information relied on by Mr SM having been raised in the DVA proceedings.

unfavourable view of Mr SM falls well short of establishing a platform for argument that Mr NL had disclosed confidential information that had adverse consequences for Mr SM.

[58] Nor does Mr SM establish that Mr NL had disclosed any information about him, or that there was any risk of Mr NL doing so.

[59] Mr SM does not, for example, suggest that the proceedings filed by Mr NL's client in support of an application for a domestic violence order, referenced any information that Mr NL had acquired about Mr SM, in the time he had represented Mr SM.

[60] I agree with the Committee, that Mr NL's earlier retainer with Mr SM, would have had little relevance to the DVA proceedings.

[61] I also agree with the Committee that if Mr SM had concerns about the appropriateness of Mr NL appearing as counsel in the DVA proceedings, his concerns could, and should, have been raised directly with the judge.

[62] Examined carefully, Mr SM's complaint (and as I have noted, I understand the reason for it) reduces to a concern that he felt unhappy that his former lawyer was acting against him. That alone is insufficient to establish a breach of r 8.71.

[63] For completeness, I record that Mr SM made inquiry in the course of the hearing as to whether Mr NL would agree to represent him on another matter. Mr SM directed this inquiry through me and was anxious that Mr NL be required to provide an answer.

[64] Mr SM was advised that he was free to make inquiry of Mr NL as to whether Mr NL would agree to represent him on another matter, but that was not an issue to be addressed in the course of a review hearing.

[65] I see no grounds which could persuade me to depart from the Committee's decision.

Anonymised publication

[66] Pursuant to s 206(4) of the Act, I direct that this decision be published so as to be accessible to the wider profession in a form anonymising the parties and bereft of anything as might lead to their identification.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed.

DATED this 25th day of June 2020

R Maidment
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 SM as the Applicant
Mr NL as the Respondent
[Area] Standards Committee [X]
New Zealand Law Society
Secretary for Justice