

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

[2020] NZLCRO 68

Ref: LCRO 174/2019

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

SH

Applicant

AND

NG

Respondent

DECISION

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

Introduction

[1] Mr SH has applied for a review of a decision by the [City] Standards Committee [X] to take no further action in respect of his complaint concerning conduct on the part of Mr NG.

Background

[2] Mr SH was charged with a single criminal offence in respect of events on 2 May 2018 involving two individuals. The charge carried a maximum term of imprisonment of 7 years (the original charge).

[3] Mr SH contacted his solicitor, Mr PW. Mr PW instructed Mr NG to act as counsel for Mr SH on the criminal charge.

[4] Mr NG's retainer began on or about 17 May 2018. Initially Mr SH denied the charge, then later made admissions to Mr NG, as a result of which Mr NG advised him to plead guilty. No plea was entered, but police amended the charges and laid new ones, preliminary expert evidence was obtained at Mr SH's expense and on his instructions. In or about mid-October 2018 Mr SH instructed a new lawyer and terminated Mr NG's retainer.

[5] Mr SH paid money into Mr PW's trust account to cover fees. Mr NG issued two invoices to Mr PW, one dated 6 June 2018 for a fee of \$7,500, the other dated 25 June 2018 for a fee of \$1,400. Mr PW's trust account records indicate he paid both of those with Mr SH's money in accordance with his written authority. At the end of the retainer, Mr NG did not bill the remaining time, about 20 hours, he had recorded to Mr SH's file, and Mr PW refunded the unused balance of funds to Mr SH.

[6] In May 2019 Mr SH made a complaint to the New Zealand Law Society (NZLS) about Mr NG's conduct and fees.

The complaint and the Standards Committee decision

[7] Mr SH's complaint begins with him being "unfairly charged by Police", continues with Mr NG putting him under "emotional pressure" to plead guilty, forcing him to see a psychiatrist, telling him he would face "72 lashes" for the charge and being sent to prison if the judge is having "a bad day". Mr SH objects to having to pay for Mr NG's failures and broken promises. He attached documents including Mr NG's two invoices to Mr PW.

[8] Mr NG provided a detailed reply to Mr SH's complaint and attached a copy of what appears to be the majority of his file.

[9] Further correspondence between the parties and NZLS followed in which Mr SH expanded on his complaint and both parties responded to the matters raised.

[10] The Standards Committee delivered its decision on 30 October 2019. The Committee considered all of the materials, and the various issues Mr SH had raised. Having done so, the Committee concluded further action was not necessary or appropriate, and determined Mr SH's complaint pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) accordingly.

[11] Mr SH disagrees with the Committee and applied to this Office for a review.

Application for review

[12] For various reasons Mr SH wants compensation. Mr SH made handwritten notes on the Committee's decision. He considers the psychiatrist was a waste of time and money, and maintains Mr NG's 72 lashes comment was inappropriate, untruthful and should have been treated far more seriously by the Committee. He says he has suffered stress, anxiety, psychological and emotional harm and financial loss as a result of Mr NG's conduct.

[13] Mr SH says he had a fixed fee agreement with Mr NG, from which Mr NG resiled. Mr SH is adamant that he only accepted he had made the comments as claimed by the prosecution witnesses because Mr NG put him under pressure. Mr SH appears to confirm Mr NG advised him to plead guilty rather than take the risk of going to trial and being imprisoned if he was convicted, and that Mr NG advised him, after he had made admissions, that he would be unable to continue to act for him if he did not enter guilty pleas.

[14] Mr NG refers to and relies on the materials he placed before the Committee.

Review on the papers

[15] Mr NG agreed to the review being dealt with on the papers. Mr SH was invited to comment on that as a proposed process. No comments were received from him within the allotted timeframe.

[16] 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. The parties' consent to that process is not a prerequisite.

[17] 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. On the basis of the information available I have concluded that the review can be adequately determined in the absence of the parties.

Nature and scope of review

[18] 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 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.

[19] 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.

Analysis

Lashings

[20] Mr SH returns repeatedly in his complaint and application for review to Mr NG’s comment about “72 lashes”. Mr SH asks in his application for review whether there is such a thing as “lashes in New Zealand law?”.

[21] In case there is any lingering doubt in Mr SH’s mind, the answer is no. The New Zealand Courts do not dispense lashings or any other form of corporal punishment.

[22] Mr NG accepts he referred to lashings in his discussions with Mr SH. Mr NG says he intended his comment to be humorous, made as it was in the context of what he describes as a “friendly working relationship”. Mr NG understood Mr SH was capable of

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

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

understanding his comment was intended to lighten the mood, and believed he had taken it light-heartedly at the time.

[23] It is understood that lashings were, and still are, a reality in Mr SH's country of origin. There is nothing funny about the reality of corporal punishment.

[24] Humour is not always well received. It can, however, be an extremely useful tool for diffusing tension. It is accepted that was Mr NG's intention. The facts do not raise a professional standards issue.

Judicial temperament

[25] Mr SH says Mr NG told him he could end up with a term of imprisonment if the judge was having a bad day.

[26] Sentencing involves a level of judicial discretion. The comment Mr SH refers to conveys that in a colloquial way. Like humour, colloquialisms can be taken the wrong way. However, in isolation and in the context of Mr NG's retainer, the comment Mr SH refers to does not found a professional standards issue.

The psychiatric report

[27] At Mr NG's suggestion, Mr SH went to see a psychiatrist. The psychiatrist evaluated Mr SH and prepared a report. Mr NG says it was a helpful report and he would have tendered it in evidence to support an application by Mr SH if his retainer had not come to an end when it did. Mr SH says the report was not required by his next lawyer. He has come to the view it was a waste of his time and money. He says Mr NG thought Mr SH was probably not suffering from any relevant psychiatric condition, and cannot see why he would need a psychiatric report if he already knew there was nothing wrong with Mr SH.

[28] If anyone was going to give expert evidence of Mr SH's psychiatric condition it was not going to be Mr NG. Mr NG is a lawyer not a psychiatrist. Mr NG cannot evaluate Mr SH, nor can he give expert evidence: it was simply not part of Mr NG's job.

[29] According to the psychiatrist, the purpose of the psychiatric report was to give an opinion on whether Mr SH might have "post-traumatic stress disorder or any other condition that might be relevant to his behaviour" at the time of the alleged offences, and to advise on any further treatment/therapy options. The report could have been useful

in mitigation on sentencing, or to support argument for discharge without conviction. It would not have assisted if Mr SH had entered a not guilty plea and wanted to mount a defence, but that was not the direction in which his matter was heading.

[30] While it is not part of the role of this Office to second-guess counsel's strategy in litigation, the materials indicate that Mr NG advised Mr SH that one of his options was to obtain independent expert evidence from a psychiatrist. Clearly that option was open to Mr SH. It was his choice whether or not to accept the advice. Neither he nor Mr NG could direct the end result. The psychiatrist was obliged to express an independent view as an expert. Having examined Mr SH, that is what the psychiatrist did.

[31] The psychiatrist's fee was a disbursement. This Office does not exercise jurisdiction over liability for, or the quantum of, fees charged by expert witnesses. However, the materials indicate that Mr NG made the arrangements with the psychiatrist on Mr SH's instructions at the time. Mr PW's trust account records indicate he paid the bill with funds he held to Mr SH's account and with his authority. That is all entirely unremarkable.

[32] The facts provide no foundation for a professional standards issue.

Mr NG's fees

[33] Mr NG issued two invoices to Mr PW, the first for a fee of \$7,500, the second for a fee of \$1,400. Mr NG therefore charged a total of \$8,900 in fees. Mr PW's trust account records show that, among other things, he paid those fees with funds held to Mr SH's account and with his authority.

[34] Each of Mr NG's invoices was supported by his time record. Mr NG also supplied his time record for his unbilled time.

[35] Mr SH says Mr NG failed to adhere to a fixed fee agreement. The materials do not evidence the existence of a fixed fee agreement. They indicate Mr NG charged primarily on the basis of recorded time, but with a discount. That is unobjectionable.

[36] There is nothing about the fees charged that suggests they were not fair and reasonable on any basis. The entries on the time records are supported by the materials Mr NG supplied from his file and are entirely consistent with what might generally be expected in a retainer of this nature. It is perhaps unfortunate that Mr SH's instructions were inconsistent and changeable, but that is not unusual in criminal matters. It is

unfortunate that Mr SH exposed himself to the risk of further charges by attempting to communicate with prosecution witnesses, albeit that risk did not materialise in the form of further charges while Mr NG was acting.

[37] Mr NG was not involved when Mr SH's criminal matters were finally resolved. His conduct can only be considered on the basis of his actual involvement, and what his instructions actually were at that time. While it is not always the case, a new lawyer is sometimes able to build on the accomplishments of a predecessor lawyer. Suffice to say Mr NG's conduct cannot be evaluated on the basis of what some other lawyer may have been able to achieve on the basis of other instructions later on.

Misunderstanding and the language barrier

[38] Mr SH seems to believe that misunderstanding on his part, and the language barrier, were sufficient for him to avoid criminal liability on the original charge and the one that followed. On the facts as they were when Mr NG was instructed, that seems unlikely. Again, Mr NG's conduct cannot be evaluated on the basis of what some other lawyer may have been able to achieve on some presumedly different future basis.

Summary

[39] The materials disclose no evidence of unsatisfactory conduct on the part of Mr NG. In the circumstances, further action is not necessary or appropriate. That is consistent with the Committee's decision. There is no reason to modify or reverse that. It is confirmed.

Decision

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

DATED this 19th day of May 2020

D Thresher
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 SH as the Applicant
Mr NG as the Respondent
[City] Standards Committee [X]
New Zealand Law Society
The Secretary for Justice