

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

[2020] NZLCRO 81

Ref: LCRO 196/2019

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

FL

Applicant

AND

ND

Respondent

DECISION

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

Introduction

[1] Mr FL 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 ND.

Background

[2] Mr BL (Mr FL's brother)¹ brought a private prosecution in the Auckland District Court, against Mr AS.

¹ I will refer to FL throughout this decision as Mr FL, to distinguish from his brother Mr BL.

[3] It was alleged by Mr BL, that Mr AS had control of a publication which operated under the name of “[Journal A]”. Mr FL contended that this publication had published material which was subject to a suppression order.

[4] Mr AS instructed Mr ND to represent him in the proceedings. Mr ND instructed a barrister, Mr KM, to conduct the defence to the prosecution.

[5] The prosecution was heard before [Judge A] in the [City] District Court.

[6] The Judge dismissed the charges, following a finding that Mr FL had failed to produce evidence to substantiate his claim. After hearing submissions from the parties on costs, the Judge made orders that Mr BL was to pay indemnity costs in the sum of \$28,750 together with costs of \$3,400 as contribution to the costs incurred in respect to preparing the application for costs.

[7] Mr FL believed that Mr ND, writing under the nom de plume “CD”, was responsible for authoring the article posted on [Journal A] website that had, in Mr FL’s view, breached suppression orders.

The complaint and the Standards Committee decision

[8] Mr FL lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 17 May 2019. The substance of his complaint was that:

- (a) The Court had been incorrectly informed as to the costs incurred by the defendant.²
- (b) Mr ND had failed to inform the Court that he was the author of the article that had been published on [Journal A] website.
- (c) Mr ND, in acting as Mr AS’s solicitor, had been conflicted, as he had been directly involved in the events which were the subject of the proceedings before the Court.

[9] The Standards Committee identified the issues to be considered as:

- (a) Was Mr ND acting in his capacity as a lawyer?
- (b) Can the Standards Committee consider a matter before the Courts?

[10] The Standards Committee delivered its decision on 13 December 2019.

² Mr FL described this in his complaint as “false accounting”.

[11] The Committee determined, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) that Mr ND was not providing regulated services and, pursuant to s 138(1)(f) of the Act, that a Standards Committee was not the correct forum to determine whether Mr ND had committed an offence by posting material in breach of a suppression order.

Application for review

[12] Mr FL filed an application for review on 23 December 2019.

[13] He submits that:

- (a) The Committee had failed to conduct interviews.
- (b) The Committee's decision records that Mr ND was not acting as counsel, when that clearly was not the case.
- (c) Mr ND had misled the Court in omitting to disclose his involvement in [Journal A] posting.

[14] By way of remedy, Mr FL requests that:

- (a) The investigation into his complaint be recommenced with the appointment of a fresh investigator.
- (b) The complainant's witnesses be interviewed and the court records be obtained.
- (c) The costs awarded be refunded.
- (d) Charges to be laid against Mr ND for egregious conduct and directions made that he be suspended from practice until such time as the charges were determined.
- (e) Mr ND be fined.
- (f) The investigator be removed from his employment and be ordered to apologise in writing.
- (g) Compensation in the sum of \$25,000.

Review on the papers

[15] Section 206 (2) of the Lawyers and Conveyancers Act 2006 provides that if it appears to the Legal Complaints Review Officer that the review can be adequately determined on the papers, he or she may, without the consent of the parties, do so on the basis of the information available.

[16] Before electing to deal with a review application on the papers, the Review Officer must give the parties a reasonable opportunity to comment on whether the review should be dealt with in that manner.

[17] After concluding an initial appraisal of the file I formed a firm view, that it was appropriate that this review application be considered on the papers.

[18] On 12 May 2020, correspondence was forwarded to the parties advising that the Review Officer considered that the application was suitable for determining on the papers.

[19] The parties were invited to advise within 7 days if they objected to the review being dealt with in that manner. The parties were not required to provide a response if they had no objection to the approach the Review Officer had proposed.

[20] No response was received from either party.

[21] On 20 May 2020, correspondence was forwarded to the parties advising that the Review Officer would be proceeding with the review.

[22] 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

[23] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:³

³ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

... 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.

[24] More recently, the High Court has described a review by this Office in the following way:⁴

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.

[25] 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

[26] Before addressing the specific issues raised by Mr FL’s review, it is helpful to clarify the nature of the review process.

[27] As noted at [24] above, a review is neither an appeal nor a judicial review.

[28] Expressed in simple terms, the review process is intended to provide opportunity to parties who are dissatisfied with a Committee’s decision, to have a Review Officer look at their complaint afresh, and in doing so, to arrive at an independent view as to the merits or otherwise of the complaint.

⁴ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

[29] In approaching that task it is important to note that it is not the role of a Review Officer to conduct a first stage inquiry into a complaint. The task of a Review Officer is to review the information that was presented to the Standards Committee. In the course of conducting that review, a Review Officer may, if he or she considers it appropriate or necessary, make such investigations and inquiries as he or she thinks fit.⁵

[30] This capacity to make further investigations or inquiries is a power that is exercised judiciously by Review Officers, and always with careful reference to the particular nature of the review jurisdiction.

[31] In setting out his grounds for review, Mr FL appears to labour under the misapprehension that a conduct complaint is investigated by a single investigator. He makes request that “the investigation start again with another investigator being directed as to the appropriate law and what they need to have been provided by ND”.⁶

[32] Complaints against lawyers are investigated by Standard Committees.

[33] Standards Committees are made up of practicing lawyers, familiar with the practice of law including the conduct of litigation in the Courts, as well as lawyers’ duties and obligations and the pressures under which lawyers often find themselves. Standards Committees must also include a lay member. This format allows for a range of views – legal and non-legal – to be considered. The process is flexible and robust.

[34] Whilst it is the obligation of a Committee to investigate conduct complaints, it is not the role of a Committee to construct a complaint.

[35] It is expected of any party seeking to advance a conduct complaint against a lawyer, that the complaint is clearly articulated, and that the complainant provides the Committee with all the relevant information the complainant considers is relevant to establishing the complaint.

[36] A complainant, whatever the jurisdiction, is obliged to support their claim with evidence to the required standard; in this case, the balance of probabilities. It is not enough for a complainant to provide documents, make allegations and ask questions.

[37] Mr FL carries the burden of establishing, on the balance of probabilities, that the allegations he makes concerning Mr ND’s conduct are established. In other words, he must provide evidence which tips the scales towards it being more probable than not that

⁵ Section 207(1) of the Act.

⁶ Mr FL, submission to LCRO (23 December 2019).

Mr ND was both conflicted when taking instructions from Mr AS, and that it is established, on the same standard of proof, that Mr ND had misled the court.

[38] As noted, it is not the role of a Review Officer to commence a first stage inquiry into a conduct complaint.

[39] Mr FL makes request for a fresh investigation. He asks that this investigation secure an admission from Mr ND that Mr ND was responsible for publishing the article that had raised concerns for Mr FL. Admission is sought from Mr ND that he failed to disclose to the Court the extent of his involvement with posting the article to [Journal A] site that had purportedly breached a court order.

[40] Mr FL makes request for witnesses to be interviewed, and for court records to be obtained.

[41] In advancing these requests, Mr FL misunderstands the role of a Review Officer.

[42] The task of a Review Officer is to review the information that has been presented to the Committee and to bring a fresh pair of eyes to an examination of that information.

[43] It is most commonly the case, that the process of conducting inquiry into a complaint against a lawyer proceeds by:

- (a) A complainant setting out the grounds of their complaint.
- (b) A complainant providing the Complaints Service with all the evidence they consider relevant to establishing their complaint.
- (c) The Complaints Service, consistent with its obligations to promote its consumer protection objectives, assisting the parties, where necessary or appropriate, with clarifying the substance of the complaint.
- (d) The lawyer being provided with opportunity to provide response to the complaint.⁷
- (e) The complainant being given opportunity to respond to any submissions filed by the lawyer.

⁷ A lawyer may elect not to provide a response. There is no compulsion on them to do so.

- (f) The parties being issued with a notice of hearing that identifies the scope of the Committee's investigation.

[44] A Committee is required, as is a Review Officer, to conduct its inquiry with proper attention to natural justice principles.

[45] In most cases, a Review Officer will be reluctant to accept fresh evidence that was not provided to the Standards Committee.

[46] The Guidelines for Review provided to parties, note at [18] that "in general, the LCRO will not consider new information which should have been placed before the Standards Committee. Any person who seeks to introduce information which was not made available to the Standards Committee will need to provide good reason as to why it was not available to the Standards Committee and show that it is relevant to the review. The LCRO will decide how extensive the inquiry needs to be."

[47] Further, the Guidelines emphasise that no new complaints may be made at the review stage.

[48] These guidelines reinforce the particular nature of the review process, being that it is a process whose focus is on providing opportunity for oversight of a Standards Committee investigation.

[49] A fundamental difficulty with Mr FL's complaint is that he failed, at first step, to provide evidence to the Committee that Mr ND was responsible for authoring [Journal A] posting.

[50] It is not sufficient for Mr FL to advance a forceful belief that Mr ND was conflicted and had misled the court. It was his responsibility to establish the evidential basis for a finding that Mr ND had acted in breach of his obligations to the court.

[51] As noted by the Committee, if Mr BL had evidence that Mr ND had posted material that breached a name suppression order, he should have named Mr ND in his prosecution.

[52] I have read the costs decision issued by the Court following the hearing of Mr FL's application, and the issuing of the substantive judgment.⁸

[53] The presiding judge was critical of the manner in which Mr BL had advanced his case noting, in referencing the judgment issued, that:

⁸ *FL v AS* [Date] NZDC [Case number].

- (a) The prosecution failed to call appropriate witnesses who may have been able to prove its case.
- (b) The trial had been beset with difficulty.
- (c) Mr BL had failed to comply with directions to provide a list of witnesses he proposed to call.
- (d) There had been disarray in the conduct of the prosecution case.
- (e) The prosecution case had never been properly prepared.

[54] In the course of the prosecution proceedings, Mr BL made application to summons Mr ND as a witness.

[55] This application was opposed by Mr AS on grounds that the application, if granted, would constitute a breach of the legal professional privilege he was entitled to place reliance on.

[56] The application to summons Mr ND was dismissed by the Court.

[57] This, says Mr FL, allowed Mr ND to evade responsibility for answering the question as to whether he had been responsible for authoring articles that had been posted on [Journal A] site, and provided opportunity for Mr ND to secure safe haven from accusation that he had misled the court and was conflicted in acting for Mr AS.

[58] I accept that Mr FL would have had genuine grounds for concern if it was established that Mr ND had been responsible for authoring an article that had breached a court suppression order, and that those concerns would be significantly compounded if, that authorship having been conclusively established, Mr ND continued to act in proceedings before the court, where the issue of authorship was at the heart of the proceedings.

[59] But the critical point, and it is a point that was properly emphasised by the Committee, is that the Standards Committee was not the appropriate forum to determine whether Mr ND had posted material in breach of a suppression order.

[60] If Mr BL had evidence that Mr ND had committed an offence, he should, as the Committee observed, have named Mr ND in the prosecution.

[61] I have noted that the Judge was critical of the manner in which the prosecution had been conducted, noting many errors, omissions and failures to comply with directions that seemingly blighted the prosecution's case.

[62] It is my understanding that relatively few private prosecutions are proceeded in the District and High Courts, and that in the majority of cases when a private prosecution is advanced, parties bringing those prosecutions enjoy, for the most part, the benefit of legal counsel.

[63] It can be a difficult task for a party advancing a private prosecution without benefit of independent counsel, to achieve the degree of detachment necessary when acting in the role of a prosecutor, particularly when it is inevitable that the party bringing the prosecution has what is frequently an intense and committed interest in the matters that are the subject of the prosecution.

[64] But Mr FL cannot attempt to re-litigate his brother's case through the vehicle of a professional conduct complaint.

[65] His complaint fundamentally rests on unproven allegation that Mr ND was responsible for authoring, under a nom de plume, an article that breached a suppression order.

[66] Mr BL had opportunity in the course of bringing his private prosecution, to frame that prosecution in a manner that specifically engaged Mr ND. This would have provided opportunity for Mr ND's conduct to be examined in a forum that had both the jurisdiction, and the legal processes, to conduct such inquiry.

[67] Fundamental to that inquiry, would be the onus on Mr BL to provide evidence to establish his allegation. More would be required than a simple expression of belief that Mr ND had written an article under an assumed name.

[68] Mr FL believes that Mr ND breached a suppression order. He is entitled to his view. But if it is his position that his view provides proper basis for a professional conduct complaint, then he must provide evidence to substantiate his position. In the current matter the best possible evidence would have been a finding in the prosecution that Mr ND had indeed authored the posting.

[69] Nor is it realistic for Mr FL to have expectation that a Standards Committee should set about investigating and gathering evidence to substantiate the allegations that Mr FL makes.

[70] It is a serious matter to make complaint that a lawyer has breached their obligations to the Court. A finding that a lawyer had deliberately misled the Court, would inevitably have disciplinary consequences for the offending lawyer.

[71] But, as has been noted, allegations of professional misconduct must, if they are to be established, be supported by robust evidence.

[72] It is not the function of either a Standards Committee or a Review Officer, to provide further opportunity for a party to litigate a matter that has been before the court, through the guise of advancing a conduct complaint.

[73] The decision of the Standards Committee to take no action on the complaints is affirmed.

Anonymised publication

[74] 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 8TH 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 FL as the Applicant
Mr ND as the Respondent
Mr BL as the Representative for the Applicant
[Area] Standards Committee [X]
New Zealand Law Society
Secretary for Justice