

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

[2021] NZLCRO 114

Ref: LCRO 211/2020

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

BU

Applicant

AND

**APPLICATION FOR REVIEW OF
A PROSECUTORIAL DECISION**

DECISION

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

Introduction

[1] Mr BU has applied for a review of a decision by [Area] Standards Committee [X] to refer Mr [BU] to the New Zealand Lawyers and Conveyancers Disciplinary Tribunal.

Background

[2] Mr GC, and his mother Mrs RC, were engaged in a lengthy and acrimonious family dispute.

[3] In 2016, Mrs RC instructed Mr BU to make application to the Family Court for a protection order. Mr GC was the subject of the application for protection.

[4] The application was filed on 9 May 2016. The application recorded the parties to the application as Mrs RC, together with her husband SC.

[5] Unfortunately, an error was made in naming SC as a party to the application. He had not provided Mr BU with instructions and there were concerns at the time as to whether in any event, SC had capacity to provide instructions. I say unfortunate, because that error (which was one of a nature that could have been easily remedied), appears to have provided the ignition point for a number of events, which culminated in Mr GC filing a series of complaints against Mr BU, with the New Zealand Law Society Complaints Service.

[6] The first of these complaints was filed in May 2016 and a decision issued by the [Area] Standards Committee [X] on 12 December 2016. Mr GC sought a review of the Committee's decision.

[7] The Legal Complaints Review Officer (LCRO) issued her decision on 31 July 2019.

[8] In that decision, the LCRO felt it necessary, to comment on the tone of the email correspondence that had been forwarded to the LCRO during the course of the review, noting, that the parties had "become increasingly discourteous towards one another".¹

[9] Whilst the LCRO concluded that the decision of the Standards Committee should remain largely unchanged, the Officer made a minor modification to the decision, in directing that Mr BU be ordered to tender an apology to Mr GC.

[10] On that, the LCRO said this:

[59] ... It can be difficult to assess the value of an ordered apology. However, Mr BU is encouraged to reflect on his conduct towards Mr GC and to others who have been subjected to his disrespectful and discourteous correspondence.

[60] Mr BU is ordered to apologise to Mr GC for his part in causing Mr GC distress arising from the protection order incorrectly recording SC as an applicant, and for his disrespectful and discourteous correspondence in the complaint and review processes. The wording of the apology will be left to Mr BU to determine. The date by which the apology is to be made is one month from the date of this decision. The reason for the extended period is to give Mr BU the opportunity to reflect on his conduct and to show some remorse in the wording of the apology.

[11] On 21 February 2017, Mr GC lodged a further complaint about Mr BU. This complaint was made after Mr GC had lodged his application for review of the Committee's decision delivered in response to his first complaint, but before the LCRO had issued her decision.

[12] A third complaint was lodged by Mr GC on 16 October 2018.

¹ LCRO 13/2017 (31 July 2019) at [19].

[13] A fourth followed on 2 September 2019.

[14] The Standards Committee tasked with the responsibility for investigating the fourth complaint filed by Mr GC, identified four separate grounds of complaint, including complaint made by Mr GC that the apology that Mr BU had been ordered by the LCRO to provide, was inappropriate.

[15] Mr BU's apology said this:

APOLOGY AS DIRECTED BY THE LCRO

As you are aware the Legal Complaints Review Officer ("LCRO") issued a decision, directing me to issue an apology to you GC, dated the 31st July 2019.

Both before and during the decision making process I outlined in detail my version of events.

To my surprise the Legal Complaints Review Officer issued a decision which required me to reflect on my conduct and to issue that apology.

As a person subject to any decision making process under The Lawyers & Conveyancers Act 2006, I may judicially review any decision, if I am dissatisfied with the decision or do not agree with aspects of that decision. I have considered the Act and the Judicial Review process, at some length and have sought guidance from Counsel in relation to not only the lengthy delay with Judicial Review proceedings but the stress and anxiety that goes with any such application.

By a very close margin I have elected to ignore the legal and factual matters within the decision, which conflict with my version of events and the advice I have received and have determined that whilst justice is a good thing, finality is better.

Accordingly I am therefore in the complex and discombobulating position of having to comply with that decision. That state of affairs, I am left in, is however something that I can accept.

I also have to respect the institution that is the LCRO after all I am a Barrister and Solicitor of the High Court of New Zealand and am therefore subject to all the joys and burdens that flow from such a position. I believe in the institution and the system that created it.

As directed by the Legal Complaints Review Officer ("LCRO") I have reflected on my conduct.

That has been a joyous and pleasurable opportunity and I thank the Legal Complaints Review Officer for allowing me the opportunity for quiet contemplation to reflect on my conduct.

I say that not in tongue in cheek but in all honesty as it is very rare for a busy suburban practitioner to take time out from assisting clients and striving to add value in a complex legal, political, social and economic climate to reflect on one's conduct in an historical matter.

The second aspect of the LCRO decision was after cogitating on my conduct, to issue an apology to GC.

I therefore am without fear or hindrance and comforted by the institutions that as a practitioner I not only respect but follow freely, apologise to GC in accordance with the direction of the LCRO decision dated 31 July 2019.

[16] The Committee determined to take no action in regard to three of the complaints but decided to investigate further, complaint that Mr BU had provided an inadequate apology.

[17] In approaching that task, the Standards Committee issued a notice of hearing inviting the parties to comment on two issues, namely:

- (a) whether Mr BU, by the contents of his letter dated 30 August 2019, failed to comply with an order of the LCRO (contained at paragraph [60] of her decision dated 31 July 2019 in matter LCRO 13/2017), and if so, whether Mr BU's failure amounted to unsatisfactory conduct as defined at section 12(c) of the Lawyers and Conveyancers Act 2006 (the Act) and/or possible misconduct as defined at section 7 of the Act, such that it may warrant referral to the Lawyers and Conveyancers Disciplinary Tribunal (the Disciplinary Tribunal); and
- (b) whether Mr BU, by the contents of his letter dated 30 August 2019, could be said to have breached any or all of Rule 2, 2.1, 2.2, 10, 11, 12, 13.2 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) and, if so, whether Mr BU's failure amounted to unsatisfactory conduct as defined in section 12 (c) of the Act and/or possible misconduct as defined at section 7 of the Act, such that it may warrant referral to the Disciplinary Tribunal.

[18] In its decision issued on 7 October 2020, the Committee determined that the two issues identified in its notice of hearing, should be referred to the Disciplinary Tribunal for consideration, pursuant to s 152(2)(a) of the Act.

Application for review

[19] Mr BU filed an application for review on 20 November 2020.

[20] Mr BU included with his review submissions, a copy of the submissions his counsel had provided to the Standards Committee.

[21] Mr BU submitted that:

- (a) the Standards Committee had refused to allow him an extension of time for filing submissions in circumstances where he had made appropriate request of the Committee to provide further particulars; and
- (b) the Committee had taken insufficient time to consider the complaint; and
- (c) the Committee had failed to identify which elements of his correspondence had breached specific conduct rules; and
- (d) the Committee's decision lacked explanation as to why the Committee considered it necessary to make a referral to the Disciplinary Tribunal; and
- (e) the letter of apology was directed to be sent to the LCRO, with expectation that it would be read by the LCRO before being forwarded to Mr GC; and
- (f) the Committee had been unduly influenced by email from opposing counsel; and
- (g) criticism could not reasonably be made of those aspects of his correspondence that addressed his views of the decision, or provided account of his reflections on the complaints process; and
- (h) whilst his apology may have been perceived to have been "tongue in cheek", it was honestly composed; and
- (i) he remained unclear as to how the apology provided constituted a breach of the conduct rules referenced by the Committee; and
- (j) he had an expectation (whether rightly held or otherwise) that the LCRO would read the apology and that he would be informed if the apology did not meet the LCRO's expectations; and
- (k) he was aware that it was a relatively rare occurrence for an LCRO to reverse a Committee's decision to refer a party to the Disciplinary Tribunal and if the apology was acceptable to the LCRO, this would give indication of improper motivation on the part of the Committee; and
- (l) it was difficult to respond to the complaint when the Committee refused to provide further particulars; and

(m) comments made in the decision were taken out of context.

[22] In his submissions to the Standards Committee, Mr BU submitted that:

- (a) he had complied with the LCRO's direction; and
- (b) to place an interpretation on the final paragraph of his apology as representing a departure from what was actually said, would be to "strain" the meaning of the words used; and
- (c) the words, the phrases and the entire sentences (of the apology) considered individually and collectively were clear and unambiguous; and
- (d) the LCRO was acting as a gatekeeper and had "sole power to consider the letter of apology and to determine whether it complied with her decision";²
- (e) the Committee should take into account that the LCRO had exercised her discretion and judgement and clearly determined that the letter of apology complied with the order made; and
- (f) the LCRO was best equipped to determine whether the apology was appropriate; and
- (g) there is no indication that the LCRO considered the apology tendered to be inappropriate; and
- (h) a careful analysis of the apology confirms that the apology complied with the Rules referenced by the Committee; and
- (i) it was important for the apology to provide a context; and
- (j) his compliance with the LCRO's direction that he take time to mull on matters was indicated by the reflective nature of the apology; and
- (k) the Committee's assessment of the apology should have taken into consideration the opportunity the breadth of the English language allows for individuals to express themselves in different ways; and

² Mr YN, submissions (15 May 2020) at [10].

- (l) he had been inspired in his University days by a decision of Lord Denning,³ which had illustrated the importance of context and background in writing, and encouraged him to adopt that writing style; and
- (m) individual style was important; and
- (n) whilst the apology may have been expressed in a manner that members of the Committee may not have chosen (or have wished him to adopt), the apology nevertheless complied with the direction made by the LCRO and had not breached any conduct rules.

[23] Mr GC responded to Mr BU's review application.

[24] The submission filed was comprehensive.

[25] To the extent the submission addressed matters relating to the apology provided, Mr GC submitted that:

- (a) the apology provided was "mocking" of the LCRO and the complaints process; and
- (b) Mr BU had utilised the opportunity to provide a vehicle to justify his actions; and
- (c) Mr BU's apology gave no indication of him expressing remorse.

Hearing

[26] An applicant only hearing proceeded on Tuesday 13 May 2021.

Nature and scope of review

[27] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:⁴

... 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" ...

³ *Miller v Jackson* (1977) QB 996 (EWCA).

⁴ *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.

[28] More recently, the High Court has described a review by this Office in the following way:⁵

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.

[29] 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.

Statutory framework for the prosecution decision

[30] In *EB (Application for review of a prosecutorial decision)* LCRO 110/2017 (20 November 2017), the LCRO summarised the approach adopted by Standards Committees when considering a decision to refer a practitioner to the Disciplinary Tribunal. That analysis is summarised in paragraphs [31] to [42] that follow.

[31] The Act provides for two categories of conduct which may attract disciplinary sanction, being misconduct and unsatisfactory conduct.⁶ The former is the more serious and can lead ultimately to a practitioner being struck off by the Tribunal.⁷

[32] Standards Committees may only make findings about the lesser category of unsatisfactory conduct.⁸ When confronted with a complaint⁹ in which the spectre of misconduct is present, a Standards Committee may direct it to be considered by the

⁵ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

⁶ Lawyers and Conveyancers Act 2006, ss 7 and 12.

⁷ Section 244.

⁸ Section 152(2)(b).

⁹ Including an own-motion investigation under s 130(c) of the Act.

Tribunal,¹⁰ and thereafter the Standards Committee must frame and lay any appropriate charge with the Tribunal¹¹ and serve them on the practitioner (and any complainant).

[33] Significantly, when directing a complaint to be considered by the Tribunal, a Standards Committee is not obliged to provide reasons. This is evident from the language of s 158 of the Act, which requires reasons to be given only when a Standards Committee makes a finding of unsatisfactory conduct or determines to take no further action.

[34] It is generally a fundamental tenet of natural justice that decision-makers provide reasons. At first blush it may seem inconsistent with that principle that a Committee with a statutory power of decision-making is not obliged to provide reasons for a decision it makes.

[35] In *Orlov v New Zealand Law Society* the Court of Appeal gave careful consideration to the question as to whether a Standards Committee was required to provide reasons for its decision to refer a matter to the Tribunal, and concluded that “it is clear from s 158 that a Standards Committee is not required to give reasons for a decision made under s 152(2)(a) to refer a matter to the Tribunal.”¹² Further, the Court noted that if Parliament had intended that a Committee be required to provide reasons for its decision to refer, then it would have expressly said so.¹³

[36] It is also important to note that in *Orlov* the Court of Appeal held that there is no threshold test to meet before a Standards Committee makes a prosecution decision.¹⁴

[37] Moreover, because Standards Committees may not make findings that particular behaviour is misconduct, the decision to prosecute is not a merits-based decision. In effect when directing the prosecution of a practitioner a Standards Committee is saying, “this behaviour may constitute misconduct; if so, only the Tribunal may determine that question”.

[38] Furthermore, the Tribunal may make that determination only after charges have been laid and a hearing conducted in that forum. The hearing will include parties giving evidence and being cross-examined – indeed, a traditional first-instance hearing procedure. It is only at the conclusion of that process that a merits-based decision may be made by the Tribunal.

¹⁰ Section 152(2)(a).

¹¹ Section 154.

¹² *Orlov v New Zealand Law Society* [2013] NZCA 230, [2013] 3 NZLR 562 at [98].

¹³ At [99].

¹⁴ Above at [53].

[39] Nevertheless, whilst a Standards Committee is not required to provide reasons for its decision to refer a matter for prosecution before the Tribunal, there is an express right of review conferred by the Act.¹⁵

Role of the LCRO on reviewing a prosecution decision

[40] In *Orlov* the Court of Appeal commented “there is now oversight of the referral decision by the independent LCRO”.¹⁶

[41] More recently the High Court was asked to review a decision of this Office in which it had dismissed an application for review of a Standards Committee’s decision to prosecute a practitioner. Fogarty J held the following:¹⁷

- (a) The purpose of a review by the LCRO is to form a judgment as to the appropriateness of the charge laid in the prosecutorial exercise of discretion by the Standards Committee. It is as simple as that. ... I agree ... that “a review by the LCRO (should be) 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. I agree also there is room in that review for the LCRO to identify errors of fact.

[42] Fogarty J also observed that “a critical question for the LCRO is whether the degree of gravity of the matter should justify the Standards Committee exercising the power to refer [conduct] to the Tribunal”.¹⁸

Discussion

Was Mr BU’s opportunity to respond to the complaint, frustrated by the Committee’s refusal to allow an extension of time for filing of submissions, and the Committee’s refusal to provide further particulars?

[43] On 1 May 2020, Mr BU’s counsel wrote to the Complaints Service seeking “clarification or particulars as to the breach of the relevant rules referred to in the Notice of Hearing”. Mr BU’s counsel sought clarification as to which aspect of Mr BU’s correspondence of 30 August 2019 had breached the rules referenced by the Committee in its notice of hearing. A request was made for an extension of time for filing submissions.

[44] That request was responded to on 5 May 2020 by Mr VM, a Legal Standards Officer. Mr VM advised that the request for an extension of time sought had been declined. Mr VM noted that Mr BU had been aware since 6 April 2020 that submissions

¹⁵ Section 193.

¹⁶ At [54](d).

¹⁷ *Zhao v Legal Complaints Review Officer* [2016] NZHC 2622.

¹⁸ At [25].

were required to be filed by 1 May 2020, and that the on the papers hearing was to proceed on 6 April 2020. Mr VM noted however that the Committee was prepared to allow Mr BU a short extension of time.

[45] In responding to request to provide further particulars, Mr VM advised that the Committee was unable to provide further particulars beyond those identified in the notice of hearing. He advised that the rules identified in the notice of hearing which were potentially engaged, were determined having regard to the tone and content of Mr BU's correspondence, and the circumstances in which the correspondence was sent.

[46] Mr BU makes complaint that the Committee's failure to provide him with explanation as to how his correspondence was said to have breached a specific rule, compromised his ability to provide full response to the concerns identified by the Committee in the notice of hearing issued.

[47] The Committee's indication to Mr BU that its concerns about his apology embraced issues of tone, content and the circumstances in which the apology was issued, gave clear indication to Mr BU (if indication was needed) that the Committee was examining the issue as to whether the apology issued, raised potential conduct issues.

[48] In my view, the Committee's notice of hearing adequately and sufficiently identified the issues that Mr BU was required to respond to. Nor do I consider that it was necessary for the Committee to attempt, at Mr BU's request, to break down each conduct rule and provide explanation as to how it considered that the rule had been breached.

[49] The rules referenced by the Committee can be summarised as rules which touch on a lawyer's obligations, as an officer of the court, to uphold the rule of law and to facilitate the administration of justice. Falling under the umbrella of those obligations, would be the obligation to properly comply with an order directed by the LCRO. Other rules referenced reinforce the obligations on practitioners to engage courteously with colleagues and third parties.

[50] There is no indication from the submissions filed by Mr BU with the Complaints Service, that he was unaware of the nature of Mr GC's complaint regarding the apology, nor confused as to the potential conduct issues raised by the complaint. His comprehensive submission set out a detailed response to the issues identified in the Committee's notice of hearing.

[51] I consider that Mr BU would have had a clear understanding that the rules referred to raised issue as to whether the nature of the apology provided by Mr BU adequately met his obligations to comply with an order made by an LCRO.

[52] Nor do I consider that there was force to Mr BU's submission that the Committee had failed to take sufficient time to address the complaint. The Committee had detailed the time frame it intended to follow in considering the complaint, and met that time frame.

[53] Mr BU suggests that the Committee's failure to specifically reference his submissions was indicative of the Committee having rushed its investigation. The decision delivered was comprehensive. To the extent that the decision failed to specifically record Mr BU's position in respect to the issue of complaint engaging the apology, the Committee's failure to provide reasons was consistent with the statutory direction that it was not required to do so.

Did the order made by the LCRO give indication that it was the intention of the LCRO to review the apology provided by Mr BU?

[54] Mr BU argues that the LCRO's direction that his apology be forwarded to the LCRO was somewhat unusual, but was indicative of the LCRO's intention that she would monitor the apology. Mr BU suggests that the LCRO was proposing to act in the role of a gatekeeper, that she would assess the suitability of the apology provided and, if dissatisfied with it, invite Mr BU to try again. Given no indication of any objection having been raised to the apology by the LCRO, Mr Kennelly submits that no objection can be taken to it.

[55] It is not the practice of the LCRO when making orders for a party to provide an apology, to make such direction with expectation that the apology prepared be provided to the LCRO for perusal. It is expected of practitioners, where such direction is made, that the practitioner understands their professional obligations to draft an appropriately worded apology.

[56] Mr BU's argument that he had legitimate expectation that the LCRO would examine the apology with a view to determining its suitability or otherwise, relies on argument that the LCRO had directed that the apology be forwarded to the LCRO.

[57] The starting point is an examination of the LCRO's order which said:

- (a) Pursuant to s 156(1)(c) of the Lawyers and Conveyancers Act 2006 Mr BU is ordered to tender an apology to Mr GC as provided in paras [59] and [60] of this decision. The apology is to be addressed to Mr GC but sent to this Office to be forwarded to Mr GC. Mr BU is not to correspond directly with Mr GC.

[58] There is nothing in the order to suggest that it was the intention of the LCRO that she peruse the apology when received and assess its suitability.

[59] A careful reading of the LCROs decision gives clear indication as to the reason why the LCRO took the unusual step of directing that the apology be forwarded to Mr GC through the office of the LCRO.

[60] I have noted at paragraph [8] that the LCRO, during the course of conducting the review, became increasingly concerned with the discourteous way in which the parties were engaging with each other.

[61] The LCRO was also concerned at what she described as the “extraordinary content of the emails received from both parties”. She noted, that “the content of Mr BU’s emails is particularly surprising in that to a significant extent they do not address the issues raised in the complaint. Instead they are directed in a personal manner towards Mr GC and latterly at Mr Vaughan”.¹⁹

[62] The LCRO considered that the conduct of the review had been hindered by the unhelpful approach adopted by the parties.

[63] Suggestion that the LCRO would provide oversight of the apology is dispelled by an examination of paragraph [60] of the LCRO’s decision where she noted, that “the wording of the apology will be left to Mr BU to determine”.

[64] It is compellingly clear that the LCROs direction that the apology be sent to the LCRO for forwarding to Mr GC was an appropriate step by the LCRO to ensure that there was no opportunity for the parties to become further embroiled in unpleasant exchanges.

[65] The apology when received by the LCRO was not reviewed by the LCRO. A case manager’s file note records that subsequent to her forwarding the apology, Mr GC made complaint that he was unhappy with the apology. A LCRO advised the case manager to inform Mr GC that the wording of the apology was not subject to approval by the LCRO. Mr GC was informed that as the review had been completed, no further correspondence was to be forwarded to the LCRO.

Did the apology provided by Mr BU breach any of the conduct rules?

[66] Mr BU was adamant that his apology had not breached any conduct rules.

¹⁹ LCRO 13/2017 (31 July 2019) at [24].

[67] He was emphatic that whilst the apology may not have been framed in terms that others would have, the apology, drafted in his style, gave indication that he had taken on board the LCRO's suggestion that he take time to reflect on his behaviour.

[68] I have noted, that the conduct rules referenced by the Committee broadly fell within the raft of rules which reinforce the obligations which attach to a lawyer as an officer of the court, and those rules which demand of a lawyer that the lawyer maintain proper standards of professionalism and treat both colleagues and third parties courteously.

[69] Viewed through the prism of these specific conduct rules, the issue reduces to an examination as to whether Mr BU's apology complied with the order directed by the LCRO, and whether the apology tendered met the obligation on Mr BU to deal courteously with Mr GC.

[70] I indicated to Mr BU at hearing that I did not consider that a detailed semantic analysis was required to achieve an understanding of what the word apology meant, nor for there to be a comprehensive examination of the obligations on a lawyer when responding to a direction to provide an apology.

[71] The purpose of an apology is to express regret for conduct that has caused offence or distress and to acknowledge that offence or distress.

[72] It is perhaps most profitably and constructively tendered in circumstances when a party, on their own volition, determines that they need to express regret for conduct that they themselves have concluded was unacceptable.

[73] A "directed" apology may not carry the force of one that is freely provided, but nevertheless is a remedy of considerable consequence in the world of professional discipline.

[74] A lawyer is entitled to robustly defend a conduct complaint. But if the complaint is upheld and the lawyer is required (as was the case here) to apologise to the complainant, the lawyer must do so in an appropriate manner.

[75] The obligation on Mr BU was not to provide Mr GC with an effusive apology but at minimum it could be expected of Mr BU that his apology be courteous. It would not be expected that the apology provided would be provocative and inflame the situation.

[76] It is so obvious as to approach the trite to emphasise that if a party providing an apology uses the opportunity to justify the conduct which they are purportedly providing an apology for, any force the apology carries is negated.

[77] In such circumstances, the apology may well be regarded by the recipient as cynical.

[78] At hearing, Mr BU was invited to indicate where he considered that he had, in his correspondence of 30 August 2019, precisely recorded his apology to Mr GC. Mr BU identified the final sentence of his apology. I agree with Mr BU. It is only in the final sentence of his correspondence that Mr BU addresses the LCRO's direction.

[79] Mr BU characterises the bulk of his correspondence as being drafted in response to the LCRO's direction that it would be appropriate for him to take time to carefully reflect on his conduct. He says that his correspondence reflects the degree of contemplation that he had engaged in and provides a helpful context for the apology that followed. He says that he was "creating a meaningful narrative for the apology". He says that if he had not provided the context for the apology, he would not have adequately complied with the LCRO's direction that he take time to reflect on matters. Mr BU included in his written submissions an extract from a decision of Lord Denning. This, as his counsel (Mr YN) explains it, to "illustrate the importance of context and background information and how it assists in addressing a significant and important point".²⁰

[80] Mr YN submits that when Mr BU's apology is scrutinised line by line, it is evident that Mr BU adhered to the rules.

[81] Mr YN contends that the introductory paragraphs to the apology illustrates that Mr BU had "subsequently accepted that the LCRO decision was correct (when prior to the decision he could not)" and that this illustrated the practitioner's understanding that his obligations and duties as an Officer of the Court were paramount. Mr YN submits that the Committee would have been comforted by Mr BU's reference in the apology to his obligations and duties as an Officer of the Court. Mr YN suggests that Mr BU's providing of personal insights into the issues he faced when dealing with an "unanticipated decision" may have presented as unusual, but when considered alongside the LCRO's direction that Mr BU take a month to reflect on matters, was understandable. Indeed, Mr YN argues that Mr BU may have faced accusation that he had not given proper consideration to the LCRO's direction that he take time to reflect on matters, if he had neglected to provide the broader context.

[82] Mr YN concluded his submission with argument that Mr BU "... has adopted perhaps a very personal style, and the individual practitioner may not have apologised in the way that members of the committee may have done, or may have wished him to

²⁰ Mr YN, submissions (15 May 2020) at [27].

do, but never the less he has complied with LCRO decision and has not breached any rules or engaged in any misconduct".²¹

[83] It is then Mr BU's position that his apology was the product of thoughtful and contemplative reflection, and crafted with careful attention to his obligations as an Officer of the Court. It was an apology that reflected his commitment to the LCRO's suggestion that he take time to reflect on his conduct. It was an apology that gives no indication of him having breached any conduct rules.

[84] With every respect to Mr BU, I do not consider that the apology drafted is reflective of the apology he describes.

[85] Serious concerns were identified by the LCRO regarding both the manner in which Mr BU had elected to engage with Mr GC, and his approach to advancing his review with the LCRO.

[86] The purpose of the apology, and this would have been abundantly clear to Mr BU, was to apologise to Mr GC for his part in causing distress to Mr GC.

[87] Much is made by Mr BU of the LCRO's direction that he take time to reflect on his conduct. Mr BU elevates this simple invitation for personal reflection to an explanation for him providing a somewhat perambulating view of the merits of the LCRO's decision, and a vehicle to provide comment on the institution of the LCRO.

[88] I am reluctant to parse every sentence of the apology, but a degree of examination cannot be avoided. In examining the apology paragraph by paragraph (as Mr BU's counsel has done), it is important to emphasise that the flavour and tone of the apology is best determined by considering the apology in its totality.

[89] Mr BU commences by explaining that he had "before and during" the decision-making process, outlined in detail his version of events. This was unnecessary but unobjectionable. Mr GC would have been fully aware of Mr BU's positions.

[90] Mr BU then expresses "surprise" that the LCRO had directed him to reflect on his conduct and to issue an apology.

[91] This is immediate indication from Mr BU, that he has issues with the direction.

²¹ Mr YN, submissions (15 May 2020) at [30].

[92] Mr BU then proceeds to explain that he is entitled to judicially review the decision. An apology is not appropriately prefaced by indication that the party providing the apology considers that the order directing the apology could be legally challenged.

[93] Mr BU goes on to say that he had considered the Act and the judicial review process at some length, and that he had taken advice from counsel. Having done so, he informs Mr GC that “by a very close margin I have elected to ignore the legal and factual matters within the decision which conflict with my version of events and the advice I have received and have determined that while justice is a good thing, finality is better”.

[94] Mr BU then advises that he is in the “complex and discombobulating position of having to comply with that decision. That state of affairs, I am left in, is however something that I can accept”.

[95] Mr BU characterises this extensive introduction to his apology as being something he was required to do, to satisfy the LCRO’s direction that he reflect on his conduct.

[96] In giving indication that he was surprised with the decision of the LCRO, that he had contemplated judicially reviewing the decision, that he had by a fine margin decided not to review it but was nevertheless discombobulated by the position he was in, Mr BU was not providing evidence of his commitment to having reflected on his conduct. He was suggesting that the LCRO decision was wrong, but that he had to put up with it. This provided the context for the apology that followed.

[97] The LCRO’s invitation to Mr BU to reflect on his conduct was a comment in the nature of that which is not uncommonly made by decision-makers in circumstances where the decision-maker has concluded that it is appropriate for an apology to be tendered.

[98] The comment was not, and I do not consider that Mr BU realistically considered it to be such, an invitation to present his apology with expansive account of his view of the decision together with his ruminations on his obligations as an Officer of the Court.

[99] Mr BU informed Mr GC that he had, as directed, reflected on his conduct and that the opportunity to do so had been both “joyous and pleasurable”. He thanked the LCRO for the opportunity.

[100] All of this, in an apology that was purportedly written for Mr GC.

[101] Mr BU would argue that his description of the opportunity offered for self reflection as joyous and pleasurable was a sincere reflection of his position, but he runs

the obvious risk in describing his response in such effusive terms, of descending towards the sarcastic.

[102] Mr BU himself appears to appreciate the potential for misunderstanding, when he emphasises that his indication that he had found the process of reflection to be “pleasurable” was not a comment made with tongue in cheek. He notes that the demands of suburban practice allow little opportunity for such self-reflection.

[103] I emphasise again, all this is preliminary to Mr BU getting to the point of proffering apology to Mr GC.

[104] When he does get there, Mr BU says that the second aspect of the LCRO decision required him to issue an apology, this seemingly to elevate the LCRO’s suggestion that he reflect on his conduct, to a specific direction or order of the LCRO.

[105] It was not.

[106] The order made by the LCRO was that Mr BU was to tender which an apology to Mr GC.

[107] The apology was cluttered, in my view, with unnecessary comment that had potential to (and did) provoke Mr GC.

[108] It was apology that rather than dampen down concern that Mr BU had been disrespectful to Mr GC, had obvious potential to inflame.

[109] Mr BU’s apology, considered in a disciplinary context, raises two concerns.

[110] Firstly, the apology leaves itself open to concern that it is an attempt by a practitioner to undermine an order made by an LCRO.

[111] The things said by Mr BU and the manner in which he says them, were not in my view reflective of a quirky individualistic style, but rather a somewhat self-indulgent attempt to diminish the apology.

[112] In undermining the order made, as I consider he did, Mr BU puts himself as an Officer of the Court, at risk of breaching the rules identified by the Committee.

[113] Secondly, it is troubling that Mr BU took the opportunity available to ameliorate what the LCRO considered to have been disrespectful, discourteous and provocative behaviour, by drafting an apology which had potential to be construed by the recipient of the apology as a continuation of that behaviour.

[114] The issue I am required to consider is whether there is any proper basis for interfering with the Committee's decision to refer Mr BU's conduct to the Disciplinary Tribunal for prosecution.

[115] As Fogarty J held in *Zhao*, I must robustly come to my own view of the fairness of the substance and process of the Committee's prosecution decision.

[116] Viewed in its totality, I consider it reasonable that the Standards Committee concluded that the apology raised legitimate disciplinary issues.

[117] In determining that it was appropriate to refer the matter to the Disciplinary Tribunal, the Committee had clearly concluded that the conduct concerns identified, raised possibility that the conduct was at a level of seriousness that merited a consideration as to whether the conduct may have amounted to misconduct.

[118] It is not for a Standards Committee or this Office to make findings of misconduct. That is the exclusive domain of the Disciplinary Tribunal. At the most, a Standards Committee and this Office is able say that there are conduct issues that could – not would – amount to misconduct if the Committee's evidence crosses the threshold required before the Disciplinary Tribunal.

[119] A Committee of experienced practitioners has concluded that it is appropriate to refer Mr BU to the Disciplinary Tribunal. Having, as I am required to do, independently come to a view as to the fairness of the Committee's decision, I see no reason to interfere with the decision of the Standards Committee to lay a charge before the Disciplinary Tribunal.

Costs

[120] Where an adverse finding is made, costs will be awarded in accordance with the Costs Orders Guidelines of this Office. It follows that Mr BU is ordered to pay costs in the sum of \$900 to the New Zealand Law Society within 30 days of the date of this decision, pursuant to s 210(1) of the Act. In setting costs in that sum, I have calculated costs on the basis applied when a straight forward review is managed on the papers.

Enforcement of costs order

[121] Pursuant to s 215 of the Act, I confirm that the order for costs may be enforced in the civil jurisdiction of the District Court.

Anonymised publication

[122] 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 30th day of July 2021

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 BU as the Applicant
[Area] Standards Committee [X]
New Zealand Law Society