LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2020] NZLCRO 74

Ref: LCRO 079/2019

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	**PS** Applicant
AND	**NR** Respondent

DECISION

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

Introduction

[1] Ms PS has applied for a review of a decision by the [Area] Standards Committee [X] to take no further action in respect of her complaint concerning the conduct of the respondent, Mr NR, at the relevant time a lawyer employed by [Law Firm G] (the firm) as a consultant. Mr NR represented Ms PS' former husband, Mr UM, in domestic violence proceedings against Ms PS in the Family Court.

[2] Ms PS and Mr UM separated during 2002. Their twin sons, A and B, were then aged 2. Mr UM remarried in 2015.

[3] Ms PS says she had over time experienced difficulties obtaining financial contribution from Mr UM for the boys' care and upbringing which led to her making "email

threats" to Mr UM on 25 June 2017, and assaulting him[1]. On 29 June 2017 the Family Court granted Mr UM's application for a temporary protection order against Ms PS.

[4] Just over three months later on 3 October 2017, Ms PS who was self-represented, and Mr NR who represented Mr UM attended a Court pre-hearing conference of the domestic violence proceedings.

[5] As discussed in detail in my later analysis, Ms PS explained to the Court her difficulty in obtaining responses from Mr UM concerning the boys' care. To avoid Ms PS contacting Mr UM, which she was prohibited from doing by the temporary protection order, Mr NR agreed to "redirect" Ms PS' emails to Mr UM.

[6] On 17, 18, and 19 October 2017 Mr NR received emails from Ms PS about B's tuition which he passed to Mr UM.[2]

[7] On 20 October, Mr NR informed (by email) Ms PS that he had "forwarded" those emails to Mr UM. He told Ms PS he would no longer pass on her emails about the boys' care to Mr UM, and she "must deal" with Mr UM "direct". Ms PS sent an email to Mr UM on 22 December 2017 about B's holiday job, and his care and wellbeing.

[8] During February 2018, the Court appointed a barrister, Ms TK, to assist in the proceedings.

[9] On 12 June 2018 the Court granted Mr UM's application for a permanent protection order, and ordered Ms PS to pay Mr UM's Court costs.[3] The Judge stated that despite the temporary protection order "there ha[d] been numerous emails" from Ms PS to Mr UM and Mr NR "notwithstanding that for some of the time, [Ms PS] has herself had a barrister acting for her".

Complaint

[10] Ms PS lodged a complaint with the Lawyers Complaints Service (LCS) on 24 September 2018. She asked that Mr NR be reprimanded, and be required to pay Mr UM's legal costs in respect of the 12 June 2018 hearing which the Court had ordered her to pay.

(1) Pre-hearing conference, 3 October 2017 – parenting communications

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[1] *UM v PS* [2018] NZFC XXXX at [5] and [8] – Ms PS was discharged without conviction.
[2] Ms PS' email included emails from B's school. Mr NR says he received four emails. Ms PS says she cannot locate the fourth email.
[3] Minute, Family Court, order for costs totalling $6,052.00 on 10 July 2018.

[11] She claimed (a) she "accepted" Mr NR's offer, made at the Court pre-hearing conference on 3 October 2017, to pass on her communications "regarding parenting" to Mr UM, and (b) Mr NR subsequently informed her in his 20 October 2017 email that he would no longer do that, and she "must deal with these matters direct" with Mr UM.[4]

[12] She said although herself not aware at that time, Mr NR would have known that if she communicated directly with Mr UM she would breach the temporary protection order made on 29 June 2017.

(2) Final protection order, 12 June 2018

[13] Ms PS claimed Mr NR, although directing her in his 20 October 2017 email to send future communications to Mr UM, "used [that] against" her at the 12 June 2018 hearing where she says the Judge was "furious" with her for having communicated with Mr UM about A's and B's care and wellbeing.

[14] She said she had represented herself in the proceedings but the Judge mistakenly recorded in his decision that she had a lawyer representing her.

[15] She said when she sent her 22 December 2017 email, referred to above, to Mr UM, she had "no awareness" she would breach the temporary protection order. She said the Law Society had advised her to raise her concerns about Mr NR with the Court first, and if "not content" with the outcome, to then make a complaint to the Law Society.[5]

[16] She said all of her emails to Mr UM, presumably including her 17, 18, and 19 October 2017 emails sent to Mr NR, concerned "childcare", and were "courteous" notwithstanding Mr UM's "ongoing lack of support for parenting".

[17] Ms PS said her 22 December 2017 email was her last to Mr UM. By then, she said the boys had left school and she had no further need to communicate with him about their care.

Response

[18] Following an initial assessment by the LCS, Ms PS' complaint was dealt with through its Early Intervention Process which I refer to later in this decision.

[19] When providing, as requested by a Legal Standards Officer, a copy of the Court's 12 June 2018 decision, Mr NR stated that his "advice" to Ms PS to contact Mr UM

[4] Transcript, Family Court pre-hearing, 3 October 2017.
[5] Ms PS, letter to the Family Court, 29 June 2017.

direct had not led to the permanent protection order. He said Ms PS "had Counsel to [a]ssist throughout".

Standards Committee decision

[20] The Committee delivered its decision on 17 May 2019 and determined (a) pursuant to s 138(1)(f) of the Lawyers and Conveyancers Act 2006 (the Act) to take no further action on Ms PS' complaint on the grounds that the Court was the appropriate forum to hear her concerns, and (b) pursuant to s 138(2) of the Act any further action on the complaint was unnecessary or inappropriate.

(1) Pre-hearing conference, 3 October 2017 – parenting communications

[21] In reaching that decision the Committee said Ms PS had not produced any evidence that supported her allegation that Mr NR, by informing her in his 20 October 2018 email that "he [would] not carry communications between" her and Mr UM "regarding childcare issues", had misled her thereby breaching his professional obligations.

[22] The Committee observed that the Court had made the final protection order in reliance on evidence before the Court, not because Ms PS, acting on "Mr NR's advice", had breached the temporary protection order by subsequently "communicat[ing] directly" with Mr UM.

(2) Family Court hearing, 12 June 2018 – costs award

[23] The Committee stated that the Court, which heard the matter, was the appropriate forum to raise her concerns, not the Committee.

[24] For that reason, the Committee declined jurisdiction to consider Ms PS' allegation that she would not have been liable for costs awarded against her had she not breached the temporary protection order, which, as noted earlier, she says she did at Mr NR's direction.

Application for review

[25] Ms PS filed an application for review on 20 June 2019. She says the Committee did not "address [her] main complaint", namely, that Mr NR "told [her] to contact [Mr UM] directly" thereby "placing [her] in breach of the protection order".

[26] She says if Mr NR "had not directed [her] to contact [Mr UM] directly, [she did] not believe [Mr UM's] case against [her] would be won". She repeats her request that Mr NR be reprimanded, and fined an amount equivalent to Mr UM's costs she was ordered by the Court to pay.

(1) Pre-hearing conference, 3 October 2017 – childcare communications

[27] Ms PS repeats that Mr NR's 20 October 2017 email "advi[ce] … to contact" Mr UM "caused [her] to breach the protection order".

[28] She says the Committee was wrong in stating that because Mr NR was not instructed by Mr UM "on other matters", [Mr NR's] offer, made at the 3 October 2017 Court pre-hearing conference "to carry communications between [her] and Mr UM", was confined "to the protection order proceedings".

[29] She says because the protection order matter "was being dealt with" by the Court, it would have been "ludicrous for [her] to contact Mr NR" about that matter. In support she refers to the transcript of the 3 October 2017 pre-hearing conference which she says demonstrates she needed to contact Mr UM about "childcare matters, and general matters".

[30] She says her 25 June 2017 email to Mr UM, regarded by the Court as "offensive", was "[t]he only abusive email". She says when she sent that email, the reason for the protection order "in the first place", she "was under extreme financial and emotional stress" because Mr UM had "withheld [her] superannuation, and refused to pay any child support".

(2) Family Court hearing, 12 June 2018 – permanent protection order decision

[31] Ms PS says the Court registry informed her that any appeal of the decision would be to the High Court. Whilst she says she was receiving legal aid, that "[did] not resolve the issue" of Mr NR having "instruct[ed]" her "to contact [Mr UM] directly".

[32] She says the "numerous emails" referred to by the Court from her to Mr UM, and Mr NR following the temporary protection order hearing on 29 June 2017, and the pre-hearing on 3 October 2017, were her emails which Mr NR had agreed at the 3 October 2017 pre-hearing conference, could be sent to him to pass on to Mr UM.

[33] She says despite the Judge's statement that during "some of [the] time" when Mr PS was communicating by email with Mr UM and Mr NR she "had a barrister acting for her", she represented herself in the proceedings. She says Ms TK, appointed by the

Court in February 2018 "to assist" the Court, "did not even explain … any points of law" to her.[6]

Response

[34] In his initial response, Mr NR said he did not wish to add anything further. He said he was soon to retire from both the firm, and the practice of law, and had not renewed his practising certificate from 1 July 2019.[7]

[35] He said any further communications concerning Ms PS' application should be directed to his supervising partner.[8]

[36] On 14 February 2020 I directed Mr NR to provide submissions on (a) why, in his 20 October 2017 email to Ms PS, he withdrew his agreement, made at the 3 October 2017 pre-hearing conference, to forward Ms PS' emails about A's and B's care to Mr UM, and (b) what considerations he took into account before sending that email.

[37] I asked Mr NR, when responding to the second question, to say whether he considered Ms PS would breach the temporary protection order if Ms PS communicated directly with Mr UM about the boys' care. Also, whether he considered first informing both Ms PS and the Court of his intention to stop sending Ms PS' childcare emails to Mr UM.

[38] I refer to Mr NR's submissions in my later analysis.[9]

Review on the papers

[39] In my initial consideration of Ms PS' application for review, and accompanying material, I formed the view that this matter could be adequately considered "on the papers" without hearing from the parties in person.[10] The parties were informed by this Office by letter dated 8 July 2019, and invited to comment on, or raise any objection to the review proceeding in that manner.[11]

[40] Whilst Mr NR agreed, Ms PS objected stating she wished to be heard in person on the grounds that (a) she did not consider herself skilled enough to "present [her] case

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[6] At [8].
[7] Mr NR, letter to LCRO, 28 June 2019.
[8] Ms LE. Mr NR also provided his personal email address and mobile telephone number.
[9] Submissions, Mr NR, 3 March 2020.
[10] Section 206(2) of the Act; "… on the basis of the information available" including the parties' written submissions, together with the Committee's complaint file.
[11] Section 206(2A).

entirely in writing, (b) wished to speak to her submissions, and (c) the "misrepresentation" of her position by the Committee did not give her confidence on review.[12]

[41] Having considered Ms PS objection I remained of the view that her application could be adequately determined in the absence of the parties. In accordance with my directions, the case manager informed Ms PS on 8 August 2019.

[42] 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. This review has been undertaken on the papers, including the parties' submissions provided in accordance with my directions referred to earlier, pursuant to s 206(2) of the Act.

Nature and scope of review

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

> … the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.
>
> The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" …
>
> … 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.

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

> A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

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[12] Ms PS, letter to LCRO, 20 July 2019.
[13] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].
[14] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

[45] 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 consider all of the available material afresh, including the Committee's decision, and provide an independent opinion based on those materials.

Early Intervention Process

[46] As I mentioned earlier, Ms PS' complaint was dealt with through the LCS' Early Intervention Process. This involves a Standards Committee conducting an initial assessment of a complaint and forming a preliminary view as to outcome.

[47] If the Committee's preliminary view is that the complaint lacks substance, a Legal Standards Officer (LSO) will inform the lawyer concerned of the Committee's preliminary view, inviting response. Any response is recorded in a file note and provided to the Committee, which then completes its inquiry into the complaint.

[48] On 6 May 2019 an LSO telephoned Mr NR and informed him that the Committee had reached a preliminary view that it would take no further action on Ms PS' complaint. Having been asked by the LSO a week later, on 13 May 2019, whether he wished to respond to the complaint, Mr NR indicated (by email) that he did not wish to do so.[15]

Issues

[49] The issues I have identified for consideration on this review are:

(a) Did Mr NR agree at the 3 October 2017 Court pre-hearing conference to forward Ms PS' written communications about childcare to Mr UM?

(b) If so:

(i) did Mr NR have professional duties and obligations that required him to first, obtain Ms PS' approval, and notify the Court of his intention to withdraw from that agreement?

(ii) by subsequently telling Ms PS, in his 20 October 2017 email to her, he would no longer pass on Ms PS' emails "regarding childcare issues" to Mr UM, and she would have to send all future such communications "direct", did Mr NR breach or contravene any professional duties and obligations?

[15] Lawyers Complaints Service – Call Log.

Analysis

(1) Child care communications – Mr NR's offer

[50] The issues on this review concern the nature of Mr NR's offer made during the 3 October 2017 pre-hearing conference to "redirect" to his client, Mr UM, any of Ms PS' communications to Mr UM about the care of A and B, and his withdrawal of that offer.

[51] During the pre-hearing conference, Ms PS asked the Judge how she could communicate with Mr UM "about care of the children". In response, the Judge (a) directed Ms PS that "anything in relation to the domestic violence proceedings" had to be "communicate[d] with Mr NR" who represented Mr UM, and (b) added Ms PS "could send that letter" intended for Mr UM "to… Mr NR and ask him to forward it onto Mr UM".[16]

[52] Mr NR informed the Judge that "the best help" he could "offer [was] that if there had been emails that have gone to Mr UM, if Ms PS re-directs them to [Mr NR]". In reply to the Judge's response, "that might help", Mr NR said he would "forward them on with comments".

[53] Finally, the Judge told Ms PS if she was "not getting any response then Mr NR [had] invited [her] to send "letters and correspondence to [Mr NR] and he will forward it on" to Mr UM, on condition that "the only matter [Mr NR] [i]s obliged to talk to [Ms PS] about are the domestic violence proceedings because [Mr NR] is not instructed in relation to other matters".

(2) Ms PS

[54] Ms PS claims that if Mr NR "had not directed [her] to contact [Mr UM] directly", the Court would not, on 12 June 2018, have made a permanent protection order against her.[17] She claims that when telling her to contact Mr UM direct, Mr NR would have known she would breach the temporary protection order if she did so.

[55] To provide context, Ms PS explains that her 25 June 2017 email threat to, and assault on Mr UM were the events that led to the temporary protection order being granted by the Court on 29 June 2017.

[56] She says she was under "severe stress" at that time due to Mr UM (a) having "refused to assist in financial or physical care" of A and B, (b) "not respond[ing] to [her] requests for help, or concerns" about them, and (c) "with[holding] [superannuation] funds

[16] A copy of the transcript was produced for this review.
[17] Ms PS, letter to the Court, 29 June 2018.

owed to her". She also says B was clinically depressed, had missed "85 days of school in NCEA 3 year, 2017", and needed his teachers' and her help to "pass his exams".

[57] Ms PS says she did not "physically" assault Mr UM but "touch[ed]" his "chest … as [she] cried and pleaded with him to assist [her] in paying for [their] kids" having already taken "as much [money] as [she] could" from her Kiwisaver with "a significant financial hardship" withdrawal. She says she wanted to plead not guilty but "could not afford a trial", and "had to plead guilty" to obtain a discharge without conviction.

[58] She says her 25 June 2017 "offending email" to Mr UM followed him having "just cancelled a much awaited" appointment for B to see a psychologist, rescheduled by Mr UM eight weeks later. She explains that her email to Mr UM was "a cry for help" brought about by her "frustrat[ion] and exhaust[ion]" dealing with Mr UM about childcare.

[59] Ms PS refers to the Judge's comment at the subsequent 3 October 2017 pre-hearing conference that although "the lack of financial support from Mr UM" for A and B was an "ongoing issue" for, and "challenging" to her, "the only proceedings" before the Court were "the proceedings under the Domestic Violence Act" yet to be heard.[18]

[60] She says she regards Mr NR's "offer" to pass on her unanswered emails to Mr UM about the boys' care as "an agreement … done in court [which] surely is binding". Contrary to Mr NR's view, she says her 17, 18, and 19 October 2017 emails about B's education, intended for Mr UM, were "urgent".

[61] She says by communicating with Mr UM through Mr NR she would "not [be] breaching the protection order", and did not expect Mr NR to reply.

[62] She says contrary to the Judge's statement in his 12 June 2018 judgment, she represented herself at that hearing. She says she disputed information produced by Mr NR that Mr UM "had paid child support", but "ha[d] been unable to respond" at "the last minute".

[63] Ms PS refers to the Judge being "cross with" her for having communicated directly with Mr UM after receiving Mr NR's 20 October 2017 email. In her view, this influenced the Judge to make a permanent protection order. She claims Mr NR "should have had some doubts" that Mr UM had "contribute[d] financially" towards the boys' "essential care".

[18] Transcript of the Family Court pre-hearing conference on 3 October 2017, produced by Ms PS.

[64] Ms PS acknowledges that the Court's 12 June 2018 decision, which also required her to pay Mr UM's court costs although she was "not in a position to do so", "cannot be changed".

[65] She explains "no-one" previously "mentioned overturning the judgment", and the Court registry told her she "would have to … appeal" to the High Court.[19] She says she now has "a legal aid lawyer who will hopefully be able to address this", although that would "not resolve the issue of Mr NR's instruction for [her] to contact the protected parties directly".

(3) Mr NR

[66] Mr NR says he "offered" at the 3 October 2017 pre-hearing conference "to receive the letters or emails Ms PS had already sent on to Mr UM that had not been answered and forward them on to Mr UM". He says he expected those communications "would be urgent and important childcare issues", but that was "not what [he] subsequently received from Ms PS".

[67] In his submissions to this Office, Mr NR explains that during the pre-hearing conference Ms PS' "attempt[ed] to raise issues…about earlier [child care] proceedings" on which he did not act for Mr UM. He says the Judge informed Ms PS that "the only proceedings to be considered" that day were "the current Domestic Violence proceedings and directions to be given".

[68] He says the Judge told Ms PS that A's and B's age – over 16 – "would cause jurisdictional issues" for her to "bring [child care] proceedings back" to the Court before the domestic violence hearing intended for 2018 after they "had completed" secondary school.

[69] Mr NR explains, after Ms PS informed the Court of her "continuing problems communicating with Mr UM", he "offered" to "forward … on to Mr UM" the unanswered "letters or emails Ms PS had already sent on to Mr UM". He says Ms PS' 17, 18 and 19 October 2017 emails were not the "urgent and important childcare issues" he had expected from her.

[70] He says having received those emails he informed Ms PS in his 20 October 2017 email (a) he would "no longer act as 'gatekeeper' in respect of communications regarding childcare issues", and (b) she "must deal with these issues direct".

[19] Ms PS, submissions, 12 March 2020.

[71] He says in her reply email that day Ms PS told him "she would stop forwarding [him] communications". However, on 24 October 2017 she sent him an email dated 21 September 2017 addressed to Mr UM about a relationship property issue from her lawyer acting for her on that matter.[20]

[72] He says there were three reasons why he withdrew his offer to redirect Ms PS' letters and emails intended for Mr UM. First, on 16 November 2017 A and B would turn 18 and would no longer be children; secondly, Mr UM instructed him not to correspond with Ms PS stating [Mr UM] "would deal with all education financial and other issues direct with his sons"; and thirdly, Ms PS' 17, 18 and 19 October 2017 emails were not "limit[ed] [to] correspondence [about] urgent and important childcare matters".

[73] In Mr NR's submission, in cases of "serious or urgent" childcare issues, such as "a medical urgency", Ms PS "would have the defence of a reasonable excuse even if she was technically in breach of the protection order".

[74] Mr NR submits it was "not … necessary" to "advise" the Court of his "intention to stop forwarding" that correspondence to Ms PS because (a) the Court did not direct or order him to do so, and (b) Ms PS informed him on 20 October 2017 she would not send him further communications intended for Mr UM.

(4) Professional duties owed to a non-client

[75] Generally, a lawyer acting for a client would not owe a professional duty to a person who was an opposing party in litigation. For that reason, "the existence of a duty" owed to a non-client has been described as "exceptional".[21]

[76] The Courts have referred to policy considerations why a lawyer acting for one party to a transaction owes no professional duty to a party on the other side of the transaction, the most obvious being the different interests possessed by each party.[22]

[77] On the facts of this review, where Ms PS, who says she was self-represented, complains about the conduct of a lawyer, Mr NR, who acted for the opposing side, Mr UM, then those of the professional duties and obligations in the Lawyers and

[20] About superannuation.
[21] Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at [5.4.3].
[22] At [5.4.3] referring to *Burmeister v O'Brien* [2010] 2 NZLR 395 (HC), at [234].

Conveyancers Act (Lawyers: Conduct and Client Care Rules) 2008 (the Rules) which might apply include: [23]

(a) a lawyer's overriding duty to the Court (rules 2.1);

(b) the duty to promote and maintain proper standards of professionalism in the lawyer's dealings (rule 10);

(c) when acting in a professional capacity, the duty to conduct dealings with others, including self-represented persons, with integrity, respect, courtesy (rule 12);

(d) the duty to inform a person whom the lawyer knows is self-represented to take legal advice (rule 12.1).

(5) Discussion

(a) Offer

[78] As noted earlier, at the 3 October 2017 pre-hearing conference Ms PS explained to the Court that her need to communicate with Mr UM concerned the practicalities of A's and B's care – "where do I put [the boys'] beds? Do they need TV's? Are they going to Uni next year? Are they flatting? Are they Street kids?".

[79] In response the Judge told Ms PS she "could send that letter to … Mr NR and ask him to forward it on to Mr UM".

[80] Mr NR then "offer[ed]" that "if there had been emails that have gone to Mr UM if Ms PS redirects them" to Mr NR, then Mr NR would "forward them on with comments". The Judge reminded Ms PS that if she was "not getting a response" from Mr UM then Mr NR had "invited [her] to send – letters and correspondence to [Mr NR] and he will forward it on" to Mr UM.

[81] In contending that his offer was limited to unanswered emails already sent by Ms PS to Mr UM, Mr NR seems to rely on his words "if there <u>had</u> been emails that <u>have</u> gone to Mr UM…". [emphasis added]

[23] Other rules which can apply when a lawyer may not be acting for a client include, not to attempt to obstruct, prevent, perverted or defeat the course of justice (rule 2.2); not to provide false certificates (rules 2.5, 2.6).

[82] However, I do not interpret the Judge's reference to Ms PS' "letters and correspondence" about the boys' care as confining Mr NR's "offer" to unanswered emails already sent by Ms PS to Mr UM.

(b) Withdrawal

[83] Ms PS claims Mr NR could have "extended [her] the courtesy of advising" her she would breach the protection order if she contacted Mr UM directly. Instead, she claims Mr NR later, at the 12 June 2018 hearing, "used" her 22 December 2017 email to Mr UM "against" her.

[84] Ms PS argues Mr NR's "allegiance to" Mr UM did "not permit" [Mr NR] to "encourage [her] to breach" the protection order. She claims her 22 December 2017 email had nothing to do with Mr NR having told her on 20 October 2017 he would not pass on her emails to Mr UM.

[85] Mr NR submits it was not necessary for him to inform the Court of his "intention to stop forwarding" Ms PS' correspondence to Mr UM. His main reason is because the Court had neither directed nor ordered him to redirect Ms PS' communications about A's and B's care to Mr UM.

[86] Mr NR acted for Mr UM, not for Ms PS. Other than the professional duties and obligations of a broader nature referred to earlier, he did not owe Ms PS professional duties of the type owed by a lawyer to his or her client.

[87] However, in agreeing, at the 3 October 2017 pre-hearing conference, to pass on Ms PS' communications about the boys' care intended for Mr UM, Mr NR would have appreciated that the temporary protection order prevented Ms PS from communicating directly with Mr UM.

(c) Conclusion

[88] For these reasons, it is my view that without prior discussion with Ms PS, and notification to the Court, it was at best insincere, at worst discourteous[24] and unprofessional[25] for him to tell Ms PS, as he did in his 20 October 2017 email, that (a)

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[24] Rule 12: "A lawyer must, when acting in a professional capacity, conduct dealings with others, including self-represented persons, with integrity, respect, and courtesy."

[25] Section 12(c) of the Act: "conduct consisting of a contravention of this Act, or of any regulations or practice rules made under this Act that apply to the lawyer …, or of any other Act relating to the provision of regulated services (not being a contravention that amounts to misconduct under section 7)". Section 12(b): "conduct of the lawyer … when he or she… is providing regulated services and is conduct that would be regarded by lawyers of good standing as being unacceptable, including—… (ii) unprofessional conduct".

he would no longer forward to Mr UM her communications "regarding childcare issues", and (b) she "must deal" with Mr UM "direct" about those matters.

[89] Because Mr NR knew Ms PS was self-represented at that time, it could also be expected he would have informed Ms PS of her "right to take legal advice".[26]

[90] Further, I would think that a judge before whom an offer such as Mr NR's was made would expect counsel making the offer to honour its terms unless for very good reason it becomes unreasonable or impracticable to do so. When an officer of the court has indicated to a judge that they will follow an agreed course of conduct, even if it was peripheral to the main issue before the court, I consider it appropriate for that lawyer to inform the court if there has been a change. This is all the more so when the opposing party, as did Ms PS, represented herself.

[91] In such circumstances, it is open to me to make an unsatisfactory conduct finding against Mr NR under ss 12(b) and 12(c) of the Act. However, a breach of the Act, if established, does not automatically attract a disciplinary sanction. In *Burgess v Tait* the Court observed that:[27]

> The ability to take no further action on a complaint can be exercised legitimately in a wide range of circumstances, including those which would justify taking no action under s 138(1) and (2). It is not confined to circumstances where there is no basis for the complaint at all.

[92] That position was affirmed in *Chapman v Legal Complaints Review Officer* where the Court noted that:[28]

> … it appears to me that the [Review Officer] may have assumed that her finding of unsatisfactory conduct inevitably led to the setting aside of the Committee's decision to take no further action under s 138. No point has been taken on this but any such assumption would be incorrect. The discretion which s 138 confers subsists throughout.

[93] In conducting a review, the Review Officer may exercise any of the powers that could have been exercised by the Standards Committee in the proceedings in which the decision was made or the powers were exercised or could have been exercised.[29]

[94] Included in those powers, is the ability to exercise a discretion to take no action, or no further action on the complaint.[30] That discretion may be exercised in

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[26] Rule 12.1: "When a lawyer knows that a person is self-represented, the lawyer should normally inform that person of the right to take legal advice."
[27] *Burgess v Tait* [2014] NZHC 2408 at [82].
[28] *Chapman v Legal Complaints Review Officer* [2015] NZHC 1500 at [47].
[29] Lawyers and Conveyancers Act 2006, s 211(1)(b).
[30] Section 138.

circumstances where the Review Officer, having regard to all the circumstances of the case, determines that any further action is unnecessary or inappropriate.[31]

[95] The fact that, on receipt of Mr NR's 20 October 2017 email, Ms PS does not appear to have taken legal advice does not diminish Mr NR's professional duties referred to above.

[96] However, having considered the parties' submissions on the issues I identified along with the information previously produced by the parties, and by the Committee, I have decided, by the finest of margins, not to make an adverse finding against Mr NR. In reaching that decision I have been particularly mindful of the following:

(a) Upon receipt of Mr NR's 20 October email it is reasonable to expect that Ms PS would have either queried his change of position with him, or obtained her own legal advice on the proper course for her to take.

(b) Equally, upon receipt of that email, Ms PS, being subject to the temporary protection order, would have been aware of the risk to her of her contacting Mr UM direct.

(c) The Judge made this clear to Ms PS at the 3 October 2017 at the pre-hearing conference.[32]

(d) Ms PS says she was aware of her right of appeal to the High Court.

[97] In addition, and importantly, at the 12 June 2018 hearing the Judge would have heard from Ms PS and Mr UM on all aspects of their interactions. For that reason, it is not open to me to attempt to gauge, effectively by way of a rehearing, to what degree, if any, Ms PS' childcare communications to Mr UM after 20 October 2017 persuaded the Judge to make a permanent protection order against Ms PS.

Decision

[98] For the above reasons, pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee to take no further action against Mr NR in respect of Ms PS' complaint is confirmed.

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[31] Section 138(2).
[32] "… there are the challenges of the protection order … so if [Ms PS] need to contact Mr UM for any … [she] need[s] to contact Mr NR".

Anonymised publication

[99] 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.

DATED this 28th day of May 2020

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B A Galloway
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:

Ms SP, as the Applicant
Mr NR, as the Respondent
Ms LE, as a related person
[Area] Standards Committee [X]
New Zealand Law Society