

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

[2020] NZLCRO 181

Ref: LCRO 104/2020

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

BETWEEN

LN

Applicant

AND

RT

Respondent

DECISION

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

Introduction

[1] Mr LN has applied for a review of a decision by the [Area] Standards Committee to take no further action in respect of his complaint concerning conduct on the part of Ms RT.

Background

[2] Mr LN's former wife instructed Ms RT to act for her in relation to a dispute over whether Mrs LN could take their children overseas. On behalf of her client, Ms RT applied for orders without notice to Mr LN. In doing so, Ms RT assisted Mrs LN in preparing and filing her affidavit evidence. Ms RT also signed the standard form certificate dated 18 June 2019 in which she provided certain assurances to the Court (the certificate). The certificate said:

I certify that:

1. I have advised the applicant that every affidavit filed with this application must fully and frankly disclose all relevant circumstances, whether or not they are advantageous to the applicant or to any other person and
2. I have made reasonable enquiries of the applicant in Order to establish whether the relevant circumstances have been disclosed, and that to the best of my knowledge, every affidavit filed with this application discloses all relevant circumstances; and
3. I am satisfied:
 - (i) that the application and every affidavit filed with it complies with the requirements of the Care of Child Act 2004 and the Family Courts Rules 2002; and
 - (ii) on reasonable grounds that the Order being sought falls within the grounds on which an Order can be made.

[3] Although Mr LN said he had quite a number of other objections regarding Ms RT's conduct, the complaint he made to the New Zealand Law Society (NZLS) centred on the truth of the certificate and the content of the affidavits filed in support of Mrs LN's without notice application.

The complaint and the Standards Committee decision

[4] Mr LN says the evidence is incomplete to the point of being misleading, and the certificate is false. He wants action taken to ensure Ms RT cannot provide a false certificate again, and he would like to recover costs from her.

[5] Ms RT stands by the accuracy of her certificate and the advice she gave to her client. Ms RT says the affidavit contained all she considered relevant and necessary to her client's application and she made reasonable enquiries. She was satisfied of all she was obliged to be satisfied of. Ms RT set out the steps she had taken to reach that point.

[6] The Committee considered Ms RT's detailed response and concluded further action was not necessary or appropriate with respect to either element of Mr LN's complaint.

Application for review

[7] Mr LN applied for a review. He would like this Office to reverse the Committee's decision, take disciplinary action and order Ms RT to pay costs. Mr LN says:

- (a) The decision contains errors that suggest bias and a lack of attention to detail;

- (b) The Committee did not consider all of the relevant facts and the lack of disclosure of relevant information to the Court.

[8] Mr LN refers to a number of points he might have argued if the Court had put the application on notice, including his desire to resolve the travel issue, and the “whole stream of negotiations” that preceded the application. He refers to comments in the Family Court decision that he believes are prejudicial to him and queries what the standard of disclosure required in without notice applications is.

[9] In reply, Ms RT confirms the position she adopted in the complaint process and responds in some detail to the various issues raised by Mr LN.

Review on the papers

[10] The parties were invited to comment on this review being dealt with on the papers. Neither party responded within the allotted timeframe.

[11] This review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all the information available on review if the LCRO considers that the review can be adequately determined in the absence of the parties.

[12] I record that having carefully read the materials, 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

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

... the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.

The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to “any review” ...

... the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the

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

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.

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

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

Discussion

Rule 2.5

[15] Mr LN says Ms RT made a false certification, which would be a contravention of r 2.5 which says:³

A lawyer must not certify the truth of any matter to any person unless... she believes on reasonable grounds that the matter certified is true after having taken appropriate steps to ensure the accuracy of the certification.

[16] Mr LN's concerns relate to the circumstances that preceded Ms RT's without notice application and whether those were fully and frankly disclosed. His view is that Mrs LN's affidavit did not disclose all relevant circumstances.

[17] Mr LN sees himself as having been committed to resolving the travel issue, and having genuine concerns about his wife's new partner's behaviour towards him. Mr LN sees himself as committed to co-parenting with Mrs LN, including by creating and maintaining structure and consistency around the family's living and child care arrangements.

[18] The difficulty with that is that not everyone sees things the same way. Clearly Mrs LN does not see Mr LN's behaviour in the same way as he does. Whatever the rights and wrongs of it, that might explain why Mrs LN minimised her direct communications with Mr LN, and instructed Ms RT to assist her in reaching some conclusion to the travel issue with Mr LN in time to give effect to the travel plans she had made, on her understanding, with his agreement.

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

³ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[19] As Mrs LN is Ms RT's client, Ms RT is professionally obliged to protect and promote Mrs LN's interests, and to advocate for her, in this case, in respect of issues around the arrangement she had made to travel with the children. The Court will have been focussed on where the children's interests lay in relation to the travel issue.

[20] Mrs LN had arranged to take the children to visit family overseas, including their paternal grandparents, and had evidence that Mr LN had agreed they could go then changed his mind and tried to use the travel plans as leverage in respect of other matters involving the children. Mrs LN's application, made without notice, succeeded on that basis, without the Court considering it necessary to air the arguments at a hearing, which the parties had already traversed at some length between themselves. Time was short. As Mr LN says, there had been a "whole stream of negotiations" before the application was made.

[21] There comes a point when people need certainty. As Mr LN had provided certainty by consenting to the children's travel, and then backed away from his commitment in that regard, Mrs LN laid the position out to the Court and obtained certainty from it.

[22] It can be difficult for a parent to accept the loss of their voice where their children are concerned, but it can and does happen. Sometimes the Family Court steps in to attend to the children's interests. This was one of those occasions.

[23] The Committee was satisfied that Ms LN's affidavit fully and frankly disclosed the circumstances to the Court before it granted her application. If the Court had reservations about the information before it, the Court could have required the application to be made on notice. It did not. That is a fairly clear indication, if more indications were necessary, that the Court was satisfied that Ms RT met her obligations to it in that regard.

[24] I have looked at the documents. I observe that Mrs LN's affidavit could have been longer. However, refinement is an important aspect of the work that lawyers do. When it comes to evidence, Courts often prefer quality over quantity. The application and evidence appear to have covered the key points that would have been of interest to the Court. It was not Ms RT's role to refine the evidence Mr LN might have liked to give, or present his case to the Court. It was not part of Ms RT's role to support, or not undermine, Mr LN's position.

[25] Having given then backed away from his consent, Mr LN had undermined his own position. Ms RT only passed that evidence on to the Court so it could form its own view, which it did. The email exchanges between Mr and Mrs LN speak for themselves.

[26] Much of what Mr LN says in his complaint and review application is the sort of thing he might have wanted to put before the Court if he wanted orders to prevent the children from travelling overseas, or if the application had been placed on notice. Those are more in the nature of an acceptance by Mr LN that he was slow to act, or that the Court's process in dealing with the application without notice was defective.

[27] They are not really complaints about the certificate Ms RT gave.

[28] The evidence does not demonstrate a contravention of r 2.5 by Ms RT.

Rule 12

[29] Rule 12 says that:

A lawyer must, when acting in a professional capacity, conduct dealing with others, including self-represented persons, with integrity, respect, and courtesy.

[30] Mr LN represented himself. His complaint is an attack on Ms RT's integrity. It suggests she was not honest in her dealings with the Court.

[31] There is no evidence that supports that position.

[32] There is no evidence that Ms RT was disrespectful or discourteous towards Mr LN.

[33] The evidence does not demonstrate that Ms RT contravened r 12.

Summary

[34] There is no reason to reverse or modify the Committee's decision, and no reason to take further action on review.

[35] The decision is therefore confirmed.

Decision

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

DATED this 30th day of September 2020

D Thresher
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr LN as the Applicant
Ms RT as the Respondent
[Area] Standards Committee
New Zealand Law Society