

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

[2020] NZLCRO 201

Ref: LCRO 134/2019

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

NM

Applicant

AND

LL

Respondent

DECISION

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

Introduction

[1] Mr NM 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 Ms LL, at the relevant time a lawyer and director of [Law Firm A] (the firm).

[2] From 2008 Ms LL, then an employed member of a law firm, began representing four members of [ABCDE] and [KLMN] marae [(ABC)] in respect of their claim to the Waitangi Tribunal. During 2010, as a barrister acting on instructions, Ms LL continued representing the claimants on that matter, and from April 2011 as principal of the firm.¹

¹ Waitangi Tribunal claim reference number [XYZ] [XXXX].

[3] Ms LL is Mr NM's niece. Both are from the same iwi. From the outset Mr NM was appointed to the role of claims adviser, and in that role initially worked with Ms LL in preparing the statement of claim.

[4] As counsel for the claimants, Ms LL attended hui of the claimants where she was minuted as their "legal counsel", provided them with updates on progress with the claim, and filed memoranda with, and appeared before the Tribunal on the claimants' behalf. Ms LL's fees acting for the claimants were paid by legal aid.

[5] On 18 May 2017 Mr NM's wife, Ms JG, the principal of another law firm, filed a memorandum in the Waitangi Tribunal concerning representation of the claimants.

[6] In her 19 May response memorandum, Ms LL stated that although Ms JG had produced a letter of engagement signed by the four claimants, two of the claimants, including Mr BT, asked [Ms LL] to continue acting for them on the claim. Ms LL explained that a QC had "been engaged to represent [the claimants] for three months solely to cross-examine technical witnesses" at a joint hearing, and thereafter "all legal issues relevant to the [XYZ XXXX] claimants" would remain with her firm.

[7] However, in response to a further memorandum filed by Ms JG on 31 May 2017, Ms LL informed the Tribunal on 6 June 2017 she "accept[ed]" Ms JG had been instructed to act for three of the four claimants, but Mr BT wanted [Ms LL] to continue to act for him.

[8] On 7 June 2017, Mr NM requested (by email) Ms LL to "forward all [her] records relating to the claim".

[9] Ms LL's practice manager responded (by email) to Mr NM on 14 July 2017 explaining that because Ms LL had acted for the claimants since 200[8] she needed to "retrieve" their records (the files) "from archives and to prepare the file for couriering" to Mr NM which she expected to do "within the next two weeks".

[10] On 29 September 2017 Ms LL, by her practice manager, requested (by email) legal advice about Mr NM's request for the claimants' files. Also that day, Mr BT requested (by email) the claimants' files. Six months later, on 29 March 2018, Ms LL's counsel informed (by email) Mr NM that Ms LL was "no longer instructed in relation to any matter involving [ABC]", and "some months ago" had forwarded her file to Mr BT who "on behalf of [ABC]" had "demanded" the file.²

² Ms LL's counsel stated that Ms LL's file "contain[ed] a record of the advice that she provided to [ABC] while instructed together with all relevant documents - including the various matters referred to in [Mr NM's] email".

Complaint

[11] Mr NM lodged a complaint with the Lawyers Complaints Service on 31 March 2018.

(1) Request to uplift file

[12] He claimed in response to his request to produce “all information” on “the work she had undertaken” for the claimants, Ms LL agreed, but instead subsequently “transferred the whole of her material” to one of the claimants, Mr BT, who “benefited personally” from some of her work.

(2) Authority to act

[13] Mr NM said because Ms LL did not have the claimants’ “written or other instructions” to act for them, three of the four claimants objected which “subsequently” led to Ms LL “withdrawing from her previous role in acting” for them.

Response

[14] In Ms LL’s response, made on her behalf by her counsel, Mr RR, and referred to in my later analysis, Ms LL submitted that the facts relied upon by Mr NM did not give rise to any breach of a professional obligation by her.

[15] Ms LL said the matters referred to by Mr NM in his complaint were “being adequately explored” concerning related complaints about her.³

Standards Committee decision

[16] The Standards Committee delivered its decision on 30 July 2019 and determined, pursuant to s 138[(2)] of the Lawyers and Conveyancers Act 2006 (the Act), that no further action on the complaint was necessary or appropriate.

(1) Request to uplift file

[17] The Committee concluded that Ms LL “had not acted inappropriate[ly] regarding the return of her files”, and Mr NM’s concerns ought “more properly” be “taken up” with Mr BT to whom she had provided the claimants’ files.

³ Mr RR, letter to Mr NM (16 May 2018).

[18] In reaching that decision, the Committee referred to Ms LL's duty of confidence owed to the claimants in respect of their information held by her which the Committee stated prevented her from handing over their files to Mr NM upon termination of her retainer by them.⁴

[19] The Committee observed that Ms LL, who was "facing multiple complaints made" by some of the complainants, was "understandably anxious not to worsen the situation by releasing confidential material with undue haste".

[20] In the Committee's view, having taken counsel's advice, Ms LL had "resolved that the most appropriate action" was to return the files to Mr BT from whom she had taken her instructions, and whom she "considered to be her client", to "distribute the material" as "he saw fit".

(2) Authority to act

[21] In the Committee's view, as "claims advisor" to Ms LL's clients, Mr NM was not one of her former client claimants, and was not representing them.

Application for review

[22] Mr NM filed an application for review on 11 September 2019. In his submission, the Committee failed (a) to establish "the relevant identity of the client(s), (b) "the question of" Ms LL's "authorisation to act" for the claimants, and (c) "to consider" the "nature of her obligations regarding the return of documents".

[23] Mr NM claims Ms LL contravened rr 3.2, 4.4.1 and 6.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).⁵ He seeks a finding that Mrs LL "acted inappropriately concerning the return of her files".

(1) Request to uplift file

[24] He says Ms LL's failure to hand the "relevant documents" to the claimants "other than Mr BT", had "a significant adverse impact on the ability" of the claims committee to "prosecute its...claim".

⁴ The Committee referred to rr 8 (a duty of confidence) and 4.4 (duty to act upon a client's request to uplift files) of the Rules.

⁵ Rule 3.2 (respond to client inquiries); r 4.4.1 (change of lawyers – request for documents); r 6.1 (qualified prohibition against acting for more than 1 client).

[25] He terms as “cautious” the approach by Ms LL of not responding to his request for the files, but instead first obtaining counsel’s advice before providing the files to Mr BT.

(2) Authority to act

[26] Mr NM contends the Committee failed to identify that Ms LL acted for the four claimants being the “joint representatives” of the claims committee, not for any one of them, including Mr BT, as individuals.⁶

[27] In his view, Ms LL’s “fail[ure] to provide a written retainer or to properly obtain instructions” to “reflect this reality” ought not “deprive the [claims] [c]ommittee” of its right to remedy” against Ms LL for “failing to provide documents, in further breach of the Rules”.

[28] Mr NM argues that the relationship of the claimants to each other is “analogous” to trustees of a trust “all of whom must authorise an action to be taken by the lawyer”. For that reason, he says the Committee was “required to consider Ms LL’s obligations to the claimants as a collective”.⁷

[29] In his submission this is “particularly” so because of “significant disputes” between Mr BT with other claimants. He says the Committee did “not consider or enquire into” the “inconsistency between this position” and Ms LL’s “earlier representations” in the Tribunal that she acted for all claimants.

Response

[30] In Ms LL’s response, also made by her counsel, Ms LL says she is “content to rely” on the Committee’s decision.⁸

Review on the papers

[31] 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 a review on the basis

⁶ In support of that position, Mr NM refers to Waitangi Tribunal “Practice Note: Guide to the Practice and Procedure of the Waitangi Tribunal” (May 2012) at [3.4].

⁷ Mr NM refers to a decision of a Standards Committee where the trustee from whom the lawyer took instructions assured the lawyer [the trustee] “had authority” to do so. In his view, the “disputes about authorisation” to act “preclude that assumption”.

⁸ Mr RR, email to LCRO (30 September 2019).

of all information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

[32] Having formed the view that this review can be adequately determined on the papers, and the case manager having informed the parties and invited their comment, neither party has commented or raised an objection to the review being dealt with on the papers.

[33] 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

[34] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:⁹

... 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.

[35] More recently, the High Court has described a review by this Office in the following way:¹⁰

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

⁹ s 203 of the Act; *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

¹⁰ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[36] 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.

Issues

[37] The issues I have identified for consideration are:

- (a) Was Mr NM Ms LL's client?
- (b) If so, by forwarding the claimants' file to one of the claimants, Mr BT, did Ms LL fail to comply with Mr NM's request for the claimants' file thereby contravening the Rules?

[38] Ms LL's counsel has submitted to this Office a copy of a decision of a Standards Committee concerning other complaints about Ms LL by persons who are not parties to this review. That decision has not been considered on this review. This is because unless, under s 142(2) of the Act, a Standards Committee directs publication, its decisions "must remain confidential".¹¹

Analysis

(1) Ms LL's clients – issue (a)

(a) Parties' positions

[39] Mr NM claims Ms LL did not comply with his request to uplift the claimants' file. In response, Ms LL says Mr NM was not one of the claimants and therefore did not have their authority to make, and ask her to comply with his request to uplift the claimants' file.

(b) Discussion

Mr NM

[40] Mr NM's position is that as the "appointed" claims adviser, "to the extent" Ms LL "purported to act for the claimants", she "purported to act for [him]". He argues that the

¹¹ Regulation 31 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008. See also reg 30, concerning censure orders.

issue is not that he was “acting as the lawyer” for any of the claimants, but that he “was part of the [claims] [c]ommittee”, and had “requested those documents on behalf of the [claims] [c]ommittee”.

[41] He contends Ms LL did not have “written or other instructions” from the claimants’ to act for them. He says this led to three of the four claimants objecting to Ms LL’s representation of them, and “subsequently” to Ms LL “withdrawing from her previous role in acting” for them.

[42] He says he was “not aware of any previous assertion” by Ms LL that she acted for Mr BT alone.¹²

Ms LL

[43] Ms LL disagrees. She says Mr NM, not the claimants, requested the claimants’ files. She refers to Mr NM’s response to her counsel’s enquiry of Mr NM that he was “not engaged as a lawyer acting” for the claimants, but had been asked by three of them to progress their complaints made to the Law Society about her.

[44] She says she had not received an authority from the claimants to provide the files to Mr NM, and had she complied with his request without that authority, she would have contravened r 8 of the Rules.¹³

[45] In her submission, if Mr NM, either as a lawyer or in another capacity, was acting for all four claimants, then it was for him to ask them for the information he requested.

[46] Ms LL explains that having received Mr NM’s 7 June 2017 request for the claimants’ files, her practice manager set about retrieving the files. However, on 14 July 2017 the practice manager informed Mr NM that although the firm expected “to be able to provide” him with the files “within the next two weeks”, [Ms LL] needed to “retain the files” so as to “answer the various allegations made against her”.¹⁴

[47] She says being “concerned to ensure that she acted appropriately” she sought legal advice “about her obligations”. She says her counsel advised her to “retain the file until responses were received in relation to the ongoing complaints” at which stage “it

¹² Mr NM refers to Ms LL’s memoranda dated 10 May 2017, 19 May 2017, 6 June 2017 filed in the Waitangi Tribunal.

¹³ Rule 8 (duty of confidence); r 8.4(a) (an authorisation from a client to disclose confidential information).

¹⁴ A reference by Ms LL’s counsel to other complaints to the Law Society about Ms LL.

might be appropriate” to hand the file to Mr BT” for him “to determine to whom [the file] should be given”.

[48] Ms LL says Mr BT’s 29 September 2017 request for the files “removed” any “doubt about the matter” because had she refused his request she would have contravened her professional obligations owed to him.

Retainer

[49] The first aspect of whether Mr NM was authorised by the claimants to request their file from Ms LL is whether he, along with the claimants, was Ms LL’s client in the matter.

[50] A “retainer” is the agreement or contract between a lawyer and client for the provision of legal services by the lawyer to the client. Rule 1.2 of the Rules defines “retainer” as:

... an agreement under which a lawyer undertakes to provide or does provide legal services to a client, whether that agreement is express or implied, whether recorded in writing or not, and whether payment is to be made by the client or not.

[51] Although preferable for evidentiary purposes, a retainer need not be in writing to be enforceable.¹⁵ The question whether a lawyer has been retained is to be “determined objectively”. The fact that the lawyer concerned “had personal reservations as to whether he [or she] was going to take the case are relevant only in so far as they were objectively ascertainable”.¹⁶

[52] In particular, “... whether a reasonable person observing the conduct of both (the lawyer) and (the client) would conclude that the parties intended [a] lawyer-client relationship to subsist between them ... some responsibility on making the position of whether a retainer exists or not lies properly with the lawyer.”¹⁷

[53] In circumstances where an alleged client claimed his or her lawyer contravened a professional obligation or duty, then the alleged client bears the burden of proof “of facts and circumstances sufficient to establish a tacit agreement to provide legal

¹⁵ Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at [5.4].

¹⁶ *Hartlepool v Basildon* LCRO 79/2009 (3 September 2009) at [23]; see also GE Dal Pont *Lawyers’ Professional Responsibility* (6th ed, Thomson Reuters, Sydney, 2017) at [3.20].

¹⁷ At [23] referring to *Day v Mead* [1987] 2 NZLR 443 at 458 (CA); *Blyth v Fladgate* [1891] 1 Ch 337; *Giffith v Evans* [1953] 1 WLR 1424 at 1428. See also *T v G* LCRO 29/2009 (21 April 2009) at [26].

services". In those circumstances "objective facts, not merely from the lawyer's belief as to which clients he or she was acting for" will be determinative.¹⁸

[54] The "reasonable expectations of the alleged client carry significant weight here, as the lawyer may always take steps to dissuade a belief that the lawyer acts for a person". Considerations include (a) "how" the lawyer "referred to and dealt with" the alleged client, (b) the lawyer's file material, (c) "who instructed the lawyer", (d) who is liable for the lawyer's fees, and (e) whether the alleged client had previously retained the lawyer.¹⁹

Consideration

[55] Ms LL represented the claimants on their claim in the Tribunal for nine years commencing in 2008, when an employed lawyer, until June 2017 when, as principal of her own firm, she informed the Tribunal she had withdrawn from acting for three of the claimants.

[56] Throughout that time Ms LL (a) was acknowledged by the Tribunal as the claimants' counsel, (b) attended hui of the claimants where she was minuted as their "legal counsel", (c) provided them with updates on progress with their claim, (d) obtained the claimants' approval of documents she prepared for proceedings, and (e) both filed memoranda with, and appeared before the Tribunal on the claimants' behalf. As noted earlier, Ms LL's fees were paid by legal aid.

[57] Accompanying Ms LL's response to Mr NM's complaint, submitted to the Committee by her counsel, were submissions prepared on her behalf by her previous counsel in respect of other complaints about her by other members of [ABC], and her complaint about Ms JG who had raised the issue of representation of the claimants with the Tribunal.

[58] Helpfully, in the context of this review, those submissions contained an overview of the claimants' claim in the Tribunal, Ms LL's connection with [ABC], her career background, and her familial relationship with Mr NM.

[59] The chronology of documents which formed part of those submissions evidence that most of Ms LL's instructions from the claimants were received from Mr BT, and less frequently Mr BT-FR. Mr BT was also in communication with both Ms LL and the Legal

¹⁸ GE Dal Pont, above n 18 at [3.50].

¹⁹ GE Dal Pont, above n 18 at [3.50].

Services Agency concerning the provision of legal aid for the claimants to pay for Ms LL's legal work carried out for them on their claim.

[60] The documents referred to which specify Mr NM's relationship with the claimants describe him as "claims adviser", "adviser", "chief adviser", and "legal adviser" contrasting with Ms LL's role as the claimants' "legal counsel".

[61] I observe that by stating Ms LL "withdr[ew]" from her "previous role in acting" for the claimants as stated above, Mr NM acknowledges that up until that time Ms LL did act for them. However, concerning his position as claims adviser, other than his claim that his membership of the claims committee meant that if Ms LL represented the claimants then she also represented him, he has not produced, either with his complaint, or his review application, evidence in support.

[62] I accept although Ms LL and Mr NM worked together in preparing the claimants' statement of claim at the outset, Mr NM's role as claims adviser, drawing on his experience with Tribunal matters, presents as a peripheral or behind-the-scenes role, but not Ms LL's client.

[63] Having carefully read the information produced, and applying the objective approach I have referred to, the conclusion I have reached is that Ms LL's representation of the claimants in their claim in the Tribunal did not include Mr NM.

(2) Providing the file

(a) Parties' positions

[64] As noted earlier, Mr NM claims Ms LL agreed to produce "all information" she had "on the work she had undertaken" for the claimants, but subsequently "transferred the whole of her material" to Mr BT, who Mr NM says "benefited personally" from some of Ms LL's work thereby adversely affecting the ability of the claimants to pursue their claim.

[65] Ms LL says she represented the claimants from 2008 and it was to them, including Mr BT, to whom she owed her duty of confidence.

(b) Discussion

Mr NM

[66] Mr NM says the claims committee, which coordinated the claimants' claim was "prejudiced by not knowing what was done" by Ms LL "on their behalf", and "what arrangements may have been made with the Crown and third parties, over the last 10 or so years".

[67] He says that committee did not have information needed "to prepare for hearings", and Ms LL's work, paid for by legal aid, would "have to be redone". He says instead of sending the claimants' file to him as he requested, Ms LL sent her file to Mr BT.

[68] He says despite the firm having "promise[d]" him on 14 July 2017 the file would be provided to him, and his subsequent requests through the Law Society, he did not hear further from Ms LL until her counsel's 29 March 2018 letter to him.²⁰

[69] As noted earlier, Mr NM likens Ms LL having acted on Mr BT's request to uplift the claimants' files as acting on the instructions of one trustee "contrary to the instructions and/or interests of the remaining trustees".

Ms LL

[70] Ms LL says having been informed by Ms JG in May 2017 that three of the claimants had instructed [Ms JG] to act for them on the matter, on 6 June 2017 she informed the Tribunal that she would no longer act for them, but would continue to represent Mr BT.

Consideration

[71] Because, as I have found, Ms LL did not act for Mr NM on the claimants' matter, it is unnecessary for me to consider his complaint that Ms LL did not comply with his request to hand over the claimants' file. However, I do make the following observations concerning Mr NM's request.

[72] When a client changes lawyers, r 4.4.1 of the Rules which concerns the handover of the client's files, referred to by Mr NM in his review application, provides:

Subject to any statutory provisions to the contrary, upon changing lawyers a client has the right either in person or through the new lawyer to uplift all documents,

²⁰ Mr NM refers to his memoranda to the Law Society dated 6 June 2017, 7 October 2007, 13 March 2018, 20 March 2018, 24 March 2018.

records, funds, or property held on the client's behalf. The former lawyer must act upon any written request to uplift documents without undue delay subject only to any lien that the former lawyer may claim.

[73] In a practical sense, having received the client's instructions to act, the new lawyer (a) prepares an authority to uplift for signature by the client, and as applicable the client's entities, in which the client authorises and directs the previous lawyer to hand over the client's files to the new lawyer, and (b) sends that authority to the previous lawyer accompanied by a request to uplift the client's files.

[74] As noted above, r 4.4.1 requires the previous lawyer, upon receipt of that authority, to "act upon" the new lawyer's request "to uplift" the files "without undue delay".

[75] In the context of Mr NM's request, it is important to note that no such authority from the claimants was attached to his 7 June 2017 email. Three weeks earlier Ms JG stated in her 18 May 2017 memorandum to the Tribunal she had received the claimants' authority to act.

[76] However, in her 19 May 2017 memorandum in response, Ms LL explained to the Tribunal that although Ms JG had produced a letter of engagement signed by the four claimants, two of them, including Mr BT with whom she had liaised for most of the time, wanted her to continue to act for them.

[77] In summary, it could be expected that instead of Mr NM requesting the claimants' file, Ms JG, as the claimants' new lawyer, would have had the claimants sign an authority which she would then have sent to Ms LL with [Ms JG's] request to uplift the file.

[78] For completeness, by handing the claimants' files to Mr BT, one of the claimants, I do not consider Ms LL contravened her duty of confidence owed to the other claimants as she would have done had she provided the files to Mr NM who I have found was not her client.

Decision

[79] For the above reasons pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed but modified by deciding that pursuant to section 138(2) of the Act, any further action on Mr NM's complaint is unnecessary or inappropriate.

Anonymised publication

[80] 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 23rd day of October 2020

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:

Mr NM as the Applicant
Ms LL as the Respondent
Mr RR Counsel for the respondent
[Area] Standards Committee [X]
New Zealand Law Society