

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

[2021] NZLCRO 080

Ref: LCRO 147/2020

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

KQ

Applicant

AND

**[AREA] STANDARDS
COMMITTEE [X]**

Respondent

DECISION

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

Introduction

[1] Mr KQ has applied for a review of a decision by the [Area] Standards Committee [X] which, following completion of a conduct inquiry, had made findings that Mr KQ's conduct had been unsatisfactory.

Background, complaint and Standards Committee decision

[2] Mr KQ practises as a barrister.

[3] He employs Ms PV.

[4] In 2019, Ms PV took instructions from a Mr RS to represent Mr RS on a charge of assault. Mr RS had been accused of assaulting his partner, Ms CB.

[5] After taking instructions from Mr RS, Ms PV accepted instructions to act for Ms CB. The Police had made application to obtain Ms CB's medical records. Ms CB was opposed to the Police obtaining her medical information.

[6] On learning that Ms PV was acting for both Mr RS and Ms CB, the police prosecutor made complaint that Ms PV was conflicted.

[7] The matter came before the District Court on 28 August 2019. On that day the presiding judge issued a judgment in which he expressed concern that Ms PV was representing both defendant and alleged victim. The Judge expressed the view that he could not see how "a lawyer can simultaneously purport to act for a person who has been charged with a domestic assault on the person who is alleged to have been the subject of the assault".¹

[8] The Judge directed that his decision be referred to the Law Society.

[9] The police prosecutor filed a complaint against Ms PV with the New Zealand Law Society Complaints Service, the focus of that complaint being concern that Ms PV had been conflicted when representing both Mr RS and Ms CB.

[10] Mr KQ provided a submission in support of Ms PV. In that submission he advised that:

- (a) he was involved in the decision making in the matter of Ms PV's representation of Ms CB; and
- (b) Ms PV had taken no steps without first consulting Mr KQ; and
- (c) He had given careful consideration to how Ms PV could manage matters to ensure that the interests of both parties were protected whilst avoiding possibility of conflict between Mr RS's and Ms CB's interests.

[11] The Standards Committee, in the course of conducting its investigation into the complaint against Ms PV, noted that Mr KQ had confirmed that he was involved in the decision making throughout.

¹ *Police v RS* [case number] at [11].

[12] The Committee determined to commence an own motion complaint against Mr KQ. It considered that the complaint issue to be addressed and responded to by Mr KQ, was “essentially the same as Ms PV”.

[13] The Committee delivered its decision in respect to the complaint made against Ms PV on 5 June 2020.

[14] The decision was comprehensive and traversed in detail the circumstances of Ms PV’s representation of the parties, the principles which underpin a lawyer’s obligation to ensure that they do not become conflicted, the scope and application of r 6.1 of the Lawyers and Conveyancers (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), and an examination of what constitutes both negligible risk and informed consent.

[15] On concluding that Ms PV had breached r 6.1, the Committee determined that given the extent of Mr KQ’s role in the decision-making process, he too had breached r 6.1, and that his conduct fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

Mr KQ’s response to the Standards Committee

[16] Mr KQ filed a response to the Committee’s own motion complaint on 12 February 2020. He commenced his submission with indication that he had read the documents filed by Ms PV, and with request of the Committee for his submission to be read alongside Ms PV’s response.

[17] He submitted that:

- (a) He considered there was no conflict in Ms PV acting for both Mr RS and Ms CB; and
- (b) he drew a distinction between Mr RS’s matter (criminal) and Ms CB’s matter which he considered was a civil matter; and
- (c) there was no conflict between the matters that Ms CB had instructed Ms PV to act on; and
- (d) Rule 6.1 had no application as the matters were different; and
- (e) he considered that there was not more than a negligible risk that Ms PV would not be able to discharge her obligations to both Mr RS and Ms CB.

Application for review

[18] Mr KQ filed an application for review on 13 July 2020. His application is identical in form and content to a review application filed by Ms PV. Ms PV's application was heard on the same day as Mr KQ's.

[19] It is submitted that the Committee erred in finding that:

- (a) it did not need to take into account Mr RS's actual instructions to counsel in respect of defence, it was entitled to presume the defence, and determine the complaint without complete evidence; and
- (b) it could not receive evidence and information from Mr KQ in respect of Mr RS's active criminal matter without disclosing it to Mr GY, the police prosecutor; and
- (c) there was otherwise more than negligible risk of a conflict of interest arising on the facts as it found them; and
- (d) informed consent was not obtained from Mr RS.

[20] It is argued by Mr KQ, that the Committee would not receive evidence from him unless the evidence could be disclosed to the police prosecutor. Mr KQ says that this restriction compromised his ability to provide full information to the Standards Committee.

Hearing

[21] The review application was heard on Tuesday 18 May 2021.

Nature and scope of review

[22] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:²

... 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" ...

² *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.

[23] More recently, the High Court has described a review by this Office in the following way:³

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.

[24] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to:

- (a) Consider all of the available material afresh, including the Committee's decision; and
- (b) Provide an independent opinion based on those materials.

Discussion

[25] Mr KQ commenced his submission with indication that he considered it unreasonable that the Standards Committee had made a finding against Ms PV. He explained that he had overseen the steps taken by Ms PV, that she had throughout sought his advice on the issue of possible conflict, and that he had, after giving the matter careful consideration, concluded that it was appropriate that Ms PV continue to represent both Mr RS and Ms CB.

[26] That was a gracious admission from Mr KQ and a commendable acknowledgement of the responsibility he bore for guiding Ms PV down the path she had followed.

[27] Mr KQ acknowledged that there was a considerable degree of overlap in the review applications filed by himself and Ms PV.

³ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

[28] I indicated to Mr KQ that the substantive issues would be addressed in Ms PV's review decision, and that I saw little point in replicating either the background or analysis from that decision in this decision.

[29] Mr KQ indicated his agreement to that approach and his willingness for his decision to be made available to Ms PV, and conversely, Ms PV's to him.

[30] I need then simply address Mr KQ's argument as to why he considered that Ms PV was able to represent both parties.

[31] Mr KQ indicated that he had given considerable thought to the issue of possible conflict. He emphasised that he was not oblivious to the possibility of conflict. He acknowledged that the potential for conflict was obvious at the outset, but having worked through the issues, had come to conclusion that Ms PV could safely proceed.

[32] His reasons for arriving at that view were, understandably, similar to those relied on by Ms PV.

[33] Whilst Mr KQ agreed to an extent with the Committee's view that Mr RS's matter and that of Ms CB were intertwined, he nevertheless considered that the Committee had failed to recognise the extent to which the two matters were quite distinct. If categorised, he considered that they could be best distinguished as one being criminal in nature, the other civil.

[34] Considerable emphasis was placed by Mr KQ on argument that Mr RS's and Ms CB's interests were aligned. It was in Mr RS's interest that the charge be vigorously defended. It was in Ms CB's interests that her medical records not be disclosed to the Police.

[35] Mr KQ argued that the critical question for Ms PV was "will you do anything in acting for these two people that will cause them any concern?". In Mr KQ's view, there was little that could go wrong. He considered that there was no "downside" for Mr RS, and clear benefit for Ms CB. It was, said Mr KQ, largely about outcome. He considered that in having a single legal representative, the parties had better opportunity to achieve their respective goals.

[36] In advancing argument that the perceived mutuality of interests overrode any conflict concerns, and in emphasising that he could not foresee, any circumstances in which either party would be disadvantaged, Mr KQ argued that he had carefully considered the consequences for Ms PV of her representing both parties, and had concluded that:

- (a) public interest in policy issues (in this case resolution of domestic violence matters in the court) did not always align with the interests of complainants/victims; and
- (b) both Mr RS and Ms CB had prospect of achieving best outcomes if they were represented by single counsel; and
- (c) in the event that Mr RS's matter proceeded to trial, the evidence that Ms CB would give (if called on to give evidence) would be consistent with that provided by Mr RS; and
- (d) the critical question to address was, would Ms PV in acting for these two people, give either any cause for concern; and
- (e) the police case was not reliant on evidence from Ms CB.

[37] Central to Mr KQ's argument was his contention that there was such a degree of synchronicity of interests between Mr RS and Ms CB, that the possibility for conflict was significantly diminished.

[38] Having had opportunity to hear Mr KQ advance his carefully considered submissions at hearing, I have no doubt that Mr KQ did recognise the possibility for conflict at the outset, that he did carefully turn his mind to an assessment as to whether, as matters evolved, Ms PV could face potential difficulties, and that he had concluded that Ms PV was not at risk of breaching her professional obligations if she continued to represent both parties.

[39] But with respect to Mr KQ, I do not agree with the analysis (as he saw it) of the circumstances that confronted Ms PV. Nor do I consider that his analysis paid sufficient attention to the scope and purpose of r 6.1.

[40] Pivotal to Mr KQ's analysis is argument that the parties' interests were so in sync, that this diminished possibility for conflict.

[41] The question that r 6.1 asks of practitioners, is not whether the interests of two clients are seemingly aligned, but rather where there is a more than negligible risk that the lawyer may be unable to discharge the obligations owed to one or more of the clients.

[42] In considering Ms PV's review I noted that an apparent synchronicity of interests should not divert a lawyer from rigorously examining, in circumstances such as these, the possibility of conflict emerging.

[43] In cases which pose potential for conflict, it is not unusual for there to be a perceived synchronicity of interests between clients. It is the apparent mutuality of interests that often seduces lawyers into accepting instructions to act for two clients on the same matter, as the lawyer's sensitivity to the potential for possible conflict is clouded by the lawyer's belief that the interests of the clients are so closely intertwined, that possibility for conflict emerging is minimal.⁴

[44] Nor do I accept the submission that this perceived synchronicity of issues, resulted in both Mr RS and Ms CB having possibility of securing an outcome more advantageous to them both, if they were represented by single counsel.

[45] This argument is advanced, as I consider it must be, on assumption the knowledge and understanding Ms PV would acquire of her respective client's instructions and circumstances, provided opportunity for her to use this information for the benefit of both.

[46] It is argument that proceeds on the basis that the interests of the respective clients remain unchanging throughout. It is argument that does not, in my view, pay sufficient regard to the particular sensitivity of the situation, and in particular, to the critical need for Ms CB to be advised independently of Mr RS.

[47] Mr KQ could not properly address the conflict issues in terms as required by r 6.1 by proceeding on assumption that Ms PV's clients' interests would remain unified throughout, nor was it appropriate to assess possible conflict by him speculating as to what evidence would be given by Ms CB when the matter progressed to trial. His task was to assess at commencement, whether there was a more than negligible risk that Ms PV may be unable to discharge the obligations owed to one or more of her clients.

[48] Ms PV, in the course of her review hearing, conceded that in 99.9 per cent of cases involving a defendant and complainant (in this case an alleged victim), it would be inappropriate for a lawyer to represent both defendant and complainant. As noted, the judge who considered the conflict issue considered it difficult to conceive of circumstances where a lawyer could simultaneously purport to act for a person who has been charged with a domestic assault on the person who is alleged to have been the subject of the assault.

[49] I agree with the Committee, that it was not required to identify conflicts that actually arose, but rather, it was sufficient to identify potential conflicts. I also agree with the Committee's conclusion, that Ms PV informing her clients of the need to advise her

⁴ See Ms PV's review decision (LCRO 148/2020) at [102].

if they considered any issue of conflict arose, did not qualify as her having obtained her clients' informed consent to act.

[50] I was satisfied that Ms PV breached r 6.1.

[51] In concluding that Mr KQ should also be subject to a disciplinary finding, the Committee concluded that his close involvement in the decision-making process (acknowledged by him) constituted a breach of r 6.1.

[52] To breach r 6.1, a lawyer must be acting for the client.

[53] It was Ms PV who took instructions. She received an assignment to act for Mr RS. She had met Ms CB in the course of acting for Mr RS. Ms CB had contacted Ms PV directly. It was Ms PV who provided Ms CB with a letter of engagement, though it is noted that Mr KQ is recorded in the letter of engagement as being responsible, with Ms PV, for the carriage of the file. Objection could perhaps be taken to conclusion that Mr KQ was, in practical terms, directly representing Mr RS and Ms CB, but Mr KQ does not challenge this aspect of the Committee's decision.

[54] His position throughout has been to accept responsibility rather than seek to evade it.

[55] If the Committee had not concluded that Mr KQ was in effect representing Mr RS and Ms CB, it would have been open to the Committee to consider Mr KQ's responsibility under r 11.3 to ensure that had provided competent supervision to Ms PV.

Costs

[56] Where an adverse finding is made, costs will be awarded in accordance with the Costs Orders Guidelines of this Office. It follows that Mr KQ is ordered, pursuant to s 210(1) of the Act to pay costs in the sum of \$1,200 to the New Zealand Law Society, those costs to be paid within 30 days of the date of this order. That costs order has been reduced from what would customarily be awarded, to recognise the degree of overlap in the two review hearings conducted

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

Anonymised publication

[58] 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 1st day of June 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 KQ as the Applicant
[Area] Standards Committee [X] as the respondent
New Zealand Law Society