

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

[2020] NZLCRO 217

Ref: LCRO 191/2019

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

UY

Applicant

AND

FB

Respondent

DECISION

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

Introduction

[1] Mr UY 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 the respondent, Ms FB.

Background

[2] Mr UY is engaged in proceedings that are before the Family Court.

[3] Ms FB acts for the opposing party.

[4] In the course of the Family Court proceedings, Mr UY filed an application for a protection order.

[5] In submissions responding to that application, Ms FB described Mr UY's application, as an application for variation of a parenting Order "in drag".

[6] Ms FB was required to file a memorandum with the court. A copy of that memorandum had to be served on Mr UY. The memorandum was initially misdirected. Mr UY considered that Ms FB had deliberately failed to serve him with the memorandum thus prejudicing his position in the proceedings before the Court.

The complaint and the Standards Committee decision

[7] Mr UY lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 13 September 2019. The substance of his complaint was that:

- (a) in a memorandum filed with the Family Court on 5 September 2019, Ms FB had described his application for a protection order as an "application in drag", this with purpose of denigrating his core identity; and
- (b) as a consequence he had felt violated; and
- (c) Ms FB had deliberately prejudiced him by failing to contemporaneously serve a memorandum on him.

[8] Mr UY argued that his complaints were but the tip of an iceberg. He said that he had in the course of advancing his case before the court over a three-year period, had his reputation sullied by Ms FB advancing arguments on behalf of her client which defamed his character. He considered that Ms FB had persistently failed to take steps to check the veracity of the arguments advanced by her client (this later described by him as his third complaint).

[9] By way of outcome, Mr UY sought that Ms FB be struck off.

[10] On 15 September 2019, Mr UY wrote further to the Complaints Service in which he advised that he had omitted to attach an email to his complaint.

[11] In this correspondence Mr UY argued that it was implausible that Ms FB's failure to serve him with a memorandum could be attributable, as argued by her, to a simple error in typing his email address.

[12] Mr UY reinforced in this correspondence that his "main complaint is with regard to Ms FB's submission that I make parenting order applications "in drag" by way

of a deliberate attack on my character, that is, without basis, and violates me to my core”.¹

[13] Mr UY’s complaint was managed by the Complaints Service through its Early Resolution Service (ERS).

[14] Ms FB was advised on 7 November 2019 that the Standards Committee tasked with conducting an investigation into the complaint did not require her to provide a response to Mr UY’s complaint.

[15] The Committee determined that the issues raised by Mr UY’s complaint, could be adequately addressed under a broad consideration of the question as to whether Ms FB had breached any of her professional obligations.

[16] The Standards Committee delivered its decision on 15 November 2019.

[17] The Committee 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.

[18] In reaching that conclusion the Committee concluded that:

- (a) subject to any overriding duties to the court, a lawyer’s duty is to his or her client, not to the person on the other side of a dispute; and
- (b) Ms FB had no duty to protect and promote the interests of Mr UY; however
- (c) Ms FB had a duty in her dealings with Mr UY to act towards him with respect and courtesy; and
- (d) the Committee was not in a position to determine whether the words “in drag” were used by Ms FB to deliberately denigrate Mr UY; and
- (e) Ms FB’s error in mistyping an email address did not reach the threshold for establishing a conduct breach.

Application for review

[19] Mr UY filed an application for review on 19 December 2019.

[20] His submission is comprehensive.

¹ Mr UY, email to NZLS (15 September 2019).

[21] He submits that:

- (a) he does not accept the Committee's view that a lawyer's duty is owed to his or her client alone;² and
- (b) his complaint sits outside the normal scope of that principle; and
- (c) the Committee had neglected to pay sufficient heed to Ms FB's requirement to act with integrity; and
- (d) he sought recognition for the fact that he is the holder of a Master of Philosophy in the field of computing and has considerable experience in the IT industry; and
- (e) Ms FB's explanation for her typing error was inexplicable; and
- (f) in view of the extensive history of email communications between himself and Ms FB, there was zero possibility of a typo error resulting in the email being misdirected; and
- (g) his analysis drew him to the "incontrovertible conclusion that Ms FB's act was a deliberate act of sabotage at a critical juncture in proceedings"³; and
- (h) the Committee's explanation as to possible meanings to be ascribed to the expression "in drag" was incorrect, that term having only one accepted definition, that is, "wearing clothes that are usually worn by the opposite sex"; and
- (i) the Committee's failure to conclude that the comment made constituted insulting behaviour was itself insulting; and
- (j) any "reasonably right-minded person" would regard Ms FB's conduct as "highly unbecoming", and
- (k) the process of inviting Ms FB to provide a response in circumstances where Mr UY had assumed she had already responded to the complaint, provides further ground to appeal the Committee's decision; and

² Mr UY considered that the Committee had adopted a narrow view of the case it relied on in advancing its position.

³ Application for review at Part 7 (dated 19 December 2019).

- (l) the complaint was not minor, it was one of a myriad of complaints concerning Ms FB's conduct that could have been made; and
- (m) his third complaint concerned an allegation of perjury; and
- (n) the importance of his complaint cannot be understated; and
- (o) his view of relevant sections of the Family Courts Act 1980, was that s 11B(4)(a)(i) of that Act permitted circulation of Family Court documents, thus enabling him to release material to the Legal Complaints Review Officer (LCRO) that had been before the Family Court.

[22] By way of outcome, Mr UY made request for the LCRO to:

- (a) examine the complaint and revisit issues of law, fact and credibility; and
- (b) substitute its judgement for that of the Committee; and
- (c) make remedial or compensatory orders; and
- (d) lay charges of misconduct or unsatisfactory conduct.

[23] Ms FB was invited to comment on Mr UY's review application.

[24] She submits that:⁴

- (a) Mr UY had, on review, significantly amplified his original complaint; and
- (b) Mr UY's complaint concerning her memorandum was confined to four words in a lengthy memorandum; and
- (c) she had, when contacted by the Complaints Service, spoken to a Legal Standards Officer (LSO), and read parts of the memorandum to the Officer over the phone, in doing so, taking care not to breach ss 11B to 11D of the Family Courts Act 1980; and
- (d) with the benefit of context, the LSO had understood immediately, and without difficulty, the correct meaning of the words; and
- (e) she had informed the LSO that the presiding judge had read her memorandum and had no issues with it; and

⁴ Submission to the LCRO (31 January 2020).

- (f) the LSO had made her aware that Mr UY was sensitive about his identity, from which she resolved to use more politically correct euphemisms going forward; and
- (g) two emails despatched on the evening of 5 September 2019 had failed to reach their intended recipient, her having, in both instances, got the email addresses wrong; and
- (h) on discovering the error, she had rectified it; and
- (i) every intended recipient of the email had received the email on the same day; and
- (j) errors occur from time to time; and
- (k) the computer from which the email had been despatched was a different computer to that which she normally used for work purpose; and
- (l) she was having problems with her eyesight at the time which may have contributed to the problem; and
- (m) accusations of perjury are matters to be dealt with by the Court; and
- (n) Mr UY had filed applications with the court alleging (in respect to her client) contempt of court, perjury, making false oaths and had sought directions from the court that her client be referred for prosecution, but these applications had been struck out and costs reserved in favour of her client; and
- (o) she denied allegation that she had not behaved courteously to Mr UY throughout; and
- (p) Mr UY's complaint was frivolous and vexatious; and
- (q) Mr UY had misled the Standards Committee and the LCRO.

[25] Mr UY responded to Ms FB's submission on 28 August 2020. In that submission he:

- (a) noted that he had made request of the Review Officer to issue Ms FB with a "notice of facts" requiring her to divulge the name of the company who authors and supports her email software; and

- (b) advises that he has appeared in the Court as an expert witness on matters engaging the misuse of computer software to mislead the court; and
- (c) Ms FB had avoided disclosing details of her software supplier; and
- (d) his deduction was that Ms FB was not using proprietary software and that she had cropped an image; and
- (e) issued invitation to the LCRO to compare screen shots from his computer with a screen shot from Ms FB's machine; and
- (f) provides expansive account of the technical issues which, he argues, support his contention that it was not possible for Ms FB to have made an error with his email address; and
- (g) stands by his claim that Ms FB's client has committed multiple acts of perjury; and
- (h) invites the LCRO to consider evidence that was before the Family Court;
- (i) invites the LCRO to draw conclusions about that evidence; and
- (j) rejects suggestion that his complaint was frivolous or vexatious.

[26] Ms FB filed a brief further response which, in substantial part, provided explanation as to the operation of her email system.

Review on the papers

[27] Section 206(2) of the Act allows a LCRO to conduct a review on the basis of all information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

[28] Indication was given to the parties that I considered the matter was suitable to be heard on the papers.

[29] Neither party raised objection.

[30] The parties were advised that the review would be heard "on the papers".

[31] 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

[32] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:⁵

... 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.

[33] More recently, the High Court has described a review by this Office in the following way:⁶

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.

[34] 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.

⁵ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

⁶ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

Discussion

[35] The issues to be considered on review are:

- (a) Were there any procedural irregularities in the way the conduct investigation was proceeded?
- (b) Did Ms FB breach any duties owed to Mr UY by using the words “an application in drag” in a memorandum filed with the Court?
- (c) Did Ms FB prejudice Mr UY’s case by deliberately failing to serve him with a copy of a court memorandum?
- (d) Did Ms FB commit perjury in proceedings before the Family Court?

Analysis

Were there any procedural irregularities in the way the conduct investigation was proceeded?

[36] Mr UY said that he was confused by a statement in the Committee’s decision where the Committee noted that Ms FB had denied that terminology she had used was intended to offend Mr UY.

[37] Mr UY noted that Ms FB was invited to provide a response to the complaint but had chosen not to do so. Mr UY questioned as to how Ms FB’s opinion could have been ascertained, if she had not provided a response to his complaint.

[38] Mr UY expressed concern that either Ms FB had provided a written response and he had not been provided with a copy of it, or, Ms FB had been interviewed by phone by the Standards Committee “outside of any formal hearing”.

[39] In either case, Mr UY argues this presents as a miscarriage of justice as he has not been accorded an opportunity to respond.

[40] I agree with Mr UY, that if the Standards Committee obtained information from Ms FB without providing opportunity for Mr UY to respond, that would present as an unfair process.

[41] Mr UY filed his complaint with the Complaints Service on 13 September 2019. He added further information to his complaint on 15 September 2019.

[42] On 16 September 2019, Mr UY was advised that his complaint was being assessed to ascertain whether the Complaints Service had sufficient information to progress his complaint.

[43] On 3 October 2019, Mr UY was advised that the Complaints Service would be completing an initial assessment of the complaint, before referring it to a Standards Committee.

[44] Mr UY was advised that following that initial assessment, the Standards Committee may:

- (a) decide to take no further action; or
- (b) refer his complaint for early resolution.

[45] He was advised that if his complaint was determined to be unsuitable for either of the two options identified, his complaint would be referred to a different Standards Committee, and he would receive correspondence from a Legal Standards Officer.

[46] On 5 November 2019, almost eight weeks after Mr UY had lodged his complaint, Ms X (a Legal Standards Officer (LSO) with the Lawyers Complaints Service) wrote to Mr UY to advise that a query raised by Mr UY had been referred to her for response. Ms X informed Mr UY of her intention to contact Ms FB. Ms X explained that lawyers were required to be offered the opportunity to respond to a complaint but were under no obligation to do so. Ms X concluded her correspondence with assurance that she would contact Mr UY further, once she'd had opportunity to speak with Ms FB.

[47] Legal Standards Officers play an important role in the complaints process. They provide significant administrative support to Committees. An LSO may exercise some of the powers available to Standards Committee members, if the Committee has delegated those powers to the LSO.

[48] When engaging with complainants and lawyers, an LSO must remain neutral. An LSO must not give indication to either complainant or lawyer as to how they view the merits or otherwise of the complaint under investigation.

[49] On 7 November 2019, Ms X made contact with Ms FB.

[50] It is common practice for an LSO to record details of their telephone contact with the parties in a call log (a record similar to a file note).

[51] It is this record which most commonly provides the LCRO conducting the review, with an understanding (albeit limited) of the ERS process.

[52] The call log on the Committee file is headed with the title “[Area] Standards Committee[X] – Early Resolution Process – call log”.

[53] The log records the LSO’s contacts with Mr UY and Ms FB.

[54] Under the heading Contact: Complainant, the LSO records the exchanges with Mr UY described above.

[55] Under the heading Contact: Lawyer, the LSO records attempts to make phone contact with Ms FB, and an account of her conversation with Ms FB on 7 November. The log note for 7 November records as follows:

7 Nov- call from Ms FB, told of complaint and SC preliminary view, use of term “in drag” in reference to an application and papers deliberately sent to incorrect email address, offered opportunity to respond, she willing to provide any information SC requires to make its decision, understands will note in decision that offered opportunity to reply, she willing, SC not require any further info, can make decision on what it has, I to send her copy of complaint.

[56] In informing Ms FB that the Committee had formed a preliminary view, and in confirming that the Committee did not require a response from her, what has been clearly signalled to Ms FB is the high probability that the preliminary view reached by the Committee was to take no further action on the complaints.

[57] It would be inconceivable that a Standards Committee would contemplate making an adverse finding against the lawyer, without requiring a response from the lawyer. Indication to a lawyer that they may file a response to the complaint accompanied by indication that they are not required to do so, indicates that the Committee has likely reached a decision as to how its investigation is to proceed.

[58] On 7 November 2019, Ms X emailed Mr UY to inform him that she had spoken with Ms FB and that Ms FB had expressed a willingness to provide information to the Committee. She advised Mr UY that she would let him know if the Committee required any further information, and that if it did, copies of any information received would be forwarded to him for comment.

[59] On 11 November 2019, Ms X wrote to Mr UY to advise him that the Committee considered it had sufficient information to enable it to make a decision. Mr UY asked to be given a copy of Ms FB’s response to his complaint.

[60] On 12 November 2019, Ms X wrote again to Mr UY, this time to inform him, as had been advised earlier, that there was no obligation on a lawyer to respond to a complaint, and to confirm that no written response had been received from Ms FB. Ms X reiterated her earlier advice that the Standards Committee considered it had sufficient information to make a decision.

[61] What the log note indicates, is that Ms FB was unaware that a complaint had been made until she received a phone call from the LSO. As noted, in the course of that call the LSO clearly explained the nature of the complaint to Ms FB and indicated to her that the Committee had formed a preliminary view.

[62] It was Mr UY's expectation that Ms FB would be required to provide a response, and after reading the Committee's decision and learning that Ms FB had indicated that she would refrain in the future from using terms that could be misinterpreted, Mr UY concluded that Ms FB had provided a response, but that he had been denied an opportunity to consider that response.

[63] The submissions filed by Ms FB on review provide a more comprehensive account of the discussion that took place.

[64] Ms FB explains that in the course of her conversation with Ms X:

- (a) Ms X "read me the relevant parts of the complaint and we discussed it"; and
- (b) she had, as Mr UY had elected to not supply the Standards Committee with a copy of her memorandum, read parts of the memorandum to Ms X over the phone; and
- (c) Ms X had immediately understood the "correct meaning of the four words without any difficulty," and
- (d) she had informed Ms X that at the 9 December 2019 directions conference,⁷ the presiding judge who had read her memorandum also understood it and took no issue with any aspect of it; and
- (e) she had offered to provide Ms X with copies of her memorandum and the court minute from the directions conference but Ms X had informed her that would not be necessary; and

⁷ Ms FB references the conference proceeding on 9 December 2019, however that may have been a typo error as the conference is later referenced as proceeding on 9 September 2019.

- (f) she had read to Ms X the emails that Mr UY had omitted from his complaint; and
- (g) she had explained to Ms X that she had university qualifications in IT and was experienced in managing domains, websites, email accounts and office programs; and
- (h) her discussion with Ms X ended with Ms X providing indication that she did not require anything further from Ms FB.

[65] It is clear from the account provided by Ms FB, that her discussion with Ms X was comprehensive, and that she had, in the course of that discussion, provided Ms X with a detailed response to Mr UY's complaint.

[66] It is unclear what Ms X did with the information that she had received from Ms FB which was not recorded in the log note.

[67] The log note provides but brief account of what appears to have been a lengthy conversation.

[68] It may be the practice of the Complaints Service for the LSO to report to the Committee solely through the providing of the call log.

[69] But it may not. There is nothing to indicate whether Ms X provided more comprehensive account to the Committee of her conversation with Ms FB than the summary recorded in the call log.

[70] I have reservations about an inquiry process where a representative of the body inquiring into a complaint conducts telephone conversations of the nature described above with the lawyer who is the subject of the complaint, without any record of the conversation being provided to the complainant, or the complainant having any knowledge of the details of his complaint having been discussed in such depth with the lawyer who is the subject of the complaint.

[71] A process of that nature runs risk of raising the perception that the process is not sufficiently fair or transparent.

[72] On occasions in the course of conducting reviews, Review Officers are confronted with criticism from parties that the lawyer's complaints process is biased in favour of the lawyer who is the subject of the complaint. This criticism often stems from a perception that as the Complaints Service is managed by the Law Society and the

Committees conducting the investigations are largely comprised of lawyers, the scales must inevitably be tilted in favour of the lawyer.

[73] A comprehensive and compelling rebuttal to the occasionally expressed criticism that the inquiry process is skewed in favour of the lawyers complained about, is provided by the significant volume of decisions that arrive at the Review Office which give abundant evidence of Standards Committees conducting their investigations with conscientious and diligent commitment to ensuring that all parties receive the benefit of a fair and even-handed inquiry.

[74] But particular care must be taken to ensure, when a decision is made to manage a complaint through the vehicle of the Early Resolution Process, that the desire to achieve an expeditious resolution does not compromise the fundamental objective of ensuring fair process.

[75] It is important to note that the information Ms FB records as having provided to the LSO was information that was not on the Committee file. It was essentially new evidence.

[76] Ms FB, in expressing her view that the LSO agreed with her view of the interpretation placed on words referenced in the court memorandum, drew Ms X into the inquiry in a manner that presents as unsettling and challenging of the requirement that Ms X be seen at all times, to be adopting a neutral stance in her dealings with the parties.

[77] I hasten to emphasise that I intend no criticism of the LSO.

[78] The difficulty that Ms X confronted was that she was not simply a conduit for conveying information that the Committee had formed a preliminary view of the complaint. She was put in a “cart before the horse” situation of having to first explain to Ms FB that a complaint had been received.

[79] Understandably, the first response of any lawyer on being advised that a complaint has been made, is to seek to establish what the complaint is about.

[80] Even the simplest of complaints may require considerable explanation.

[81] Inevitably, as was the case here, on occasions the lawyer will be drawn into, if not insistent on, providing the LSO with full account of their response to the complaint.

[82] In this case, Ms FB felt it necessary to read to the LSO from a memorandum that had been filed in the court. She felt compelled to provide account to the LSO of a series of emails that had been exchanged with Mr UY.

[83] In the course of this exchange (which appears to have been lengthy) Ms FB forms an impression that Ms X supported her position in respect to one of Mr UY's complaints.

[84] Bluntly put, this process is at risk of assuming the mantle of a de-facto hearing, but one in which Mr UY is not involved, and of which he has no knowledge of.

[85] Questions can fairly be asked as to whether Mr UY would have considered it appropriate that discussions of this nature had taken place, without him being fully informed as to what Ms FB had reported to the LSO.

[86] The difficulties with the ERP in this instance begin with the decision not to forward a copy of the complaint to Ms FB immediately on receipt.

[87] If Ms FB had been provided with a copy of the complaint before receiving a call from the LSO, the LSO would not have been drawn into the potentially fraught area of having to provide explanation of the complaint to the lawyer, whilst at the same time advising the lawyer that the Committee did not require the lawyer to respond to the complaint.

[88] That approach almost inevitably invites opportunity for the LSO to be drawn into a wide-ranging discussion of the complaint.

[89] The question this raises, is whether a Committee is required to provide a lawyer with a copy of complaint filed before it embarks on the process of commencing its initial investigation.

[90] Section 121 of the Act requires the New Zealand Law Society to establish a Complaints Service to receive complaints about lawyers and former lawyers.

[91] The Society is required to make and maintain practice rules governing the operation of the Complaints Service established by it.⁸

[92] The Complaints Service must be administered in accordance with the Act and the rules governing the operation of the Complaints Service.

⁸ Section 122 of the Act.

[93] The Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008 (the Complaints Service and Standards Committees Regulations) provide direction to the Complaints Service as to how complaints are to be administratively managed and directions for Standards Committees as to how Committees are to operate.

[94] Regulation 9 of the Complaints Service and Standards Committees Regulations provides that:

9 Procedure on receipt of complaint

- (1) When a complaint is received, the complaints service must—
 - (a) acknowledge receipt of that complaint in writing; and
 - (b) as soon as is reasonably practicable, refer the complaint to a Standards Committee; and
 - (c) notify the firm to which, or the person or persons to whom, the complaint relates; and
 - (d) provide a copy of the complaint to that firm, that person, or those persons.
- (2) When a complaint is referred to a Standards Committee, the complaints service must advise the firm to which, or the person or persons to whom, the complaint relates of their right to make a written submission to the Committee.
- (3) If a complaint relates to matters that arose during the course of a person's employment by a lawyer or an incorporated law firm, the complaints service must also provide a copy of the complaint to that lawyer or that incorporated law firm unless, in the opinion of the complaints service, there are special circumstances that make it inappropriate to do so.

[95] It is clear then, that the Complaints Service must, on receipt of a complaint take preliminary steps that:

- (a) provide assurance to the complainant that their complaint has been received; and
- (b) ensure that the complaint is referred to a Standards Committee as soon as practicably possible so that the investigation of the complaint gets underway expeditiously, as is required by the Act; and
- (c) ensure that the subject of the complaint receives a copy of the complaint.

[96] Whilst reg 9 does not specify a timeframe in which the Complaints Service must comply with its obligation to serve the subject of the complaint, it is clear from a reading of reg 9 in its entirety, and when considering the requirement for complaints when received to be dealt with in a fair, efficient and effective manner,⁹ that it could be expected that the Complaints Service would on receiving a complaint, promptly comply with its obligation to provide a copy of the complaint to the party complained about.

[97] The requirement for prompt attention is reinforced by reg 9(1)(b) which requires the Complaints Service to refer the complaint to a Standards Committee as soon as reasonably practicable.

[98] It is pivotal to the requirement that the Complaints Service deal with complaints in a fair, efficient and effective manner, particularly in a jurisdiction where the subject matter of the complaints engage criticism of professional or personal reputation, that the party complained of has early opportunity to be informed as to the nature of the complaint made.

[99] The importance of providing a copy of the complaint to the subject of the complaint is reinforced by the explanatory note accompanying the regulations which emphasises that “in particular” the Complaints Service must acknowledge receipt of the complaint and provide a copy of the complaint to the party about whom the complaint is made.

[100] Part 2 of the Complaints Service and Standards Committees Regulations focuses on the Complaints Service, part 3, on Standards Committees.

[101] To fulfil its obligations under reg 9, the Complaints Service must, on receipt of a complaint, forward a copy of the complaint to the person to whom the complaint relates.

[102] This obligation arises quite independently of the Standards Committee and is an obligation which cannot be overridden by the Standards Committee, when determining its approach to proceeding its investigation, by taking steps which interfere with or override the Complaints Service’s obligation to serve the subject of the complaint on receipt of the complaint.

[103] When the Complaints Service is in a position to refer the complaint to a Standards Committee, it is obliged at that point, to advise the person to whom the complaint relates of their right to make a written submission to the Committee.

⁹ Section 123(b) of the Act.

[104] When a Standards Committee receives a complaint, the Committee may exercise any of the three options set out in s 137 of the Act, which provides that:

- (1) A Standards Committee, on receiving a complaint, may—
 - (a) inquire into the complaint; or
 - (b) give a direction under section 143; or
 - (c) decide, in accordance with section 138, to take no action on the complaint.
- (2) A Standards Committee that receives a complaint must, as soon as practicable, advise the complainant and the person to whom the complaint relates of the procedure that the Standards Committee proposes to adopt under subsection (1).

[105] A decision to take no further action must be exercised by reference to the criteria set out in s 138 of the Act which provides that:

- (1) A Standards Committee may, in its discretion, decide to take no action or, as the case may require, no further action, on any complaint if, in the opinion of the Standards Committee,—
 - (a) the length of time that has elapsed between the date when the subject matter of the complaint arose and the date when the complaint was made is such that an investigation of the complaint is no longer practicable or desirable; or
 - (b) the subject matter of the complaint is trivial; or
 - (c) the complaint is frivolous or vexatious or is not made in good faith; or
 - (d) the person alleged to be aggrieved does not desire that action be taken or, as the case may be, continued; or
 - (e) the complainant does not have sufficient personal interest in the subject matter of the complaint; or
 - (f) there is in all the circumstances an adequate remedy or right of appeal, other than the right to petition the House of Representatives or to make a complaint to an Ombudsman, that it would be reasonable for the person aggrieved to exercise.
- (2) Despite anything in subsection (1), a Standards Committee may, in its discretion, decide not to take any further action on a complaint if, in the course of the investigation of the complaint, it appears to the Standards Committee that, having regard to all the circumstances of the case, any further action is unnecessary or inappropriate.

[106] In many instances (as was the case here), a Committee's decision to take no further action relies on s 138(2), the Committee reaching conclusion that, having regard to all the circumstances of the case, any further action is unnecessary or inappropriate.

[107] It is a discretion that can be exercised with a wide reach.

[108] If a Committee determines, after concluding an initial assessment, that a complaint requires further investigation, it will advise the party who is the subject of the complaint, and inform the party complained of, of their opportunity to provide a written response.

[109] Section 141 of the Act provides that:

The Standards Committee—

- (a) must send particulars of the complaint or matter to the person to whom the complaint or inquiry relates, and invite that person to make a written explanation in relation to the complaint or matter:
- (b) may require the person complained against to appear before it to make an explanation in relation to the complaint or matter:
- (c) may, by written notice served on the person complained against, request that specified information be supplied to the Standards Committee in writing.

[110] On first examination, it may appear as if s 141 replicates the obligation on the Complaints Service to provide the lawyer with a copy of the complaint, however, s 141 must be read in context of the inquiry process that commences under s 140.

[111] The requirement under s 141 is not simply for a Committee to provide the lawyer with a copy of the complaint, but to send “particulars of the complaint or matter” to the lawyer.

[112] This is requirement that the Committee distil from the complaint filed, any issues it identifies from the complaint as having potential to raise conduct issues (the particulars).

[113] Having identified these particulars, the lawyer is commonly served with a notice of hearing which identifies the specifics of the complaint that the Committee considers the lawyer should have opportunity to respond to.

[114] In requesting the LSO to inform the lawyer of the details of the complaint, whilst at the same time instructing the LSO to inform the lawyer that she was not required to respond to the complaint, the obligation of the Complaints Service to provide a copy of the complaint to the lawyer when the complaint was received, has not been met.

[115] That failure, in my view, significantly contributed to the procedural difficulties discussed above.

[116] I have noted that I consider that the LSO was put in a difficult position when she was inadvertently drawn into being, as is clearly evident from Ms FB's submissions, a sounding board for Ms FB.

[117] To a degree, the LSO's position continued to be compromised after she had spoken to Ms FB, as she continued to communicate with Mr UY in a manner which inevitably would have led Mr UY to assume that the Committee's investigation was "live", when Ms X was aware when first making contact with Ms FB on 7 November 2019, that the Committee had reached a "preliminary view", and had concluded that it did not require any further input from Ms FB.

[118] I have given consideration to returning the matter to the Standards Committee with direction that the complaints be investigated by another Committee, however consistent with the ability of the LCRO to look at the complaints afresh, and mindful of the desirability for the parties of having complaints dealt with expeditiously, I consider it preferable to conclude the review.

[119] Whilst I have concerns about the process followed, I am not persuaded that the procedural concerns identified resulted in the inquiry into Mr UY's complaints being materially compromised.

[120] Having considered the conduct complained as articulated by Mr UY, and the submissions filed in support, I am satisfied that the Committee had sufficient information before it to give proper consideration to s 138.

[121] The nature of the complaints raised by Mr UY, and the submissions advanced in support of the complaints, were such that it was reasonable for the Committee to conclude that it had sufficient information to properly address the complaints, without requirement for further submissions from either of the parties.

[122] The reservations I have expressed regarding process, are not with the Committee's decision to take no further action.

[123] Whilst I consider that the consequences which flowed from the Complaints Service's failure to provide Ms FB with a copy of the complaint illustrated how the failure could result, even if inadvertently, in the inquiry process having potential to be regarded by at least one of the parties as being less than open and transparent, I am satisfied that the procedural concerns identified had no impact or influence on the outcome of the inquiry.

[124] If the matters were to be returned to a Committee, I see minimal possibility of a Committee reaching conclusion that the complaints advanced by Mr UY merited consideration of a disciplinary sanction being imposed on Ms FB. That said, Mr UY's perceptive analysis of the process adopted by the Complaints Service has assisted in identifying a significant and fundamental failure which, it could be expected, the Complaints Service would be alert to in the future.

[125] I see negligible value for the parties in returning the matter to the Standards Committee.

[126] As has been observed by the High Court, it is the task of a Review Officer when conducting a review, to look at matters "afresh", and to bring a robust approach to the review.

[127] The requirement for complaints to be dealt with expeditiously is best met by me dealing with the issues raised by Mr UY.

Did Ms FB breach any duties owed to Mr UY by using the words "an application in drag" in a memorandum filed with the Court?

[128] Mr UY complained that Ms FB had responded to an application Mr UY had brought against Ms FB's client for a protection order by describing Mr UY's application as "yet another application for variation of a parenting order in drag".

[129] Mr UY said that Ms FB's description had left him feeling violated. He says that Ms FB's description "clearly attacks and denigrates my core identity projecting an image of a cross dressing man who assumes the role of a female".

[130] On review, Mr UY argues that the Committee had, when considering the scope of r 12, failed to take into account that the rule required a lawyer to act with integrity.

[131] Mr UY submits that the Committee had, in overlooking this element of the rule, misinterpreted his application.

[132] Mr UY is also critical of the Committee's approach to interpreting the principle it deduced from the decision in *Allied Finance and Investments Ltd v Haddow & Co* [1983] NZLR 22 (CA), arguing that the facts of his particular case did fall within the ambit of the *Haddow* decision. It was his view that the Court of Appeal decision did affirm that a lawyer could owe, in certain circumstances, a duty of care to another lawyer's client, this to support his view that the duty owed to him by Ms FB was more

expansive than being solely confined to an obligation to ensure her dealings with him were conducted with integrity, courtesy and respect.

[133] Mr UY's review submissions are detailed and expansive but lack, two critical elements; an appreciation of context and a sense of proportion.

[134] Context is critical when considering conduct complaints.

[135] It is a serious matter for a conduct finding to be made against a lawyer, and the evidence to establish a conduct breach must meet the necessary threshold. The conduct complained of must be assessed by reference to the context in which the breach is alleged to have occurred.

[136] I accept that Mr UY was offended by Ms FB's description of his application but there is no evidence to support conclusion that Ms FB was aware that her comment had potential to cause such distress to Mr UY.

[137] Nor do I consider that the comment in itself was one that could, and should, have alerted Ms FB to the possibility that it would cause offence when considered in the context in which the comment was made.

[138] Criticism could fairly be made that comments of a colloquial nature should be avoided in court documents, but the forum which was best placed to make an assessment as to whether the comment carried the potential for the offence that Mr UY ascribes to it, was the court. Judges are acutely aware of the need to ensure that proceedings before the court are conducted with courtesy. It was the Judge who was best placed to assess the comment in its context.

[139] There is no evidence that the Judge raised objection to the comment.

[140] I accept that Mr UY was troubled by the comment and it is regrettable that the comment caused him distress. Ms FB could have couched her argument in a less colloquial manner, but I do not consider that a lapse in drafting of this degree merits consideration of a disciplinary response.

[141] I have emphasised the importance of alleged conduct breaches being considered in context. It is also important, as was emphasised in *Wilson v Legal Complaints Review Officer*,¹⁰ that conduct rules be interpreted as sensibly and fairly as possible.

¹⁰ *Wilson v Legal Complaints Review Officer* [2016] NZHC 2288 at [43].

[142] Mr UY considers that Ms FB's use of the expression could only have been deliberately intended by her to refer to the practice, as he describes it in his review application, of parties wearing clothes that are usually worn by the opposite sex.

[143] In the absence of explanation from Ms FB it is reasonable to assume from the the phraseology used by Ms FB, that she was expressing a view to the court that she considered that Mr UY's application was not advanced from a sincere concern that he felt a genuine need for the security that a protection order would provide, but rather that the application was a strategic step taken by Mr UY with purpose to provide him with further opportunity to litigate parenting order issues.

[144] The fact that Mr UY was offended by the comment does not establish that the comment was intended to cause offence, nor is the comment itself when considered in context, so demonstrably ill conceived and offensive as to allow for conclusion to be drawn that Ms FB's obligations of courtesy, respect and integrity, were compromised simply by virtue of the fact that the comment was made.

[145] Ms FB says that she has resolved to "use much more politically correct euphemisms going forward".¹¹

[146] I take that to be a recognition on her part of the need to ensure that information she puts to the court is expressed more carefully in the future. That presents as a sensible and proportionate response to the concern raised by Mr UY.

Did Ms FB prejudice Mr UY's case by deliberately failing to serve him with a copy of a court memorandum?

[147] Mr UY submits that Ms FB deliberately prejudiced his case by failing to serve him with a memorandum.

[148] Ms FB says that she sent the memorandum to Mr UY late in the evening, but inadvertently made an error in typing in his correct email address.

[149] Mr UY, in reliance on what is clearly a considerable experience in the computing field argues, (and I intend no disrespect in endeavouring to reduce his knowledgeable and sophisticated technical argument to layman's terms) that an understanding of the way in which an email system works can only lead to what he describes as the incontrovertible conclusion that Ms FB did not make an error in misdirecting the memorandum, but rather her actions were a "deliberate act of sabotage at a crucial junction in proceedings".

¹¹ Ms FB, submissions to the LCRO (31 January 2020) at [11].

[150] A memorandum that was intended to be sent to Mr UY was not received by him.

[151] This is not a matter that should, at first instance, be addressed through the vehicle of a professional conduct complaint.

[152] If Ms FB's mistake in failing to appropriately serve a memorandum on Mr UY caused prejudice to him, that was a matter to be addressed by the court.

[153] There is no evidence that the court has raised concern that Ms FB failed to comply with court directions.

[154] Regrettably, but not infrequently, for a variety of reasons, lawyers fail to comply with court directed timetables for the filing of documents, and neglect to serve documents on parties to the proceedings in the timeframe directed by the court.

[155] Mr UY elevates the issue from one of simple mistake to one engaging in his view, a consideration as to whether professional disciplinary issues arise. This by dint of argument that Ms FB's error was not innocent, but deliberate, deceptive, and reflective of conduct unbecoming a lawyer.

[156] Irrespective of the technical arguments advanced by Mr UY (and I acknowledge that it is readily apparent that he has a sophisticated understanding of computer systems), errors can be made in despatching emails.

[157] His forensic analysis of software and email systems, his understanding of the computer system that Ms FB was operating, his request that Ms FB be required to provide specific details of the software she was operating, all proceed from argument that technical analysis can eliminate possibility of human error.

[158] It is an approach which might be appropriate in circumstances where there is allegation of fraudulent conduct that demands and justifies a sophisticated forensic examination, for example in circumstances where there is need to scrutinise complex accounting and banking transactions, but it is not an approach which can remotely be justified in circumstances where the allegation is that a lawyer has failed to properly serve a memorandum to be filed with the court.

[159] If Mr UY did not receive Ms FB's memorandum when he should have, and if his position before the court was prejudiced because of delay in receiving the memorandum, the court would have taken steps to ensure that Mr UY was not disadvantaged.

[160] It presents as inexplicable that an experienced family lawyer would deliberately send a document that was required to be served on a party in proceedings, to a wrong address.

[161] The error would be promptly, if not immediately, discovered.

[162] I return to the point that a complaint of this nature is properly addressed by the court.

[163] In emphasising the appropriateness of the presiding judge being responsible for oversight of the proceedings being conducted under the judge's stewardship, I do not overlook the fact that there is a court memorandum on the review file dated 13 February 2020, in which the presiding judge records that any complaint Mr UY has regarding the conduct of counsel is a matter to be addressed by the Law Society, not the court.

[164] This judicial comment appears to have been prompted by a memorandum filed with the court by Mr UY in which he raised allegation that Ms FB had, in advancing her client's case before the court, deliberately and dishonestly misled the court.

[165] In this memorandum, Mr UY submits that Ms FB had breached obligations owed by her under the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. He invites the presiding judge to "copy his/her honour's findings raised by the matter for the attention of the Legal Complaints Review Officer".

[166] The Family Court judge's reluctance to have the Family Court provide a forum for the advancement of conduct complaints against a lawyer is reciprocated by a similar lack of enthusiasm on the part of Review Officers, for the review process being utilised as a forum for litigating Family Court disputes.

[167] Complaint that a lawyer has failed to properly serve a memorandum, or used inappropriate language in that memorandum, are matters that are most properly addressed in first instance, by the presiding judge.

[168] Ms FB has apologised to Mr UY for the error.

[169] I consider that to be a proper and proportionate response.

[170] I agree with the Committee that the error, while unfortunate and annoying for Mr UY, does not reach the high threshold for a finding that Ms FB misled or deceived the court as to any aspect of her practice.

Did Ms FB assist her client in providing perjured evidence to the court?

[171] The question as to whether a party has committed perjury is a matter to be determined by a court.

Disclosure of information filed with the Family Court

[172] The extent to which information that should remain confidential to the Family Court has been disclosed in the course of the progressing of this complaint has been regrettable.

[173] I make directions that the lawyer for child report, affidavits and memorandums in respect to proceedings FAM 2019-090-410 and FAM 2009-090-789 that have found their way to the LCRO file are to be removed from the file and shredded.

Conclusion

[174] I see no grounds which could persuade me to depart from the Committee's decision.

Anonymised publication

[175] 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 26th day of November 2020

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 UY as the Applicant
Ms FB as the Respondent
Central Standards Committee 1
New Zealand Law Society
Secretary for Justice