

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

[2021] NZLCRO 068

Ref: LCRO 224/2020
LCRO 230/2020

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

EZ
Applicant

AND

MQ
Respondent

AND BETWEEN

MQ
Applicant

AND

EZ
Respondent

DECISION

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

Introduction

[1] Mr EZ has applied for a review of a decision by the [Area] Standards Committee [X] which, following completion of its inquiry into complaints made by Mr EZ against Ms MQ, made a finding that Ms MQ's conduct had been unsatisfactory. Penalty and cost orders followed that finding. Ms MQ sought to have the Committee's finding of unsatisfactory conduct set aside.

[2] Mr EZ's review application took objection to one element of the Committee's decision. He considered that the Committee should have made orders directing Ms MQ to refund costs he had incurred in advancing his visa application.

Background

[3] In 2019 Ms MQ was a director of, and consultant to, a company that specialised in providing advice on immigration matters. The company traded under the name of YTE Ltd.

[4] Ms MQ was a licensed immigration adviser.

[5] Mr EZ became a client of Ms MQ's firm in June 2019. Ms MQ assisted Mr EZ in securing work with a company that was in the process of establishing a restaurant, PLD Ltd (PLD).

[6] Ms MQ also assisted Mr EZ in making application for a work visa. Ms MQ provided Mr EZ with a letter of engagement dated 23 October 2019. That correspondence was presented under the banner of her companies' letterhead.

[7] On 18 November 2019, Ms MQ surrendered her immigration advisers licence. She had commenced working as a lawyer. Individuals are not permitted to concurrently hold a practising certificate issued by the New Zealand Law Society and an Immigration advisers licence.

[8] Mr EZ commenced working for PLD on 5 December 2019.

[9] Unfortunately, problems developed in the employment relationship and on 5 January 2020 Mr EZ resigned, that resignation to take effect on 12 January 2020. Mr EZ made request of Ms MQ to refund the fees he had paid for immigration services she had rendered.

[10] On 27 January 2020, Ms MQ wrote to Mr EZ to advise that she had been instructed by PLD in respect to the company's employment dispute with Mr EZ. In that correspondence, Ms MQ advised Mr EZ that:

- (a) payments Mr EZ had sought from PLD in compensation for his notice period would not be paid; and
- (b) PLD was seeking compensation from Mr EZ for failure to comply with his notice period and compensation for breach of a restraint of trade clause; and

- (c) he was invited to attend a mediation at Ms MQ's office; and
- (d) in the event that Mr EZ failed to attend the proposed mediation, PLD would proceed to file a claim in the Court or Employment Relations Authority; and
- (e) PLD had instructed her to advise Immigration New Zealand of the circumstances of the employment dispute and this could have consequence for any further applications made by Mr EZ to Immigration New Zealand; and
- (f) She would be writing to Immigration New Zealand to report that Mr EZ's father had been working illegally in New Zealand, and that Mr EZ had been assisting his father-in-law to similarly work in New Zealand without the necessary legal status.

The complaint and the Standards Committee decision

[11] Mr EZ's union advocate lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 4 March 2020. The substance of Mr EZ's complaint was that:

- (a) Ms MQ had a conflict of interest in acting for PLD against Mr EZ; and
- (b) Ms MQ had breached duties of confidentiality owed to Mr EZ; and
- (c) Ms MQ had engaged in conduct that was intimidatory, and in clear breach of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

[12] Ms MQ responded to Mr EZ's complaint on March 26, 2020. In part, Ms MQ's response addressed matters arising from her engagement with Mr EZ in her capacity as an Immigration advisor. To the extent that her submission addressed issues relating to her engagement with Mr EZ in her capacity as a lawyer, she submitted that:

- (a) she had acted for Mr EZ solely in respect to immigration matters; and
- (b) she did not have access to any sensitive information pertaining to Mr EZ's family members; and

- (c) she had offered to become involved in discussions between Mr EZ and his employer as she was concerned that the employment issues may compromise Mr EZ's application for a work visa; and
- (d) she had not acted in a formal capacity for the employer, but if she had, her involvement would have been limited to addressing employment rather than immigration issues; and
- (e) her correspondence to Mr EZ of 27 January 2020 had been written on a "without prejudice" basis, and reference to Mr EZ's family members in that correspondence was "mere allegation"; and
- (f) there was no conflict of interest; and
- (g) other than preparing initial correspondence, she'd had no involvement in the employment dispute; and
- (h) the immigration and employment matters were separate issues; and
- (i) Mr EZ's family members were not her clients, and she had never done any work for them; and
- (j) The complaint was frivolous; and
- (k) Suggestion that she had attempted to use confidential information was a "bluff".

[13] Both Mr EZ and Ms MQ filed further submissions with the Complaints Service. I have read and considered them but have no need to summarise them here. In significant part, those submissions amplify the arguments earlier advanced.

[14] The Standards Committee identified the key issues for its consideration as being:

- (a) whether Ms MQ had a conflict of interest in acting for PLD; and
- (b) whether Ms MQ had complied with her obligations to Mr EZ following the completion of her retainer with Mr EZ; and
- (c) whether Ms MQ otherwise breached her professional obligations in relation to her conduct towards Mr EZ

[15] The Standards Committee delivered its decision on 2 November 2020.

[16] The Committee determined that Ms MQ had breached rr 2.7, 6, 6.1, 8, 8.7.1, and 10 of the Rules, and that these breaches amounted to unsatisfactory conduct under ss 12(a) and 12 (c) of the Lawyers and Conveyancers Act 2006 (the Act).

[17] In reaching that decision the Committee concluded that:

- (a) whilst initially instructed in her capacity as a licensed immigration adviser, Ms MQ had continued to act for Mr EZ until termination of her retainer on 5 January 2020; and
- (b) it was satisfied that Ms MQ had acted for PLD on an employment matter notwithstanding the retainer may have been brief; and
- (c) in acting for both PLD and Mr EZ, Ms MQ had breached rr 6 and 6.1; and
- (d) it was clear that Ms MQ retained information confidential to Mr EZ, and that disclosure of that information would adversely affect Mr EZ's interests; and
- (e) Ms MQ's indication of intention to disclose information to Immigration New Zealand was clearly a threat for an improper purpose and constituted a breach of r 2.7.

Applications for review

[18] Ms MQ filed her application for review on 9 December 2020.

[19] Ms MQ submits that:

- (a) her correspondence to Mr EZ of 27 January 2020, to the extent that it referenced Mr EZ's relations, could not properly be described as having been written with an improper purpose as the references to family members did not relate to Mr EZ himself, but to those family members; and
- (b) if her references to family members did have potential to affect Mr EZ directly, she would agree that she would have "breached the code", and
- (c) Mr EZ has been advantaged as he has pursued complaint against her through the Immigration Advisers Authority's (IAA) complaints process and through the Lawyers and Conveyancers disciplinary regime; and

- (d) she accepts that when she wrote to Mr EZ that she had at this juncture relinquished her immigration adviser licence and had obtained a practising certificate; and
- (e) this complaint arose at an early stage of her professional career; and
- (f) information she had acquired had not been used for an improper purpose; and
- (g) in the event that there had been a breach of r 2.7, she would wish for a number of factors to be given consideration in mitigation including her relative inexperience in practice and difficult family demands that she was managing at the time of the offending conduct; and
- (h) the penalty imposed was severe and harsh when measured against comparable decisions; and
- (i) Mr EZ's immigration status had not been affected by her actions.

[20] Mr EZ filed his application to review the Committee's decision on 3 December 2020.

[21] His single concern was that the Standards Committee had failed to make orders directing that Ms MQ refund fees paid to advance his visa application.

Hearing

[22] A hearing, attended by both parties, proceeded on Wednesday 12 May 2020.

Nature and scope of review

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

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

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

... the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to

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

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.

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

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

[25] 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

Ms MQ's application

[26] Early in the review hearing, Ms MQ indicated that she had, after having reflected on matters, accepted that her conduct had been unsatisfactory.

[27] She accepts that it had been inappropriate for her to have accepted instructions to act against a former client. In making what was in my view an entirely appropriate concession, Ms MQ advised that:

- (a) she now recognises "where the problem lay"; and
- (b) in acting for PLD she had a "huge conflict of interest"; and
- (c) her conduct fell below the standard required of a practitioner.

[28] Ms MQ's decision to withdraw her objection to the Committee's finding of unsatisfactory conduct was discussed extensively with her at the hearing.

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

[29] I was satisfied that Ms MQ had carefully considered the conduct, discussed matters thoroughly with her supervising partner, and taken steps to attend various Law Society seminars to ensure that she had a better understanding of the application of the rules engaged by the conduct complaint.

[30] Having withdrawn her objections to the unsatisfactory finding, Ms MQ focused her review submissions on the penalties imposed by the Committee. She was also concerned that Mr EZ had advanced his complaint in two jurisdictions but accepted that conduct that occurred when acting as a lawyer, properly fell to be considered under the disciplinary procedures provided for under the Act.

[31] I see no difficulty with Mr EZ exercising, as I consider he was entitled to do, his right to advance a complaint in two jurisdictions. Ms MQ had represented Mr EZ both in her capacity as an immigration adviser, and then as a lawyer.

[32] The Standards Committee inquiry was, as has this review, been confined to considering Ms MQ's conduct when acting as Mr EZ's lawyer. Clearly the scope of any conduct inquiry conducted by the IAA would be limited to addressing issues engaging the work Ms MQ had done in assisting Mr EZ with his visa application. The complaint to the Law Society Complaints Service was properly focused on addressing Ms MQ's conduct as a lawyer.

[33] Ms MQ, in conceding on review that her conduct had been unsatisfactory, asked for consideration to be given to the fact that she had only just commenced practising law when the mistakes were made. She acknowledged that the process of working through a conduct inquiry had been a learning experience for her. She considered the penalties imposed by the Committee to have been unreasonably harsh and the fine imposed to be disproportionate to fines imposed in similar cases.

[34] Request was made of Ms MQ at hearing to identify the decisions referenced which would support argument that the fine imposed by the Committee presented as excessive in comparison to penalties imposed by Committees in similar cases. Ms MQ was unable to identify the cases she had made general reference to as supporting argument that the penalties imposed by the Committee were excessive.

[35] It is rare for a Review Officer to interfere with penalties imposed by a Committee. A Review Officer will not engage in "tweaking" orders. In order for a Review Officer to interfere with a fine imposed, the Officer must be satisfied that there are demonstrable issues with the penalty order that merit intervention.

[36] When determining an appropriate penalty by way of fine, a Standards Committee is exercising its discretion. There is no formula by which to calculate the appropriate level of a fine. As such, this Office would have to have good reason to interfere with the exercise of that discretion. That said, the expectation of this Office is that it will form its own independent opinion.

[37] There do not tend to be comparable cases in disciplinary proceedings because of the wide range of conduct that can be subject to such proceedings and because of the relevance of wider factors, making each case very fact-specific.³

[38] The maximum fine a Committee or this Office can order a practitioner to pay pursuant to s 156(1)(i) of the Act is \$15,000. A fine at that level is reserved for the most serious of cases of unsatisfactory conduct.

[39] The function of a penalty in a professional context was recognised in *Wislang v Medical Council of New Zealand* [2002] NZAR 573 (CA) as being to punish a practitioner, to act as a deterrent to other practitioners, and to reflect the public's and the profession's condemnation or disapproval of a practitioner's conduct. It is important to mark out the conduct as unacceptable and to deter other practitioners from failing to pay due regard to their professional obligations.

[40] A penalty ought to be fair, reasonable and proportionate in the circumstances (*Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850 at [28]).

[41] I agree with the Committee that Ms MQ's conduct was at the serious end of the scale of unsatisfactory. I appreciate that Ms MQ was new to practice, but it is concerning that however inexperienced she may have been in legal practice, Ms MQ did not recognise that in taking up cudgels on behalf of PLD and, in doing so, advancing threats to jeopardise Mr EZ's position with immigration New Zealand, she was significantly compromising the duties she owed to Mr EZ. It could reasonably have been expected of Ms MQ, that her considerable experience owning and managing an immigration advisory consultancy for a number of years, would have given her some experience in identifying and dealing with situations where there was potential for conflicts of interest to arise. The singular feature of Mr EZ's case was that the conflict issue was so starkly obvious. The other aspect which in my view merits the imposition of a significant penalty, is the particularly egregious element of the r 2.7 breach. This was conduct that demanded a significant disciplinary response.

³ *Deliu v National Standards Committee* [2017] NZHC 2318 at [165].

[42] I consider that the Committee's obligation to mark out the conduct as unacceptable and to deter other practitioners from failing to pay due regard to their professional obligations was properly met in this case by a significant fine.

[43] In summary, I see no basis to interfere with the Committee's conduct finding, or the penalties imposed.

[44] At the conclusion of Ms MQ's submissions, I summarised the argument that had been advanced by her, and invited her to identify any error, omissions or oversights. Ms MQ confirmed that the summary provided accurate account of her position.

Mr EZ's application

[45] Mr EZ submits that the Committee should have made orders that Ms MQ be directed to refund the fees he had paid to Ms MQ to advance his application for a work visa.

[46] Mr EZ confirmed at hearing that he had laid a complaint with the IAA, and that he had, in that jurisdiction, sought a refund of fees paid.

[47] He is awaiting a decision on his complaint from the IAA.

[48] That is the appropriate forum for him to pursue remedy seeking refund of fees paid to Ms MQ for immigration services.

Analysis

Costs on Ms MQ's review application

[49] Where an adverse finding is made or upheld, costs will be awarded in accordance with the Costs Orders Guidelines of this Office. It follows that Ms MQ is ordered to pay costs in the sum of \$1,200 to the New Zealand Law Society within 30 days of the date of this decision, pursuant to s 210(1) of the Act.

Enforcement of costs order

[50] 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

[51] 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 19th day of May 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 EZ as the Applicant/Respondent
Ms MQ as the Respondent/Applicant
Mr LK as a Related Person
[Area] Standards Committee [X]
New Zealand Law Society