

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

[2020] NZLCRO 178

Ref: LCRO 24/2019

CONCERNING

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of [Area] Standards Committee

BETWEEN

UC

Applicant

AND

SO

Respondent

DECISION

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

Introduction

[1] Mr UC has applied for a review of the determination by [Area] Standards Committee in which a finding of unsatisfactory conduct was made against Mr UC. Mr UC was ordered to pay a sum of \$1,500 by way of a fine and to pay costs in the sum of \$1,000.

Background

[2] In January 2016, Mr SO approached Mr UC directly¹ for assistance with regard to a complaint against him of indecent assault. Mr UC involved another

¹ Mr UC was not required to have an instructing solicitor – see rule 14.5.2.

barrister, PT, to assist. In [2] of its determination,² the Committee stated that “PT appears to have been acting on instructions from Mr UC during the relevant period”.³

[3] Mr SO says he met with Ms PT at Mr UC’s chambers on 27 January 2016,⁴ two days before he was required to make a statement at the [XX] policing centre. Mr SO says that at this meeting he was asked to pay \$1,500 on account of legal fees.

[4] Mr SO says he met Ms PT in the carpark prior to the meeting with the police and handed her \$1,500 in cash. Ms PT’s advice to Mr SO was not to make any statement to the police.

[5] Two court appearances took place on X and XX [Month] 2016. Following the appearance on XX [Month], Ms PT sent an email to Mr SO⁵ advising him that the fee to proceed with a defended hearing would be \$10,000, to be paid by three payments of \$3,300 each. She requested the first payment be made into “the my bank account”.⁶ It would seem from this email that Ms PT did not intend to pay the funds into a solicitors trust account as I would have expected her to direct any payment to be made into that trust account.

[6] That is not an issue for this review as the application for review is made by Mr UC but I ask Mr UC to draw this comment to Ms PT’s attention.

[7] On 30 March 2016, Mr SO sent an email to Ms PT advising her that he had decided to plead guilty (having earlier pleaded not guilty) and had made a statement to police. In the same email, he terminated his instructions to Mr UC/ Ms PT.

Mr SO’s complaints

[8] Mr SO’s complaint is dated 26 February 2018, some two years after the conduct complained about occurred. There is no explanation provided by Mr SO as to the reason for the delay in complaining.

[9] Mr SO’s complaints are summarised in [8] of the Standards Committee determination:

² Standards Committee determination (21 December 2018).

³ This was confirmed by Mr UC at the review hearing. It is important to note this confirmation, as Mr UC must therefore assume responsibility for the events that occurred.

⁴ In his response to the complaint Mr UC says that Mr SO met with Ms PT about two weeks prior to the date Mr SO was due to provide his statement to the police. Ms PT’s notes taken at that meeting are undated. The difference in recall is immaterial.

⁵ Ms PT, email to Mr SO (18 March 2016).

⁶ This quotation is exactly as set out in Ms PT’s email.

- (i) He handed to Ms PT at Mr UC's office a memory stick containing information relating to the charge he faced together with unrelated personal matters and despite repeated requests they have not returned it; and
- (ii) the lawyers took \$1,500 from him on account of fees and did not give him a receipt, nor render an invoice.

Response to the complaint

[10] In his response to the complaint,⁷ Mr UC said that he considered the complaint was only about the misplaced memory stick and not about the lack of receipt and invoice for the payment of \$1,500 to Ms PT.

[11] He says the payment was made to Ms PT after the meeting with the police and says that there is a receipt on file for that sum. Mr UC also says:

In my view Mr SO is clearly harassing Ms PT (and myself). He is misusing legal process to further his own ulterior purpose or using the process in an improper way. His claims are fictitious, groundless and without foundation and serve no purpose and are malicious. Mr SO is put on notice by me that if this continues I will not hesitate to file proceedings against him in the District Court for abuse of process and will seek considerable damages in tort against him.

The Standards Committee determination

[12] The Standards Committee identified the following issues to be addressed:⁸

- (a) What standards of professional conduct apply?
- (b) Did Mr UC provide to his client in advance information in writing on the principal aspects of client service? (Rule 3.4A, Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 applies)
- (c) Was Mr UC entitled to accept a cash payment for his fees upfront?
- (d) Did Mr UC fail to provide an invoice or a receipt for the payment made in cash by his client?
- (e) Did Mr UC issue a final invoice to his client within a reasonable time of concluding a matter? (Rule 9.6 applies)
- (f) Did Mr UC and/or Ms PT receive and fail to return to their client a memory stick?

⁷ Mr UC, email to Lawyers Complaints Service (29 May 2018).

⁸ Above n 2 at [9].

Provision of information

[13] The Committee referred to rule 3.4A of the Conduct and Client Care Rules⁹ (the Rules) which requires a barrister sole to provide a client with information about the services to be provided, often referred to as Terms of Engagement.

[14] The Committee determined that Mr UC had breached this rule as he had not provided the Committee with sufficient evidence to show that he had provided his Terms of Engagement to Mr SO.

Fees

[15] The Committee formed the view that the payment made by Mr SO was for services to be provided subsequently, as the narration included 'attending court', and the first Court appearance was on 4 February, i.e. after the payment had been made on 29 January.

[16] The Committee referred to r 14.2(e) which prohibits a barrister sole from "receiv[ing] or hold[ing] money ... on behalf of another person."

[17] The Committee also considered Mr UC was in breach of r 14.10 which provides that all money paid in advance to a barrister accepting instruction pursuant to r 14.5.2 must pay those monies into a trust account. Although the rule does not refer to a **solicitor's** trust account, that would be the most obvious interpretation of the wording.

[18] No information was provided to the Committee as to how the funds were disbursed.

[19] The Committee noted that regs 9 and 10 of the Trust Account Regulations¹⁰ were applicable and concluded "that on the balance of probabilities ... neither of the invoices nor a receipt for the payment made was issued to Mr SO".¹¹

[20] Mr UC was not able to provide evidence that he had sent the final invoice to Mr SO. The Committee determined, on a balance of probabilities, that Mr UC had breached r 9.6 of the Conduct and Client Care Rules. That rule requires a final invoice to be rendered within a reasonable time of the retainer being terminated.

⁹ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

¹⁰ Lawyers and Conveyancers Act (Trust Account) Regulations 2008.

¹¹ Above n 2 at [22].

Findings / orders

[21] Having determined that Mr UC had breached rr 3.4A, 9.3, 9.6, 14.2(e), and 14.10 of the Conduct and Client Care Rules, and regs 9 and 10 of the Trust Account Regulations,¹² the Committee made a finding of unsatisfactory conduct against Mr UC pursuant to s 12(c) of the Lawyers and Conveyancers Act 2006 (the Act).

[22] The Committee made the following orders:¹³

- a) Mr UC is to pay to the New Zealand Law Society a fine of \$1,500 (section 156(1)(i)); and
- b) Mr UC is to pay to the New Zealand Law Society the sum of \$1,000 in respect of the costs and expenses of and incidental to the inquiry and investigation made and hearing conducted by the Standards Committee (section 156(1)(n)).

Mr UC's application for review

[23] Mr UC has applied for a review of the Committee's determination. The reasons for his application are:¹⁴

1. The Standards Committee;
 - (a) failed to take into account material provided establishing that invoices were provided; and
 - (b) made an error of fact that fees were taken as a retainer and held in advance of services provided; and
 - (c) failed to take into account material provided establishing terms of engagement were provided; and
 - (d) unnecessarily made enquiries as to Court appearances by counsel when this information was already provided by counsel; and
 - (e) failed to take into account significant voluntary work done by counsel on Mr SO's application to vacate his guilty plea (with assigned legal aid counsel).

[24] The outcome of the review he seeks is:¹⁵

1. There was no breach of rule 3.4A
2. There was no breach of rules 14.2(e), 14.10 or of the regulations 9 & 10

[25] Mr UC also provided more detailed submissions with his application which are referred to in the Review section of this decision.

¹² At [31].

¹³ At [37].

¹⁴ Application for review, part 7.

¹⁵ Application for review, part 8.

Review

Terms of engagement

[26] Rule 3.4A of the Conduct and Client Care Rules provides:

3.4A A barrister sole must, in advance, provide in writing to a client information on the principal aspects of client service including the following:

- (a) The basis on which the fees will be charged, and when payment of fees is to be made.
- (b) The professional indemnity arrangements of the barrister sole. This obligation is met if it is disclosed that the barrister sole holds indemnity insurance that meets or exceeds any minimum standards from time to time specified by the Law Society. If a barrister sole is not indemnified, this must be disclosed in writing to the client.
- (c) The fact that the Lawyers' Fidelity Fund does not provide any cover in relation to a barrister sole as he or she does not hold client's funds.
- (d) The procedures in the barrister sole's practice for the handling of complaints by clients, and advice on the existence and availability of the Law Society's complaints service and how the Law Society may be contacted in order to make a complaint.

[27] In response to the complaint, Mr UC produced his standard terms of engagement, but advised that there was no copy on his file. The Standards Committee determined, on the balance of probabilities, that Mr UC had not provided his terms of engagement to Mr SO and was therefore in breach of r 3.4A of the Rules. This determination was made on the basis that there was no copy of the terms of engagement on Mr UC's file. In addition, it would be expected that there would be a covering email sending the terms of engagement to Mr SO, but Mr UC has not provided copies of any emails.

[28] In the memorandum of issues provided by Mr UC in support of his application for review, he says:¹⁶

Some time between March 2016 and the complaint filed with the NZLS (a significant period later) Telecom implemented new technology for their email and web services. Some data was migrated to the new system. Many emails over the relevant period were not migrated and were lost. ...

[29] If such an event had occurred, it would be expected that Mr UC and other members of his chambers would have communicated dissatisfaction to Telecom, and

¹⁶ At [1.8].

at the conclusion of the hearing, I requested Mr UC to endeavour to locate, and forward, evidence of complaints by any members of his chambers.

[30] Mr UC initially objected, on the grounds that he was being asked to provide evidence to disprove Mr SO's statements, and that his word was not being accepted. He refers to Mr SO's past offending in support of his view that his word should be accepted in preference to that of Mr SO.

[31] Mr SO's past offending has no relevance to this review which proceeds on the evidence presented. Mr UC ultimately accepted that if he could provide such emails, then this would support his assertions.

[32] Nothing further has been received from Mr UC.

Invoices

[33] The Committee determined that Mr UC had:¹⁷

... breached rules 14.2(e) and 14.10 RCCC and regulations 9 and 10 of the Trust Account Regulations 2008 when he failed to receive and hold those funds in a solicitors trust account until the work was done and an invoice used to Mr SO.

[34] Mr UC asserts that two invoices were sent to Mr SO dated 29 January 2016 and 24 February 2016.

[35] The Committee's determination was that Mr UC had not provided evidence that he had in fact **sent** the invoices to Mr SO, and I concur with that view. The comments in [27]–[32] above apply equally to the provision of the invoices.

[36] At [1.2] of his memorandum of issues, Mr UC says:

The first invoice did not relate to any legal services provided by the applicant. It related to Ms PT meeting Mr SO in chambers prior to attending the police interview, preparation of the file and taking instructions, and attending the police interview at the [XX] police station. It also included attending the court the same day as the interview.... This took place on 29 January 2020. All services were provided by PT at the time she took payment or contemporaneously with the time she either attended the [XX] District Court or was on route to the Court.

[37] By making this statement, Mr UC seems to be suggesting that it was Ms PT's obligation to provide an invoice. This is countered by the fact that Mr UC has advised that Ms PT was acting on his instructions, and the invoice which Mr UC has produced in support of his contention, is on his letterhead. It also includes a bank account number into which payment could be made, which is somewhat puzzling, given the

¹⁷ Standards Committee determination at [23].

evidence is that Mr SO had paid the sum of \$1,500 in cash to Ms PT on the day of the meeting.

[38] I note that the bank account number on the bottom of these invoices, into which payment was to be made, differs from that advised by Ms PT in her email of 18 March 2016.¹⁸ At the review hearing, I overlooked asking Mr UC whose bank accounts these were, but as Mr UC has accepted responsibility for all that occurred, it is immaterial.

[39] The above paragraphs support the determination that Mr UC has breached the rules and regulations referred to.

[40] For these reasons, I confirm the determination of the Standards Committee.

*Skagen v Wellington Standards Committee of the New Zealand Law Society*¹⁹

[41] Mr UC's view is that the complaint was only about the lost memory stick. In his complaint, Mr SO does refer to the fact that he had not received a receipt for the payment made, which he had requested in his email to Mr UC 3 December 2017. Mr UC says the receipt is on his file, which, in itself, seems to confirm it was not sent to Mr SO. Mr UC has not provided a copy of the receipt to either the Standards Committee or this Office.

[42] I consider the determinations made by the Committee, and confirmed on review, that Mr UC has not provided Mr SO with an invoice or receipt in accordance with the Trust Account Regulations, have greater importance than the missing USB stick. Although the Committee did not refer to it, the judgment of Mallon J in *Skagen v Wellington Standards Committee of the New Zealand Law Society* must be considered.

[43] Regulation 10 of the Trust Account Rules provides that any payment received "in respect of which an invoice has not been issued" MUST be paid into a trust account.

[44] Mr UC was not required to have an instructing solicitor,²⁰ but was required to pay the funds into a solicitor's trust account.

[45] There has been no evidence provided as to what Ms PT did with the cash, but there is a strong inference to be drawn from the evidence, that the cash was either retained by Ms PT or shared between her and Mr UC.

¹⁸ See [5] above.

¹⁹ [2016] NZHC 1772.

²⁰ Rule 14.5.2.

[46] I proceed on that basis.

[47] As Mr UC has firmly advised that Ms PT was acting on his instructions, and the invoice when rendered, was rendered by Mr UC, it is he who has the responsibility to ensure that reg 10 was complied with.

[48] In the Tribunal hearing that preceded the *Skagen* court proceedings,²¹ Mr Skagen was found guilty of misconduct on each of twelve charges, two of which were:

Accepting fees in advance;

Failing to pay monies received into a trust account.

[49] Although I do not think Mr UC's conduct is such that it should be referred to the Tribunal, I consider that the fine imposed on Mr UC (\$1,500) does not reflect the seriousness with which the Tribunal views such conduct.

[50] The fine imposed by the Standards Committee is therefore increased to \$2,000. Payment of this increased amount (\$500) is deferred for a period of two weeks and if Mr UC provides irrefutable evidence during that period that the sum of \$1,500 was paid into a solicitor's trust account on 29 January 2016 or immediately thereafter, an amendment to this decision will be issued by which the fine will revert to the amount ordered by the Committee (\$1,500).

The memory stick

[51] The Standards Committee determined that "it is likely on the balance of probabilities that Mr SO did provide a memory stick to Ms PT and that stick has been misplaced or lost".²²

[52] At [1.4] of the memorandum of issues supplied by Mr UC with his application, he says:

Ms PT accepted that she received a memory stick from Mr SO and that this item was mislaid. All the material provided [o]n this stick was already provided to counsel by the police and included emails between Mr SO and the complainant about the alleged sexual offending.

[53] This is in direct contrast to Mr UC's assertions to the Standards Committee that neither he or Ms PT could recall that they had received the memory stick and that "none of the lawyers in our offices take USB devices from clients and connect them to

²¹ *Wellington Standards Committee of the New Zealand Law Society v Skagen* [2014] NZLCDT 82.

²² At [30].

any of our equipment. There are obvious security risks associated with this and we have a practice of not doing so.”²³

[54] It seems that Ms PT was not aware of this practice.

[55] The Committee determined to take no further action with regard to Mr SO’s complaint that the memory stick had not been returned to him, on the grounds that it did “not reach the threshold of requiring a disciplinary response”.²⁴

[56] Rather than the decision in this regard being made on a balance of probabilities, it can now be said that Mr SO’s assertions are accepted by Mr UC. However, it is also acknowledged that items can be misplaced, and there would be no reason for Mr UC or Ms PT to retain the memory stick. The matter has been before the Disputes Tribunal which has issued its decision.

[57] For these reasons, and those provided by the Standards Committee, no further action is the appropriate response with regard to this matter.

Decision

[58] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination of the Standards Committee, in so far as it relates to the conduct of Mr UC, is confirmed. Ms PT’s conduct is not part of this review.

[59] The fine imposed by the Committee pursuant to s 156(1)(i) of the Lawyers and Conveyancers Act 2006 is increased to \$2,000 subject to the terms referred to in [50] above.

Costs

[60] The determination of the Standards Committee has been confirmed. In accordance with the Costs Orders Guidelines issued by this Office Mr UC is ordered, pursuant to s 210 of the Lawyers and Conveyancers Act 2006, to pay the sum of \$1,200 to the New Zealand Law Society by no later than 30 October 2020.

[61] Pursuant to s 215 of the Act, the order for costs made may be enforced in the civil jurisdiction of the District Court.

²³ Mr UC, email to the Lawyers Complaints Service (21 March 2018).

²⁴ At [30].

DATED this 30th day of September 2020

O Vaughan
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 UC as the Applicant
Mr SO as the Respondent
[Area] Standards Committee
New Zealand Law Society
The Secretary for Justice