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

[2023] NZLCRO 150

Ref: LCRO 107/2023

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| **CONCERNING** | an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006 |
| **AND** | |
| **CONCERNING** | a decision of the [Area] Standards Committee [X] |
| **BETWEEN** | **NC**<br>Applicant |
| **AND** | **PJ**<br>Respondent |

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

## Introduction

[1] The applicant, Mr NC, has applied for review of a decision by the [Area] Standards Committee [X] (the Committee) dated 24 July 2023 in which it resolved under s 138(1)(c) of the Lawyers and Conveyancers Act 2006 (the Act) to take no further action in relation to his complaint dated 13 April 2023 about the professional conduct of the respondent, Mr PJ.

## Background

[2] The applicant was pursuing a private prosecution in the District Court at [City A]. The applicant, who is not a lawyer, was representing himself. The respondent, a barrister sole, was representing the defendant.

[3] The defendant had applied for the prosecution to be dismissed. Her application was set down for hearing on [redacted]. The applicant requested an adjournment. His

request was addressed at a teleconference on 13 April 2023 before his Honour, Judge [A], attended by the applicant and the respondent.

[4] His Honour issued a minute of the outcome of the teleconference, which relevantly reads as follows:

> [3] When that the teleconference commenced [the applicant] asked me to recuse myself, suggesting that I had acted unjudicially in past hearings involving him. I attempted to explain to him that the purpose of the teleconference was to consider his adjournment request.
>
> [4] Mr NC was much focused on suggesting there had been non-service or misservice by [the respondent] of his submissions. Heated words arose between [the applicant] and [the respondent]. There seemed little point to me becoming involved in that dispute for the moment.

[5] The applicant subsequently obtained a transcript of the teleconference. He provided a copy of the transcript to the Committee in support of his complaint against the respondent. He also provided another version of the transcript annotated with his recollection of entries expressed as "inaudible" in the Court transcript and his interpretation of the context and implications of what was actually said.

[6] The Court transcript records that the teleconference traversed four matters, which I express broadly as:

(a) the applicant's criticisms of the Judge;

(b) the applicant's request for the adjournment;

(c) the applicant's criticisms of the respondent;

(d) the respondent's criticisms of the applicant.

[7] The applicant's contributions commenced with his criticisms of the Judge. The relevant part of transcript reads as follows:

> **THE COURT TO MR NC:**
>
> Q. So, Mr NC, the phone conference is about your request, as I understand it, to adjourn this hearing on Monday.
>
> A. Okay. I think you should recuse yourself, Judge [A], because you have stood in the court while I was assaulted by security officers and you have lied to the police about what happened when that, when that occurred. You stood there. When I asked you to stop the security officers from interfering with me, you said: "No, I won't."
>
> Q. Mr NC, Mr NC just –
>
> A. (inaudible 09:24:05) Judge [A] –

Q. There is no other –

A. – You are a (inaudible 09:24:07) –

**MR PJ:**

(inaudible 09:24:07).

**THE COURT TO MR NC:**

Q. Mr NC –

A. You are a threat to me.

Q. – there is no other judge available to deal with the matter this morning.

A. Well, I don't care. You should recuse yourself.

Q. Right.

A. It's not reasonable. You have an extreme bias against me –

Q. I (inaudible 09:24:20) –

A. – because you have stood there and basically passively, passively approved people assaulting me.

**MR PJ:**

(inaudible 09:24:26)

**MR NC:**

That is not a reasonable behaviour from any human being, and it is certainly not a reasonable behaviour from a judge of the District Court. I don't think that you are in a position to sit in judgement over me because of your extreme (inaudible 09:24:42) biases that you have already shown. In fact, and it is known that I have said on record that you are criminal.

**THE COURT TO MR NC:**

Q. Well, I will not have you –

A. And (inaudible 09:24:53 – 09:24:55) –

Q. Mr NC, I will not have you –

A. You are a criminal, Judge [A].

[8] Judge [A] did not respond to the request for recusal. He dealt with the adjournment.

[9] The applicant then embarked on his criticisms of the respondent. The relevant part of the transcript reads as follows:

A. Okay. Can we deal with –

Q. The hearing will take – no, no.

A. (inaudible 09:25:29) to deal with things, can we deal with Mr PJ not serving me with documents? I believe he is contempt of court.

Q. Well –

**MR PJ:**

Oh, shut up. I'm sick of listening to you.

**THE COURT:**

Mr NC, if you believe that –

**MR PJ**

Start telling the truth, Mr NC.

**MR NC:**

(inaudible 09:25:42)

**THE COURT:**

Mr NC –

**MR PJ:**

(inaudible 09:25:42) a copy of those submissions –

**MR NC:**

(inaudible 09:25:43 – 09:25:44) abuse from Mr PJ.

**THE COURT:**

Right.

**MR PJ TO MR NC:**

Q. Yeah. Well, you abuse me. You received those submissions on NC.com on the 6th of April, the same email address –

A. And I told you (inaudible 09:25:56) – the Criminal Disclosure Act requires that you use an address that is nominated by me, and the Court should uphold –

Q. You telling – you're telling this court a lie. You say that I have not communicated with you and that I'm in contempt of court. I will not take that from you or anyone else. I have served this court for 46 years. I would never do anything in contempt of the Court. So you start telling the –

A. Sir, Judge [A] –

Q. You start telling the truth.

**MR NC:**

Judge [A] –

**THE COURT:**

Mr NC –

**MR NC:**

Can I speak please? Can I speak please?

**THE COURT:**

Mr NC –

**MR PJ:**

I wouldn't listen to him.

[10] Judge [A] at that point returned to the matter of the adjournment.

[11] The respondent then re-engaged about the matter of the service of his submissions on the applicant. The relevant part of the transcript reads as follows:

**MR PJ:**

I have one question, Sir, if I may.

**THE COURT:**

Yes?

**MR PJ:**

Can Mr NC please confirm that he has seen my submissions on his email address that he's, the same one that he emailed the Court on. Yes or no, Mr NC?

**MR NC:**

I'll wait for instructions from the Judge.

**THE COURT:**

Well, Mr NC, have you received the submissions filed by Mr PJ?

**MR NC:**

Mr – I have not received those submissions from Mr PJ. Mr PJ, the requirement under the Criminal Disclosure Act –

**MR PJ:**

Oh, shut up, shut up.

**THE COURT:**

Mr NC –

**MR NC:**

– (inaudible 09:27:43 – 09:27:45).

**MR PJ TO MR NC:**

Q. You tell us, you tell us whether or not – you tell us whether or not you received those submissions on that email address, the same one that you emailed the Court on. Yes, or no?

A. Email address that I have nominated is not (inaudible 09:27:57) address –

Q. You are mad, you are mad. You are mad. I refuse to talk to you any further.

A. (Inaudible 09:28:01) do I have to, do I have to, do I have to have this –

Q. You are the one that's calling me a liar, mate.

A. – (inaudible 09:28:08) abuse me, Sir?

Q. Yes, I'm gonna abuse you. Next time I see you, I'll abuse you because you're a liar.

A. (Inaudible 09:28:13).

**THE COURT:**

Right. We will end the call now. Thank you.

## The complaint[1]

[12] The applicant's complaint was firstly about the respondent making:

> … numerous insults against me including: 1. Calling me a liar; 2. Telling me repeatedly I was "mad" 3. Unequivocally telling me he would abuse me next time that he saw me.

[13] He added that:

> Mr PJ had deliberately used an email address that I had asked him not to use and had not used the email address that I have nominated for service. He did this knowing that I had previously advised him that his emails to my personal email account would be blocked or equivalently automatically deleted as that account is almost full. Mr PJ's response was to call me a "liar" and later to call me "mad" both of these insults were repeated.

[1] Standards Committee complaint (14 April 2023).

[14] The outcome the applicant sought from his complaint was as follows:

> PJ needs to be censored (sic) for his actions. He is not entitled to make such disparaging comments towards an unrepresented person in his role as a defence counsel. He is not entitled to threaten me with ongoing abuse.

[15] The respondent was given the opportunity to respond to the complaint. He did not do so at that time.

**The Standards Committee decision**

[16] The Committee's findings, paraphrased, were as follows:

(a) the applicant made a number of extremely serious claims against both Judge [A] and the respondent;

(b) in responding, the respondent used unprofessional language;

(c) although the respondent was entitled to dispute the applicant's allegations, he was required, in doing so, to promote and maintain professional standards and treat the applicant with respect and courtesy;

(d) it was:

> … regrettable that [the respondent] lost his composure. There was nothing preventing [the respondent] from explaining, in a calm and dispassionate manner, why he considered your allegation to be unfounded. There was no justification for [the respondent] resorting to insulting language.

(e) the respondent had failed to maintain professional standards and to treat the applicant with respect and courtesy;

(f) it was an aggravating factor that the respondent conducted himself in such a way before a judge;

(g) the Judge did not intervene or make any comments in relation to the respondent's conduct.

[17] On the basis of the above findings, the Committee concluded that the respondent's conduct amounted to breach of rr 10 and 10.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

[18] Notwithstanding these findings, the Committee exercised its discretion to take no further action on the basis that "…not every professional lapse is sufficiently serious to require disciplinary intervention".[2]

[19] It did so expressly under s 138(1)(c) of the Act, which empowers a standards committee to take no further action if, in its opinion, the complaint "is frivolous or vexatious or is not made in good faith".

[20] Its stated grounds for doing so, summarised, were that:

(a) "…as best the Standards Committee could ascertain, this appears to have been an isolated incident and one that was entirely out of character for [the respondent]";

(b) there was no evidence that the applicant's interactions with the respondent before or after the teleconference were characterised by similar conduct;

(c) it was ultimately the role of the Judge to regulate conduct of the parties and there was nothing to indicate that the Judge considered the respondent's conduct was such as to warrant a disciplinary response;

(d) in the circumstances, no meaningful purpose would be served by making an adverse finding against the respondent.

[21] The Committee further commented as follows:

> [31] The Standards Committee considers that this complaint will have been a salutary experience for [the respondent]. He is urged to reflect on his conduct and take care in future to maintain professional detachment during his interactions as a lawyer, however much he may take issue with the claims made by an opposing party.
>
> [32] Since the Standards Committee has not made an adverse finding, it did not have the power to make any orders. However, [the respondent] is encouraged to apologise to you. It is hoped that an apology will allow you both to put the events of the teleconference behind you.

**Application for review**

[22] The applicant's application for review, which is particularised at considerable length, is adequately summarised in his statement of the outcome he is seeking:

> A finding that [the respondent's] conduct was at least "unsatisfactory conduct" and that he would be appropriately censured – this is a serious threat of ongoing

[2] *J v A* LCRO 31/2009 (30 April 2009).

> abuse toward an unrepresented person made by [the respondent] and is not merely a loss of composure or isolated and appropriate language. A finding that the standards committee was wrong to find that my complaint was frivolous, vexatious, or not made in good faith and for the committee to issue an apology for that finding. A complaint of a serious threat of ongoing abuse cannot be any of those things and in any event such a finding if credible should be accompanied by which of those applied and the express reasons why the complaint was considered frivolous, vexatious, or not made in good faith.

[23] I do not intend to quote from any of the applicant's more detailed submissions, as it will be evident from my decision which of them I consider to be relevant, cogent and persuasive.

[24] The respondent responded to the review application. In doing so, he commented that he did not initially respond to the complaint because he was informed by the New Zealand Law Society Complaints Service (NZLS) that if it wished to hear from him, it would let him know. I record that this is something of a gloss on NZLS' communication to the respondent.

[25] Although it is correct that the NZLS stated that it did not "require a response" from the respondent at that time, it invited him to provide one and cautioned him that any correspondence received from him would be shared with the applicant as part of the complaints process. It also stated that complaints process can be stressful and that the respondent might wish to seek legal advice and representation.

[26] Aside from that, I consider it surprising, at best, that a practitioner of 46 years' experience faced with a complaint about being abusive towards a lay litigant and making statements that, on their face, were plainly unprofessional would consider it sensible not to offer an explanation of the circumstances.

[27] Be that as it may, the respondent has now offered such an explanation and, as with the applicant's detailed submissions, I will comment on this decision on the elements of it that I consider relevant, cogent and persuasive.

**Review on the papers**

[28] This review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows a Legal Complaints Review Officer (LCRO) to conduct the 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. The parties were given an opportunity to comment on that proposed course of action as required by s 206(2A) of the Act. No objection was received.

[29] I record that having carefully read 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 generally**

[30] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[3]

> … 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.

[31] More recently, the High Court has described a review by this Office in the following way:[4]

> 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.

**Issues**

[32] The issues for consideration in this review are:

(a) Do I differ from the Committee in respect of any of its factual findings?

(b) Specifically which statements by the respondent were professionally objectionable, and why?

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[3] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].
[4] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

(c) Which statements by the respondent were not necessarily professionally objectionable?

(d) Is the applicant's own conduct relevant?

(e) Did the respondent's conduct amount to breach of rr 10 or 10.1, or both, of the Rules?

(f) Was it reasonably open to the Committee to exercise its discretion on the grounds that it did?

(g) Can the complaint reasonably be regarded as "frivolous"?

(h) Can the complaint reasonably be regarded as "vexatious"?

(i) Can the complaint reasonably be regarded as "not made in good faith"?

(j) Does the respondent's conduct constitute unsatisfactory conduct?

(k) Are there any mitigating or aggravating factors?

(l) What orders are appropriate in the circumstances?

**Discussion**

*(a) Do I differ from the Committee in respect of any of its factual findings?*

[33] I record that I would not normally express the first issue in this way, as it implies an assessment of what was "right" or "wrong" about the substance of the Committee's decision rather than an entirely fresh analysis of the facts on review. In this instance, however, I agree completely with the Committee's factual findings as I have summarised them in paragraph [16] above and consider it unnecessary to repeat the analysis.

*(b) Specifically which statements by the respondent were professionally objectionable, and why?*

[34] The first professionally objectionable statement is: "Oh, shut up. I'm sick of listening to you". This is objectively discourteous and unprofessional.

[35] The statement "Oh, shut up, shut up" is in similar vein and is similarly objectionable.

[36] If one were to ask whether the respondent would ever have said the same thing to opposing counsel (in Court, before a judge), I am confident the answer in both cases would be "no".

[37] The statement "You are mad, you are mad. You are mad. I refuse to talk to you any further" raises the objectionability bar several notches. It is plainly both discourteous and disrespectful as well as being unprofessional.

[38] That statement does not quite reach the heights, or depths, of the parting riposte: "Yes, I'm gonna abuse you. Next time I see you, I will abuse you because you're a liar." This is appalling, regardless of the circumstances.

[39] To his credit, albeit belatedly, the respondent does not attempt to defend the indefensible but rather to explain his reactions to what he perceived to be the circumstances.

[40] The respondent makes no comment about his "shut up" statements. In the circumstances, this is prudent; they speak for themselves.

[41] The respondent does seek to explain his "mad" (or "… mad… mad… mad…") statement by reference to the applicant's attack on the Judge. He says:

> … I called [the applicant] "mad" because of the way he spoke to His Honour Judge [A] during the telephone conference. I had never heard anyone address a Judge like that before, in my 45 years practice at the criminal bar. I was gobsmacked and shocked that anyone would abuse a Judge like that. However I should not have used that word.
>
> [The applicant] had accused the Judge of acting unprofessionally and of being complicit in an assault by security officers at an earlier hearing, and he then accused the Judge of lying to the police. He told the Judge that he regarded the Judge as a threat to himself. He accused the Judge of having an extreme bias towards himself. Among other things, he called the Judge criminal. All of these things were said by [the applicant], before I spoke.

[42] I accept without hesitation the accuracy of everything the respondent says about the applicant's behaviour towards Judge [A]. It was deplorable, disgraceful and outrageous. If the applicant had said the same things in court, I imagine he would probably have found himself in the cells with opportunity to reflect on the futility of his blatant contempt of court.

[43] On the basis of the transcript, however, I do not accept that this was the spur for the initial outburst from the respondent. The applicant's tirade against Judge [A] was for the Judge to deal with. It seems he endeavoured to do so, without being able to get a word in edgeways. The transcript does not record the respondent leaping to the Judge's defence.

[44] On the contrary, and although the climate of hostility engendered by the applicant's verbal assault on the Judge no doubt influenced the respondent's temper, his first comment was prompted by the applicant's allegation of the respondent being in contempt of court for allegedly not serving him with documents.

[45] Conversely in relation to that matter and the respondent's consequent reference to the applicant "telling this court a lie" and to the applicant being a "liar", I have some sympathy with the respondent's explanation, which was as follows:

> Secondly, I called [the applicant] a liar because I did not believe that he had not received my submissions, delivered by way of service to the same email address that he used to communicate with the Court.
>
> He had previously insisted that I used an email address that I refuse to use, and that a Judge directed him to cease using – it was an email address that contained the full name of my client, followed by the words "assaulted me". The Defendant (my client) had and still has name suppression.
>
> When I emailed my submissions to [the applicant] (on a date earlier than the Court had directed) I used the same email address that he was using to communicate with the Court. I accept that an error was made by me, but in all of the cases I have been involved in, I have never been required to use a different email address to the one that was being used, on a regular basis, to communicate with the Court about this matter. I do not understand why [the applicant] insisted that I use a completely different email address and I doubt his claims that that email inbox was full.
>
> However, I still do not accept [the applicant] did not in fact receive my email and that he claimed I did not serve him only because I had not used the other nominated address.

[46] I have no reason to doubt the factual accuracy of the respondent's explanation as to his beliefs. It is consistent with, and well explains, the substance of the exchanges recorded in that part of the Court transcript.

[47] In addition, the respondent has provided a copy of an email he received from the applicant sent from the email address the applicant objected to him using. The email reads as follows:

> By using my email address last week as per previous instructions and as you were informed you actively consented to be charged for the use of my service.
>
> Please therefore pay me $1000 for the use of my service that you use last week.
>
> Failure to pay by 5 pm Friday 14 April 2023 will incur additional charges of 5% per week or part thereof.

[48] If the applicant had been a lawyer trying to obfuscate an issue of service by arguing about use of a specified email address where there was evidence of service in fact, he would have received short shrift from the Court. This, however, is precisely the

point. It was for the Court to deal with any debate about whether or not service had been properly or adequately effected.

[49] The Court's apparent unwillingness to do so in this instance in the context of a teleconference convened solely for dealing with an application for adjournment is understandable and does not excuse discourteous, disrespectful and unprofessional behaviour by the respondent.

[50] It was open to the respondent to illuminate if necessary, for the Court's benefit, the applicant's attempted distinction between email addresses and make submissions accordingly. However, any issue of alleged contempt of court was for the Court to raise. It had not raised it. It was unnecessary for the respondent to respond.

[51] In any event, it was not open to him in responding voluntarily to attack the applicant personally for any alleged contrivance in his argument.

[52] The scope of appropriate professional engagement, if such engagement was required at all, was confined to whether or not service had been effected as a matter of fact. The applicant's state of mind in asserting that service had not been effected was outside that scope.

[53] The respondent's statement that "You are the one that's calling me a liar, mate" suffers from the same lack of distinction. The applicant had not called the respondent a liar. He had asserted that the respondent had not served him with documents. The respondent's state of mind was not at issue. This statement was also professionally objectionable.

[54] More generally, the respondent may rail in his own mind against the obligation to accord his opponent respect where he considers respect may not have been due but that is what the rules of professionalism demand. If the profession were to tolerate advocacy by way of *ad hominem* attack on the opposing advocate, it would find itself on a slippery slope of competing subjective justifications for tit-for-tat nastiness. The Rules simply do not allow this.

*(c) Which statements by the respondent were not necessarily professionally objectionable?*

[55] In the unusual circumstances as they have been explained, I consider the "start telling the truth" enjoinder to be on the margins. The applicant was asserting at the time that he had not been served with submissions, and that the respondent (actually his client) was thereby in contempt of Court, because they had not been sent to a specified

email address, as distinct from not having received them in fact. The respondent was asserting that the applicant had in fact received them and that he was therefore obfuscating.

[56] In the same category, I consider the respondent's stated objection to being abused, by way of the applicant's allegation of his being in contempt of Court, to be excessive but not necessarily professionally objectionable.

[57] It is unnecessary to be definitive about those two statements, there being plenty of others that clearly cross the line.

*(d) Is the applicant's own conduct relevant?*

[58] The applicant's conduct is relevant but not in the way the respondent might wish.

[59] As already stated, the applicant's denigration of the Court was a matter for the Court, not for the respondent.

[60] From all the materials, I observe that the applicant's way of being and quite possibly his purpose is to unsettle, irritate, goad and provoke those with whom he is engaged in the legal process. In the case of the respondent, he has been demonstrably successful in that regard.

[61] Lay litigants are not bound by the Rules and are otherwise not required to meet professional standards in their engagement with opposing counsel (as distinct from the Court). This is all the more reason for a professional person to be on his or her mettle in dealing with such a person. I find it extraordinary that a highly experienced criminal barrister would conduct himself in the way the respondent did on this occasion.

*(e) Did the respondent's conduct amount to breach of rr 10 or 10.1, or both, of the Rules?*

[62] I agree with the Committee. The respondent's conduct constituted breach of rr 10 and 10.1 of the Rules.

[63] I consider also that lawyers of good standing would consider his conduct to have been unacceptable by reason of it being unprofessional.

*(f) Was it reasonably open to the Committee to exercise its discretion on the grounds that it did?*

[64] It was not open to the Committee to find that "this appears to have been an isolated incident and one that was entirely out of character for [the respondent]". There was no evidence before the Committee of prior similar conduct or lack of prior similar conduct. Accordingly, the finding was evidentially unsound and procedurally inappropriate.

[65] As part of the standard Lawyers Complaints Service Procedural Guidelines, a standards committee is informed of a lawyer's prior disciplinary history only after making a finding of unsatisfactory conduct and turning to consider penalty. In this instance, no finding of unsatisfactory conduct had been made, so the Committee could not have had the respondent's disciplinary history before it.

[66] In any event, prior conduct is relevant only to mitigation or aggravation, not to first determining whether or not the conduct is unsatisfactory.

[67] If the Committee did not in fact have any information as to the respondent's disciplinary history, its comment is tantamount to judging a lawyer on reputation. This would be plainly inappropriate.

[68] Secondly, the Committee commented that "there was no evidence that the applicant's interactions with the respondent before or after the teleconference were characterised by similar conduct". This is also irrelevant. If challenged conduct had to be part of a wider pattern of similar conduct in order to be unsatisfactory, no conduct would ever be unsatisfactory. The respondent's conduct speaks for itself, in isolation from anything else.

[69] Next, the Committee suggested that it was for the Judge to determine whether the respondent's conduct warranted a disciplinary response. The basis of this view is unstated.

[70] It is open to a Judge to raise with the NZLS an issue regarding lawyer conduct by way of minute should the Judge see fit. Beyond that, a judge has no role in professional discipline under the Act.

[71] The Committee has conflated a Judge's control of the Court process under the applicable Court rules with the profession's regulation of professional behaviour. The two are not mutually exclusive.

[72] I agree that it is the prerogative of a Judge to regulate the conduct of counsel appearing in Court. In this instance, for whatever reason, His Honour did intervene to curtail the intemperate exchanges between the parties appearing (electronically) before him. The consequence, for the respondent, is that his conduct falls to be dealt with under the professional disciplinary regime.

[73] Lastly, the Committee advanced the challenging proposition that "no meaningful purpose would be served by making an adverse finding against the respondent". The purposes of the Act include to maintain public confidence in the provision of legal services and to recognise the status of the legal profession. It seems very clear that both purposes have the potential to be undermined by professional conduct of the standard in question in this instance.

[74] Aside from that, if there is any scale of expectation involved, one might expect a leading member of the criminal bar to display the highest standards of professional conduct and not to lower the bar of professional etiquette to the stepover level displayed by the applicant towards the Judge.

[75] In addition, on a technical basis rather than consideration of the substance of the conduct, none of the Committee's stated grounds have anything to do with s 138(1)(c) of the Act. That section focuses solely on the conduct of the complainant.

[76] I have the strong perception that the Committee was unduly influenced in its decision-making process by the reprehensible conduct of the applicant. His conduct may partly explain the respondent's otherwise inexplicable outbursts but does not excuse them.

*(g) Can the complaint reasonably be regarded as "frivolous"?*

[77] I agree with the applicant that it was incumbent on the Committee to specify whether it considered the complaint to be frivolous, vexatious or not made in good faith. These are alternatives, although more than one may apply.

[78] Frivolous can mean carefree and superficial or not having any serious purpose. Neither meaning can be arguably applicable to this complaint.

*(h) Can the complaint reasonably be regarded as "vexatious"?*

[79] The applicant's engagements with the legal system may well be vexing to others involved. The respondent was plainly vexed by the applicant's assertion of contempt of

court. This does not make the complaint about the respondent's subsequent conduct was vexatious.

[80] In a legal context, the word means to bring an action without sufficient grounds that has the effect of causing annoyance to the other party, the complainant's purpose not being determinative.[5] I have no doubt that causing annoyance to the respondent and probably also to his client, the defendant, were among the applicant's purposes in making the complaint and that this was its effect. It cannot reasonably be argued that he did so without sufficient grounds, however.

*(i) Can the complaint reasonably be regarded as "not made in good faith"?*

[81] Again, the answer to this question must be "no". The respondent's conduct was unprofessional and in breach of rr 10 and 10.1 of the Rules. The applicant does not have to justify bringing the complaint.

*(j) Does the respondent's conduct constitute unsatisfactory conduct?*

[82] For the reasons traversed in this decision, I find the respondent's conduct to have been unsatisfactory for the purposes of both s 12(a) and s 12(b) of the Act.

*(k) Are there any mitigating or aggravating factors?*

[83] As I have already commented, the respondent has not sought to defend the indefensible but only to explain his view of the circumstances.

[84] He has also acknowledged that he made a mistake in relation to the procedural issue that gave rise to the *contretemps* in the first place, namely the use for attempted service of an email address not notified to him by the applicant.

[85] The applicant does not resile from his belief that the applicant had been served, explaining that he used the email address that the applicant was using for his communications with the Court registry. The applicant does not resile from his position that he had not been served.

[86] The factual dispute is one for the Court, if necessary, and is not material to this decision one way or the other. It is the standard of the respondent's conduct in reaction to the procedural issue being raised in the way the applicant raised it that is the issue in this jurisdiction.

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[5] See *P v H* LCRO 002/2009 at [9] – [11].

[87] The respondent expressly accepts that he should not have said to the applicant that he would continue to abuse him because he considered the applicant had lied. The respondent could hardly do otherwise.

[88] This may well have been an "isolated incident", as the Committee believed. I have no information about that. Unlike standards committees, the LCRO's practice is not to inquire into a lawyer's disciplinary history in considering matters of mitigation and aggravation where submissions have not addressed the issue. Accordingly, this is a neutral factor.

[89] I take no account of the applicant's somewhat bizarre claim about the supposed effect of seating positions in Court and his protestations about safety and the "significant harm" he claims to have suffered. They are unsubstantiated and irrelevant to the complaint that was made, which relates solely to statements made during a teleconference.

[90] The Committee "encouraged" the respondent to apologise in writing to the applicant. I consider it unfortunate that the respondent has not seen fit to respond positively to that encouragement. He may wish to reflect properly on that matter. This would require genuine acceptance of fault.

[91] The respondent appears to be fixated on truth and falsehood in relation to a procedural matter that is not directly relevant to his own conduct or is not an excuse for it. I reiterate that the applicant did not accuse the respondent of lying, either expressly or by implication, during the teleconference. In both cases, this reflects adversely on the respondent's professional judgement.

*(l) What orders are appropriate in the circumstances?*

[92] Despite the above comments, I see no utility in making an order for an apology that would very likely be inauthentic and made through gritted teeth.

[93] A penalty needs to appropriately reflect professional disapproval of plainly unprofessional conduct and to remind the respondent of the expectations of him both as a very senior practitioner and as a lawyer dealing with a self-represented lay litigant.

[94] In accordance with the NZLS Penalty Guidelines for Standards Committees, I consider this matter to be within the low spectrum with no telling mitigating or aggravating factors. I therefore adopt the mid-point of the recommended range.

**Decision**

[95] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the decision of the Standards Committee to take no further action on the complaint under s 138(1)(c) of the Act is reversed.

[96] Pursuant to s 152(2)(b) of the Act and for the reasons set out in this decision, I determine that there has been unsatisfactory conduct on the part of the respondent.

[97] Pursuant to s 156(1)(b) of the Act, the respondent is reprimanded for that unsatisfactory conduct.

[98] Pursuant to s 156(1)(i) of the Act, I order the respondent to pay a fine of $2,000.00 to the New Zealand Law Society.

**Costs**

[99] Where an adverse finding is made, costs will be awarded in accordance with the Costs Orders Guidelines of this Office. I consider this matter to have been straightforward. It follows that the respondent is ordered to pay costs in the sum of $800.00 to the New Zealand Law Society within 30 days of the date of this decision, pursuant to s 210(1) of the Act.

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

**Publication**

[101] Section 206(1) of the Act requires that every review must be conducted in private. Section 213(1) of the Act requires a Review Officer to report the outcome of the review, with reasons for any orders made, to each of the persons listed at the foot of this decision.

[102] Pursuant to s 206(4) of the Act, a Review Officer may direct such publication of his or her decision as the Review Officer considers necessary or desirable in the public interest. "Public interest" engages issues such as consumer protection, public confidence in legal services and the interests and privacy of individuals.

[103] Having had regard to the issues raised by this review, I have concluded that it is desirable in the public interest that this decision be published in a form that does not identify the parties or others involved in the matter and otherwise in accordance with the LCRO Publication Guidelines.

**DATED** this 30TH day of November 2023

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**FR Goldsmith**
**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 NC as the Applicant
Mr PJ as the Respondent
[Area] Standards Committee [X]
New Zealand Law Society
Secretary for Justice