

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

[2023] NZLCRO 028

Ref: LCRO 146/2022

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

RK

Applicant

AND

ZW

Respondent

DECISION

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

Introduction

[1] Mr RK has applied to review a decision of the [Area] Standards Committee [X] (Standards Committee). Following its investigation of a complaint against Mr ZW which had been advanced by Mr RK, the Standards Committee had determined that Mr ZW's conduct had been unsatisfactory.

Background

[2] For a period of around 8.5 years, Mr RK occupied a position with the [government department] as a senior advisor.

[3] Mr RK had been admitted to the role of barristers and solicitors and held a practising certificate.

[4] In his role as a senior advisor, Mr RK had responsibility for considering applications made by lawyers, on behalf of their clients, for Legal Aid funding. Mr RK would make recommendations to the Legal Services Commissioner as to whether the application for funding sought, was, in broad terms, fair and reasonable.

[5] That assessment was made with reference to the Legal Services Act 2011, and the relevant regulations.

[6] Mr RK also had responsibility for drafting submissions to the Legal Aid Tribunal (LAT) when applications were being made to that Tribunal to challenge Legal Aid funding decisions.

[7] Mr RK had considerable experience in assessing Legal Aid applications. He estimated that during his time in the role of senior advisor, he had made more than 6,000 recommendations, and, in the process of doing so, engaged with more than a hundred lawyers.

[8] Over a period of time, Mr ZW became dissatisfied with how his applications for Legal Aid were being managed.

[9] He considered that he was being specifically targeted by staff managing applications for Legal Aid, and that Mr RK in particular, was not bringing a fair and even-handed approach to his consideration of the applications that were being submitted to him.

[10] In December 2020, Mr ZW made a complaint to the Lawyers Complaints Service about Mr RK. This complaint was administratively managed under case number 214277.

[11] In the course of progressing its inquiry into Mr ZW's complaint, the Standards Committee decided to appoint an investigator (Ms AY).

[12] Ms AY's report was made available to the Standards Committee on 4 March 2022.

[13] Ms AY's report examined, in broad terms, Mr ZW's relationship with Legal Aid services over a number of years, and in particular (in respect to Mr RK), if there was any indication that Mr RK had lacked objectivity when considering Mr ZW's files, or whether there was any evidence of bias in the assessment of Mr ZW's files or the recommendations made by Mr RK

[14] In the course of conducting her investigation, Ms AY noted that Mr RK had lodged a complaint with the Complaints Service against Mr ZW. In her report, Ms AY observed that whilst Mr RK's complaint did not fall within the scope of her investigation, she nevertheless paid regard to the content of Mr RK's complaint to the extent it was relevant to, or impinged on, the investigation she was conducting.

[15] In conducting her inquiry, Ms AY also considered the consequences, from a disciplinary perspective, of an affidavit that a client of Mr ZW's had filed in the High Court. Concerns about comments made in that affidavit were significant to Mr RK's complaint that Mr ZW had behaved unprofessionally.

[16] In August 2021, Mr ZW filed submissions with the LAT in support of an application by his client Mr SN, to challenge a funding decision.

[17] In those submissions, Mr ZW said this:

The concerns raised about senior advisers both in this specific instance and in general have a solid foundation and are under investigation by the NZLS who currently two [sic] unresolved complaints at Standards Committee level about senior advisers and an ongoing investigation have at least looking into competence issues of one senior advisor. There is also a matter presently before the Court of Appeal that became necessary the result of this same senior adviser's recommendations.

[18] Mr SN was engaged in proceedings before the High Court. Mr ZW was on the court record as Mr SN's lawyer for those proceedings

[19] In an affidavit filed in the High Court, Mr SN said this:

I have real concerns about the decisions made by Legal Services Agency and some are so lacking in the application of even the most basic legal principles that I am lead to question what influence was at work in the background. I have learned that one senior adviser is already under investigation by the NZ Law Society who have concerns about Mr RK's competence. That is certain a view that I would take, even before I found that out.

[20] Concerns were raised that Mr ZW had, over a period of time, persisted in making unnecessary and unfounded criticisms of [government department] staff. This resulted in an internal complaint against Mr ZW being made to the [government department]. This complaint was subsequently referred to a Performance Review Committee, an independent body constituted under the Legal Services Act.

The complaint and the Standards Committee decision

[21] Mr RK lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 29 September 2021. The substance of his complaint was that:

- (a) over a period of 3-4 years, Mr ZW had been highly critical of Mr RK's performance; and
- (b) that criticism was frequently advanced in a manner that was belittling and bullying; and
- (c) Mr ZW had used the vehicle of a professional conduct complaint to criticise, belittle and humiliate him before the High Court and LAT; and
- (d) had attempted to advance his clients' interests by personally attacking him; and
- (e) endeavoured to pressure and bully him into granting Mr ZW's funding requests; and
- (f) adopted a policy of criticising him personally, rather than the decision that was the subject of challenge; and
- (g) allowed a client to file an affidavit in the High Court which contained material which was deliberately intended to embarrass him; and
- (h) had failed to ensure that the affidavit presented to the court disclosed that the complaint made to the Complaints Service had in fact been made by Mr ZW himself; and
- (i) efforts to persuade Mr ZW to desist from engaging in persistent gratuitous attacks on [government department] staff members, had been resisted by Mr ZW, and in fact only served to encourage Mr ZW to intensify his attacks; and
- (j) Mr ZW's conduct had been unethical and unreasonable.

[22] Mr RK concluded his complaint with this:

I have a right to perform my role free from bullying, harassment, and undue criticism, particularly from another member of my profession. Mr ZW has repeatedly, over a number of years, breached this right. No other Legal Aid lawyer has treated me in the same manner as Mr ZW. It needs to stop.

[23] Mr ZW, through his counsel, responded to Mr RK's complaint on 16 December 2022.

[24] In what was a comprehensive response to the complaint filed, it was submitted for Mr ZW that:

- (a) the complaint was unwarranted; and
- (b) he had not belittled or humiliated Mr RK before the court and LAT; and
- (c) Mr RK's complaint reflected a degree of oversensitivity on Mr RK's part; and
- (d) criticisms Mr ZW had made of the Legal Aid funding process were not personal; and
- (e) Mr ZW was duty-bound to advance his clients' interests "fearlessly"; and
- (f) Mr ZW had not endeavoured to assert pressure on Mr RK with purpose to achieve desired outcome of securing Legal Aid funding for his clients; and
- (g) Mr ZW rejected suggestion that the affidavit filed in the High Court contained material that was gratuitous or insulting to Mr RK; and
- (h) criticism that had been made of senior advisors had been made within the bounds of appropriate professional standards; and
- (i) Mr ZW had not engaged in "attacking" Mr RK; and
- (j) suggestion that Mr ZW had acted unethically was both untrue and libellous; and
- (k) Mr RK's recommendations had frequently indicated a lack of knowledge in the area of the law in which he had been called on to make recommendations; and
- (l) this had resulted in delay which had impacted on the rights to a fair trial for Mr ZW's clients; and
- (m) request for amendment to grants had been frequently delayed by Mr RK's insistence on requiring response to questions that had been previously answered; and
- (n) Mr RK had dealt with 99% of Mr ZW's applications; and
- (o) there was a strong evidential basis to support argument that Mr RK had been targeting Mr ZW's applications; and
- (p) Mr RK had been garnering applications filed by Mr ZW, and dealing with those applications in a manner that "consistently demonstrated a lack of

knowledge in the areas of criminal law and procedure in the context of Legal Aid in which he was advising”; and

- (q) a high percentage of Mr RK’s recommendations had been overturned on review, but despite this, Mr RK continued to persist with making recommendations on grounds that had been found to be wanting; and
- (r) Mr RK failed to approach the task of assessing applications from a neutral perspective but rather from a default position of seeking to decline the applications; and
- (s) it was troubling that Mr RK had secured access to an affidavit filed in proceedings that he was not a party to; and
- (t) it was reasonable to infer that there had been an improper use of a bureaucratic power; and
- (u) the content of the affidavit filed was factually correct.

[25] In concluding the submission for Mr ZW, this was said:

Mr ZW has never met with RK (and with, which he, RK, agrees) wherefore, any suggestion, that his (RK’s) criticisms are personal, is rejected. Indeed, Mr ZW has gone to great lengths to deal with the issues in a constructive and profession manner, including making an offer to [government department] to provide mentoring to any specialist advisor and have them accompany him to various hearings so they can develop an understanding of the challenges of “coalface law”. This offer was never even acknowledged, let alone accepted.

[26] Mr RK provided a comprehensive response to Mr ZW’s reply to his complaint on 25 March 2022.

[27] I will not summarise all matters raised in reply.

[28] The essence of Mr RK’s response was that:

- (a) it was compellingly clear that the paragraphs in Mr SN’s affidavit which had caused offence, were the product of Mr ZW’s drafting; and
- (b) Mr SN’s comments were similar in substance, nature and tone, to those made by Mr ZW over a number of years; and
- (c) comments made in the affidavit were insulting, gratuitous, unprofessional and irrelevant to the issue before the court; and

- (d) Mr ZW's conduct over a number of years had breached a number of the conduct rules; and
- (e) despite request of Mr ZW from LAT to desist from criticising senior advisors, Mr ZW continued to do so; and
- (f) Mr ZW had endeavoured to dissuade the Criminal Bar Association (CBA) from allowing Mr RK to continue with a webinar he was presenting for the association, this reflective of Mr ZW's ongoing vendetta and determination to humiliate, belittle and criticise him; and
- (g) in drafting over 6,000 recommendations in his role as senior advisor, more than 99% of those recommendations had been adopted, a statistic in itself which provided complete response to Mr ZW's mistaken allegation that a high proportion of Mr RK's recommendations had been overturned; and
- (h) if, as alleged, he lacked competency in criminal law matters, it would have been expected that there would have been a significant number of decisions from the LAT or the High Court criticising his recommendations and making adverse comments about his competency and knowledge, but no such decisions existed; and
- (i) in by far the majority of occasions where Mr ZW had challenged a review decision flowing from a recommendation he had made, the LAT had upheld his recommendation; and
- (j) the affidavit produced to the High Court was not factually correct; and
- (k) complaints made by Mr ZW to the Law Society (and by his client) both in their content and timing, reflected a determination on Mr ZW's part to continue to harass Mr RK; and
- (l) an investigation into Mr ZW's engagement with Legal Aid Services which had prompted a 26-page report, detailed a history of poor and unacceptable conduct from Mr ZW towards Legal Aid Services staff; and
- (m) the concerns he had raised about Mr ZW's conduct were totally vindicated and affirmed by Ms AY's report; and
- (n) Mr ZW gave no indication of accepting responsibility for his conduct, for being apologetic for it, or for having inclination to change it.

[29] In a further submission to the Committee of 9 May 2022, Mr ZW submitted that:

- (a) Mr RK had neglected to advise in his response to the complaint, that the CBA had received several complaints about their choice of presenter for the webinar; and
- (b) he had little confidence in the report Ms AY had prepared for the Standards Committee, his view being that Ms AY had turned her enquiry into a popularity contest between himself and Mr RK; and
- (c) he was not alone in having concerns about decisions made by Mr RK; and
- (d) an [government department] staff member had expressed reservations about Mr RK's decisions; and
- (e) Mr RK was no longer employed by [government department] and request should be made of him to clarify as to whether his departure from that organisation was by choice.

[30] That prompted a further response from Mr RK on 13 May 2022.

[31] He submitted that:

- (a) it remained his view that Mr ZW had repeatedly engaged in misconduct or unsatisfactory conduct; and
- (b) it was obvious that Mr ZW had orchestrated the complaints that had been made to the CBA, but in any event alleged concerns relating to his conduct of the webinar were "non-issues"; and
- (c) lawyers were entitled to challenge his recommendations, but to elevate such challenges to an issue of competency, was analogous to elevating appeals filed in the courts, to criticism of the competence of the judges against whose decisions the appeals were being advanced; and
- (d) it would defy credibility to suggest that Mr ZW had played no part in the drafting of Mr SN's High Court affidavit; and
- (e) the number and timing of the complaints made by Mr ZW and his client could lead to no conclusion other than that Mr ZW was sustaining a vendetta against him.

[32] Mr ZW provided further submissions on 15 May 2022.

[33] Mr ZW submitted that:

- (a) Mr RK's reference to Ms AY was "manipulative"; and
- (b) complaint that he had orchestrated complaints to the CBA were unfounded; and
- (c) the opinions of other lawyers as to Mr RK's competency were relevant; and
- (d) he had concerns that Mr RK may have been communicating with Ms AY; and
- (e) Mr RK had failed to provide explanation as to how Mr SN's affidavit had come into his hands.

[34] On 19 May 2022, the Standards Committee issued the parties with a notice of hearing which:

- (a) identified the complaints advanced by Mr RK; and
- (b) identified the specific conduct rules engaged by its investigation; and
- (c) invited the parties to provide their view as to whether the conduct matters complained about, constituted unsatisfactory conduct; and
- (d) their views on appropriate orders and possibility of publication, in the event of a finding of unsatisfactory conduct; and
- (e) whether the conduct complained of could amount to misconduct within the meaning of ss 7(1)(a)(i) and/or 7(1)(a)(ii) and/or negligence pursuant to s 241(c) of the Act such that a referral to the Disciplinary Tribunal was necessary.

[35] Both Mr RK and Mr ZW provided comprehensive submissions in response to the notice of hearing. Understandably in circumstances where there had been detailed submissions and responses filed in the course of the complaint investigation progressing, the submissions filed by the parties in response to the Committee's notice of hearing replicated in significant part, arguments that had been previously traversed.

[36] Mr RK's submissions reinforced his argument that:

- (a) Mr ZW had, over a number of years, deliberately attempted to undermine Mr RK in his position as a senior advisor, by making continuous and unfounded criticisms of him; and
- (b) his concerns had been validated by various parties who had investigated concerns raised regarding Mr ZW's conduct; and
- (c) comments made in the affidavit Mr ZW's client had filed in the High Court were insulting, gratuitous and irrelevant to the appeal under consideration; and
- (d) the evidence strongly supported conclusion that a lawyer had assisted Mr SN with the drafting of his affidavit; and
- (e) Mr ZW had misled the court and the LAT; and
- (f) Mr ZW had used the complaint process for an improper purpose; and
- (g) Mr ZW's conduct met the threshold for a misconduct finding; and
- (h) Mr ZW's conduct amounted to bullying and harassment; and
- (i) if his complaint was upheld, the Committee's decision should be published.

[37] Mr ZW instructed fresh counsel to file submissions for him in response to the Committee's notice of hearing.

[38] Those submissions presented as something of a departure from the approach Mr ZW had previously adopted in responding to Mr RK's complaint, in that Mr ZW acknowledged, for the first time, that he may have made some errors.

[39] Concessions made by Mr ZW included:

- (a) indication that any criticism that he had made of Mr RK was never intended to be personal, but rather professional; and
- (b) whilst he may have been critical of Mr RK's actions and recommendations, any criticism made had stopped short of expressly criticising or disparaging Mr RK on a personal level; and
- (c) an acceptance, having had opportunity to reflect on his conduct, that he should have raised his concerns in a more constructive way;

- (d) an acknowledgement with the benefit of hindsight that whilst he did not consider that his conduct crossed into the territory of harassment or bullying, he accepted that his language could have been more collegial and that he could have adopted a more professional tone when communicating with Mr RK; and
- (e) an acceptance that he had breached the confidentiality of the complaints process when referencing the complaint in his submission to the Legal Aid Tribunal; and
- (f) an acceptance that he had breached the confidentiality of the complaint process by informing his client that a conduct complaint had been made against Mr RK; and
- (g) an acceptance that his eagerness to act in his client's best interests may have clouded his judgement, this resulting in him falling short of the professional standards expected of him; and
- (h) an acknowledgement that whilst he remained firm in his position that he had no involvement in drafting Mr SN's affidavit, he was the lawyer on the record in the proceedings; and
- (i) an acknowledgement that the tone of his communications and his handling of the information in respect of his Law Society complaint against Mr RK, fell short of the standards required and could be viewed as unprofessional; and
- (j) an acknowledgement that he overstepped the mark in some of his dealings with Mr RK, particularly in response to Mr RK's recommendation to decline Mr SN's Legal Aid funding.

[40] Having recorded those concessions, Mr ZW submitted that:

- (a) his actions arose from frustration he experienced in dealing with a number of Legal Aid applications where he considered that Mr RK had adopted an unduly restrictive approach; and
- (b) he was a fierce advocate for his client's interests; and
- (c) he had never intended to mislead the LAT; and

- (d) he had not misled the court and his conduct could not be found to have breached r 10.9;¹ and
- (e) in the event the Committee was to conclude that rules had been breached, the breaches, if established should be considered to fall at the minor end of the spectrum, and did not merit or require a disciplinary sanction; and
- (f) his submission to the LAT was advanced with purpose to assist his client; and
- (g) if the Committee was to conclude that his conduct was unsatisfactory, any penalty imposed should reflect the fact that the conduct in question, whilst arguably misguided, was borne out of his frustration with the Legal Aid system and a genuine desire to try and resolve matters for his clients; and
- (h) if orders were to be imposed, the matter could be most reasonably dealt with through the imposition of a censure, a modest monetary penalty, costs, and an order directing Mr ZW to provide a written apology to Mr RK; and
- (i) a publication order would not be required; and
- (j) the conduct did not merit a referral to the Disciplinary Tribunal.

[41] The Standards Committee delivered its decision on 27 July 2022.

[42] The Committee determined, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act), that there had been unsatisfactory conduct on the part of Mr ZW.

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

- (a) Mr ZW's conduct fell short of the standard to be expected of a responsible practitioner in the way that he advanced a campaign against Mr RK, culminating in his decision to lodge complaints with the Law Society; and
- (b) Mr ZW's attacks on Mr RK could reasonably be described as personal; and

¹ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

- (c) criticisms Mr ZW had made in respect to some matters were “demonstrably wrong”, and presented as more analogous to a rhetorical device than an appropriate response to a conduct concern; and
- (d) the pattern of complaints and the advancing of allegations of impropriety without any proper evidential basis fell short of the conduct expected of a responsible practitioner;
- (e) Mr ZW had breached rr 2.3, 10, 10.1 and 10.3 of the Rules, such as to constitute unsatisfactory conduct under section 12(b) and 12(c) of the Act; and
- (f) Mr ZW had breached the confidentiality of the complaints process; and
- (g) Mr ZW’s use of the complaints process in separate proceedings for a client’s benefit constituted a breach of Rule 2.3; and
- (h) the disclosure of the complaint, a breach of Rule 10.1; and
- (i) these breaches also amounted to unsatisfactory conduct pursuant to section 12(b) and section 12(c) of the Act; and
- (j) the references to the complaint in the material filed with the LAT, and in Mr SN’s affidavit were misleading, such as to constitute a breach of Rule 10.9, meriting a further finding of unsatisfactory conduct; and
- (k) by a relatively fine margin, that the breaches did not merit a referral to the Disciplinary Tribunal, but nevertheless, that the breaches fell in the moderate to serious band of unprofessional and misleading conduct.

[44] Having concluded that Mr ZW’s conduct established foundation for 3 unsatisfactory conduct findings, the Standards Committee turned its attention to penalty.

[45] Mr ZW was:

- (a) censured; and
- (b) ordered to pay a fine of \$3,000 to the New Zealand Law Society; and
- (c) ordered to pay costs of \$1,000; and

- (d) directed to provide an apology to Mr RK in a form approved by the Standards Committee.

Application for review

[46] Mr RK filed an application for review on 22 August 2022.

[47] His key arguments were that:

- (a) The Standards Committee had failed to provide a satisfactory analysis to form basis for its conclusion that the conduct did not amount to misconduct; and
- (b) it was perplexing that the Standards Committee had not concluded that the prolonged and systematic process of harassment that had been carried out by Mr ZW, did not constitute misconduct; and
- (c) as the Committee had concluded that the bullying and harassment was at the higher end of unsatisfactory conduct, the penalties imposed presented as insufficient to reflect the gravity of the offending; and
- (d) the decision was inconsistent with the Law Society's apparent commitment to targeting and eliminating the culture of bullying and harassment which existed in some parts of the legal profession; and
- (e) no credit should have been allowed to Mr ZW for his belated acknowledgement that he had breached the rules; and
- (f) concerningly, Mr ZW's submissions gave no indication that he accepted those aspects of the Committee's findings which recorded the more serious conduct breaches; and
- (g) correspondence forwarded by Mr ZW to the CEO of [government department] dated 7 July 2022, (forwarded after the Committee had received submissions from the parties), give clear indication of Mr ZW's inclination to continue to bully and harass him; and
- (h) the Committee had given insufficient weight to a number of factors (summarised at paragraph 24 of Mr RK's submissions of 22 August 2022).

[48] By way of outcome, Mr RK sought:

- (a) that Mr ZW be referred to the Lawyers and Conveyancers Disciplinary Tribunal; or
- (b) in the alternative, that the fine imposed be increased to at least \$10,000; and
- (c) direction be made that Mr ZW attend an anti-bullying seminar or workshop; and
- (d) Mr ZW to provide an apology and to desist from his harassing and bullying behaviours.

[49] Mr ZW was invited to comment on Mr RK's review application.

[50] He submits that:

- (a) it was beyond the scope of the jurisdiction of the LCRO to consider the further evidence that Mr RK sought to produce, (Mr ZW's correspondence to [government department] of 7 July 2022); and
- (b) he had not misled the High Court;
- (c) the remaining grounds were accepted as unsatisfactory conduct; and
- (d) he would be prepared to participate in mediation to bring about "closure"; and
- (e) he saw no grounds which would merit or justify an increase in the penalties imposed; and
- (f) the fine of \$3,000 appeared to be at the higher end of the spectrum relative to a number of recent cases; and
- (g) assessment as to whether new evidence should be permitted to be produced at the review stage, should be considered by reference to the LCRO guidelines (guideline 17); and
- (h) his correspondence to the [government department] of 7 July 2022 adds nothing to the complaint, and cannot be construed as a "tipping point" for argument that the Committee erred in not reaching a misconduct finding; and

- (i) there is no basis for finding the Committee erred in concluding that the conduct breaches amounted to unsatisfactory conduct; and
- (j) A Standards Committee has discretion to consider mitigating factors and the Committee appropriately acknowledged that he had been “clear” in his acceptance that rules had been breached; and
- (k) he emphatically rejected suggestion that he had misled the Court; and
- (l) a disciplinary offence in respect of misleading or deceiving the court requires a high level of culpability on the part of a practitioner; and
- (m) the fine imposed should be reduced to \$500; and
- (n) penalties imposed should be fair and reasonable and proportionate and maximum penalty is reserved for the worst offending; and
- (o) reference to disciplinary decisions engaging the conduct of practitioners where findings had been made that the practitioners conduct constituted bullying, would support argument that a lesser fine should have been imposed; and
- (p) he remained committed to having the issues resolved through mediation.

[51] Mr RK responded to Mr ZW’s submissions on 21 October 2022.

[52] He submitted that:

- (a) Mr ZW’s email correspondence of 7 July 2022 did constitute fresh evidence, and was evidence that could not have been placed before the Standards Committee as Mr RK had not sighted the correspondence until approximately 3 weeks after the Standards Committee had delivered its decision; and
- (b) the email was relevant, as it was indicative of Mr ZW’s commitment to continuing his campaign of bullying and harassment; and
- (c) Mr ZW had not disclosed the content of the email to the Committee; and
- (d) Mr ZW presented as more concerned as to how Mr SN’s affidavit came to Mr RK’s attention, than he was about the unacceptable criticisms made in that affidavit and the purpose for which the offending paragraph was included in the affidavit; and

- (e) Mr ZW's acknowledgement that he "may" have breached the rules did not constitute a clear acceptance on his part that rules had been breached; and
- (f) Mr ZW had failed to satisfactorily address more serious complaint that he had engaged in a protracted campaign of bullying and harassing Mr RK; and
- (g) it was not open to Mr ZW to challenge the Committee's conclusion in respect to its finding on the issue of the High Court affidavit, as Mr ZW had not made formal application to challenge the Committee's decision; and
- (h) Mr ZW's continuing argument that he had played no part in drafting the affidavit of 3 September 2021 lacked credibility; and
- (i) it was not open to Mr ZW to challenge the fine; and
- (j) Mr ZW's indication that he considered a fine of \$500 reflected a reasonable penalty for conduct that had occurred over a four-year period, illustrated his lack of insight and the lack of genuineness of his apology; and
- (k) he had no interest in attending mediation, a suggestion advanced by Mr ZW for purposes which were self-serving; and
- (l) the decisions cited by Mr ZW in support of argument that his conduct was nothing more than mildly unsatisfactory, did not provide sound foundation for, or support, the argument advanced; and
- (m) Mr ZW's submissions were not reflective of a person who was contrite, remorseful, or who had insight into their behaviour; and
- (n) the Standards Committee decision fell well short of achieving the Law Society's stated policy of eliminating bullying and harassment; and
- (o) if the Committee's finding of unsatisfactory conduct was to be upheld, the fine imposed on Mr ZW should be at least \$10,000.

Hearing

[53] A hearing, attended by both parties proceeded on 28 March 2023.

Nature and scope of review

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

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

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

... 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.

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

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

[56] 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

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

- (a) should Mr ZW’s correspondence of 7 July 2022 be accepted into evidence; and

² *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

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

- (b) is Mr ZW prevented from challenging the Committee's finding that he had breached r 10.9, on grounds that he had failed to file a review application which sought to challenge that element of the Committee's decision; and
- (c) should the matter be referred to mediation; and
- (d) should the Standards Committee have referred Mr ZW to the Disciplinary Tribunal; and
- (e) if the conduct was appropriately determined to constitute unsatisfactory conduct, were the penalties imposed sufficient to mark the gravity of the offending?

Should the LCRO accept into evidence Mr ZW's correspondence of 7 July 2022?

[58] In general, a Review Officer will be reluctant to accept fresh evidence that has been filed on review.

[59] The reason for that is self-evident.

[60] The particular nature of the review process proceeds on assumption that the parties have availed themselves of opportunity to put all the evidence they consider relevant before the Standards Committee.

[61] Review Officers are careful to avoid being cast into the role of a first instance decision maker.

[62] But it is nevertheless recognised that on occasions it will be appropriate for a Review Officer to consider evidence that was not made available to the Standards Committee.

[63] The guidelines for review that are provided to the parties, inform the parties of the limited circumstances in which a Review Officer may accept evidence that was not put before the Standards Committee. On that the guidelines say this:

In the general, the LCRO will not consider new information which should have been placed before the standards committee. Any person who seeks to introduce information which was not made available to the Standards Committee will need to provide good reason as to why it was not available to the standards committee and show that it is relevant to the review. The LCRO will decide how extensive the enquiry needs to be.⁴

⁴ Legal Complaints Review Officer *Guidelines for Parties to Review* (May 2021) at [17].

[64] When considering question as to whether fresh evidence should be considered, a Review Officer will reference longstanding and conventional principles, commonly adopted when issue as to whether fresh evidence should be considered arises.

[65] Firstly, a Review Officer will seek to be satisfied that the evidence could not, with the application of reasonable diligence, have been obtained and put before the Standards Committee. Secondly, the evidence must be seen to have relevance to the issues under review. Thirdly, the evidence must be present as credible although it need not present as incontrovertible.

[66] If a Review Officer concludes that the evidence is of such importance or relevance, that a Committee's decision may have been significantly influenced by the evidence if it had been put before the Committee, it would be commonplace for the Review Officer to refer the matter back to the Standards Committee for reconsideration.

[67] In relation to any review of a determination of a Standards Committee, the Legal Complaints Review Officer may, on his or her own initiative, seek and receive such evidence and make such investigations and enquiries as he or she thinks fit.⁵

[68] A Review Officer may, in the course of conducting a review, receive and take into account any relevant evidence or information, whether or not that evidence or information would normally be admissible in a court of law.⁶

[69] I consider that it is appropriate to accept Mr ZW's correspondence of 7 July 2022 into the review evidence.

[70] It is evidence that clearly was not available to Mr RK at the time he filed his final submissions with the Standards Committee.

[71] The evidence is relevant to the review.

[72] There is no question as to the credibility of the evidence.

[73] It is correspondence that directly addresses a matter of significance to Mr RK's complaint, being his concern that Mr ZW would, whatever the outcome of the Standards Committee's investigation, find ways to continue to make Mr RK's life a misery.

[74] Mr ZW says that he was entitled to continue with inquiries as to how his client's affidavit came into Mr RK's possession.

⁵ Section 207(1) of the Act.

⁶ Section 207(2) of the Act.

[75] The evidence is relevant. It will be considered.

Is Mr ZW prevented from challenging the Committee's finding that he had breached r 10.9, on grounds that he had failed to file a review application seeking to challenge that element of the Committee's decision?

[76] No.

[77] Mr ZW filed, as he was entitled to, a response to Mr RK's application for Review.

[78] In a jurisdiction where submissions are advanced informally rather than in the guise of formal pleadings, Review Officers take the view that when a party (as has Mr ZW in this case) files a response to a review application, that provides a gateway for that party to challenge any aspects of the Committee's decision.

Should the matter be referred to mediation?

[79] No.

[80] Mediation may have presented as viable at the commencement of the investigation into Mr RK's complaint, but the matter has gone too far to make that a sensible or realistic option.

[81] In any event, for mediation to have prospect of success, both parties need to be committed to the progress.

[82] Mr RK is robustly opposed to suggestion that the matter go to mediation.

Should the Standards Committee have referred Mr ZW to the Disciplinary Tribunal?

[83] After completing its investigation of a complaint, a Standards Committee may make one of the determinations in s 152(2) of the Act being,

- (a) a determination that the complaint or matter, or any issue involved in the complaint or matter, be considered by the Disciplinary Tribunal (s 152(2)(b));
- (b) a determination of unsatisfactory conduct (s 152(2)(b));
- (c) a determination to take no further action (s 152(2)(c)).

[84] There is no threshold test that a Standards Committee is required to meet before determining that a matter should be referred to the Disciplinary Tribunal.⁷

[85] A decision to refer to the Disciplinary Tribunal will be made when a Standards Committee concludes that the conduct under investigation, if proven, has possibility of constituting misconduct.

[86] It is not the role of a Committee to determine whether the conduct does constitute misconduct.

[87] A Standards Committee is not required to provide reasons for a decision to refer to the Disciplinary Tribunal.⁸

[88] It is clear that the Standards Committee gave careful consideration to sending the matter to the Tribunal.

[89] The Committee noted at [28] of its decision, that it had given consideration to referring Mr ZW to the Disciplinary Tribunal, but had, by a “relatively fine margin”, concluded that it was not necessary to do so in the circumstances. The Committee’s reference to a “fine margin” can be taken as indication that the decision could have gone either way.

[90] Indication that the Committee considered that Mr ZW’s conduct went close to requiring a consideration as to whether the conduct constituted misconduct, leads to no conclusion other than that the Committee considered that Mr ZW’s conduct was at the high end of unsatisfactory conduct.

[91] At hearing, Mr ZW acknowledged that his behaviour had been unsatisfactory.

[92] He did not step back from frank admission that he had, over a period of time, engaged in bullying behaviour towards Mr RK. In the course of the hearing, Mr ZW conceded that:

- (a) his conduct towards Mr RK was bullying; and
- (b) he failed to appreciate how hurtful his conduct had been; and
- (c) his engagement with Mr RK had become personal; and
- (d) he had mounted a sustained campaign against Mr RK; and

⁷ *Orlov v New Zealand Law Society* [2013] NZCA 230; [2015] 3 NZLR 562 at [53].

⁸ *New Zealand Law Society Penalty Guidelines for Lawyers Standards Committees* (February 22) at [2.18].

- (e) the incidents of bullying had been “intermittent”; and
- (f) on reflection, his submission that a fine of \$500 would be appropriate did not reflect an acceptable penalty.

[93] In advancing argument that a fine of \$3,000 adequately reflected the seriousness of the conduct, Mr ZW reiterated his argument that the Committee had erred in concluding that he had misled the Court through the vehicle of Mr SN’s affidavit, and in his submissions to the LAT.

[94] Mr RK considered that Mr ZW’s conduct merited a referral to the Disciplinary Tribunal.

[95] He was dismissive of Mr ZW’s expressions of remorse. He considered that Mr ZW lacked insight into the consequences of behaviour and that Mr ZW’s last minute expressions of contrition were motivated not from a genuine sense of regret at the harm he had caused Mr RK, but rather prompted by a self-centred desire to avoid disciplinary consequence.

[96] In arguing forcefully that Mr ZW’s conduct merited a referral to the Tribunal, Mr RK emphasised:

- (a) the lengthy period of time over which the bullying had occurred; and
- (b) the many requests made of Mr ZW to moderate his behaviour; and
- (c) the extent to which he had been re-victimised by the approach Mr ZW had adopted to defending the complaint; and
- (d) it would approach an absurdity not to recognise that Mr ZW’s fingerprints were all over the paragraph in Mr SN’s affidavit that had caused offence; and
- (e) if penalty was to be imposed by way of a fine, the fine should be at the upper level; and
- (f) every element of his complaint had been upheld.

[97] Mr ZW suggested that when engaging with Mr RK, he was conscious that Mr RK was a lawyer and accordingly had expectation that Mr RK would be accustomed to a degree of robust exchange.

[98] It is abundantly clear that Mr ZW’s conduct went well beyond robustness.

[99] His conduct was bullying. He now acknowledges that to be the case.

[100] And it was bullying that had specific purpose of endeavouring to coerce Mr RK into giving Mr ZW what he wanted.

[101] What is telling about the responses provided by Mr ZW when addressing allegation that he had behaved inappropriately in his dealings with not only Mr RK, but other individuals dealing with Mr ZW's Legal Aid applications, is the difficulty he has in providing plausible explanation for the conduct.

[102] His overarching explanation that he considered that he was being unfairly treated, is unsupported by any evidence.

[103] He is not for example able to identify a string of successful applications to the Legal Aid Tribunal which support his contention that his applications were being mismanaged.

[104] He provided no specific evidence to substantiate allegation that Mr RK had treated him unfairly.

[105] As noted, in the course of completing investigation into the complaint that Mr ZW had filed against Mr RK, the Standards Committee appointed Ms AY to prepare a report.

[106] That report focused on Mr ZW's dealings with Legal Services.

[107] I agree with the Standards Committee that much of the report, prepared by Ms AY, has relevance to Mr RK's complaint.

[108] In the course of preparing her report, Ms AY:

- (a) considered the material provided to her by the Lawyers Complaints Service; and
- (b) considered the Legal Services Act; and
- (c) met with Mr RK and Mr ZW; and
- (d) reviewed additional material provided by both Mr ZW and Mr RK; and
- (e) examined from the documentary material provided, a number of examples of files where Mr ZW and Mr RK were both involved.

[109] Ms AY concluded, that:

- (a) Mr ZW had been disrespectful and unprofessional in his correspondence with the Legal Aid Services specialist advisors; and
- (b) Mr ZW's difficulties with Legal Aid were due in significant part to his failings in providing Legal Aid Services with sufficient information to support the application's filed; and
- (c) the manner of Mr ZW's criticisms, and the tone of his correspondence with Legal Aid Services was concerning; and
- (d) in contrast, correspondence she had observed from Legal Aid to Mr ZW had been measured and courteous, this often in the face of quite vitriolic comments from Mr ZW.

[110] Ms AY concluded that Mr ZW "appeared to be committed to destroying his own relationship with Legal Aid with continuous complaints about the way he is treated but at the same time not playing by the rules".⁹

[111] This was a damning critique of Mr ZW's relationship with Legal Aid Services, and one that was largely unchallenged by Mr ZW.

[112] Whilst he expressed disagreement with Ms AY's findings, he was unable to provide a substantive response to those findings.

[113] Ms AY's report provided an independent, detailed, and comprehensive examination of Mr ZW's relationship with Legal Aid Services. It is a report that has considerable relevance to this review. Importantly, it was a report that both Mr ZW and Mr RK had opportunity to provide input into. It was a report that provided opportunity for a comprehensive examination of Mr ZW's relationship with Legal Services.

[114] Ms AY's conclusion that Mr ZW had conducted a "vendetta against Mr RK" and her finding that Mr ZW had conducted a "scorched earth policy" in his dealings with Legal Aid Services, is conclusion consistent with Mr RK's evidence that he had been bullied and treated discourteously by Mr ZW over many years.

[115] Those findings cannot lead to comfortable conclusion that Mr ZW's conduct properly fell, as he argues it to be, at the lower end of the scale.

[116] Attention then turns to the issue of the affidavit filed by Mr ZW's client in the High Court, and the submissions filed by him in the LAT.

⁹ Ms AY's report to the Standards Committee (4 March 2022) at [90].

[117] Mr ZW was emphatic that he had played no part in preparing the affidavit filed by his client in the High Court. It was his contention that the Standards Committee had erred in concluding he had played a part in misleading the Court and the Tribunal. Correct that error argues Mr ZW, and the Committee's penalty findings present as adequate and proportionate.

[118] Turning firstly to the affidavit filed by Mr ZW's client.

[119] When providing response to Mr RK's complaint, in the course of the complaint progressing through the Committee's investigation process, Mr ZW sought to distance himself from his client's affidavit.

[120] He acknowledged that he was on the court record as counsel acting, but emphasised that Mr SN had drafted the affidavit, and that he had played no role in its preparation.

[121] In the course of the review hearing, Mr ZW clarified that he had read Mr SN's affidavit prior to it being filed.

[122] That would have been expected. It would present as surprising that a lawyer who was counsel on the record in a matter before the High Court, would permit an affidavit to be filed without subjecting that affidavit to scrutiny.

[123] Mr ZW vigorously resists suggestion that the offending paragraph in Mr SN's affidavit could be read as supporting conclusion that he (Mr ZW) had misled the Court.

[124] I accept that Mr ZW is genuine in his view that he did not set out to deliberately mislead the Court, but Mr ZW's actions in allowing, as he clearly did, the affidavit to be filed in the form it was, raises a number of issues.

[125] I do not accept Mr ZW's argument that the comments made were entirely a reflection of concerns Mr SN had about the Legal Aid system.

[126] Mr SN should not, at first step, have been made aware of that the Complaints Service had received complaints about Mr RK.

[127] I agree with the Standards Committee, that the requirement for practitioners to maintain confidentiality in the complaints process, is a facet of a practitioner's broader obligations.

[128] Mr SN's proceedings before the High Court had nothing to do with Mr RK.

[129] Nor was Mr SN qualified to provide the High Court with opinion as to whether decisions to decline Legal Aid were “lacking in the application of even the most basic legal principles”.

[130] This was complaint in both subject matter and tone, that mimicked the approach Mr ZW had adopted in advancing his grievances with Legal Aid Services.

[131] Ms AY, who had been given opportunity to scrutinise a number of Mr ZW’s communications with Legal Aid Services, was also persuaded that Mr SN’s criticisms had strong resonance of the flavour of the complaints that had been made by Mr ZW.

[132] On that she said this:

Having read the affidavit and other documents associated with those proceedings and Mr RK’s resulting complaint about Mr ZW, I am struck by the tone and substance of the client’s assertions in his affidavit.

The tone is not dissimilar to that used by Mr ZW in his correspondence with Legal Aid Services.

It appears on the face of it that Mr ZW has used the vehicle of the client’s affidavit to criticise and embarrass Mr RK in the High Court.

Further, the comments made by the client in the affidavit, presumably drafted by Mr ZW, are insulting, gratuitous and irrelevant to the appeal.

Interestingly, they do not disclose that Mr ZW is the complainant in relation to the investigation into Mr RK, nor does the document acknowledge that an investigation is standard procedure for such a complaint.

With respect to Mr ZW, it does appear that he has used his client’s affidavit as a way to further criticise Mr RK, albeit in another forum.

The client’s knowledge of the complaint against Mr RK, and the resulting investigation, could only have come from information provided to him by Mr ZW.

The use of the information in the comments made about Mr RK and his part in the client’s Legal Aid situation, including the refusal of a grant of Legal Aid, appear gratuitous and designed to belittle or embarrass Mr RK.¹⁰

[133] Having acknowledged that he had read the affidavit said to have been drafted by his client, it presents as improbable that Mr ZW would not, on reading the offending paragraph, have immediately recognised that the concerns expressed mirrored those which clearly must have been the subject of discussions between himself and Mr SN.

[134] Having been acutely aware of the issues traversed (it being the case that Mr ZW had been raising identical concerns with Legal Aid Services) and on noting that the paragraph referenced Mr RK by name, it was required of Mr ZW that he inform Mr SN

¹⁰ At [72] – [80].

that the paragraph, as framed, was both misleading, and unacceptable to the extent that it made damaging and unsubstantiated allegations about a fellow practitioner.

[135] The manner in which the paragraph is framed is misleading.

[136] In reporting that he had learnt that “one senior adviser is already under investigation by the NZ Law Society had concerns about Mr RK’s competence”, Mr SN is suggesting that the Law Society had concerns about Mr RK’s competence and, as a consequence, it had determined to commence an investigation.

[137] That entirely misrepresents the situation and Mr ZW would have known that.

[138] These inaccurate and misleading allegations were seriously damaging of Mr RK’s professional reputation. They should have been immediately identified as such by Mr ZW and stopped in their tracks.

[139] There was no point or purpose for need to have Mr RK referenced in the High Court proceedings.

[140] A failure to identify the source of the complaints would inevitably had potential for the Court to be misled. Argument advanced for Mr ZW that the Court could have deduced that either Mr ZW or Mr SN had prompted the Law Society’s investigation was unconvincing. The beating heart of the misrepresentation was the framing of the paragraph in terms that inevitably would have led readers of the affidavit to conclusion that the Law Society had become so concerned about Mr RK’s competence that it had, on its own volition, taken steps to commence an investigation into Mr RK.

[141] The Standards Committee was satisfied that the references in the submissions to the LAT and in Mr SN’s affidavit were misleading, and that Mr ZW had breached his obligations under r 10.9 of the Rules.

[142] Rule 10.9 provides that a lawyer must not engage in conduct that is misleading or deceptive, or likely to mislead or deceive anyone on any aspect of the lawyer’s practice.

[143] In my view, the conduct is more directly addressed under r 13.1 which provides that a lawyer has an absolute duty of honesty to the court and must not mislead or deceive the court.

[144] The New South Wales Court of Appeal has said that:¹¹

¹¹ *Gruzman, Re; Ex parte The Prothonotary* (1968) 70 SR (NSW) 316; (1968) 88 WN (Pt 2) (NSW) 298 at 323.

Frankness should be one of the main attributes of a barrister. It is his duty to not keep back from the court any information which ought to be before it, and he must in no way mislead the court by stating facts that are untrue, or mislead the judge as to the true facts, or knowingly permit a client to attempt to deceive the court. *How far a barrister may go on behalf of his client is a question too difficult to be capable of abstract definition, but when concrete cases arise one can see for oneself whether what he has done is fair or not.*

[145] As to the fairness or otherwise of what may have been said or done, a case of no more than honest error or oversight cannot warrant the upholding of a complaint of misleading conduct:¹²

In order to make a disciplinary finding under this Rule, there needs to be more than an honest error or oversight. *A finding that a lawyer has 'misled' or 'deceived' the Court requires an element of knowledge or intention on the part of the lawyer to mislead or deceive the Court, or some evidence of a reckless disregard as to the accuracy of information conveyed to the Court.* This may come in the form of a wilful blindness to matters that challenge the accuracy of the information, but materially there needs to be an element of moral lapse in the lawyer's actions.

[146] The overriding duty of lawyers not to mislead the court means that any affidavit evidence, or written briefs, found to be incorrect must be corrected either by being withdrawn or by filing a corrected affidavit or statement.¹³

[147] On reading the paragraph in Mr SN's affidavit that was so directly connected to both the professional conduct complaints that Mr ZW was progressing against Mr RK, and the criticisms that Mr ZW had been making of Legal Services over a number of years, Mr ZW would have been aware that the concerns, raised by Mr SN in his affidavit, did not provide accurate account of the situation.

[148] Mr ZW should have been acutely sensitive of the caution that should be exercised in naming Mr RK.

[149] I do not accept Mr ZW's submission that the Standards Committee erred in concluding that Mr ZW had misled the Court.

[150] When it is noted that:

- (a) Mr ZW had a responsibility to oversee the affidavit (and indeed did so);
and
- (b) had a responsibility to inform his client if there were concerns with the affidavit; and

¹² *OX v PE LCRO* 224/2010 and 262/2011 (22 August 2012) at [20].

¹³ Matthew S R Palmer (ed) *Professional Responsibility in New Zealand* (LexisNexis, Wellington, 2019) at [11.112]. See also *EBR Holdings Ltd (in liquidation) v van Duyn* [2019] NZHC 3325.

- (c) was aware that the subject matter of the offending paragraph mirrored and encapsulated his argument with Legal Services and Mr RK; and
- (d) was aware that information in the affidavit was misleading; and
- (e) the affidavit failed to identify that it was Mr ZW who had raised concerns with the Law Society.

Mr ZW's argument that he played no part in misleading the Court falls away.

[151] On best construction, I think it possible that by the time Mr SN filed his affidavit, Mr ZW's relentless determination to wage protracted war against individuals in the Legal Services Agency had clouded his judgement, and that it was becoming difficult for him to separate the personal from the professional.

[152] The problems which permeate the paragraph in Mr SN's affidavit are similarly given free rein in the submissions Mr ZW filed with the LAT on 23 August 2021.

[153] Mr ZW cannot seek safe haven in argument that he is distanced from consequence in respect to this submission on grounds that the submission was drafted by a third person.

[154] It was Mr ZW's submission.

[155] He wrote it.

[156] In that submission (written with purpose to appeal a decision declining aid to his client), Mr ZW commences with allegation that there is "solid foundation" for the concerns that had been raised about senior advisors in the Legal Services Agency.

[157] It was Mr ZW's responsibility to produce relevant and convincing evidence to the Tribunal to support the allegation made.

[158] No evidence has been given as to the outcome of Mr ZW's appeal.

[159] It could reasonably have been assumed that if Mr ZW had been successful in his appeal, and the Tribunal Chair had concluded that there was merit in the concerns he had raised, Mr ZW would have brought that decision to the attention of the Standards Committee.

[160] The concerning aspect of Mr ZW's submission to the LAT is not just what Mr ZW directly says, but more significantly what he does not say, and what he allows, by omission, to be inferred.

[161] The impression he seeks to leave with the Tribunal is that the Law Society has concerns about, and is in the course of investigating, concerns about the competency of the advice being provided by a senior advisor with the Legal Aid Services. Reference to the concerns raised having a “solid foundation” is intended to reinforce impression that Mr ZW’s concerns are shared by the Law Society.

[162] It is transparently obvious that Mr ZW was endeavouring to convince the Tribunal chair that concerns raised fell to be considered in the context of a widespread malaise within the Legal Services Agency

[163] Mr ZW’s inexplicable failure to disclose that the “unresolved complaints “that the Standards Committee have in their sights”, were complaints that had been filed by himself, created impression as the Standards Committee noted, that the Law Society had commenced an investigation and had reached a view that there was a basis for concerns about the level of competency in the Legal Services Agency.

[164] Mr ZW would have been well aware that this did not provide accurate account of the Complaints process.

[165] His submission misled the Tribunal both as to the nature of the complaints process, and failed to explain that he was the instigator of the complaints that were before the Complaints Service.

[166] Argument that his conduct could be justified by explanation that his earnest desire to robustly advance his client’s interests had resulted in him pursuing those interests with insufficient attention to the manner in which he was advancing his client’s position, was not persuasive.

[167] I agree with the Standards Committee that Mr ZW’s submission to the Legal Aid Tribunal was misleading. The Standards Committee determined it to be a breach of r 10.9. As noted, I consider the breach is more appropriately assessed by reference to r 13.1.

[168] Whilst it was Mr ZW’s prerogative to bring complaints to the Law Society about Mr RK, it is not common occurrence for a Review Officer to deal with reviews in which a lawyer is advancing complaint against a lawyer who had been acting in a role in the nature of that undertaken by Mr RK.

[169] Mr RK’s role was to provide advice on Legal Aid applications.

[170] He specialised, as noted, in applications filed for criminal aid.

- [171] The Legal Services Agency was short staffed in this area.
- [172] Mr ZW was an experienced and busy criminal lawyer.
- [173] Inevitably, a number of his applications would have come before Mr RK.
- [174] Mr RK's role was to provide advice.
- [175] He was not the final decision maker.
- [176] But his part in the process was influential.
- [177] The Legal Services Agency had responsibility to ensure that public funds were managed in a fiscally responsible manner, and in a way that conformed with established protocols and procedures.
- [178] Competition for available funds has, for many years, been intense.
- [179] Inevitably, a significant number of grants will be declined.
- [180] There is opportunity to challenge a decision to decline aid.
- [181] It is approaching the trite to emphasise that a practitioner's dissatisfaction with having a client's Legal Aid application declined, cannot, and never could, provide reasonable basis for the lawyer to pursue a conduct complaint against a legally qualified public servant who had been involved in considering the Legal Aid application.
- [182] It is unacceptable for a lawyer to endeavour to use the complaints process for collateral purpose to assert pressure on a public servant in an attempt to bolster efforts to successfully secure Legal Aid grants for their client.
- [183] Mr RK is emphatic in his view that Mr ZW weaponised the Complaints process with deliberate purpose to cause him distress and embarrassment.
- [184] Four conduct complaints were made against Mr RK.
- [185] None were upheld.
- [186] It is difficult to escape conclusion that the complaints process was being deployed with purpose to cause distress to Mr RK.
- [187] A comprehensive inquiry into complaint made by [government department] staff who had raised concerns about the manner in which Mr ZW engaged with staff, concluded that Mr ZW's behaviour towards staff had been unsatisfactory.

[188] That finding was referred to an independent body for review (Performance Review Committee) who upheld the Ministry's findings.

[189] The conduct complaints that are convincingly established (harassment of Mr RK/misleading the Court/Tribunal), are matters that constitute (considered in their totality) a pattern of conduct at the serious end of the conduct spectrum.

[190] Of particular concern is:

- (a) the period of time over which Mr ZW had engaged in harassing and bullying behaviours towards Mr RK (4 years); and
- (b) the evidence of the extent to which efforts had been by Legal Services to address a multitude of concerns that Mr ZW had raised, and the stark contrast between the respectful and courteous manner in which Mr ZW had been dealt with by that Agency and the "disrespectful and unprofessional"¹⁴ manner in which Mr ZW had been found to have engaged with Legal Aid Services; and
- (c) the significant efforts that had been to encourage Mr ZW to moderate his behaviours; and
- (d) Mr ZW's persistent refusal to do so.

[191] Having carefully examined Mr ZW's conduct, I agree with the Standards Committee that the conduct merited a consideration as to whether the complaint should proceed to the Disciplinary Tribunal.

[192] It was not demonstrably inconsistent with the evidence provided to support the complaint, for the Committee to give consideration as to whether the conduct met the threshold of misconduct.

[193] The Standards Committee concluded "by a relatively fine margin" that it was not necessary to refer the matter to the Disciplinary Tribunal.

[194] It is difficult to provide precise explanation of the term "relatively fine margin", but it is reasonable to conclude that Committee members gave serious consideration to sending Mr ZW to the Tribunal.

[195] Mr RK invites me to interfere with that decision, but I do not propose to do so.

¹⁴ AY report at [24](a).

[196] I consider the matter could have been referred to the Tribunal, but as an alternative to that, have concluded that the conduct can be appropriately marked by substitution of the Committee's penalty order with orders that more adequately reflect the seriousness of the conduct.

[197] In determining not to interfere with the Committee's conduct finding, I am mindful of Mr RK's evidence that he has been profoundly embarrassed and distressed by what he considers has been a systematic campaign on Mr ZW's part over many years to damage his professional reputation.

[198] There is need for these matters to be brought to conclusion.

[199] On that point, Mr RK expressed concern that the correspondence, referenced in [52] above, supported conclusion that despite all, Mr ZW remained committed to doing whatever he could to inconvenience and embarrass him.

[200] Mr ZW provided assurances at hearing that he would be taking no further steps in respect to any matters engaging Mr RK.

[201] Mr ZW advised that he was happy for that position to be recorded in my decision, this to provide comfort to Mr RK. Mr ZW accepted that if he was to walk back from that undertaking, that Mr RK could evidence the undertaking by reference to the LCRO decision.

[202] I am confident that Mr ZW is genuine in his commitment to ensuring that he causes no further distress to Mr RK.

[203] Having concluded that the matter is not to be referred to the Disciplinary Tribunal, attention turns to penalty.

If the conduct was appropriately determined to constitute unsatisfactory conduct, were the penalties imposed sufficient to mark the gravity of the offending?

[204] The Committee concluded that the conduct fell into the "moderate to serious" band of unprofessional and misleading conduct.

[205] The features which elevated the conduct to the serious end of the spectrum, was the prolonged, persistent, and repeated harassment of Mr RK.

[206] Mr ZW had, for many years, been attacking Mr RK's professional reputation, his competency, his ability as a lawyer, and his knowledge and expertise in the areas in which he was trained to provide advice.

[207] This alone was sufficient to elevate the conduct to the more serious end of the spectrum.

[208] The Standards Committee concluded that a fine of \$3,000 was adequate and considered that a fine of that magnitude “represented a balance between the seriousness of the conduct, and the belated recognition by Mr ZW of the breaches of the rules”.

[209] The Committee observed, that absent the remorse it perceived to have been expressed by Mr ZW, “the amount would have been much higher”.

[210] With respect of the Committee, I consider the fine imposed to be manifestly inadequate in reflecting the seriousness of the conduct, and excessively charitable to Mr ZW in according to him, in the degree it does, allowance for the concessions that Mr ZW was said to have made.

[211] When making decision as to penalty, the starting point is to consider the seriousness of the conduct, then to address any aggravating or mitigating features. The penalty should properly be scrutinised as to whether it both accurately reflects the gravity of the conduct, and presents as the least restrictive available option to ensuring the purposes of disciplinary proceedings are met.

[212] That exercise must be undertaken with recognition of the importance, for the public, that disciplinary breaches be met with an adequate disciplinary response.

[213] The primary purpose of disciplinary proceedings is to protect the public and to maintain professional standards.¹⁵

[214] In *Daniels v Complaints Committee 2 of the Wellington District Law Society* the High Court observed that:¹⁶

... The public are entitled to scrutinise the manner in which a profession disciplines its members, because it is the profession with which the public must have confidence if it is to properly provide the necessary service. To maintain public confidence in the profession members of the public need to have a general understanding that the legal profession, and the Tribunal members that are set up to govern conduct, will not treat lightly serious breaches of standards.

[215] The function of a penalty in a professional context was recognised in *Wislang v Medical Council of New Zealand*¹⁷ as being to punish a practitioner, to act as a deterrent to other practitioners, and to reflect the public’s and the Profession’s

¹⁵ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1; [2008] BCL 787; [2008] NZSC 55 at [97].

¹⁶ *Daniels V Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850 at [34].

¹⁷ [2002] BCL 393; [2002] NZAR 573.

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.

[216] It is desirable that there be consistency in the imposition of disciplinary penalties, but in the assessment of appropriate penalty, context is critical, and dependent on the facts and circumstances of the individual case.

[217] The starting point is to consider the conduct.

[218] Having done so (above), I have concluded as noted, that I consider the conduct to be at the serious end of the spectrum.

[219] The gravity and repetitive nature of the conduct has been emphasised.

[220] Breaches of a number of conduct rules have been established. The Standards Committee had concluded (and I agree with it) that there was foundation established for 3 separate unsatisfactory conduct findings.

[221] The Law Society has published a set of penalty guidelines to assist Standards Committees when called on to consider penalty.

[222] The guidelines are comprehensive and informative, and helpfully consider penalty by reference to specific categories of conduct.

[223] Those guidelines emphasise, that "penalty orders should be sufficient to mark the gravity of the offence".¹⁸

[224] The guidelines suggest that conduct which is of a low level in terms of seriousness, (in comparison to other cases involving similar conduct), should attract as a starting point a fine in the range of \$1,000 to \$3,000.¹⁹

[225] That approach is not inconsistent with the policy adopted by Review Officers in a number of decisions, where Officers have concluded a fine of \$1,000.00 is a proper starting point where unsatisfactory conduct has been found as a result of a breach of applicable Rules (whether the Conduct and Client Care Rules, the Regulations or the Act).²⁰

¹⁸ Above n 8, at [3.14].

¹⁹ At [3.20].

²⁰ *Workington v Sheffield* LCRO 55/09 (26 August 2009).

[226] For conduct considered to be moderately serious, the guidelines suggest a fine in the range of \$4,000 to \$7,000. Conduct in the upper range of seriousness may attract a fine in the region of \$7,000 to \$15,000.

[227] The highest fine available, (\$15,000) is to be reserved for the most serious instances of unsatisfactory conduct.

[228] In those cases where the conduct involves misleading the court, the guidelines observe that because of the fundamental nature of the obligation involved, referral to the Tribunal would generally be warranted.

[229] In such cases, the practitioner's culpability, i.e. was the conduct motivated by ill motive or bad faith, intentional reckless, negligent or inadvertent requires consideration. The penalty guidelines suggest that some "moral lapse" will be required for a disciplinary response if the error is a "one off".

[230] A feature of the conduct (certainly in respect to Mr SN's affidavit), is that it could not be reasonably argued that the deceptiveness of the comments made, had prospect of misleading the Court on matters significant to the litigation under consideration.

[231] Mr ZW's submission to the Legal Aid Tribunal carried more potential to mislead.

[232] To support his application for aid, Mr ZW was allowing the Tribunal Chair to labour under mistaken impression that the Law Society had concerns about the very issues that Mr ZW had raised to support argument that his application for aid had not received fair treatment.

[233] The element that elevated this conduct to the more serious was its capacity to cause damage to Mr RK's reputation.

[234] The recently introduced r 10.3 was enacted to clarify the standards of behaviour expected of lawyers when engaging with clients, colleagues and others.

[235] Rule 10.3 directs that a lawyer must not engage in conduct that amounts to bullying or harassment, these obligations grafted on to the requirement that a lawyer must, when acting in a professional capacity, treat all persons with respect and courtesy, and refrain from engaging in conduct that tends to bring the profession into disrepute.²¹

[236] Amendments to the conduct rules which directly addressed head-on issues regarding workplace harassment, racial harassment and sexual harassment, reflected

²¹ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Amendment Rules 2021.

widespread concern that the profession had failed to respond with sufficient alacrity, to address bullying in the legal environment.

[237] The guidelines note that, because of the inherent seriousness of conduct of this kind, a disciplinary response will generally be required.

[238] Serious cases of bullying, discrimination and harassment are likely to be capable of amounting to misconduct, and therefore warrant referral to the disciplinary Tribunal.

[239] The guidelines observe that consideration should be given to a referral to the Tribunal, in circumstances where the conduct was prolonged, repeated, or indicative of a pattern of behaviour, or the conduct was determined to be premeditated, deliberate, or displaying a reckless disregard for the lawyers professional obligations.

[240] There have been few cases come before the LCRO which have required a consideration of r 10.3.

[241] Those cases (and cases of similar ilk which have come before the Disciplinary Tribunal) have generally involved situations where allegation is made that a lawyer has bullied or harassed a colleague in the workplace, in a social setting, or in the course of engaging on a particular file.

[242] The circumstances of this case are unusual.

[243] Mr ZW and Mr RK were not personally known to each other.

[244] They had never met.

[245] As I understand it, the first time Mr ZW and Mr RK had personally sighted each other was at the review hearing.

[246] The cases to date, which provide reference point for assessment of penalty when considering a breach of 10.3, do not comfortably fit with the facts of this case.

[247] But what can fairly be said is the fact that Mr RK was not personally known to Mr ZW did not diminish or negate his obligation to ensure that he conducted his dealings with Mr RK in a courteous and professional manner.

[248] The fact that he did not personally know Mr RK, the fact that he was not a colleague of Mr RK's, the fact that Mr RK was not representing a client in a case engaging a client of Mr ZW's, did not moderate the severity of the bullying or its impact on Mr RK.

[249] To the contrary, those factors which are commonly advanced as exculpatory (collegial familiarity, previous conduct, acquiescence, workplace culture, complicity) are all absent here.

[250] A lawyer's obligation to engage courteously with individuals working within the justice system are as important as the obligation to engage courteously with workplace colleagues and fellow practitioners.

[251] The penalty guidelines recommend that for bullying, discrimination and harassment cases, conduct at the lower end of the spectrum should attract a fine in the range of \$1,000 to \$3,000, moderately serious conduct \$4,000 to \$7,000, and conduct at the upper end of the spectrum of seriousness, a fine in the range of \$8,000 to \$15,000.²²

[252] The Committee's indication that it considered the complaint was on the cusp of being referred to the Disciplinary Tribunal, indicates, as I have noted, that it perceived the conduct to be at the high end of unsatisfactory.

[253] Its decision to record that assessment by imposition of a penalty at the lower end of the scale, was explained by the indication that it considered that the fine imposed represented a "balance between the seriousness of the conduct and the belated recognition by Mr ZW of the breaches of the rules".

[254] With respect to the Committee, I do not agree that Mr ZW's acknowledgement of error was a factor of such significance to merit a substantial reduction in the fine. The fine imposed was, when referenced to the Standards Committee penalty guidelines, inconsistent with the Committee's finding that the conduct was "moderate to severe".

[255] Having concluded that the conduct was unsatisfactory, I am required to address any aggravating or mitigating factors.

[256] Again, with every respect to the Committee, it is my view that the Standards Committee overemphasised the extent that Mr ZW's acknowledgement of the error of his ways should impact on penalty.

[257] Mr ZW's (as the Committee noted) "belated" acknowledgement of error was not sufficient, in my view, to justify ameliorating the severity of the conduct from that which engaged a consideration as to whether Mr ZW should be sent to the Disciplinary Tribunal, to conclusion that an appropriate penalty to mark the conduct was a financial penalty at the lower end of the scale.

²² Above n 8, at [15.6].

[258] When given first opportunity to address Mr RK's complaint, Mr ZW's approach was to emphatically deny any wrongdoing, and to:

- (a) contend that his complaint against Mr RK was warranted; and
- (b) describe his correspondence as "professionally critical"; and
- (c) contend that criticisms he had made of Mr RK were within the bounds of professional standards; and
- (d) suggest that Mr RK's criticisms of him were libellous; and
- (e) assert (incorrectly) that Mr RK had dealt with 99% of his applications; and
- (f) assert (incorrectly) that Mr RK had been targeting Mr ZW; and
- (g) assert that it was reasonable for the Court to be made aware of the difficulties that Mr SN was experiencing with his Legal Aid application; and
- (h) argue that Mr RK had been "oversensitive".

[259] In later responses, Mr ZW alleged that there were widespread concerns, amongst Legal Aid providers, about Mr RK, and further questioned Mr RK's knowledge and experience in the area of criminal law. Mr ZW went so far as to suggest that the Committee should make inquiry of Mr RK as to the reasons why he had left the employ of the [government department].

[260] None of this gave indication that Mr ZW considered that there had been anything untoward in his interactions with Mr RK. To the contrary, the underlying theme of his argument was that it was Mr RK's failure to adequately do his job that was at the root of the problem.

[261] Crafted with the assistance of helpful counsel, Mr ZW's final submissions to the Committee of 28 June 2022 were advanced in more conciliatory tone, with what I would describe as modest concession being made by Mr ZW that he had fallen down in some areas. Mr ZW made no concession to having engaged in bullying behaviour, but rather characterised his communications with Mr RK as being of an overly colloquial nature, and deserving of a more professional approach.

[262] Mr ZW remained firm in his view that he had not, through the vehicle of Mr SN's affidavit, misled the Court.

[263] I do not consider that the concessions made by Mr ZW were sufficient to merit the reduction in fine. If made earlier and accompanied by indication of genuine acceptance that his conduct had fallen well short of what was required and with less focus on shifting explanation for the conduct to argument that Mr RK had contributed to the problem, more weight could have been justifiably given to the concession made.

[264] The submissions filed by Mr ZW on Review, indicate that he continued to believe that the conduct breached were relatively innocuous.

[265] He emphasises that he had acknowledged that “there may have been some minor breaches of the rules”.

[266] But he remained committed to his position that his only error, in respect to the affidavit matter, was informing his client that a conduct complaint had been lodged.

[267] Best insight into Mr ZW’s view of the severity of the conduct, was indication in his written submissions that the fine imposed by the Committee should be reduced to \$500.

[268] When challenged in the Review hearing as to why he could justify a penalty of such insignificant consequence, Mr ZW indicated that he did not pursue that submission.

[269] If I understood his revised submission correctly, he accepted that a fine of \$3,000 (perhaps with modest increase of \$1,000) would adequately reflect the seriousness of the conduct.

[270] I disagree.

[271] I return to the point that has been reinforced on a number of occasions. The length of time that Mr RK had to put up with Mr ZW’s discourteous attacks.

[272] This was not an isolated incident.

[273] The behaviour went on for years.

[274] If there is to be firm commitment to eradicating bullying in the legal profession, that will not be achieved by orders that serious and persistent bullying can be adequately marked by a three-thousand-dollar fine.

[275] Public confidence in the ability of the legal profession to adequately sanction its members is not enhanced by indication that prolonged bullying of a public servant merits such modest sanction.

[276] My confidence in conclusion that Mr ZW's conduct towards Mr RK had been unacceptable, and properly merited a description of it as bullying in nature, was bolstered by Mr ZW's evidence in the course of the review hearing.

[277] In my view, Mr ZW presented his argument at the review hearing in a genuine and honest manner, and in a fashion that gave indication that he had, by the time the matter had arrived at the door of the LCRO, stepped back and carefully reflected on his actions.

[278] He accepted, without qualification, that his behaviour towards Mr RK had been unacceptable.

[279] He accepted it as bullying.

[280] He expressed regret that he had not been sufficiently alert to the distress he had caused Mr RK.

[281] He acknowledged that he had "some trouble defending" his bullying.

[282] He remained committed to his position that he had never set out to mislead the Court, but acknowledged that aspects of Mr SN's affidavit may have been influenced by one of Mr ZW's employees.

[283] Mr ZW accepted that he had crossed the line.

[284] Mr RK was not convinced that Mr ZW was genuinely remorseful.

[285] It was his view that Mr ZW had tailored his contrition with purpose to achieve minimal disciplinary consequences.

Conclusion

[286] The fine imposed by the Standards Committee was inadequate to reflect the severity and duration of the offending.

[287] Incidents of prolonged bullying, as this was, demand a disciplinary response at the upper end of the scale.

[288] The Standards Committee penalty of \$3,000 was inadequate and inconsistent with the penalty guidelines provided for the assistance of Standards Committees.

[289] Belated and qualified acknowledgement by a practitioner that their conduct may not have been satisfactory, does not provide a principled basis for reducing a fine for

conduct that approached the threshold of misconduct, to a level equivalent to that which would be imposed for conduct at the lower end of the spectrum.

[290] Mr ZW could have been expected to appreciate that an earnest desire to advance a client's position, did not, and could not, absolve him of responsibility to ensure that his dealings with Mr RK were conducted courteously and professionally.

[291] Mr ZW's failure to insist on amendments to his client's affidavit, and his failure to adequately inform the LAT as to the correct basis on which the Complaints Service was conducting inquiries, add further weight to argument that the fine imposed should be significant.

[292] I consider a fine of \$10,000 is appropriate.

Anonymised publication

[293] 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.

ORDERS

- (a) Order that Mr ZW pay a fine of \$3,000 to the New Zealand Law Society is reversed and substituted with an order that Mr ZW pay a fine of \$10,000 to the New Zealand Law Society, (s 211(1)(a), s 156(1)(i) Lawyers and Conveyancers Act 2006).
- (b) The fine is to be paid within 30 days of the date of this decision.
- (c) In all other respects, the decision of the Standards Committee is confirmed.

DATED this 14TH day of APRIL 2023

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 RK as the Applicant
Mr ZW as the Respondent
Mr NL as the Respondent's Representative
[Area] Standards Committee [X]
New Zealand Law Society
Secretary for Justice