LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2024] NZLCRO 009

Ref: LCRO 097/2023

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	**RQ and EP** Applicants
AND	**OM** Respondent

DECISION

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

Introduction

[1] The applicants (Ms RQ and Ms EP) have applied for a review of a decision by the [Area] Standards Committee [X] to take no further action in respect of their complaint about the conduct of the respondent, Ms OM, a lawyer in [City 1].

Background

[2] In 2016, the first applicant commenced a domestic relationship with a Mr ND (Mr X). Later in 2016, she obtained a final protection order against him under the family violence legislation then in force.

[3] Mr X was prosecuted on several occasions for breach of the protection order and imprisoned for various periods for that reason. Despite this, the first applicant

continued in an intermittent relationship with him until finally ending the relationship in 2019.

[4] Three years later, during 2022, the respondent acted for Mr X in making an application for a protection order under the Family Violence Act 2018 (the FVA) against both applicants. I understand that the second applicant was regarded as being an associate of the first applicant for the purposes of s 89 of the FVA.

[5] At the time, the respondent had 5 years' legal practice experience in New Zealand and had been practising on her own account for a year. I have no information as to whether she might have previously practised in another jurisdiction.

[6] Mr X was granted legal aid for his protection order application. The second applicant was also granted legal aid to respond to it. The first applicant did not qualify for legal aid.

[7] The applicants engaged the same lawyer to represent them. The lawyer quoted the first applicant a fixed fee for his work in representing her in her defence of Mr X's application.

[8] Mr X's application was made without notice. The duty Judge declined to grant a temporary order and required that the application proceed on notice. In doing so, she noted on the Court file:

> Jurisdiction not made out. Threshold not met…. There are clearly issues about the disclosure of [Mr X's] private information and whether [the first applicant] has breached any privacy boundaries in the regard but it is also clear that there are complex issues to be considered and more detail required before the Court could be satisfied that family violence has occurred.

[9] The applicants filed notices of defence and an application to strike out Mr X's application because the grounds for making a protection order were not made out and because Mr X's application was an abuse of process.

[10] The Court subsequently recorded that the applicants' abuse of process argument appeared to be on the basis of a statement made by Mr X in his affidavit which read:

> This application is made without notice because the delay in obtaining the protection order would provide chances to the respondent and associate respondent to spread negative comments in the community to disrupt my involvement with the charity organisation I currently run.

[11] The applicants' lawyer wrote to the respondent expressing his opinion that no family harm could be established on the basis of Mr X's affidavit and requesting that the application be withdrawn.

[12] The Court issued a minute directing Mr X to file further affidavit evidence by a specified date and setting a time limit for any affidavit evidence in response from the applicants.

[13] The applicants' lawyer wrote to the respondent again stating, among other things, that Mr X would not be successful in seeking a protection order, that the applicants' lawyer would be notifying the Legal Services Commissioner of the "hopeless case" being advanced by the respondent for Mr X, that he would be seeking recovery of costs from Mr X once Mr X's application for a protection order was unsuccessful and again requesting immediate withdrawal of that application.

[14] The respondent replied by email that day stating:

> Thanks for your intimidating letter you sent to me for not withdrawing the application. It is common that people think that the women and specially a coloured one does not have an ability to assess for legal aid. You can proceed what legally right and I can do the same. (sic)

[15] The applicants' lawyer responded:

> I think [you] misunderstood my email. It's not an attack on you or your ability to provide legal aid. My intention is to seek that your legal aid grant be withdrawn for [Mr X] - not your ability to provide legal aid generally.

[16] The respondent replied:

> The indirect message is that I am not capable to assess the case and it is abjectly seen as such. (sic) The prospect of case is professionally assessed by the legal provider. (sic)
>
> I have seen several senior local lawyers applied for legal aid for very unfounded cases and we never wrote to each other like this. I am sure you would not dare to write like this to them.
>
> You are aware that your application to struck (sic) the PO application was not accepted. Also my client is supposed to reply to the affidavits. However, you seem to be very predetermined and wrote to the me (sic) the application is hopeless. It should be determined by the Court.
>
> Honestly, I never received such letter from anyone of my peers for the last five years.

[17] The applicants' lawyer wrote to the Legal Services Commissioner putting the Commissioner on notice of a likely costs application.

[18] Further affidavit evidence was filed in support of Mr X's protection order application.

[19] The respondent failed to file a notice of defence[1] to the applicants' application to strike out Mr X's protection order application. The Court issued a minute setting the strike-out application down for formal proof.

[20] The respondent then sought for the strike-out hearing to be vacated based on further documentation, the nature of which is unspecified.[2] This request was declined.

[21] A hearing was then held for formal proof of the strike-out application. The respondent instructed an agent to appear. Although the matter had been set down for formal proof, the Court gave the agent leave to make submissions as to why Mr X's application should not be struck out.

[22] The outcome was that Mr X's protection order application was struck out. The Court minute relevantly records:

> Having heard from both parties I am convinced the matters alleged do not fall within the Family Violence Act 2018. It may be the Harassment Act or the Harmful Digital Communications Act are applicable but that is for the civil court not the Family Court to consider. Application struck out….

[23] The applicants' lawyer then filed an application for costs against the Legal Services Commissioner under s 45 of the Legal Services Act 2011 (the LSA) on the basis of "exceptional circumstances" warranting reimbursement of costs under s 46 of that Act. This application was also largely successful, in that exceptional circumstances were indeed made out but that the amount to be reimbursed needed to be calculated by reference to the applicable schedule of the District Court Rules rather than being an award of indemnity costs.

[24] The Court took into account several matters including that the fixed fee that had been quoted could be assumed to have allowed for a full hearing but that a full hearing had not taken place and that the fact a fixed fee had been agreed did not determine the reasonableness of the costs claimed.

[25] The applicants were eventually awarded a sum which, on my calculation, represented a fraction under 50% of the cumulative sum the applicants' lawyer had charged to the first applicant and the Legal Services Commissioner respectively.

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[1] This is the term used in all the submissions for a notice of opposition to the interlocutory strike-out application. I use it for convenience.
[2] It may have been the late-filed notice of defence discussed later in this decision.

[26] In the first of two decisions dealing with the applicants' costs application, the Judge recorded that the applicants had sought indemnity costs on the basis that Mr X had "acted vexatiously, frivolously, improperly or unnecessarily in commencing and continuing defending [the] proceeding, or a step in [the] proceeding."

[27] The Judge's comments included the following:

> [41] What is concerning is that at no time did [Mr X's] lawyer or counsel address directly the issue as to whether what was alleged in their affidavits constituted family violence as interpreted in the Family Violence Act.
>
> [42] In her submissions filed in respect of costs, [the respondent] still does not address that issue directly. Her submissions are directed to indicate the strike-out was wrong. If that is her understanding of the law, then the actions she should be taking do not include arguing that in relation to a costs application.
>
> [43] I accept that it is possible for parties to misunderstand the law and to file documents which are ill-conceived. That does not constitute being frivolous or vexatious.
>
> [44] However, the situation changes when the party is put on notice by the minute of the judge that there is an issue as to whether the matters alleged met the definition of family violence. On receipt of [the duty Judge's] minute, counsel should have reassessed whether the factual basis being pleaded was sufficiently robust to ensure that the crucial element of the application was met.
>
> [45] The subsequent documents filed did not correct the deficit.
>
> [46] The correspondence by the [applicants'] counsel was entirely appropriate. It was not a slur on counsel for the applicant. It was putting her and her client on notice that there is a real issue to be dealt with. It is disconcerting to read counsel for the applicant saw the email of 13 May as relating to her abilities rather than causing her to address the issue raised. Continuing the proceeding without addressing the issue as to whether the pleadings contain evidence of family violence is vexatious.
>
> [47] The applicant was given several opportunities to resolve this matter without the question of costs being an issue.
>
> [48] Exceptional circumstances are made out – section 45 (3) of the LSA. The failure of [Mr X] to reassess his case and consider whether he should be proceeding has incurred unnecessary cost, his failures to comply with the directions as to when to file documents has prolonged the proceeding, his refusal to negotiate a settlement or participate in ADR was unreasonable and the way in which the matter was conducted was an abuse of the court process.

The complaint

[28] The applicants lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 2 November 2022. They also lodged it with the office of the Minister of Justice.

[29] The particulars of the complaint, paraphrased, were that:

(a) the respondent had assisted Mr X in pursuing a "vexatious and frivolous application" that was a "hopeless case";

(b) the respondent had acted in a conflict of interest, having previously represented the second applicant;

(c) the respondent was not independent in providing legal services to Mr X because she had "… a personal relationship and is 'friends' with [Mr X] and named associate [Ms Y] through the Multicultural Society in [City 1]";

(d) at the time Mr X's application was made, the respondent certified that there was a legal basis for the application when there was no such basis (expressed by the applicants as "providing false assurance");

(e) the respondent then "… failed to inform Legal Aid of the hopelessness of the application as indicated by the Judge's notice that the application did not meet the threshold";

(f) the respondent "… ignored judicial directions to provide evidence of family harm;

(g) the respondent "… broke the Court rules on multiple occasions", including failing to file a notice of defence;

(h) the respondent "… was extremely unprofessional in her communication with my lawyer accusing him of racism, making unsubstantiated allegations towards myself and [the second applicant] …";

(i) "Despite being advised of the psychological and financial impact of this hopeless case, [the respondent] offered an ultimatum that if we do not sign an undertaking (a quasi-protection order) then I will have to suffer the financial strain. This indicates she agrees the application did not necessitate a protection order."

[30] The outcomes the applicants sought, again paraphrased, were:

(a) an inquiry into the respondent's alleged professional misconduct;

(b) reimbursement of the difference between the fixed fee for which the first applicant was liable and whatever sum might be paid by the Legal Services Commissioner pursuant to the costs award made by the Court;

(c) a "performance review" and "audit" of the respondent's legal aid practices, implicitly by Legal Aid;[3]

(d) an apology from the respondent that acknowledged she had reflected on her unprofessional conduct.

[31] The respondent provided an extensive written response to the complaint. Her comments, which are again paraphrased where not appearing in quotation marks, included the matters stated below.

[32] The respondent submitted that the Court did not state that Mr X's application was vexatious or frivolous and it "… addressed that complainers' actions may come under the Harassment Act."

[33] She stated that Mr X's protection order application was struck out because of "sharp practice" by the applicants' lawyer.

[34] She stated that the applicants' lawyer "… never submitted legal reasons to justify his case why his clients' conduct was not falling under the Family Violence Act."

[35] She stated that "this is a classic case of a victim using the Family Violence Act to control and abuse the perpetrator by not allowing him to move on with his life and rehabilitate him. I have to fight for justice for my client using my experience and skills and I believe I did my best."

[36] She asserted (with various stated reasons) that the applicants had been overcharged by their lawyer and that the Court had declined to make a costs award against her personally.

[37] She stated (in various ways) that her obligations were to Mr X, not to the applicants.

[38] She commented that rehabilitation is a core purpose of any judicial sanction and that Mr X had attempted unsuccessfully to engage in "restorative justice" before applying for the protection order, including by way of the proposed undertaking from the applicants that the first applicant had taken exception to.

[39] She stated that she had not represented the second applicant and that she had no conflict of interest.

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[3] Using that term generically to encompass the Minister of Justice, the Secretary for Justice and the Legal Services Commissioner in their respective roles under the Legal Services Act 2011 (the LSA).

[40] She described the applicants' assertions that she had a personal relationship with Mr X or his partner as "delusions".

[41] She stated that:

> The judge never stated that the case was hopeless or frivolous it was the complainer's subjective speculation. The judge specifically stated in his decision my client's case was not vexatious or frivolous.

[42] She stated that she had the "… right to voice if there is any conscious or unconscious bias about the quality of my work …" and suggested that the criticism of her case by the applicants' lawyer was an attempt to intimidate her and was a "personal attack".

[43] She repeated that, as it was the applicants seeking to strike out, the onus was on them to establish that their actions did not meet the definition of family violence.

[44] She submitted that the failure to file a notice of defence shortened the proceeding rather than prolonging it.

[45] She asserted that the Court decisions "… did not say for what reasons the complainer's actions were not considered under the Family Violence Act", that there had been a "predetermination without hearing", that the "court justified its predetermined decision by 'cherry picking' the affidavit my client submitted" and that the concept of natural justice had not been followed.

[46] She asserted that "the judge sitting was an acting judge and not a usual judge who knows about each lawyer and gets the bigger picture".

[47] She stated that the court outcome was "…not because of inefficiency in the assessment of my client's case but rather time constraints and other technical reasons of the court".

[48] She stated her opinion that "the purpose of the proceeding is to achieve justice and not prove who is correct or better than others at the cost of the states". (sic)

[49] She submitted that it was the Court's job, not counsel's job, to interpret the FVA. Having made that submission, she then stated her opinion of the scope of "psychological abuse" and, without explaining how the applicants' alleged conduct came within that scope, implied that the Court's decisions were wrong.

[50] After stating that "it is understandable that the courts and Judges have limited time and do their best to give justice" and further that "I am not undermining their

services, I respect the decision" she nevertheless proceeded to state that "some one else shortcomings (sic) should not be turned against me to doubt my competency".[4]

[51] The respondent then proceeded to make numerous factual allegations about interactions between Mr X, the first applicant, the second applicant and Mr X's new partner, including the circumstances of various alleged breaches of the first applicant's protection order, and made critical comments about various details in the applicants' affidavit evidence.

[52] Despite expressing extensive personal, subjective opinions about the applicants' alleged conduct, the respondent stated, remarkably, that "I don't have any personal opinions against the opposite parties".

The Standards Committee decision

[53] The Standards Committee delivered its decision on 16 May 2023. It addressed the respondent's alleged conduct in a global fashion by stating that the key issue was whether the respondent had breached any of her professional obligations to the applicants.

[54] The Committee findings, again paraphrased, were that:

(a) the applicants were not the respondent's clients;

(b) generally, lawyers' obligations to third parties are limited to obligations of respect and courtesy;

(c) the remedy provided to a party for another party bringing vexatious or meritless proceedings is through an award of costs against the party bringing the proceedings;

(d) it considered that the Court had taken into account the respondent's conduct in assessing the costs to be awarded to the applicants;

(e) the Court was in a better position to assess the respondent's conduct than the Committee and if the Court had reached an adverse view of her conduct, it would have expected the Judge to refer the respondent to the NZLS;

[4] I observe that the ambiguous "some one else" could refer to either or both of the two Judges, or the applicants' lawyer, or all of them.

(f) it was not the role of the Committee to provide a "top up to a costs order" where a party is not satisfied with the Court outcome;

(g) the respondent was obliged to follow her client's instructions, there was no evidence that what she did was other than in accordance with her client's instructions and, although the matter clearly caused distress to the applicants, this did not constitute a failure by the respondent to treat the applicants with respect and courtesy;

(h) the respondent "… appeared not to fully understand the Court's conclusions and its findings in respect of the merit of the application …" and recommended that the respondent "… take time to fully understand the court's decision and its views about the appropriateness of her client's actions";

(i) the respondent denied having previously acted for the second applicant and there was no evidence that she had done so;

(j) the respondent "… might consider a less aggressive response in future and to focus on responding to the substance of the issues rather than perceived personal slights" but it did not consider her communications were sufficient to amount to a breach of her professional obligations;

(k) matters relating to Mr X's legal aid application were for Legal Aid to address.

[55] On that basis, the Committee determined, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act), that no further action on the complaint was necessary or appropriate.

Application for review

[56] The applicants filed an application for review dated 29 June 2023. They made the general comment that:

> This process has been biased towards [the respondent]. The Law Society has contradicted itself by acknowledging [the respondent's] unprofessional conduct but then failing to hold her accountable for litigation financial abuse.

and supported the comment with a detailed, 18-point critique of the Committee's decision.

[57] By the time of the application for review, the Legal Services Commissioner had paid the costs awarded by the Court, leaving the first applicant $4,186 out of pocket. The

second applicant also had a liability to Legal Aid of about $3,300. In effect, they sought orders for compensation against the respondent for recovery of these sums.

[58] The applicants also continued to seek "review or audit of [the respondent's] legal aid practices", stating that "the public deserves assurance that legal aid lawyers are providing the required standards of quality and value".

[59] Both the complaint and the review application also traversed various issues relating to the history of the first applicant's relationship with Mr X, Mr X's breaches of the first applicant's protection order, Mr X's criminal history and the affairs of the charity with which both Mr X and the second applicant were associated.

[60] The respondent was invited to comment on the review application. She did so, responding specifically to elements of 14 of the 18 points raised by the applicants on review. Some of the comments made by both the applicants and the respondent related to the content of affidavit evidence which was not at that time available to me.

[61] Relevantly to this review, the respondent submitted (paraphrased) that:

(a) there was nothing in the Court decisions that could be construed as the Judge reprimanding her for unprofessional conduct;

(b) the Court decided that the facts alleged in Mr X's affidavit evidence "fall under the Harassment Act";

(c) the Court found that the protection order application was not vexatious or frivolous;

(d) Mr X was not a personal friend of the respondent;

(e) any failure to comply with directions and any prolonging of proceedings or refusal to negotiate a settlement had been addressed by the Court in its award of costs;

(f) the first applicant's claim for compensation representing the shortfall between the fixed fee she had paid and the Court award of costs would defeat the purpose of s 45(1) of the Legal Services Act as to the awarding of costs in an amount that is reasonable in the circumstances;

(g) the claim for compensation was made "… to retaliate against my support to [Mr X]";

(h) the applicants' conduct constituted "continuous retaliative legal battles against [Mr X]".

[62] The respondent's response prompted further submissions from the first applicant refuting many of the statements made by the respondent. Most of the points raised in these submissions repeated points the first applicant had already made in previous submissions. Relevantly to this review, she submitted (paraphrased) that:

(a) the Court decision outlined the respondent's unprofessional conduct;

(b) the Committee had commented that the respondent did not appear to understand the Judge's decision;

(c) the respondent was motivated in advising Mr X to make an unmeritorious application under the FVA by the availability of legal aid, which was not available for an application under the Harassment Act;

(d) the respondent was not a "reasonable and competent lawyer";

(e) the respondent had made various factual allegations in her responses to the Committee about matters that she could not have been aware of in her professional capacity and that this evidenced she was friends with Mr X and not independent in her legal advisory role;

(f) the respondent's comments on the Court's costs decision criticising the applicants' lawyer constituted "denigrating your own profession";

(g) the respondent's conduct overall amounted to "litigation abuse".

Review on the papers

[63] Section 206(2) of the Lawyers and Conveyancers Act 2006 (the Act) allows a Legal Complaints Review Officer (Review Officer or LCRO) to conduct the review on the basis of all information available if the Review Officer considers that the review can be adequately determined in the absence of the parties. The parties were given an opportunity to comment on my provisional view that this would be the most appropriate course of action.

[64] The applicants sought a hearing in person to be attended by all parties. The respondent objected to a hearing being held in person and submitted that the purpose of the applicants' request was to harass her using the legal system.

[65] After conducting a preliminary appraisal of the file, I had concerns about the extent of the respondent's understanding of the complaint made against her, the Court's minute of the outcome of the strike-out application and the Court's costs judgment. I also observed that the Committee's decision focused solely on professional duties owed by the respondent directly to the applicants and did not address the respondent's general professional obligations when undertaking litigation for a client.

[66] I therefore issued a minute in which I indicated that this was an instance in which the applicants had properly raised complaint particulars about the respondent's professional conduct generally. I identified in the minute ten specific professional conduct issues that, on a provisional analysis, I might be addressing in a decision and offered the respondent further opportunity to make submissions by reference to those possible issues.

[67] I also made the observation that the respondent was relatively inexperienced and apparently practising on her own account and that it can be difficult for any lawyer to maintain objectivity when dealing with a complaint made against her. I suggested that the respondent might wish to consider seeking independent legal advice and gave her opportunity to do so.

[68] The respondent then engaged counsel. Counsel provided copies of three affidavits filed in the protection order proceedings, two of which had been sworn by the applicants, and extensive written submissions drawing my attention to various aspects of the affidavit evidence in the Family Court proceedings, commenting on the applicants' claim for compensation and responding comprehensively to the issues I had identified in my minute.

[69] I record that having carefully read the complaint, the response to the complaint, the Committee's decision and the submissions filed in support of and in opposition to the application for review, there are no additional issues or questions in my mind that necessitate any further submission from either party. On the basis of the information available and in the light of my previous comment, I have concluded that the review can be adequately determined in the absence of the parties.

Nature and scope of review

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

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

> … 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.

[71] More recently, the High Court has described a review in the following way:[6]

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

[72] 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 consider all of the available material afresh, including the Committee's decision, and provide an independent opinion based on those materials.

[73] I wish to emphasise that the review is of the respondent's professional conduct. It is not a review of any claims made by any party about the content or implications of any of the affidavit evidence filed in the Court proceeding or otherwise to re-litigate the Family Court proceeding.

[74] Nor is it an opportunity for any party to vent her opinions about the social behaviour of any other party in the community in which they live. Any such alleged matters that have legal implications are matters for the Family Court or the District Court.

[75] I wish to emphasise also that this is a review of the complaint originally made by the applicants. As will be evident from this decision, I may take a different view from the Committee about the scope of the professional conduct issues raised by the complaint but it is not appropriate for any party to complain on review about any matters that were not put to the Committee for its consideration. I will identify in this decision any such matters that I consider to be outside the scope of the review.

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

[76] Similarly, the applicants may well regard some of the comments and submissions made by the respondent in her responses to the complaint and to the review application as being discourteous, disrespectful, unsubstantiated and/or factually false. Those are not matters appropriate for me to address in making a decision on the review of the Committee's determination.

The Issues

[77] The issues for consideration in this review are as follows:

(a) Do I have any jurisdiction to consider the applicants' complaints about the respondent's compliance with the obligations under the LSA and, if so, should I exercise it?

(b) Should I take into account the additional materials submitted by the respondent's counsel on review, being affidavit evidence filed in the Family Court proceedings?

(c) Is the complaint, and consequently the review, restricted to consideration of professional obligations owed by the respondent to the applicants directly?

(d) Did the respondent fail to treat the applicants with respect and courtesy?

(e) Did the respondent fail to treat anyone else with respect and courtesy?

(f) Did the respondent assist in using a legal process for an improper purpose?

(g) Did the respondent act for Mr X in circumstances where she had a conflict of duty?

(h) Did the respondent fail to maintain her independence in the conduct of litigation?

(i) In providing legal services to Mr X, did the respondent act competently consistent with the terms of her retainer and the duty to take reasonable care?

(j) Did the respondent meet her duty to promote and maintain professional standards?

(k) Is there a proper basis for awarding compensation to either applicant by reason of any failure by the respondent to meet her professional obligations?

(l) What is the appropriate outcome of the review?

Discussion

(a) Do I have any jurisdiction to consider the applicants' complaints about the respondent's compliance with the obligations under the LSA and, if so, should I exercise it?

[78] This is an issue addressed initially in the minute issued to the parties. The original complaint was expressly addressed to the Minister of Justice as well as to the NZLS. The applicants have criticised the standard of performance of the respondent's obligations under the LSA and, in effect, requested that Legal Aid[7] "audit" or otherwise inquire into the respondent's conduct as a legal aid provider.

[79] In my view, that is very much a matter for Legal Aid under the LSA and not a matter that is appropriate for a Review Officer to make any findings about under the Act.

[80] This is not to say that a Review Officer does not have the relevant jurisdiction. The LSA is an "… other Act relating to the provision of regulated services …" for the purposes of paragraph (c) of s 12 of the Act, which defines unsatisfactory conduct. So, a breach of the LSA can amount to unsatisfactory conduct.

[81] Section 81 of the LSA provides, in summary, that the fact that a lawyer provides legal aid services does not in any way affect the lawyer's obligations under the Act and the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

[82] The LSA nevertheless prescribes its own quality assurance and audit regime which involves performance review committees acting under specific quality assurance regulations,[8] a Ministerial power to carry out quality assurance checks[9] and a power of the Secretary for Justice to conduct audits.[10]

[83] The practical upshot of this is that it is the responsibility of Legal Aid to monitor legal aid provider performance under the LSA. Adverse findings by Legal Aid about the

[7] See footnote 3.
[8] The Legal Services (Quality Assurance) Regulations 2011.
[9] Section 88 of the LSA.
[10] Section 91 of the LSA.

standard of a legal aid provider's performance could be the subject of a complaint to the NZLS under the Act but it is not appropriate for a standards committee or the LCRO to consider such performance complaints at first instance.

[84] Accordingly, I decline to make any findings in this decision about any matter relating to the respondent's conduct as a legal aid provider.

[85] As I informed the parties by minute, however, the Secretary for Justice receives, as a matter of course, a copy of any standards committee or LCRO decision relating to the professional conduct of a registered legal aid provider. Legal Aid is therefore made aware of any relevant conduct issues.

[86] I do not know whether the NZLS is notified by Legal Aid of adverse findings in a performance assessment process under the LSA. If that were to occur and if the issues were potentially material, I imagine that the NZLS could request a standards committee to consider commencing an own-motion investigation into the matter.

(b) Should I take into account the additional materials submitted by the respondent's counsel on review, being affidavit evidence filed in the Court proceedings?

[87] This Office has a review jurisdiction, not a first instance complaint or investigatory jurisdiction. As stated previously by the LCRO:[11]

> The review process is not intended to provide opportunity to parties to adduce fresh or new evidence at the review stage. A Review Officer must be cautious to ensure that he or she does not get cast into the role of a "first instance" determiner of the evidence. Such an approach, if permitted, would undermine the very process of review.

[88] It is incumbent on a lawyer responding to a complaint to ensure that all material documentary evidence relevant to the issues raised in the complaint is provided to the NZLS. Gaps in information can be filled following the lawyer's response and as the standards committee inquiry progresses but additional material will not normally be accepted on review.

[89] In this instance, it was the issuing of my minute seeking submissions on possible issues I considered had not been adequately dealt with by the respondent and the Committee and prompting the respondent to engage counsel that has resulted in the additional material being submitted. I issued the minute expressly because I was

[11] *GS & Ors v ABC LTD and HY & Ors* [2022] NZLCRO 126 at [70].

concerned that the respondent did not appear to be alive to the issues of professionalism and competence raised by the complaint.

[90] In those circumstances, I consider it appropriate to accept the material for consideration. Although the review is a private process, I will refrain from making any direct reference to any content of the affidavit evidence.

[91] The first consideration is the relevance of the material to the review. Counsel makes no express submission as to its relevance. Her purpose in submitting it appears to be to provide some of the alleged factual context to the Court proceedings and to explain Mr X's reasons for seeking the respondent's legal advice.

[92] Mr X's motivations and reasons for seeking legal advice are not an issue in this review. They do not require justification. I observe that counsel for the respondent's reference to "a relentless and damaging harassment campaign" against Mr X would seem to be a reasonable one in relation to the second applicant's digital communications but that is not what this review is about. The review is about the respondent's professional conduct once she was engaged by Mr X.

[93] The material does not appear to have any other arguable relevance or probative value, other than possibly to evidence and reinforce the Court's findings of its inadequacy to establish jurisdiction under the FVA and its reasons for the strike-out and the costs decision.

(c) Is the complaint, and consequently the review, restricted to consideration of professional obligations owed by the respondent to the applicants directly?

[94] The Committee noted correctly that the respondent was acting for Mr X and that, subject to her general duties to the Court, she had an obligation to follow Mr X's instructions. Further, the respondent's primary professional obligation was, within the bounds of the law and the Rules, to protect and promote the interests of Mr X to the exclusion of the interests of third parties, including the applicants.[12]

[95] The Committee also noted correctly that the respondent's primary professional obligation to the applicants was to treat them with respect and courtesy.[13]

[96] This does not mean that the applicants are precluded from making a complaint about standard of the respondent's professional conduct generally, in my view. In many if not most instances of a complaint being made by a complainant who is not the client

[12] Rule 6 of the Rules.
[13] Rule 10.1 of the Rules.

and not a person with responsibilities relating to administration of justice, the Committee or the LCRO has the power to decide to take no further action on the grounds that the complainant does not have a sufficient personal interest in the subject matter.

[97] The purposes of the Act nevertheless include the maintenance of public confidence in the provision of legal services and the protection of consumers of legal services. Where those purposes are engaged, it is not inappropriate for a standards committee or the LCRO to give due consideration to a complaint by a non-client about professional obligations not owed to the complainant.

[98] Counsel for the respondent submits that most of the issues complained about were in relation to, or closely intertwined with, the respondent's provision of legal aid services and that I have already declined to inquire into such issues. I disagree. The issues relate to the respondent's judgement, professionalism and competence as a lawyer.

[99] In my view, those issues are of such a nature and degree as to require inquiry and, if appropriate, a disciplinary response.

[100] This is not an instance where it can be said that the applicants, as the respondents to the vexatious and procedurally abusive application, can be said not to have a sufficient personal interest in the subject matter of the complaint.

[101] I also disagree with the Committee's comment implying that the conduct of a lawyer in Court proceedings should not prompt disciplinary inquiry unless a Judge refers the matter to the NZLS. Judges' immediate priority and prerogative is the management of lawyers' conduct in Court on the day. In this instance, the Judge's opinion of the respondent's professional responsibility is evident from the costs judgment. Whether or not a Judge takes the additional step of referring conduct to the NZLS is not determinative of the need for inquiry.

(d) Did the respondent fail to treat the applicants with respect and courtesy?

[102] Rule 10.1 provides that a lawyer must, when acting in a professional capacity, treat others with respect and courtesy. In a litigation context, r 13.2.1 additionally provides that a lawyer must treat others involved in court processes with respect.

[103] As I have already noted, this question must be answered by reference solely to the conduct giving rise to the complaint, namely the respondent's representation of Mr X in the course of his protection order application proceedings.

[104] The fact that the proceedings were brought cannot of itself constitute a failure by the respondent to treat the applicants with respect and courtesy. The applicants' criticisms of the respondent in this respect conflate her professional conduct with the actions of Mr X in pursuing the protection order application.

[105] However objectionable Mr X's application might have seemed to the applicants, that was the action of Mr X, not of the respondent, albeit that the application must have been made on the respondent's advice.

[106] There is no evidence before me of any direct engagement between the respondent and the applicants.

[107] In my view, nothing in the circumstances giving rise to the complaint constitutes an expression of disrespect or discourtesy by the respondent towards the applicants.

[108] The respondent's subsequent subjective commentary, in the course of responding to the complaint and review application, about the alleged behaviour of the applicants does signify disrespect but is not part of the professional conduct under review.

(e) Did the respondent fail to treat anyone else with respect and courtesy?

[109] The same cannot be said for the respondent's conduct towards the applicants' lawyer. The exchange of correspondence recorded in paragraphs [14] to [16] above prompted the comment by the Judge at paragraph [46] of her decision quoted at paragraph [27] above.

[110] In my view, the Judge exercised considerable restraint in her phraseology but still made clear that she considered that the respondent shared personal responsibility for the vexatiousness of the protection order application.

[111] The respondent had received what the Judge considered, the Committee considered and I consider to be a perfectly appropriate professional letter challenging the factual and legal basis of her client's application to the Court. The letter did not express any disrespect of the respondent personally. There was nothing in it objectively capable of being interpreted in the way the respondent chose to interpret it.

[112] Counsel submits that "the tone was sharp" and that "the tone was snippy and superior". I have no argument with counsel's "sharp" and "snippy" descriptions. Counsel

herself cites comment by the LCRO that "the practice of law calls for vigorous, forthright exchanges. Robustness is a necessary quality for lawyers".[14]

[113] In the circumstances, I consider that the applicants' lawyer no doubt considered that something of a wake-up call to the respondent was appropriate.

[114] I acknowledge also that the lawyer's stated deadline for taking the requested action was arguably unreasonable but the context was the pursuit of proceedings under the wrong legislation that were objectively without merit, as the Court duly held.

[115] I find that the letter was neither discourteous nor disrespectful on its face. To respond to it with an accusation of intimidation, sexism and racism goes well beyond "forthright and vigorous" and is at the extreme end of the spectrum of professional impropriety, in my view.

[116] In a professional conduct context, I consider the respondent's comments to have been troubling rather than merely disconcerting. In any event, they were plainly disrespectful and discourteous towards the applicant's lawyer. I consider that both r 10.1 and r 13.2.1 were breached by the respondent.

[117] It is additionally disturbing that the respondent does not appear to have any insight into this aspect of her conduct. Despite the rebuke from the Court, she doubled down, in responding to the complaint, on her accusation of intimidation and described the applicants' lawyer's letter to her as a "personal attack".

[118] Then, on review, the respondent also ignored the relatively mild admonishment from the Committee and asserted that there was nothing in the Court decisions that could be construed as the Court reprimanding her for unprofessional conduct. It is as if the respondent has not read the Court judgment. This reflects poorly on the respondent's personal and professional judgement.

[119] Whether or not the applicant's lawyer perceived the respondent's letter to be rude or impolite and/or warranting a complaint by him is, with due respect to counsel, speculative and irrelevant. The applicants are entitled to complain about disrespect of their lawyer.

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[14] *SW v HB* LCRO 75/2017 at [124].

(f) Did the respondent assist in using a legal process for an improper purpose?

[120] Rule 2.3 provides as follows:

> A lawyer must use legal processes only for proper purposes. A lawyer must not use, or knowingly assist in using, the law or legal processes for the purpose of causing unnecessary embarrassment, distress, or inconvenience to another person's reputation, interests, or occupation.

[121] In a litigation context, r 13.8.1 also provides that:

> A lawyer must not be a party to the filing of any document in court alleging fraud, dishonesty, undue influence, duress, or other reprehensible conduct, unless the lawyer has taken appropriate steps to ensure that reasonable grounds for making the allegation exist.

[122] The ethical principles underlying these two rules have additional, regulatory expression in the context of a protection order application made without notice under the FVA. A lawyer acting for an applicant for such a protection order must certify to the Court in the following terms:

> I certify:
>
> That I have advised the applicant that every affidavit that accompanies this application must fully and frankly disclose all relevant circumstances, whether or not they are advantageous to the applicant and any other person for whose benefit the order is sought; and
>
> That I have made reasonable enquiries of the applicants to establish whether the relevant circumstances have been disclosed, and to the best of my knowledge every affidavit filed in support of this application discloses all such circumstances; and
>
> That I am satisfied:
>
> a. that the application and every affidavit filed with it complies with the requirements of the Family Violence Act 2018 and the Family Courts Rules 2002;
>
> b. that the orders sought are orders that ought to be made.

[123] It seems clear that the purpose of this requirement is to impose on the lawyer a professional duty to act in a screening role to ensure that, viewed objectively, there are reasonably arguable grounds for the application being made. The lawyer is not able to rely solely on the fact of the client's instructions if those instructions are to file an application to the Court that is objectively unsupportable on the basis of the available facts and the applicable law.

[124] In terms of the Rules, this is an example of the application of the qualifying words "within the bounds of the law and these Rules" in r 6.

[125] The main, relevant requirements under the FVA for the making of an application without notice are that:

(a) the respondent has inflicted, or is inflicting, family violence against the applicant;[15] and

(b) the making of an order is necessary for the protection of the applicant;[16] and

(c) proceeding on notice would or might involve, for the applicant, a risk of harm or undue hardship.[17]

[126] The necessary implication of the duty Judge's minute quoted at paragraph [8] is that none of these requirements were met. This inevitably raises a question as to the basis on which the respondent provided her certificate to the Court.

[127] For r 2.3 to have been breached at that point, it would be necessary to find that the respondent "knowingly" assisted in making of an unmeritorious application. On the information available to me, that is not a finding I can make. As I will discuss later in this decision, the respondent's actions at that point appear to be a matter of lack of competence and professional judgement rather than intent.

[128] Separately, however, there is the matter of the ongoing pursuit of the application after the duty Judge had made clear that the application was not supportable on the basis of the material filed for Mr X at that point.

[129] Additional affidavit evidence was then apparently filed for Mr X. The minute made by the Judge when striking out the protection order application and the comments subsequently made by the Judge at paragraphs [41] to [45] of the costs decision are pertinent in that regard.

[130] The Judge considered that the continued failure to address the issue of whether any family violence was involved despite the Court expressly drawing the issue to the respondent's attention changed the character of the application from being merely ill-conceived to being vexatious. The Judge considered the respondent to have personal responsibility for that deficiency.

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[15] Section 79(a) of the FVA.
[16] Section 79(b) of the FVA.
[17] Section 75(1) of the FVA.

[131] The professional obligation of a lawyer in these circumstances is to honestly make her own assessment, on the information available to her, that there is an objectively reasonable basis for the arguable claim that Mr X seeks to advance, the arguable claim being factual allegations that arguably satisfy the criteria under the FVA.

[132] It is clear that the judge considered the respondent had failed to do this once her misjudgement in filing the application had been expressly drawn to her attention.

[133] In the arguably analogous context of the lodgement of a caveat against dealings with land, it has been found that "… it is self-evident that the lodgement of [a] caveat [is] done for the purpose of causing unnecessary inconvenience if there was no legitimate interest to be protected".[18] In my view, similar considerations apply, in terms of the application of r 2.3, where a lawyer assists in the ongoing pursuit of a protection order application where the Court has already determined there is no jurisdiction and where additional material filed for the Court's consideration does not address the jurisdictional impediment.

[134] In terms of the certificate the respondent must have given to the Court in the form set out in paragraph [122] above, it would seem to follow from the fact that the respondent was unable at any point to articulate an argument for the Court having grounds to make a protection order that she could not have satisfied herself at the time the application was lodged that the requirements of the FVA were met and that the order ought to be made.

[135] Aside from the Judge's findings and comments, several of the comments made by the respondent in response to the complaint and the review application give cause for additional concern about her approach to the FVA application.

[136] The first is the comment quoted at paragraph [35] above, which is evidently a criticism of the fact of the first applicant having obtained a protection order against Mr X. This can have had nothing to do with the alleged grounds for Mr X seeking a protection order against the first applicant. The implication of Mr X's application possibly having been made on a "tit-for-tat" basis is an obvious one.

[137] Secondly, there is the respondent's extensive critical commentary of the applicants' alleged behaviour, particularly in relation to alleged breaches of the first applicant's protection order, and the sweeping general comment about the applicants' "continuous retaliative legal battles against [Mr X]."

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[18] *BAB v PW* [2012] NZLCRO 68, at [30].

[138] I observe firstly that the respondent could not have had personal knowledge about any such matters and secondly that the making of such assertions does not assist me in avoiding reaching a conclusion that the respondent was knowingly assisting Mr X's misuse of the protection order procedure.

[139] In summary, I am guided by the Judge's express finding that protection order application was both vexatious and an abuse of the court process and by her critical comment about the respondent's role in the application being pursued despite its manifest defects being drawn to her attention, compounded by the respondent's subjective commentary on the applicants' alleged behaviour. In all circumstances, I consider that the respondent breached r 2.3 of the Rules in that the legal process of the protection order application was not used for a proper purpose.

[140] There is no judicial comment on the content of the affidavit evidence filed in Court, so there is no evidential basis for any finding of breach of r 13.8.1 of the Rules.

(g) Did the respondent act for Mr X in circumstances where she had a conflict of duty?

[141] The applicants alleged that the respondent had formerly acted for the second applicant and therefore had a conflict of interest. The respondent denied this. There is no evidence before me that the respondent ever represented the second applicant. This aspect of the complaint is not made out.

(h) Did the respondent fail to maintain her independence in the conduct of litigation?

[142] Rule 5 of the Rules provides that "a lawyer must be independent and free from compromising influences or loyalties when providing services to his or her clients". Rule 13.5 then provides that "a lawyer engaged in litigation for a client must maintain his or her independence at all times."

[143] The applicants alleged that the respondent had a friendship or other personal connection with Mr X and his then partner that compromised her independence in representing him. The respondent denied that there was any such friendship or other personal connection.

[144] In a hearing on the papers, I cannot make any factual finding in the face of such conflicting assertions. The applicants have not put forward any evidence of the suggested compromising friendship, however, and there is no other evidence before me of any circumstances that could reasonably give rise to a finding that the respondent's

independence was compromised. This aspect of the complaint is therefore not made out.

[145] I wish to emphasise that there is a clear distinction between independence and objectivity. The respondent's reasonably extensive commentary about incidents relating to the breaches or alleged breaches of the first applicant's protection order and her subjective expressions of opinion about the applicants' behaviour clearly indicate a lack of professional objectivity on the respondent's part.

[146] These matters are relevant to an assessment of the respondent's maintenance of professional standards but do not indicate a lack of independence.

[147] I find that there is no evidence of a breach of either r 5 or r 13.5 of the Rules.

(i) In providing legal services to Mr X, did the respondent act competently consistent with the terms of her retainer and the duty to take reasonable care?

[148] Rule 3 of the Rules provides that "in providing regulated services to a client, a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care."

[149] The authors of a leading New Zealand text on professional discipline make the following comments about professional competence:

> Being competent does not, in professional practice, preclude the making of mistakes … when the error is in the exercise of judgement or the interpretation of an uncertain, unclear, or complex provision, a lawyer cannot be said to be incompetent.[19]
>
> The concept of lawyer competence relates to the areas in which the lawyer practises. Competence does not necessarily require an exhaustive knowledge of the law or procedure in any particular area. It entails an ability to complete the work required in finding the relevant law and applying the relevant skills.[20]
>
> The standard of competence is an objective one. The question is whether the lawyer under scrutiny applied the care and skill that any reasonable employer in the same position would have done …. Competence is not simply taking care. It extends beyond this and includes diligence.

[150] At the time of the events in question, the respondent was a relatively inexperienced lawyer. She appears to have been qualified to practise on her own account for a year. I have no information as to the nature of her practice experience before establishing her firm.

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[19] Webb, Dalziel and Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, Lexis-Nexis, Wellington, 2016) at [11.3].
[20] Above, n 14 at [11.3]

[151] There are several matters evident from the materials that, in my view, call into question the professional competence of the respondent at the time of the relevant events in relation specifically to the making of applications under the FVA and more generally to Court procedure.

[152] I comment first on the more general issues of understanding of the judicial process and principles.

[153] I acknowledge that I have no information as to the terms of the respondent's retainer. In particular, I do not know whether the retainer was a general one to respond appropriately to the difficulties faced by Mr X in relation to the first applicant's protection order, or to advise on available legal remedies for what appears to have been a breach of Mr X's privacy, or to help safeguard by appropriate means Mr X's working role in the charity in which he worked, or specifically to apply for a protection order against the applicants.

[154] Consequently, I do not know whether the protection order application was made mainly on Mr X's instructions or mainly on the basis of the respondent's advice to Mr X. In either case, the respondent had a regulatory obligation to exercise reasonable care in the advice she gave to Mr X.

[155] Regardless of whether the respondent's advice was to use the protection order process to combat the first applicant's protection order or that applying for a protection order was an appropriate response to Mr X's concerns about his reputation with the charity being adversely affected by information posted on Facebook, the respondent's obligation was to exercise reasonable care in satisfying herself, advising Mr X and certifying to the Court that he had a reasonable argument that the criteria under the FVA for obtaining a protection order were satisfied.

[156] In doing so, the respondent needed to apply the care and skill that any reasonable lawyer in the same position would have done. She needed to find the relevant law and apply the relevant skills in relation to applicable provisions of the FVA that cannot reasonably be regarded as uncertain, unclear or complicated.

[157] It is plain from Court's minute on the strike-out application and from the costs judgment that Mr X did not have a reasonable argument, either on the facts or in law. As the Judge made clear, this could be excused as misunderstanding or misjudgement at the time the application was made but it could not be excused once the previous Judge had made clear there was no jurisdiction on the basis of the affidavit evidence initially filed. The Court held that the additional evidence did not cure the deficiency.

[158] In my view, it follows that in advising Mr X:

(a) at the time the application was initially made and the respondent provided her certificate to the Court; and

(b) at the time Mr X persevered with the application on filing fresh evidence,

the respondent did not apply the care and skill that any reasonable lawyer in the same position would have done and was therefore not competent.

[159] Next, there is the matter of the respondent's self-contradictory statements about her understanding of the burden of proof in protection order proceedings. The respondent seems to have advanced three different and irreconcilable positions in this regard.

[160] Her original position, in response to both the correspondence from the applicants' lawyer challenging the evidential and jurisdictional basis of Mr X's application and later the applicants' complaint, was that it was solely the task of the Court to determine jurisdiction and satisfaction of the statutory threshold for relief, and consequently not her responsibility as counsel to present a case.

[161] In adopting this position, the respondent either ignores or does not understand the basic precept that, regardless of the nature of the application made to the Court, the applicant always has the burden of establishing an arguable case.

[162] This would have been so even if the respondent had not provided a certificate to the Court in the form set out earlier in this decision. She does not appear to understand, in responding to the complaint, that in order to provide such a certificate, she must first form a professional opinion that there are grounds for the application and that the orders sought should be granted.

[163] She did appear to understand that principle at the time the application was made, as evidenced by her comment to the applicants' lawyer that "… the prospect of case is professionally assessed by the legal provider". (sic)

[164] Her second position, in response to the complaint, was that once Mr X's application and evidence were before the Court, it was the responsibility of the applicants' lawyer to establish that the applicants' conduct did <u>not</u> constitute psychological abuse and therefore family violence. Again, this seems to demonstrate a basic misunderstanding of burden of proof.

[165] Her third position, in response to the applicants' application for costs following the successful strike-out application and repeated in response to the complaint, was that

the Court was wrong to have held that there was no evidence of family violence so as to engage the Court's jurisdiction under the FVA.

[166] There are several problems with this stance. The first is that the respondent expressly argued that it was solely for the Court to decide whether it had jurisdiction and not for her to persuade the Court that this was so. The Court having done so, twice, it is self-evidently problematic for the respondent to seek to argue otherwise in response to a costs application.

[167] Secondly, there is the matter of the strike-out hearing that was initially set down for formal proof but in which the Court nevertheless allowed the respondent's agent to present argument. The costs judgment indicates that he had no argument to present. This implies that the respondent had not given her agent instructions regarding an argument to make.

[168] This is compounded by the respondent's unfortunate assertion that the Court "predetermined" the outcome of the application. Conflating her own failure to advance an argument for her client with the Court concluding that there was no argument to advance can only cast doubt on the respondent's competence at least in relation to applications of this kind.

[169] It appears that the Judge helpfully pointed the respondent in the direction of the Harassment Act and the Harmful Digital Communications Act as having possible application to the circumstances. It reflects poorly on the respondent's competence in the particular circumstances that she had not identified this herself but instead made an inappropriate application in the wrong Court.

[170] Separately, the respondent's apparent misunderstanding of the costs judgment is a matter of concern. She has submitted or insisted that the Court not only did not find the pursuit of the protection order application to be vexatious but also that it was affirmatively <u>not</u> vexatious, when the Court very clearly did decide that it was vexatious.

[171] The Court's additional finding that the application was also an abuse of court process appears to have escaped the respondent altogether, or at least not been acknowledged. The respondent appears to imply that because of the Judge's comment that the applicants' alleged behaviour "may" fall under the Harassment Act or the Harmful Digital Communications Act, Mr X's protection order application under the FVA was justified.

[172] The fundamental problem here in terms of competence is that despite now being represented by counsel, the respondent still does not seem to grasp, let alone acknowledge, that the appropriate legal response to poisonous and vituperative and/or

defamatory on-line social commentary is not an application for a protection order under the FVA.

[173] Counsel for the respondent submits that the respondent seeking to protect her client from continued harassment and derogatory online comments was a proper basis for the Court action. She also submits, in effect, that the Judge was wrong to find the application to be vexatious for one of the several stated factual reasons for doing so. I respect counsel's forthright advocacy for the respondent. The submissions are not tenable in the face of the Court's judgments, however.

[174] For all of the above reasons, I find that in pursuing this particular Court application for Mr X without arguable grounds, in doing so on a without notice basis without addressing the statutory criteria, in continuing to pursue it after its defects had been drawn to her attention by the Judge and in seeking to argue the merits of the application after it had been struck out when the sole issue was costs, the respondent failed to act competently and thereby breached 2.3 of the Rules.

(j) Did the respondent meet her duty to promote and maintain professional standards?

[175] Rule 10 of the Rules provides that "a lawyer must promote and maintain professional standards". This is something of a catch-all provision capturing sub-standard professional conduct that is often the subject of more specific provisions of the Rules.

[176] I find that the respondent breached r 10 of the Rules for all of the above reasons but particularly those set out in paragraphs [120] to [139] above and in the Court costs judgment regarding the vexatious and abusive nature of the application.

[177] I agree with counsel for the respondent that there is no merit in the applicants' argument that the respondent failed to comply with judicial directions.

[178] The matter of the failure to file, or late filing of, a notice of defence[21] is indeterminate. Until receipt of counsel's submissions, my understanding from the Court judgments was that Mr X's application was struck out mainly because Mr X did not defend it and that this was a procedural error on the respondent's part in that she did not file a notice of defence within the prescribed period. Consequently, the Court issued a minute setting the matter down for formal proof.

[179] Counsel has explained that the applicants' lawyer had not filed an affidavit in support of the strike-out application, the implication being that the respondent considered

[21] See [19] above.

she therefore did not need to file a notice of defence but that she did so once the missing affidavit was filed. Counsel submits there were procedural errors on both sides.

[180] Although I find the reasoning unconvincing, I have not seen the pleadings and consider it unnecessary to make any finding regarding the matter. The procedural error was of no detriment to the applicants. As I have already noted, the more important issue is that the respondent had no defence to present.

(k) Is there a proper basis for awarding compensation to either applicant by reason of any failure by the respondent to meet her professional obligations?

[181] The first applicant seeks an award of compensation representing the difference between her costs recovery from Legal Aid and the fixed fee she agreed with the applicants' lawyer. The second applicant appears to seek an award of compensation representing the amount of her costs funded by Legal Aid, implying that one of the conditions of her legal aid grant was an obligation to repay that amount.

[182] I agree with the approach taken by the Committee to this issue. It was ultimately Mr X, not the respondent, who pursued an unmeritorious application. The respondent's obligation was to advance Mr X's interests, even if she was misguided in her legal advice to him as to how best to do so and in her representation of Mr X.

[183] It is for the Court to make an appropriate costs order against an unsuccessful party. It has done so. Legal Aid bears that part of the resulting costs burden. The disciplinary process is not an opportunity, as the Committee put it, to provide a "top up to a costs order" where a party is not satisfied with the Court outcome.

[184] The reason the respondent has a shortfall to meet is that she agreed with her lawyer a fixed fee for dealing with an application that, by reason of the lawyer's robust representation, eventually did not go to hearing on the merits, as there were no merits.

[185] In all the circumstances, I do not consider there is any basis to make an order against the respondent for the payment of compensation to the applicants.

(l) What is the appropriate outcome of this review?

[186] I consider the Committee's attempt to prompt some self-reflection on the respondent's part and to encourage a more objective and dispassionate approach to professional engagement and to the conduct of litigation was commendable in intent but appears to have been signally ineffective and was not a sufficient response to the complaint in terms of the purposes of the Act.

[187] Nor has my prompt to the respondent to seek independent advice apparently resulted in her having any insight into the possibility that she might have had some degree of responsibility for the way in which this matter went so horribly wrong.

[188] I find that the respondent's breaches of rr 10.1, 13.2.1, 2.3, 3 and 10 of the Rules constitute unsatisfactory conduct under s 12(c) of the Act.

[189] With reference to the NZLS Penalty Guidelines for Standards Committees, I consider the respondent's conduct to sit at the high end of the "low" spectrum.

[190] I am required to consider all matters of aggravation and mitigation, including any submissions made in that regard.

[191] I find there is no evidence to support the first applicant's submission that the respondent's "… motivation has been to mislead the legal aid process for financial gain and for personal friends." In my view, for the reasons I have stated, the respondent's conduct has been a matter of lack of objectivity, competence and professionalism rather than improper motivation.

[192] I find also that the procedurally abusive nature of Mr X's application made on the respondent's advice has been dealt with by way of the Court's costs award.

[193] The respondent has argued at various times in response to the complaint that the applicants were in the wrong, their lawyer was in the wrong, the two Family Court judges were in the wrong and the judicial process is wrong. I have already described her initial response to the applicants' lawyer as being extremely improper. The overall approach of persistent denial continues to manifest in counsel's submissions.

[194] The High Court has commented that "… it is well settled that a lawyer's conduct in relation to the disciplinary process is relevant to the question of sanction, and can aggravate the original offending."[22]

[195] The respondent demonstrates no insight into her own errors of legal knowledge and poor understanding of Court process. Nor does she appear to recognise the impropriety of her persistent criticisms of the Court in responding to the complaint. These are matters of concern and, in the last case, an aggravating feature.

[196] Counsel has submitted three letters from supportive community organisations. These testify to her compassion, integrity, willingness and availability to help disadvantaged and vulnerable members of society and to their perception of her general

[22] *Orlov v The New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2014] NZHC 1987 at [190].

competence and professionalism in doing so. I accept these references and take them into account as matters of mitigation.

[197] The references provided indicate that the respondent's heart is in the right place. It is her judgement, competence and professionalism that have been found wanting.

[198] The obvious lack of competence in FVA matters does not necessarily indicate a lack of competence in her practice generally although the observations I have made about her understanding of burden of proof and Court process are cause for concern. I cannot determine on the facts of this one matter whether the issues of judgement and professionalism are generic to her approach to legal practice.

[199] I also give due allowance for the fact that the respondent is relatively inexperienced and that English does not appear to be her first language.

[200] The professional life of an inexperienced sole practitioner undertaking legal aid work can be challenging, unforgiving and unrewarding. Both the circumstances of the complaint and the manner of the respondent's response to it indicate to me that the respondent lacks professional support. Practising in challenging fields of law in isolation from colleagues is a hard row to hoe.

[201] I observe that the LSA includes provision for a legal aid provider's performance to be assessed by a performance review committee and that the Secretary for Justice has the power to require a provider to be supervised, to be mentored or to undergo training.[23]

[202] In making that observation and in noting that the Secretary for Justice receives a copy of this decision, I have no information as to the regularity with which the respondent undertakes legal aid assignments or as to the areas of law in which she is approved.

[203] I have jurisdiction to order the respondent to take advice as to the management of her practice and to undergo practical training or education. I consider an education order would be appropriate in relation to applications under the FVA and that an order for professional supervision would be appropriate in a form that contemplates that the Secretary for Justice might do something similar.

[204] All lawyers make mistakes. It seems to me the challenges for the respondent are to learn the relevant law, learn from her mistakes, engage professionally with others involved in the Court process and not be unduly defensive.

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[23] Reg 10 of the Legal Services (Quality Assurance) Regulations 2011.

[205] The applicants have expressly requested an apology from the respondent. An order for an apology to be made would normally be considered where a complaint is made by a client about a breach of duty owed by the lawyer to Mr X. This is not the situation here.

[206] In all cases, a Review Officer will exercise caution in ordering an apology to be made where there is no genuine recognition of fault. An apology that is inauthentic serves no useful purpose. As the High Court has observed, conduct in the course of the disciplinary process "…is assessed and brought to account in the evaluation of the likely efficacy of available penalty options …".[24]

[207] The respondent's refusal to take on board the Judges' comments and her insistence on review that everyone else was at fault and that the Court outcome was "… not because of inefficiency in the assessment of my client's case but rather time constraints and other technical reasons of the court", aside from being provocative, do not encourage me to think that the respondent will approach this decision with any greater level of acceptance.

[208] Further, I have no jurisdiction to order an apology to be made to a person who is not a party to the complaint, such as the applicants' lawyer or a Family Court Judge.

[209] The respondent commented in her submissions about the benefits of restorative justice and the need for issues to be resolved between parties for peace in the community in which they live. She also stated that she did not "have any personal opinions against the opposite parties." Her former client is deceased.

[210] The respondent may therefore wish to give due consideration to acting in accordance with her stated principles and to communicate accordingly both with the applicants and with their lawyer on a voluntary basis. I do not propose to order her to do so. (I note that there is nothing to indicate the applicants' lawyer is aware of the complaint).

[211] 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 be of average complexity. The respondent will pay costs accordingly.

Decision

[212] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the decision of the Committee is reversed.

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[24] *Sisson v The Standards Committee (2) of the Canterbury-Westland Branch of the New Zealand Law Society* [2013] NZHC 349 at [54].

[213] Pursuant to ss 211(1)(b) and 156(1)(b) of the Act, the respondent is reprimanded for her unsatisfactory conduct.

[214] Pursuant to ss 211(1)(b) and 156(1)(i) of the Act, the respondent is ordered to pay a fine of $2,500.00 to the New Zealand Law Society by 13 March 2024.

[215] Pursuant to s 210(1) of the Act, the respondent is ordered to pay costs of $1,200.00 to the New Zealand Law Society by 13 March 2024.

[216] Pursuant to ss 211(1)(b) and 156(1)(m) of the Act, the respondent is ordered to attend and complete the next available course offered by either the NZLS or the Law Association on or encompassing the law and practice relating to applications for orders under the FVA and to provide a copy of her certificate of attendance to the NZLS.

[217] Pursuant to ss 211(1)(b), 156(1)(l) and 156(m) of the Act, the respondent is ordered to arrange professional supervision on the following terms:

(a) she is to engage a local practitioner with at least 15 years private practice experience in civil and family court practice as a professional supervisor and to advise the NZLS of the name and contact details of the supervisor;

(b) she is to provide the supervisor with a copy of this decision;

(c) she is to engage with the supervisor no less frequently than monthly and to complete at least 20 hours of direct (in person) supervision within an 18-month period;

(d) the supervisor is to report to the NZLS six-monthly with a summary of the supervisory engagements and their general nature and of any recommendations made by the supervisor to the respondent;

(e) the respondent will meet any costs of or incidental to the required professional supervision;

(f) should the Secretary for Justice make any order for professional supervision, compliance with any such order may substitute in whole or in part for the above orders;

(g) leave is reserved to the respondent to seek clarification or further order from me regarding any aspect of supervision not expressly covered above.

[218] I recommend that the respondent make enquiry promptly of the NZLS. It may be that a local member of the Panel of Friends might be available to assist.

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

Publication

[220] 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.

[221] 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.

[222] 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 14TH day of February 2024

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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:

Ms RQ and Ms EP as the Applicants
Ms OM as the Respondent
Ms VF as the Respondent's Representative
[Area] Standards Committee [X]
New Zealand Law Society
Secretary for Justice.