

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

[2021] NZLCRO 23

Ref: LCRO 193/2019

CONCERNING

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

AND

CONCERNING

a determination of the [Area] Standards Committee

BETWEEN

CF

Applicant

AND

YL

Respondent

DECISION

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

Introduction

[1] Mr CF has applied for a review of a decision by the [Area] Standards Committee to take no further action in respect of his complaint concerning the conduct of the respondent, Ms YL.

Background

[2] The circumstances which led to Mr CF filing his complaints against Ms YL with the New Zealand Law Society Complaints Service (NZLS) are carefully set out in the Standards Committee decision, and I will just briefly touch on those circumstances here.

[3] Mr CF is the father of BF (B).

[4] B instructed Ms YL to act for him on an employment matter.

[5] As a consequence of ill health, B had been required to take an extended period of leave from his work. The Committee explained the causes of B's requirement for extended leave to be "a serious [redacted] infection and subsequent significant [other] health issues".¹

[6] B considered that his ability to return to work had been compromised by ongoing bullying he had suffered in the workplace.

[7] On completing a review of B's circumstances, Ms YL provided an opinion to B. She concluded that the threshold for establishing workplace bullying had not been met.

[8] Mr CF, clearly a caring and attentive father, had endeavoured to assist B in assembling and advancing B's employment case.

The complaint and the Standards Committee decision

[9] Mr CF lodged a complaint with the NZLS on 20 May 2019. The substance of his complaint was that:

- (a) Ms YL had failed to communicate effectively with B, particularly given B's [other] health disability; and
- (b) his attempts to communicate with Ms YL on behalf of his son had been frustrated by Ms YL; and
- (c) Ms YL had made no attempt to organise a "face-to-face" meeting with B.

[10] In providing response to the complaint, Ms YL submitted that;

- (a) she considered that she had communicated appropriately with B throughout; and
- (b) B had not made request of her to liaise with him through Mr CF; and
- (c) throughout the course of the retainer, no concerns had been raised either by B or Mr CF as to her method of communication with B; and
- (d) she was careful during the retainer to proceed with caution when considering what information could be disclosed to Mr CF, bearing in mind that B was her client; and

¹ Standards Committee decision (4 December 2019) at [2].

- (e) at no stage had she advised Mr CF that she could not communicate with him, but if request had been made of her that communications on behalf of the client were to be directed through Mr CF, she would have sought B's consent for that to happen; and
- (f) a colleague from her office had first met with B, and
- (g) her instructions were to peruse documentation and consider the possibility of advancing an employment claim; and
- (h) in her telephone discussions with B she had advised him of the documentation he would be required to provide in order to advance a claim; and
- (i) there had been some delay in her requests for information being responded to; and
- (j) on completing her initial opinion, she had invited B to meet with her to discuss how he would wish to proceed.

[11] Mr CF was provided with a copy of Ms YL's response to his complaint.

[12] In correspondence to the Complaints Service of 8 July 2019, Mr CF noted the following:

At the 10/10/2018 [Law Firm J] first meeting with SP he made a brief comment about two thirds of the way through the meeting that we (B and C) should consider setting up a Power Of Attorney for B. I (C) said that we would think about it. I assume SP made that comment because at that stage of the meeting he was aware of B's [other] health disability and possible lack of communication means. SP did not write that comment down on his hand-written notes and subsequent memo to YL according to her response where no mention has been made of that suggestion. None the less YL should have employed prudence and made that suggestion and discussed it in full as well given that she was very much informed about B's disability because she had a considerable amount of medical notes and certificates on the file outlining the situation and realising the privacy difficulties of communicating with myself (C) on behalf of B. The above comment indicates that a face-to-face meeting with B and myself should have been initiated by her and not B.

[13] The Standards Committee identified the issues to be addressed as whether Ms YL had communicated adequately and appropriately with Mr CF and B.

[14] The Standards Committee delivered its decision on 4 December 2019.

[15] The Committee determined, pursuant to s 138(1)(c) of the Lawyers and Conveyancers Act 2006 (the Act) that no further action on the complaint was necessary

or appropriate. The Committee concluded that any further action was unnecessary and inappropriate pursuant to s 138(2) of the Act.

[16] In reaching that decision, the Committee concluded that considerable effort had been made by Ms YL to ensure that she had necessary information to advise B. The Committee considered the opinion prepared by Ms YL to have been thorough.

Application for review

[17] Mr CF filed an application for review on 23 December 2019.

[18] He submits that “within the decision no indication was made in regard to the basis of the complaint that being the appointment of power of attorney”.

[19] By way of outcome, Mr CF indicated that he was uncertain “at this stage” as to what result he hoped to achieve through the review process.

[20] Ms YL was invited to comment on Mr CF’s review application.

[21] She advised that she placed reliance on the response and supporting documentation she had provided to the Complaints Service. She noted that Mr CF referenced an appointment of power of attorney as providing the basis for his review application. Ms YL stated that she had not been made aware of any power of attorney appointment, or received any documentation to this effect.

Review on the papers

[22] The parties were given indication that I considered that the review was suitable to be considered “on the papers” and provided opportunity to raise objection to the approach proposed. No objections were taken.

[23] This review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

[24] 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 I have concluded that the review can be adequately determined in the absence of the parties.

Nature and scope of review

[25] 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.

[26] 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.

[27] 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

[28] Mr CF raises one issue on review.

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].

[29] He notes that the Committee made no reference in its decision to what he described as the “basis of the complaint that being the appointment of power of attorney”.

[30] With every respect to Mr CF, his grounds of review are not particularly well articulated, but I take his complaint to be that the Committee failed to address complaint that Ms YL had neglected to take steps to have a power of attorney (POA) put in place for B. What he appears to be suggesting, is that Ms YL should have been proactive in taking steps to set up a POA.

[31] This concern is closely linked to the concern Mr CF had initially raised, that Ms YL had not communicated effectively with B.

[32] Whilst I do not consider that I am required to reconsider those aspects of the Committee’s determination that address the substance of Mr CF’s initial complaint as Mr CF on review, only identifies as a ground of review his concern that the Committee failed to address the issue of the POA, I have nevertheless in completing a careful appraisal of the file, considered all of the issues of complaint raised.

[33] Having done so and brought to that examination, as I am required to, a fresh and independent analysis of the Committee’s decision, I find myself in agreement with the Committee that Ms YL had done all she could to ensure that she had communicated appropriately with her client. I also agree with the Committee, that the opinion prepared by Ms YL was thorough and conscientious.

[34] Ms YL’s duties were owed to her client.

[35] In arguing that Ms YL should have followed up on the suggestion of her colleague that consideration be given to taking steps to execute a POA, Mr CF is suggesting that Ms YL would, if she had taken steps earlier to meet with B, have been alerted to the fact that B was not capable of managing his own affairs.

[36] But there is nothing on the file to suggest that B had become so incapacitated that he was incapable of providing instructions. His communications with his employer over a period of time were coherent and consistent. He was being supported.

[37] As Mr CF had a close involvement with his son’s employment dispute (he attended the initial meeting with Ms YL’s colleague), it could reasonably have been expected that if he considered that B’s condition had deteriorated to the point where it was necessary to have a POA put in place, that he would have alerted Ms YL to his

concerns and, more importantly, taken steps himself to traverse the possibility of having a POA executed.

[38] Decisions to implement a POA in circumstances where there is concern as to whether a family member is capable of managing their affairs are frequently difficult decisions for families to make.

[39] Mr CF's argument that Ms YL should have "employed prudence" and discussed the possibility of setting up a POA because of the medical information she had on her file, is argument that Ms YL should have taken steps to deal with serious issues of capacity that were manifesting.

[40] The material on the file before me does not give indication that B's medical circumstances were such that Ms YL should have been alerted to the possibility that her client was unable to provide her with instructions.

[41] Nor was it the case that Ms YL could compel her client to agree to his affairs being managed by an attorney. She had received no specific instructions from her client to take steps on his behalf to prepare a POA and nor had Mr CF's concerns about his son's ability to manage his own affairs reached the point where Mr CF had taken steps.

[42] Mr CF says that at the initial meeting with Ms YL's colleague Mr SP, Mr SP had made brief comment about the possibility of setting up a POA for B.

[43] I assume that this comment was made in the context of discussions surrounding B's [other] health issues, and Mr SP prudently and sensibly suggesting that consideration be given to setting up a POA, this to ensure that B's affairs could be effectively managed in the event that B was incapacitated.

[44] Mr CF's response to this suggestion is telling when considered in context of his complaint that Ms YL breached professional obligations by not advancing the POA issue further. Mr CF says that the issue having been raised, "I (C) said that we would think about it".

[45] The decision was, quite properly, left with the close family members best placed to ensure that B's interests were protected.

[46] It is difficult to see how Ms YL can be criticised for not taking steps to initiate further discussions around the possibility of organising a POA, when Mr CF himself was clearly reflecting on the question as to whether it was desirable or necessary to take those steps.

[47] I see no grounds which could persuade me to depart from the Committee's decision.

Anonymised publication

[48] Pursuant to s 206(4) of the Act, I direct that this decision be published so as to be accessible to the wider profession in a form anonymising the parties and bereft of anything as might lead to their identification.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed.

DATED this 19th day of February 2021

R Maidment
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr CF as the Applicant
Ms YL as the Respondent
Mr RP as a Related Person
[Area] Standards Committee
New Zealand Law Society