

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

[2022] NZLCRO 064

Ref: LCRO 113/2021

CONCERNING

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

AND

CONCERNING

a determination of the Auckland Standards Committee 1

BETWEEN

VN

Applicant

AND

**[AREA] STANDARDS
COMMITTEE [X]**

Respondent

DECISION

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

Introduction

[1] Mr VN has applied for a review of a decision by [Area] Standards Committee [X].

Background

[2] A lawyer who had been in practice for over 40 years files an application for an incarcerated client who is seeking bail to permit attendance at a family funeral. The application is to be heard by a judge (Judge A) who the practitioner has regularly appeared before over a period of some twenty years. The lawyer's journey to Court is briefly delayed by roadworks. He arrives at Court a few minutes late. In his absence, the presiding judge has dismissed the application. The lawyer makes request to have

the matter recalled. That request is denied. The lawyer advises the Court registrar to inform the Judge that he considers the application should be heard and informs the Registrar of his intention to make complaint about the judge's conduct. Arrangements are made to have the application heard (by another judge). These circumstances culminate in the unfortunate situation of an experienced judge, who has presided over courts located in a provincial area for many years, feeling it necessary to file a professional conduct complaint against a senior lawyer who had regularly appeared before him in those courts for over twenty years, and the lawyer responding with complaint to the Judicial Conduct Commission (JCC) about the conduct of the judge.

The complaint and the Standards Committee decision

[3] Judge A lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 22 September 2020. The substance of his complaint was that:

- (a) he had directed that an application for compassionate bail be set down before him at 9 am on 17 September 2020; and
- (b) Mr VN, (counsel on the matter) had been advised of the time that the application would be heard; and
- (c) when the application was called, Mr VN was not present; and
- (d) he subsequently had a message from Mr VN conveyed to him, the content of which was "... He had been held up by roadworks which were not his fault. He was demanding a hearing today and he was going to make a complaint to the Judicial Complaints Authority¹ regarding the situation"; and
- (e) he had discussed Mr VN's message with the executive judge who had shared his view that Mr VN's behaviour was "intolerable".
- (f) but irrespective as to concerns regarding Mr VN's conduct, the interests of Mr VN's client demanded that the bail application be heard; and
- (g) that application, heard before Judge B, was "poorly presented", and the application declined; and
- (h) his concern was the "grossly discourteous message passed to me at Mr VN's request".

¹ Mr VN's reference to the Judicial Conduct Authority is presumed to be intended to reference the Officer of the Judicial Conduct Commissioner.

[4] Judge A considered that Mr VN's message was not only discourteous, but also presented as an inappropriate attempt to threaten a judge in order to secure a particular outcome. Judge A believed that Mr VN's actions had potential to diminish a judge's reputation in the eyes of the Court staff.

[5] Of further concern to Judge A was his impression that the registry staff had "bent over backwards" to assist Mr VN.

[6] Judge A's complaint was put before the Auckland Standards Committee 1. Minutes of a Committee meeting held on Friday, 9 October 2020, record the Committee's decision to commence an own motion investigation pursuant to 130(c) of the Lawyers and Conveyancers Act 2006 (the Act).

[7] On 30 October 2020, the Complaints Service wrote to Mr VN advising of its intention to proceed an own motion investigation. The Committee enclosed a report, and invited Mr VN to respond to matters raised by the report.

[8] Mr VN responded on 2 November 2020. He considered that the complaint he had received contained a number of inaccuracies. He advised that he had made request for transcripts of the hearings that had proceeded before Judge A in the morning, and before Judge B in the afternoon. He also indicated his intention to refer the conduct of both judges to the Judicial Complaints Authority and questioned as to whether the Law Society should not await the outcome of that process, before continuing with its investigation.

[9] Mr VN provided a comprehensive response to the complaint on 19 November 2020. He prefaced his response with explanation as to why he had arrived late at the [Town C] Court on the morning of the 16th of September. He explained that he had set out from [Town D] with confident expectation that he would arrive at Court in time but had been delayed by roadworks. He explained that there was poor cell phone coverage on the route he travelled, but that in any event it was not his practice to use his cell phone when driving. On arrival at the [Town C] Court at around 9.04 am, Mr VN says he was informed by the Registrar that his application had been dismissed. He made request for the [City E] Registry to be contacted and for his application to be rescheduled but was informed that he would need to contact the Registry directly. On doing so, he was informed by the Registry that he would be required to file a fresh application. Mr VN says that he then made request of the Registrar to speak with Judge A and to ascertain as to whether the judge would give consideration to revisiting his decision to dismiss the application. These steps were taken in the context of Mr VN's concern that his application had to be addressed urgently if his client was to

have an opportunity to attend a family funeral. Mr VN informed the Registrar that it was his intention to make a complaint to the Judicial Complaints Authority as he considered the actions of the judge in dismissing his application to be “totally unacceptable in the circumstances”.

[10] Mr VN says that he was then advised that his application would be recalled and heard (in the [City E] Court) at 1 pm. The matter was heard by Judge B.

[11] In addressing the steps taken once the decision had been made for his application to be recalled, Mr VN complains that it was “extremely clear that Judge B had talked to Judge A and that at no time was there any prospect of my client’s compassionate bail application being granted”. Mr VN complains that what he considered to be inappropriate comments made by Judge B in the course of his decision indicated that “there was something else going on at the hearing of this bail application”.

[12] Mr VN’s response to the complaint then proceeds to address a number of issues not directly engaged by the complaint raised, in particular his assessment as to the merits of the application he was advancing.

[13] In concluding his response to the complaint, Mr VN submitted that:

- (a) his decision to advise the Registrar of his intention to lodge a complaint with the JCC was appropriate, and the minimum he was required to do in defending his client’s bail rights; and
- (b) it was his view that Judge A’s conduct was unacceptable conduct for a judicial officer; and
- (c) if Judge A’s complaint was advanced with purpose to intimidate him, that outcome had not been achieved; and
- (d) he would be pursuing complaints against both Judge A and Judge B with the JCC.

[14] After considering Mr VN’s response, the Standards Committee resolved to set the matter down for a hearing on the papers.

[15] The Committee issued its notice of hearing on 19 February 2021. The issues identified by the Committee (these issues being put to Mr VN with invitation to him to respond) traversed questions as to whether in advising his intention to lodge a

complaint with the JCC whilst demanding that a hearing proceed on 17 September 2020, Mr VN had:

- (a) failed to uphold the rule of law and facilitate the administration of justice or otherwise failed to act in accordance with his overriding duty as an officer of the court; and
- (b) threatened, expressly or by implication, to make any accusation against a person (for example a complaint with the JCC about Judge A or Judge B) or to disclose something about any person for any improper purpose; and
- (c) failed to treat others with respect and courtesy and/or promote and maintain proper standards of professionalism in his dealings; and
- (d) acted in a way that undermines the process of the court or the dignity of the judiciary, or otherwise failed to treat others involved in court processes with respect.

[16] On 21 February 2021, Mr VN provided the Standards Committee with a copy of a complaint that he had lodged with the Judicial Conduct Commissioner. To the extent that his complaint (dealing as it did with complaints made against two judges) specifically addressed the concerns which were the subject of the Committee's investigation, Mr VN provided further account of the events which had occurred on the morning of 17 September 2020, and reiterated his concerns at Judge A's decision to dismiss his application.

[17] On 23 February 2021, the Complaints Service made enquiry of Mr VN as to whether he intended to make submissions in response to the notice of hearing issued on 19 February. Mr VN was reminded that his submission was required to be filed by 12 March 2021.

[18] Mr VN responded on 1 March 2021. He expressed concern that the Committee was continuing with its own motion investigation. It was his view that the Committee should refrain from proceeding its investigation until such time as the Judicial Conduct Commissioner had opportunity to determine the complaints he had made against the two judges.

[19] It was Mr VN's view that informing a judge of an intention to refer a conduct complaint to the JCC, could never properly be the subject of a complaint to the Law

Society. Mr VN expressed concern that when he had raised this issue previously with the Committee, he had not received a response.

[20] A file note recording minutes of a Standards Committee meeting convened on Friday, 12 March 2021, notes that the Committee had concluded that it could see no valid reason to delay its own motion investigation, or to postpone the hearing that had been set down on the papers, pending the Judicial Conduct Commissioner's determination of Mr VN's complaint. The Committee's position was conveyed to Mr VN in the correspondence of 26 March 2021.

[21] Mr VN responded to the Committee's indication of its position on 28 March 2021. In that correspondence he:

- (a) repeated his concern as to whether the complaint could be properly investigated by the Committee, pending receipt of the Judicial Conduct Commissioner's findings; and
- (b) emphasised that he was well aware that it was not acceptable to threaten a judicial officer and rejected suggestion that he had done so; and
- (c) noted that he and other practitioners (unnamed) had considered referring Judges A and B to the Judicial Complaints Authority on numerous occasions.

[22] The Standards Committee delivered its decision on 28 June 2021.

[23] The Committee determined pursuant to s 152(2)(b) of the Act that there had been unsatisfactory conduct on Mr VN's part in terms of ss 12(b) and 12(c) of the Act, and that he had breached rr 2, 2.1, 2.7, 10, 12, 13.2 and 13.2.1.²

[24] The Committee did not accept Mr VN's submission that his indication of intention to lodge a complaint against Judge A could properly be characterised as "a statement of fact", and a "courtesy". It was the Committee's view that it was "utterly improper" to "tack on" to a request to a registrar to allocate a hearing, indication of intention to file a complaint.

[25] The Committee considered that the conduct undermined the processes of the court and the dignity of the judiciary, and that Mr VN's demand had potential to

² Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

undermine the integrity of the judiciary by creating an appearance that a threat to make complaint against a judge could influence the scheduling of a hearing.

[26] In turning its attention to appropriate penalty, the Committee concluded that Mr VN's previous history of behaving unprofessionally towards individuals involved in court processes, merited an uplift in the fine it had decided to impose.

Application for review

[27] Mr VN filed an application for review on 2 August 2021.

[28] In referencing his specific concerns with the Committee's decision, Mr VN submitted that:

- (a) the Standards Committee had "misstated" the situation; and
- (b) he had appeared before Judge A on many occasions over a period of many years and the Judge would be well aware that he would never attempt to "threaten" the judge; and
- (c) His indication that he would be making complaint to the JCC was not intended to be construed as a threat, nor did he consider it would have been perceived as such; and
- (d) as a senior practitioner, he considered Judge A's action in dismissing his application to have been disrespectful; and
- (e) his attempts to ascertain what process had been followed in dismissing his application had proved fruitless, and the absence of documentary evidence recording the steps that had been taken made him suspicious that there had been a "cover up"; and
- (f) the Committee lacked evidence to support the finding made; and
- (g) indication of intention to refer a judge's conduct to the Judicial Conduct Authority could never provide reasonable foundation for a conduct complaint to be made against a lawyer; and
- (h) the judge's "total disrespect" of himself as senior counsel, and the disregard shown for the rights of his client was intolerable; and
- (i) it was not the duty of counsel to accept a judge's ruling that was "clearly unacceptable"; and

- (j) the Committee's decision should be overturned on the basis of natural law, public policy and law; and
- (k) the Committee's decision should be made public.

[29] The Standards Committee advised that it did not seek to engage in the review.

Review on the papers

[30] 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.

[31] 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

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

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

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

... the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

³ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

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

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

[34] 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

[35] It is regrettable that this matter could not have been resolved by means other than recourse to the disciplinary process.

[36] But this is where it is.

[37] The issues to be addressed on review are:

- (a) Was the message passed to the Judge at Mr VN's request discourteous?
- (b) Did Mr VN fail to treat others with respect and courtesy and/or promote and maintain proper standards of professionalism in his dealings?
- (c) Did the message conveyed to the Judge threaten, expressly or by implication, to make accusation against a person (the judge) for an improper purpose or for any improper purpose?
- (d) Did Mr VN act in a way that undermined the processes of the court or the dignity of the judiciary or otherwise fail to treat others in court processes with respect?
- (e) Was Mr VN, in providing indication of his intention to file a complaint against Judge A, doing no more than exercising his right as a lawyer to

⁴ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

make complaint about the conduct of a judge in circumstances where he considered he had legitimate grounds to do so?

[38] There are a raft of conduct rules which directly address a lawyer's obligations to the Court.

[39] Overarching these rules, is a lawyer's fundamental obligation to uphold the rule of law and to facilitate the administration of justice. Closely allied to this is the overriding duty a lawyer owes, as an officer of the court, to the court. Those duties take precedence over the obligations a lawyer may owe to their client.

[40] On occasions, a lawyer's understandable and commendable determination to protect and promote their clients' interests may buttress up against their obligations as an officer of the court, but it can be, and is, expected of lawyers that they have a sound appreciation of their obligations as officers of the court.

[41] It is required and expected of lawyers that they understand that the privileged position they enjoy as members of the legal profession carries with it an absolute requirement to:

- (a) Conduct their dealings honestly;
- (b) Conduct their dealing with colleagues professionally,
- (c) Ensure that any dealings with third parties are conducted courteously,
- (d) Understand their duty of absolute honesty to the court and obligation to not act in a way that undermines the process of the court or the dignitary of the judiciary.

[42] In circumstances where it is alleged that a lawyer's conduct has failed to meet the obligations required under the conduct rules, or has breached overriding duties owed to the courts or to the justice system, it is critical to assess the conduct complained of by reference to context.

[43] It is also important to recognise that the conduct rules are not intended to provide an exhaustive statement of the conduct expected of lawyers, they set "the minimum standards that lawyers must observe and are a reference point for discipline".⁵

⁵ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, preface to Rules at page 3.

[44] The Court has observed that the conduct rules are to be applied as specifically as possible and applied as sensibly and fairly as possible.⁶

[45] Not every conduct breach (if established) demands a disciplinary response.

[46] In addressing the question as to whether Mr VN's communication with the judge was discourteous, it is necessary to consider the conduct rules that address a lawyer's obligation to engage with the court in a manner which falls under the general umbrella of "courteousness", and those rules which traverse a lawyer's obligations in respect to their engagement with members of the judiciary.

[47] Rule 10 provides that a lawyer must maintain proper standards of professionalism in their dealings.

[48] In referencing a general standard of professionalism, it has been noted that "it is desirable that rules of professional conduct be applied as specifically as possible, rather than requiring adherence to general standards that may be difficult to interpret and apply".⁷

[49] Rule 12 provides that a lawyer must, when acting in a professional capacity, conduct dealings with others, including self-represented persons, with integrity, respect and courtesy.

[50] Rule 13.2 provides that a lawyer must not act in a way that undermines the processes of the court or the dignity of the judiciary.

[51] Rule 13.2.1 provides that a lawyer must treat others involved in court processes with respect.

[52] I have emphasised that it is important when considering conduct complaints, to give attentive consideration to context.

[53] Mr VN filed his application on 16 September 2020.

[54] It was critical that the application be dealt with promptly.

[55] The application was filed in the [Town C] Court but, as there were no judges sitting in [Town C], the matter was set down to be heard in the [City E] Court. The earliest the application could be put before a judge was on the morning of the 17th of September.

⁶ *Wilson v LCRO* CIV 2016-404-00301 [2016] NZHC 2288.

⁷ *Q v Legal Complaints Review Officer* [2012] NZHC 3082, [2013] NZAR 69 at [59].

[56] Arrangements were made for Mr VN to attend the hearing remotely from the [Town C] Court.

[57] At this time, the Court was operating under level 2 COVID restrictions.

[58] A venue was organised to enable the hearing to proceed with the police prosecutor and Mr VN present. Those arrangements were made to ensure compliance with COVID protocols.

[59] On the morning of the 17th of September, prior to the hearing commencing, a member of the [Town C] Court staff attempted to make contact with Mr VN.

[60] A note on the Standards Committee file records that the staff member had phoned Mr VN several times, and “physically walked up the road to try and find him”.

[61] I am uncertain as to why Court staff were seemingly concerned that a lawyer would not arrive on time for an application being advanced by the lawyer to the extent that a member of the Court staff would consider it necessary to phone the lawyer several times, and to make attempts to physically locate the lawyer in the near environs of the Court, but what the steps taken to arrange the hearing and the steps taken to locate Mr VN indicate, is a very conscientious and courteous effort on the part of the Court staff to assist Mr VN.

[62] Mr VN arrived a few minutes late for the hearing.

[63] He was understandably concerned that his client’s opportunity to have his bail application heard had been thwarted by what Mr VN described as unavoidable delay which had directly resulted from his travel being disrupted by roadworks.

[64] The notes on the Standard Committee’s file recording the Court staff’s interactions with Mr VN following the decision made to dismiss the application, record that Mr VN had become upset with Court staff, and was demanding another hearing.

[65] I do not give any weight to suggestion that Mr VN had become upset with Court staff. The subject of this complaint is not focused on Mr VN’s interactions with Court staff, but rather his engagement with the judge.

[66] But it is reasonable to conclude (at no risk of being unfair to Mr VN), that he was upset that he had not been able to advance his application and that he was determined to make every attempt to have the application recalled.

[67] Those attempts culminated in the request that provided foundation for, and prompted, the judge's complaint.

[68] The member of the Court staff who had been liaising with Mr VN was asked by him to pass a message to the judge.

[69] As recorded by the staff member, the message was as follows:

Good morning Sir,

[VN] has asked me to pass the following message to you: He was held up this morning by road works which was not his fault. He has demanded a hearing today and he is also going to make a complaint to the Judicial Complaints Authority regarding this situation.

[70] There are two elements to the message which raise possibility of concern that Mr VN may have breached his obligations to engage courteously with the court.

[71] The first, is the apparent indication that Mr VN was "demanding" a hearing. The second, concern that Mr VN was using threat of lodging a complaint against the judge in an attempt to secure leverage to have his application reinstated.

[72] In explaining the steps taken to have his application recalled, Mr VN says that on learning that his application had been dismissed, he had spoken with the Registrar of the [Town C] Court and explained the reasons for him being delayed. He says that he was advised that he would need to speak to the [City E] Registry and proceeded to do so. He says that he made request of the Registrar to speak with the judge, and to convey his request that his application be recalled.

[73] As explained by Mr VN, his request was not advanced in the nature of a "demand", but rather as a request that emphasised both the unfortunate circumstances that had resulted in him being delayed, and his concern that efforts could not be made to accommodate an application that was critically important for his client.

[74] As noted, I cannot be certain on the evidence before me, that the request Mr VN made of the judge was couched in the form of a "demand", but I think it is reasonable to conclude that Mr VN adopted a robust approach in his attempts to secure a hearing.

[75] Permeating Mr VN's submissions is argument that he had been unfairly treated. The unfairness, in Mr VN's view, resulted from the judge's refusal to have immediately sanctioned his request to have his application recalled. It was Mr VN's view that the judge's failure to do so constituted not only an assault on his client's rights, but an affront to Mr VN's standing as a senior practitioner.

[76] Mr VN frames his response to the complaint in terms of argument that he carries no responsibility for the events that transpired. It is argument that implicitly suggests that either the judge should have waited longer before taking steps to dismiss his application, or that the judge should have reinstated the application immediately on being provided with explanation by him for his late arrival.

[77] Mr VN's concern that his application had been dismissed was understandable.

[78] If it was the case (as he argues it to be) that he was delayed as a consequence of circumstances beyond his control, it would be troubling for him that his client's position had been adversely compromised as a consequence of his failure to arrive at court on time.

[79] I accept that Mr VN had genuine concern that the judge had been somewhat peremptory in seemingly allowing little latitude for Mr VN's late arrival at court, but it is not open to either a Standards Committee or the LCRO to speculate as to whether the judge was too quick off the mark in dismissing the application. The application was scheduled to proceed at 9 am. Mr VN did not appear when the matter was called. The decision to dismiss the application was a decision open to the judge to make.

[80] When explaining the decision taken consequential upon Mr VN's non-appearance, the judge explained that as he was "occupied for the rest of the day I indicated that the application could not be heard". I infer from this that the judge, on concluding that Mr VN was not appearing, turned his attention to other matters that were pressing.

[81] There is no evidence on the file to indicate as to exactly when Judge A was alerted to Mr VN's concerns, but it is clear that it is unlikely the case that he was informed as to the circumstances of Mr VN's late arrival immediately on dismissing the application. The notes on the Standards Committee file recording the steps taken by the Court staff, indicate that on being advised that his application had been dismissed, Mr VN phoned the Court Registrar several times and left two messages for the Registrar. The Registrar explains that she endeavoured to call Mr VN back on his cell phone but was unable to reach him. When Mr VN did manage to make contact with the Registrar, he made request for his message to be conveyed to the judge. It presents as probable that by the time the message got through, the judge had turned his attention to other matters.

[82] On being advised that his application had been dismissed, Mr VN had a duty to do what he could to get the application reinstated. He could not be criticised for that.

[83] But the beating heart of Judge A's complaint was allegation that in partnering his request for a hearing with indication of intention to make a complaint to the JCC, Mr VN was overstepping the mark. The judge considered Mr VN's indication of intention to file a complaint to be "grossly discourteous", and a transparent and flagrant attempt by Mr VN to "get his own way".⁸

[84] A consideration of the question as to whether it was inappropriate for Mr VN to accompany his request for a rehearing with indication of his intention to file a complaint with the JCC, is critical to the analysis as to whether Mr VN's conduct presented at odds with his obligations to engage courteously (as an officer of the court) with the court, or reflective of an attempt by him to bully a judge.

[85] Mr VN's defence to allegation that his conduct was inappropriate can be concisely summarised. He argues that it can never be the case that a lawyer giving indication of an intention to file a complaint against a judge, could constitute conduct that could properly attract consideration of requirement for a disciplinary response. Mr VN correctly noted that a lawyer has a right to complain about a judge. The very purpose of the JCC is to provide a forum in which concerns about a judge's conduct can be raised.

[86] The office of the Judicial Conduct Commissioner was established in August 2005.

[87] The function and purpose of the Office is set out in section 4 of the establishing legislation,⁹ which explains the purpose of the Act as being to enhance public confidence in, and to protect the impartiality and integrity of, the judicial system, by:

- (a) providing a robust investigation process to enable informed decisions to be made about the removal of judges from office:
- (b) establishing an office for the receipt and assessment of complaints about the conduct of judges:
- (c) providing a fair process that recognises and protects the requirements of judicial independence and natural justice.

[88] It was Mr VN's view that the judge's decision to file a complaint presented as an unconscionable restriction on a lawyer's rights to make complaint about a judicial

⁸ Judge A complaint (23 September 2020).

⁹ Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004.

officer, and an unreasonable attempt by Judge A to restrict his freedom to raise his concerns about the judge's conduct. Mr VN emphasises that "we are all accountable and this includes judges".¹⁰

[89] Mr VN argues that his actions were reflective of a lawyer fulfilling their obligation to "uphold the dignity of the court by attempting to ensure it acts appropriately and respects people's rights".¹¹

[90] Judge A did not consider that Mr VN's indication of intention to file a complaint was reflective of Mr VN availing himself of a legitimate and genuine opportunity to exercise his rights to pursue a complaint to the JCC. He believed (and he says he is supported in his view by his brother judge) that Mr VN's advice, that he would be filing a complaint, was a transparent threat advanced with obvious intent to influence the judge into reinstating Mr VN's application.

[91] It is surprising that there should be such a marked degree of disagreement in views between experienced District Court judges, and a practitioner of Mr VN's seniority, on a question as to what constitutes appropriate protocol before the court.

[92] A useful starting point for a consideration as to whether Mr VN was simply exercising his rights, or behaving either discourteously or at worst in a threatening manner towards the judge, is an examination of the grounds for Mr VN's proposed complaint at the time he made request of the Court registrar to convey his concerns to the judge.

[93] It is compellingly clear, that the basis for his complaint at the time he gave indication of an intention to lodge a complaint, was, and could only be, accusation that Judge A had acted improperly in dismissing his application and refusing to reinstate it.

[94] That was it. There was nothing more to it at that point in time.

[95] It is difficult to see how a judge's decision to dismiss an application in circumstances where counsel for the applicant had failed to appear, could provide a reasonable and contestable basis for a lawyer to advance a complaint to the JCC.

[96] It is equally difficult to see how a judge's refusal to reinstate an application in circumstances where the application was dismissed on grounds of non-appearance, could provide fertile grounds for a complaint against a judicial officer.

¹⁰ Mr VN's response to the Lawyers Complaints Service (19 November 2020) at [21].

¹¹ Mr VN's review submission (2 August 2021).

[97] Decisions of this nature are part and parcel of a judge's daily work. The appropriate vehicle to challenge such decisions is through the appeal process. I appreciate that Mr VN's capacity to appeal the decision (or to file a fresh application) was restricted because of time pressures, but I do not consider that most lawyers would conclude that a judge's decision to dismiss an application (considered in context of the circumstances of this case) and subsequent indication of refusal to reinstate the application, would provide a reasonable foundation for filing of a complaint with the JCC.

[98] In my view, Mr VN's indication of intention to file a complaint was reflective more of his frustration at being denied an opportunity for his case to be heard, than it was a genuine indication of him having given careful attention as to whether he had reasonable and proper grounds to advance a complaint against Judge A.

[99] I am sustained in that view by an examination of the complaint that Mr VN eventually filed with the JCC. That complaint was filed four months after the events of 17 September 2021.

[100] Mr VN does not ventilate his complaint on the back of simple allegation that Judge A had dismissed his application and had refused to reinstate it. His complaint is considerably more expansive and includes complaint about the conduct of Judge B.

[101] Whilst Mr VN provides a background to the events of 17 September 2020 in his complaint to the JCC, the substance of his complaint includes allegation that:

- (a) Judge B's attitude to his application was "hostile"; and
- (b) Judge B had gone out of his way to criticise Mr VN's client and the application brought on his client's behalf; and
- (c) Judge A's decision to make a complaint to the Law Society was intolerable and was an attempt by the judge to bully him; and
- (d) his attempts to "get an account" of what had happened when his client's application was dismissed had been unsuccessful, and had prompted him to speculate that information had been removed from the court file; and
- (e) both judges had regularly appeared late for timetabled court proceedings; and

- (f) Judge B had no evidential basis for making extremely adverse comments about Mr VN's client; and
- (g) Judge B was prejudiced against Mr VN's client.

[102] It is instructive that when Mr VN formalised the complaint that he had signalled would be filed with the JCC on 17 September, his articulation of his complaint focuses in large part on his dissatisfaction with the manner in which Judge B had dealt with his client's bail application.

[103] To the extent that his complaint addresses concerns he had regarding Judge A's conduct, which were the "live" concerns at the time he informed the registrar of his intention to pursue a complaint against the judge, his complaint does little more than provide bare account of the fact that he was delayed in arriving at court, that Judge A had dismissed his application, and that he had been informed he would be required to file a fresh application.

[104] The substance of the complaint that was filed by Mr VN, focused on events consequential on the decision made by Judge A, rather than the decision itself.

[105] Reduced to its essence, Mr VN's argument at the time he signalled intention to file his complaint, was argument that Judge A should have accepted his explanation for his late arrival, and complied with Mr VN's request for the matter to be recalled. It is complaint that a judge's failure to comply with a request from counsel, provided legitimate foundation for counsel to advance complaint against the judge to the JCC.

[106] Mr VN may fairly have considered the judge's actions to have been unreasonable, and he clearly took the view that a request from senior counsel should have received a more accommodating response, but to the extent that his complaint to the JCC assists in providing clarification as to precisely how the judge's refusal to recall his application constituted evidence of judicial misconduct on the part of the judge, his account is confined to narrow explanation that he considered the judge's failure to reschedule a hearing to be "unacceptable".

[107] It is approaching the trite to emphasise that the concerns identified by Mr VN detailed at p [102] above raise serious issues. If a lawyer had reasonable foundation for concerns that information had been improperly removed from a court file (presumably on the instructions of a judge), that a judge had attempted to bully counsel, and that a judge had adopted a hostile and improper approach to the hearing

of a bail application, it would be entirely appropriate that these concerns be addressed to the JCC.

[108] But when Mr VN gave indication of an intention to file a complaint, none of the concerns identified above were in play.

[109] As noted, Mr VN's threat to lodge complaint must be examined by reference to the circumstances that had transpired prior to Mr VN advising of his intention to complain.

[110] And those circumstances were Judge A's decision to dismiss Mr VN's application and his rejection of Mr VN's request for the application to be reinstated.

[111] In my view, the message Mr VN asked to be conveyed to the judge was discourteous. It was a message that was indicative more of his personal annoyance than it was reflective of a careful and considered assessment as to whether there was reasonable foundation to issue threat of complaint.

[112] I agree with the Standards Committee that Mr VN's threat to make complaint was (considered in the context of the circumstances at the time the threat was made) unprofessional and discourteous, and as such constituted a breach of rr 10, 12 and 13.2.1.

[113] In emphatically rejecting argument that his indication of intention to lodge a complaint was intended to coerce the judge into reversing his decision, Mr VN emphasised that he was well aware from his lengthy experience of appearing in front of Judge A, that the judge was not a person who would be cowed or influenced by threat of complaint.

[114] I accept Mr VN's submission that he did not perceive Judge A as an individual who would readily acquiesce to a perceived threat, but it is difficult to conclude that Mr VN's linking of demand that his case be reinstated to indication of intention to lodge a complaint against the judge was not advanced with purpose to assert pressure on the judge.

[115] The Committee concluded that Mr VN's statement to the JCC that he did not consider that a decision would have been made to reschedule his case "if I had not given notice of my intention to refer his (Judge A's) conduct to the Judicial Conduct Commissioner", reinforced its view that Mr VN had issued a threat with purpose to achieve an outcome for his client.

[116] Whilst Mr VN maintains that his advice that he was to lodge a complaint was simply a “statement of fact” and a courtesy to the Court in that he was giving the Court notice of his intentions, his acknowledgement that he considered that threat of complaint had been instrumental in the judge’s decision to reconsider his position, reinforces that Mr VN himself considered that putting the judge on notice was a step that carried possibility of broader consequence than those that would result from mere courteous conveyance of advice as to his future intentions.

[117] In his response to the complaint of 19 November 2020, Mr VN submitted that “my advising of the Registrar that I would lodge a complaint with the Judicial Complaints Authority was entirely appropriate and the minimum I was required to do in defence of my client’s bail rights which of course have recognition under the Bill of Rights Act.” This would indicate that Mr VN viewed the option of lodging a conduct complaint, as a necessary stratagem in protecting his clients’ interests.

[118] Mr VN correctly emphasises that judges are accountable for their actions, and that it is important that judges’ conduct not be immune from scrutiny. But with every respect to Mr VN, his characterisation of Judge A’s complaint as an improper attempt to shut down legitimate criticism of the judge’s actions and his argument that it can never be the case that a lawyer’s indication of intention to lodge a complaint can provide proper foundation for a conduct complaint to be advanced against the lawyer, misses the point. Judge A’s complaint was not that Mr VN had exercised the right available to him to criticise a judge’s conduct. His complaint was that Mr VN had used the threat of complaint for collateral purpose.

[119] It is difficult to consider Mr VN’s threat of complaint in isolation from the steps Mr VN was taking to have his case recalled.

[120] The Standards Committee was satisfied that Mr VN’s cobbling together of demand for a hearing with advice that he was intending to file a complaint, constituted a threat for an improper purpose, such as to constitute a breach of r 2.7. I cannot disagree with that finding, although my sense of the matter is that Mr VN’s actions were more reflective of a somewhat impulsive and belligerent response to what he genuinely perceived to be was an unreasonable approach adopted by Judge A, rather than a conscious attempt to “threaten” the judge. But it is difficult to escape conclusion that Mr VN was raising threat of complaint to encourage the judge to reconsider his position.

[121] I am satisfied that the steps taken by Mr VN constituted a breach of his overriding duties as an officer of the court (r 2.1). I also agree with the Committee that the conduct reflected a failure on Mr VN's part to treat others involved in the court process with respect (r 13.2.1).

[122] I see no basis to interfere with the Committee's decision.

Costs

[123] Where an adverse finding is made, costs will be awarded in accordance with the Costs Orders Guidelines of this Office. Mr VN is ordered pursuant to s 210(1) of the Act to pay costs in the sum of \$900.00 to the New Zealand Law Society within 30 days of the date of this decision.

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

Anonymised publication

[125] 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 27TH day of June 2022

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 VN as the Applicant

[Area] Standards Committee [X] as the Respondent
New Zealand Law Society
Secretary for Justice