

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

[2022] NZLCRO 086

Ref: LCRO 114/2022

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 [X]

BETWEEN

WB

Applicant

AND

XD

Respondent

DECISION

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

Introduction

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

Background

[2] In 2020, Mr XD represented Mr WB in respect to family violence offences that Mr WB was facing in the District Court.

[3] Mr WB was dissatisfied with the representation he had received from Mr XD and filed a complaint with the New Zealand Law Society Complaints Service.

[4] In his initial complaint Mr WB identified a number of issues with the representation he had received, but the primary focus of his complaint was concern that Mr XD had failed to competently guide him through the sentencing process and that the strategy recommended by Mr XD would (if adopted) have resulted in a more serious outcome.

[5] As is customary, Mr WB's complaint was allocated a complaint number (21588) for administrative purposes, and the Committee commenced its investigation.

[6] The Committee delivered its decision in respect to complaint 21588 on 4 November 2021. The Committee determined to take no further action in respect to Mr WB's complaint.

[7] Mr WB sought to review that decision with the Legal Complaints Review Officer.

[8] I was the Review Officer tasked with conducting that review.

[9] On 25 February 2022, Mr WB lodged a further complaint with the Complaints Service raising further concerns about Mr XD. Mr WB described his second complaint as constituting an amendment to his prior complaint.

[10] The Committee opened a fresh complaint file (22988) and progressed its investigation of the further matters raised by Mr WB as a separate complaint inquiry.

[11] A review decision (LCRO 183/ 2021) was about to be issued when the LCRO received notification of an application filed by Mr WB to review the decision of the Standards Committee which had addressed matters raised by his second complaint.

[12] The Standards Committee's decision in respect to Mr WB's second complaint was issued on 29 June 2022 and delivered identical outcome to the first, in that the Standards Committee determined to take no action on the complaint.

[13] As the two complaints (and the subsequent review applications) had their genesis in the same set of circumstances (Mr XD's representation of Mr WB on family violence charges), I considered it appropriate to address the two review applications filed by Mr WB together.

[14] As a consequence, I am able to approach this second review without need to:

- (a) Comprehensively traverse the background to the complaint; or
- (b) Provide detailed explanation of the review process.

[15] The matters detailed at [14] above, are set out in LCRO 183/2021.

Mr WB's second complaint and the Standards Committee decision.

[16] Mr WB appeared in the [City] District Court on [Date] 2020.

[17] At the conclusion of the hearing, the Court issued a Protection Order in favour of Mr WB's wife and daughter. A copy of the order was served on Mr WB on [Date] 2020.

[18] Mr WB's second complaint focuses on concerns that Mr XD failed to adequately inform and advise him as to the consequences that flowed from the Court's decision to issue a Protection Order.

[19] On the 10th of March 2022, Mr WB emailed the Complaints Service. Mr WB advised that after having spoken to his lawyer, he had been informed that "it will cost \$2,000 to seek to have the Protection Order rescinded in the High Court. I would like to add restitution in this amount to my complaint".

[20] Mr XD was provided opportunity to respond to the second complaint.

[21] Mr XD responded on 12 April 2022. That response was provided to Mr WB and opportunity given to him to reply to it.

[22] The Standards Committee distilled the substance of Mr WB's complaint as concerns that:

- (a) Mr XD had failed to bring to his attention that the protection order was in place "indefinitely"; and
- (b) Mr XD had failed to seek instructions from Mr WB; and
- (c) Mr XD had failed to advise Mr WB as to the implications of the order, or options to address the order.

[23] The Standards Committee identified the conduct issue at the heart of the complaint as engaging a consideration as to whether Mr XD had failed to act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.

[24] In determining to take no further action on the complaint, the Committee concluded that:

- (a) the protection order was made following Mr WB's guilty plea; and
- (b) Mr XD had discussed the order with Mr WB in the context of discussions concerning the circumstances in which Mr WB would be permitted to return to the family home; and
- (c) Mr WB had been present in court when the order was made and had received a copy of the order; and
- (d) the order contained specific information detailing Mr WB's obligations, and information explaining steps that could be taken to modify, discharge or amend the order; and
- (e) costs involved in seeking to have the order discharged would have been incurred whenever such steps were taken.

Application for review

[25] Mr WB filed his application to review the Standards Committee decision (complaint 22988) on 21 July 2022.

[26] His application was supported by a statement of position, and a comprehensive submission he had prepared for the Standards Committee, when advancing his first complaint.

[27] Mr WB submits that:

- (a) the decision of the Standards Committee was "unfair and unreasonable";
and
- (b) he was unaware of the issues which prompted him to file his second complaint at the time of filing his first complaint; and
- (c) Mr XD had failed to bring up the matter of the protection order with him;
and
- (d) it was some months after the order was imposed that he was able to "understand what had happened" in respect to the protection order; and
- (e) whilst he had uplifted documents from the court which included the order that had been made, he had not realised the significance of the order;
and

- (f) in focusing its attention on the question as to whether Mr XD had failed to act competently, the Committee had erroneously shifted the onus for managing the situation with the protection order to Mr WB; and
- (g) if he had been cognisant of the fact that the order provided opportunity for Mr WB's wife to apply to have the order discharged, he would have had opportunity to discuss this option with his wife, and have her explore possibility of the order being discharged; and
- (h) discussions with a lawyer he had subsequently consulted, indicate that it would have been a "routine matter" to have the order discharged, but if steps were now taken to discharge the order, he would likely incur costs in the region of \$2,000.

[28] Mr XD was invited to comment on Mr WB's review application.

[29] In a response forwarded to the Complaints Service on 12 April 2022, Mr XD submitted that:

- (a) his ability to respond to the complaint was somewhat hampered as his file had been provided to a colleague Mr ZH in November 2020, in response to request from Mr WB for his file to be uplifted; and
- (b) the complaint filed was essentially a continuation of the complaint which had been previously raised and dealt with by the Standards Committee; and
- (c) the protection order was made pursuant to the provisions of sections 123A to 123H of the Sentencing Act 2022, following Mr WB's entering of his guilty pleas; and
- (d) Mr WB had received a copy of the order on [Date] 2020; and
- (e) it is a statutory obligation for a Judge or registrar of the court to explain the effect of the protection order to the recipient (section 123D); and
- (f) the statutory criteria in section 6(2) of the Family Violence Act 2018 had been clearly met in this case; and
- (g) correspondence he had forwarded to Mr WB provided clear evidence of him having reinforced to Mr WB the importance of compliance with the

anger management programme that had been directed consequential on the making of the protection order; and

- (h) Mr WB had terminated his instructions on 23 November 2020; and
- (i) the circumstances of the making of the order following the entering of the guilty plea, (part a of a decision which would allow Mr WB to return to his home), and the service of the order on Mr WB on the same day his bail was varied, gives clear indication of the fact that Mr WB was aware of the order and the obligations that arose for him as a consequence of the order being made; and
- (j) he had received no instructions from Mr WB to challenge the order or to appeal it, but in any event, no appeal could be lodged until after he was sentenced by the court; and
- (k) Mr WB had instructed Mr ZH prior to the sentencing being completed and it can only be assumed that Mr ZH had provided advice to Mr WB in respect of the protection order; and
- (l) Mr WB retained the option of applying to the Family Court to discharge the protection order if he saw fit.

Review on the papers

[30] The parties have agreed to the review being dealt with on the papers.

[31] Section 206(2) of the Act 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.

[32] 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.

Discussion

[33] At the core of Mr WB's complaint, is allegation that Mr XD failed to adequately discuss the implications for him of the Court making the protection order, and that this failure:

- (a) had consequence of Mr WB being unaware as to the steps that could be taken to modify or discharge the order; and
- (b) denied Mr WB opportunity to explore possibility that his wife may take steps to have the order discharged; and
- (c) if he had been better informed as to his options, steps could have been taken to have the order discharged which would have avoided the significant costs that would accrue if such steps were to be taken now.

[34] Permeating these concerns, is suggestion that Mr WB did not fully understand the consequences that followed from the Courts decision to subject Mr WB to a protection order.

[35] With every respect to Mr WB, I do not find that submission to be compelling. It is submission that is at odds with the abundant evidence of Mr WB having been a very engaged, articulate and informed client, who was acutely alert to the issues that were before the court.

[36] Mr WB was a client who was able (and he is to be commended for this) to form his own views as to what steps should be taken to advance his position. In his engagement with various individuals within the justice system, Mr WB indicated a capacity to express his point of view and advocate his position.

[37] In drawing these conclusions as to Mr WB's capacity to competently understand and independently respond to the various issues that arose in the course of the progressing of his sentencing matters, I have had the benefit of having opportunity to assess Mr WB's articulation of his position in two conduct complaints advanced by him.

[38] That opportunity has accorded me the benefit of acquiring not only a reasonably comprehensive understanding of Mr WB's view of the sentencing process, but also an insight into the extent to which Mr WB had been active in participating in the process.

[39] Mr WB says that whilst he received a copy of the protection order, it was some months after receiving the order that he first became aware of its implications and consequences for him.

[40] Whilst I cannot entirely discount possibility that Mr WB, following receipt of the order, remained oblivious to its consequences, that degree of apparent oversight does not present as consistent with the extent to which Mr WB appears to have become closely engaged in all other aspects of the sentencing process.

[41] I think it is most probable that Mr WB would have been aware of the implications of the order.

[42] The order was court directed.

[43] Section 123(d) of the Sentencing Act 2002 provides that, on making of a protection order, the Judge or registrar must explain to the recipient of the order:

- (a) the effect of the order and;
- (b) any direction to attend a program or engage with prescribed services made under section 188(1)(b) or (3)(b) of the Family Violence Act 2018.

[44] It is clear that Mr WB was aware of the requirements to attend the court-directed programme required under the protection order, and there is evidence of correspondence between Mr XD and Mr WB in which Mr XD reinforces and emphasises to Mr WB, the importance of compliance with the court-directed programme.

[45] Mr WB appears to suggest, when advancing his second complaint, that if he had been made aware of the fact that the order was in place for an indefinite period (an apparent oversight which he attributes to a failure on Mr XD's part to fully explain the implications of the order), he could have given consideration to having the order discharged. Mr WB explains his position as follows:

The order was subsequently in my court file, for which Mr XD was responsible. I never handled the file. Had Mr XD, in the one year period during which he was my lawyer, addressed the matter of the protection order with me, I would have realised that this was something which could burden my future actions and interests, and would have asked him to seek cancellation. That could have been done as part of his activities on my behalf, but now requires dedicated legal attention, with perhaps further liabilities that I have yet to fully understand, not having immediate access to legal counsel

[46] There are two difficulties with the argument advanced by Mr WB.

[47] Firstly, it presents as unlikely that the court would have entertained an application for Mr WB to have the protection order discharged prior to sentencing and it would have been potentially problematic for Mr WB to have advanced argument to the Court that the order should be discharged in circumstances where he was both awaiting sentence on serious charges, and desirous of remaining in the family home pending the sentencing outcome.

[48] Secondly, Mr WB appears to labour under the impression that if steps had been taken to discharge the order during the time that his matter was under Mr XD's stewardship, any costs that would or may have been incurred, would have been cost neutral to Mr WB, and somehow (in ways that are not explained by him) absorbed and assimilated into the costs that were being incurred on his sentencing matter.

[49] If Mr WB had determined that he wished to take steps to discharge the protection order, further costs would inevitably have resulted.

[50] It is difficult to imagine a situation, considering the circumstances that Mr WB faced, where a lawyer would be recommending that steps be taken to appeal or discharge the court-directed order prior to sentencing, but if Mr WB wished to pursue that option, this would have inevitably required his lawyer to carry out further and additional work.

[51] Another important factor that must be taken into account when considering complaint that Mr XD failed to adequately advise Mr WB on matters relating to the protection order, was that Mr WB terminated Mr XD's retainer, prior to sentencing.

[52] Mr ZH took over the matter from Mr XD.

[53] It would have been likely that Mr ZH would have discussed the implications of the protection order with Mr WB. There is no indication that Mr ZH was instructed to take steps to have the order discharged.

[54] Whilst I do not wish to speculate as to what advice may or may not have been given to Mr WB, if question arose as to whether it was prudent for Mr WB (or his wife) to have made application to appeal the order, I think it would have been probable that Mr WB would have been cautioned that an application to discharge prior to sentencing (taking into consideration the nature of the evidence that would necessarily have had to have been advanced to support the application) could have potentially compromised the sentencing outcome.

[55] That is not to say that consideration could not be given to Mr WB seeking to have the order being discharged under the relevant provisions of the Family Violence Act 2018, but such steps would, in my view, have likely been considered to have had greatest prospect of success after sentencing had been completed.

[56] Advice on future steps that could be taken, would have had most relevance for Mr WB, during the time he was represented by Mr ZH.

[57] I am not persuaded by the evidence provided, that Mr XD failed in his duty to provide competent representation to Mr WB.

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

Anonymised publication

[59] 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 22ND day of JULY 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 WB as the Applicant
Mr XD as the Respondent
Ms YF as a Related Person
[Area] Standards Committee [X]
New Zealand Law Society
Secretary for Justice