

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

[2022] NZLCRO 117

Ref: LCRO 119/2022

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

BETWEEN

FT

Applicant

AND

GS

Respondent

DECISION

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

Introduction

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

Background

[2] Mr FT was charged with dangerous driving causing injury.

[3] Mr GS, a barrister practising in [Town], was retained on legal aid to represent Mr FT. Mr GS was the second lawyer appointed to represent Mr FT.

[4] An issue critical for Mr FT was the question as to whether the vehicle he had been driving at the time of the accident had been driven with a deflated tyre prior to the accident occurring.

[5] Mr GS was required to file an application for amendment to the legal aid grant.

[6] In the course of representing Mr FT, Mr GS sought opinions from potential expert witnesses as to factors which may have contributed to the accident.

[7] The relationship between Mr FT and Mr GS broke down.

[8] Mr GS made application to the court for leave to withdraw as counsel for Mr FT. That application was granted.

The complaint and the Standards Committee decision

[9] Mr FT lodged a complaint with the New Zealand Law Society Lawyers Complaints Service (NZLS) on 10 December 2021. The substance of his complaint was that Mr GS:

- (a) had been incompetent, dishonest, and negligent in his representation of him; and
- (b) had incorrectly completed an application to amend his grant of legal aid and in doing so had acted contrary to his instructions; and
- (c) had misrepresented his case to the Legal Services Agency; and
- (d) had misrepresented his position in a submission to the District Court Judge at the case review hearing; and
- (e) had provided inaccurate account of the evidence of witnesses for the prosecution; and
- (f) had failed to protect or promote his interest; and
- (g) had behaved unethically.

[10] By way of remedy, Mr FT sought reimbursement of fees ultimately paid to private counsel instructed, reimbursement of fees paid to an expert witness, and compensation in the sum of \$150,000 for stress and anxiety. He sought direction that Mr GS be struck off.

[11] Mr GS provided response to Mr FT's complaint on 28 February 2022. He submitted that:

- (a) the memorandum for the case management conference had been prepared by the lawyer who had preceded him; and
- (b) no formal admission of erratic driving had been made at the conference; and
- (c) it would have been unlikely that he would have made concessions as to possibility of his client's driving being at fault in the course of the review hearing; and
- (d) he had commenced inquiry into the question as to whether a tyre on Mr FT's car had been deflated at the time of the accident; and
- (e) there was no evidence to support conclusion that he had failed to maintain professional standards.

[12] Mr FT responded to Mr GS's reply to his complaint on 7 April 2022.

[13] He submitted that Mr GS:

- (a) had failed to respond to complaint that he had failed to complete the amendment to the legal aid grant in accordance with Mr FT's instructions, and that lack of response could only properly be interpreted as indication that Mr GS accepted that he was at fault; and
- (b) characterising his driving as being "aggressive" and "erratic" presented at odds with the instructions provided; and
- (c) had failed to act in his best interest; and
- (d) had failed to competently represent him; and
- (e) failed to treat him with courtesy and respect; and
- (f) failed to promote his interests; and
- (g) breached his terms of engagement; and
- (h) brought the legal profession into disrepute; and
- (i) had formed a view that Mr FT's actions had contributed to the accident; and
- (j) had failed to provide the court with reliable information; and

- (k) had ignored the opinion of experts instructed; and
- (l) had provided an expert with false and misleading instructions; and
- (m) failed to fully and competently brief the experts instructed.

[14] The Standards Committee identified the issues for the focus of its investigation as being an inquiry into whether Mr GS had breached any duty owed to Mr FT by:

- (a) making a statement in support of an application to the Legal Services Agency for an amendment to the grant of legal aid that the defence case would be that “the defendant tried an aggressive but not dangerous manoeuvre and due to the flat tyre it went badly wrong”; and
- (b) repeating the statement at the case review hearing; and
- (c) describing to a potential expert witness the police case as being dependent on two passengers who described erratic driving, when that was not the evidence of one of the witnesses.

[15] The Standards Committee delivered its decision on 15 June 2022.

[16] 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.

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

- (a) Mr GS’s comments in correspondence with the Legal Services Commissioner did not adversely affect Mr FT’s ability to retain a legal aid grant or embarrass the defence available to Mr FT; and
- (b) there was no evidence of any dishonest intention on Mr GS’s part in his communications to the Legal Services Commissioner; and
- (c) there was no evidence that Mr GS had made a statement at the case management hearing that the defence case would be that the defendant had tried an aggressive but not dangerous manoeuvre; and
- (d) if Mr GS had misinterpreted instructions from Mr FT or had reached his own opinion that may have been unfavourable to Mr FT’s defence, that carried little consequence; and

- (e) submissions made at a case review hearing are not binding unless concessions are sought by the presiding judge; and
- (f) oral submissions by counsel at a review hearing did not constitute “evidence” that would be taken into account by the court should the matter proceed to trial; and
- (g) there was no evidence to support contention that Mr FT suffered any adverse consequences as a result of comments made by Mr GS; and
- (h) even if it was the case that Mr GS had, in the course of the case review hearing, referenced aspects of the driving conduct, this did not constitute a concession of driver fault; and
- (i) it was not persuaded that any of the concerns raised by Mr FT concerning the standard of service provided by Mr GS, required any further inquiry or a disciplinary response.

Application for review

[18] Mr FT filed an application for review on 19 July 2022.

[19] He submits that:

- (a) the Standards Committee had overlooked the fact that Mr GS had failed to correctly advise the court as to the nature of his defence; and
- (b) as a consequence of this oversight, he had lost faith in Mr GS’s ability to competently represent him.

[20] Mr GS was invited to comment on Mr FT’s review application.

[21] In a brief response forwarded to the Legal Complaints Review Officer (LCRO) on 15 August 2021, Mr GS submitted that:

- (a) in progressing the file, he had only got to the stage where he had received an early indication from experts in respect of the evidence of the under inflated tyre; and
- (b) a full brief of evidence was required to take the matter further; and
- (c) he ceased acting before that further investigation was possible.

Review on the papers

[22] This review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows the 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.

[23] 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

[24] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:¹

... 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.

[25] More recently, the High Court has described a review by this Office in the following way:²

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.

¹ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

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

[26] 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

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

- (a) Did Mr GS's application to amend the grant of legal aid misrepresent the instructions he had been provided by Mr FT?
- (b) Did Mr GS compromise Mr FT's case by providing inaccurate account of the grounds of Mr FT's defence to the District Court?
- (c) Did Mr GS fail to competently manage the evidence of witnesses instructed?

Analysis

Did Mr GS's application to amend the grant of legal aid misrepresent the instructions he had been provided by Mr FT?

[28] No.

[29] I agree with the Standards Committee that there is no evidence to suggest that Mr GS's correspondence with the Legal Services Commissioner compromised Mr FT's ability to secure a grant of aid, nor did that correspondence compromise any defence that could potentially be advanced for Mr FT.

[30] Mr GS's obligation was to outline the basis of the defence that would be advanced for Mr FT. There is no expectation of a lawyer that a legal aid application be supported by a complete account of the defence that is intended to be advanced.

[31] Mr FT's objection to the application lodged by Mr GS is that Mr GS advised that the issue of mechanical failure will be advanced as a factor in "contributing" to the crash, and will be advanced in conjunction with argument that Mr FT had attempted an "aggressive but not dangerous" manoeuvre.

[32] Couched in these terms, Mr FT interprets Mr GS's description of the defence as an egregious breach of the instructions provided (his view being that the problems with the tyre were the sole cause of the crash), and a submission that seriously compromised Mr FT's position that the accident was entirely caused by a tyre problem.

[33] These concerns are seen by Mr FT to be of such significance that he considers they provide proper foundation for allegation that Mr GS had acted dishonestly.

[34] Mr FT's concerns do not remotely approach the level of seriousness such as could reasonably provide foundation for serious allegation that a lawyer had acted dishonestly.

[35] Underpinning Mr FT's complaints is resolute conviction that problems with the tyre had caused the accident.

[36] But that position was by no means conclusively established at the point where Mr FT took over management of the file, nor was it established on the back of the brief views provided by the two experts consulted.

[37] Mr GS's assessment of the defence available (as reported to the Legal Services Commissioner) properly identified that a defence would be advanced on the basis of the argument that there had been a mechanical failure.

[38] Mr FT considerably overstates the case when he mounts robust objection to Mr GS's description of "an aggressive but not dangerous manoeuvre". Mr GS had formed a preliminary view of the case, but his application to the Legal Services Commissioner did not remotely compromise Mr FT's position.

[39] Nor was it the case that the architecture of Mr FT's defence was set in stone by the account of events provided to the Legal Services Commissioner.

[40] The application to amend the grant correctly identified the foundation of the defence as resting on argument that mechanical error played a part. It was not open to Mr GS to explain Mr FT's case as if the evidence was conclusive and settled. It would have been inappropriate for him to do so.

[41] What would have assumed significance for the Legal Services Commissioner, was that Mr GS's defence was not reliant solely on his client's view of events, but also supported by two experts consulted.

[42] I agree with the Standards Committee that Mr GS's application to amend the legal aid grant neither adversely affected Mr FT's ability to secure a grant nor

compromised his defence. I do not consider that the manner in which the application for amendment was framed, presented as a misrepresentation of Mr FT's position.

Did Mr GS compromise Mr FT's case by providing inaccurate account of the grounds of Mr FT's defence to the District Court?

[43] In addressing this aspect of complaint, it is important to recognise that the comments allegedly made by Mr GS to which Mr FT takes offence, were made at a case review hearing.

[44] As noted by the Standards Committee, a case review hearing is a preliminary step towards a contested hearing.

[45] It is contended by Mr FT that Mr GS neglected to advise the court that Mr FT considered that no aspect of his driving had contributed to the accident. It was his contention that the cause of the accident was 100% attributable to mechanical failure.

[46] Mr FT believes that Mr GS fundamentally misunderstood the basis of his defence and in doing so, compromised his case by allowing the element of driver fault to be brought into the mix.

[47] Mr FT considered that Mr GS had misrepresented his position to the court.

[48] He indicated to the Complaints Service that he would obtain a transcript of the review hearing, but there is evidence of that transcript having been provided to the Complaints Service.

[49] It may have been the case that Mr FT was unable to secure a copy of the transcript.

[50] Mr FT says that his recollection of events is supported by his mother who was present in court for the case review hearing.

[51] Mr FT provides a statement from his mother. The statement was considered by the Standards Committee.

[52] The statement provided is clearly drafted by Mr FT. It is in his handwriting.

[53] The statement provided records Mrs FT as being "appalled" to hear Mr GS submit to the court that "the issue was the extent of the driving conduct, thus "accepting that there was driver fault on the part of Mr FT". Further, Mrs FT expresses concern that Mr GS had failed to advise the court that argument that there had been no fault or error

on the part of Mr FT was “accepted”, and that an expert would be called to give evidence that the deflated tyre was the “cause of the crash”.

[54] If Mr FT wished to have his mother give evidence to the Standards Committee, it would have been preferable, in my view, if the statement had been directly prepared by Mrs FT, rather than drafted by Mr FT.

[55] Best practice would have been for Mrs FT to have confirmed her evidence in an affidavit.

[56] I accept that the statement provides record of Mrs FT’s recollection of events, but I am not satisfied that the evidence of either Mr GS or Mr and Mrs FT provides the necessary evidential foundation required which would enable me to make conclusive findings as to what was said to the Judge.

[57] It is Mr GS’s recollection, that no formal concession was made that there had been erratic driving. He says that if the experts he had consulted had considered that an issue with a tyre had been the primary cause of the accident, the experts would have told him so.

[58] Underpinning Mr FT’s complaint is accusation that Mr GS had undermined his defence before the court and had introduced argument that driver error may have contributed to the accident when it was clearly established that the accident was caused by a mechanical failure.

[59] The cause of the accident had been conclusively established at the time of the case review hearing. A strong possibility that problems with the tyre had been a contributing factor had been identified, but it could not be said at this stage in the proceedings that the deflated tyre was the sole cause of the accident.

[60] Mr FT was confident that the initial indications from the experts canvassed by Mr GS, would support argument that problems with the tyre had caused the accident, but the certainty of that position was not established at the time of the case review, nor was it the purpose of the review hearing to provide opportunity for definitive findings to be made.

[61] The brief reports provided by the experts who were proposed to be called to give evidence, was supportive of Mr FT’s position, but those initial indications fell well short of providing the degree of emphatic and conclusive assurance that Mr FT interpreted them to provide.

[62] I agree with the Standards Committee that there is no evidence to support contention that Mr FT had suffered any adverse outcome as a consequence of comments made by Mr GS.

[63] It bears repeating that the final shape of Mr FT's defence, and the evidence advanced to support that defence, would be marshalled and presented at the trial.

[64] Even if it was the case that Mr GS had misunderstood the position and failed to accurately explain the nature of the defence to the Judge at the case review hearing, an error of that nature would not automatically attract a disciplinary sanction.

[65] Mr GS notes that the case management memorandum had been prepared by the lawyer who had preceded him.

[66] I can see no possible reason as to why Mr GS should advance a position to the court that disadvantaged his client.

[67] If error was made, it was one that was readily capable of being rectified. There was ample opportunity to do so.

[68] Accusation that Mr GS had "grossly failed to maintain professional standards", that he had failed to act with "honesty and integrity", that he had attempted to conceal the "wrong that he had done", that he had "maligned" Mr FT before the Legal Services Agency, and that he had "brought disrepute to the legal profession" are, with every respect to Mr FT, accusations that present as quite disproportionate to the conduct complained of.

Did Mr GS fail to competently manage the evidence of witnesses instructed?

[69] I have carefully considered the limited evidence on the file pertaining to the enquiries made of the expert witnesses.

[70] Having done so, I am not persuaded that Mr GS's enquiries of those witnesses, or his representations to the court at the case review hearing concerning the results of his enquiries, raise any disciplinary issues.

[71] Responses received by Mr GS from the experts were preliminary and brief.

[72] Much more would have been required from those witnesses if the matter was to proceed to hearing.

[73] I agree with the Standards Committee that the inquiries made of the witnesses did not indicate a lack of competence or diligence on Mr GS's part.

Conclusion

[74] I have addressed in this decision the main concerns identified by Mr FT and in doing so, have considered all the matters raised in his initial complaint.

[75] Having done so, I am not persuaded that the complaints advanced by Mr FT concerning the standard of service provided by Mr FT require a disciplinary response.

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

Anonymised publication

[77] 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 31ST day of October 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 FT as the Applicant
Mr GS as the Respondent
Mr HR as the Applicants representative
[Area] Standards Committee
New Zealand Law Society