

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

[2021] NZLCRO 197

Ref: LCRO 13/2021

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

ZW

Applicant

AND

HN

Respondent

DECISION

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

Introduction

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

Background

[2] Mr HN is a former prisoner.

[3] He describes himself as a [redacted]. I take it from that, that Mr HN draws on the experiences he acquired over a period of time as a prison inmate, to assist him in advocating for prisoners' rights.

[4] Mr HN, in his personal capacity, has for some time been advancing a number of claims against the Crown. He is seeking compensation from the Crown for perceived failures on the part of the Corrections Service to ensure that it complied with legislation, regulations and policies governing the treatment to be accorded to prisoners.

[5] In 2013, Mr HN applied for legal aid to assist him with a civil claim he was intending to take against the Crown. Mr HN's claim related to what he described as inhumane treatment he had been subjected to by the Department of Corrections in 2011 and 2012.

[6] Mr HN's treatment had been the subject of investigation by the Ombudsman. The Ombudsman's findings were released in May 2016.

[7] Mr HN's application for legal aid was approved in 2013. Mr ZW was appointed to represent Mr HN.

[8] It was Mr HN's contention that from 2013 to September 2017, Mr ZW had made little progress in advancing his claim.

[9] Legal Services¹ conducted an audit of Mr ZW (in respect to the representation provided to Mr HN) and produced a report in December 2018. That report was critical of the representation that Mr ZW had provided to Mr HN.

The complaint and the Standards Committee decision

[10] Mr HN lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 25 March 2019. The substance of his complaint was that:

- (a) Mr ZW had failed to draft and file proceedings in an appropriate time frame; and
- (b) Mr ZW's failure to file proceedings in a timely manner had provided opportunity to the Crown to advance a Limitation Act defence.

[11] On Tuesday, 6 August 2019, Mr HN provided the Complaints Service with further information. This comprised a memorandum prepared on behalf of the Crown dated 29 July 2019. The memorandum was filed in support of an application for partial strike out of Mr HN's statement of claim.

[12] Mr ZW provided a brief response to Mr HN's complaint on 16 September 2019.

¹ The Agency responsible for administering legal aid grants is described variously in the submissions filed as Legal Services, the Legal Services Agency, and Legal Aid Services.

[13] He submitted that:

- (a) correspondence Mr HN had forwarded to him on 5 February 2019 amounted to extortion; and
- (b) the Committee should refuse to take action on Mr HN's complaint until such time as Mr HN's 5 February 2019 correspondence was concluded not to constitute an attempt to extort; and
- (c) Mr HN had previously advanced similar complaint to the Legal Services Agency which, following an intensive audit, advanced Mr HN's complaint no further; and
- (d) as Mr HN's complaint presented as a blatant demand for money, the Committee should decline to take further action until a decision had been reached by the courts; and
- (e) Mr ZW needed to take advice from his insurer.

[14] Mr HN provided a brief response to Mr ZW on 27 February 2019. Mr HN rejected suggestion that his complaint was improper. He reiterated his belief that a failure on Mr ZW's part to file proceedings until late 2017 had significantly compromised his case.

[15] On October 2019, Mr HN provided the Complaints Service with documents he had received from the Legal Services Agency. Mr HN said that those documents confirmed that:

- (a) on 16 January 2014, Mr ZW had been approved an interim grant of legal aid for 40 hours to "enable him to draft and file High Court proceedings"; and
- (b) it appeared to be the case that no work had been done by Mr ZW other than him submitting an invoice to Legal Services dated 28 May 2017, in which Mr ZW had claimed reimbursement for 39 hours work at \$149 per hour; and
- (c) on 15 September 2017, Legal Services had raised concerns with Mr ZW about the invoice he had rendered.

[16] Mr HN attached to his correspondence a report prepared by a specialist adviser who had conducted an inquiry into Mr ZW's management of the legal aid grant. That report was dated 29 June 2017.

[17] The Complaints Service forwarded Mr HN's complaint to Mr ZW on 23 July 2019.

[18] On 6 December 2019, the Standards Committee made request of Legal Aid Services (LAS) to provide further documents relating to the progressing of Mr HN's legal aid grant.

[19] On that same day, the Standards Committee forwarded correspondence to Mr ZW. The Standards Committee had resolved to inquire into the complaint and set the matter down for hearing on the papers. The Committee made request of Mr ZW to:

- (a) provide a substantive response to Mr HN's complaint; and
- (b) provide an explanation as to when the grant application was made and approved and any subsequent issues or circumstances that may have arisen including:
 - (i) the date any issues may have arisen; and
 - (ii) whether Mr ZW had been instructed by legal aid to cease work on the file whilst the issue of Mr HN's eligibility for legal aid was resolved; and
 - (iii) if so, when did that occur; and
 - (iv) if so, on what date was Mr ZW advised that legal aid was confirmed/reconfirmed; and
 - (v) what role had Mr ZW played in resolving the issue of Mr HN's entitlement to aid?
- (c) clarify when was the statement of claim filed; and
- (d) explain what work was done on the file from the grant of aid to the filing of the statement of claim?

[20] Request was made of Mr ZW to provide the information requested no later than 5 pm Monday, 6 January 2020.

[21] The notice of hearing issued by the Standards Committee, identified the following issues for consideration:

- (a) whether Mr ZW failed to act competently and in a timely manner by failing to file proceedings on behalf of Mr HN within a reasonable time; and
- (b) whether Mr ZW failed to obtain and follow Mr HN's instructions on significant decisions in respect of the conduct of litigation; and
- (c) whether Mr ZW's conduct in respect to any of the above matters could be considered as unsatisfactory conduct or misconduct under the Act.

[22] On 19 December 2019, Mr HN forwarded to the Complaints Service what he described as "very relevant documentation". He made request that it be included amongst the complaint evidence. Those documents were copied and forwarded to Mr ZW. That documentation related to an audit that had been conducted by the Legal Services Agency.

[23] Mr HN provided submissions in response to the Committee's notice of hearing on 9 January 2020. He submitted that:

- (a) Mr ZW had advised him prior to release of the Ombudsman's report, that he had a strong case to proceed against the Crown; and
- (b) the delay in the granting of interim legal aid had been occasioned by Mr ZW's delay in providing information to the Legal Services Agency; and
- (c) the statement of claim was not filed until 5 October 2017; and
- (d) he had repeatedly warned Mr ZW, that if the proceedings were not filed within six years of the cause of action, a Limitation Act defence could be available to the Crown; and
- (e) as a consequence of Mr ZW's failure to file proceedings expeditiously, he was denied opportunity to pursue legal remedy for "inhumane and tortuous treatment" he had received when a prisoner; and
- (f) the extent of the delay elevated the seriousness of the conduct complaint; and
- (g) Mr ZW had failed to meaningfully engage in the complaints process and respond to the complaint at an early stage; and

(h) Mr ZW had failed to express remorse for his errors.

[24] By way of outcome, Mr HN made request of the Committee to direct that Mr ZW be censured and ordered to apologise to Mr HN. Mr HN sought compensation in the sum of \$100,000. In the alternative, Mr HN submitted that the Committee may wish to give consideration to the matter being referred to the Disciplinary Tribunal.

[25] Mr ZW, through his counsel, filed submissions in response to the notice of hearing on 14 May 2020. It was submitted for Mr ZW that:

- (a) Mr HN had a history of filing proceedings late; and
- (b) in 2017 proceedings before Associate Judge Johnson, the Associate Judge had not referenced delays in filing the statement of claim having been caused by Mr ZW; and
- (c) claims advanced by Mr HN in 2017, were similar to those he had previously advanced before the court in 2011; and
- (d) extensions provided by the Complaints Service for filing of his submissions were reasonable; and
- (e) it remained Mr ZW's considered view that Mr HN's threat of complaint was extortionate; and
- (f) matters pleaded in Mr HN's 2019 amended statement of claim appear to have been considered in a 2011 judgment; and
- (g) it was for Mr HN to clarify and establish whether or not any alleged delay in Mr ZW's filing of a statement of claim was causative of the claim regarding Mr HN's detention between 15 June and 5 October 2011 being struck out;
- (h) Mr HN had other avenues to seek redress; and
- (i) the amount claimed by Mr HN cannot be awarded against Mr ZW; and
- (j) it was not appropriate to refer the matter to the Disciplinary Tribunal.

[26] On 18 May 2020, the Complaints Service emailed Mr ZW's counsel, expressing concern that the submissions filed by Mr ZW had failed to address the issues that Mr ZW had been asked to provide a response to in the Complaints Service's correspondence to Mr ZW of 6 December 2019.

[27] Mr ZW's counsel provided a further response on 27 May 2020. It was submitted for Mr ZW that:

- (a) on 4 March 2016, Mr ZW had discussed Mr HN's legal aid grant with a staff member at LAS; and
- (b) he had informed LAS that Mr HN had, in the course of a television interview, claimed to have been earning an income whilst in prison; and
- (c) this potentially raised issue as to whether Mr HN was entitled to a legal aid grant; and
- (d) as a consequence, Mr ZW was advised that no billable work was to be done on the file; and
- (e) these instructions had been confirmed in a file note recorded by Mr ZW; and
- (f) it was not until 7 January 2017 that LAS confirmed in writing to Mr ZW that legal aid was reconfirmed and that he could proceed with Mr HN's claim; and
- (g) the statement of claim was filed on 28 September 2017.

[28] Mr ZW provided a further response to Mr HN's complaint, which was forwarded to the Standards Committee by Mr ZW's counsel on 28 May 2020.

[29] In this response, Mr ZW submitted that:

- (a) a legal aid application was completed in February 2013 and filed; and
- (b) there had been some delays in approving legal aid; and
- (c) by January 2014, aid was granted on a provisional basis of 40 hours with work done until July 2015 (indicating that the statement of claim would be commenced); and
- (d) he had not kept regular timesheets, and did not commence doing so until January 2017; and
- (e) on 4 March 2016, he was contacted by an employee of Legal Aid who raised concern that Mr HN had claimed to be earning income while in prison; and

- (f) he had been informed that Legal Aid were proceeding enquiries, and that no billable work was to be done in the meantime; and
- (g) this resulted in there being no further retainer unless and until the legal aid issue was resolved; but
- (h) nevertheless, he had made request of another counsel to assist Mr HN; and
- (i) costs had been incurred by counsel instructed and Mr HN had refused to meet those costs, this resulting in loss to Mr ZW; and
- (j) accordingly, little further was done on the case in 2016; but
- (k) he had revived the case at the beginning of January 2017 even though the issue of legal aid was in limbo; and
- (l) subsequent to him recommencing work, further issues arose as to whether Mr HN was in receipt of income; and
- (m) the statement of claim was completed in 2017, but Mr ZW required a waiver of privilege for fees, an issue he communicated to Mr HN on 27 June 2017; and
- (n) documents were finalised for filing on 27 September 2017, and filed in the court that day; and
- (o) his communications with Mr HN throughout 2017 had been positive.

[30] The Standards Committee identified the issues to be considered as:

- (a) whether Mr ZW failed to act competently and in a timely manner by failing to file proceedings on behalf Mr HN within a reasonable time; and
- (b) whether Mr ZW failed to obtain and follow Mr HN's instructions on significant decisions in respect of the conduct of litigation?

[31] The Standards Committee delivered its decision on 3 December 2020.

[32] The Committee determined, pursuant to s 152(2)(b)(i) of the Lawyers and Conveyancers Act 2006 (the Act) that Mr ZW's conduct had been unsatisfactory.

[33] The unsatisfactory conduct finding was arrived at on the back of the Standards Committee's conclusion that Mr ZW's failure to file the statement of claim in a timely

manner constituted a breach of rule 3 of the conduct rules,² and amounted to conduct that fell short of the standard of competence and diligence that Mr HN, as a member of the public, was entitled to expect of a reasonably competent lawyer.

[34] The Standards Committee concluded that it was unable, on the evidence before it, to establish whether Mr ZW had failed to obtain and follow Mr HN's instructions on significant decisions relating to the conduct of the litigation.

[35] The Committee concluded that Mr ZW's conduct was at the higher end of the scale of unsatisfactory conduct.

[36] Mr ZW was censured and a fine of \$10,000 imposed.

Application for review

[37] Mr ZW filed an application for review on 25 January 2021. The outcome sought is that the unsatisfactory conduct finding and penalty are set aside.

[38] Alternatively, in the event that the LCRO does not consider it appropriate to set aside the unsatisfactory conduct finding, Mr ZW seeks a reduction of the fine and costs imposed by the Committee.

[39] Mr ZW submits that:

- (a) it remains uncertain as to whether Mr HN's complaint is time-barred; and
- (b) the Court of Appeal decision in *PF Sugrue Ltd v Attorney-General* [2004] 1 NZLR 207 is authority for the proposition that s 4(1)(d) of the Limitation Act has no application, and there is no statutory time limit in bringing a claim under the NZBORA; and
- (c) further case law supported the proposition that actions in the nature of those advanced by Mr HN may not be impeded by Limitation Act considerations; and
- (d) Sentencing Act principles should be applied when considering the appropriate penalty (fine); and
- (e) the Standards Committee had failed to provide justification for imposing a fine at the higher end of the scale; and

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

- (f) the Standards Committee had failed to consider the proportionality of the fine by reference to the gravity of the offending, but rather had allowed their “disapproval” to dictate the quantum of the fine.

[40] Mr HN was invited to comment on Mr ZW’s review application.

[41] He submits that:

- (a) Mr ZW’s application lacks merit; and
- (b) the Committee’s finding was amply supported by the evidence; and
- (c) the Committee’s conclusion that Mr ZW’s conduct was at the higher end of the scale of unsatisfactory conduct was supported by the evidence; and
- (d) imposition of a higher penalty would have been warranted; and
- (e) Mr ZW had expressed no remorse or proffered apology for his conduct; and
- (f) the Committee had considered Mr ZW’s submission that the Legal Services Agency (LSA) had asked him to cease work; and
- (g) the Committee had observed that the LSA had audited the services provided by Mr ZW, and had been critical of the representation provided; and
- (h) the Committee had noted that Mr ZW had failed to respond to repeated requests for information from the LSA; and
- (i) Mr ZW’s claim that Mr HN had made little or no inquiry as to the progress on his case, was contrary to the uncontradicted evidence before the Committee which confirmed the extent and degree to which Mr HN had been in contact with Mr ZW; and
- (j) the Committee would have been justified in imposing a higher penalty; and
- (k) the penalty imposed by the Committee should be increased; and
- (l) the LCRO should proceed with caution when considering interfering with the discretion exercised by a Standards Committee; and

- (m) the principal case cited by Mr ZW to support argument that the Limitation Act impose no time limits in respect to the Bill of Rights act 1990 claims, was decided under the Limitation Act 1950; and
- (n) the Committee had correctly noted that the relevant act was the Limitation Act 2010, section 11 of which imposes a limitation of six years in respect of BORA claims; and
- (o) consideration should be given to an award being made to compensate Mr HN for emotional harm, the costs of opposing the review, and loss of opportunity to obtain considerable financial compensation from the Crown in respect to the time barred BORA causes of action.

Hearing

[42] A hearing proceeded on Wednesday 27 October 2021.

[43] Mr ZW was represented by Mr IQ.

Nature and scope of review

[44] 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] (citations omitted).

[45] 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.

[46] 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.

Submissions at hearing

Mr IQ

[47] Mr IQ advanced argument for Mr ZW under four headings.

[48] Firstly, Mr IQ addressed the relationship between the Limitation Act and claims advanced under the New Zealand Bill of Rights Act 1990.

[49] In briefly referencing the approach the Courts have adopted in addressing the extent to which the opportunity to advance a claim for monetary relief under the Bill of Rights may be circumscribed in circumstances where there had been delay on the part of the party bringing the claim for relief, Mr IQ submitted that the Court retained a discretion to deny an applicant monetary relief although it may be prepared to grant a declaratory remedy. He submitted that the court would be flexible in considering whether a claim for monetary relief could be advanced in circumstances where there had been delay, particularly in situations where the claim involved accusation that a party's fundamental human rights had been breached.

[50] Secondly, Mr IQ submitted that the Committee's decision to censure Mr ZW was excessive and inconsistent with its decision to dismiss complaint that Mr ZW had failed to follow instructions. This was not a case, argued Mr IQ, where Mr ZW had been indifferent to his obligation to carry out his client's instructions.

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

[51] Thirdly, it was submitted that the fine imposed by the Committee was excessive. Mr IQ argued that Mr ZW was entitled to receive credit for his previous good disciplinary record. It was contended for Mr ZW, that a fine of \$1,000 would reflect a more proportionate response.

[52] In concluding his submission, Mr IQ indicated that Mr ZW took no issue with the Committee's costs order.

[53] It was put to Mr IQ in the course of the hearing, that the critical concern identified by the Committee, was the concerning delay in Mr ZW taking steps to prepare and file Mr HN's statement of claim.

[54] It was conceded by Mr IQ that the delay was unacceptable. However, Mr IQ argued that when considering the delay that had occurred in preparing the statement of claim, allowance should properly be made for the fact that the issues engaged were particularly complex.

Mr ZW

[55] Mr ZW, in providing further amplification of the arguments advanced by his counsel, submitted that:

- (a) whilst he accepted the costs order imposed by the Committee, the order was not inconsequential for him; and
- (b) the LCRO was not the appropriate jurisdiction to determine Bill of Rights issues; and
- (c) the censure order imposed by the Committee was a penalty of severe consequence and did not need to be accompanied by a fine.

[56] In responding to argument put to him that the delay in advancing Mr HN's claim presented as inordinate, Mr ZW argued that consideration needed to be given to the broader context. He maintained that Mr HN had, despite the restrictions that inevitably accompany a prison sentence, been able to maintain regular contact with him throughout.

[57] Mr ZW considered that Mr HN was an experienced litigant as opposed to a vulnerable client, and a litigant who had the necessary skills and experience to advance his own case. Mr ZW described Mr HN as a "very advantaged client in some ways". Mr ZW said that at times, he understood that Mr HN himself was assuming responsibility for managing the case.

[58] In providing explanation for the considerable delay that had occurred in finalising Mr HN's legal aid application, Mr ZW conceded that the progressing of the application had been leisurely. He indicated that the legal aid application had "sat there" but noted that the application had not been particularly exercising his or Mr HN's mind. Mr ZW submitted that Mr HN's claim did not fall into the category of matters as would for example, an application to prevent removal of children from the jurisdiction. The only reasonable inference that could be drawn from this submission, was that Mr ZW considered that Mr HN's claim was not of a nature that demanded urgent attention. This was a submission at odds with the representation made by Mr ZW to the Legal Services Agency (noted in the audit report) where Mr ZW himself had acknowledged that delay in advancing the claim could result in the claim facing Limitation Act issues.

[59] Mr ZW was provided opportunity to expand on his argument that the progressing of Mr HN's claim had been delayed for a considerable period of time as a consequence of the Legal Services Agency instructing him to refrain from working on Mr HN's file, whilst the Agency made inquiry as to whether Mr HN had received income from undisclosed sources.

[60] Mr ZW explained that he had been contacted by a member of the Agency's staff, who had advised that Mr HN's financial circumstances were being investigated. Mr ZW explained that the Legal Services Agency had denied knowledge of this conversation having taken place. It was Mr ZW's view that in denying knowledge of the conversation, the Agency was endeavouring to protect its own position.

[61] Request was made of Mr ZW as to whether he had a record on his file of any communications with Mr HN in which he had either advised Mr HN of the concerns that had been raised or sought clarification from Mr HN as to whether Mr HN had received income from any sources during the relevant period which could have potential to compromise his legal aid application.

[62] Mr ZW had no record of having communicated with Mr HN to discuss the concerns raised by the Legal Services Agency.

Mr HN

[63] Mr HN submitted that:

- (a) an audit report prepared for the Legal Services Agency which had closely scrutinised Mr ZW's performance in managing Mr HN's file, provided a damning assessment of Mr ZW's management of Mr HN's case; and

- (b) Mr ZW's failure to progress the file in a timely manner had compromised Mr HN's ability to seek compensation for the full period of time for which was entitled to seek compensation; and
- (c) the statement of claim eventually filed by Mr ZW was, almost in its entirety, a replication of a draft statement of claim that Mr HN himself had prepared and forwarded to Mr ZW; and
- (d) Mr ZW was alerted to concerns that Mr HN's claim could confront Limitation Act issues if the claim was not expeditiously progressed; and
- (e) Mr ZW had made numerous representations that he was on the verge of filing Mr HN's statement of claim but never did so; and
- (f) he felt badly let down by Mr ZW; and
- (g) he was concerned that Mr ZW had never expressed remorse for his abject failure to advance his case; and
- (h) the fine imposed by the Committee reflected the seriousness of the conduct breaches; and
- (i) the Committee should have imposed a higher fine, or given consideration to Mr ZW's conduct being referred to the Disciplinary Tribunal; and
- (j) Mr ZW's argument that his history of having no previous disciplinary issues did not serve to mitigate his position, but rather reinforce that more could have been expected of him.

Analysis

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

- (a) Was the Committee correct in concluding that Mr ZW's conduct had been unsatisfactory?
- (b) If the answer to (a) is yes, were the penalties imposed by the Committee appropriate?

Was the Committee correct in concluding that Mr ZW's conduct had been unsatisfactory?

[65] Mr ZW takes no serious challenge to the Committee's unsatisfactory conduct finding.

[66] His submissions focused primarily on argument that the penalties imposed were unduly harsh.

[67] To the extent that Mr ZW touched the edges of argument that his conduct had not been unsatisfactory, Mr ZW suggested that it was his understanding throughout that Mr HN himself would assume a degree of responsibility for advancing the case. Mr ZW did not explain precisely how this arrangement was intended to work, but his depiction of Mr HN as a person experienced in litigation matters (which it appears he was), and his advancing of argument that Mr HN was not a vulnerable client, appeared to suggest that Mr ZW had expectation that if he himself did not get on with the job, Mr HN would.

[68] None of these arguments assisted Mr ZW. To the contrary, they diminished his position. They reflected a casual indifference on the part of Mr ZW to his fundamental obligation to advance and protect the interests of his client.

[69] Mr HN argued that Mr ZW's conduct had been so egregious, that it would have been appropriate for the Committee to have referred Mr ZW to the Disciplinary Tribunal.

[70] In advancing argument that the penalties imposed by the Committee were inadequate to reflect the seriousness of the conduct breaches, Mr HN argued that he had suffered a loss of opportunity as a consequence of Mr ZW failing to advance his claim expeditiously.

[71] It was Mr HN's view that as a consequence of delay in lodging his statement of claim, he was unable to seek remedy for harm he contends he had suffered over a period of approximately five months.

[72] It was Mr HN's contention that the Court has made a finding on the limitation issue and determined the extent to which his claim was time barred.⁵

[73] It is not the role of Review Officer to determine issues as to whether a civil claim is compromised by Limitation Act issues.

[74] Mr HN's claim is ongoing. He advises that a hearing is scheduled to proceed in the High Court in February 2022. It is in that jurisdiction that Mr HN's claim will be properly determined.

[75] His claim for compensation, and the extent to which that claim has been compromised by delay, is properly addressed in the proceedings that are before the Court, or alternatively, in proceedings advanced in a negligence claim.

⁵ *HN v Attorney General*, CIV XXXX-XXX-XXX, [XXXX] NZHC XXXX, [redacted].

[76] Whilst I consider that Mr ZW's conduct (for reasons which will be later explained) was at the high end of unsatisfactory, it did not in my view, reach the threshold that would necessitate a referral to the Disciplinary Tribunal.

Were the penalties imposed by the Committee appropriate?

[77] The focus of Mr ZW's application was on argument that the penalties imposed by the Committee were excessive.

[78] The starting point for any penalty assessment must be the seriousness of the conduct under consideration.⁶

[79] Consideration must then be given to any aggravating or mitigating features, both in relation to the conduct itself or the practitioner.

[80] When considering conduct complaints in a disciplinary context, mitigating factors personal to the practitioner cannot outweigh considerations of public protection, and as a consequence, may not be given as much weight as they would, for example, in the context of sentencing in the criminal jurisdiction.⁷

[81] It is rare for a Review Officer to interfere with penalties imposed by a Committee. A Review Officer will not engage in "tweaking" orders. In order for a Review Officer to interfere with a fine imposed, the Officer must be satisfied that there are demonstrable issues with the penalty order that merit intervention.

[82] When determining an appropriate penalty by way of fine, a Standards Committee is exercising its discretion. There is no formula by which to calculate the appropriate level of a fine. As such, this Office would have to have good reason to interfere with the exercise of that discretion. That said, the expectation of this Office is that it will form its own independent opinion.

[83] There do not tend to be comparable cases in disciplinary proceedings because of the wide range of conduct that can be subject to such proceedings and because of the relevance of wider factors, making each case very fact-specific.⁸

[84] In this case, the conduct issue is sharply focused.

[85] The complaint was that Mr ZW had failed to diligently advance Mr HN's claim.

⁶ *Hart v Auckland Standards Committee 1 of the New Zealand Law Society* [2013] 3 NZLR 103.

⁷ *Bolton v Law Society* [1994] All ER 486 at 492.

⁸ *Deliu v National Standards Committee and the Auckland Standards Committee No 1* [2017] NZHC 2318 at [165].

[86] In providing regulated services to a client, a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.⁹

[87] Unsatisfactory conduct includes conduct of a lawyer that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.¹⁰

[88] Mr ZW accepts that there had been considerable delay in advancing Mr HN's claim. There is little room for him to argue otherwise. Mr HN completed a legal aid application in 2013. Mr ZW completed his part of the application in February 2013. Legal aid was granted in January 2014. Mr HN's statement of claim was filed with the Court on 27 September 2017.

[89] In considering the delay issue, the Standards Committee had before it as noted, an audit report which had closely examined the progressing of work on Mr HN's legal aid file from the time instructions were provided to Mr ZW, to the date the statement of claim was filed.

[90] The audit report is wide-ranging.

[91] Whilst that report understandably focuses on the process by which Mr HN's application for legal aid had been managed, the report provides a comprehensive account of the steps that had been taken by Mr ZW to progress Mr HN's claim subsequent to the grant being approved.

[92] Mr HN claimed that his human rights had been breached during time he had been an incarcerated.

[93] The starting point for Mr HN was to commence his proceedings with the filing of a statement of claim.

[94] It could be expected that this statement of claim would:

- (a) Identify the conduct which Mr HN contended had breached his human rights; and
- (b) Identify the legal foundation for the claim.

[95] It was submitted for Mr ZW that the matter was particularly complex.

⁹ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 3.

¹⁰ Lawyers and Conveyancers Act 2006, s 12(a).

[96] I accept that the claim was not straightforward, but Mr ZW was a very experienced practitioner. It is difficult to envisage circumstances where the argument of complexity would justify a delay of three years in filing a statement of claim.

[97] Much of the work would require Mr HN to establish an evidential foundation for his claim. This would require him to particularise the specific conduct and circumstances which would establish and support Mr HN's contention that his rights had been breached.

[98] The work involved in laying this foundation would be significant and time consuming. But Mr ZW had the benefit, as he himself acknowledges, of a client who was experienced and proficient in arguing for prisoners' rights. This was not the first occasion Mr HN had challenged the Corrections Department. He was able to provide Mr ZW with a statement of claim in draft. As noted, it was Mr HN's contention that the statement of claim eventually filed by Mr ZW, substantially replicated the work that Mr HN had provided in his draft. I cannot on the evidence before me draw any conclusion as to the extent to which the statement of claim filed presented as being largely the product of Mr HN's endeavours, but I am satisfied that Mr HN provided substantial assistance to Mr ZW in organising and preparing the evidential foundation for the claim.

[99] I do not consider that Mr ZW's argument that the claim was complex, mitigates the demonstrable failure on his part to advance Mr HN's claim.

[100] The audit report identifies a number of aggravating factors. These include:

- (a) The unacceptable delay in finalising Mr HN's legal aid grant.
- (b) The repeated failure on Mr ZW's part to respond to requests from Legal Aid Services to provide, or clarify, information to enable Mr HN's application to progress.
- (c) Mr ZW's acknowledgement of the need to progress the claim to avoid potential limitation issues.
- (d) Mr ZW's repeated failure to respond to requests to advise on the progress of filing the statement of claim.
- (e) Mr ZW's frequent representations that work on the statement of claim was in hand and progressing when that was clearly not the case.
- (f) Mr ZW's failure to respond to concerns that the lack of activity on the file was concerning.

[101] Mr ZW submitted that part of the explanation for the delay, was attributable to instructions he says he received from Legal Aid to refrain from continuing to work on Mr HN's file, until investigations were completed into establishing whether Mr HN was receiving income that had not been disclosed in his legal aid application.

[102] I accept Mr ZW's evidence that a conversation took place (he has a file note recording the conversation) but the Legal Services Agency say that they have no record of a staff member having a conversation with Mr ZW in which there was a discussion about him holding off on doing further work.

[103] However, it could reasonably have been expected of Mr ZW that if there was obstacle (as he says there was) to Mr HN being able to continue to proceed his claim on legal aid, that he would have immediately taken steps to inform Mr HN of the problem, and that he would be able to produce evidence to show that he had followed up on what clearly would have presented as a potentially serious impediment to Mr HN's ability advance his claim.

[104] Mr ZW argued that the Committee's decision to take no further action on complaint that Mr ZW had failed to follow instructions, was a factor to be taken into account when considering the broader context of the conduct complaint.

[105] Mr ZW submitted that the Committee's finding that he had not breached his obligations to follow instructions, reinforced his argument that preparing the statement of claim was a complex task.

[106] Whilst I do not propose to interfere with the Committee's finding on the question as to whether Mr ZW had failed to follow instructions, in my view it would not have been surprising if the Committee had concluded, on the evidence that was before it, that Mr ZW's delay in advancing the legal aid application, his lengthy delay in attending to filing the statement of claim, and his persistent failure to respond to requests made of him to provide information, constituted a failure to follow instructions.

[107] I do not consider that the Committee's decision to take no action on this aspect of complaint ameliorates in any degree the approach to be taken to an assessment as to whether the penalties imposed by the Committee consequential on its single finding of unsatisfactory conduct, were appropriate.

[108] The factors that elevated Mr ZW's conduct to the more serious end of unsatisfactory conduct were his indifference to carrying out the work he had been instructed to do, and his repeated failure to respond to requests to provide information and explanation. This was not a case of occasional omission or oversight. The

indifference displayed to advancing Mr HN's claim over such a lengthy period of time, bordered on the cavalier.

[109] It is against that background, that the Committee's decision to impose a censure and substantial fine must be considered.

[110] I accept the submission made for Mr ZW that imposition of a censure is a matter of significance for a practitioner. As noted by the Court of Appeal in *New Zealand Law Society v B*, "a rebuke of a professional person will inevitably be taken seriously".¹¹

[111] But I can see no basis on which the Committee's decision to impose a censure could be considered an unreasonable or disproportionate response.

[112] A censure amounts to an indication from the profession that regardless of the circumstances, a lawyer must adhere to the standards of conduct required of him or her and is to be taken seriously.

[113] In circumstances where a practitioner has failed to take steps to act on a client's instructions for such a lengthy period of time and the practitioner has not only failed to complete necessary work but has been seemingly oblivious to numerous requests to provide explanation for delay or to provide updates on progress, a censure order is appropriate to mark the seriousness of the conduct breach.

[114] Turning in conclusion to the fine imposed, it was submitted for Mr ZW that the fine imposed was excessive, disproportionate, and manifestly high.

[115] Mr IQ suggested that a fine of \$1,000 would be appropriate.

[116] The maximum fine a Committee or this Office can order a practitioner to pay pursuant to s 156(1)(i) of the Act is \$15,000. A fine at that level is reserved for the most serious of cases of unsatisfactory conduct.

[117] The function of a penalty in a professional context was recognised in *Wislang v Medical Council of New Zealand* [2002] NZAR 573¹² as being to punish a practitioner, to act as a deterrent to other practitioners, and to reflect the public's and the profession's condemnation or disapproval of a practitioner's conduct. It is important to mark out the conduct as unacceptable and to deter other practitioners from failing to pay due regard to their professional obligations.

¹¹ *New Zealand Law Society v B* [2013] NZCA 156, [2013] NZAR 970 at [39].

¹² At [21].

[118] A penalty ought to be fair, reasonable and proportionate in the circumstances.¹³

[119] The LCRO has taken the view that in cases where unsatisfactory conduct is found as a result of a breach of applicable rules (whether the Rules of Conduct and Client Care, Regulations or the Act) and a fine is appropriate, a fine of \$1,000 would be a proper starting place in the absence of other factors.¹⁴

[120] I have noted that the LCRO is reluctant to “tinker” with fines imposed by Standards Committees.

[121] I am reluctant to do so in this case.

[122] Whilst the fine imposed was substantial, the penalty reflected an appropriate response to the seriousness of the conduct breach.

[123] This was not a case where a practitioner had simply been inattentive to getting on with the job. This was a case where the extent of delay approached the unconscionable.

[124] It was submitted for Mr ZW, that his history of previous good conduct should be properly taken into account. That is a factor to consider, but I do not conclude that Mr ZW’s previous good disciplinary record is, set against the seriousness of the conduct breach established, sufficiently influential to merit a reduction in the fine imposed.

[125] I agree with the Committee that the conduct was at the higher end of unsatisfactory. In my view, the conduct came close to meriting a consideration as to whether the matter should be referred to the Disciplinary Tribunal.

[126] The length of the delay, the indifference Mr ZW displayed to advancing Mr HN’s case, the unconvincing explanations provided by Mr ZW for his failings, which in part attempted to shift responsibility for those failings to his client, bolster argument that the unsatisfactory conduct finding be marked by a significant fine.

[127] A penalty is intended to reflect the degree of seriousness of the conduct in question.

¹³ *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850 at [28].

¹⁴ *Workington v Sheffield* LCRO 55/2009 (26 August 2009) at [68].

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

Costs

[129] Where an adverse finding is made, costs will be awarded in accordance with the Costs Orders Guidelines of this Office. It follows that Mr ZW is ordered to pay costs in the sum of \$1,600 to the New Zealand Law Society, pursuant to s 210(1) of the Act.

Enforcement of costs order

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

Anonymised publication

[131] 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 25TH day of November 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 ZW as the Applicant
Mr HN as the Respondent
Mr IQ as the Applicant's Representative
[Area] Standards Committee [X]
New Zealand Law Society
Secretary for Justice