

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

[2021] NZLCRO 139

Ref: LCRO 14/2021

**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**

**PR and [Law Firm A]**

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 PR has applied for a review of a decision by the [Area] Standards Committee [x].

**Background**

[2] Mr PR is the sole director of the incorporated law firm [Law Firm A].

[3] In that capacity, he had responsibility for supervising the firm's trust account.

[4] In October 2019, whilst in the process of undertaking a routine review of another firm's trust account, a New Zealand Law Society inspector identified correspondence on a conveyancing file from a barrister, Mr KJ.

[5] Mr KJ was, at this time, employed by [Law Firm B], barrister.

[6] The Inspector was advised that Mr KJ was utilising the trust account of [Law Firm A] to facilitate transactions.

[7] A review of Mr PR's trust account was undertaken. A report finalised by the Inspectorate in November 2019, identified areas where the Inspector had concluded that there had been a lack of compliance with a number of conduct rules.<sup>1</sup>

[8] The [Area] Standards Committee [x] ("the Committee"), commenced an own motion investigation.

### **The own motion investigation and the Standards Committee decision**

[9] The issues identified by the Committee as the focus of its investigation were whether:

- (a) Mr PR and/or [Law Firm A] had breached s 110(2) and s 110(3) of the Lawyers and Conveyancers Act 2006 (the Act) by allowing Mr KJ to utilise his firm's trust account; or
- (b) had failed to promote and maintain proper standards of professionalism (r 10 of the Rules); or
- (c) had failed to ensure compliance with reg 16(4)(b)(i) of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 (the Trust Account regulations); or
- (d) had breached r 8 of the Rules by allowing Mr KJ to communicate with clients and third parties who were represented by [Law Firm A]; or
- (e) had breached r 11.1 of the Rules by engaging in conduct that was misleading or deceptive; or
- (f) had breached r 5.9 of the Rules by paying referral fees to Mr KJ; or
- (g) had breached reg 6 of the Trust Account regulations, by overdrawing a client ledger.

[10] In responding to the matters raised by the Committee, Mr PR accepted that he had paid Mr KJ a referral fee and that in doing so, he had breached r 5.9. Concession was also made by Mr PR to having breached reg 6 of the Trust Account regulations.

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<sup>1</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

[11] Mr PR denied that he had permitted Mr KJ to use his firms trust account.

[12] The Standards Committee delivered its decision on 16 December 2020.

[13] The Committee concluded that there was insufficient evidence to establish that Mr PR or [Law Firm A] had allowed Mr KJ to utilise the firms trust account.

[14] Whilst the Committee was satisfied that Mr PR had permitted Mr KJ to communicate with clients and third parties represented by [Law Firm A], it was not persuaded that the conduct constituted a breach of professional standards.

[15] In addressing concern that Mr PR had breached reg 6 of the Trust Account regulations by allowing his trust account to become overdrawn (a breach acknowledged by Mr PR), the Committee concluded that the breach was minor and that it was appropriate in the circumstances for the Committee to exercise a discretion to take no further action.

[16] The final issue considered by the Committee, was the question as to whether Mr PR had breached r 5.9 of the Rules.

[17] Rule 5.9 provides that:

A lawyer must not directly or indirectly offer to, or receive from, a third-party any reward or inducement in respect of any advice given, referrals made, products or services purchased, or any work done for a client. This rule does not apply to arrangements under which a third party has agreed to pay or contribute to normal fees payable by a client with the knowledge and consent of that client.

[18] Mr PR conceded that he had paid what he described as a “small referral fee” to Mr KJ, but emphasised that in doing so, he was unaware that he was in breach of r 5.9.

[19] The Committee concluded that Mr PR’s payment of referral fees to Mr KJ, and his conduct in offering Mr KJ referral fees, constituted a breach by Mr PR (rather than his firm) of r 5.9, such as to constitute unsatisfactory conduct.

[20] In turning its attention to penalty, the Committee:

- (a) imposed a fine of \$5,000; and
- (b) directed that Mr PR undergo practical training or education by attending a CPD seminar; and
- (c) pay costs in the sum of \$1,000.

[21] In considering the question as to an appropriate penalty, the Committee noted that it “considered Mr PR’s conduct in relation to collateral rewards in the form of referral fees was serious”.

### **Application for review**

[22] Mr PR filed an application for review on 28 January 2021.

[23] The focus of his review is narrowly confined to the issue of penalty. Mr PR does not challenge the unsatisfactory conduct finding, nor the other orders made by the Standards Committee.

[24] It is submitted for Mr PR that:

- (a) his conduct must properly be assessed against the broader context of Mr PR’s mentoring relationship with Mr KJ, and Mr PR’s commendable history of encouraging and fostering graduates and junior lawyers who had frequently encountered difficulties in securing legal employment; and
- (b) his motivation in making payments to Mr KJ was to provide some remuneration to Mr KJ in circumstances where Mr KJ was receiving no remuneration for the time he was spending at [Law Firm A]; and
- (c) all fees paid to Mr KJ had been repaid; and
- (d) the breach was professionally irresponsible, but not sufficiently serious to merit an imposition of a fine of the magnitude imposed; and
- (e) the fine imposed was disproportionate to the magnitude and severity of the breach, and it was out of step with fines imposed in other disciplinary cases.

[25] Mr PR’s counsel (Mr HP) helpfully provided a summary of LCRO cases where the LCRO had considered fines imposed by Standards Committee’s across a raft of cases. It was Mr HP’ argument that the cases identified reinforced that the penalty imposed on Mr PR was disproportionate and excessive, and significantly out of step with the cases referenced.

### **Review on the papers**

[26] 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.

[27] 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**

[28] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:<sup>2</sup>

... 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.

[29] More recently, the High Court has described a review by this Office in the following way:<sup>3</sup>

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.

[30] 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:

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<sup>2</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

<sup>3</sup> *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

- (a) Consider all of the available material afresh, including the Committee's decision; and
- (b) Provide an independent opinion based on those materials.

## Discussion

[31] Whether to impose a fine, and if so at what level, are all elements of the discretion exercised by Committees. There is no set 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 as to the appropriateness of a penalty imposed by a Standards Committee.

[32] It is rare for a Review Officer to interfere with penalties. 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.

[33] The functions of a disciplinary penalty have been considered by the High Court in the leading decisions of *Daniels v Complaints Committee 2 of the Wellington District Law Society 2* and *Auckland Standards Committee 1 v Fendall*.<sup>4</sup>

[34] The primary purpose of a disciplinary penalty is not punishment. The predominant purpose, as set out in s 3 of the Act, is to protect not only the interests of consumers of legal services, but also to assist in maintaining public confidence in the provision of legal services, 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.

[35] A penalty ought to be fair, reasonable and proportionate in the circumstances (*Daniels* at [28]).

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

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<sup>4</sup> *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850 (HC); *Auckland Standards Committee 1 v Fendall* [2012] NZHC 1825.

[37] The decisions referenced by Mr PR's counsel, identify a number of cases in which Committees have, when considering an appropriate level of fine for relatively serious conduct breaches, elected to impose a fine considerably less than the \$5,000 fine imposed on Mr PR.

[38] The overview of cases is helpful, but reference to comparative penalties is of most assistance when the cases compared share a degree of commonality in their factual matrix, and where the conduct rule breached is identical.

[39] It has been noted that 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.<sup>5</sup>

[40] I have been unable to locate any previous cases that have come before the LCRO which have considered complaint that a lawyer has breached r 5.9.

[41] As a starting point, I agree with the Standards Committee that Mr PR's conduct in receiving collateral rewards in the form of referral fees was a serious matter.

[42] It has been observed that an underlying theme in the conduct rules, is a lawyer should profit only from his or her reasonable fee and not from collateral matters.<sup>6</sup>

[43] Rule 5.9 must be understood and applied in light of rr 5.1 and 5.3 concerning confidence and trust, and independence. The objective of the rule is to "prevent influence by a non-client, tending to compromise the lawyer's independent judgement on behalf of the client."<sup>7</sup>

[44] In my view, it was reasonable of the Committee to conclude that it was appropriate to mark the seriousness of Mr PR's conduct by imposition of a fine. I do not consider that the Committee's decision to impose a fine presented as a disproportionate disciplinary response.

[45] Mr PR was financially benefitting from the arrangements.

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<sup>5</sup> *Deliu v National Standards Committee and the Auckland Standards Committee No 1* [2017] NZHC 2318 at [165].

<sup>6</sup> Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3<sup>rd</sup> ed, LexisNexis, Wellington, 2016) at [12.3].

<sup>7</sup> Matthew Palmer (ed) *Professional Responsibility in New Zealand* (LexisNexis, Wellington, 2019) at [11.60].

[46] Whilst the payments made to Mr KJ were, considered in their totality, relatively modest, Mr PR acknowledged that there had been five occasions on which he had paid Mr KJ a fee for “referring property related business to him”.

[47] I accept the submission advanced for Mr PR that the arrangement he had made with Mr KJ must be considered within the broader context of the commendable efforts made by Mr PR to assist a young barrister acquire valuable experience in the work place, but it would approach the naïve to characterise Mr PR’s actions as entirely altruistic. Business was being brought into his firm.

[48] Whilst Mr PR cannot find safe haven in argument that he was unaware of the implications of r 5.9 (it being his responsibility to be familiar with the disciplinary rules that are pivotal to the operation of his daily practice), I accept Mr PR’s counsel submission that Mr PR’s firm had been competently run and well managed, and that Mr PR had served his community diligently over a number of years.

[49] Whilst I have noted that Mr PR benefited from the financial arrangement he had with Mr KJ, I accept that Mr PR’s actions were also motivated by a genuine desire to assist a young colleague.

[50] There is also much to commend Mr PR for in the way he elected to respond to the complaints.

[51] It is clear that Mr PR on becoming aware of the breach, took immediate steps to remedy the situation.

[52] He has accepted gracefully the Committee’s finding of unsatisfactory conduct, and sensibly elected not to challenge that finding on review.

[53] Taking into account:

- (a) the circumstances in which the offending conduct arose; and
- (b) Mr PR’s attempts to mentor a young colleague; and
- (c) steps taken by Mr PR to remedy the breach; and
- (d) the importance of r 5.9 as a bulwark to prevent encroachment on a lawyer’s independence,

I accept counsel for Mr PR’s submission that a fine in the sum of \$5,000 presents as excessive.



[54] In my view, an appropriate level of fine is \$2,000.

*Costs*

[55] Mr PR has had some success in his review application. No costs order is made.

*Anonymised publication*

[56] 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**

[57] Pursuant to s 211(1)(a) and (b) and 156(1)(i) of the Act, the order made by the Committee that Mr PR is to pay a fine in the sum of \$5,000 to the New Zealand Law Society is modified to provide that Mr PR is to pay a fine in the sum of \$2,000 to the New Zealand Law Society. In all other respects the Committee's decision is affirmed.

**DATED** this 30<sup>th</sup> day of August 2021

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**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 PR & Ric [Law Firm A] Limited as the Applicant  
Mr HP as Representative for Applicant  
[Area] Standards Committee [x]  
New Zealand Law Society