LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2022] NZLCRO 142

Ref: LCRO 176/2021

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [X] Standards Committee
BETWEEN	**BR** Applicant
AND	**UE and VJ** Respondents

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

Introduction

[1] Mr BR has applied for a review of the determination by [X] Standards Committee, in which the Committee determined that Mr BR had breached rule 10.1 of the Conduct and Client Care Rules[1] and made a finding of unsatisfactory conduct against Mr BR by reason of that breach.

[2] The Committee censured Mr BR and ordered him to apologise to Mrs UE. It also ordered him to pay a fine of $3,000 and costs of $1,000.

Mrs UE's complaints

[3] Mr BR acted for a[n] [employee]. Mrs UE acted for the owner of the farm.

[1] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

[4] A dispute arose between the owner and the [employee].

[5] Mrs UE has complained that communications[2] from Mr BR were demeaning, hectoring, insulting and threatening. She also complained that Mr BR had wrongly accused her of dishonesty and had misrepresented to a conciliator the position adopted by her.

[6] Mrs UE referred to each of the communications which supported her complaints. These are set out in the schedule attached to this decision.

[7] Mr BR denied the allegations, and addressed each of the communications referred to by Mrs UE.

[8] Mr BR instructed Mr FT to provide submissions on his behalf.

The Standards Committee determination

[9] The Committee noted that "there were numerous examples throughout Mr BR's correspondence with Mrs UE where Mr BR accused both her client and Mrs UE of lying, misrepresenting and references to what he considered as Mrs UE's incompetence."[3]

[10] "The Committee considered, contrary to submissions to hearing by counsel, that the tone of his communications which Mr BR characterised as "direct" and counsel characterised as "accurate" and "strong" were disrespectful, condescending and insulting."[4]

[11] The committee referred to examples of Mr BR's communications which it considered could be described as such.

[12] "The Committee accepted that counsel involved in litigation must be able to make "threats" to take further action and the making of such "threats" is not improper."[5]

[13] "The Committee considered the statement "I record that you have breached your ethical duties to provide all material …". "The Committee considered that even if it was not an implied threat, it was presented as a statement of fact that Mrs UE had breached her ethical duties, it was not merely pointing out that she had those ethical duties. If it was not an implied threat of future consequence for an alleged breach of her

[2] Written and verbal.
[3] [X] Standards Committee determination 20 September 2021 at [19].
[4] At [20].
[5] At [21].

ethical duties, it was at least reasonable to conclude that it was meant to intimidate and undermine her reputation, and incorrect." [6]

[14] The committee continued:[7]

> As Mr BR stated, context is important. This correspondence would not only be seen by Mrs UE and her supervising partner which would have been distressing at least, it would have been referred to Mrs UE's client, with the inevitable distress caused to Mrs UE that is put forward in her submissions to hearing and the possible effect as undermining the trust and confidence between her client and her, to intimidate and therefore for improper use.

[15] Having formed these views, the committee made the finding of unsatisfactory conduct, and made the orders as set out in [1]–[2] above.

Application for review

[16] Mr FT provided submissions in support of Mr BR's application for review of the Committee's determination. He described the nature of the disputes between the [employee] and the owner: "... issues of animal welfare, farm effluent and water issues, power going to fences, weed control, and representations as to the output of the farm. …"[8]

[17] These "involved a heated farming dispute between the parties"[9] and Mr FT submits that "The disciplinary process does not exist to adjudicate such disputes."[10] He submits that "clients are entitled to have their cases put forcefully."[11]

[18] He submits that "No proof has been supplied to the Complaints Service that Mr BR was either wrong or that he lacked a proper evidential basis for making this allegation" and that he was "entitled and obliged to act in accordance with his client's instructions …."[12]

[19] Mr FT refers to several authorities in support of his submissions, and summarises: "… the Committee's finding of unsatisfactory conduct lacks a foundation grounded in any evidence or cogent reasoning against the authorities cited to the Committee."

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[6] At [22].
[7] At [23].
[8] FT submissions (18 February 2022) at [9].
[9] At [18].
[10] At [18].
[11] At [20].
[12] At [28].

Submissions in response

[20] "The respondents do not accept in any aspect of the Applicant's description of the facts … as a fair and accurate description of a complex, acrimonious and multi-faceted dispute." They say that the relevant issue before the Review Officer pertain to Mr BR's behaviour and they rely on the correspondence set out in the complaint."[13]

Scope of review

[21] The High Court has described a review by this Office in the following way:[14]

> 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.
>
> This review has been conducted in accordance with those comments.

Review

[22] This review has been conducted on the papers with the consent of both parties.

[23] I have not attempted to record the comprehensive submissions provided by Mr FT and Mr RQ, but assure the parties that I had full regard to them when conducting this review.

[24] Much has been said by way of commentary and by the courts about a lawyer's professional obligations towards other lawyers and their clients.

The duty of respect and courtesy

[25] This article deals mostly with a lawyer's conduct toward a client, but can be applied to conduct towards another lawyer, as in this case.[15]

> **IT IS NOT** (yet) compulsory for lawyers to be nice. They must, however, be courteous.
>
> …
>
> One challenge is the fact that what amounts to appropriate behaviour varies with context. There are situations where a robust exchange that bruises some sensibilities is permitted (and useful). …

[13] RQ submission (31 March 2022) at [4].
[14] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].
[15] Duncan Webb "The duty of respect and courtesy" (2012) 802 LawTalk at p19.

…

… the proper test required an objective measure of what kind of communications were acceptable, and should be assessed on the basis of whether the conduct would be considered by other lawyers or members of the public as being unacceptable.

Similarly, letters to other lawyers or third parties may need to be phrased in strong terms and make clear that certain consequences will follow if a particular course of action is taken. …

Similarly, it has been found that a threat that any proceedings would be met by an application for indemnity costs was not in breach of any obligation of courtesy. It was, however, noted that "if a costs warning was issued without any reasonable basis for the belief in the futility of a proceeding, and where it might reasonably be concluded that the warning was given for no purpose other than to apply improper pressure to refrain a would-be claimant from issuing proceedings, this may well amount to a breach of Rule 10". …

…

One thread that may be seen to be emerging is that standards committees seem to have little tolerance for lawyers who act in a bullying manner whether to court staff, clients or third parties.

On the other hand, lawyers who deal robustly with clients, other lawyers, or third parties in a manner which is not abusive will not generally be found to be in breach of the courtesy rule even though feelings are hurt or parties are intimidated. Sometimes this forms part of the role of a lawyer.

There will, of course, be some conduct which will never be acceptable. The use of insulting, offensive and abusive language is unlikely to ever be appropriate. Similarly, conduct which is intimidating and intended to coerce a vulnerable party (such as a former client) is unlikely to be permitted. In the middle there is an area where lawyers must read carefully.

…

Threats, scandalous allegations and other perils for stressed lawyers [16]

…

1.2 … A hallmark of professionalism, particularly in contentious adversarial matters, is civility and the requirement to rise above the heat and intensity of conflict. This is the theme in many of the *Conduct and Client Care Rules* …

1.3 … The distinction needs to be made between (legitimate) fearless advocacy and forthright independence in the representation of clients and the protection of their interests, and improper, intemperate or overreaching conduct crossing the line into professional irresponsibility.

1.4 Lawyers are required to refrain from inflammatory, scandalous, abusive, or unduly aggressive communications with others in their professional dealings, including fellow lawyers and the Courts, and to refrain from misusing legal processes. …

[16] Paul Collins *LexisNexis Webinar* (8 March 2016).

2. Some cases to set the scene – examples of intemperate or inappropriate behaviour crossing the line of professional irresponsibility

…

2.2 *Orlov v New Zealand Law Society:*[1]

> It is fundamental to the integrity of our legal system that counsel should be able to advance their client's cause in court fearlessly. However, that is not an absolute right in the sense that counsel do not have carte blanche to behave in any way they please and to make scandalous allegations against others which are without any foundation. ...

[1] *Orlov v New Zealand Law Society* [2013] 3 NZLR 562 (CA) at [77].

…

2.4 In *Waikato Bay of Plenty Standards Committee v Parlane*[3] the Disciplinary Tribunal found that a course of objectionable and unprofessional communications by the lawyer, in his dealings with the Standards Committee, amounted to misconduct. Examples of the tone and content of the correspondence (in letters to the Complaints Service, in response to complaints) were:

> If this matter goes any further the WBOPDLS and the NZLS will be sued. This will simply be added to the list of cheating and tortious behaviour undertaken by them. Your flagrant waste of your members' money has been well and truly noted.
>
> Firstly, go jump in the lake.
>
> Where is your noddy badge, saying that you are the person entitled to investigate?
>
> …
>
> I suggest that there are really only two lawyers in New Zealand to help [complainant] … I hasten to add that both should be in Springhill Prison with this client. Perhaps they will end up there ….

[3] *Waikato Bay of Plenty Standards Committee v Parlane* [2010] NZLCDT 8 and, on appeal, *Parlane v New Zealand Law Society* CIV-2010-419-1209 High Court, Hamilton, Cooper J, 20 December 2010.

…

2.7 On appeal, Cooper J referred to "… the truculent and abusive nature" of the lawyer's communications with representatives of the Law Society as being "… properly characterised as a failure to meet the standards of integrity that ought to be met by all practitioners".

2.8 In *New Zealand Law Society v Dorbu* [6] …

> Mr Dorbu's inability to treat fellow practitioners with respect and courtesy is a clear breach of the rules of professional conduct and again demonstrates Mr Dorbu's inability to understand the fundamentals which underpin the operation of the profession and distinguish those who practise in it from other members of the public.

…

[6] *New Zealand Law Society v Dorbu* [2011] NZLCDT 24, at 35.

…

2.10 … in *Hong v Legal Complaints Review Officer*,[11] … the Tribunal found the lawyer to have engaged in correspondence characterised by: persistent personal attacks, threats of menace, allegations of racism and mental illness, and unprofessionalism generally; "taken cumulatively, the fact that there are nine pieces of what can be described as scurrilous communications, aggravates those individual instances".[12] The Tribunal found that the correspondence could not be "…excused as a momentary lapse or overreaction".

[11] *Hong v Legal Complaints Review Officer* [2016] NZHC 184, on appeal from the Disciplinary Tribunal in *Legal Complaints Review Officer v Hong* [2015] NZLCDT 27 (liability) and [2015] NZLCDT 37 (penalty).

[12] *LCRO v Hong*, Tribunal's liability decision, at [63].

…

4.3 …

> "There is no duty of care on the part of a solicitor to keep someone who is not the solicitor's client free of baseless proceedings, but it is as well to confirm the existence of a duty to the Court on the part of both counsel and instructing solicitors not to lend assistance to a litigant if satisfied that the initiation or further prosecution of a claim is mala fide or for an ulterior purpose so as to be an abuse or unjustifiably oppressive."

…

Where to from here?

[26] It remains now to compare Mr BR's conduct with the matters discussed above. In the first instance, it is important to put matters into context, as much as I am able to, on the information available:

- Both practitioners practise in the same regional town. One would expect there to be a greater collegiality between lawyers.
- [Law firm A] is a large firm. Mrs UE had the ability to ask a partner in the firm to either contact Mr BR personally, or to take over acting for the owner of the farm.
- Mrs UE was less experienced than Mr BR. It is not unreasonable to expect him to assume a less confrontational manner towards her.
- Much of the correspondence from Mr BR can be seen to be directed more at Mrs VJ than to Mrs UE personally.

- The suggestion by Mr BR that his client would be seeking costs against the owner, and statement that he would be applying for summary judgement, are matters that could be contested in the relevant forum. Whether or not Mrs UE and her client considered Mr BR's stated intentions had substance or not, is not relevant.

- There was clearly a degree of friction between the clients of each lawyer, and the suggestion that the farm owners had an ulterior motive in wanting to have Mr BR's client removed as the [employee] has not been disputed.

[27] Some of Mr BR's correspondence crosses the line. These are the comments directed at Mrs UE personally. I refer to:

(a) Email (5 June 2022) – "I am not sure who is the most misguided – you or your client …. This shows you do not know what you are doing."

(b) Email 24 June 2022) – "Your confirmation is yet a further misleading statement from you and your clients. It is dishonest of you … to put forward invoices."

[28] There is also the alleged verbal barb – "I thought you were supposed to be a lawyer [U]; you're certainly not acting like one." In his response to the complaint,[17] Mr BR denies using these words. However, in submissions on behalf of Mr BR,[18] Mr FT says that Mr BR regrets using the words and apologises.

Has there been a breach of rule 10.1 and if so, should a disciplinary finding follow?

[29] There are a number of directions from the courts that every breach of the rules does not necessarily result in a disciplinary finding, and that Review Officers must take a step back and look at matters objectively. In *Client J v Lawyer A*,[19] the Review Officer said:

> [35] … However, not every professional lapse is sufficiently serious to require disciplinary intervention (*Perera v Medical Practitioners Disciplinary Tribunal* District Court, Whangarei MA 94/02, 10 June 2004, Judge Hubble at para 42). It must be established not only that the conduct departs from acceptable professional standards but also that the departure is of such a degree as to warrant sanction.

[17] Letter BR to Lawyers Complaints Service (16 October 2020).
[18] Letter FT to Lawyers Complaints Service (9 July 2021).
[19] LCRO 31/2009.

[30] In *National Standards Committee v Shand*,[20] the Lawyers and Conveyancers Disciplinary Tribunal found that there had been a breach of r 3.5 of the Rules. The Tribunal, however, did not make a disciplinary finding against Mr Shand.

[31] These cases can be distinguished as they did not involve comments of a personal nature, as is the case here.

[32] *Hugh Peter Petrie Ragg v Legal Complaints Review Officer and the New Zealand Law Society*[21] is a case involving a conveyancing transaction where Mr Ragg had released the vendor's documents to the purchaser's solicitor, relying on the assurance from the purchaser's solicitor that settlement monies would be paid. In that case also, Mr Ragg had sent correspondence to the purchaser's solicitors which resulted in the Standards Committee making a finding of unsatisfactory conduct for breach of r 10.1 of the Rules. This finding was confirmed on review.

[33] Mr Ragg had said to the legal executive acting for the purchaser:[22]

> I probably will report your Firm to the Law Society and as part of my case will be to find out the requirement you made to the Agent before the deposit of 36,000 was paid by your Firm or your client.
>
> …
>
> Regrettably, I have found your firm to be more than disrespectful – Impertinent even
>
> I am still almost certain to report you all to the Law Society unless I get a personal apology from your sen[i]or Partner.
>
> …
>
> Your explanation is not accepted.
>
> The ANZ Bank here in Ashburton do not issue deposit slip[s] unless specifically ordered.
>
> I view your conduct as impertinent and I am not impressed by your explanation.

[34] This correspondence mirrors, to some extent, the correspondence from Mr BR.

[35] The Standards Committee found against Mr Ragg on two counts:

(a) Mr Ragg had not acted competently by releasing the e-dealing instruments for the vendor before the purchaser had paid the settlement monies.

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[20] [2019] NZLCDT 2.
[21] [2021] NZCA 579.
[22] At [13]–[19].

(b) The Committee also found that Mr Ragg had breached r 10.1 by failing to treat Mrs Thomas with respect and courtesy.

[36] The Standards Committee made a finding of unsatisfactory conduct against Mr Ragg, required him to send written apologies to the purchaser's solicitors, pay a fine of $750 for each breach, and $500 by way of costs. The Committee also resolved to notify the Registrar-General of Land of its decision, pursuant to s 159 of the Lawyers and Conveyancers Act 2006 (the Act).

[37] On review, the Review Officer quashed the fine and the requirement that Mr Ragg write letters of apology, but upheld the remaining orders.

[38] On review, the High Court upheld the decision of the Review Officer.

[39] Mr Ragg appealed the High Court decision to the Court of Appeal. The Court of Appeal said:

> [38] While we can understand the Committee and Review Officer being concerned Mr Ragg had departed from normal conveyancing practices, his conduct was at the low end of the spectrum of conduct that warranted referral to a Committee and was therefore a case that required the Committee and the Review Officer to reflect on the necessity to take disciplinary action against Mr Ragg.
>
> …
>
> [40] When assessing the case against Mr Ragg it was necessary for the Review Officer to consider whether protection of the interests of the community and the profession justified taking the formal step of making a finding that Mr Ragg was guilty of unsatisfactory conduct. The possibility of deciding to take no further action under s 152(2)(c) of the Act needed to be considered. The Review Officer failed to take this step."

[40] The Court of Appeal set aside the Legal Complaints Review Officer's decision.

[41] The High Court and the Court of Appeal both focused on Mr Ragg's decision to release the vendor's part of the e-dealing without receiving payment. No comments were made about the content of Mr Ragg's correspondence.

[42] This case presents something of a conundrum. Mr Ragg's correspondence was before the Courts. Neither Osborne J (in the High Court) or the members of the Court of Appeal, commented on the content of Mr Ragg's emails. Consequently, those judgments do not assist greatly in reaching a view in this instance. However, the fact that neither Court made any comment would suggest that none of the Judges found the correspondence to be objectionable.

[43] Balanced against that is the view of the Standards Committee members, who include at least one lay person. With due respect to members of the judiciary, it can be considered that members of the Committee better reflect the view of the profession and the public (through the lay member) to Mr BR's conduct.

[44] There is also a direction from *A LN and B LN v QG*[23] that in exercising a discretion, a Review Officer should be reluctant to substitute his or her own view for that of the Committee.

[45] Taking these comments into consideration, I have reached the view that Mr BR's conduct breaches r 10.1.

A disciplinary finding?

[46] The issue to address now is whether the breach of r 10.1 results in a finding of unsatisfactory conduct.

[47] Mr BR has apologised for the worst of his conduct.[24] The events giving rise to the complaints occurred some three years ago. The conduct was certainly not a threat to the public. Mr BR has allowed himself to be drawn into the personal conflict between his client and Mrs UE's client.

[48] Standing back and conducting an assessment as to whether protection of the interests of the community and the profession justifies taking the formal step of making a finding that Mr BR was guilty of unsatisfactory conduct, I have come to the view that there is no need for a finding to be made against Mr BR. The determining factors for reaching this decision to reverse the finding of unsatisfactory conduct by the Committee are:

(a) Mr BR has apologised for his conduct.

(b) Neither the High Court or the Court of Appeal found it necessary to make any comment on this conduct.

(c) Mrs UE had the option of asking one of the firm's partners to contact Mr BR and request him to desist from the type of conduct complained about, and/or to ask one of the partners to take over acting for her client.

[23] *A LN and B LN v QG* [2021] NZLCRO 176 (9 November 2021) at [163].
[24] The verbal questioning of Mrs UE's abilities.

(d) The complaint and disciplinary process through the Lawyers Complaints Service and this Office should serve as a reminder to Mr BR in the future to be careful about the language he uses.

Decision

[49] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the finding of unsatisfactory conduct by the Committee is reversed. The orders made by the Committee fall away (subject to [54] below).

Costs

[50] Even though a Standards Committee makes a determination, pursuant to s 152(c) of the Act to take no further action on a complaint, s 157 enables a Committee to make an order for payment of costs if it thinks the proceedings were justified. This Office has all of the powers of a Standards Committee.[25]

[51] I have no hesitation in confirming that Mrs UE and her client were justified in making the complaints.

[52] The Committee ordered Mr BR to pay the sum of $1,000 by way of costs to the New Zealand Law Society. Mr FT says that that the sum ordered 'fixes an arbitrary figure that has no justification'. The Complaints Service Manual requires that a costs order reflects the costs of, and incidental to, the complaint investigation and hearing and provides a checklist to guide the Legal Standards Officer and the Committee when fixing the amount to be ordered. Any such checklist is administrative material that is not received or requested by this Office when the Committee's file is sent for review.

[53] It is only rarely that this Office will engage in an audit of an amount ordered to be paid by way of costs. This matter does not warrant any such interference.

[54] Pursuant to s 211(1)(a), that order is confirmed, notwithstanding the reversal of the finding of unsatisfactory conduct.

LCRO costs

[55] As noted, the complaint by Mrs UE was justified and notwithstanding reversal of the finding of unsatisfactory conduct, Mr BR's conduct is nevertheless subject to criticism. Pursuant to s 210(3) of the Lawyers and Conveyancers Act 2006, Mr BR is

[25] Section 211(1)(b) of the Lawyers and Conveyancers Act 2006.

ordered to pay the sum of $1,200 to the New Zealand Law Society by way of the costs of this review.

Enforcement of costs orders

[56] Pursuant to s 215 of the Act, I confirm that the orders for costs are enforceable in the civil jurisdiction of the District Court.

Publication

[57] Pursuant to s 206(4) of the Lawyers and Conveyancers Act 2006, I direct this decision to be published in anonymised format.

DATED this 7TH day of DECEMBER 2022

_____

O Vaughan
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 BR as the Applicant
Mrs UE and Mrs VJ as the Respondents
Mr FT as the Representative for the Applicant
Mr RQ as the Representative for the first Respondent
[X] Standards Committee
New Zealand Law Society
Secretary for Justice

Schedule of communications

1 Letter 7 February 2020.

My client is over the drama created by [the farm owner.]

2 Letter 7 February 2020

… your client has misinformed you and misrepresented [the] matter …

3 Email 9 April 2020

Perhaps you need to obtain full instructions.

4 Email 9 April 2020

I see no sense in continuing this worthless correspondence about petty pinpricking issues designed to harass my clients.

5 Email 9 April 2020

I regret you are wrong.
We will be seeking full solicitor client costs against your client.
Perhaps your client needs to take professional advice from the farm advisor and sort out the real issue here.
You may like to reflect on the trough issue
I await with interest to see if there can be some se3nse here.

6 Email 21 April 2020

Perhaps if you took up my suggestion that there be a frank discussion about compensation the matter could be progressed between the parties.

7 Emails 22 April 2020 (chain)

I note that you are refusing to respond to my email queries.

Email BR to AMINZ 22 April 2022 (chain)

Please find attached my email of 21 April to Ms UE. No reply has been received.
The solicitors for the [J]'s need to engage in communication to deal with the issues as set out.
It is unfortunate when you are not provided with the correct information.
I am waiting for the [J]'s solicitors to contact me and deal with matters.

All of that correspondence is held by [Law firm A] and it would be misleading for it not to be provided to the Chairperson.

8 Email to [Company B], Mrs UE

[My client] … expresses concern about an email from Mrs UE which refers to a Farm Advisers report that has not been disclosed and which Mrs UE refuses to disclose.

What is more disturbing is that Mrs UE refers to her client's as having 'losses over the current season'. Again I have asked for these to be quantified. There is a steadfast refusal to do so.

Our clients have made it abundantly clear to this point that the only issue s the desire of the [J]s for our clients to vacate the property. This then is a compensation issue. Neither point is addressed in the draft document provided by Mrs UE.

9 Letter 5 June 2020

I am not sure who is the most misguided, you or your clients.

It is this bad faith that underlies their bad behaviour throughout the whole course of the file.

This shows that you do not understand what you are doing.

10 Letter 24 June 2020

I have checked, Mr MN has not been appointed by your clients. Your confirmation is yet a further misleading statement from you and your clients.

It is dishonest of you and the [J]s to put forward that there are invoices as part of a Judicial Process and then advise us on 22 June 2002 [? sic] that they have not been received.

11 Email to [Company B] and Mrs UE 29 April.

My clients have expressed concern about an email from Ms UE which refers to a farm advisor's report that has not been disclosed and which Ms UE refuses to disclose.

What is more disturbing is that Ms UE refers to her clients as having 'losses over the current season'.

Again I have to ask for these to be quantified. There is a steadfast refusal to do so. The only issue is the desire of the [J]s for our clients to vacate the property. This is then the compensation issue. Neither point is addressed in the draft document provided by Ms UE.