

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

[2021] NZLCRO 198

Ref: LCRO 178/2021

**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**

**AA**

Applicant

**AND**

**EL**

Respondent

**DECISION**

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

**Introduction**

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

**Background**

[2] Mr and Mrs AA were the owners of a [Business] situated in [Town].

[3] They sold the [Business].

[4] The purchasers were required to pay to the vendors in addition to the agreed purchase price, 50% of the sale proceeds of the impending seasons [fruit] harvest.

[5] The agreement also directed that the vendors would provide the purchasers with a warranty that items of plant and machinery sold with the property, were in reasonable working order.

[6] Included in the plant and machinery were a number of [fruit] nets.

[7] It was the purchasers' view that the nets were unfit for purpose. They refused to pay the vendors the agreed portion of the proceeds received from the [fruit] harvest.

[8] The dispute escalated. Proceedings were filed in the District Court.

[9] Mr AA was represented in those proceedings by Mr JB of the law firm [TKR] legal. [ABCD (Abies)] represented the purchasers.

[10] On 29 October 2020, Mr OP who was the lawyer from [Abies] who was managing the case for the purchasers, spoke with Mr JB. The lawyers discussed the possibility of endeavouring to progress the matter through negotiation rather than continuing with litigation in the court.

[11] Following that discussion, Mr OP forwarded an email to his client in which he provided an account of his conversation with Mr JB. In that email, Mr OP said this:

As we discussed yesterday, I called JB this afternoon. I explained that you were willing to litigate this matter but given the sums involved it is crying out for a commercial resolution. I asked if there was something preventing Mr AA from negotiating. JB described his client as a [Asian] businessman. He said that his client is furious about the current situation and it is a matter of honour to him. He says that he feels as though he has been let down over his unanswered information requests (apparently he made 15 of these). Whilst that appears to be the issue, JB agreed that the matter should be settled given the amounts involved. He will relay to his client that you are open to doing a deal. I said that a deal would need to be a full and final settlement. I'm not sure we made a lot of progress on the call. Although a deal should be done, Mr AA's approach does seem to currently be preventing that from happening.

[12] Mr EL took over the management of the file.

[13] A case management conference was scheduled to proceed in early March 2021.

[14] On 19 February 2021, Mr JB forwarded an email to [Abies] in which he gave indication that it was his client's preference that the dispute proceed directly to trial. Mr JB advised that his client saw little possibility of agreement being able to be reached at a settlement conference.

[15] Mr EL was of the view that the sums involved in the dispute (whilst clearly of significance to both parties) were sufficiently modest such as to expose the parties to

risk of incurring litigation costs that would be disproportionate. It was his position that the Court would incline to the view that efforts should be made to assist the parties reach a settlement.

[16] Mr EL responded to Mr JB's correspondence of 19 February 2021 with this:

Thank you for your email. However, I do not share your rather pessimistic assessment on the prospect of some (it must be said pretty orthodox/commonplace) ADR occurring here. I say this for two reasons... The only reason that I am aware of the plaintiffs *not* wishing to engage in the sort of sensible commercial discussion that you and I have every day on cases, is that your client is a [Asian] businessman and "*this is a matter of honour to him*" (OP/JB on 29 October 2020). It is trite, JB, but statements of this ilk could be made by nearly all litigating parties in nearly any civil case that has ever occurred. But usually, and with the benefit of wise counsel, all litigating parties can come to see the inescapable advantages of dealing with disputes pragmatically. That is the place for ADR. And I am sure that you could recount as many instances as I could of seemingly intractable disputes actually settling. (It is very unusual, in my experience, for a litigant to simply want to 'give up' on ADR before even trying it).

[17] Mr JB responded to Mr EL on 24 February 2021 as follows:

Whilst I personally agree with your comments regarding ADR, every now and again one strikes a client whose adamant refusal to go to ADR is unshakable. Mr AA is just such a client for me. I am of course aware of the ethical obligations regarding the need to explain to a client alternatives to litigation. I have carefully and repeatedly given advice, but my instructions are clear. The plaintiffs wish to have a short trial. If that finally becomes a simplified trial then that is a matter for the judge. If the matter is to go to a judicial settlement conference then as you say the Judge will have the final say, but such an order will be opposed by the plaintiffs.

[18] Both counsel then filed memorandum with the court.

[19] Mr EL's memorandum advanced argument that the dispute "called out" for some form of alternative dispute resolution. At paragraph 10 of his memorandum he said this:

To explain in a little more detail, the defendants have sought to initiate a sensible "without prejudice" negotiation to bridge the modest gap between them. This was immediately rebuffed by the plaintiffs. Why? Because "*this is a matter of honour to him.*" More recently (as per the attached marked "A"), they have sought to agree the prompt allocation of a judicial settlement conference – before time and cost are consumed in discovery and inspection (and other interlocutory tasks). While, from the attached marked "B" their counsel may be sympathetic, the plaintiffs are utterly unmoved. It is a trial they want, and nothing else will do.

[20] After hearing from counsel, the Judge made directions for a settlement conference.

### **The complaint and the Standards Committee decision**

[21] Mr AA lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 28 April 2021. The substance of his complaint was that:

- (a) Mr EL's memorandum of 1 March 2021 contained racist and discriminatory references; and
- (b) Mr EL's memorandum unfairly conveyed an impression that [Asian] people were inflexible in business and legal matters and placed little value on concepts of honour; and
- (c) It was inappropriate for a lawyer to present a document to the court which indicated elements of racial bias.

[22] The Complaints Service elected to manage Mr AA's complaint through its Early Resolution process.

[23] Mr EL was provided with a copy of the complaint, but not required to provide a formal response to it.

[24] The Standards Committee identified the focus of its investigation as requiring a consideration as to whether Mr EL had breached any of his professional obligations.

[25] The Standards Committee delivered its decision on 29 October 2021.

[26] 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.

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

- (a) an understanding of the relationship of a lawyer to their client was fundamental to an understanding of the outcome of the complaint; and
- (b) it had no jurisdiction to determine whether there had been a breach of the Human Rights Act; and
- (c) Mr EL's obligations (subject to the duties owed to the court as an officer of the Court) were owed to his client; and
- (d) there was a reasonable foundation for the comments made by Mr EL in his memorandum to the court, as the comments reflected remarks that had been made by Mr AA's lawyer.

### **Application for review**

[28] Mr AA filed an application for review on 2 November 2021.

[29] He submits that:

- (a) the Standards Committee had significantly misunderstood a number of the facts of his case; and
- (b) Mr EL had crafted his memorandum on the back of Mr OP's poor recollection of events;
- (c) Mr JB has no recollection of making the remarks which Mr EL had referenced in his memorandum; and
- (d) Mr EL had intentionally misled the Committee by failing to fully inform the Committee of the extent to which Mr JB's clients had been uncooperative in responding to requests to provide information; and
- (e) He had never used the word "honour" or phrase "matter of honour" in his discussions with his lawyer Mr JB; and
- (f) Mr EL had created a false narrative; and
- (g) it could be expected of lawyers that they be particularly sensitive to issues of racism.

[30] Underpinning Mr AA's submission, whilst not directly stated by him, was the implication that racist comments had been deliberately made as a tactic in the litigation.

[31] Mr EL was invited to comment on Mr AA's review application and did so in a submission to the LCRO on 12 November 2021.

[32] Mr EL submitted that:

- (a) the allegedly racist statements of which Mr AA makes complaint were statements made by Mr AA's own lawyer, and simply repeated by him accurately and without embellishment; and
- (b) the statement was made in an appropriate context; and
- (c) this provided definitive response to Mr AA's complaint; but for completeness
- (d) there can be no dispute that the comments made which were of concern to Mr AA had been initially made by Mr AA's lawyer; and

- (e) nor can there be doubt that the comments made in the memorandum to the court were based on Mr OP's accurate recollection (recorded in email correspondence) of his conversation with Mr AA's lawyer; and
- (f) Mr AA's lawyer's own account of his conversation with Mr OP provides clear confirmation that it was Mr AA's lawyer who initiated the comments that Mr AA subsequently took exception to.

[33] Mr AA provided a comprehensive reply to Mr EL's response to his review application.

[34] Mr AA considered that Mr EL's response was "full of misleading descriptions". Included with the further submissions received from Mr AA, were copies of a number of emails that had been exchanged between Mr AA and [Abies] subsequent to Mr AA raising his concerns.

[35] In his further submission, Mr AA argued that:

- (a) Mr EL had not simply repeated what Mr JB had purportedly said, he had "created a false story on me, using his own words to express a biased view of racism", and
- (b) Mr EL could not avoid responsibility for what had been said in the memorandum filed in the court, by arguing that he was simply repeating what Mr JB had said; and
- (c) Mr EL had either intentionally or inadvertently, failed to provide accurate explanation as to why Mr AA had been forced to seek a resolution of the dispute in the court; and
- (d) It was not simply the references to Mr AA as being a [Asian] businessman and the alluding to matters of honour, but the broader account that Mr EL had conveyed of Mr AA's position that had caused offence; and
- (e) Mr EL had manipulated the narrative in an attempt to persuade the Court that Mr AA had been resistant to attempts to settle the dispute; and
- (f) Mr EL's memorandum had caused offence; and
- (g) Mr EL had failed to promote and maintain proper standards of professionalism and to conduct his dealings with Mr AA with courtesy, dignity and respect.

## Review on the papers

[36] 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.

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

[38] 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

[39] 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>1</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.

[40] More recently, the High Court has described a review by this Office in the following way:<sup>2</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

<sup>1</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41] (citations omitted).

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

coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[41] 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**

[42] The issues to be addressed on review are:

- (a) What was the extent of the duties and obligations Mr EL owed to Mr AA?
- (b) In reporting to the court that Mr AA was a [Asian] businessman and that the issues in dispute had become a matter of honour for Mr AA, was Mr EL providing accurate account of what had been reported by Mr AA's lawyer?
- (c) Did Mr EL's memorandum, to the extent that it referenced that Mr AA was a [Asian] businessman and that the issues in dispute had become a matter of honour for him, breach his obligation to deal with Mr AA in a courteous and respectful manner?
- (d) What is the significance for Mr AA's conduct complaint of the email exchanges between himself and [Abies]'s?

*What was the extent of the duties and obligations Mr EL owed to Mr AA?*

[43] The Committee was correct to observe in commencing its examination of Mr AA's conduct complaint, that an understanding of the relationship between a lawyer and a lawyer's client, was fundamental to an understanding of the complaint that had been advanced by Mr AA.

[44] Mr EL was not Mr AA's lawyer.

[45] Mr EL was representing clients in a civil dispute which had found its way to the door of the court.



[46] As an officer of the court, Mr EL's overriding duties were owed to the Court.<sup>3</sup>

[47] Every lawyer providing regulated services, has a fundamental obligation to uphold the rule of law and to facilitate the administration of justice.<sup>4</sup>

[48] Hard on the heels of a lawyer's duty to the court, are the duties a lawyer owes to their client.

[49] Subject to his or her overriding duties as an officer of the court, a lawyer has a fundamental obligation to protect the interests of his or her clients.

[50] To the extent that Mr EL owed duties and obligations to Mr AA, those duties and obligations were limited.

[51] Whilst the Conduct Rules provide succinct and unequivocal account of the obligations a lawyer owes both to the Court and to their client, the rules also provide guidance as to the extent that a lawyer may owe duties to third parties.

[52] A lawyer must promote and maintain proper professional standards.<sup>5</sup>

[53] Of particular application to Mr AA's complaint (it being his view that Mr EL had advanced a submission to the court that had racist connotations) is the obligation on a lawyer when acting in a professional capacity, to conduct their dealings with others with integrity respect and courtesy.<sup>6</sup>

[54] In his further submission to the LCRO of 15 November 2021, Mr AA made complaint that Mr EL had failed to explain the full background as to why Mr AA was reluctant to engage in ADR.

[55] As articulated by Mr AA, this concern reduced to accusation that Mr EL had misled the court. Mr AA accuses Mr EL of having "made up a false story in his Memorandum seemingly from his own biased perception".<sup>7</sup> Mr AA argues that Mr EL had been resistant to his suggestion that the dispute be progressed in the Disputes Tribunal.

[56] Accusation that Mr EL had misled the Court was not raised by Mr AA when he lodged his complaint. The complaint filed focused entirely on the allegation that the

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<sup>3</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 2.1.

<sup>4</sup> Lawyers and Conveyancers Act 2006, s 4(a).

<sup>5</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 10.

<sup>6</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 12.

<sup>7</sup> AA submission to LCRO, 15 November 2021, at [6].

memorandum filed by Mr EL contained statements which were offensive and discriminatory.

[57] Allegation that Mr EL had failed to provide an accurate account of events to the court, having not been raised by Mr AA in his complaint, understandably did not form part of the Standards Committee's deliberations, although the Committee made brief reference to the fact that Mr EL considered it was in his client's best interests that the Court be informed why the matter was being defended.

[58] A Review Officer cannot address matters of fresh complaint that are raised on review. The Review process is, as the name reinforces, a process by which a Review Officer undertakes a fresh and independent investigation of a Standards Committee decision, that process understandably being confined to addressing the specific issues of complaint that were before the Standards Committee.

[59] Whilst I am not required to address Mr AA's concern that Mr EL failed to adequately inform the Court as to the context for Mr AA's resistance to progressing the claim through a settlement conference, I nevertheless propose to do so as I consider that in taking that approach, it will provide a more comprehensive explanation of the scope of the duties and obligations Mr EL owed to Mr AA.

[60] I adopt that approach, mindful of the fact that Mr EL was provided with a copy of Mr AA's submission of 15 November 2021, but not required to provide a response to it.

[61] As noted, subject to Mr EL's obligations as an officer of the Court, Mr EL's overarching obligation was to protect and promote the interests of his client.

[62] In litigation cases, this demands of a conscientious litigation lawyer, that they make every effort to robustly advance their client's position.

[63] This is not to suggest that a lawyer's duty to their client absolves them of responsibility to ensure that they advance their client's case with proper regard to their professional obligations.

[64] It is clear from the submissions advanced by Mr AA, that Mr AA considered that Mr EL had misrepresented his position to the court.

[65] It was not Mr EL's role to present Mr AA's position to the Court. That task fell to Mr JB.

[66] When Mr AA makes complaint that Mr EL failed to provide an accurate context for his reluctance to proceed the case to a settlement conference, the question can be reasonably raised as to why, if Mr EL had provided an inaccurate account of Mr AA's position, this was not immediately addressed and responded to by Mr JB.

[67] Mr AA contends that Mr EL unfairly presented him to the Court as being reluctant to consider alternative means to resolve the dispute. It is Mr AA's view that he was being unfairly portrayed as an obdurate and intractable individual, and this added an additional layer to his concern that he had been the subject of racist comment.

[68] I have a degree of sympathy for Mr AA's position.

[69] His argument was (and I accept his evidence on this point) that he had made numerous requests of Mr EL's client to provide information, and that these requests had over a period of many months, been ignored.

[70] Mr AA had suggested that the dispute be referred to the Disputes Tribunal, but says that this suggestion had been rejected by Mr EL.

[71] Against this background, Mr AA complains that it was unfair of Mr EL to characterise his attitude as being resistant to considering any option for resolution other than proceeding to a hearing.

[72] Whilst it is understandable that Mr AA considered that Mr EL's memorandum did not provide the full context from his perspective, it is necessary to examine that context from the time that proceedings were filed in court and, importantly, as the conduct complaint engages a consideration of Mr EL's conduct, from the time that Mr EL became more directly involved with the file.

[73] Mr EL was not responsible for any failure on the part of Mr EL's clients to respond to emails that Mr AA had forwarded directly to Mr EL's clients.

[74] Once proceedings were filed in the Court, irrespective as to what may have gone beforehand, the process then fell under the stewardship of the court. Part of the judicial oversight in civil proceedings involves case management and directions from the court with purpose to ensure that proceedings are expeditiously advanced.

[75] The Court would inevitably in my view, considering the sums involved in the claim and counterclaim, be seeking indication from the parties as to whether there was possibility of reaching a settlement.

[76] It is clear that by 19 February 2021, Mr AA had concluded that there was minimal prospect of settlement. On that day, Mr JB forwarded an email to [Abies] (copied to Mr EL) in which he advised that his clients saw no prospect of agreement being reached at a settlement conference. They wished to proceed to trial.

[77] It may well have been Mr AA's position that he considered that Mr EL's clients had been uncooperative throughout, and this did not foster confidence that a settlement conference would be productive, but Mr EL took a different view. He was convinced that commercial realities dictated that the parties explore possibility of settlement. He believed that the Court would take a similar view.

[78] Mr EL wrote to Mr JB expressing the view that it was not uncommon for seemingly intractable disputes to be settled.

[79] Mr JB's response to Mr EL of 24 February 2021 is telling in that it provides insight both into Mr JB's view of the approach advocated by Mr EL, and indication that Mr JB himself had formed a view that Mr AA was vehemently resistant to considering any path to resolution other than that offered by a Court hearing.

[80] Mr JB says that he agreed with Mr EL's comments regarding ADR. He says that "every now and again one strikes a client whose adamant refusal to go to ADR is unshakeable". He says that "Mr AA is just such a client for me". He says that he has "carefully and repeatedly given advice, but my instructions are clear". The only inference that can be reasonably drawn from this, is that Mr JB had been making earnest efforts to persuade Mr AA to agree to the dispute being timetabled to a settlement conference.

[81] Mr AA objects to his position being presented by Mr EL as intractable, but this was a reasonable and accurate description of Mr AA's determined resistance to having the case proceed to a settlement conference. It did not remotely approach Mr AA's description of Mr EL's account as a "made up ... false story".

[82] Mr AA may have had good reason to be sceptical about the prospect of achieving success at a settlement conference. He had little confidence in Mr EL's clients.

[83] But Mr EL's task was not to provide explanation or broader context for Mr AA's refusal to agree to a settlement conference. Mr EL's task was to advocate for his client. He believed that it was in his clients' interests to attempt to settle. He considered it was commercially sensible to attempt to settle. It was his experience that it was unusual, irrespective as to how entrenched parties were in their positions, for parties to give up on ADR before it had been tried. He had been given clearest indication from Mr AA's lawyer that Mr AA was resolutely committed to advancing the matter to trial.

[84] Mr AA advances as further evidence to support his contention that Mr EL had misrepresented his willingness to consider settlement options, argument that Mr EL had rejected suggestion that the dispute be referred to the Disputes Tribunal.

[85] I accept that Mr AA's suggestion that the matter proceed to the Disputes Tribunal reflected a willingness on his part to explore the possibility of the dispute being determined in a less formal jurisdiction where the parties could avoid escalating legal costs. But it was not the case that Mr EL rejected the suggestion outright. He rejected the proposal as he considered that the basis on which it had been suggested that the matter be forwarded to the Tribunal, disadvantaged his client.

[86] In providing that advice, Mr EL was fulfilling his fundamental obligation to advance and protect the interests of his client.

[87] Mr AA's willingness to have the case heard in the Disputes Tribunal, does not ameliorate or soften the oppositional approach he took to suggestion that the matter proceed to a settlement conference.

[88] Absent from Mr AA's criticism of Mr EL's memorandum, is a recognition of the fact that he was legally represented and had opportunity to put his position to the Court. At the heart of adversarial proceedings is the opportunity for both parties to present their case. It is a feature of such proceedings that each party will endeavour to present their strongest possible case to the court.

[89] Mr AA was entitled to oppose suggestion that the matter proceed to a settlement conference. He had little confidence that a settlement conference would achieve anything. He was determined in his position. He was resistant to any suggestion other than that the matter proceed to trial.

[90] But Mr EL was permitted, and indeed required, to vigorously oppose a position which he did not consider to be in his client's interests.

[91] But Mr EL's criticism of Mr AA was not, nor was it intended to be, a criticism of Mr AA personally. It was criticism of Mr AA's approach to a specific issue of case management.

[92] Importantly, Mr AA had opportunity to provide response to criticism that his approach was unreasonable. It could be anticipated of such response, that it would identify and provide evidence of the repeated failures on the part of Mr EL's clients to provide Mr AA with information. Mr AA's contention that it would be fruitless to waste time endeavouring to negotiate with parties who had a history of persistently being

uncooperative, could have been expected to have been put before the presiding judge to counter Mr EL's argument. That is the essence of litigation.

[93] But Mr EL's argument to the court was not fabricated, biased, or misleading. It was argument that was inevitably fashioned such as to present his clients' preferred position in the best light, but it was not argument that was misrepresenting Mr AA's view on the settlement conference issue such as would demand a consideration as to whether Mr EL had breached the limited duty he owed to Mr AA to treat Mr AA with courtesy and respect.

*In reporting to the court that Mr AA was a [Asian] businessman and that the issues in dispute had become a matter of honour for Mr AA, was Mr EL providing accurate account of what had been reported by Mr AA's lawyer?*

[94] In the initial stages of advancing his complaint, Mr AA sought clarification from [Abies] as to what had been said in the course of Mr OP's conversation with Mr AA. Mr AA made inquiry of [Abies] as to whether the discussion between Mr OP and Mr JB had been taped.

[95] Mr AA made inquiry of [Abies] as to whether it had evidence of the conversation between Mr OP and Mr JB, or whether [Abies] account of what had been said in the conversation was based on "the memory or perception of your staff".<sup>8</sup>

[96] The nature of these inquiries would indicate that Mr AA was uncertain as to whether the comments made by Mr EL in his memorandum to the Court, provided accurate account of what had been said by Mr JB, or if the comments reported to have been said by Mr JB were in fact actually made by Mr JB.

[97] In the submission that accompanied his review application, Mr AA noted that he had:

... never accepted that those remarks were not made by Mr EL. He insists that he quoted those remarks from a telephone conversation between our lawyer Mr JB and his colleague Mr OP on 29 October 2020. There is no tape record on the telephone conversation. I believe Mr EL heard about the telephone conversation from Mr OP and wrote the memorandum including those remarks four months after the telephone conversation. There is no evidence that Mr JB made those remarks on the telephone conversation. Mr EL wrote the memorandum based on Mr OP's poor memory and misperception on the whole process of the case by then. Mr JB doesn't have any clear memory on those remarks.

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<sup>8</sup> AA email correspondence to WT, 17 May 2021.

[98] There is conclusive evidence that Mr JB had made the comments which, when reported in Mr EL's memorandum, caused offence to Mr AA.

[99] Following his discussion with Mr JB, Mr OP immediately wrote to his clients to inform them of what had been covered in his conversation with Mr JB.

[100] Mr OP noted that Mr JB had referred to his (Mr JB's) client as a "[Asian] businessman". Further, he explained that Mr JB had informed him, that Mr AA was "furious about the current situation and it is a matter of honour to him".

[101] It presents as highly unlikely that Mr OP's specific recollection of the conversation would be inaccurate or unreliable in regard to the two issues identified in the paragraph above, and difficult to establish plausible explanation for Mr OP providing inaccurate account of the telephone discussion to his clients.

[102] Mr AA himself made inquiry of Mr JB as to what Mr JB had said to Mr OP in the 29 October 2020 telephone conversation.

[103] In responding to that request in correspondence to Mr AA on 5 March 2021, Mr JB recalled having reported to Mr OP that the dispute engaged matters of "honour" for his client. Mr JB explained that he could not recollect as to whether he had mentioned that Mr AA was a [Asian] businessman but noted that if he had inadvertently caused Mr AA to be upset, he apologised for that.

[104] I am satisfied that Mr OP's email to his clients, drafted contemporaneous with his telephone discussion with Mr JB, provided accurate account of what had been discussed. I can see no plausible explanation as to why Mr OP, on his own volition, would reference comment that he had been advised that Mr AA was a [Asian] businessman.

[105] In his second submission filed with the LCRO, Mr AA did not persist with complaint that either Mr OP or Mr EL had provided inaccurate account of the JB conversation, rather he focused on advancing argument that Mr EL was not exonerated from responsibility for repeating comments that were offensive to Mr AA simply because the comments had been initially made by Mr AA's lawyer. Mr EL had, argued Mr AA, a responsibility not to repeat the comments, particularly in a document that was filed with the Court.

*Did Mr EL's memorandum, to the extent that it referenced that Mr AA was a [Asian] businessman and that the issues in dispute had become a matter of honour for him, breach his obligation to deal with Mr AA in a courteous and respectful manner?*

[106] Mr AA considered that the references in Mr EL's memorandum to "[Asian] businessman" and "matter of honour" constituted what he described as "racist harassment".

[107] It was his view, that the descriptions were deployed with deliberate and malevolent purpose in an effort to portray him to the court as an intractable and obdurate individual, who was difficult to deal with.

[108] Whilst as noted it was initially the case that Mr AA was sceptical as to whether his own lawyer had been the source of the comments which Mr AA had taken objection to being disclosed in a court memorandum, when it became clear that Mr EL was repeating what he had been told, Mr AA insisted that Mr EL should nevertheless, have refrained from incorporating the comments in his memorandum. Mr AA was adamant that what Mr EL had written in the memorandum was "inappropriate in terms of racial discrimination and actually offended me".<sup>9</sup>

[109] The first question is whether the comments made were comments of a nature that it could have been anticipated carried potential to cause Mr AA offence. The second issue to address, is that if it was the case that the comments were potentially offensive, did Mr EL have a responsibility to ensure that the comments were not included as part of his memorandum?

[110] There are two distinct comments.

[111] Firstly, Mr AA is described as a [Asian] businessman.

[112] Secondly, Mr AA's rationale for his determination to have his day in court is explained by reference to comment that it has become a matter of "honour" for him to fight the case.

[113] Considered together, it was Mr AA's view that the comments conveyed an unfortunate racist flavour.

[114] There would be little dispute that it would be utterly inappropriate for a lawyer to be responsible for initiating racist comments in a memorandum filed with the court. It would also be necessary for a lawyer to exercise care and caution in those circumstances where the lawyer was required to report or record racist comments that had been made by third parties.

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<sup>9</sup> AA submission to LCRO, 15 November 2021, at [10].



[115] Were the references to Mr AA as a [Asian] businessman and a man of honour, racist?

[116] The Committee was understandably unwilling to be drawn into deciding whether the comments made constituted a breach of the Human Rights Act, noting that it did not fall within its jurisdiction to determine breaches of the Human Rights Act.

[117] Mr AA has made a complaint to the Human Rights Commission. No doubt Mr AA will receive a decision from that jurisdiction in due course, but in addressing Mr AA's complaint in a disciplinary context in the course of reviewing a Standards Committee decision, it is necessary that the Review Officer assess the comments made by reference to Mr EL's obligations to promote and maintain proper standards of professionalism in his dealings, and his obligation to treat Mr AA with integrity, respect and courtesy.

[118] The Committee's assessment that Mr EL had not breached his duty of courtesy to Mr AA was a determination arrived at on the back of its conclusion that Mr EL's foremost obligation was to advance argument to the court that bolstered his client's position. In this case, that argument was supported by the information that Mr AA's lawyer had provided to Mr EL. The Committee concluded that Mr EL was distanced from the remarks in that he was not responsible for the comments, but rather repeating them.

[119] I am uncertain as to why Mr JB had specifically described Mr AA as a [Asian] businessman in his conversation with Mr OP, but I am not persuaded (and I caveat my comment by acknowledgement that the comment is speculative) that the reference to Mr AA's ethnicity was intended by Mr JB to be disrespectful or discourteous to Mr AA.

[120] The conversations between Mr OP and Mr JB were courteous, and whilst their clients had diametrically opposed views as to whether it was worthwhile to pursue options for settlement, the client's respective positions were responsibly advanced.

[121] I do not consider that the single reference to Mr AA as a [Asian] businessman, was in its repeating by Mr EL, a comment that could reasonably or sensibly be interpreted as evidence of Mr EL behaving unprofessionally or discourteously. Mr AA was a [Asian] businessman.

[122] Turning to the second of the comments that had caused offence, Mr AA was upset by comment that it had become a matter of honour for him not to participate in further settlement negotiations. Mr AA interpreted this comment (in conjunction with other comments made) as a dishonest and misleading attempt to portray him as a person who was unreasonably obdurate.

[123] With every respect to Mr AA, it is my view that he misunderstands the context of the comment, and the relative regularity that such comments (or comments of a similar nature) are made in the course of litigation.

[124] There is nothing inherently disrespectful in the word honour. To the contrary, it carries implication of respect and esteem.

[125] In the context in which Mr JB deployed the word, the word which is most analogous, is principle.

[126] It is not uncommon in litigation for a lawyer to advise opposing counsel, that their client is determined, as a matter of "principle", to continue with litigation irrespective as to whether a decision to do so has potential to carry risk for the client including the prospect of incurring further legal costs and exposure to possibility of losing the case.

[127] When a lawyer alerts opposing counsel that their client is committed, as a matter of principle, to rejecting offers to settle and is determined to proceed to trial, description of the client's position having become one of principle is frequently indicative of the client's strength of belief in the justness of their cause, and a confidence that the court will find in their favour.

[128] A party's refusal to settle on grounds of principle, may also reflect that the party considers the claim or defence advanced by their litigation opponent to have been so unmeritorious and transparently flawed, that it is important to advance the matter to trial in order for those inadequacies to be exposed and marked with an appropriate costs order.

[129] I do not consider that the description of Mr AA as a man of honour was a description that carried negative connotations for Mr AA. It was a description that conveyed that Mr AA was confident in his position, disappointed by the conduct of the defendants, and determined to have his day in court,

[130] Mr AA is adamant that reference to him as being [Asian] and a man of honour, together with other comments made that suggested that he was resistant to settlement, not only misled the the court into believing that he was intractable and obdurate, but also elevated the comments to a level where they could reasonably be described as racist.

[131] Whilst this element of Mr AA's complaint will be determined before the Human Rights Commission, to the extent that my obligation and responsibility is to test Mr AA's concerns against the limited obligations Mr EL owed to Mr AA, it is trite but necessary to state that if it was determined that the comments made contained a racist element,

consideration would need to be given to the question as to whether Mr EL's conduct in reporting the comments made merited a disciplinary response.

[132] The Committee correctly observed that Mr EL had not initiated the comments that had caused offence to Mr AA, he had simply repeated what he had been told by Mr AA's lawyer.

[133] The Committee noted that "[t]he fact that the remarks were made by Mr AA's lawyer gave Mr EL reasonable cause to believe there was a reasonable foundation for including them in the documents filed in Court. In the circumstances there was no breach of his very limited duty to Mr AA."<sup>10</sup>

[134] Mr AA argues that irrespective as to whether Mr EL had made the comments or not, it was his responsibility to ensure that information was not put before the Court that was offensive to Mr AA. In essence, Mr AA is arguing that it was Mr EL's responsibility to filter the information he had received from Mr AA's lawyer.

[135] A lawyer has responsibility for the material that a lawyer puts before the court.

[136] In some circumstances a lawyer will have a duty to filter information received from a client to ensure that inappropriate material is not presented to the court.

[137] A lawyer has an absolute duty of honesty to the court and must not mislead or deceive the court.

[138] A lawyer engaged in litigation must not attack a person's reputation without good cause in court or in documents filed in court proceedings.

[139] But the comments of which Mr AA makes complaint do not, in my view, remotely approach the threshold where Mr EL would have been required to pause to consider as to whether the comments should have been excluded from the memorandum.

[140] Whilst Mr AA was aggrieved at suggestion that he had been resistant to negotiation, on the question as to whether it would be beneficial for the matter to proceed to a settlement conference, (which was the issue Mr EL was directly addressing in his memorandum) Mr AA was resolute in his position that he would not consider attending a settlement conference.

[141] Mr JB's email of 24 February 2021 to Mr OP gives indication that Mr AA was resisting repeated advice from his own lawyer that it would be advantageous to attempt

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<sup>10</sup> Standards Committee decision, 29 October 2021 at [16].

to settle. Mr JB's correspondence gives clear indication that Mr AA was very opposed to the Court directing the parties to attend a settlement conference.

[142] To the extent that Mr EL correctly identified the grounds for Mr AA's resistance (as explained to him by Mr AA's lawyer) his memorandum could not, and did not, breach the duties of courtesy owed to Mr AA, nor any of the broader duties he owed to the court.

[143] It is Mr AA's belief that the comments were racist in nature that elevates the seriousness of the conduct complaint.

[144] Mr AA says that his son has experienced several instances of racial discrimination during the period of time that the AA family has resided in New Zealand.

[145] That is extremely disappointing, and no doubt has caused considerable distress to Mr AA and his family.

[146] But the unfortunate and regrettable incident that Mr AA describes of his family having suffered racial discrimination does not, as he is convinced it does, provide compelling argument that Mr EL had a responsibility to not repeat the comments that had been made by Mr JB.

[147] The family anecdote referenced by Mr AA, does no more than reinforce the important point that Mr AA would understandably be sensitive to, and distressed by, instances of racist behaviour. It does not provide a useful template for determining whether comments made by individuals would fall within the category which constituted racial harassment.

[148] Mr AA has not established that the comments reported by Mr EL were racist in nature.

[149] His belief that they were so, does not automatically make them so.

[150] Nor does the fact that he says he was offended by the comments, establish that the comments were racist in nature.

[151] Mr AA has, he says, examined the NZ Human Rights Commission website and located what he describes as a definition of racism. I assume Mr AA believes that definition he says he has sourced is backed by the weight and authority of the Commission.

[152] Mr AA notes that the material he has examined clarifies that racial harassment may be unintentional and that the individual responsible for making a comment that

another finds offensive, may be oblivious to the effect the comment has on others. Mr AA observes that “[w]hat is important is how the behaviour affects you or others”.

[153] I have noted that a more nuanced and comprehensive examination as to whether the comments initially made by Mr AA’s lawyer could properly be described as racist in nature, will be undertaken when Mr AA’s complaint is considered by a jurisdiction with specialist expertise in the area.

[154] But if Mr AA is suggesting that the comments reported by Mr EL in his memorandum must be fairly construed as carrying the flavour of a racist comment, because Mr AA was offended by them, that conclusion proceeds in my view from the erroneous premise that the offence is established by the party who takes offence.

[155] In recent years, the New Zealand Law Society has become increasingly concerned that the existing conduct rules were inadequate in providing a framework to address concerns that many men and women in the legal community had raised concerning experiences of bad conduct they had experienced from within the legal community.

[156] Those concerns focused on issues of inappropriate behaviour including sexual harassment, workplace bullying and racist comments.

[157] Changes were made to the conduct rules.

[158] These changes came into force on 1 July 2021.

[159] The conduct of which Mr AA makes complaint arose prior to 1 July 2021, and therefore falls for consideration under the conduct rules in force at that time, but it is informative for this review to note that the conduct rules now include definitions of discrimination and racial harassment.

[160] Discrimination is defined as discrimination that is unlawful under the Human Rights Act 1993 or any other enactment. Mr AA’s indication that he has laid a complaint with the Human Rights Commission, will allow opportunity for his complaint of discrimination to be measured against the defining test that is now referenced in the conduct rules for lawyers.

[161] Significant to the issues for this review, was the introduction to the Conduct Rules of a definition of racial harassment.<sup>11</sup>

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<sup>11</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care Rules 2008), r 1.2.

[162] Whilst Mr AA does not focus his complaint in terms of which emphasise the element of harassment, (he talks in more general terms of discrimination), it is nevertheless informative for this review to consider how a complaint of racial harassment is now to be addressed in the context of conduct rules which provide specific guidance on the issue.

[163] Racial harassment is described in the amended rules as behaviour that:

- (a) expresses hostility against, or contempt or ridicule towards, another person on the ground of race, ethnicity, or national origin; and
- (b) it is likely to be unwelcome or offensive to that person (whether or not it was conveyed directly to that person).

[164] This definition is closely analogous to the prohibition against racial harassment in s 63 of the Human Rights Act 1993.

[165] It is noted, that it is not necessary to prove that the behaviour was unwelcome or offensive to the affected person but rather that it was likely to be. Nor, and this reinforces a point made by Mr AA, does the behaviour need to be conveyed directly to the person affected. A lawyer, under the new framework, engages in racial harassment if they express to a person (person A), hostility against, or contempt or ridicule towards, another person (person B) on the ground of race, ethnicity, or national origin, if that is likely to be unwelcome or offensive to person B, whether or not it was conveyed directly to person B.

[166] This analysis supports Mr AA's contention that racial discrimination (the making of racist comments) can be established without need to prove that an offending comment was directly addressed to the individual who was offended by the comment. But importantly, the commencing point is that the comment made must (in adopting a definition similar to that applied under the Human Rights Act 1993), have been a comment that expressed hostility, contempt or ridicule to another person.

[167] I accept that Mr AA was offended by the comments reported in Mr EL's memorandum. The determined and resolute approach Mr AA has adopted in advancing his complaint, gives every indication that he holds a genuine and sincere belief that the comments reported by Mr EL were unacceptable.

[168] But the comments, if considered under the framework of the new rules, would not, in my view, remotely approach an accurate description of them as being hostile, contemptuous, or intended to provoke ridicule.

[169] I do not consider that Mr EL, in reporting comments that had been made by Mr JB, breached the limited duties owed to Mr AA.

*What is the significance for Mr AA's conduct complaint of the email exchanges between himself and [Abies]?*

[170] In his final submission to the LCRO, Mr AA provided copies of an extensive email exchange that he had with [Abies] Chief Executive Officer and other members of the [Abies] staff.

[171] Mr AA explained that he had forwarded the emails in order to provide a more comprehensive account of his position.

[172] It is unusual for a complainant and colleagues of the lawyer complained of to engage in continuing dialogue when a Standards Committee investigation is under way, but the email trail reflects a courteous and earnest attempt on the part of [Abies] to reassure Mr AA that the comments made by Mr EL were an accurate account of what Mr AA's lawyer had reported to [Abies], and that [Abies] were regretful if the comments had caused Mr AA any offence.

[173] [Abies] provided a careful and considered response to the issues raised by Mr AA. Importantly, those responses did not reflect a "raise the drawbridge" approach by the [Abies] lawyers, but rather a determined attempt on their part to ensure that Mr AA received a fair hearing.

[174] Whilst [Abies] remained resolute in their view that Mr EL had not breached any duties owed to Mr AA, their responses acknowledged that Mr AA had been upset by the reported comments, and expressed sympathy for any distress he had suffered.

[175] Mr AA provided [Abies] with a thoughtful and personally reflective account as to how his family had endured incidences of racism, and a detailed analysis as to why he remained firm in his view that it was inappropriate for Mr EL to record the comments he had in his memorandum.

[176] Regrettably the email exchanges were unable to resolve the complaint. They provide however a useful context for this review, in that the email exchanges provide a more comprehensive account of the parties' respective attitudes and positions, than is frequently gleaned in the process of review, from the submissions filed by the parties.

*Conclusion*

[177] I see no reason to depart from the conclusion reached by the Standards Committee.

*Anonymised publication*

[178] 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 26<sup>th</sup> day of November 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 AA as the Applicant  
Mr EL as the Respondent  
Mr WT as a Related Person  
[Area] Standards Committee [X]  
New Zealand Law Society