

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

[2022] NZLCRO 033

Ref: LCRO 204/2021

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 [A]

BETWEEN

UX

Applicant

AND

AK

Respondent

DECISION

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

Introduction

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

Background

[2] Mrs AK represented Mr UX's former wife, Ms QE. Mr UX had day to day care of the couple's children

[3] Ms QE had concerns regarding the accommodation that Mr UX was residing in with the children. She was uncertain as to the precise location of the home.

[4] Mrs AK instructed her husband (Mr AK) to photograph the property where it was understood Mr UX was residing.

[5] Mr AK stopped at the property on his way home from work. He photographed the property from the road.

[6] Mr UX noticed Mr AK. He followed Mr AK and caught up with him.

[7] Mr UX subsequently made a complaint to the Police.

[8] Mr UX consulted a barrister, Mr KD. On 24 January 2020, Mr KD telephoned Mrs AK. Mr KD says that the purpose of his call to Mrs AK was to discuss his client's concerns about the steps that had been taken to photograph his property.

[9] Mr KD says that in the course of that conversation, Mrs AK did not disclose to him that it was her husband who had been responsible for taking photographs at Mr UX's property.

[10] The Police determined to take no steps in respect to the complaint lodged by Mr UX.

The complaint and the Standards Committee decision

[11] Mr UX lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 31 January 2021. This was the second occasion that Mr UX had lodged a complaint against Mrs AK. His first complaint was filed on 29 October 2020, and a decision delivered in respect to that complaint on 27 November 2018. Mr UX's first complaint was not upheld.

[12] The substance of Mr UX's second complaint was that Mrs AK had misled Mr UX's barrister by failing to advise Mr KD in the telephone conversation of 24 January 2020, that she had instructed her husband to take a photograph of Mr UX's property and had disavowed any knowledge of the events that had taken place. He was concerned that Mr AK had been filming his daughter.

[13] Mrs AK provided a response to Mr UX's complaint on 11 November 2020.

[14] To the extent that response addressed Mr UX's concerns regarding her husband's actions in taking photographs at Mr UX's property, Mrs AK submitted that:

- (a) Ms QE was concerned about the state of the accommodation the children were residing in and wanted the accommodation to be "checked out"; and
- (b) at the time Ms QE raised these concerns, Mrs AK's husband was working at a location close to Mr UX's home; and

- (c) she had obtained instructions from Ms QE to request her (Mrs AK's) husband to take a photo of Mr UX's property from the road; and
- (d) whilst it was not usual practice for her to ask her husband to become involved in any matters concerning one of her clients, on this occasion it presented as convenient to have her husband photograph Mr UX's property; and
- (e) her client had been happy for Mrs AK's husband to assist; and
- (f) attempts to assist her client had escalated to an "awkward situation" as a consequence of her exercising poor judgement; and
- (g) when contacted by Mr KD on 24 January 2020, she informed Mr KD that she would need to take instructions, but conceded that any unauthorised filming of children would be unacceptable; and
- (h) in a subsequent telephone conversation with Mr KD, Mr KD had expressed concern that she had initially failed to disclose her husband's involvement; and
- (i) the police had concluded that no offences had been committed; and
- (j) her decision to involve her family member was wrong and resulted in serious allegations being made that did not reflect well on her.

[15] Mr UX responded to the explanations provided by Mrs AK.

[16] He submitted that:

- (a) Mr AK had misled the Police in providing explanation for his actions; and
- (b) Mr AK had been located on a private rather than public road when taking photographs; and
- (c) Mrs AK had misled Mr KD as to the extent of her involvement; and
- (d) Mrs AK had instructed her husband to lie to the Police; and
- (e) he had never made allegation that his daughter had been in his car, when he pursued Mr AK; and
- (f) Mrs AK had misled the Complaints Service; and

- (g) Mrs AK's husband was engaged on the phone when being followed, this conversation would have engaged Mrs AK, and would support conclusion that Mrs AK had discussed confidential matters with her husband.

[17] On 24 May 2021, the Standards Committee issued the parties with a notice of hearing, which identified the issues under consideration by the Committee as:

- (a) whether Mrs AK engaging her husband (who was not a licensed private investigator) to follow and photograph a male respondent in Family Court proceedings (Mr UX) was consistent with her professional obligations as required by rule 10 and 12 of the Client Care Rules;¹ and
- (b) whether when challenged by Mr UX's lawyer in a phone call in early 2020, Mrs AK provided an honest explanation of her husband's involvement that was consistent with her duty to maintain proper standards of professionalism.

[18] Mrs AK responded to the notice of hearing on 11 June 2021.

[19] She submitted that:

- (a) she had not engaged her husband to follow and photograph any person; and
- (b) her husband had not been paid; and
- (c) when initially discussing Mr UX's concerns with Mr KD, she was taken aback at allegation that photos had been taken of children and considered that this allegation required further investigation by her; and
- (d) her decision to involve her husband needed to be considered in the context of her endeavouring to assist her client in a pragmatic and cost-effective way; and
- (e) what was intended to be an inexpensive and convenient solution for her client had escalated to engage a police complaint and allegation of improper filming of a child.

[20] Mr UX requested Mr KD to provide his recollection of his telephone discussions with Mrs AK.

¹ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rr 10 and 12.

[21] Mr KD confirmed that Mrs AK had not disclosed in their first telephone call that it was her husband who had photographed Mr UX's property. He indicated that he was concerned at the steps that Mrs AK had taken but did not on reflection consider that it was conduct that he was obliged to report to the Law Society. Mr KD confirmed that in his subsequent discussion with Mrs AK, she had conceded that the conduct did not reflect her "finest moment".

[22] In correspondence to the Complaints Service of 18 June 2021, Mr UX confirmed his view that:

- (a) Mrs AK had instructed her husband to lie to the Police; and
- (b) Mr AK had intruded on private property.

[23] The Standards Committee delivered its decision on 5 November 2021.

[24] The Committee determined, pursuant to s 152(2)(c) of the Lawyers and Conveyancers Act 2006 (the Act) that no further action on the complaint was necessary or appropriate.

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

- (a) Mr KD's recollection of his conversation with Mrs AK of 24 January 2020 was materially similar to the recollection of Mrs AK, and neither of those accounts provided evidence to support Mr UX's allegation that Mrs AK had informed Mr KD that she had no knowledge of what had occurred; and
- (b) argument that Mr AK was only photographing the house "accorded with common sense", as Mrs AK's client would not require her children to be filmed or have expectation that would be done; and
- (c) photographs taken were taken from the road and Mr AK had not detoured onto private property; and
- (d) the photographing of a property from a public road does not breach any laws, and arguably even if the photographs were taken on private property, it would be unlikely that would have breached any particular law;
- (e) Mrs AK had not breached r 10 of the Rules; and
- (f) no instructions had been provided to Mr AK to engage in any way with Mr UX or the children; and

- (g) it had not been established on the evidence, that Mrs AK had misled Mr KD;

[26] Whilst it had concluded that Mrs AK had not breached any of the conduct rules, the Committee considered that the issues raised by the complaint “should be a salutary lesson to Mrs AK that ‘cutting corners’ can create unnecessary issues, especially in tensely fought litigation”.

[27] To mark what it concluded was Mrs AK’s deviation from best practice, the Committee directed that Mrs AK make modest contribution to the costs of the Committee’s investigation.

Application for review

[28] Mr UX filed an application for review on 17 December 2021.

[29] He submits that:

- (a) Mrs AK had misled the Law Society in providing response to his complaint; and
- (b) Mrs AK had instructed her husband to lie to the Police; and
- (c) the Standards Committee had failed to take into consideration that Mrs AK had essentially instructed her husband in the capacity of a private investigator; and
- (d) Mr AK’s response to the police enquiry of him as to whether he was a private investigator (“something like that”) indicates that Mrs AK had instructed her husband to misrepresent his status to the Police.

[30] Mrs AK was invited to comment on Mr UX’s review application.

[31] Mr JL provided a response on 28 January 2022.

[32] It was submitted for Mrs AK that:

- (a) Mrs AK had not misled the Committee; and
- (b) there was no foundation for allegation that Mrs AK had instructed her husband to lie to the Police; and

- (c) there was no evidence to support allegation that Mr AK had returned to Mr UX's property some months after he had photographed the home; and
- (d) Mrs AK acknowledged that making request of her husband to attend Mr UX's property was inappropriate and not best practice, but her conduct did not amount to a breach of the conduct and client care rules.

[33] In further correspondence to the Legal Complaints Review Officer (LCRO) of 2 March 2022, Mr UX made request of the LCRO to obtain Mr AK's telephone records. Mr UX repeated allegation that Mrs AK had misled Mr KD in the course of their initial telephone conversation and submitted that Mrs AK became inappropriately personally involved in the Family Court proceedings engaging Mr UX and Mrs AK's client.

Review on the papers

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

[35] 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

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

... 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

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

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.

[37] More recently, the High Court has described a review by this Office in the following way:³

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.

[38] 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

[39] At the nub of Mr UX's concerns, is allegation that Mrs AK misled his barrister when inquiry was made of her as to what had transpired at his home, and that Mrs AK had provided inaccurate account of the basis on which the decision had been made for her husband to attend at Mr UX's property.

[40] The beating heart of the complaints is accusation that Mrs AK, in providing explanation for what had occurred, had misled Mr KD, the Police (indirectly) and the Complaints Service.

[41] Underpinning these specific concerns, is allegation that Mrs AK had become too personally involved in her client's case, and that this had resulted in her adopting a negative and unhelpful approach in her dealings with Mr UX.

[42] The starting point is an examination of the decision made by Mrs AK to ask her husband to photograph Mr UX's property.

[43] Mrs AK's conduct must be examined by reference to her professional obligations. To a degree, that examination has been expanded to a broader

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

consideration of issues as to whether Mr AK had committed an illegal act by trespassing on private land, and a consideration as to whether either Mrs AK had (indirectly), and Mr AK (directly) misled the Police. A further peripheral issue touched on by the complaint, is the question as to whether Mr AK's actions (or the explanation provided for those actions) intersected with regulations controlling the conduct of a private investigator. Mr UX gave indication when initially filing his complaint, of an intention to proceed a complaint against Mr and Mrs AK through the Private Security Personnel Licensing Authority.

[44] But it bears repeating, that Mrs AK's conduct is examined in this jurisdiction, by reference to her professional obligations and duties as a practising lawyer.

[45] The commencing point for what transpired to be an unfortunate series of events, had been concerns raised by Ms QE. She was worried that her children may not be living in suitable accommodation.

[46] This was a legitimate issue for Ms QE to raise. There is nothing untoward or unusual in a parent who does not have children in their day-to-day care seeking to be assured that the children are living in suitable accommodation.

[47] Mrs AK concluded that a cost effective and expeditious way to gather some information on Mr UX's accommodation would be for her husband to take photographs of Mr UX's home. Mrs AK considered that this would be a relatively straightforward and convenient task for her husband, as he was at the time working in the vicinity of Mr UX's home and could stop off and photograph the property on his way home from work.

[48] Mrs AK's decision to ask her husband to photograph Mr UX's property was unfortunate on a number of levels. Mr UX and his former wife had been engaged in intense litigation in the Family Court. Mr UX considered that Mrs AK had become too personally involved in the litigation. He had filed a conduct complaint against Mrs AK. Mrs AK displayed demonstrably poor judgement when she took steps which directly involved her husband in her client's case.

[49] In fairness to Mrs AK, she does not dispute that she exercised poor judgement in allowing her husband to be drawn into the matter.

[50] And it appears that she was immediately aware of the lapse.

[51] In discussing the issue with Mr UX shortly following his discussions with Mrs AK, Mr KD informed Mr UX that Mrs AK had been "constructive" in her discussions with him, and that she had openly acknowledged that her behaviour had not been acceptable.

[52] When Mrs AK provided comprehensive response to Mr UX's complaint and addressed, as she was entitled to, those aspects of the complaint which she considered were unfounded, she freely acknowledged that the events had not reflected well on her.

[53] She maintains that position on review, noting that she regretted having involved her husband. She observes that the experience has proven a salutary one for her.

[54] Not every error made by a lawyer demands or requires a disciplinary response.

[55] Inevitably on occasions lawyers will make mistakes.

[56] Mrs AK's conduct must be considered by reference to specific conduct rules, in particular, rule 10 of the of the Rules, and s 12 of the Act.

[57] Mr UX submitted that Mr AK's conduct constituted an illegal act, in that Mr AK had intruded onto private property when taking the photograph.

[58] There is insufficient evidence on the file to confirm precisely as to where Mr AK was located when he took the photographs. It is argued for Mrs AK, that Mr AK was at all times, on a public road.

[59] I am not able to make a determinative finding on that issue, but in any event, I do not consider that the issue has particular relevance to the conduct matters I am required to address.

[60] I am not persuaded that there is any illegality that attaches to an individual taking a photograph of a home from a public road, or indeed that allegation of illegality would necessarily be upheld, if the photograph was taken on private property.

[61] Mr UX's complaint was considered by the Police who elected to take no action on it.

[62] I accept that Mr UX was disconcerted when he was alerted by his daughter to the fact that somebody was taking photographs of the home.

[63] As the complaint evolved, allegation that Mr AK had been taking photographs of Mr UX's children was raised. If this was the case, it understandably would have been seriously concerning for Mr UX (and indeed for Mrs AK) but any reasonable and sensible analysis of the background circumstances leads to an unshakeable conclusion that Mr AK's intention was to photograph the home. If Mr UX's daughter was unsettled by the incident, that was unfortunate, but I am not persuaded that Mr UX at any stage in the

proceedings had genuine concern that the conduct complained of was intended to involve his children.

[64] I think it probable that Mr UX was immediately aware that the intrusion had some connection with the dispute that was going on with his former wife. In the statement Mr UX made to the Police shortly after the incident, Mr UX informed the Police that he thought the incident was directly connected to the long-standing disagreements between himself and his former wife.

[65] Significantly, in his statement to the Police, Mr UX makes no mention of concern that the individual photographing his home was doing so with purpose to photograph his children. He makes complaint that a male individual had been “filming his new address”.

[66] Mr UX’s allegation that Mrs AK had been dishonest, commences with accusation that she had provided differing accounts as to the circumstances which prompted Mr AK to attend at Mr UX’s property. In her response to the Standards Committee of 11 November 2020, Mrs AK said that she had “obtained instructions from Ms QE for Mr AK to be asked to drive home via [Address A] and take a picture of any house there from the road”.

[67] Mr UX submits that this explanation was inconsistent with the statement Mr AK had provided to the Police, in which Mr AK had purportedly told the Police that he had been contacted by Ms QE and requested to obtain photos of the address as part of an ongoing investigation.

[68] Mr AK had responded to inquiry from the Police as to whether he was a private investigator with reply that he was “something like that”.

[69] There is no evidence from Mr AK on the file as to what was said in the course of his interview with the Police, but I accept in the absence of any evidence contradicting the statement made, that the statement made by the police recording the interview with Mr AK provides accurate account of what took place. I can see no reason as to why (excluding human error or error of recollection) the police statement would not have been drafted with purpose to provide accurate summary of the interview.

[70] Mr AK clearly became inadvertently enmeshed in a set of circumstances which went well beyond what he could remotely have anticipated, when he agreed to take a photograph of Mr UX’s property on his way home from work.

[71] What likely presented to Mr AK as a task of insignificant consequence, resulted in him being pursued by Mr UX, overhauled, confronted by Mr UX and demand made for

explanation as to his actions, and concluded with a police interview and the advancing of complaint that his wife had been professionally compromised.

[72] Whilst I am reluctant to speculate on what may have prompted Mr AK to frame his responses to the Police in the manner that he purportedly did, I think it possible that Mr AK in responding to request for explanation from the Police as to why he had been photographing Mr UX's home, provided incorrect explanation when he contended that he had been directly contacted by Ms QE. That clearly was not the case. Mrs AK does not suggest in her response to the Law Society of 11 November 2020 that her husband had been directly contacted by her client. Nor am I persuaded that Mrs AK's explanation in that response that she had "obtained instructions from Ms QE" for her husband to go to Mr UX's property and take a photograph, provides the full context for the decision made to involve Mr AK. Realistically, that suggestion could only have come from Mrs AK and for her to frame the suggestion in the guise of her having received "instructions" from her client, does not, in my view adequately explain the extent to which it would have been Mrs AK's decision to involve her husband.

[73] Ms QE was concerned to find out where her former husband was living. In discussing those concerns with her client, Mrs AK in what was likely a genuine and well-meaning attempt to assist her client avoid additional costs, fell upon the idea that her husband could take a photo of the house on his way home from work. It was as simple as that.

[74] Mr UX is emphatic that Mrs AK was instrumental in encouraging her husband to mislead the Police. There is no evidence of that. There is no evidence as to what Mrs AK may or may not have said to her husband, prior to Mr AK being interviewed by the Police. There is no evidence as to what Mrs AK may or may not have said to Mr AK in telephone discussions that Mr UX alleged took place between Mrs AK and her husband when Mr UX was in pursuit of Mr AK's vehicle.

[75] Conduct complaints cannot be established on the back of mere speculation. And it is Mr AK who is responsible for comments he made to the Police. Regrettably, Mr AK had been inadvertently drawn into a melee that he could not remotely have anticipated becoming involved in. It would be understandable that he would have been anxious not to compromise either his or his wife's position when speaking with the Police. It may have been the case that he could have been more forthcoming in providing explanation of the background to the events which culminated in him being interviewed. But it is not Mr AK's conduct that is under scrutiny here, and accusation that Mrs AK instructed her husband to mislead the Police is not supported by any evidence.

[76] Nor am I persuaded that Mrs AK deliberately misled Mr KD when she first spoke with him by failing to disclose that it was her husband who had been responsible for taking the photographs that had caused offence to Mr UX.

[77] I accept that Mrs AK may have considered it necessary to take instructions from her client, but full disclosure at commencement would have been preferable. But that lack of full disclosure cannot reasonably or sensibly be elevated to complaint that Mrs AK had deliberately set out to mislead Mr UX.

[78] I think it probable that Mrs AK was immediately disconcerted when contacted by Mr KD, and the reason for that was that she had abandoned the professional distance that she would commonly be able to bring to such conversations, by ill-advisedly drawing her hapless husband into the dispute. The professional was contaminated by the personal. But her indication to Mr KD that she needed to take instructions was understandable, particularly so when Mr KD had raised concern that the individual who had attended at Mr UX's home, may have been taking photos of children. That introduced a seriously concerning element and it was reasonable that Mrs AK take steps to clarify exactly what had happened before she spoke further with Mr KD.

[79] As noted, when Mrs AK did get a better handle on the events, she was open in conceding to Mr KD that she had made an error of judgement.

[80] I agree with the Committee's decision to take no further action on the complaint. I am not persuaded that Mr UX has established to the required standard of proof that Mrs AK breached her professional duties and obligations. I am also in agreement with the Committee that Mrs AK's decision to involve her husband placed her husband in an invidious position, and reflected a considerable deviation from accepted norms.

Anonymised publication

[81] 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.

Request to file further information

[82] On the day this decision was to be released, Mr UX forwarded an email to the LCRO advising that he had been awaiting information "vital" to his complaint and had expectation that he would be in receipt of that information within 48 hours.

[83] Mr UX was advised that the LCRO would not accept any further information from either of the parties.

[84] Mr UX filed his complaint in January 2021.

[85] He has had ample time to provide necessary information to support his complaint.

[86] Complaints and reviews are required to be dealt with as expeditiously as possible. It is not contemplated that the process of advancing and determining a complaint is an evolving one which allows opportunity for parties to provide additional information over a lengthy period of time. By the time the matter arrived at the door of the LCRO, it could reasonably have been expected of Mr UX that all information relevant to his complaint and review had been filed.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed.

DATED this 28th day of APRIL 2022

R Maidment
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr UX as the Applicant
Mrs AK as the Respondent
Mr JL as the Respondent's Representative
[Area] Standards Committee [A]
New Zealand Law Society