LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2021] NZLCRO 208

Ref: LCRO 35/2021

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	**ZN** Applicant
AND	**YM and XL** Respondents

DECISION

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

Introduction

[1] Ms ZN has applied for a review of a decision by the [Area] Standards Committee [X] to take no further action in respect of her complaint concerning the conduct of the respondents, Ms YM and Mr XL.

Background

[2] Ms ZN is a practitioner specialising in employment law.

[3] She has considerable experience in the field in which she practises.

[4] From September 2019 to 1 October 2020, Ms ZN provided legal services to an Incorporated Charitable Trust which traded under the name [WKJ] [(WK)].

[5] In July 2020, Ms YM was invited to take up a position that had become vacant on the [WK] board. Her position was formalised on 2 September 2020.

[6] At the time of Ms YM's appointment, Ms ZN was engaged by [WK] in defending proceedings that had been brought by a former employee of [WK] in the Employment Relations Authority (ERA).

[7] Request was made of Ms ZN to attend a meeting with [WK]'s CEO and Chair. The meeting proceeded on 1 October 2020. At that meeting Ms ZN was informed that her retainer had been terminated. Ms ZN was advised that the litigation file she had been working on, was to be transferred to the law firm [VHG]. Ms YM was employed by [VHG].

The complaint and the Standards Committee decision

[8] Ms ZN lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 27 October 2020. The substance of her complaint was that:

(a) Ms YM had appeared to have used her position of the [WK] board as a springboard to both malign Ms ZN's reputation and tout for work; and

(b) [WK] would not have terminated the retainer, but for the actions of Ms YM in denigrating Ms ZN's reputation; and

(c) Ms YM had provided advice to [WK] on matters engaging an area of law that Ms YM had no experience in; and

(d) Ms YM had breached a number of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 including;

(i) Rule 2.7 – a lawyer must not threaten expressly or by implication, to make any accusation against a person or to disclose something about any person for any improper purpose.

(ii) Rule 10 – a lawyer must promote and maintain proper standards of professionalism in the lawyer's dealings.

(iii) Rule 10.1 – a lawyer must treat other lawyers with respect and courtesy.

(iv) Rule 11.1 – a lawyer must not engage in conduct that is misleading or deceptive or likely to mislead or deceive anyone on any aspect of the lawyer's practice.

(v) Rule 11.2 – a lawyer must not directly contact a prospective client –

(a) in a way that is intrusive, offensive, or inappropriate;

(b) if the lawyer knows or should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgement in engaging a lawyer.

(vi) Rule 12 – a lawyer must, when acting in a professional capacity, conduct dealings with others, including self-represented persons, with integrity, respect, and courtesy.

(e) viewed in its totality, Ms YM's conduct amounted to misconduct, or in the alternative, unsatisfactory conduct.

[9] Ms ZN also made complaint that Ms YM's employer ([VHG]) had breached r 5.11 of the conduct rules which provides that when a lawyer becomes aware that a client has or may have a claim against him or her, the lawyer must immediately advise the client to seek independent advice, and inform the client that he or she may no longer act unless the client, after receiving independent advice, gives informed consent.

[10] Following receipt of Ms ZN's complaint, she was informed by the Complaints Service that her complaint against [VHG] could not proceed against the firm as there was no jurisdiction to advance a complaint against a law firm that was not incorporated. The complaint was amended to record that Mr XL (the partner who had initially responded to the complaint that Ms ZN had forwarded directly to [VHG] would be included, along with Ms YM, as a party to the complaint.

[11] Mr XL responded to Ms ZN's complaint on 26 November 2020. His response was provided on behalf of himself and Ms YM. He submitted that:

(a) there was no proper or reasonable basis for the complaints and criticisms that Ms ZN had made; and

(b) Ms YM had expressed an interest in becoming a member of the [WK] board prior to her taking up an employment position with [VHG]; and

(c) Ms YM had joined the [WK] board in her private capacity; and

(d) Ms YM was not [WK]'s lawyer, and did not and had never, provided legal advice to [WK]; and

(e) Ms YM was an independent member of the [WK] board and participated in the board's discussions in that capacity; and

(f) Ms ZN's complaint contained a number of speculative, baseless and intemperate assertions in relation to the decisions that had been taken by [WK]; and

(g) [WK]'s decisions were confidential to [WK]; and

(h) Ms YM had not initiated the discussion at [WK] concerning the issue as to whether fresh counsel should be instructed in the litigation that [WK] was then defending; and

(i) Ms YM was not acting in her professional capacity, therefore her conduct was beyond the reach of the lawyers' professional conduct rules; and

(j) Ms ZN's complaint was an attempt to complain about her client and its internal decision-making; and

(k) Ms YM rejected what she considered to be baseless and unsupported accusation that she had said or done anything to malign Ms ZN's reputation; and

(l) there was no responsible basis on which Ms ZN could advance intemperate assertions that Ms YM had acted unethically or dishonestly; and

(m) there was no basis for Ms ZN to assert that [WK] had or may have had a claim against [VHG], arising out of Ms YM referring [WK] to [VHG].

[12] Ms ZN provided a response to Mr XL's reply to her complaint.

[13] In that submission, Ms ZN responded to suggestion that [WK] had terminated her retainer as a consequence of concerns that she may have been conflicted. Ms ZN remained firm in her view that Ms YM had maligned her reputation. It was her contention that Ms YM was providing advice in a reserved area of work, and that her conduct fell fair and squarely within the scope of work which fell to be regulated by the conduct rules.

[14] Ms ZN considered that the manner in which Mr XL had responded to her complaint constituted a clear breach of r 5.11. She believed that Mr XL's response constituted a thinly veiled threat to intimidate her into refraining from filing a complaint with the Complaints Service.

[15] The Standards Committee identified the scope of its investigation as focused on a consideration as to whether Ms YM or Mr XL had breached any of their professional duties.

[16] The Standards Committee delivered a brief decision on 2 March 2021.

[17] 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.

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

(a) [WK] had taken the decision to terminate Ms ZN's retainer and to engage fresh counsel; and

(b) it fell within the prerogative of [WK] to make those decisions, and it was not open to the Committee to review or comment on [WK]'s decision; and

(c) as a lawyer has no proprietary interest in a client, it is open to a client to terminate their instructions at any time, subject to the terms of the retainer; and

(d) it was satisfied that Ms YM had not breached any of her professional obligations; and

(e) Mr XL had not breached any of his obligations under the conduct rules.

Application for review

[19] Ms ZN filed an application for review on 18 March 2021.

[20] She submits that:

(a) the Standards Committee had focused its inquiry on the narrow and unrelated issue as to whether clients have a right to change lawyers; and

(b) it was not contested by her that clients have the right to terminate a retainer as they choose, but this was not the question she had asked the Committee to address; and

(c) the issues the Committee were asked to consider were;

(i) did Ms YM malign Ms ZN's reputation in order to entice [WK] to change their legal representatives; and

(ii) did Ms YM provide regulated services to litigants in an area of law in which she had no experience or expertise, and in doing so, did she damage her client's legal position; and

(iii) did Mr XL breach rules 2.10 and 5.11?

[21] Ms ZN considered that the Committee had been "overwhelmed by the paperwork", and unwilling to undertake a "proper analysis of the issues and evidence".

[22] Mr XL and Ms YM were invited to comment on Ms ZN's review application. They advised that they placed reliance on the response they had provided to the Standards Committee.

Review on the papers

[23] 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.

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

[25] 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

[26] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[1]

> … 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.

[27] More recently, the High Court has described a review by this Office in the following way:[2]

> 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.

[28] 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.

---

[1] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41] (citations omitted).
[2] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

Discussion

The YM Complaint

[29] Ms ZN is a competent practitioner who has acquired considerable experience practising in the employment law field.

[30] When filing her initial complaint, Ms ZN explained that her practice had enjoyed considerable professional success in recent years, as evidenced by its selection as a finalist in a number of NZ Law annual award presentations. Ms ZN has taught employment law at [City] University and been a regular contributor to the Employment Law bulletin.

[31] This background reinforced that Ms ZN rightly considered herself to be a very competent practitioner in her specialist field.

[32] Ms ZN says that when she began representing [WK], the organisation had a considerable history of becoming embroiled in disputes with its employees. She says that as a result of the advice and guidance she had provided over a period of time, [WK] had managed to implement a more cohesive approach to the management of its workplace. She says that the work environment had become more "calm and harmonious after almost 3 years of upheaval and turmoil" as a consequence of the recommendations she had made.

[33] Ms ZN considered that she had worked extremely diligently to promote [WK]'s interests. She had frequently gone the "extra mile". She had provided sound and competent advice, and charged fees to her client in a fiscally responsible manner.

[34] Ms ZN explains that the litigation she was working on for [WK] at the time her retainer was terminated had been particularly difficult, largely as a consequence of the obstructive approach adopted by the employees' advocates. She maintained that both advocates had acquired reputations in the employment field for what she describes as negligent and unacceptable behaviour in the employment law jurisdiction.

[35] Ms ZN noted that she had enjoyed a constructive relationship with the [WK] board chair and CEO, as evidenced by a number of emails she had received over a period of time, in which the [WK] management had been effusive in their praise of the work she had done.

[36] It was perplexing to Ms ZN, that just two weeks prior to [WK] terminating her retainer, [WK] had forwarded her an email thanking her for the work that she was doing on what was clearly a difficult case.

[37] It is important to emphasise both the depth of Ms ZN's experience in employment law, and the constructive and productive history she had enjoyed with [WK], as these factors were instrumental in shaping Ms ZN's decision to both proceed her complaint, and provide context for the strength of her conviction that she had been unfairly treated, and explanation for her belief that Ms YM was primarily responsible for the decision taken by the [WK] board to no longer continue with her services.

[38] At the core of Ms ZN's concern, was her belief that she had provided competent representation to [WK] over a considerable period of time, and that she had enjoyed the confidence of the [WK] board. It presented to her as inexplicable that [WK] would terminate her retainer.

[39] Ms ZN considered that the decision by [WK] to terminate the retainer carried significant reputational and financial cost for her, and compromised [WK]'s position in the proceedings that were on foot. Adamant in her view that explanation for the termination could not be found in circumstances that related to her performance, Ms ZN is convinced that the only plausible explanation for the decision to terminate her retainer was that Ms YM had disparaged her to the board, this with purpose to entice the board to transfer its legal work to the firm that employed Ms YM.

[40] It is significant that Ms ZN, with the prudent caution that could be expected of a careful practitioner, does not (for the most part) go so far as to contend that she has concrete evidence to establish argument that Ms YM had (as Ms ZN describes it) maligned her to the [WK] board.

[41] The reason for that, is that there is no evidence of substance to support serious accusation that Ms YM had made derogatory comments about Ms ZN.

[42] Ms ZN frequently prefaces the comments she advances to support her pivotal assertion that Ms YM had spoken ill of her, with the qualification that it "appeared to be the case" that Ms YM had engaged in the behaviour Ms ZN makes complaint of.

[43] For example, in her initial complaint, Ms ZN contends that:

(a) Ms YM "appears to have no experience at all in employment law or litigation, yet appears to have advised the board that the way [GC][3] was dealing with their employment law issues and current litigation proceedings was unacceptable, and that the matter should be transferred to [VHG] senior associate, UF".

(b) "… It appears likely that this paragraph has been drafted by Ms YM".

[44] In correspondence to [VHG] of 5 October 2020 in which she informed [VHG] of her complaint against Ms YM, Ms ZN informed [VHG] that:

(a) [WK] had terminated her retainer "which would appear to be the result of Ms YM's advice and adverse comments about [GC], following her recent appointment to the [WK] Board"; and

(b) Ms YM "appears to have advised the Board that the way [GC] was dealing with their employment law issues and current litigation proceedings was unacceptable"; and

(c) "(… it appears as a result of Ms YM's attempts to use her recent position on the [WK] Board to malign the reputation of another lawyer, and tout for work for [VHG]), Mr TE would not even respond to an email I sent him…"

[45] On occasions, Ms ZN is more robust and emphatic in her criticism, noting that Ms YM had "maligned my reputation with [WK], all of its Board members and the Authority (following the sudden change in representation)".[4]

[46] This degree of certitude in her position evolves from what Ms ZN concludes is "an inescapable conclusion that a client, having been so pleased with my work and rightly so, given the outstanding results achieved by resolving all of their long-running employment issues and all but one of six grievances (the latter without paying the grievants anything) would not have had such a sudden "about face" but for Ms YM clearly maligning my reputation as soon as she had joined the Board, in an attempt to win a client to [VHG]".[5]

[3] Ms ZN's practice operated under the name of [GC] Legal [(GC])
[4] ZN correspondence to Complaints Service (27 October 2020) at p [32].
[5] ZN correspondence to Complaints Service (27 October 2020) at p [28].

[47] Allegation that a lawyer, with venal purpose, has deliberately set out to impugn the reputation of another lawyer, is a serious allegation. It is allegation which must, if it is to be established, be supported by convincing evidence.

[48] A complainant is obliged to support their claim with evidence to the required standard; in this case, the balance of probabilities.

[49] Ms ZN carries the burden of establishing, on the balance of probabilities, that the allegations she makes concerning Ms YM's conduct are established.

[50] Ms YM rejects suggestion that she had made comments to the [WK] board that were critical of Ms ZN.

[51] It is her position that:

(a) she had not initiated the discussion at the board meeting which had raised the question as to whether [WK] should consider engaging fresh counsel for the litigation it was then engaged in; and

(b) she was specifically asked by board members as to whether she could recommend an employment lawyer at [VHG] and did so; and

(c) she had not provided legal advice to [WK] on the employment claim it was defending; and

(d) she was an independent member of the [WK] board, acting in a personal rather than professional capacity.

[52] Ms ZN does not accept that Ms YM was "hands off" and that she had not been influential in the decision to terminate her retainer.

[53] She notes that when she received an invitation to attend the meeting of 1 October 2020, the invitation specifically stated that Ms YM, the newest member of the board, had "raised some questions/perspectives that are worth discussing with you".

[54] Ms ZN believes that the questions and perspectives that Ms YM was referencing, related to an issue that had been raised by representatives of the former employee who was advancing the claim against [WK]. The employee's advocates were asserting that it was not appropriate for Ms ZN to continue as counsel in the case, based on argument that she had conducted the initial investigation into the employee's workplace concerns and faced possibility of being called as a witness in the proceedings.

[55] It was Ms ZN's view that allegation that she was potentially conflicted was spurious, and an argument frequently advanced in employment cases by these particular advocates. Ms ZN considered that the argument adopted by the advocates was unprincipled, and one that had been frequently and unsuccessfully asserted by these particular advocates in many cases that had come before the Employment Authority.

[56] Ms ZN considered that her initial involvement in the employment investigation was entirely appropriate, consistent with the practice adopted by many employment lawyers, and a matter that she had addressed head on in a memorandum filed with the Authority. Ms ZN was confident that the Authority, when it came to consider the conflict issue, would find in her favour.

[57] In noting that employment lawyers were frequently involved in employment disputes from the outset, Ms ZN advised that she had reviewed approximately 35 cases she had appeared as counsel in before the Employment Court and Authority, and that she had never, despite in many of these cases being involved in the process from commencement, been called on to recuse herself.

[58] Mr XL, in responding to Ms ZN's complaint, argued that irrespective as to whether Ms ZN considered demand that she recuse herself to be a transparent attempt to derail the litigation, once the issue was raised, a legitimate question arose as to whether [WK]'s interests were served by becoming embroiled in a procedural argument. Mr XL submits that whilst Ms YM rejects suggestion that she had said anything to malign Ms ZN's reputation or done anything that would have constituted a breach of the conduct rules, he observed that "[h]olding the view that [WK]'s interests were best served by instructing as counsel someone who was not involved in running the investigation that was being criticised and was directly at issue in the case, does not imply any criticism of that other person".

[59] Whilst Mr XL does not directly state that Ms YM had expressed a view that it would be preferable for [WK] to avoid possibility of becoming embroiled in a procedural argument, Ms ZN took it from Mr XL's comments that Ms YM had in fact expressed an opinion to the [WK] board as to whether it was prudent to instruct fresh counsel.

[60] Ms ZN considers that Ms YM was ill-equipped to provide any advice on employment matters, as she simply lacked the experience to do so.

[61] But there is minimal evidence of what was said by Ms YM at the 1 October 2020 meeting, and no evidence at all of what Ms YM may or may not have said in discussions with [WK] board members prior to the October meeting.

[62] Ms ZN is the only party that has provided a first-hand account of the extent of Ms YM's contribution.

[63] She advises that she arrived at the meeting early and spoke with [WK]'s chairperson, Mr TE, immediately on arrival. Ms ZN explains that Mr TE indicated to her that he wished to get straight to the point and informed her that she was being dismissed as [WK]'s lawyer.

[64] A decision had clearly been made to terminate Ms ZN's retainer prior to the October meeting.

[65] Ms ZN explains that Ms YM arrived late for the meeting.

[66] The extent of Ms YM's participation in the meeting can only be gauged by the account that Ms ZN provides of what took place. But what appears clear, is that Ms YM's involvement was limited. Ms ZN reports that Ms YM had commented in respect to the ongoing litigation that "[the matter] just needs to settle now". The only other comment that Ms YM is reported to have made was to make inquiry of Ms ZN as to what was involved in a directions conference. This inquiry reinforced Ms ZN's view that Ms YM had negligible litigation experience and was singularly ill-equipped to be providing legal advice on employment matters.

[67] The foundation for Ms ZN's serious allegation that Ms YM had sabotaged Ms ZN's reputation with [WK] in order to secure kudos with her firm by bringing a new client into the firm, does not rest on evidence of what Ms YM is reported to have actually said. Rather, Ms ZN relies on argument that as she was a very competent and experienced lawyer who had provided high quality legal advice to [WK] over a period of time and had garnered an excellent reputation amongst the [WK] leadership team, no reasonable explanation could be given for [WK]'s decision other than that Ms YM had spoken about her in negative terms of such consequence, that [WK] felt they had no option but to terminate the retainer.

[68] I accept that Ms ZN was aggrieved and indeed bewildered by the decision taken by the [WK] board. But her explanation that the decision must have been prompted by the actions of Ms YM, provides flimsy foundation for her conduct complaint. As an experienced lawyer, Ms ZN would understand that complaints of serious professional misconduct are not established on the back of conjecture.

[69] Even a cursory examination of the manner in which "malign" has historically been defined, reinforces the seriousness of the allegation that Ms ZN makes against Ms YM. To malign an individual or an individual's reputation is not to make mild criticism

of the person who was the subject of the criticism. The term carries connotation of a party speaking maliciously and spitefully of another.

[70] Accusation that Ms YM maligned Ms ZN's reputation is purely speculative. The evidence advanced by Ms ZN to support serious allegation that Ms YM had disparaged her reputation to the extent that a board who she says had been both well served by her and supportive of her, felt it necessary to take steps to terminate her retainer, falls significantly short of the threshold required.

[71] On that basis alone, Ms ZN's complaint against Ms YM is not established. There is insufficient evidence to support the accusation that Ms YM had maligned Ms ZN.

[72] Ms ZN's complaint that Ms YM damaged her reputation, is not established simply on the basis that Ms ZN can see no other explanation for her being dismissed other than that the decision to dispense with her services was made hard on the heels of Ms YM taking up a position on the board, and the decision then made to transfer the file to a colleague of Ms YM's. I don't think it unreasonable for Ms ZN to have felt a degree of discomfort with the decision, certainly she could find no explanation for it, but allegation that Ms YM had spoken of her to the board in such condemnatory terms as would justify and establish a description of that discussion as "malign", demands of Ms ZN that she provide solid evidence to support the allegation made.

[73] It is submitted for Ms YM, that her conduct is not captured by the conduct rules, as she was, at all times, acting in a private capacity as a member of the [WK] board, rather than in the capacity of a legal advisor to the board. It is argued that she was not providing regulated services to the board.

[74] Having concluded that Ms ZN has been unable to establish an evidential foundation for complaint that Ms YM had impugned her reputation, I do not consider it necessary to undertake a detailed analysis of the issue as to whether Ms ZN was providing regulated services to the [WK] board, but there is minimal evidence which could reasonably support conclusion that Ms YM was providing regulated services to the [WK] board.

[75] Ms ZN notes that it was the practice of the board to appoint members with a particular expertise, and I accept that it would be reasonable to assume that in appointing a lawyer to its board, the board would have an expectation that it would be able to draw on Ms YM's legal background and experience.

[76] But Ms YM was not engaged by the board to provide legal advice on the litigation that Ms ZN had been managing. She had been appointed to the board to fill a

vacancy. This appointment had followed on from her expressing an interest in joining the board in May 2019, some months prior to her taking up a position with [VHG].

[77] Ms YM joined the board in her private capacity.

[78] In *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2014] NZHC 1987, the Court adopted a broad interpretation of what constituted regulated services" as including conduct *connected* with the provision of regulated services, but there is a distinction to be drawn between a lawyer (as a number of lawyers do) acting in the role of a member of a board, to that of a lawyer providing legal services to that board.

[79] It is critical also to note (as emphasised by the Standards Committee) that the decision to terminate the retainer was a decision taken by the [WK] board.

[80] Ms ZN is critical of the Standards Committee for focusing on what she describes in her review application as "the very narrow and unrelated issue of whether clients have a right to change lawyers".

[81] With respect to Ms ZN, the issue of a client's right to change their lawyer is neither narrow nor unrelated to the circumstances of this review. To the contrary, the issue is pivotal.

[82] Ms ZN does not contest that [WK] were free to terminate her retainer at any time, and indeed there would be no basis for her to do so in the absence of evidence of an established contractual obligation reinforced by a provision in the retainer. But she erodes the principle that a client is free to terminate a retainer at will by argument that the decision to terminate was malignantly influenced by an individual board member.

[83] Ms ZN has not established that was the case, but her argument is dismissive and diminishing of the role of the other board members (particularly the board chair) and the board's CEO.

[84] Central to Ms ZN's argument, is her contention that the judgment of the board members and its CEO had been subverted and compromised by the actions of a board member who had only just taken up a position on the [WK] board. I accept that Ms ZN was shocked when her retainer was terminated, and that she struggled to find explanation for the decision, but her argument that Ms YM had asserted an ill-informed and self-interested influence over the board in the short time she had occupied a seat on the board, is argument that inevitably demands acquiescence to suggestion that the

board chair and other board members, had little capacity to exercise their independent judgement.

[85] Whilst Ms ZN has her view as to why her retainer was terminated (and she is entitled to that view), noticeably absent from this complaint is any evidence of an explanation from the board as to the reasons for its decision. Ms ZN suggests that light could be thrown on the matter if Ms YM or Mr XL sought and provided explanation from [WK] as to the reasons for her dismissal.

[86] Neither Mr XL nor Ms YM is obliged to comply with that request. Both would have obligations of confidentiality to the board, and it is unknown as to whether the board would be willing to provide information to Ms ZN. It has no obligation to do so.

[87] Ms ZN makes much in her submission of argument that [WK]'s case was significantly compromised by her departure. She suggests that Ms YM's conduct had "forced [WK] to incur significant unnecessary legal fees when instructing a new lawyer in the middle of litigation proceedings".[6]

[88] Ms ZN contends that[VHG] had potentially obtained a client "negligently", or "recklessly", and that in doing so, their client had potentially suffered a loss.

[89] Ms ZN provides no evidence to support contention that [VHG] acquired a client recklessly or negligently. It is argument that [VHG] did not have the capacity to provide adequate legal advice on an employment matter. Ms ZN understood it to be the case that Ms YM had no employment law experience, but Ms YM did not assume responsibility for the carriage of the file, when the matter was transferred to [VHG]. The file was allocated to a [VHG] staff member who was an employment law specialist.

[90] It must be reiterated, that [WK] were free to terminate Ms ZN's retainer if they wished to do so. Ms ZN did not have a proprietary interest in her client.[7]

[91] It is frequently the case that additional costs will be incurred by a client when they instruct fresh counsel in the course of litigation, but that is not Ms ZN's concern.

[92] It is not uncommon for lawyers to be replaced in the course of litigation. On occasions, fresh counsel are instructed on the cusp of a hearing proceeding.

[93] There is an element to Ms ZN's submissions which gives indication that she considered that she, rather than her client, should assert control over the direction of the

---

[6] ZN correspondence to Lawyers Complaints Service (27 October 2020) at p [50].
[7] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rr 4.3, 4.4.

file. For example, she believes that [VHG] were asked to look over the litigation file prior to the meeting of 2 October 2020. She contends that it "was concerning that [VHG] lawyers with no knowledge of employment law reviewed and advised on an employment law file".

[94] Ms ZN's evidence to support contention that the file had been reviewed prior to the 2 October 2020 meeting relies on a statement that was reported to her by a former [WK] board member. Her suggestion that the file had been reviewed by [VHG] lawyers who had no knowledge of employment law is unsupported by any other evidence.

[95] But the point that is reinforced by Ms YM's raising this issue, is her apparent belief that there was some degree of impropriety in the board seeking a view from [VHG].

[96] There was not.

[97] It is difficult to see how Ms ZN could advance accusation that it was concerning that [WK] had sought a second opinion on the file (if that was the case), if the file had been referred to a firm other than [VHG].

[98] The issue inevitably returns in circuitous fashion, to allegation that transferring the file to [VHG] was improper because Ms YM was an employee of the firm. It is argument that Ms YM (and [VHG]) were conflicted.

[99] They were not.

[100] Ms YM says that request was made of her as to whether she could recommend an employment lawyer at [VHG]. Her position as a board member and employee of the firm did not disqualify her from recommending a lawyer from [VHG].

[101] It is commonplace for lawyers to occupy positions on boards of governance, whilst the lawyer's firm provides legal advice and representation to the board.

[102] To summarise the issues raised on review by Ms ZN, which relate to her complaint against Ms YM:

(a) Ms ZN's evidence does not establish that Ms YM had maligned her reputation; and

(b) that evidence does not establish that Ms YM had acted improperly in enticing [WK] to transfer the file to [VHG]; and

(c) whilst the point was not required to be comprehensively addressed in this decision, I think it unlikely that Ms YM could be held out to have been providing regulated services to [WK]; and

(d) there is no evidence to establish that Ms YM had breached obligations of courtesy owed to Ms ZN.

The XL Complaint

[103] Ms ZN submitted that the Standards Committee had failed in its decision to address her concerns that:

(a) Mr XL had breached r 2.10 by implying that pursuing her complaint would place her at risk of disciplinary action; and

(b) Mr XL had potentially breached r 5.11 by failing to inform [WK] that they may have a claim against Ms YM and should seek legal advice; and

(c) Mr XL's firm should have ceased acting until [WK] had obtained independent legal advice.

[104] In her correspondence to [VHG] of 5 October, Ms ZN advised that she was informing [VHG] that she was making a complaint against Ms YM.

[105] The grounds of her complaint have been summarised in this decision.

[106] At paragraph 21 of her correspondence, Ms ZN said this:

> Out of professional courtesy to [VHG], I seek in the first instance, to resolve these matters privately rather than filing a complaint with NZLS. If private resolution proves impossible, then the matter will need to be elevated to NZLS.

[107] Ms ZN then proceeded to explain the terms on which she would be prepared to resolve the complaint. These included requirements:

(a) that Ms YM provide her with a full, genuine and formal written apology; and

(b) requirement that Ms YM "resign from the [WK] Board immediately, fully informing them that her advice/comments were wrong and based on the total ignorance of the facts of the case and in an area of law that she does not practice in and has no knowledge or expertise. I further require that

you provide a copy of her resignation from [WK] to me and provide a copy of the formal apology … above to the [WK] Board; and

(c) that [VHG] cease acting in the matter "given the circumstances in which this client was obtained were unethical, a conflict and [VHG] should not profit from such conduct"; and

(d) [VHG] pay [GC] compensation for lost future fees from [WK].

[108] Mr XL responded to Ms ZN's complaint on 9 October 2020. In that response he:

(a) rejected suggestion that Ms YM had behaved improperly; and

(b) submitted that there was no proper and reasonable basis for Ms ZN to advance a conduct complaint; and

(c) rejected suggestion that [VHG] should cease acting for [WK]; and

(d) rejected request that [VHG] pay compensation to Ms ZN.

[109] In his concluding comments, Mr XL signalled to Ms ZN that there was an element of Ms ZN's correspondence that he considered was "problematic". Mr XL noted that Ms ZN had sought financial compensation and other remedies on the basis of indication that if the matter was not resolved to her satisfaction, she would be advancing a complaint against Ms YM to the Law Society. It was Mr XL's view that Ms ZN's approach to advancing her complaint, potentially raised the possibility that Ms ZN herself was in breach of the conduct rules, specifically r 2.7.

[110] Rule 2.7 provides that a lawyer must not threaten, expressly or by implication, to make any accusation against the person or to disclose something about any person for any improper purpose.

[111] Mr XL concluded his correspondence with indication that [VHG] had no intention of taking this concern further but had raised the issue with Ms ZN as he considered that she would be "well advised to avoid the same issue in future".

[112] In replying to Mr XL's response to her complaint, Ms ZN submitted that:

(a) Ms YM was providing legal advice; and

(b) Ms YM's statements had prejudiced [WK]'s position; and

(c) Rule 5.11 is automatically triggered when a client has, or may have, a claim against a lawyer; and

(d) If [VHG] had obtained a client through the "potential negligence or recklessness" of one its lawyers, and the client has potentially suffered as a result, then [VHG] had an obligation to inform [WK] that it may have a claim against [VHG].

[113] Ms ZN was critical of Mr XL's response, considering it to be a "thinly veiled threat to intimidate me from filing a complaint with the NZLS". She considered that r 13.4 placed obligation on both her and Mr XL to consider alternatives to litigation.

[114] Rule 5.11 provides that when a lawyer becomes aware that a client has or may have a claim against him or her, the lawyer must immediately –

(a) advise the client to seek independent advice; and

(b) inform the client that he or she may no longer act unless the client, after receiving independent advice, gives informed consent.

[115] In arguing that [VHG] had an obligation to advise [WK] to seek independent advice, Ms ZN extends the scope and application of r 5.11 well beyond the intended reach of the rule, when she alleges that [VHG] had obligation to alert their client to possibility that their client "has or may" have had a claim against the firm.

[116] Ms ZN's contention that [VHG] had an obligation to consider the potential or possible application of r 5.11, must be initially considered from the perspective that Ms ZN was not [VHG]'s client.

[117] Possibility that [WK] may have had a claim against [VHG] is not identified by [VHG], or by any actions or steps taken by [WK], which could or should have alerted [VHG] to the possibility of a claim.

[118] The potential for a claim is solely articulated by Ms ZN, who identifies the foundation for a possible claim as being the actions of [VHG] in "obtaining a client directly through the potential negligence or recklessness of one of its lawyers, and the client has/potentially suffered as a result, then that client needs to be informed that they may have a claim against [VHG], and be sent away for independent advice".[8]

[8] ZN correspondence to Complaints Service (11 December 2020) at p [11].

[119] This is an inadequate foundation on which to base argument that a lawyer has failed to inform their client of the possibility that the client may have a claim against the lawyer.

[120] Ms ZN has no evidence that [VHG] had mismanaged [WK]'s claim. Her suggestion that [WK] had "potentially suffered loss" falls well short of establishing any reasonable basis for [VHG] to have concern that they may have let their client down. In identifying "potential" loss, and "potential negligence or recklessness", Ms ZN's submission, perhaps inadvertently, reinforces the absence of evidence to support the allegations made.

[121] Ms ZN was distressed that [WK] had terminated her retainer. She argues that [WK]'s decision to engage fresh counsel had "totally humiliated" her and removed a significant portion of [GC]'s future income.[9] She suggests that her removal as counsel had "maligned" her reputation with the Employment Relations Authority.

[122] With every respect to Ms ZN, her description of the consequences that she says would flow from the termination of her retainer are exaggerated to the point of approaching the hyperbolic, and reflect, in my view, that the obvious and understandable disappointment that Ms ZN felt when her previously productive relationship with [WK] came to an end, had compromised her ability to reflect on the circumstances of her termination in a more measured and dispassionate manner.

[123] Ms ZN introduced her complaint with a careful account of her background and experience, all of which gave indication of her as a competent and capable lawyer.

[124] She noted that she had had considerable experience appearing before the Employment Court and Employment Relations Authority.

[125] A lawyer's reputation as counsel appearing before such jurisdictions is developed and fostered over a period of time. A carefully built and hard-won reputation is not undermined by a single client's decision to terminate a retainer. It is not uncommon for clients, for a multitude of reasons, to terminate a lawyer's retainer. On occasions the reason for terminating are quite unrelated to the lawyer's performance. If Ms ZN had built, as she says she had, a reputation as a very competent employment lawyer, that reputation would not suffer the slightest dent before the Authority as a consequence of her retainer being terminated. And Ms ZN would know that.

[9] ZN correspondence to Complaints Service (27 October 2020) at p [33].

[126] Ms ZN's accusation that [VHG] or Ms YM were responsible for "removing a significant portion of [GC]'s future income",[10] is further example, in my view, of the extent to which Ms ZN's disappointment in losing a client has compromised her ability to adopt a more proportionate and measured response to the events.

[127] As noted, Ms ZN had no proprietary interest in her client. She had no guarantee that [WK] would continue to instruct her. In essentially advancing argument that but for the appointment of Ms YM to the [WK] board, she would have been guaranteed continuing work with [WK], Ms ZN makes assumptions that are not supported by evidence. It is argument that diminishes the extent of the autonomy and decision-making capacity of the [WK] board and its executive. It is trite, but necessary, to emphasise that it was not for Ms ZN or [VHG] to decide who would be instructed to represent [WK]. It was for [WK], and solely for [WK], to determine who they would wish to have represent them.

[128] There was no reasonable or objective basis for [VHG] to form a view that their client had, or may have had, a claim against them.

[129] Possibility of a claim was not established on the basis of Ms ZN's allegation that there may potentially have been one.

[130] Ms ZN raised concern that Mr XL had breached r 2.10.

[131] Rule 2.10 provides that a lawyer must not use, or threaten to use, the complaints or disciplinary process for an improper purpose.

[132] As noted at p [107], in correspondence to [VHG] of 5 October 2020 , Ms ZN listed the remedies she sought in order to resolve her complaint.

[133] Ms ZN noted in her correspondence, that "out of professional courtesy to [VHG], I seek in the first instance, to resolve these matters privately rather than filing a complaint with NZLS. If private resolution proves impossible, then the matter will need to be elevated to NZLS".

[134] In replying to Ms ZN's complaint on 9 October 2020, Mr XL responded to Ms ZN's indication of intention to refer her concerns to the NZLS if the issues could not be resolved. Mr XL considered that this indication from Ms ZN was problematic, and potentially raised possibility of a breach of r 2.7.

---

[10] ZN correspondence to Complaints Service (27 October 2020) at p [33].

[135] Rule 2.7 provides that a lawyer must not threaten, expressly or by implication, to make any accusation against a person or to disclose something about any person for any improper purpose.

[136] In responding to Mr XL, Ms ZN informed the Complaints Service that she considered Mr XL's response to her complaint to be a "thinly veiled threat to intimidate me from filing a complaint with the NZLS".[11]

[137] In explaining his position further in correspondence of 26 November 2020, Mr XL noted that he had alerted Ms ZN to his concerns "in the spirit of collegiality" and with intention to draw her attention to what he considered was essentially a threat on her part to make complaint to the Law Society, if her various requests, including requests for financial compensation, were not met. Mr XL observed, that he had in his time in practice on occasions been grateful for advice he had received from more experienced or better-informed practitioners and made no apology for bringing to Ms ZN's attention an issue which had been highlighted with genuine purpose to be constructive.

[138] Ms ZN responded to Mr XL's advice with indication that if Mr XL considered that her complaint constituted a misuse of the complaints system, or if he considered that his knowledge of employment law exceeded hers, then his "self-proclamation of being more experienced and better informed, is highly questionable".[12]

[139] Ms ZN had no reasonable grounds for advancing a conduct complaint against [VHG].

[140] I accept that Ms ZN had genuine belief that she had legitimate grounds for advancing her complaints, but the remedies she sought, give, in my view, clear indication of the extent to which she had lost perspective.

[141] She makes demand of Ms YM that she resign "immediately" from the [WK] board. In making this demand, Ms ZN is seemingly oblivious to the fact that there is no evidence that the [WK] board had made any criticism of Ms YM's conduct or were seeking her removal.

[142] But more is required of Ms YM than to provide apology to Ms ZN and to tender her resignation from the board. Ms ZN makes demand that Ms YM inform the board that advice/comments she had provided to the board was "wrong and based on a total ignorance of the facts of the case and in an area of law that she does not practice in and has no knowledge or expertise". This is demand that moves from demand for penalty to

[11] ZN correspondence to Complaints Service (11 December 2020) at p [16].
[12] ZN correspondence to complaints service (11 December 2020) at p [18].

demand for penance. It is demand that Ms YM apologise for advice she is said to have provided, when Ms ZN has absolutely no evidence of what, if any, advice Ms YM had provided to the board. It is demand that is countered by Ms YM's evidence that she had provided no advice to the [WK] board on the employment claim. To the limited extent that Ms ZN is able to provide first-hand account of any contribution that Ms YM may have made to the discussions regarding the employment claim, she is simply able to record that Ms YM had made a comment to the effect that the matter called out for settlement.

[143] Ms ZN makes demand of [VHG] that they cease acting for [WK]. This request is made with an apparent disregard to the autonomous rights of the [WK] board to control who they wished to engage to provide legal representation.

[144] Ms ZN's final demand, that [VHG] pay [GC] compensation for lost future fees, presents as a surprising demand for a lawyer to make of another in the course of advancing a conduct complaint.

[145] The complaint proceeds on assumption that Ms ZN would retain an entitlement to act for the [WK] board for the foreseeable future.

[146] As a first step to establishing a claim for compensation under s 156(1)(d) of the Act, Ms ZN would be required to establish that loss suffered was a consequence of any act or omission on the part of Ms YM. She falls well short of establishing to the required legal threshold, that loss she suffered from no longer having [WK] as a client was caused by any act or omission on the part of Ms YM.

[147] Ms ZN advised [VHG] that "if private resolution proves impossible, then the matter would need to be elevated to NZLS".

[148] Mr XL considered this aspect of Ms ZN's correspondence to be problematic and I agree with him.

[149] His decision to alert Ms ZN to a number of conduct cases in which Standards Committees had considered circumstances which could potentially lead to a breach of rr 2.7 or 2.10, was not in my view intended to "intimidate" Ms ZN into abandoning her complaint, but rather advice proffered in a spirit of genuine professional collegiality. It was advice that informed Ms ZN that her indication that she would take the matter further with NZLS if her demands were not met, veered perilously close to a threat to use the complaints or disciplinary process for an improper purpose. Mr XL's concern that Ms ZN's indication of the possibility of progressing a conduct complaint if her concerns were

not resolved, provided a legitimate basis for Mr XL to raise the question as to whether Ms ZN's approach could potentially constitute a breach of r 2.10.

[150] Ms ZN contends that r 13.4 imposed obligation on both her and Mr XL to consider alternatives to litigation.

[151] Rule 13.4 had no application. That rule imposes obligation on a lawyer, when assisting a client with the resolution of a dispute, to ensure that their client is informed of alternatives to litigation that are reasonably available.

[152] Mr XL and Ms ZN were not in a lawyer-client relationship.

[153] Nor were they engaged in litigation.

[154] Ms ZN was advancing allegation that Ms YM (and Mr XL) had breached their professional duties and obligations.

[155] The Conduct and Client Care Rules exist to maintain professional standards. Any person is able to make a complaint about a breach of the Rules. It is one thing to draw the attention of a lawyer in a collegial way to a possible breach of the Rules. It is another to say that a complaint will be lodged unless the lawyer acts in accordance with demands made by the potential complainant.[13]

[156] It is the nature of the demands made by Ms ZN, particularly the request for financial compensation in a sum unquantified by her but presumably a sum of significance in that she submits that she had suffered substantial financial impact as a consequence of losing [WK] as a client, and the demand made that [VHG] terminate its relationship with [WK], that justly elevated Mr XL's concerns to the "problematic".

[157] I do not consider that the concerns identified by Mr XL constituted a thinly-veiled threat to intimidate Ms ZN. To the contrary, I consider his response to have been genuinely accommodating in its approach. Mr XL gave clearest indication that he had no intention of advancing a complaint against Ms ZN. Nor was his reference to him having benefited in his time in practice from receiving guidance from experienced and better-informed practitioners discourteous or disrespectful to Ms ZN. Ms ZN mischaracterised this aspect of Mr XL's response as being an indication from Mr XL that he considered he had more knowledge of employment law then Ms ZN. Mr XL did not purport to hold himself out as a person having a particular experience or expertise in

[13] LCRO 90/2011 at p [33].

employment law. Rather, his reference to having himself enjoyed the benefit of collegial advice over the years, was intended to do no more than emphasise that his purpose in identifying a concern that Ms ZN herself may have breached a conduct rule, was advanced by him in a spirit of collegiality, and intended to be received by her as such.

[158] I consider the concern identified by Mr XL to have been legitimate, and the manner in which he alerted Ms ZN to this concern to have been constructive and courteous.

[159] There is no foundation for Ms ZN's allegation that Mr XL had breached r 2.10.

Conclusion

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

Anonymised publication

[161] 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 16TH day of December 2021

_____

R Maidment
Legal Complaints Review Officer

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

Ms ZN as the Applicant
Ms YM and Mr XL as the Respondents
[Area] Standards Committee [X]
New Zealand Law Society