

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

[2022] NZLCRO 061

Ref: LCRO 62/2021

CONCERNING

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of [Area] Standards Committee

BETWEEN

NR

Applicant

AND

JM

Respondent

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

Introduction

[1] On 17 November 2020, [Area] Standards Committee made a finding of unsatisfactory conduct against Mr NR. The Committee called for submissions on penalty.

[2] Mr NR provided submissions on 3 December 2020. UH Law forwarded Mrs JM's submissions on 2 December 2020.

[3] Neither submission was sent to the other party.

[4] The Committee issued its determination as to Orders on 19 April 2021.

[5] Mr NR has applied for a review of that determination.

Background

[6] The background to Mrs JM's complaint is best explained by the Standards Committee:¹

Mr NR acted for Mr and Mrs JM in the drafting of their wills. Both wills were signed and kept by Mr NR.

Mrs JM subsequently bumped into Mr NR "*a few years ago*" and he told her he was moving away and that he had given all their files to UH lawyer. ...

Mr JM died on 18 November 2019. Mrs JM contacted Mr UH to be advised by him that he did not have any of Mr NR's files and so did not have Mr JM's will.

Mrs JM was unable to access Mr JM's Kiwi Saver worth \$20,000.00 which was to be available to cover funeral expenses, so she had to borrow to pay for the funeral.

Mrs JM was struggling emotionally and financially with only her Superannuation to live on.

The Standards Committee determinations

[7] The Committee determined:²

Mr NR had ample time from when the will was executed to when he ceased to be a lawyer to make sure that something so profoundly important as a will was stored in a way which would be safe until it was needed. He failed to do so and therefore breached the above specified rules. In the circumstances as outlined by Mrs JM, the effect of his failure was serious and ongoing. In such circumstances the Committee determined that Mr NR's breaches of his obligations constituted unsatisfactory conduct under s 152(2)(b)(i) of the Act.

[8] The Committee called for submissions on penalty.

[9] After considering submissions from both parties, the Committee determined that Mr NR:³

- a. Be censured, s 156(1)(b)
- b. Must pay:
 - i. compensation of \$10,000.00 to Mrs JM made up of the specified costs incurred at the time of her submissions of \$6,300.95 and the balance for the loss of dignity and distress she suffered. s 156(1)(d)
 - ii. a fine of \$2,000.00 to the New Zealand Law Society, s 156(1)(i)
 - iii. costs of \$1,500.00 to the New Zealand Law Society, s 156(1)(n)

¹ Standards Committee findings determination (17 November 2020) at [1]–[5].

² At [21].

³ Standards Committee penalty determination (19 April 2021) at [7].

Mr NR's application for review

[10] Mr NR's grounds for review includes a submission that the Committee has breached the rules of natural justice by not forwarding Mrs JM's submissions to him for further comment, prior to making its determination as to orders.

[11] He says:⁴

... At paragraph 7 of its Determination on Penalty the Committee refers to the supporting evidence provided by the complainant. This evidence was not disclosed to me prior to the Committee's determination. There are matters provided in evidence that I would have wished to challenge or seek clarification of. ...

[12] Mr NR's further reasons in support of his application for review are:

- The Committee did not reflect the fact that he had "consistently expressed willingness to contribute to the complainant's costs".⁵
- The order for compensation is excessive and there is no jurisdiction to make orders for loss of dignity and distress.
- The fine imposed is punitive and exemplary.
- The costs order is excessive in the circumstances.

Mrs JM's response

[13] Mrs JM says that it is "a matter for the rules and powers of the Committee" as to whether or not the Committee has "overstepped its powers and the Act by granting additional compensation".

[14] As a final comment, she says:⁶

Finally, my understanding is that the delay was because of the original will not being available and that any coroners investigation has no bearing on the ability to apply for probate, the fact of death occurring being the only thing to be establish[ed] before a probate application and cause of death has no bearing on this.

Nature and scope of review

[15] The High Court has described a review by this Office in the following way:⁷

⁴ NR's supporting reasons (4 May 2021) at [1].

⁵ At [3].

⁶ Email from JM to LCRO (9 June 2021).

⁷ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [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.

This review has been conducted in accordance with those comments.

Review

[16] This is a review of the Committee's determination as to orders only. No submissions in the nature of evidence can be considered in this review. Only Mr NR's submissions as to the orders imposed by the Committee can be addressed.

Natural justice

[17] Mr NR says that the Committee has breached the principles of natural justice by reason of the fact that Mrs JM's submissions were not sent to him prior to the Committee issuing its determination.

[18] A similar scenario arose in *McGuire v Manawatu Standards Committee*.⁸

[19] Mr McGuire had applied for judicial review of a Standards Committee determination which had been confirmed on review by this Office. The facts insofar as they relate to the same issues as arise in this instance, are set out by the Court in [21]:

The second matter involved an earlier letter dated 21 November 2012 from Mr Ranganathan to Mr Greer, the Legal Standards Officer for the Committee headed "Submissions on the Case. Complaint ID/6583" relating to the complaint by he and his wife against Mr McGuire. This letter was sent some six days before the hearing of the Ranganathan complaint, by the Committee, (a hearing which it conducted on the papers) and its determination. Mr McGuire did not receive a copy of the letter. He has in fact confirmed that he had never seen this 21 November 2012 letter until 4 August 2015 and he has no idea why it was not disclosed to him by the Committee or during the review by the LCRO. Obviously, he had no chance to respond to the letter or to matters raised in it.

[20] Gendall J describes the content of that letter at [42] of the judgment:

... Although this letter from Mr Ranganathan in part repeated material which he had placed in his original letter of complaint, other aspects in this letter including the degree of ill-feeling, outrage, and hurt allegedly suffered by the Ranganathans, strongly emphasised by Mr Ranganathan in the letter, were matters available to be taken into account by the Committee. These additional matters and strong comments were clearly quite unknown to Mr McGuire.

⁸ *McGuire v Manawatu Standards Committee* [2016] NZHC 1052.

[21] His Honour continues:⁹

In terms of issues of procedural impropriety, it is a fundamental requirement of natural justice that a party must be given a reasonable opportunity to present his or her case with knowledge of the case that she or he has to meet. An underlying principle in all this is that a party should normally be given the opportunity to respond to an allegation that, with adequate notice, might be effectively refuted. Decisions in this area such as *Daganayasi v Minister of Immigration*⁴ and *Khalon v Attorney-General*⁵ are of relevance and make this clear. Key elements in all this must be the need to avoid questions of real surprise and potential prejudice.

⁴ *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA).

⁵ *Khalon v Attorney-General* [1996] 1 NZLR 458.

[22] His Honour concluded:¹⁰

...but only by a reasonably fine margin, that by failing to provide to Mr McGuire the 21 November 2012 letter from Mr Ranganathan received by the Committee shortly before its hearing, a letter no doubt taken into consideration as part of its deliberations, a breach of natural justice occurred in this case. ...

[23] I distinguish that case in this review for the following reasons:

- Mrs JM’s submissions were sent to the Committee following the Committee’s request for submissions on penalty. The basis of Mr NR’s objection is that he deduced from those submissions that the enquiry into the reasons for Mr JM’s death was ongoing and therefore not the cause of Mrs JM’s losses. That issue is addressed in [33] supra and consequently has no bearing on the Committee’s penalty decision.
- Legal costs and interest incurred on the loan from the bank are supported by evidence and cannot be disputed. The disputed difference arises out of the Committee’s imposition of an additional amount of \$3,699.05 awarded to Mrs JM by way of compensation for loss of dignity and distress.
- The Judge’s decision was made “by a fine margin”, a margin which I consider has been surpassed in this case.

The purpose of penalty in a professional context

[24] In *Wellington Standards Committee 2 v Harper*,¹¹ the Tribunal summarised the purposes of penalty in the following way:

[24] In a later *Auckland Standards Committee 1 of the New Zealand Law Society v Fendal*⁴ case the Tribunal summarised the purposes of penalty by reference to eight factors. That was a case involving strike off, and we adapt those factors to the more relevant ones for this case as follows:

⁹ At [43].

¹⁰ At [45].

¹¹ *Wellington Standards Committee 2 v Harper* [2020] NZLCDT 29 (11 September 2020) at [24].

- (a) The primary purpose is not punishment, although orders inevitably will have some such effect; the predominant purpose, as set out in s 3 of the LCA⁵ is to protect not only the interests of consumers of legal services, but also public confidence in the provision of legal services;
- (b) To maintain professional standards. Not only is this an important purpose (and end) of itself, it also connects with the purpose of maintaining public confidence in the profession. Many cases have referred to reputation as the most valuable asset of the legal profession;
- (c) To impose sanctions on a practitioner for breach of his or her duties. Again, this factor is grounded in the public interest in maintenance of confidence in lawyers' professional standards. A number of decisions have referred to the need for the public to be able to observe a strong and proportionate response by the profession's disciplinary bodies;
- (d) To provide scope for rehabilitation in appropriate cases;
- (e) To carefully consider alternatives to striking off a practitioner, and to adopt the "least restrictive alternative" approach to the imposition of penalty;
- (f) To provide deterrence. This is perhaps more accurately considered as a subcategory of factor (c), the maintenance of professional standards, however the issue of whether suspension is required for the purposes of deterrence, assumed considerable importance in this matter so we set it out separately. Deterrence can be either Specific, directed towards the practitioner, or General and directed to the whole profession, or both.

⁴ *Auckland Standards Committee 1 of the New Zealand Law Society v Fendall* [2018] NZLCDT 32.

⁵ *Lawyers and Conveyancers Act 2006*.

3 Purposes

(1) The purposes of this Act are–

- (a) to maintain public confidence in the provision of legal services and conveyancing services;
- (b) to protect the consumers of legal services and conveyancing services;
- (c) to recognise the status of the legal profession and to establish a new profession of conveyancing practitioner.

[25] In another decision, the Tribunal said:¹²

[3] The process by which penalty is determined is now well established. The starting point is the seriousness of the conduct.² Next, is consideration of aggravating and mitigating features relating to the conduct and to the lawyer. Finally, the Tribunal references cases where similar conduct has been considered, although almost every situation has unique qualities and must be individually assessed.

² *Hart v Auckland Standards Committee 1* [2013] 3 NZLR 103.

[26] The censure and fine fall into the category of 'penalties' addressed here. The order for payment of compensation is not a 'penalty' – its purpose is to reimburse Mrs JM for costs incurred as a necessary consequence of the conduct in respect of which the Committee has determined to amount to "unsatisfactory", and, in addition, to compensate Mrs JM for loss of dignity and distress.¹³

¹² *[Area] Standards Committee v Zhao* [2016] NZLCDT 32 at [3].

¹³ Discussed below at [37].

Censure

[27] The Committee censured Mr NR. He has not raised any issue with this. As noted by the authors of *Ethics, Professional Responsibility and the Lawyer*.¹⁴

... A censure before the Tribunal is presumptively public.¹⁸⁵ As such, the function of a censure may be considered not only as punitive but also as protecting the public and protective of the reputation of the profession in identifying the practitioner involved, the nature of the wrongdoing, and the fact that it is unacceptable. This not only demarcates professional standards but also informs the public (and other lawyers) as to the identity of wrongdoing practitioners so that they may make an informed choice as to whether (and how) to deal with them.

¹⁸⁵ Section 238 of the Lawyers and Conveyancers Act 2006.

[28] The Committee did not order publication of Mr NR's name. There is no need to do so, as Mr NR is no longer in practice.

[29] The censure in this case reflects the Committee's disapproval of the somewhat cavalier approach by Mr NR to keeping Mrs JM's will secured. A lawyer is often entrusted by clients to keep important documents in safe keeping. A client's will is one of the most important, as it cannot be redone after the testator has died. The trust reposed in the lawyer by the client is also often because the client does not have the facility to keep such documents in safe keeping. That means that a lawyer must ensure the documents are kept more securely than a client could themselves.

[30] Mr NR clearly did not keep a record of what documents he held. This is evidenced by the fact that he says he first looked in the files he held for Mr and Mrs JM,¹⁵ and because he could not find the will there, he assumed that it was in a shed where he kept other 'files'. The use of the word 'files' indicates that the shed was not necessarily 'safe' storage. It was not safe from the act of God that Mr NR refers to.

[31] Many law firms keep such important documents in a strong room protected from all possible interference.

[32] Overall, I consider the censure by the Committee was warranted.

The grant of Probate

[33] Mrs JM is correct when she says that her understanding is that the coroner's inquest has no bearing on the ability to apply for probate. When application for probate

¹⁴ Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at p 130.

¹⁵ Email from NR to Lawyers Complaints Service (5 March 2020).

is made, the court needs only to be satisfied that the testator has died. I refer Mr NR to form PR1 in the High Court Rules 2016.¹⁶

[34] Instead of being able to simply apply for probate of the original will signed by Mr JM, Mrs JM was obliged to apply for probate of the copy of the will in her possession. This was the cause of the delay in being able to meet ongoing costs in the meantime.¹⁷

Compensation

[35] Mr NR submits that s 156(1)(d) of the Lawyers and Conveyancers Act 2006 does not provide for payment of compensation for loss of dignity and distress.

[36] It has been well established that a Standards Committee and this Office does have jurisdiction to provide such compensation. That principle was discussed by the review officer in *EW v YL*:¹⁸

[82] Section 156(1)(d) of the Act provides for compensation to be paid to a complainant where a person has suffered loss by reason of any act or omission of a lawyer.

[83] Emotional stress has been recognised by this Office as a compensable form of loss.⁸

[84] The ability to compensate for anguish and distress in the lawyer/client relationship has been recognised in a number of cases⁹ and given the purpose of the Act (which in section 3(1)(b) includes the protection of consumers of legal services) it is appropriate to award compensation for anxiety and distress where it can be shown.

[85] There is no punitive element to an award of damages for anxiety and distress. Such an award is entirely compensatory. Orders for compensation “should also be modest (though not grudging) in nature”.¹⁰

⁸ See e.g. *Hartlepool v Basildon* LCRO 79/2009.

⁹ See e.g. *Heslop v Cousins* [2007] 3 NZLR 679 (HC).

¹⁰ *Sandy v Khan* LCRO 181/2009 (25 February 2010) [orders decision] at [29].

[37] In addition, to Mrs JM's specified costs,¹⁹ the Committee awarded Mrs JM the sum of \$3,699.05 for loss of dignity and distress. Mrs JM had been unable to meet various costs until probate of the copy will was granted. Being unable to meet payments to creditors would certainly have caused her distress and uncertainty as to what recovery steps would be taken. The loss of dignity arose from having to borrow from family members to tide her over.

¹⁶ Form PR1 is the required form of an affidavit to be sworn by an executrix named in the will.

¹⁷ Mrs JM says she was unable to access Mr JM's Kiwi Saver account, pay bills, and incurred bank interest on loans. She says she was financially embarrassed by having to borrow from family.

¹⁸ *EW v YL* LCRO 58/2021 (29 October 2021).

¹⁹ \$6,300.95.

[38] The outcome of this review sought by Mr NR is that the order for compensation be reduced to \$3,424.70 which is the additional legal fees incurred by having to apply for probate of the copy will. That excludes interest on overdue indebtedness referred to by Mrs JM.²⁰

[39] Mr NR's submissions that these costs would have been incurred anyway because the investigation as to the cause of Mr JM's death is ongoing, has been rejected.²¹ That results in the award for distress and loss of dignity as identified by Mr NR. Mrs JM's distress would have been compounded by these problems arising after the sudden death of her husband.

[40] In one of the earliest decisions of this Office,²² the Review Officer made an award of \$2,500 by way of compensation for anxiety and distress. That was a decision in 2009. The sum awarded by the Committee in this instance, some 13 years later, cannot be considered to be 'overstepping its powers'.

Mr NR's mitigatory conduct

[41] Mr NR submits that the Committee did not take his willingness to contribute to Mrs JM's costs into account when making orders for compensation. As noted above, that 'willingness' now amounts to payment of the legal costs incurred by Mrs JM.

[42] To take advantage of Mr NR's expressed 'willingness to contribute' indicates that it is likely some degree of negotiation over the amount to be paid would have been involved. A more generous expression of willingness would have been a commitment by Mr NR to pay the additional costs however much they amounted to. In her circumstances, Mrs JM declined to enter into those negotiations. That was understandable.

[43] I do not consider the offer to contribute should affect the amount ordered at all.

Fine

[44] The Committee imposed a fine of \$2,000. The maximum fine a Committee can impose is \$15,000.²³ The Committee determined that Mr NR's conduct was 'serious and ongoing'.²⁴ I agree with that assessment. A fine of \$2,000 is minimal in the context of these comments. In these circumstances the fine should possibly have been greater, but I decline to interfere with the Committee's discretion in this regard.

²⁰ Letter from JM to Lawyers Complaints Service 2 December 2020.

²¹ At [33] above.

²² *Sandy v Khan* LCRO 181/2009 (25 February 2010) [orders decision].

²³ Section 156(1)(i) Lawyers and Conveyancers Act 2006.

²⁴ Standards Committee determination (17 November 2020) at [21]

Costs

[45] The Committee ordered Mr NR to pay costs in the sum of \$1,500. Mr NR considers this to be excessive. One of the reasons provided by Mr NR is that the Committee had breached the principles of natural justice and should therefore bear its own costs. That submission has not been accepted.²⁵

[46] Mr NR says the determination was made on the papers with no legal argument and the issues were not complex. He overlooks perhaps the fact that the Committee has been called upon to address its full determination in two parts.²⁶

[47] The order of \$1,500 is confirmed.

Decision

[48] For the reasons discussed above, and pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the determination of the Committee is confirmed.

Costs

[49] Where an order of unsatisfactory conduct is upheld on review, a costs order will usually be made against the practitioner. This review involves only the penalty portion of the overall determination. In the circumstances, Mr NR is ordered²⁷ to pay the sum of \$450 by way of costs of this review. The sum ordered is one half of the amount for a straightforward review conducted on the papers as set out in the Costs Orders Guidelines issued by this Office.

Publication

[50] Pursuant to s 206(4) of the Act, I order that this determination be published but removing all identifying details of the parties.

DATED this 16TH day of JUNE 2022

O Vaughan
Legal Complaints Review Officer

²⁵ See [23] above.

²⁶ The findings determination, and now this penalty determination.

²⁷ Lawyers and Conveyancers Act 2006, s 210(1).

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

Mr NR as the Applicant
Mrs JM as the Respondent
[Area] Standards Committee
New Zealand Law Society