

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

[2022] NZLCRO 116

Ref: LCRO 75/2022

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

BG

Applicant

AND

HC

Respondent

DECISION

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

Introduction

[1] BG has applied for a review of a decision by the [Area] Standards Committee x] which, following a conduct investigation, determined that BG's conduct had been unsatisfactory.

Background

[2] HC instructed BG on 30 April 2020 to represent her in an employment dispute.

[3] Prior to instructing BG, HC had sought advice from two employment advocates.

[4] A personal grievance was filed in the Employment Relations Authority (ERA).

[5] The dispute proceeded to mediation but was unable to be settled.

[6] BG rendered HC an account on 13 July 2020 in the sum of \$7,115.63. Payment of \$7,000 was made to this account by HC on 14 July 2020. A second account was rendered on 16 November 2020 in the sum of \$2,328.75, and a final account invoiced in the sum of \$1,759.50 on 11 February 2021. The second and third accounts remain outstanding.

[7] In February 2021, BG advised HC that he would require his outstanding invoices to be settled if work was to continue.

[8] When no payment was received, BG withdrew from acting for HC.

[9] Following termination of the retainer, BG forwarded an email to HC in which he advised that:

- (a) it had come to his attention that HC had been discussing her employment case with a number of people; and
- (b) he was concerned that HC was disseminating inaccurate information about both his conduct and the fees charged; and
- (c) he would consider instigating proceedings, if he continued to receive feedback which suggested that HC was continuing to make adverse comments about his conduct.

The complaint and the Standards Committee decision

[10] HC lodged a complaint with the New Zealand Law Society Lawyers Complaints Service (NZLS) on 8 August 2021. The substance of her complaint was that BG had:

- (a) intimidated her into proceeding with a claim before the ERA when her preference was to withdraw; and
- (b) advised her that she had good prospect of achieving a “very lucrative outcome” at the ERA; and
- (c) become less supportive of her as the case progressed; and
- (d) failed to provide competent advice; and
- (e) presented as “out of his depth” at the mediation conference; and

- (f) adopted a defensive stance when questioned about his accounts; and
- (g) taken enforcement action for recovery of his fees when he was aware that the lodging of the conduct complaint precluded him from doing so.

[11] The complaint was managed by the Early Resolution Service arm of the Complaints Service.

[12] In responding to the complaint, BG submitted that:

- (a) a letter of engagement had been provided to HC at commencement; and
- (b) HC had not raised any concerns about the quality of his work during the term of the retainer; and
- (c) suggestion that he was out of his depth when participating in the mediation was “ridiculous”; and
- (d) he had not pressured HC to continue with the proceedings in the ERA, to the contrary he had, subsequent to the unsuccessful mediation, provided advice to HC which alerted her to the possibility of withdrawing at that stage; and
- (e) HC was a difficult and entitled client, who gave little indication of being receptive to the advice she was receiving.

[13] The Standards Committee issued the parties with a notice of hearing on 31 January 2022. The issues for the focus of the Committee’s investigation were:

- (a) did BG in his correspondence of 11 February 2021, breach his obligation to conduct his dealings with HC with integrity, respect and courtesy;¹ and
- (b) once the Standards Committee had given notice to BG in correspondence of 2 November 2021 that a complaint had been received, did BG contravene s 161(a) of the Lawyers and Conveyancers Act 2006 (“the Act”)?²

[14] The Standards Committee delivered its decision on 16 May 2022.

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

² Referenced by the Committee as s 161(a), the correct citation is s 161(1).

[15] The Committee determined, in respect to complaint that BG had contravened s 161(1) of the Act, that no further action on the complaint was necessary or appropriate.

[16] In reaching that view the Committee concluded that:

- (a) BG had, on being notified of the complaint, put a halt to the proceedings that had been filed; and
- (b) BG's reference in his email to HC as being "delusional", constituted a breach of r 12; and
- (c) the earlier decision to take no further action on remaining aspects of HC's complaints was confirmed.

[17] In respect to complaint that BG had breached his obligation to engage respectfully and courteously with HC, the Committee concluded that BG had breached r 12(1) such as to constitute unsatisfactory conduct on his part.

Application for review

[18] BG filed an application for review on 18 May 2022.

[19] He submits that:

- (a) the Committee erred in concluding that his use of the word "delusional" in correspondence to HC constituted a breach of his duty to conduct his dealings with others with integrity, respect and courtesy; and
- (b) "delusional" was neither a colloquial word or term of abuse, but rather a term which defined circumstances where beliefs or impressions were contradicted by reality or rational argument; and
- (c) HC's account of events (reflected in her email correspondence of 11 February 2021) gave indication that she was holding onto beliefs or impressions that were so untethered from reality, that his description of those beliefs as delusional was correct and accurate; and
- (d) his use of the term delusional was neither gratuitous nor offensive, but rather an accurate and professional description of HC's erroneous and mistaken view of events; and

- (e) he considered HC to have been one of the most difficult and challenging clients he had encountered in 25 years in practice, and, given the tone of HC's emails, he considered it was appropriate for her to "try and reflect" on what had led to the breakdown in the lawyer/client relationship.

[20] By way of outcome, BG sought:

- (a) a reversal of the unsatisfactory conduct finding; and
- (b) reversal of the order directing that he provide an apology to HC; and
- (c) reversal of the order that he be required to pay costs.

[21] HC was invited to comment on BG's review application and did so on 9 July 2022.

[22] HC's response was comprehensive. A significant component of her response provided background to the circumstances which had culminated in the employment dispute.

[23] To the extent that HC's reply addressed matters specifically relating to the Standards Committee decision and the review application filed, HC submitted that:

- (a) on first seeking advice from BG, she had been assured by BG that she had strong prospect of a satisfactory outcome; and
- (b) subsequent to the mediation she had decided to cut her losses and walk away, this decision being met with an aggressive response from BG; and
- (c) BG had informed her that he had discussed her case with the mediator following the mediation, and had been advised that the mediator considered she had good prospect of a "lucrative" outcome; and
- (d) BG's attitude to her (and her case) had deteriorated when he had received statements from her former work colleagues; and
- (e) she had been coerced into continuing with the case; and
- (f) she had been advised that fees charged were excessive; and
- (g) BG had continued with enforcement proceedings when he was prohibited from doing so.

[24] By way of outcome, HC sought acknowledgement of the concerns she had raised regarding BG's conduct, and for there to be "some sort of reasonable recourse" in respect to fees charged which she considered to have been excessive.

Review on the papers

[25] 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.

[26] 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

[27] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:³

... 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.

³ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

[28] More recently, the High Court has described a review by this Office in the following way:⁴

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.

[29] 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

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

- (a) did BG continue with enforcement action after the complaint was raised; and
- (b) did BG's description of HC as "delusional" constitute a breach of r 12 (1);⁵ and
- (c) were the fees charged fair and reasonable; and
- (d) did BG breach any other professional obligations or duties owed to HC?

Did BG continue with enforcement action after the complaint was raised?

[31] The Standards Committee decision addressed this issue in some detail.

[32] I do not propose to summarise the Committee's account of the background to this element of complaint. Having considered that background, I am satisfied that BG had, at the time he received proper notice of the complaint, taken steps to halt the proceedings.

⁴ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

⁵ As will be noted, the more appropriate rule for addressing complaint that a lawyer has failed to engage courteously with their client is r 3.1.

[33] It is clear from the Standard Committee minutes, that there may have been some confusion over the question as to when BG received the notice of the complaint.

[34] That confusion is clarified in the minutes of the Standards Committee.

[35] The Committee's decision to take no action on this aspect of HC's complaint is confirmed.

Did BG's description of HC as "delusional" constitute a breach of r 12.1?

[36] When directing its attention to complaint that BG had corresponded with HC in a discourteous manner, the Standards Committee framed its inquiry by reference to r 12.1.

[37] In its notice of hearing issued on 31 January 2022, the Committee asked the parties to address the issue as to whether BG's correspondence breached r 12.1.

[38] The rule cited by the Committee in its notice of hearing was clearly incorrect.

[39] Rule 12.1 relates to a lawyer's obligations to inform a person who they know to be self-represented of their right to take legal advice.

[40] The Standards Committee's notice of hearing was likely intended to reference r 12, which provides that a lawyer must, when acting in a professional capacity, conduct dealings with others including self-represented persons, with integrity, respect and courtesy.

[41] With respect to the Standards Committee, whilst I am both satisfied that BG was aware of the specific concerns the Committee was asking him to address and that he had opportunity to respond to the issue which was at the core of the inquiry, r 12.1 is more specifically directed to a lawyers obligations in regard to 3rd parties.

[42] A lawyer's obligation to deal with their client in a respectful manner is specifically addressed by r 3.1 which provides that a lawyer must at all times treat a client with respect and courtesy. The obligation is expressed in similar terms to r 12, which requires a lawyer to conduct their dealings with third parties with integrity, respect and courtesy.

[43] The comments which had caused offence to HC were made at a time contemporaneous with the termination of the retainer.

[44] It is unnecessary to embark on inquiry as to whether HC was technically BG's client at the time the comments were made. The termination of the retainer and

exchange of emails were part and parcel of an interlocking chain of events and it would be an artifice not to conclude that BG's obligations to HC arose from the relationship of lawyer and client.

[45] Rules 12 and 3.1 impose an obligation on lawyers to treat clients and parties they deal with, in a courteous and respectful manner.

[46] It is clear from BG's first response to the complaint, that he was aware that complaint was being made that his emails were discourteous. In explaining that he considered his email responses to have been "proper and appropriate", BG provided direct response to the complaint made.

[47] BG is critical of the Committee's finding that his correspondence breached his obligations to deal courteously with his client.

[48] His argument on review is straightforward. He maintains that there was no discourtesy in using the word "delusional" to describe HC's dealings with him. He considered that the term accurately described allegations that had been made by HC.

[49] BG rejects suggestion that the term was used in a colloquial sense. He contends that his use of the word was semantically correct.

[50] BG says that his position is supported by reference to the definition ("delusional") found in the Oxford English Dictionary. A word correctly used to convey the meaning properly ascribed to the word cannot, argues BG, amount to disrespectful conduct. In describing HC as delusional, BG says that he was doing no more than provide accurate description of comments HC had made which BG considered to have become untethered from reality.

[51] With respect to BG, I do not agree with his argument that responding to HC with allegation that she had become delusional, is satisfactorily explained by argument that he was doing no more than using the term to accurately describe her position.

[52] BG was entitled to take issue with statements that had been made by HC. He was entitled to take the view that those statements were inaccurate and entirely lacking in any evidential foundation.

[53] But I consider, as did the Committee, that his reference to HC as being delusional, reflected BG's frustration with the criticisms made of him which BG considered to be unfounded.

[54] The Standards Committee decision provides minimal insight into why the Committee had reached conclusion that the comment made by BG had breached his duty to deal with HC with courtesy and respect, but it concluded that the documents supplied indicated that HC had been a difficult client who had been “fluid” in her approach to her fees, and that HC had become “progressively negative and aggressive” in her communications with BG.

[55] The Committee considered that HC’s unhelpful approach was significant in mitigating BG’s unsatisfactory conduct.

[56] I agree that some of the communications forwarded by HC to BG presented as unconvincing, particularly her allegation that BG had reported to her that he had spoken with the mediator following the mediation and had received assurances from the mediator that it would be “lucrative” for HC to continue with her case.

[57] It would be improper for a lawyer to have a discussion with a mediator of the nature described by HC, and extraordinary for a mediator to have made comment on a party’s prospect of success in the manner as alleged by HC. It was understandable that BG was offended by the comments.

[58] But I consider it unfortunate that the Standards Committee considered it necessary to describe HC as a “difficult client who was fluid in her approach to the fees she had incurred”.

[59] Absent from this analysis was any evidence of the Standards Committee taking into account the pressure that HC was under and the concerns she clearly had that escalating legal costs had possibility of outweighing any prospect of successful financial outcome.

[60] It is not for me to speculate on the financial result that may have been achieved for HC if she had been successful in her claim, but it is reasonable to conclude that this was not a case where HC could have realistic expectation of a substantial financial windfall.

[61] That conclusion can be drawn from an examination of:

- (a) the nature of HC’s employment position; and
- (b) the time she had been in the position; and
- (c) the remuneration received.

[62] On review, HC says that when her employment was terminated she had modest expectation of receiving compensation in a sum equivalent to 12 weeks part-time wages. This equated to a sum of around \$4,200.

[63] In cases such as these, it is critical that there be a careful analysis at commencement of the potential cost of pursuing the claim, and an assessment made as to whether the likely financial return justifies the expense.

[64] In *Jeremy James McGuire v New Zealand Law Society*⁶ the court emphasised, that “for most individual litigants, evaluating the cost of the proceeding against the likely amount to be gained is fundamental to the decision whether to proceed to a hearing”.⁷

[65] Further, the court observed that “whilst there are some clients for whom money is no object, perhaps because of their financial circumstances or perhaps because the dispute is a matter of principle, for most the likely net recovery will be a significant factor. That is particularly so in the employment context where the litigant must assess whether he or she would be better off seeking employment elsewhere rather than incur substantial cost for little or no net gain”.

[66] It is difficult to determine from the information on the file as to the extent to which the risks of pursuing an employment claim were traversed with HC at commencement.

[67] A memorandum prepared for the Standards Committee by the Professional Standards Officer (PSO), dated 25 November 2021, noted that the limited documentation supplied by the parties displayed a “he said”, “she said” account of how matters had been conducted.

[68] The PSO noted that it was unclear what advice had been tendered at commencement of the retainer and noted that the letter of engagement focused on payment terms, “but did not set out any advice around expected costs.”

[69] Further, the PSO observed that there was nothing supplied to the Committee which recorded discussions around likely costs. BG had stated in his response that costs had been discussed at the outset, but there was no information provided which recorded those discussions.

[70] The PSO suggested to the Standards Committee that it may be appropriate for the Committee to obtain BG’s file.

⁶ *McGuire v New Zealand Law Society* [2017] NZHC 2484.

⁷ Above at [42].

[71] That recommendation does not appear to have been followed.

[72] In the absence of evidence to contradict BG's assertion that costs were discussed at the outset, I accept his position that discussions occurred in a broader context than by simple reference to hourly rates charged, but it is important, when addressing the comments made by BG, to give proper consideration to the circumstances which were being faced by HC.

[73] BG says that he offered HC the opportunity to withdraw from the proceedings and indicated that he would discount his account.

[74] At this point, HC had incurred fees in the significant sum of \$7,115.63.

[75] HC had reached an uncomfortable stage in the proceedings where she had accrued significant costs and was troubled by the prospect of costs escalating.

[76] Withdrawing from the proceedings would insulate HC from risk of further costs but would force her to confront the unpleasant reality that she incurred costs of over \$7,000 for no return.

[77] I accept that BG was concerned at HC's failure to settle her accounts and disquieted by statements that HC had made which he considered to be both inaccurate and damaging of his reputation.

[78] But BG's task was to respond to HC's concerns in a measured and careful manner, and to ensure that his response paid proper attention to his obligations to deal with his client in a courteous and respectful manner.

[79] BG could provide robust response to concerns raised by HC without need to:

- (a) invite HC to contemplate what the "common denominator" was in the context of allegation that HC had been in constant conflict with everyone she had worked with; and
- (b) make allegation that two employment advocates had walked away from representing HC;⁸ and
- (c) accuse HC of being "delusional".

⁸ There is no evidence of substance on the file to establish as to why the employment advocates ceased acting for HC.

[80] I am mindful that HC's correspondence with BG towards the end of the retainer was provocative and confrontational, but BG was the professional. He could not allow his annoyance to override his duty to conduct his dealings with HC in a professional and courteous manner.

[81] His response to HC should have been informed by a realistic appreciation and understanding of the difficult situation that HC was confronted with.

[82] It can be a difficult task to determine whether a comment made by a lawyer breaches the lawyer's duty to engage with their client in a respectful and courteous manner.

[83] It is not uncommon for parties to have entirely differing views as to whether a particular comment made carries potential to cause offence.

[84] An understanding of context is critical.

[85] It is, as has been noted, the responsibility of a Review Officer when conducting a review, to bring an independent and robust approach to the process.

[86] It is not the role of a Review Officer to examine a Standards Committee decision with view to simply identifying errors in the Committee's decision.

[87] The review must consider the material afresh.

[88] That said, I do consider that some weight must be accorded to the views of the Committee when considering a question as to whether a particular comment made by a lawyer has crossed the line.

[89] It is pertinent to note that Standards Committees are made up of practising lawyers who are familiar with the general area of law that is the subject of the complaint. Standards Committees must also include a lay member. This format allows for a range of views – legal and non-legal – to be considered.

[90] I consider that a Committee of experienced lawyers, all of whom would be engaged in daily practice, were well placed to assess whether a comment in the nature of that made by BG breached BG's obligation to engage courteously with HC.

[91] I do not agree with BG's comment that his use of the term delusional did no more than provide accurate account of his review of HC's position.

[92] Nor do I agree that the term is not on occasions employed in a manner which is intended to convey a pejorative force.

[93] The Committee's decision records that BG's comment constituted a breach of r 12.1 such as to constitute unsatisfactory conduct pursuant to s 152(1)(b)(i) of the Act.

[94] I think it probable that the Committee was intending to reference s 152(2)(b) of the Act which provides authority for the Committee to make an unsatisfactory conduct finding.

[95] Unsatisfactory conduct is defined in s 12(c) of the Act to include conduct consisting of a contravention of the Act or any regulations or practice rules made under the Act.

[96] I agree with the Standards Committee that BG's description of HC as delusional breached his obligation to deal courteously and respectfully with HC.

[97] I part company from the Committee (a departure of little overall consequence) in recording that the breach is more appropriately referenced as a breach of r 3.1 rather than r 12(1).

Were the fees charged fair and reasonable?

[98] Whilst the issue as to the reasonableness of the fees charged was not addressed as a "standalone issue" by the Standards Committee, I am satisfied that the initial deliberations of the Committee (followed by its decision to take no further action on a number of the matters) included a consideration of the fee issue.

[99] As noted, a more comprehensive examination as to the reasonableness of the fees charged by BG would likely have been achieved if the Standards Committee had made request of BG to provide his files. That may well have clarified in more detail the extent to which BG had addressed the cost/risk factors when first taking instructions from HC.

[100] I am satisfied however that there is sufficient information available to adequately determine the fee issue.

[101] I think it probable that HC was resolutely determined to proceed her employment claim.

[102] The fact that she had instructed BG after first taking advice from two employment advocates, gives indication that she was committed to challenging her employer's decision to terminate her employment.

[103] It is clear that BG explained (as he was required to do) the terms of his engagement at commencement.

[104] He provided HC with clear explanation of his charge out rate.

[105] BG's first invoice when rendered was promptly paid.

[106] There is no indication of HC having raised concerns with BG following receipt of the first (and most substantial) invoice.

[107] HC's criticism of the fees charged by BG does not identify any specific concerns, rather, her complaint couched in general terms, is that the fee charged was excessive.

[108] In support of her position, HC says that she had been advised by an employment lawyer she had spoken with, that the fees charged by BG were "out of proportion to his provision of less than competent services".

[109] I give no weight to this evidence.

[110] HC is a lay complainant and I am mindful that the complaints process is intended to be informal and designed to allow opportunity for complainants to advance their complaints expeditiously and without requirement for adherence to strict legal formalities.

[111] But it is an unfortunate approach for a complainant to submit that they have received advice from another lawyer which is seriously critical of their lawyer's competence and performance (this to support their argument that they had not been competently represented), without steps being taken to have the lawyer who has seemingly felt well-placed to make comments at a distance on another lawyer's performance, record their views in a written statement to the Standards Committee.

[112] Having considered the invoices, the timeframe in which the work was undertaken, and the indication of the work that was done, I am satisfied that the fees charged were fair and reasonable.

Did BG breach any other professional obligations or duties owed to HC?

[113] Other issues raised on review by HC were arguments that:

- (a) She had felt pressured by BG to continue with the case; and

(b) She felt unsupported by him.

[114] There is insufficient evidence to support accusation that BG pressured HC to continue with her claim.

[115] BG's correspondence of 17 June 2020 provides emphatic response to criticism that he was asserting pressure on HC to continue with her case. HC was, at this stage, in the unfortunate position encountered by many litigants in similar circumstances, of having to make the difficult decision as to whether she could afford to risk incurring further costs in continuing with her claim. But BG's correspondence is the antithesis of a lawyer attempting to persuade a client to continue.

[116] Nor is there evidence to support contention that BG's support of his client flagged towards the end of the retainer. It is clear that HC was unsettled by evidence that the employer had filed late in the piece, and that she felt somewhat overwhelmed by what she perceived to be an inaccurate and unfair attack on her reputation.

[117] But there is no evidence to support contention that BG lost faith in his client's claim.

[118] I do not consider that BG breached any other professional obligations or duties owed to HC.

Conclusion

[119] The decision of the Standards Committee is confirmed.

Costs

[120] Where an adverse finding is made or upheld, costs will be awarded in accordance with the Costs Orders Guidelines of this Office. It follows that BG is ordered, pursuant to s 210(1) of the Act to pay costs in the sum of \$900 to the New Zealand Law Society within 30 days of the date of this decision.

[121] Pursuant to s 215 of the Act, I confirm that the order for costs may be enforced in the civil jurisdiction of the District Court.

Anonymised publication

[122] 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 25TH day of OCTOBER 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:

BG as the Applicant
HC as the Respondent
[Area] Standards Committee x]
New Zealand Law Society
Secretary for Justice