LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2020] NZLCRO 235

Ref: LCRO 166/2020

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	**GM** Applicant
AND	**APPLICATION FOR REVIEW OF A PROSECUTORIAL DECISION**

DECISION

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

Introduction

[1] Mr GM has applied for a review of a decision by the [Area] Standards Committee [X] to refer Mr GM to the New Zealand Lawyers and Conveyancers Disciplinary Tribunal.

Background

[2] Mr GM was the sole partner in the law firm GMT Law.

[3] He was responsible for supervising the management of the firm's trust account.

[4] On 6 December 2019, the Lawyers Complaints Service received a report from the New Zealand Law Society Trust Account Inspectorate.

[5] The report identified a number of concerns regarding Mr GM's management of his firm's trust account.

[6] Matters identified by the inspector as raising concern included:

(a) 13 transfers from the firm's trust account to the firm's practice account, without evidence of Mr GM holding authority for the transfers; and

(b) concern that Mr GM was using funds held in his trust account to supplement his practice account; and

(c) failing to keep his firm's cash book records up to date; and

(d) concern that Mr GM was ill disciplined in his personal spending.

The complaint and the Standards Committee decision

[7] The Committee issued Mr GM with a notice of hearing.

[8] Matters identified in that notice that Mr GM was asked to address were:

(a) issues raised by the alleged conduct as particularised in the New Zealand Law Society's Inspectorate report; and

(b) whether Mr GM had made four transfers from his trust bank account into the practice account without authority; and

(c) whether Mr GM's trust account balance fell below the minimum of $12,000 as required by client's instructions between 19 June 2019 and 22 August 2019; and

(d) whether Mr GM failed to ensure the firm's cash book was kept up-to-date; and

(e) whether Mr GM failed to record the necessary reference details for transactions in the client's ledgers; and

(f) whether any of the conduct amounted to a breach of section 110 and/or 112 of the Lawyers and Conveyancers Act 2006 (the Act) and/or regs 6,

9, 11 and/or 12 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008; and

(g) whether any of the alleged conduct could amount to misconduct within the meaning of s 7(1)(a) and/or s 7(1)(a) of the Act or alternatively unsatisfactory conduct as defined in section 12(c) of the Act.

[9] Mr GM provided a response to the Complaints Service, in which he submitted that;

(a) accounting errors made were inadvertent and had been remedied; and

(b) errors had been made when using his mobile phone for banking; and

(c) health issues and ongoing stress over an impending IRD prosecution had preoccupied his time; and

(d) the errors had occurred during a time when he was experiencing workload pressure; and

(e) he had placed untoward reliance on his memory rather than checking manual records; and

(f) attempts to rectify errors when identified had, on occasions, been time delayed by the fact that he had identified the error on a Friday and was unable to rectify until the following Monday; and

(g) the introduction of a new client that required him to issue an invoice for costs involved in filing documents had led to some confusion; and

(h) an amount was drawn from his trust account which had been described as unauthorised had in fact been authorised by his client; and

(i) a number of the errors identified by the inspector, whilst accepted by him as being errors, were nevertheless inadvertent; and

(j) a failure to maintain his cash book was acknowledged; and

(k) steps had been taken to ensure that there would be no repetition of these errors; and

(l) no client of any other lawyer, was disadvantaged or suffered any ill consequence as a result of his inadvertent errors; and

(m) his isolated and inadvertent errors occurred over a limited period of time.

[10] The Standards Committee delivered its decision on 9 July 2020.

[11] The Committee determined, pursuant to s 152(2)(a) of the Act that the matter and all issues involved in the matter should be considered by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal.

Application for review

[12] Mr GM filed an application for review on 18 August 2020.

[13] He submits that:

(a) errors made were inadvertent; and

(b) errors made were rectified as soon as they came to his attention; and

(c) the Standards Committee was the appropriate forum to consider the disciplinary issues raised.

[14] By way of outcome, Mr GM sought direction that the matter be referred back to the Standards Committee to determine penalty.

[15] A teleconference was convened to provide opportunity for the Review Officer to have a discussion with Mr GM concerning various issues arising from his application.

[16] At the conclusion of the teleconference, a minute was issued which made timetabling directions for filing of further submissions.

[17] The minute issued noted that neither the submissions filed by Mr GM on review, nor the submissions filed with the Standards Committee, raised any objections to, or identified any issues with the NZLS inspectors report which had been provided to NZLS on 6 December 2019.

[18] Request was made of Mr GM (if he considered there were errors or omissions within the inspector's report) to identify those concerns in the further submissions to be filed.

[19] Mr GM's submissions were received on 8 November 2020.

[20] He submitted that:

(a) there were sound public policy reasons as to why the Standards Committee should conduct the conduct investigation rather than the Disciplinary Tribunal; and

(b) it would put unnecessary demand on the resources of the Tribunal if it was required to deal with conduct issues which essentially engaged incidents where practitioners had made "inadvertent errors" in managing the trust accounts; and

(c) principles of natural justice require Committees to provide reasons for their decisions, irrespective of the provisions of s 158 of the Act and the judgment of the Court of Appeal in *Orlov v New Zealand Law Society* [2013] NZCA 230; and

(d) in the absence of the Committee providing reasons for its decision, a Review Officer has no knowledge as to whether the Committee gave sufficient consideration to Mr GM's argument that errors made were inadvertent; and

(e) his review application was prejudiced as the Review Officer was not in possession of the full facts, absent the Committee providing reasons for its decision; and

(f) a review determination should not be made until the Committee's reasons have been made known; and

(g) he had been unable to source evidence of disciplinary decisions which reference lawyers making inadvertent errors; and

(h) in circumstances where a practitioner has made errors in the managing their trust account which are "inadvertent", such incidents should be managed in a pragmatic way, rather than by referral to the Disciplinary Tribunal; and

(i) it would damage the reputation of the profession, if inadvertent errors were subject to a disciplinary sanction; and

(j) errors made were rectified promptly when identified without loss to clients; and

(k) without having the benefit of being provided by the Committee with reasons for its decision, he had reason to believe that the Committee may have acted in a discriminatory manner, or have been significantly influenced by irrelevant considerations; and

(l) it was his understanding after speaking with the Law Society inspector, that his explanations for the problems with his trust account had been understood and accepted, and that no further action would be required; and

(m) the Review Officer should refrain from making any final decision until the Committee's reasons are known, and he has been given opportunity to comment on those reasons,

Review on the papers

[21] On 15 September 2020, Mr GM was advised that the LCRO who had completed the initial appraisal of the file concluded that the review could be appropriately dealt with "on the papers".

[22] Mr GM was advised that if he wished to comment on or raise objection to possibility of the review hearing proceeding "on the papers", he was to provide submissions by 4 pm, 28 September 2020.

[23] No submissions were received from Mr GM.

[24] In responding to Mr GM's request for an extension of time for filing his submissions, Mr GM was advised that the Review Officer considered that the application was suitable for a hearing on the papers. Mr GM was provided further opportunity to confirm if he had any objections to an "on the papers" hearing. No objection was raised.

[25] Following receipt of his final submissions, Mr GM was informed that the hearing would proceed on the papers.

[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:[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.

[28] 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.

[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.

Role of the LCRO on reviewing a prosecution decision

[30] In *Orlov* the Court of Appeal confirmed that "there is now oversight of the referral decision by the independent LCRO".[3]

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[1] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].
[2] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].
[3] [2013] NZCA 230 at [54](d).

[31] In considering applications to review a decision to prosecute, Review Officers in a number of decisions, have observed "that the general position in common law jurisdictions is to take a very restrictive stance in respect of the reviewability of a decision to prosecute, observing that the prosecutor's function is merely to do the preliminary screening and to present the case".[4]

[32] Those cases have identified the principles set forth in the various Court decisions where a decision to prosecute might be revisited. These include situations in which the decision to prosecute was:

(a) significantly influenced by irrelevant considerations;

(b) exercised for collateral purposes unrelated to the objectives of the statute in question (and therefore an abuse of process);

(c) exercised in a discriminatory manner;

(d) exercised capriciously, in bad faith, or with malice.

[33] In addition, it was noted in the *Rugby* decision that "if the conduct was manifestly acceptable then this might be evidence of some improper motivation in the bringing of the prosecution".[5]

[34] More recently the High Court when reviewing a decision of this Office in which it had dismissed an application for review of a Standards Committee's decision to prosecute a practitioner, has emphasised that a Review Officer must bring to its assessment of a decision to refer, a robust and independent judgement as to the appropriateness of the Committee's decision to prosecute. Fogarty J held the following:[6]

> [23] The purpose of a review by the LCRO is to form a judgment as to the appropriateness of the charge laid in the prosecutorial exercise of discretion by the Standards Committee. It is as simple as that. ... I agree ... that "a review by the LCRO (should be) 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. I agree also there is room in that review for the LCRO to identify errors of fact.

[35] Fogarty J also observed that "a critical question for the LCRO is whether the degree of gravity of the matter should justify the Standards Committee exercising the power to refer [conduct] to the Tribunal".[7]

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[4] *Rugby v Auckland Standards Committee* LCRO 67/2010 (12 July 2010) at [3].
[5] At [5].
[6] *Zhao v Legal Complaints Review Officer* [2016] NZHC 2622.
[7] At [25].

Discussion

[36] The issues to be considered on review are:

(a) did the Committee err in failing to provide reasons for its decision to refer Mr GM to the Disciplinary Tribunal; and

(b) should the matter be returned to the Committee for reasons of public policy; and

(c) are inadvertent breaches by a practitioner in the management of his or her trust account, breaches which should be dealt with informally rather than by instigation of a conduct enquiry; and

(d) did the Committee err in directing that the matter, and all issues involved in the matter, should be considered by the New Zealand Lawyers and Conveyancers disciplinary Tribunal?

Did the Committee err in failing to provide reasons for its decision to refer Mr GM to the disciplinary tribunal?

[37] Underpinning the submissions advanced by Mr GM, was argument that the Committee's decision was fundamentally flawed, in that it failed to provide reasons for its decision.

[38] It is generally a fundamental tenet of natural justice that decision-makers provide reasons. At first blush it may seem inconsistent with that principle that a Committee with a statutory power of decision-making is not obliged to provide reasons for a decision it makes.

[39] However, when directing a complaint to be considered by the Tribunal, a Standards Committee is not obliged to provide reasons. This is evident from the language of s 158 of the Act, which requires reasons to be given only when a Standards Committee makes a finding of unsatisfactory conduct or determines to take no further action.

[40] In *Orlov v New Zealand Law Society* the Court of Appeal considered the question as to whether a Standards Committee was required to provide reasons for its decision to refer a matter to the Tribunal, and concluded that "it is clear from s 158 that a Standards Committee is not required to give reasons for a decision made under s 152(2)(a) to refer a matter to the Tribunal."[8] Further, the Court noted that if

[8] *Orlov*, above n 3 at [98].

Parliament had intended that a Committee be required to provide reasons for its decision to refer, then it would have expressly said so.[9]

[41] Mr GM's argument that the Committee's failure to provide reasons significantly compromised his ability to progress his review, was advanced by him in full knowledge of the provisions of s 158 of the Act, and the Court of Appeal judgment in *Orlov*.[10]

[42] He argues that Committees should be required to provide reasons for their decisions, despite there being no statutory requirement for them to do so, and the Court of Appeal decision which reinforces the statutory position.

[43] A Standards Committee's power to refer a practitioner to the Tribunal derives from s 152(2) of the Act. The Standards Committee may make a referral if it considers that concerns have arisen which, if proven, could lead to a misconduct finding. All that a Standards Committee needs to be satisfied of is whether the conduct in question, if proven, is capable of constituting misconduct. It does not fall to the Standards Committee to determine whether the conduct in question is misconduct.

[44] It is unclear from Mr GM submissions, as to how he envisages the inquiry process would proceed, if a direction was made on review that the matter be returned to the Committee with direction that the Committee provide reasons for its decision. In suggesting, as he does, that I should refrain from making any decision on his review until the Committee's reasons are "made known", he appears to be contemplating a process where the matter is returned to the Committee with direction for it to provide reasons, but with expectation that the matter would then return to the LCRO.

[45] I am not prepared to direct that the matter be returned to the Committee. Such a direction would present at odds with the direction provided by the Act, and inconsistent with the long-established practice (supported by authority) that Standards Committees are not obliged to provide reasons for their decisions to refer a matter to the Disciplinary Tribunal.

[46] In any event, I am not persuaded that Mr GM's ability to advance his argument on review, has been hampered by the Committee's failure to provide reasons for its decision.

[47] Mr GM would be aware that the crux of any Committee's decision to refer a matter to the Disciplinary Tribunal, is the Committee reaching conclusion that the

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[9] At [99].
[10] The reasons as to why a Committee is not obliged to provide reasons for a decision to refer, was also discussed at the teleconference noted at [15] above.

conduct issues which are the subject of its investigation, may engage a consideration as to whether the conduct merits a misconduct finding

[48] A Committee's decision to refer, reflects its belief that the conduct complained of may require a more serious disciplinary response, than would be achieved by imposing a finding of unsatisfactory conduct.

[49] It is not for a Standards Committee or this Office to make findings of misconduct. That is the exclusive domain of the Disciplinary Tribunal. At the most, a Standards Committee and this Office are able to say that there are conduct issues that could — not would — amount to misconduct if the Committee's evidence crosses the threshold required before the Tribunal.

[50] I accept that Mr GM does not have explanation provided to him by the Committee as to why it had concluded that the conduct may raise the spectre of misconduct, but I am satisfied that Mr GM was fully conversant with the concerns that were being investigated by the Committee.

[51] Those concerns were identified in a comprehensive report prepared by a NZLS inspector. The report identified a number of problems in the way Mr GM had been operating his firm's trust account.

[52] Mr GM had been provided with a copy of the inspector's report and given opportunity to meet with the inspector to discuss its contents.

[53] After deciding to commence an own motion investigation, the Committee provided a notice of hearing to Mr GM which summarised the issues that had been identified by the NZLS inspector.

[54] That notice of hearing referenced extracts from the legislation and regulations that the Committee considered relevant to its investigation.

[55] The alleged breaches identified in the notice of hearing were cross-referenced to the sections of the legislation which identified the practice obligations that it was contended Mr GM may have neglected to follow or observe.

[56] I am satisfied, that there would have been minimal possibility of Mr GM not being fully informed as to the nature of the conduct concerns that had been raised. I am also satisfied that he was provided, as he was required to be, with ample opportunity to address the issues that had been identified.

[57] I am not persuaded that Mr GM's ability to respond to the complaint or advance his review, was compromised by the Committee's failure to provide reasons for its decision.

Should the matter be returned to the Committee for reasons of public policy?

[58] Mr GM submits that there are "good public policy reasons" as to why the Standards Committee should determine the conduct investigation rather than the Disciplinary Tribunal.

[59] If I understand his argument correctly, he is suggesting that it would be a drain on the resources of the Tribunal, for it to be hearing conduct matters which he considers to be relatively minor in nature.

[60] This argument, and I certainly intend no disrespect to Mr GM, provides example of what I consider to be, a failure on Mr GM's part, to recognise the gravity of the matters raised in the inspector's report. Whilst Mr GM characterises the errors as minor, he fails to address concerns that drawings made from his trust account were made with purpose to fund, albeit for short periods of time, his personal spending. The conclusions the inspector draws concerning the reasons why Mr GM made a series of withdrawals, elevates matters which Mr GM continues to regard as minor administrative errors, to matters which demand a robust disciplinary inquiry. Response to these concerns is not adequately met by simple explanation that the errors were inadvertent.

[61] In the hierarchy of professional discipline, it is the role of the Disciplinary Tribunal to determine the most serious charges against members of the legal profession.

[62] Mr GM's argument that there are sound public policy grounds for having his case heard by a Committee (which it has been) in essence is argument that he does not consider the complaints to be sufficiently serious to merit the intervention of the Disciplinary Tribunal. It is a repetition of Mr GM's argument that the errors in managing his trust account were not errors that were sufficiently serious to merit a referral.

[63] I do not consider that there are any issues of public policy that have material or relevant impact on the question as to where the conduct issues should be determined.

Are inadvertent breaches by a practitioner in the management of his or her trust account, breaches which should be dealt with informally rather than by instigation of a conduct enquiry?

[64] As noted, when a Minute was issued setting timetabling directions for filing of submissions, Mr GM was invited to identify any errors he considered he had identified in the report.

[65] He has not identified any issues with the account the inspector provides of the transactions that had been identified as breaching trust account rules.

[66] His argument is that the mistakes that he had made were inadvertent, minor in nature, and the result of genuine error.

[67] He notes that no client suffered loss as a consequence of a failure to efficiently manage his trust account.

[68] He emphasises that he has learnt from this bitter experience and put in place systems that will ensure that there is no possibility of the errors made being repeated.

[69] Underpinning these submissions, is the argument that the mistakes made were not deliberate. The absence of intention should, argues Mr GM, mark out the offending as offending of a less serious nature that does not require to be litigated before the Disciplinary Tribunal.

[70] Responsibility for managing a trust account imposes obligation on a lawyer to ensure that trust monies are carefully and transparently managed.

[71] Sections 110–116 of the Act, together with the Lawyers and Conveyancers Act (Trust Account) Regulations 2008, provide guidance for lawyers, as do the Lawyers Trust Account guidelines.

[72] The fact that a lawyer's error in managing his or her trust account was inadvertent does not inoculate the lawyer from possibility that the breach may attract a disciplinary sanction.

[73] Some fiduciary breaches in relation to the handling of money may be due to oversight or poor financial management such as failing to deposit money or overdrawing a trust account by drawing on uncleared funds. Such unintentional breaches may amount to misconduct, especially if they are repeated or serious.[11]

[11] *B v Canterbury District Law Society* CA79/97, 1 May 1997.

Where the breach is minor or unintentional, it is more likely to be unsatisfactory conduct.[12]

[74] I do not agree with Mr GM that the pattern of errors identified by the inspector can be conclusively characterised as a product of inadvertent error.

[75] Mr GM says, that he is surprised that his problems with managing his trust account merited a disciplinary inquiry. He suggests that the inspector also considered the matters to be relatively inconsequential, or, if that is to put it too highly, that she at least left him with the impression that she "understood" the explanation he had provided, and did not see the need to take the matter further.

[76] That assessment presents as starkly at odds with what the inspector says in her report and reflects, perhaps, as I have previously noted, a failure by Mr GM to fully appreciate the gravity of the errors made in the management of his trust account.

[77] In her report, the inspector:

(a) identified 13 transfers of clients' funds from the trust bank account of the practice bank account, these transfers said by the inspector to have subsidised Mr GM's personal spending; and

(b) records that Mr GM had breached the Act and Regulations; and

(c) notes that Mr GM appeared to be incompetent in the administration of his office trust account; and

(d) suggests that there appeared to be an element of deception in Mr GM's record-keeping; and

(e) postulates that the recording of entries is more suggestive of a deliberate manipulation than mere error or incompetence; and

(f) observes that a number of unauthorised payments give indication that the withdrawals were made to fuel personal expenses; and

(g) identifies a number of "potential" breaches of the Act and Regulations; and

(h) concludes that records were not being correctly maintained.

[12] Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at [4.3.6].

[78] After having discussed her report with Mr GM, the inspector concluded, that explanations provided by Mr GM for the errors identified presented as "strained".

[79] All of those are matters which, in my view, are proper ones for the Tribunal to consider. They require careful assessment of the evidence and matching that evidence against the legislative standard of misconduct, to see whether that has been met or not. Only the Tribunal may carry out that function and determine the gravity of the conduct.

Did the Committee err in directing that the matter, and all issues involved in the matter, should be considered by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal?

[80] The issue I am required to consider is whether there is any proper basis for interfering with the Committee's decision to refer Mr GM's conduct to the Tribunal for prosecution.

[81] As Fogarty J held in *Zhao*, I must robustly come to my own view of the fairness of the substance and process of the Committee's prosecution decision.[13]

[82] I have given careful consideration to all the material on the Standards Committee file, which includes the processes it adopted when making the decision to prosecute. Nothing about that process raises any cause for concern. Mr GM was given every opportunity to put any matters he wished before the Standards Committee.

[83] I have also carefully considered the submissions filed by Mr GM.

[84] Having done so, I conclude that these matters are proper ones for the Tribunal to consider. They require careful assessment of the evidence and matching that evidence against the legislative standard of misconduct, to see whether that has been met or not. Only the Tribunal may carry out that function and determine the gravity of the conduct.

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

Costs

[86] Where an adverse finding is made, costs will be awarded in accordance with the Costs Orders Guidelines of this Office.

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[13] *Zhao v Legal Complaints Review Officer,* above n 6, at [23].

[87] When filing submissions, Mr GM indicated that if I was to consider a cost award, he would wish to be heard on that.

[88] Mr GM was provided opportunity to provide a submission on costs.

[89] Having considered those submissions, (the content of which I do not consider necessary to provide account of here) I decline to make a costs order.

Anonymised publication

[90] 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 18th day of December 2020

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R Maidment
Legal Complaints Review Officer

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

Mr GM as the Applicant
[Area] Standards Committee [X]
New Zealand Law Society