LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2021] NZLCRO 101

Ref: LCRO 1/2020

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	**NR**
	Applicant
AND	**YB**
	Respondent

DECISION

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

Introduction

[1] Ms NR has applied for a review of a decision by the [Area] Standards Committee [X] which determined the complaint on the basis that there had been unsatisfactory conduct on her part for contraventions of rr 3.6 and 9.6 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) and imposed the following orders pursuant to s 156(1) of the Lawyers and Conveyancers Act 2006 (the Act):

(a) Censure (s 156(1)(b));

(b) Reduced fees (s 156(1)(e));

(c) Cancelled fees (s 156(1)(f));

(d) Refund to Ms YB (s 156(1)(g));

(e) Fine of $4,000 to the New Zealand Law Society (NZLS) (s 156(1)(i)); and

(f) Costs to NZLS of $1,200 (s 156(1)(n)).

Application for review

[2] Ms NR's application for review is detailed and conveys a clear sense that she feels she has been treated unjustly by the Committee in relation to this complaint and others in the past. Nonetheless, on this occasion Ms NR does not challenge the Committee's determination of unsatisfactory conduct. Submissions filed by Ms NR dated 4 September 2020 convey her acceptance of the firm's difficulty in proving it sent Ms YB a letter updating the firm's hourly rates, and a sense that the firm accepts it could have issued a final invoice sooner. Ms NR says she has complied with orders (b), (c) and (d) above.

[3] However, Ms NR would like this Office to review orders (a), (e) and (f) pursuant to which she was censured and ordered to pay a $4,000 fine and costs of $1,200. Ms NR contends the orders are disproportionate to the conduct, punitive, take into account irrelevant matters and do not take into account relevant matters including the particular challenges the retainer between her and Ms YB posed. She speaks of the increased level of fine based on her disciplinary history as a sort of doubling up of punishment.

[4] Ms NR refers to some of the many challenges that she has faced in the course of her career as a lawyer in New Zealand, including being drawn into the complaints process on several occasions by non-clients for what she views as purposes unrelated or collateral to the maintenance of professional standards. In Ms NR's view, the Committee's assessment of her disciplinary history shows "ignorance of the facts" around previous complaints and:

> In particular the decision takes into account matters in excess of seven years old, and does not take into account that the matter was not concluded.

[5] Ms YB's complaint adds another unwanted blemish to Ms NR's professional record. Ms NR considers she is being punished for getting on with the job Ms YB instructed her to do, for going the extra mile and for using her "common sense" in moving that work forward. In her view, the decision overall is "biased, predetermined and an abuse of power!". Ms NR considers the decision paints her as "a dishonest, incompetent lawyer" and is based on unlawful grounds of discrimination. Ms NR says that although she recorded time for printing emails and attachments she did not charge the client for that time and it demeans her for the Committee to say she did. Ms NR says this "has

had a very serious emotional impact on [her], personally and the stress has impacted [her] health".

[6] Although this Office lacks the statutory jurisdiction to make determinations in these regards, Ms NR's views that the decision contravenes the Human Rights Act 1993 and her rights under the New Zealand Bill of Rights Act 1990, in particular for being expressly and/or impliedly racist, are noted for completeness.

[7] Mrs YB's reply to the application for review is dated 29 July 2020. She says:

> I have tried to read the documents you sent but finding it a bit too much for me again, especially when it took me a few years to try and reasoned with Mrs NR about refunding my deposit.
>
> So, I have decided that the Standard Committee has done a great job with their decision. I will not continue with this matter anymore.
>
> I hope that Mrs NR will do right by my [redacted] people and not charge them an arm and a leg for her fees.

Review on the papers

[8] 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.

[9] 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

[10] 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

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

> Committee or an investigator and seek and receive evidence. These powers extend to "any review" …
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> … 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.

[11] 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.

Analysis

[12] As Ms NR does not challenge the unsatisfactory conduct findings those have not been reviewed. I would say, however, the retainer between Ms YB and Ms NR did present its own special challenges. The case Ms YB wanted to pursue was contingent on her having what one might describe as "buy in" from others in her family. Unfortunately, it appears those others were not as committed as Ms YB was to the particular outcomes she sought: compensation and reinstatement.

[13] The name of one of Ms YB's sisters, Ms GW, appears on Ms NR's timesheet and on the final invoice which is dated 27 September 2018. The timesheet records attendances on Ms GW for which Ms YB was billed. In fairness to Ms NR and her team, if Ms YB's matter was to proceed, someone would need to bring the various family members together to agree the way ahead. That, it appears, was likely to be by way of court action. As I say, not everyone was as committed to that path as Ms YB. Ms GW for one seems to have been content to accept financial compensation but appears to have acknowledged that court action was probably the only way to get it.

[14] The situation Ms YB presented to Ms NR was complicated. For most people, court action is a big step. When an unincorporated group is concerned, as was the case here, it can take time to bring people together. Some of those who could be involved may have no wish to be involved at all. Persuading people to make a financial

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

commitment is often no easy task and can take time. The fee of $50,000 estimated by Ms NR is no small sum.

[15] Although Ms YB was able to obtain $5,000 towards Ms NR's costs, the other $45,000 was not forthcoming.

[16] Nonetheless, there was no lack of willingness to attend to the retainer at any stage on Ms NR's part. There is no sense that the delays in advancing matters on Ms YB's instructions were of Ms NR's making.

[17] The earliest attendances were on Ms YB and her sister, Ms GW. According to the firm's trust statement dated 27 September 2018, Ms GW paid $1,725 on account of fees and disbursement on 16 January 2015, and that money was used to pay the first bill, invoice 8441, on 17 March 2015.

[18] There followed a couple more attendances in March and April 2015 when the firm's letter of advice was finalised and sent out to the clients.

[19] Ms YB paid another $87.50 in June 2015 for fees and disbursements.

[20] There were more movements on the file in November 2015, when Ms GW was in touch with the lawyers, followed by another burst of activity in March 2016, then a gap of around 30 months until 21 September 2018. In the intervening time, on 10 May 2017, Ms NR had written to Ms YB and Ms GW saying she proposed closing her file because she had received no further instructions.

[21] The file was rekindled in September 2018 when there was a meeting between Ms YB, her son and Ms NR. That coincided with Ms YB paying $5,000 into Ms NR's firm's trust account on account of fees and disbursements. There followed discussion between those involved, research, correspondence and an invoice, 9520, which was issued on 27 September 2018 for $3,157.50. That was paid by deduction from the $5,000 held on trust. $1,842.50 remained in the firm's trust account.

[22] Further attendances followed in October and November 2018.

[23] By late December 2018/early January 2019 Ms YB was asking for a refund.

[24] When that had not been forthcoming by April 2019, Ms YB made a complaint to the NZLS. The three areas of complaint regarding Ms NR were that she:

(a) Did not let Ms YB know of the increase in her hourly rate;

(b) Did not let Ms YB know that it would cost $120 to talk to her on the phone; and

(c) Added work done in 2015 to the invoice she issued in 2018.

[25] There was also a complaint that Mr KR had added "bogus charges" to the account. As the evidence does not support that, and this is not a review addressing conduct on the part of Mr KR, no more is said about that here.

[26] From the materials, this appears to have been one of those files that lawyers sometimes have on their books that has a future without any particular deadline. For one reason or another some such files never really go anywhere. That seems to have been the reality of Ms YB's matter. It was not so much that Ms YB had no case, but more that she and Ms GW were lacking the wider support they needed in order to make progress. According to the time record for the file, each period of delay was preceded by a lengthy phone call and/or a letter of advice from Ms NR's office. It bears noting, as their professional relationship endured for so long, that it must have suited Ms YB at the time to maintain and refresh her connection with Ms NR.

[27] By September 2018, it appears to have become clear to Ms NR that the [redacted] family's case, fronted by Ms YB and Ms GW, was probably going nowhere and Ms NR should do something with the accumulated billable time. She could have written some or all of the billable time off but she did not. It took Ms YB another month or so after the bill was sent to reach the same conclusion, namely that the case was probably going nowhere.

[28] Ms YB formally terminated the retainer on 6 December 2018 then wanted to know what had become of the $5,000 she had deposited in Ms NR's trust account as security for fees. To an extent, the bill and trust account statement would have explained that. The time record added detail.

[29] Although that is only a very basic summary of the history of the matter, it fairly reflects the situation that resulted in the unsatisfactory conduct finding being made against Ms NR. Over time Ms NR's hourly rates increased. There is nothing unusual in that of itself. As a general observation, although there may be some, it is difficult to think of a service that holds the same price for over 3 years. There is usually some adjustment. To an extent, it is self-serving for a client to assume a law firm will hold its rates, but the Rules place the obligation on the lawyer to dispel any such assumption by providing a client with up to date information.

[30] The problem for Ms NR is that although she may have done so, she has no record of having advised Ms YB that was the case when she revived the file in 2018. If that was an oversight, it could well have been due, at least in part, to the intermittency of the instructions.

[31] Ms NR also conveys a sense of acceptance that the firm could have issued a final invoice sooner. Looking at the timesheet, the firm could probably have issued an interim invoice or two but it did not. It is the final invoice that created difficulties.

[32] It is accepted that Ms NR could have managed the billing in a different way, but realistically, without Ms NR taking some sort of stand over the time the matter had consumed, this was a matter that could have meandered along more or less indefinitely.

[33] Ms NR could have issued interim invoices earlier, but it did Ms YB no real harm not to be billed. There is no real substance to Ms YB's comment that Ms NR did not let her know that it would cost $120 to talk to her on the phone. Ms YB was aware she would be charged on a basis that included the time devoted to the matter.

[34] The materials available on review do not support the view that the time recorded and charged was for work not done, or that Ms YB did not receive fair value for the money she paid, some of which she has since recouped.

[35] The Rules obliged Ms NR to render a final account to Ms YB within a reasonable time of concluding the matter or the retainer being otherwise terminated. The bill Ms NR provided in September 2018 included sufficient information to identify the matter ("Taking of Land"), the period to which it related (18 March 2015 to 26 September 2018), and the work undertaken, which is listed in date order (and excludes time spent printing out two emails and their attachments).

[36] Strictly speaking, when Ms NR rendered what later turned out to be the final account to Ms YB in September 2018, the matter had been attended to promptly, then stagnated, been revived and not concluded, and, at least from Ms YB's perspective, the retainer had not otherwise been terminated.

[37] That history is relevant in considering the orders that Ms NR wants reviewed.

[38] It is noted that Ms YB has received the refund and the related adjustments have been made by Ms NR pursuant to the Committee's unchallenged orders. However, the assumption that a lawyer will promptly comply with unchallenged orders is implicit in formulating consequential orders.

[39] So, the professional shortcomings for which consequences follow for Ms NR, are two acknowledged failures, first, not updating her hourly rates when the retainer was rekindled, and second, being slow to charge fees.

[40] I agree with Ms NR that orders (b), (c) and (d) (fee reduction, cancellation and refund) address Ms YB's concerns effectively about delays in being billed and the changes to the hourly rates that Ms YB was not expecting. Those orders perform the function of rectification rather than penalty.

[41] The functions of penalties in a professional context recognised in *Wislang v Medical Council of New Zealand* are:[3]

(a) to punish the practitioner;

(b) as a deterrent to other practitioners; and

(c) to reflect the public's and the profession's condemnation or opprobrium of the practitioner's conduct.

[42] In assessing a proportionate penalty the starting point will always be the seriousness of the conduct.[4]

[43] The two shortcomings identified by the Committee are relatively minor in the overall scheme of conduct that contravenes the Rules.

[44] Ms NR says the fine of $4,000 was disproportionate. I agree in the sense that it was disproportionate both to the conduct that was the subject of Ms YB's complaint and to the conduct the Committee found was unsatisfactory.

[45] In isolation, a fine of between $500 and $1,000 would probably have sufficed for the purposes of punishment and deterrence. Anything more would need a fairly solid grounding.

[46] The Committee calculated the amount of the fine on the basis of "prior findings" made in relation to conduct on the part of Ms NR, particularly findings that related to fees she had charged, and to her invoicing practices.

[47] In fairness to Ms NR, consequential orders have already been made in relation to the "prior findings" made against her under the Act and Rules, and which the

[3] *Wislang v Medical Council of New Zealand* [2002] NZAR 573 (CA) at [21].
[4] *Hart v Auckland Standards Committee 1 of the New Zealand Law Society* [2013] 3 NZLR 103 at [186].

Committee took into account in deciding that a fine of $4,000 was appropriate. The amount of the fine does, as Ms NR says, carry some risk of double punishment.

[48] Generally speaking, fees and invoicing are necessary incidents of practice, that carry some risk of complaint no matter how carefully a retainer is managed. Ms NR has a long history in legal practice,[5] in the course of which complaints, adverse findings and orders have been made against her. To some extent those are relevant to the orders made in this matter.

[49] On one view, Ms NR has had ample time to sharpen up the administrative side of her practice. That said, while lawyers should aspire to high standards, the reality of being in practice is that slippage, while not ideal, can happen.

[50] As to prior findings, there are other approaches a Committee could take if it has genuine concerns backed by evidence about patterns of conduct on the part of a lawyer. One option is a referral to the Tribunal. Given the antiquity of some of the findings made against Ms NR, what she says about some of the others, and the relatively minor infractions in the present matter, it seems unlikely that the present matter forms part of a pattern that might warrant such a referral, but the future can be hard to predict.

[51] The Committee censured Ms NR in addition to what can properly be described as a hefty fine, along with an award for costs that is commensurate with the efforts the Committee put in in the course of its inquiry. Given the refund she paid to Ms YB, Ms NR probably lost money on this retainer.

[52] Without wishing to downplay the contraventions of the Rules, adding a censure to the financial orders for what are in reality relatively minor contraventions seems somewhat heavy handed. It is abundantly clear from Ms NR's application for review that she is stung by the whole episode. A censure can be a precursor to publication. Publication does not appear to have been contemplated on this occasion. Based on the contraventions, I am not persuaded that a censure was a proportionate or necessary response.

[53] Standing back and looking at the circumstances overall, a fine of $1,000 is sufficient to punish the practitioner and to act as a deterrent to other practitioners in similar circumstances.

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[5] Understood to span over [redacted] years.

[54] Lawyers should be mindful of changes to their hourly rates, and the need to keep clients informed, especially when they deal with protracted matters that might appear to have gone away but which then reappear. A degree of sensitivity around fees and billing practices is always to be encouraged. Care should be taken around administration.

[55] For the foregoing reasons the orders made by the Committee are modified:

(a) The censure is reversed;

(b) The fine is reduced to $1,000.

[56] The costs order of $1,200 is confirmed.

Anonymised publication

[57] 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

[58] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the orders made by the Standards Committee are modified to:

(a) Reverse the censure; and

(b) Reduced the fine from $4,000 to $1,000.

[59] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the costs order of $1,200 made by the Standards Committee is confirmed.

DATED this 28TH day of JUNE 2021

D Thresher
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 NR as the Applicant
Ms YB as the Respondent
Mr KR as a Related Person
[Area] Standards Committee [X]
New Zealand Law Society