

CONCERNING

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

AND

CONCERNING

a determination of the [City] Standards Committee [x]

BETWEEN

WA

Applicant

AND

XB

Respondent

DECISION

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

Introduction

[1] Ms WA has applied for a review of a decision dated 9 May 2012 by [City] Standards Committee [x] in which the Committee concluded that Ms XB had failed to competently supervise and manage the conduct of her employee, Ms AD. The Committee found that Ms XB had breached rule 11.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care Rules) 2008, and that her conduct constituted unsatisfactory conduct under s 152(2)(b) of the Lawyers and Conveyancers Act 2006 (the Act).

Background

[2] Although the Committee ordered Ms XB to apologise to Ms WA, and to pay costs and expenses to the New Zealand Law Society (NZLS), Ms WA considered more substantial penalties were appropriate, including compensation for losses she attributes to Ms XB and her employee. She continues to press her claim for compensation on review.

[3] The Law Society opened a separate file with respect to Ms WA's complaints about the conduct by Ms XB's employee. Although it is relevant to the factual background of Ms WA's complaint against Ms XB, the employee's conduct is not the subject of this review.

Standards Committee

[4] Ms WA engaged Ms XB to act for her in an application to set aside a judgment that had been obtained against her in a debt recovery proceeding. The debt related to fees claimed by Ms WA's former lawyer in acting for her in a Family Court proceeding.

[5] The Committee set out a brief history explaining how Ms WA had come to seek advice from Ms XB who had delegated day-to-day conduct of the file to her employee. The decision refers to allegations that Ms XB had been slow to respond to phone calls and emails from Ms WA, that she had not given Ms WA a realistic assessment of her prospects of success, had not properly supervised her employee and should have been quicker to relieve her of conduct of the file, which Ms WA believes was beyond the employee's capability to manage. Ms WA also expressed concern about the amount of Ms XB's fees, saying they had exceeded her estimate.

[6] The decision refers to the contents of a memorandum filed by Ms XB's employee dated 22 June 2011 seeking leave to withdraw as solicitor on the record for Ms WA (the memorandum),¹ in relation to which Ms WA says Ms XB should have intervened to prevent the memorandum being filed or served. The memorandum sets out the background to the application for leave to withdraw, includes detailed evidence of discussions over costs between Ms WA and Ms XB's employee, challenges Ms WA's credibility, is generally critical of her and the instructions she gave, says that she was acting against the advice given by Ms XB and her employee, and that Ms WA's "serious unfounded allegations regarding counsel's professionalism...are not conducive to a healthy solicitor-client relationship".² The memorandum listed 15 separate areas of complaint Ms WA had levelled against Ms XB's employee, including impugning her professionalism, experience, honesty and competence.

[7] The employee, without reference to Ms XB, filed the memorandum in court, and served it on the plaintiff in the debt recovery proceeding.

[8] The Committee noted Ms XB's acknowledgement that she should have returned Ms WA's phone calls on and around 20 June 2011, and her evidence that she had decided by that point to communicate only with Ms WA in writing, in an attempt to avoid misunderstandings. Ms XB also gave evidence that she had changed her practice, exercised greater control over the filing of documents in court by employees, and supervised her employees more closely. She also expressed her regret. Ms XB did not

¹ Memorandum Seeking Leave to Withdraw as Solicitor on Record (22 June 2011).

² At [9].

consider her fees were unreasonable or unfair, or that she was responsible for costs or other consequences to Ms WA after the memorandum was filed.

[9] The Committee considered all of the materials the parties had provided, noting Ms WA's concerns and Ms XB's responses.

[10] The Committee was unconcerned about the delays in Ms XB returning phone calls, and her fees, although it considered Ms XB should have "assumed control of and responsibility for the file" earlier.

[11] It found that Ms XB had failed to assume control of the file and competently supervise and manage the conduct of her employees at all times in breach of rule 11.3, and made a finding of unsatisfactory conduct pursuant to s 152(2)(b) of the Act.

[12] The Committee considered ordering Ms XB to pay compensation to Ms WA, but did not consider she had been materially prejudiced by any act or omission of Ms XB. It decided that further action was unnecessary or inappropriate with respect to all other aspects of the complaint pursuant to section 138(2) of the Act.

[13] The Committee ordered Ms XB to pay costs and expenses to NZLS of \$500, and to apologise to Ms WA, but did not consider publication of details identifying Ms XB was necessary in the public interest.

[14] Ms WA was dissatisfied with the outcome and the orders, and applied for a review.

Review Application

[15] Ms WA's application for review reiterated her original complaints, cited various rules she considered Ms XB had broken, updated her compensation claim and claimed reduction in fees, and included further submissions and documentation. She sought remedies for breaches of privacy, over which this Office has no jurisdiction, again emphasising the content of the memorandum about which the Committee had already recorded a disciplinary finding. Ms WA believes she would have succeeded in her application to set judgment aside, and been awarded costs, if Ms XB and her employee had done their jobs properly.

[16] In essence, Ms WA believes Ms XB should be penalised far more harshly, and ordered to pay compensation for Ms WA's losses.

Role of the LCRO

[17] The role of the Legal Complaints Review Officer (LCRO) on review is to reach her own view of the evidence before her. Where the review is of an exercise of discretion, it is appropriate for the LCRO to exercise particular caution before substituting her own judgement for that of the Standards Committee, without good reason.

Scope of review

[18] The LCRO has broad powers to conduct 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. The statutory power of review is much broader than an appeal, and gives the LCRO discretion as to the approach to be taken on any particular review and the extent of the investigations necessary to conduct that review.

Discussion

[19] The decision records the Committee's consideration of the information provided in respect of the complaint, and reaches a conclusion which I am unable to disagree with, having carefully considered all of the information available on review. That information includes Ms WA's evidence and submissions at the review hearing on 25 February 2015 in Auckland. The Committee found Ms XB's conduct was unsatisfactory, for a breach of rule 11.3, which required Ms XB to ensure that the conduct of her employees was competently supervised and managed. The Committee did not indicate which part of s 12 of the Act it relied on as the basis for the finding of unsatisfactory conduct. However, as rule 11.3 is a practice rule made under the Act, it follows that the Committee would have based its findings on s 12(c) which says:

In this Act, unsatisfactory conduct, in relation to a lawyer..., means –

- (c) conduct consisting of a contravention of... practice rules made under this Act that apply to the lawyer...

[20] Apart from that minor amendment, I have been unable to identify any reason to depart from the Committee's reasoning, its decision, or the exercise of its discretion in imposing orders under s 156 of the Act.

[21] The decision recognises Ms XB's acceptance that her conduct fell below the required standard, and she could have done better. All of the alleged conduct deficiencies can be tied back to the failure to properly supervise. A single finding of unsatisfactory conduct is appropriate in the circumstances. There is no good reason to expand the number of separate findings arising from the conduct. Nor is there any good reason to

depart from the Committee's finding that Ms XB's fees were unobjectionable, and that she had advised Ms WA when it became apparent that the fees estimate would be exceeded.

[22] While I accept that Ms WA considers she should be entitled to compensation, awarding compensation would involve determining issues that are likely to be disputed, including causation, contribution, foreseeability and loss. Those matters are unsuited to determination through this process of review.

[23] The only real question on review is whether there is good reason to interfere with any of the orders the Committee made, or to make further orders under s 156(1) of the Act. The orders the Committee made under s 156(1) were available to it, and represent a proportionate, measured response to the complaints. I have carefully considered Ms WA's submissions and Ms XB's conduct, and have been unable to identify any reason that would support the imposition of a different penalty.

[24] In all the circumstances, the decision is confirmed on review, subject to an amendment to record that the finding of unsatisfactory conduct is made pursuant to s 12(c) of the Act.

Costs

[25] An LCRO has a wide discretion to consider costs pursuant to s 210 of the Act, and the LCRO's Costs Orders Guidelines.

[26] Ms WA was entitled to apply for a review, and did so. She has not conducted herself in a manner that would attract an order for costs against her.

[27] An adverse finding was made against Ms XB by the Committee, and that has been confirmed on review.

[28] Ms XB acknowledged her conduct could have been better very early in the complaints process. She has done nothing to add to the costs of this review, and there is no reason why she should be ordered to pay costs.

[29] In the circumstances, no costs orders are made on review.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the decision of the [City] Standards Committee [x] is confirmed, subject to an amendment that the finding of unsatisfactory conduct was made under s 12(c) of the Act.

DATED this 18th day of March 2015

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 WA as the Applicant
Ms XB as the Respondent
Ms BE as the Representative for the Respondent
The [City] Standards Committee [x]
New Zealand Law Society
Secretary for Justice