LCRO 159/2014

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
BETWEEN	**AB AND RJ** Applicants
AND	**OC AND BR** Respondents

DECISION

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

Introduction

[1] Mr AB and Mrs RJ have applied for a review of a decision by the [Area] Standards Committee which made findings of unsatisfactory conduct against Ms OC and Mr BR.

Background

[2] Mr BR is the principal of BR Legal and Ms OC was a non-lawyer employee of the practice.

[3] Mr AB approached BR Legal to seek advice after receiving correspondence from Immigration New Zealand (INZ) dated 14 November 2012 advising his application for a work visa had been declined.

[4] Mr AB was at the time working for [Supermarket] in [Town] as a [XXXX] apprentice. [Supermarket] was supporting Mr AB in his application for a work visa. Mr NS was the Human Resources Manager at [Supermarket].

[5] On 20 November 2012, Mr NS emailed Ms OC requesting a meeting to discuss Mr AB's options going forward, following the decline of the visa application.

[6] On 3 March 2013, a fee estimate was forwarded to Mr NS, with Mr AB named as the client. On 8 April 2013, Ms OC emailed Mr NS advising that she was hoping to work on Mr AB's further application for a work visa that week.

[7] Ms OC took a medical leave of absence from 23 April to 8 May 2013.

[8] On 13 May 2013, in response to emails requesting if any information had been received from INZ, Ms OC emailed Mr NS stating "Good morning Mr NS, good with INZ …".

[9] On 14 May 2013, after receiving a further email from Mr NS, Ms OC emailed Mr NS stating "Mr NS, no probs, nothing definitive from INZ, but please assure [AB] I will not allow [RJ]'s status to be jeopardised. I will have something to him asap".

[10] After receiving further emails requesting information as to progress, Ms OC advised via email on 22 May 2013:

> Nothing from Immigration yet – he will have an electronic interim visa issued automatically on Friday (comes in day after visa was to expire) whilst decision is pending on the application … I know he will be chomping on the bit, but pushing INZ won't get the decision any quicker.

[11] The visa applications were received by INZ on 23 May 2013.

[12] On 25 June 2013, INZ advised that it did not consider that Mr AB's occupation [(xxxxx)], was an occupation where there was a shortage of labour which could not be met by existing New Zealand residents or citizens.

[13] Mr BR's personal assistant contacted the immigration officer at INZ on 28 June 2013, advising that Ms OC was on leave until 8 July and requesting an extension to provide a response. An extension was given to 15 July 2013.

[14] On 15 July 2013, on return from leave Ms OC requested a further extension to file submissions. INZ granted a final extension until 22 July 2013.

[15] A further email was forwarded by Ms OC to INZ on 29 July 2013 requesting a further extension. That request was granted.

[16] Ms OC provided submissions to INZ on 6 August 2013.

[17] In correspondence dated 8 August 2013, INZ advised that the application for a work visa had been declined.

[18] Ms OC advised Mr AB of the outcome of the visa application in correspondence dated 29 August 2013. Ms OC told Mr AB that she had discussed INZ's correspondence with Mr BR and requested that Mr AB make an appointment to discuss further options.

[19] Ms OC relayed the outcome of the application to Mr NS in correspondence dated 6 September 2013. She confirmed that after having discussed the matter with Mr BR, she had formed a view that an application should be made for a visa pursuant to s 61 of the Immigration Act 2009 (s 61 application). This application was to be based on an offer of employment that Mrs RJ had received.

[20] On 16 September 2013, Mr AB and Mrs RJ met with Ms OC to sign their s 61 application.

[21] Mr BR was overseas between 15 and 29 September 2013.

[22] Mr AB made a number of phone calls to Ms OC. He was anxious to find out what progress was being made. On 16 October 2013 Ms OC reported via email to Mr AB and Mrs RJ as follows:

> Good morning guys – Mr BR is dealing with your case and Immigration, as soon as we hear anything I will let you know immediately. We do fully appreciate how distressing this is for you and hope to have the situation sorted as soon as possible.

[23] Mr AB contacted INZ on 18 October 2013 and was advised that a s 61 application had not been lodged.

[24] On 21 October 2013, Mr AB and Mrs RJ met with Mr BR. They raised concerns about how their case had been handled. Mr AB and Mrs RJ recorded the meeting without Mr BR's knowledge.

[25] Mr AB and Mrs RJ decided to instruct an immigration consultant.

[26] Mr BR then received an authority, from TDA Immigration and Student Services Ltd (TDA), to uplift both the files of Mr AB and Mrs RJ. Mr EL is the principal of TDA and advanced the review application as a representative for Mr AB and Mrs RJ.

The complaint and the Standards Committee decision

[27] The details of the complaints, together with Mr BR's and Ms OC's responses, are comprehensively set out in the Committee's decision of 28 May 2014, and I do not propose to summarise the complaints further here. I simply note that Mr EL in his

submissions filed on review, acknowledged that the Committee's decision provided accurate account of both the background to, and the particulars of, the complaints.

[28] The Standards Committee delivered its decision on 28 May 2014.

Ms OC

[29] The Committee determined that Ms OC's conduct was unsatisfactory pursuant to s 14 of the Lawyers and Conveyancers Act 2006 (the Act).

[30] In reaching that decision the Committee concluded that:

(a) Ms OC's conduct fell below the requisite standard as she did not attend to matters in a timely fashion, while at the same time conveying an impression that work was in hand.

(b) Ms OC's failure to advise the clients about their options of judicial review or appeal were significant failures.

(c) There were many examples of Ms OC's failure to respond to the clients in a timely manner and failures to communicate.

(d) Ms OC acknowledged that she did not complete the retainer, despite there being ample time within which that could have occurred.

(e) Mr AB's and Mrs RJ's criticisms that Ms OC rarely provided updates unless prompted and that the communications given did not give a clear picture of the status of the various applications were reasonable.

(f) Various emails sent by Ms OC were unintentionally misleading.

[31] The Committee made the following orders against Ms OC:

(a) Censure pursuant to s 156(1)(b) of the Act.

(b) Publication of the decision pursuant to s 142(2), but not with any details that might lead to identification of the parties involved.

Mr BR

[32] The Committee determined that Mr BR's conduct was unsatisfactory pursuant to s 12(a) of the Act.

[33] In reaching that decision the Committee concluded that:

(a) There was inadequate supervision of Ms OC which contributed significantly to the difficulties Mr AB and Mrs RJ found themselves in.

(b) Mr BR had acknowledged his failings to keep the clients informed, which was a breach of r 7.1.

(c) Mr BR's conduct fell below that required by r 4.2 which requires a lawyer to complete a retainer.

[34] The Committee made the following orders against Mr BR:

(a) Fine of $5,000 pursuant to s 156(1)(i) of the Act.

(b) Costs of $1,000 pursuant to s 156(1)(n) of the Act.

Application for review

[35] TDA filed an application for review on behalf of Mr AB and Mrs RJ on 7 July 2014.

[36] Mr AB and Mrs RJ submit that:

(a) The penalty ordered against Ms OC was inadequate given the extent and seriousness of her breaches of professional conduct.

(b) The matter should be referred to the New Zealand Lawyers and Conveyancers Disciplinary Tribunal (the Tribunal).

(c) The findings against Ms OC did not stem from an isolated incident, but a pattern of behaviour spanning more than six months.

(d) No reasons were provided by the Committee for not referring Ms OC to the Tribunal. Ms OC's dishonesty requires a finding of misconduct.

(e) Compensation should have been awarded to them to cover the substantial losses alleged to have been caused by Ms OC and Mr BR.

(f) It is unfair to the applicants that the conduct of Ms OC and Mr BR was sufficiently reprehensible to warrant a $6,000 penalty, but that the penalty was awarded to the New Zealand Law Society, rather than the applicants.

(g) The published decision should include the identities of Ms OC and Mr BR as a matter of public interest.

[37] Mr AB and Mrs RJ submit that the following orders should be made against Ms OC:

(a) A finding of misconduct.

(b) Compensation for both actual and punitive damages.

(c) Termination of her employment with BR Legal.

(d) An order that no practitioner or incorporated firm should employ Ms OC.

[38] In response, counsel (who was acting at this point for both Mr BR and Ms OC) submitted that:

(a) Reliance was placed on the submissions made to the Standards Committee.

(b) Whilst the Standards Committee did not specifically address the reasons why it did not consider it necessary to lay charges with the Tribunal, it was a matter that the Standards Committee turned its mind to as it sought submissions from the parties on that issue.

(c) A referral to the Tribunal was not warranted.

(d) The Committee found that Ms OC had misled and deceived the clients, but Mr AB and Mrs RJ have taken this a step further in their assertion that Ms OC was dishonest and that her conduct was on a par with Mr Dorbu in the decision of *Dorbu.*[1]

(e) The conduct of Ms OC cannot be considered equal or similar to the conduct in the *Dorbu* case. There was no finding by the Standards Committee that Ms OC's conduct was "wilful, inadvertent and calculated".[2]

(f) Mr BR had taken steps to implement additional procedures in his practice to ensure that all employees were adequately supervised.

(g) Ms OC has acknowledged that her conduct fell below the required standard.

(h) No serious questions of public protection arise.

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[1] *Dorbu,* above n 3.
[2] Letter from [Law Firm A] to Legal Complaints Review Officer (4 August 2014) at [5](c).

(i) The loss claimed to have been suffered by the applicants, must have occurred as a result of any act or omission of the practitioner. This was not the case.

(j) The Committee's order to publish with no identifying details was appropriate. The matter had already been the subject of publication in the [Local Paper] on at least three occasions, which had had a significant impact on BR Legal.

Review hearing

[39] This review was progressed by way of a both party hearing in Auckland on 18 July 2017.

[40] Attending the hearing (either in person or by phone) were:

(a) Mrs RJ and Mr AB in person.

(b) Mr EL for Mrs RJ and Mr AB in person.

(c) Mr BR (by phone)

(d) Ms TI for Mr BR (in person).

(e) Ms OC (by phone).

(f) Mr SH for Ms OC (by phone).

[41] At commencement, and during the course of the hearing, I addressed with Mr EL, issues arising from two of the review grounds, being his request to have Ms OC's conduct referred to the Tribunal, and his request to have the names of both Ms OC and Mr BR published.

[42] Mr EL helpfully, and in my view sensibly, conceded that his arguments to refer to the Tribunal, and for publication, had little prospect of success. He indicated that he wished to withdraw those two review grounds.

[43] The focus for this review then, is solely on the compensation argument.

Nature and scope of review

[44] 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.

[45] 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.

[46] 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.

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[3] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].
[4] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

Analysis

Preliminary comments—The conduct findings

[47] In addressing Mr EL's submissions on penalty, I have found it necessary to examine the conduct which established the foundations for the Committee's penalty determinations.

[48] In undertaking that examination, I have been considerably assisted by the comprehensive submissions filed by the parties. It is clear that both during the stage of the Committee inquiry, and now on review, both parties have had abundant opportunity to set out their positions, and to respond to the arguments advanced by the other. All that could be said, has been said.

[49] In my view, the Committee's decision to make conduct findings against both Ms OC and Mr BR present as findings which were both understandable and appropriate.

[50] Whilst I accept that Ms OC's management of the file may have been adversely affected by a number of issues, no reasonable explanation can be drawn from an examination of the exchanges between the parties, other than that Ms OC's actions led her clients into believing that an application had been filed with INZ when it had not, and that she continued in the face of repeated inquiry from her client, to allow her client to be encouraged in the belief that she had got things underway with the visa application when she had not.

[51] There may have been legitimate reasons as to why Ms OC could not attend to filing the application immediately on receipt of instructions and a number of explanations are advanced to justify the delay, but I think it possible that Ms OC's initial indication to her clients that the application had been filed was given on the basis that she was intending at that time to file the application immediately, and having advised her client that the application had been filed, she became ensnared in the explanation and committed to advancing it, when further enquiries as to progress followed.

[52] I did not consider Ms OC's explanation (which essentially was that she had not advised her clients that an application had been filed) to be persuasive.

[53] Misleading a client is a serious matter, and there are features of the conduct, considered in context, which amplify the seriousness.

[54] It is self-evident as to approach the trite, to emphasise that these were matters of immense importance for Mrs RJ and Mr AB. Their futures were dependent on the outcome of the visa application.

[55] In my view, Ms OC's conduct approaches the upper level of unsatisfactory conduct.

[56] The criticism of Mr BR is that he failed to adequately supervise Ms OC.

[57] Mr EL does not challenge the unsatisfactory conduct finding entered against Mr BR.

[58] Having considered the conduct finding made in respect to Mr BR, I simply record that I agree with it.

[59] Whilst Mr BR submits that he had adequate arrangements in place to supervise Ms OC, there is no indication that those arrangements had been sufficient to identify the problems that were developing, and the explanation he provides as to his state of unpreparedness to address the concerns raised by Mrs RJ and Mr AB at the 21 October 2013 meeting, would support Mr AB and Mrs RJ's view that Mr BR presented at that meeting as having little understanding of what had occurred with the file.

[60] That being said, I accept Mr BR's evidence that he had confidence in Ms OC, and that Ms OC had considerable experience in working in the immigration field. There is no evidence to suggest that the application to be filed for Mr AB was difficult or complex, or was particularly problematic. I think it reasonable that Mr BR would have had an expectation that his employee would be able to manage the application conscientiously, and that the work involved was well within Ms OC's capability and experience.

[61] I agree with the Committee that Mr BR's failure to adequately supervise Ms OC merited an unsatisfactory conduct finding.

Compensation

[62] Mr EL asserts that the Committee erred in failing to award compensation to Mr AB and Mrs RJ.

[63] He seeks compensation for loss alleged to have been suffered by his clients, in the sum of $20,000.

[64] Mr EL is critical of the Committee orders that Mr BR be fined $5,000 and directed to pay costs of $1,000 to the New Zealand Law Society.

[65] He argues that there was unfairness in the Committee directing that payments be made to the Law Society, without making an award of compensation to his clients.

[66] Mr EL misunderstands the nature of these awards.

[67] In ordering that Mr BR pay a fine of $5,000, the Committee was exercising the power available to it, to impose a fine on a practitioner, consequential on its making a finding of unsatisfactory conduct against the practitioner. In doing so, it was expressing its disapproval of the conduct.

[68] In ordering that Mr BR make contribution to the cost of its inquiry, the Committee was doing no more than exercising its power to order a party who has an adverse finding made against them, to contribute to the cost of the inquiry.

[69] A Committee's power to make orders is set out in s 156 of the Act.

[70] Included amongst those powers, is the ability to award compensation to a party, where it appears to the Standards Committee that any person has suffered loss by reason of any act or omission of a practitioner or former practitioner or an incorporated firm or former incorporated firm or an employee or former employee of a practitioner or an incorporated firm.[5]

[71] The maximum sum that may be awarded under s 156(1)(d) is $25,000.[6]

[72] The Legal Complaints Review Officer (LCRO) has jurisdiction to exercise the powers available to a Committee under s 156 of the Act.[7]

[73] Critical to the issue as to whether a Committee (or this Office) may award compensation, is the question as to whether the loss said to have been suffered has arisen by reason of any act or omission of the practitioner or, in this case, the practitioner's employee.

[74] To establish grounds for a compensation claim, Mr EL must:

(a) Identify the loss suffered, whether in the nature of financial loss or non-financial loss.

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[5] Lawyers and Conveyancers Act 2006, s 156(1)(d).
[6] Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008, reg 32.
[7] Lawyers and Conveyancers Act 2006, s 211(1)(b).

(b) Identify the actions of the practitioner and employee that have been causative of the loss said to have been suffered.

(c) Quantify the loss.

[75] Mr EL submits that Ms OC's delay in processing the visa application, and her and Mr BR's failure to lodge a s 61 application, were directly responsible for his clients suffering significant financial loss.

[76] He does not precisely quantify the extent of the loss, but submits that his clients:

(a) Incurred substantial costs.

(b) Have had to hire advisers to represent their interests to INZ and to the Minister of Immigration.

(c) Have had to hire representatives to prepare their complaint to the Standards Committee.

(d) Were unable to legally work for a nine month period, resulting in a loss of tens of thousands of dollars.

[77] Mr EL argues that Ms OC's strategy was poorly conceived, and that she should at first step have also have lodged an application on behalf of Mrs RJ. He contends that the application submitted by Ms OC was poorly prepared. He suggests that the application's prospect of success was significantly impeded by the lack of professionalism in preparing and advancing the application.

[78] Mr BR submits that the application failed because of problems with Mr AB establishing that his intended work fell within the category which could support a successful application (a position rejected by Mr EL) but it is not open to the LCRO (nor to the Committee as was noted by the Committee) to make definitive findings as to whether a visa application to INZ could, or should, have succeeded.

[79] In respect to the s 61 application, Mr EL does not suggest that Ms OC's and Mr BR's failure to progress that application fatally affected any further s 61 applications, noting that another s 61 application was filed by him at the same time as the original complaint was filed (December 2013).[8]

[8] EL submissions to Complaints Service (17 April 2014) at [13].

[80] Rather, it is his contention that the failure to lodge a s 61 application expeditiously, significantly compromised any further application's prospect of success. It is argument that the longer the delay in filing a s 61 application, the less chance the applicant will have of succeeding.

[81] During the course of the review hearing, I heard extensive submissions from Mr EL, Mr SH, and Mr BR, addressing the legal processes associated with advancing section 61 applications, and the consequences that flow for parties whose applications are declined.

[82] Whilst there was some disagreement as to how the relevant legislation would be interpreted and applied, for the most part there was a considerable unanimity in the views expressed.

[83] To the extent that there was disagreement, the arguments can be summarised thus. Mr BR and Mr SH submitted that whilst it was unfortunate that Mr AB's initial applications had not been successful, the discretion to grant visas rested at all times with INZ, and neither the actions of Ms OC nor Mr BR could properly be said to have been responsible for the application being declined. Mr EL argues that delay in processing the applications, and a failure to present the visa applications professionally, compromised the chances of success.

[84] Mr EL accepts that he is unable to establish that INZ's decision to decline Mr AB's visa application was directly attributable to actions on the part of Ms OC or Mr BR, and indeed he submits that his clients have never advanced that position. He notes at paragraph 9 of his 17 April 2014 submissions to the Lawyers Complaints Service, that

> … despite what Mr BR and Ms OC appear to imply, the complainants have never alleged that INZ's decision to decline the complainant's work visa application was *caused* by Ms OC's incompetent submissions and delay. The original complaint states at [144] that Ms OC's incompetence and delay "made [INZ] less likely to grant the application.

[85] At the core of Mr EL's compensation claim is argument that a failure to competently and expeditiously advance Mr AB's visa application, resulted in significant delay in his clients being able to resolve their immigration status. Further, he contends that a failure to lodge the s 61 application comprised his clients' ability to secure a successful outcome.

[86] His argument is that the quality of the submissions prepared by Ms OC, and a failure to deal with matters expeditiously, must have led INZ to have formed a jaundiced view of the merits of the application it received, and that delay in filing the s 61 application would have jeopardised the chance of that application succeeding.

[87] Accepting as he does, that he cannot prove that either the actions of Ms OC or Mr BR resulted in the applications being declined, Mr EL then must confront the hurdle of establishing how the compensation he seeks on behalf of his clients, can be said to be directly linked to any act or omission on the part of either.

[88] I have noted that Mr EL's claim is not particularised. He does not specify how the $20,000 sought is made up. He simply advances a global figure.

[89] Having heard both from Mr EL and his clients, as best I can establish, the compensation claim is built on argument that Mr AB and Mrs RJ's capacity to have their immigration issues resolved promptly was compromised by delay.

[90] They report that they were unable to work for a number of months. In arguing that his clients are entitled to be compensated for the time they were unable to work, Mr EL's argument inevitably demands acquiescence to acceptance that a visa would have been approved, or a section 61 application granted, if not for the actions (or lack of action) of Ms OC and Mr BR, a position that Mr EL himself conceded cannot be proven.

[91] Whilst it is the case that the visa application should have been filed more promptly, it is not established that if the application had been filed more expeditiously, that there would have been a significant change to Mr AB's and Mrs RJ's circumstances.

[92] Nor can the (admittedly unacceptable) delay in lodging the s 61 application provide a reasonable basis for a compensation claim.

[93] I note that a s 61 application was lodged by Mr EL at the time his clients filed their complaint with the Complaints Service. There was not an inordinate period of delay from the time Mr EL was instructed to the time he took steps to get the s 61 application underway, and certainly not delay of a duration that would establish a legitimate basis for a compensation claim.

[94] Mr EL's first s 61 application failed. Whilst it would be speculative to attempt to draw conclusion as to why the application did not meet with success, and I appreciate it is an application that is entirely dependent on the exercise of a discretion, its failure would indicate that it was unlikely that significant and egregious errors had been identified in the manner in which the application had been initially presented of such import as to prompt concern that the matter should be looked at afresh.

[95] Having failed with his s 61 application, Mr EL instructed his clients to take their grievances with Mr BR's firm to the local newspaper. This resulted in the publication of

a number of articles in the newspaper. These articles provided account of Mr AB's and Mrs RJ's views on the failings of Mr BR's firm. Mr BR says that he was given no opportunity to provide his side of the story. He says, and I accept his evidence, that the publication of these articles was, and continues to be, damaging for his firm.

[96] Mr EL advised that it was he who had encouraged his clients to go the paper, and that this was a tactic he frequently used to secure an advantage for his clients. He noted that Members of Parliament were acutely sensitive to adverse publicity (as this was), and that he would leverage off that publicity to secure access to an attentive political ear, and use that to advance further argument for his clients that a Ministerial discretion be exercised in his clients' favour.

[97] Mr EL was open in explaining this stratagem. The result somewhat perversely seems to have been that his clients' public complaints against Mr BR and Ms OC appear to have contributed to Mr EL's ultimate success in obtaining a positive outcome for his clients.

[98] Whilst the process was protracted, I am not persuaded that it is established that any act or omission on the part of either Mr BR or Ms OC was responsible for the losses suffered as a consequence of delay in Mr AB and Mrs RJ finalising their immigration status.

Costs incurred in obtaining further representation and costs engaged in proceeding the complaint

[99] Mr EL submits that his clients should be compensated for costs incurred in advancing their complaint. These costs are absorbed into the $20,000 claim. I note once more that no particulars are provided by Mr EL to clarify as to how the compensation claim is made up.

[100] Section 156(1)(o) of the Act provides that a Committee may:

> Order the practitioner or former practitioner or incorporated firm or former incorporated firm, or any director or shareholder of the incorporated firm or former incorporated firm, or any employee or former employee of the practitioner or incorporated firm, to pay to the complainant any costs or expenses incurred by the complainant in respect of the inquiry, investigation, or hearing by the Standards Committee.

[101] The ability of a Committee to compensate a party under s 156(1)(o) of the Act, is confined to costs and expenses incurred by the complainant in respect of the inquiry, investigation or hearing by the Standards Committee.

[102] In *OL v RY*, the Review Officer, when considering the scope of a Committee's power to award costs under s 156(1)(o) of the Act, took the view that it was not necessary for a person wishing to lodge a complaint with the Lawyers Complaints Service to engage the services of a lawyer.[9] The Review Officer also considered that, consistent with the consumer objectives promoted by the Act, there was the expectation that lay complainants, with the help available to them,[10] were able to advance a complaint without having to seek assistance from a lawyer.[11]

[103] The Review Officer concluded that the power of a Committee to order a practitioner to pay to a complainant costs or expenses incurred in respect to the Committee's process of inquiry, investigation or hearing, must only apply to those costs that arise after the inquiry has commenced, and that it was "not possible to order a practitioner to reimburse a complainant for legal costs incurred in lodging the complaint".[12]

[104] Whilst Mr EL is not a lawyer, he is an experienced advocate who has both in his written submissions and in his arguments advanced at the review hearing, presented his clients' case in a manner typical of the way in which a lawyer would advance a case.

[105] I am not prepared to award costs to reimburse Mr AB and Mrs RJ for their costs of progressing their complaint, or their review application.

Emotional Harm and Suffering

[106] Section 156(1)(d) of the Act provides that an order for compensation may be made where it appears that any person has *suffered loss* by reason of any act or omission of a lawyer.

[107] I note that the ability to compensate for anguish and distress in the lawyer-client relationship has been recognised in a number of cases, for example in *Heslop v Cousins* (where $50,000 was awarded to each client).[13] Given the purposes of the Act (which in s 3(1)(b) includes the protection of consumers of legal services) it is appropriate to award compensation for anxiety and distress where it can be shown to have occurred.

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[9] *OL v RY* LCRO 261/2014 (17 February 2016) at [25].
[10] Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committee) Regulations 2008, reg 8(2) requires the Complaints Service to provide reasonable assistance to any person who wishes to make a complaint.
[11] *OL v RY*, above n 9, at [28].
[12] At [27].
[13] *Heslop v Cousins* [2007] 3 NZLR 679 (HC).

[108] In previous decisions of this Office, it has been accepted that orders to provide compensation for personal stress and anguish may be made pursuant to section 156(1)(d) of the Act.

[109] In *Sandy v Khan*, the LCRO made an award of $2,500.[14] In another decision, *Wandsworth v Ddinbych & Keith*, the LCRO awarded the sum of $1,200 to the review applicant.[15]

[110] The circumstances in which compensation on this basis has been awarded vary widely, but in general terms, there must be something more than the stress associated with the complaint itself. Thus, in *Sandy*, the lawyer's firm had acted for both parties in the sale and purchase of a business in circumstances where the complainant's interests had become compromised. In *Wandsworth*, the lawyer had wrongfully terminated a retainer and a compensation order under this head was made to compensate the complainant for the stress of having to arrange new representation in the litigation in which he was involved and the general disruption to his business and personal affairs.

[111] There is no punitive element to an award of damages for anxiety and distress. Such an award is entirely compensatory.[16]

[112] At hearing I indicated to counsel for both Mr BR and Ms OC that whilst the Standards Committee had not turned its collective mind to a consideration as to whether it was appropriate to make an award for anguish and distress suffered, I considered it appropriate to consider whether it was necessary to do so, and invited counsel to advance submissions on the point.

[113] I am satisfied, having considered the comprehensive submissions filed, and having had opportunity to hear from Mr AB and Mrs RJ at hearing, that Mr AB and Mrs RJ suffered considerable anguish and distress as a consequence of the inadequate service they had received.

[114] I am satisfied that a measure of compensation for anguish and distress suffered is appropriate.

[115] It is important to identify the basis upon which I consider compensation should be awarded under this head.

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[14] *Sandy v Khan* LCRO 181/09 (25 February 2010).
[15] *Wandsworth v Ddinbych & Keith* LCRO 149 & 150/09 (5 March 2010).
[16] See *Air New Zealand Limited v Johnston* [1992] 1 NZLR 159 (CA).

[116] I have noted that this was an anxious time for Mr AB and Mrs RJ. But a degree of anxiety and stress is a normal and expected consequence for parties progressing visa applications.

[117] More must be shown than a degree of understandable anxiety.

[118] I am satisfied that there were aspects of both Ms OC and Mr BR's conduct, that exacerbated the situation for their clients, and directly contributed to elevating their clients' stress and anxiety beyond that which would reasonably be anticipated.

[119] I particularly note the following. Mr AB and his employer were frequently contacting Ms OC seeking an update on progress. They were encouraged in the belief that the work visa application had been filed when it had not. It would be reasonable to conclude that Mr AB and Mrs RJ would have felt very let down when they learnt both that their application had been declined, and that it had been filed at last minute. They would have felt that they had been misled.

[120] They would have suffered a crisis of confidence when learning of the circumstances in which their application had been declined. That would have been exacerbated by the considerable delay that occurred in advising them of the outcome of the application.

[121] The situation was further aggravated by the fact that their immigration status had become compromised. They were now overstayers and subject to risk of deportation. These consequences may well have been live issues for them if their application had been managed professionally, but the failure to advance the applications in a professional manner made matters worse for them.

[122] Mr AB and Mrs RJ were in a very vulnerable position. Whilst it is commonplace for clients to place considerable faith and trust in their lawyer, in circumstances such as these where there was such dependence and reliance on the guidance they were receiving from those in whom they had placed their trust, it would have been extremely distressing for them to have been let down in the way they were.

[123] To add to their distress, they were assured that BR Legal would promptly attend to lodging a s 61 application. This was their last hope. All depended on it. They were led to believe that an application had been made. It hadn't. They had been let down, in similar and serious fashion, again.

[124] At the hearing, both Mr AB and Mrs RJ gave evidence that BR Legal's failure to competently manage their applications had caused them serious distress. I found their evidence to be genuine and persuasive.

[125] I am satisfied that the degree of stress and anguish suffered by Mr AB and Mrs RJ was considerable, and went beyond the level of anxiety that would commonly be expected for persons who were progressing visa applications in circumstances where there was uncertainty as to outcome.

[126] Mr BR fairly conceded at hearing that when he met with his Mr AB and Mrs RJ, both were extremely upset.

[127] Shortly after that meeting, Mr AB and Mrs RJ placed their affairs in Mr EL's hands. Whilst it was argued by Mr AB and Mrs RJ that subsequent to instructing Mr EL their situation remained unresolved for many months and they were anguished to the point where they were frightened to leave their home, the period of time for which it is reasonable to award compensation for stress and anxiety, is limited to that brief period from the time they learnt of the failure of their visa application to the time they instructed Mr EL.

[128] I consider it appropriate that the order for compensation in the sum of $2,500 be made against Mr BR rather than Ms OC, as it was he who had overall responsibility for the management of the file.

Decision

[129] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is modified in respect of orders for compensation, but is otherwise confirmed.

Costs

[130] There is no order as to costs.

Orders

The following orders are made pursuant to section 210(1) and 156 (1)(d) of the Lawyers and Conveyancers Act 2006.

(a) Mr BR is ordered to pay to the applicant's compensation for distress in the sum of $2,500. This payment is to be made within 30 days of the date of this decision.

DATED this 30th day of October 2017

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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 AB and Mrs RJ as the Applicants
Mr EL as the Applicant's Representative
Ms OC as the Respondent
Mr BR as the Respondent
Mr TI as Mr BR's Representative
Mr SH as Ms OC's Representative
[Area] Standards Committee
New Zealand Law Society