LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2022] NZLCRO 041

Ref: LCRO 173/2021

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	**KC** Applicant
AND	**TG** Respondent

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

DECISION

Introduction

[1] Mr KC has applied to review a determination made by the [Area] Standards Committee X on 13 September 2021, in which the Committee made a finding of unsatisfactory conduct against him for charging Mr TG a fee that was not fair and reasonable.

Background

First employment issue

[2] In early 2019, Mr TG was employed by [Company B] as a team leader in its call centre, based in Auckland.

[3] Mr TG and a colleague were having difficulties with their direct manager. They exchanged messages with one another about those difficulties on an [Company B] internal messaging system.

[4] As well, at about this time Mr TG had misplaced his building access swipe card and was being let into and around the [Company B] building by a colleague, using their card.

[5] [Company B] management became aware of the messages that Mr TG and his colleague were exchanging, as well as the fact that Mr TG had lost his swipe card.

[6] In a letter to Mr TG, dated Friday 22 February 2019, [Company B] invited him to attend a disciplinary meeting on Tuesday, 26 February 2019. It was alleged that both the use of the internal messaging system and the content of the messages exchanged with his colleague, breached various [Company B] workplace policies.

[7] As well, concern was expressed about Mr TG failing to report his lost swipe card and gaining access to the building with someone else's.

Instructing Mr KC

[8] Mr TG undertook some internet searches for employment lawyers based in Auckland, and early in the afternoon of Saturday, 23 February 2019 he completed an online form for a consultation with Mr KC's law firm ([Law Firm A]).

[9] Mr KC responded to that online inquiry and arranged to meet Mr TG in person on Sunday afternoon, 24 February 2019.

[10] Mr KC assessed that the factual position was complex. This was because in its disciplinary letter [Company B] referred to several occasions on which messages had been exchanged by Mr TG and his colleague, and it referred to different [Company B] policies and procedures allegedly engaged by Mr TG's conduct and which gave rise to its disciplinary inquiry.

[11] Mr KC and Mr TG met again on Monday, 25 February 2019. During the afternoon Mr KC persuaded [Company B] to defer the disciplinary meeting until Friday, 1 March 2019.

Mr KC's terms of engagement

[12] On 26 February 2019, Mr KC gave Mr TG a copy of his terms of engagement. Included amongst the terms was the requirement for an initial retainer of $2,000 (which Mr TG paid).

[13] As well, the terms described the legal work as being "employment dispute and associated matters" and advised that fees would be charged "based on time and attendance plus GST, office expenses and disbursements".

[14] Mr KC's hourly rate, as a partner in [Law Firm A], was described in the terms of engagement as being between $360 and $450. In fact, Mr KC charged a rate of $440 an hour for Mr TG's legal work.

Next steps

[15] On 28 February 2019, Mr KC provided a formal response to [Company B]'s disciplinary letter, essentially disputing that there were any disciplinary issues engaged by Mr TG's conduct.

Second employment issue

[16] Also on 28 February 2019, [Company B] wrote a second disciplinary letter to Mr TG in connection with a fresh issue. This concerned an allegation that he had improperly accessed his direct manager's [employee benefits] information. This was characterised as a breach of privacy.

[17] The second disciplinary letter rescheduled the disciplinary meeting – now covering the issues raised in both letters – to Monday, 4 March 2019. That meeting was shifted to Wednesday, 6 March 2019.

[18] The investigation meeting went ahead and Mr KC represented Mr TG. Later that day, [Company B] indicated that it was considering suspending Mr TG's employment. It requested a resumption of the disciplinary meeting on Friday, 8 March 2019.

Termination of retainer

[19] At about this time Mr TG spoke to Mr KC and asked for an update about legal fees incurred. Mr KC informed him that there was about $16,000 of unbilled time.

[20] Mr KC issued an invoice to Mr TG, dated 6 March 2019, for $16,546 plus GST of $2,481.90, making a total of $19,027.90. From this Mr KC deducted the $2,000 retainer that Mr TG had paid, leaving a balance owing of $17,097.90.

[21] On Friday 8 March 2019, Mr TG again spoke to Mr KC and indicated that he was terminating his retainer on the basis of increasing legal fees.

The complaint

[22] Mr TG lodged his complaint about Mr KC's fees, with the New Zealand Law Society Complaints Service (Complaints Service) in April 2019.

[23] He said:

> I would like my cost to be reviewed and corrected reasonably. I am looking for a fair charge with honest work completed. The amount [charged] is not relevant to the time I engaged with the lawyer and the cost given per hour of his service. I am prepared to pay for a reasonable amount of the cost.

[24] As well, Mr TG complained that he was charged for time spent by two junior lawyers employed by [Law Firm A]. He said that Mr KC had not advised him that other lawyers would be working on the matter.[1]

Mr KC's response

[25] Mr KC responded to Mr TG's complaint and a letter to the Complaints Service dated 25 June 2019. In summary, he said:

(a) Fees were charged in accordance with the agreed terms and conditions.

(b) Considerable documentation had to be read in a short space of time.

(c) Mr TG's employment issues were complex and urgent, and included a fresh issue raised by [Company B]'s second disciplinary letter on 28 February 2019.

(d) The employment issues required updated case law research.

[1] Mr TG also complained that there was an unacceptable delay between asking for time records from Mr KC, and being provided with those. However, the Committee decided to take no further action on that issue of complaint, holding that it was satisfied that no professional conduct concerns arose. Mr TG has not applied to review that aspect of the Committee's decision. In any event, I agree with the Committee's conclusions about that issue of complaint. I do not propose to address it further this decision.

(e) Steps taken included detailed correspondence to [Company B], a deferral of the disciplinary meeting and correspondence with [Company B]'s CEO.

(f) The fees charged were exactly in accordance with the time spent, which was the agreed basis. The fees were fair and reasonable.

(g) In particular, the matter was urgent, complex and of considerable importance to Mr TG. There was potential for his employment to be terminated.

[26] Mr KC attached his computer-generated time records, as well as copies of relevant correspondence generated during the retainer. He also invited the Committee to inspect his client files if necessary.

Cost Assessor

[27] The Committee resolved to appoint a cost assessor to investigate and report to it "about the nature of the work involved and the time spent on the work done."[2]

[28] The assessor provided his report in a letter to the Committee dated 29 May 2020. The assessor's conclusions can be summarised as follows:

(a) The bulk of the work in the matter was carried out by Mr KC.

(b) The timekeeping records were accurate and that time recorded was time actually spent.

(c) Nevertheless, the time spent was not "warranted by the very nature of the case."[3]

(d) Although the matter was urgent, it could have been time-managed more efficiently by Mr KC by, for example, seeking a time extension from [Company B].

(e) As well, the matter was neither legally nor factually complex. The three employment issues were:

(i) misuse of the [Company B] internal messaging system;

[2] Letter from the Complaints Service to the parties (9 March 2020).
[3] Cost Assessor's report (29 May 2020) at p 5.

(ii) not reporting a lost swipe card and entering and leaving the building without using a swipe card;

(iii) improperly accessing the direct manager's employee benefits details.

(f) The first and second allegations were not serious enough to warrant disciplinary action and this could quickly have been determined (half a day to a day). The third allegation could potentially have led to a finding of misconduct but not serious misconduct.

(g) Mr TG's employment was never in jeopardy.

(h) 48-hours of legal work over the space of 11 working days was not justified given the nature of the employment issues.

(i) "It is hard to reconcile the fees charged against Mr TG's ability to pay, against the results achieved in those 13 days."[4]

(j) The fees charged were not fair and reasonable.

(k) A fair and reasonable fee "to best put Mr TG in a safe and secure legal position, to accept a [first] written formal warning … should only have cost in or around $12,000 (exclusive of GST)."[5]

Mr KC's comments

[29] Mr KC had a number of concerns about the cost assessor's report, which he summarised in submissions to the Committee dated 2 September 2020, as follows:

(a) The assessor did not speak to Mr KC, contrary to Mr KC's expectation.

(b) The assessor was wrong about:

(i) the date on which Mr KC had been instructed by Mr TG;

(ii) the degree of importance for Mr TG;

(iii) the fact that the initial employment issue changed significantly following [Company B]'s second disciplinary letter on 28 February

[4] At p 7.
[5] At p 10.

2019. This development raised a much more serious employment issue;

(iv) the quantity of material involved which included "the complex rules of [Company B] concerning [employee] conduct and privacy";[6]

(v) the urgency of the matters.

(c) Mr KC emphasised that the fees charged were in accordance with his agreement with Mr TG (time spent), and that no premium had been added on account of urgency or complexity.

Standards Committee decision

[30] In summary, the Standards Committee held:

(a) Mr KC's hourly rate was fair and reasonable, as were the hourly rates of the junior lawyers who assisted with research.

(b) The time recorded reflected actual attendances.

(c) Although Mr KC's terms of engagement provided that fees would be charged on the basis of time, strict adherence to this overlooks the fact that time spent is merely one of the reasonable fee factors set out in r 9.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

(d) Determining a fair and reasonable fee is qualitative as well as quantitative.

(e) Mr KC's decision to charge a fee based solely on time spent resulted in a fee that was neither fair nor reasonable.

(f) In particular, the significant amount of time spent over the two-week period life of the retainer, was not justified.

(g) Mr KC ought to have been aware that Mr TG would be an "acutely fee sensitive" client, and Mr KC "should have been able to estimate his costs in a general way."[7]

[6] Mr KC's submissions (2 September 2020) at [5](d).
[7] Standards Committee determination (13 September 2021) at [59] – [60].

(h) Mr KC should have been able to give Mr TG a staged indication of how fees would be incurred, broken down into the various steps involved in an employment investigation and possible challenge to the outcome.

(i) Is unlikely that Mr TG would have instructed Mr KC to act had he been aware that legal fees in a two week period would run to $16,546.

(j) Mr KC's failure to provide adequate fee information and advice was a significant factor for the Committee in its determination about the fees.

(k) Mr TG's employment issues could have been approached differently by Mr KC. In particular, he "should simply have 'stepped' through the investigation process with Mr TG [rather than approach] the matter as if it was a *fait accompli* that Mr TG would lose his job, and that this had become a contentious matter."[8]

(l) Extensive legal research and a formal witness statement was not appropriate in the context of Mr TG's employment dispute and otherwise modest financial means.

(m) Although Mr KC was "dedicated to helping Mr TG" the Committee "did not agree that the approach adopted, which was time and labour intensive and therefore costly, was appropriate for an employee client on a modest salary."[9]

[31] The Committee concluded that a fair and reasonable fee for the work done by Mr KC, was no more than $13,500, exclusive of GST and disbursements.

[32] The Committee held that by charging $3,000 in excess of a fair and reasonable fee, is to KC breached r 9 of the Rules, and this was unsatisfactory conduct pursuant to s 12(c) of the Lawyers and Conveyancers Act 2006 (the Act).

[33] By way of orders, the Committee directed Mr KC to refund the consequent overpayment of legal fees by Mr TG. It imposed a fine of $2,000 and ordered Mr KC to pay costs in the sum of $1,500.

Application for review

[34] Mr KC filed his review application on 22 October 2021. He submitted:

---

[8] At [69].
[9] At [71].

(a) The Committee's determination was "wrong in fact and law."

(b) The Committee's reasons were "speculative and not related to what is [a] reasonable fee."

(c) The threshold for disciplinary intervention had not been met.

(d) The imposition of a fine and costs was unjustified.

Response by Mr TG

[35] Mr TG briefly responded to the review application in an email to the Case Manager dated 28 October 2021, in which he said that he agreed with the Committee's determination, and did not consider that fees he had been charged by Mr KC were fair and reasonable.

Nature and scope of review

[36] The nature and scope of a review was discussed by the High Court in 2012, which said of the process of review under the Act:[10]

> … 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.

[37] In a later decision, the High Court described a review by a Review Officer in the following way:[11]

> [2] … A review by [a Review Officer] is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the [Review Officer's] own opinion rather than on deference to the view of the Committee.

[10] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41] (citations omitted).
[11] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475.

…

> [19] … A "review" of a determination by a Committee dominated by law practitioners, by the [Review Officer] who must not be a practising lawyer, is potentially broader and more robust than either an appeal or a judicial review. The statutory powers and duties of the [Review Officer] to conduct a review suggest it would be relatively informal and inquisitorial while complying with the principles of natural justice. The [Review Officer] decides on the extent of the investigations necessary to conduct a review in the context of the circumstances of that review. The [Review Officer] must form his or her own view of the evidence. Naturally [a Review Officer] will be cautious but, consistent with the scheme and purpose of the Act … those seeking a review of a Committee determination are entitled to a review based on the [Review Officer's] own opinion rather than on deference to the view of the Committee. That applies equally to review of a [decision] under s 138(1)(c) and (2) [of the Act].
>
> [20] … While the office of the [Review Officer] does not have the formal powers and functions of an Ombudsman, it can be expected to be similarly concerned with the underlying fairness of the substance and process of the Committee determinations in conducting a review.
>
> [21] A review by the [Review Officer] is informal, inquisitorial and robust. It involves the [Review Officer] coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[38] Given those directions, my approach on this review has been to:

(a) independently and objectively consider all the available evidence afresh;

(b) consider the fairness of the substance and process of the Committee's determination;

(c) form my own opinion about all of those matters.

Hearing in person

[39] Mr KC's application for review was progressed before me at a hearing by Audio Visual Link in Auckland on 28 April 2022.

[40] Messrs KC and TG appeared in person from separate remote locations.

[41] Prior to the hearing Mr KC filed a synopsis of his submissions and a bundle of the relevant documents.

[42] Both parties made submissions respectively supporting and opposing the review application. Both answered questions from me during the course of the hearing.

[43] I confirm that I have read Mr TG's complaint and Mr KC's response to that. I have also read the cost assessor's report and the Committee's determination, the review application and the brief response to that.

[44] I have also read Mr KC's synopsis and considered the relevant documents.

[45] There are no additional issues or questions in my mind that necessitate any further evidence, information or submissions from either of the parties.

Discussion

[46] There is but one issue for me to determine: were the fees charged by Mr KC fair and reasonable?

[47] The fees charged – based solely on time – totalled $16,546 plus GST and disbursements.

[48] They were made up of, in reality, two tranches of time: legal work in relation to the first disciplinary letter (so, 24 – 28 February 2019) and legal work in relation to the second disciplinary letter as well as ongoing work in relation to the first, down to when the retainer was terminated (28 February – 8 March 2019).

[49] The first tranche of work involved fees of $7,828 and the second tranche, fees of $8,718.[12]

[50] Mr TG has said that he has no real sense of what amounts to a lawyer's fair and reasonable fee. This is because he has never engaged a lawyer in the past. His complaint was prompted by comment from others to the effect that Mr KC's fees appeared excessive given the amount of time over which he had been engaged (24 February 2019 – 8 March 2019), the steps taken and the outcomes.

[51] Mr TG's position was that he would be guided by the New Zealand Law Society's views (through its Standards Committee) as to what a fair and reasonable fee ought to have been for this retainer.

[52] Mr KC, on the other hand, has emphatically argued that the agreement between himself and Mr TG was that fees would be charged on the basis of time spent. Most time was faithfully recorded; all work undertaken was entirely necessary; the matter was urgent and complex and unpredictably shifted to become more serious once [Company B] issued its second disciplinary letter alleging a breach of privacy.

[53] Thus, argues Mr KC, his fees were fair and reasonable.

---

[12] Mr KC's synopsis of submissions (22 April 2022) at [31]a.

[54] Mr KC does not accept that the legal work he undertook was extravagant, or that he ought to have adopted a more passive and thus less costly approach to Mr TG's employment issues.

[55] It is accepted by all – the cost assessor, the Committee, Mr KC and Mr TG – that the legal issues were urgent, and the matters were of considerable importance to Mr TG given the threats in both disciplinary letters that his actions might amount to serious misconduct leading to termination of his employment.

[56] I accept without reservation the description that this was urgent and important work.

[57] The Committee and the cost assessor both appear to take the view that the work undertaken by Mr KC was not complex, as he has asserted. More specifically, both suggest that there was a less extravagant and costly path available to Mr KC to pursue matters on Mr TG's behalf.

[58] For example, neither the cost assessor nor the Committee considered that it was necessary for Mr KC to prepare a draft witness statement for Mr TG in advance of the disciplinary meeting.

[59] It was on the basis that unnecessary work was done, that the Committee reduced Mr KC's fees by approximately $3,000. This was a smaller reduction than the cost assessor had recommended ($12,000).

[60] I have some reservations about the Committee so emphatically insisting that the work carried out by Mr KC was unnecessarily extravagant, and that he ought to have taken a cheaper route.

[61] This is, in effect, challenging Mr KC's strategic approach to the management of his client's employment problem.

[62] Unless it can be clearly shown that a strategic step undertaken by a lawyer was patently inappropriate and completely out of step with best-practice, then my view is that a Committee ought to tread carefully when reducing a lawyer's fees on account of a different strategic view that it has taken to a legal problem.

[63] After all, litigation is an inexact science. It is well understood that in litigation there are often several different approaches that may be taken to the management of a case. One lawyer's approach to strategy can be another's description of folly.

[64] The Committee have not said that Mr KC was wrong to take a detailed approach; merely that there was an alternative approach which they preferred and which would have cost Mr TG less in fees.

[65] I take the view that there was more than one strategic option open to Mr KC when presented with Mr TG's employment problem. For example, although Mr KC was criticised for doing so, I am not certain that it was unwise (and thus unnecessary) of him to consider the preparation of a draft witness statement for Mr TG for the disciplinary meeting.

[66] Often anxious clients benefit from the anchor of a clear witness statement in their own words about the employment issue when they are facing their employer at a disciplinary meeting.

[67] The same can be said for any potentially life-changing, formal legal meeting that a lay client is required to attend.

[68] Where strategic approaches to a client's legal problem can properly be said to be contestable, I do not consider it appropriate for a Committee to simply prefer its own strategic approach as a basis – even a partial basis – for reducing a lawyer's fee.

[69] In my view, there must be something substantively wrong about the lawyer's strategic or tactical approaches before the label of an unfair and unreasonable fee can be applied, warranting reduction and the necessary finding of unsatisfactory conduct.

[70] Although the Committee said that it was concerned about the adequacy of the fees information given to Mr TG, it seems to me from reading the Committee's determination that the more compelling factor for it was the time spent by Mr KC, which it plainly regarded as being unnecessarily extravagant.

[71] For reasons which follow, I consider that the proper approach when considering whether Mr KC's fees were fair and reasonable for both parties, is to focus on an assessment of the totality of the fees information given by him to Mr TG, and to consider whether that information met the requirements of the Rules.

[72] Whilst Mr KC has said that he prefers not to give estimates to his clients in litigation matters because of the vagaries associated with them, I agree with the Committee's suggestion that staged discussion is a proper alternative to an estimate – particularly in circumstances where there is both acknowledged urgency and critical importance, and where, on the face of it, the client may not have the necessary means to meet the legal fees being incurred.

[73] Simply providing terms of engagement which include an hourly rate, without more, has little meaning for most lay clients, particularly those who are unused to legal processes or instructing lawyers.

[74] Mr TG said that this was the first time that he had instructed a lawyer in any matter.

[75] Without context, simple reference to an hourly rate in connection with legal work to be undertaken, is meaningless.

[76] This is all the more so in a situation where the work is urgent (which it undoubtedly was), and is of considerable importance to the client (which should also undoubtedly was).

[77] Most lawyers appear to include provision for monthly invoicing in their terms of engagement, or invoicing at the conclusion of significant events in the life of a file.

[78] This serves a dual purpose. First, it ameliorates ongoing cash flow issues for lawyers who, after all, are running a business. Secondly, and if not more importantly, it assists a client with their budgeting and gives good indication of how legal fees are tracking in a matter.

[79] A client can be justifiably concerned if their expectation is monthly or event billing, yet they only receive one invoice at the conclusion of a retainer and for a substantial amount. It raises the issue of whether the fee in those circumstances can be said to be fair and reasonable, given the lawyer's disregard for their own terms of engagement providing for monthly or event billing.

[80] The Committee described this as "bill shock" which is, respectfully, apt.

[81] In my view, given the requirement for a lawyer to only charge a fee that is fair and reasonable to both parties, where time is the only fee factor referred to and the matter is urgent and important, there is an obligation on a lawyer – similar to the monthly or event billing approach referred to above – to ensure that their client is regularly (perhaps even daily, depending upon the retainer) updated about where fees sit.

[82] Mr KC could have done this, and in my view should have done so. I regard this as an essential component of the obligation to ensure that fees charged are fair and reasonable to both parties.

[83] In a sense, Mr TG's employment issues were in two parts. The first related to the internal messaging and the swipe-card issues. They were addressed by [Company B] in its letter to Mr TG dated 22 February 2019.

[84] It was those legal issues which Mr TG presented to Mr KC when they met on Sunday, 24 February 2019, and it was those issues on which Mr KC worked assiduously until 28 February 2019.

[85] 28 February 2019 is significant because that was the date on which [Company B] issued its second disciplinary letter to Mr TG, concerning the breach of privacy issue.

[86] Looking only at the first set of legal issues, time spent equated to legal fees of $7,828 (plus GST).

[87] I asked Mr TG during the hearing, whether, if Mr KC had said to him when they met on 24 February 2019, that legal fees to take those first issues to the point of a disciplinary meeting could be as high as $10,000, he (Mr TG) would have instructed Mr KC to go ahead.

[88] Mr TG quite candidly said that such a figure was within his budget and he would have continued to instruct Mr KC from 24 February 2019, on that basis.

[89] As it happens, Mr TG does not recall Mr KC having such a discussion with him on 24 February 2019 and indeed believes that there was no such discussion.

[90] For his part, Mr KC does not recall a discussion of that nature though he said that he would customarily have a general discussion with his client about a fees range at a very early stage.

[91] Mr KC also candidly said that he would have been reluctant to be specific with Mr TG about fees because of what he perceived to be the volume of material he needed to become familiar with in order to properly respond to [Company B]'s first disciplinary letter.

[92] There is no written record of such a discussion – whether reasonably specific or very general as Mr KC described he might engage in.

[93] The state of the evidence leads me to conclude that the only discussion that Mr KC had with Mr TG about fees when they met on 24 February 2019, was that they would be charged on a time basis and that Mr KC's charge out rate was $440 an hour.

[94] In other words, I am not persuaded that it is more probable than not that Mr KC had a general discussion with Mr TG on 24 February 2019 in which even a very broad range of fees potential was discussed.

[95] I do not for a moment think that Mr KC deliberately omitted to have this discussion with his client, or otherwise simply saw the retainer as an opportunity to bill time on an open-ended basis.

[96] I consider that Mr TG would have presented as being very anxious about his employment, particularly given the reference in [Company B]'s letter to the potential for termination of that employment, and that, given the very tight time-frame indicated by [Company B], Mr KC regarded the matter as having a significant degree of urgency requiring immediate action.

[97] Nevertheless, I consider that a lawyer is required to do more than simply indicate that fees will be charged on the basis of time, and provide an hourly rate, at the beginning of a litigation retainer where there is a degree of uncertainty as to how the case might unfold.

[98] That is not to say that I am suggesting that a lawyer in those circumstances must give an estimate. Clearly, there is no obligation to do so unless one is requested.[13]

[99] Nevertheless, there is a continuing obligation on lawyers to keep their client fully informed of progress on a retainer, as it develops.[14] In my view, this must include information about how fees are tracking, particularly when they are being charged on the basis of time with no initial range having been indicated.

[100] This view is reinforced by the consumer protection focus of the Act, predicated on the basis that there is a knowledge imbalance between lawyer and client, which a lawyer has a duty to ameliorate to the fullest extent possible.[15]

[101] Monthly or event billing by a lawyer to some extent meets that requirement.

[102] Indeed, Mr KC acknowledged that in circumstances where he has been the client of a lawyer, event billing by his lawyer has been useful both as to noting significant progress in a matter, but also providing him with assistance in budgeting.

[103] Even if argument could be mounted to say that Mr KC had no obligation to be more specific about fees in the immediate days after 24 February, I consider that he was

[13] Rule 9.4 of the Rules.
[14] Rule 7 of the Rules.
[15] Section 3(1)(b) of the Act.

undoubtedly bound to do so on 28 February 2019, when [Company B] delivered its second disciplinary letter to Mr TG.

[104] The second disciplinary letter raised an entirely new issue – unconnected to the issues that had been raised in the first disciplinary letter.

[105] At that point, given the unexpected development and thus potentially different trajectory for the matter as a whole, Mr KC ought to have spoken to Mr TG and, first, given an indication of unbilled time to that point and secondly discussed the fact that the retainer had expanded beyond initial contemplation and that this would undoubtedly have an impact on legal fees.

[106] This would have provided Mr TG with opportunity to consider his options, armed with sufficient information about fees and about the legal and procedural roads ahead.

[107] This is entirely consistent with a lawyer's obligation in r 7 of the Rules to "promptly disclose to a client all information that the lawyer has or acquires that is relevant to the matter in respect of which the lawyer is engaged", as well as the obligation in r 7.1 of the Rules to "keep the client informed about progress on the retainer."

[108] There is no principled reason why this should not apply to fees information.

[109] As indicated above, in longer retainers, lawyers tend to meet these obligations by the processes of either monthly or event billing.

[110] Urgent and relatively fast-moving retainers, such as was Mr TG's, are nevertheless subject to the same obligations as to information and progress updating and this can be met very simply by a letter, email or discussion in person.

[111] Deprived of that proper opportunity, Mr TG was left in the position of simply unwittingly acquiescing to mounting unbilled time.

[112] It may well be that Mr KC's total fees for the work completed by him, were reasonable. I have already expressed the view that, where matters of strategy and tactics are contestable, a Committee ought to be reluctant to impose its own values and reduce a fee on the basis that it disagreed with the lawyer's approach.

[113] Nevertheless, as r 9 of the Rules makes clear, not only must fees be reasonable but they must be fair "having regard to the interests of both client and lawyer."

[114] In my view, without Mr TG being given an opportunity to consider the fees position, allowing unbilled time to simply mount up has resulted in a fee charging arrangement which was fundamentally unfair to Mr TG.

[115] Given the emphasis in the Act on consumer protection, to which I have already referred, I consider that the balance of fairness lies in Mr TG's favour.

[116] Accordingly, I consider that Mr KC breached r 9 of the Rules by failing to charge Mr TG a fee that was fair in all of the circumstances, particularly having regard to Mr KC's obligation to ensure that Mr TG was kept fully informed about all aspects of the retainer.

[117] None of this is to be critical of Mr KC's diligence, and his application to the legal problems presented by Mr TG. Indeed, Mr TG remains grateful for the legal work that was done. It was meticulous and entirely client-driven.

[118] There is no suggestion of fee-padding by Mr KC, and despite my reservations about the cost assessor's and the Committee's approaches, which was to substitute their views about strategy for Mr KC's in circumstances where the positions are contestable, neither suggested that he was driven by anything other than robust and diligent attention to Mr TG's legal problems.

[119] The next issue becomes how to appropriately measure that unfairness.

[120] When a finding has been made that a lawyer has charged an unfair fee, the proper approach is to reduce that fee to what the decision-maker considers to be fair and reasonable.

[121] At one end of the scale, Mr KC considers that his fees of $16,546 (plus GST and disbursements), are fair and reasonable because they reflect the contractual arrangement he had with Mr TG, which is that fees would be charged purely on a time basis. As well, the time charged by him was the time spent on the matters.

[122] At the other end of the scale, the cost assessor concluded that the sum of $12,000 (plus GST and disbursements) represented a fair and reasonable fee.

[123] Not quite in the middle, the Committee settled on the sum of $13,500 (plus GST and disbursements) as being a fair and reasonable fee.

[124] For his part, Mr TG said that he had no real sense of what would be fair and reasonable, given that this was his first foray into legal matters of any description. He compared his position with that of his colleague with whom he had been internally

messaging, and who was also the subject of similar disciplinary investigation by [Company B].

[125] Apparently, Mr TG's colleague's lawyers charged roughly half of the amount of fees charged by Mr KC, and over a much longer period of time.

[126] As I suggested to Mr TG at the hearing, it is difficult to draw any conclusions about the legal fees charged to his colleague on the basis of a figure alone. There may well have been quite different factors leading to fees of about half of Mr TG's.

[127] Indeed support for that is found in the fact that both the cost assessor and the Committee arrived at figures within roughly 20% of the fees charged by Mr KC.

[128] Relevant to this issue, is the fact that Mr TG said that he would have considered the legal fees of $7,828 incurred up to 28 February 2019 in relation to the first disciplinary letter to have been reasonable, if Mr KC had mentioned this to him before [Company B] issued its second disciplinary letter.

[129] The above gives good indication of the difficulty in settling on a fair and reasonable fee.

[130] It is an inexact science and at times an inelegant art.

[131] On the one hand, I could draw the fair fees line at the position immediately before [Company B] issued its second disciplinary letter: 28 February 2019. As indicated earlier, unbilled time to that point was $7,828 (plus GST and disbursements).

[132] The rationale for that would be that I have found that at the point the second disciplinary letter was issued, Mr KC was very clearly obliged to update Mr TG about legal fees.

[133] On the other hand, to take that approach overlooks that there was a considerable degree of urgency about the matter: the second disciplinary letter, dated Thursday 28 February 2019, introduced a new and serious allegation, unconnected with the earlier two matters that had been raised.

[134] The second letter also scheduled the disciplinary meeting for – effectively – just under two working days later.

[135] As well, Mr TG would undoubtedly have been expecting Mr KC to undertake at least preliminary legal work on the fresh employment issue and with a degree of urgency. He at least understood that fees would be charged according to time spent.

[136] Realistically however, I consider that there was ample opportunity for Mr KC to have updated Mr TG about the fees position, before the scheduled disciplinary meeting.

[137] I do not consider that this would have been especially difficult or time consuming, of itself.

[138] Mr KC was by then a practitioner with some 43 years post-admission experience, whose life work had been in broad litigation areas with all of their vagaries and nuances. He was no stranger to employment law at all levels.

[139] In my view, Mr KC should and could easily have given Mr TG a realistic upper-limit of anticipated additional legal fees after the second disciplinary letter, particularly as he had the anchor of the previous unbilled time.

[140] I do not consider that it would be particularly helpful for me to offer a fourth opinion as to a fair and reasonable fee. It would introduce a level of arbitrariness which could tend to confound, rather than clarify.

[141] In the end, and despite disagreeing with at least part of the Committee's approach to considering Mr KC's fees, I am nevertheless satisfied that the figure arrived at by the Committee represents a fee that is fair in the circumstances.

[142] It takes account of the unanticipated development of the employment matter, which added an additional and more serious aspect to it. It also takes account of the fact that Messrs KC and TG had less than two working days before the scheduled disciplinary meeting, within which to marshal the facts and law.

[143] Of course, Mr KC could have sought a further extension of the disciplinary meeting because of the development, but that would not have altered the need to get to grips with the issue. Moreover, it would not have absolved him of what I have held to be his obligation to re-visit fees issues with Mr TG because of the development – sooner, rather than later.

[144] In the end, despite differing with aspects of the Committee's approach to assessing Mr KC's fees, I adopt the final figure settled on by it: a fair and reasonable fee in the circumstances is $13,500 plus GST and disbursements.

Conclusion

[145] I find that Mr KC breached rr 7 and 7.1 of the Rules by failing to keep Mr TG updated as to information relevant to the retainer and its progress. As a consequence, he breached r 9 by not charging a fee that was fair to Mr TG.

[146] I find that this is unsatisfactory conduct pursuant to s 12(c) of the Act.

[147] It follows that the Committee's orders, as to fee reduction and refund, stand.

[148] As well, the Committee's order for Mr KC to pay a fine of $2,000, is confirmed.

[149] A lawyer's continuing obligation to keep their client informed and updated, including about fees information, is a fundamental aspect of the lawyer/client relationship.

[150] Mr KC's failure to do so in connection with fees, led to him charging Mr TG a fee that was not fair. It was well within Mr KC's ability to avoid that.

[151] For completeness, I also confirm the Committee's costs order. Although I disagree with some of the Committee's approach to the analysis of the fairness of Mr KC's fees, we have both concluded that he did not charge Mr TG a fair and reasonable fee.

Decision

[152] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed: specifically, the orders made at [85] of its determination.

Costs on review

[153] When a Committee's adverse finding is upheld by a Review Officer, costs will be awarded in accordance with the Costs Orders Guidelines of this Office. It follows that Mr KC is ordered to pay costs in the sum of $1,200 to the New Zealand Law Society by 5pm on Friday 27 May 2022, pursuant to s 210(1) of the Act.

Enforcement of money orders

[154] Pursuant to s 215 of the Act, I confirm that the money orders made by me above at [153], may be enforced in the civil jurisdiction of the District Court.

Anonymised publication

[155] Pursuant to s 206(4) of the Act, this decision is to be made available to the public with the names and identifying details of the parties removed.

DATED this 6TH day of MAY 2022

R Hesketh
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 KC as the Applicant
Mr TG as the Respondent
Ms SN as a Related Person
[Area] Standards Committee X
New Zealand Law Society