LCRO 197/2012

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Standards Committee
BETWEEN	**ND** Applicant
AND	**SE** Respondent

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

DECISION

Introduction

[1] Mr ND has applied for a review of a determination by the Standards Committee in which the Committee decided to take no further action on Mr ND's complaints about Ms SE's conduct, the service she had provided and her fees.

Background

[2] Ms SE is a barrister. Mr ND formally instructed her by letter dated 17 March 2011 sent to her instructing solicitor, Mr CO. In his letter he confirmed Ms SE would charge him fees at $450 per hour plus GST for "all consultations and attendances" and for mediation she would charge a fixed fee of $2,500 plus GST for a half day.

[3] Mr ND's employer had made his employment position redundant. He sought assistance from Ms SE in an attempt to be reinstated, and to secure a mediated outcome. Mr ND says he was unemployed and short of funds, but he paid $3,450 to Mr CO in advance of Ms SE doing any work. He says he received no communication from Mr CO at any time.

[4] Mr ND terminated Ms SE's retainer after mediation but before she had completed his instructions on the reinstatement application. He and Ms SE were unable to negotiate a satisfactory settlement with the employer at mediation, and he did not succeed on his application for reinstatement, which he completed himself without representation. He attributes his failure in part to documents Ms SE prepared, and to a short timetable she agreed to, but which was effective after he had terminated her retainer. He says the short timeframe compromised his ability to respond to allegations in the employer's lengthy affidavit, and caused or contributed to the failure of his application for reinstatement.

[5] Ms SE rendered two invoices for the services she had provided to Mr ND: the first for $3,395.73 and the second for $5,999.99, both including GST. Mr ND believes he should pay no more than an initial estimate they discussed of $4,000 to $5,000 including GST and endeavoured to persuade Ms SE to reduce her fees. When she refused, Mr ND laid a complaint to the New Zealand Law Society (NZLS).

Standards Committee

[6] The Committee considered Mr ND's complaints about Ms SE's competence in preparing documents, making timetabling arrangements, and attendance at mediation; whether she had acted in accordance with his instructions, provided him with information about client service and increasing fees; and if she had kept him appraised of the nature of the retainer and its progress. The Committee also considered Mr ND's complaints that Ms SE had not responded promptly to his request for an itemised invoice, and had charged a fee that was unfair or unreasonable.

[7] The Committee appointed a costs assessor who formed the view that Ms SE's fees were not fair and reasonable predominantly on the basis that she had charged $1,000 more than a comparable fee in the market.

[8] The Committee considered the evidence in relation to each aspect of the complaint in turn, and for the reasons set out in the decision, concluded in each case that further action was not necessary. It did not accept the Costs Assessor's view on the fee, but independently formed the view that the fee was fair and reasonable for the services Ms SE had provided. The Committee issued a Certificate under s 161(2) of the Lawyers and Conveyancers Act 2006 (the Act) confirming Ms SE's fee totalling $9,395.72 was fair and reasonable.

[9] Mr ND was dissatisfied with the decision and applied for a review.

Review Application

[10] Mr ND has applied for a review because he believes the Committee did not consider all the details and evidence he submitted in respect of his complaint, and erred in its determination. He provided lengthy submissions and other documents. He said he was willing to engage in mediation, and would like Ms SE's fees reassessed. He seeks a refund of part of the money he has paid and to be compensated for losses he claims arising from Ms SE's conduct of his matter. He also considers a finding of unsatisfactory conduct should be made against Ms SE, and penalties imposed on her.

Role of LCRO on Review

[11] 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.[1]

Scope of Review

[12] 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.

Review Hearing

[13] Mr ND attended a review hearing in [City] on 22 June 2015. Ms SE was not required to attend, and the review hearing proceeded in her absence.

Review Issues

[14] The question on review is whether there is good reason for me to interfere with the Committee's decision to take no further action on Mr ND's complaints, and confirm Ms SE's fee. The answer to that question is no, for the reasons discussed below. Consequently the Committee's decision is confirmed.

[1] Deliu v Hong [2012] NZHC 158, [2012] NZAR 209 at [40]-[41].

Discussion

Breach of Rule 3.4 - Written Information

[15] Mr ND says Ms SE did not provide him with written information in accordance with rule 3.4, of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 and refers to detailed discussions he had with her regarding her fees and how she would charge for the services she would provide to him.

[16] Ms SE accepts that she did not comply with rule 3.4 by promptly providing the written information required by the rule. She also refers to the detailed discussions she had with Mr ND before he formally instructed her, and says the slow start to her formal instructions lead to her oversight in not sending a client care letter. Ms SE says when she became aware of her omission she apologised promptly to Mr ND,[2] and acknowledged she was remiss in failing to send the necessary written information.[3]

[17] The Committee identified a breach of rule 3.4, but exercised its discretion in not recording a finding of unsatisfactory conduct based on Mr ND's knowledge of their arrangements over her instructions and fees, the urgency of his instructions when he formalised those after several meetings, her prompt provision of the information when its absence was drawn to her attention, and her immediate apology for her oversight.

[18] Ms SE and Mr ND both refer to the detailed discussions they had before he instructed her through Mr CO. The evidence indicates that the only relevant aspects of rule 3.4 that do not appear to have been covered in their discussion relate to Ms SE's professional indemnity arrangements, and the client care and service information set out in the rules.

[19] It is apparent from his evidence of his discussions with Ms SE, and from the letter of instruction he sent to Mr CO dated 17 March 2011 that Mr ND was aware of Ms SE's hourly rate, how she would charge him, that she worked alone and would be solely responsible for carrying out his instructions. He knew Mr CO was her instructing solicitor and that he was responsible for handling the money and making payments to Ms SE from funds Mr ND had paid into the solicitor's trust account.

[20] The rules are there to protect the public. Strict compliance also protects lawyers from disciplinary consequences. One of the purposes of the rules around provision of information to clients is to ensure lawyers make their clients aware of the lawyer's

[2] Submissions to the Standards Committee 14 October 2011 at 6-7.
[3] At 8.

situation. That enables clients to evaluate risk in instructing lawyers, and to compare the costs and benefits of instructing one or another if they so choose.

[21] Mr ND undertook such a comparison before he instructed Ms SE. He refers in particular to information provided to him by another lawyer, Mr JV. Mr ND's evidence at the review hearing was that he was willing to pay a higher fee for Ms SE's expertise as an employment specialist, and says he knew it could cost him more than if he went with Mr JV.

[22] Mr ND obtained and evaluated information that was of importance to him, and selected Ms SE on the basis of his overall assessment of the merits of instructing her over any of the other lawyers of whom he made enquiry. There is no reason to believe that the information he was missing would have made any difference to his selection of lawyer.

[23] Ms SE should have promptly provided the information the rules require in writing. However, "not every professional lapse is sufficiently serious to require disciplinary intervention."[4] The District Court said in *Perera v Medical Practitioners Disciplinary Tribunal* that:[5]

> In summary, the test for whether a disciplinary finding is merited is a two-staged test based on first, an objective assessment of whether the practitioner departed from acceptable professional standards and secondly, whether the departure was significant enough to attract sanction for the purposes of protecting the public. … The purpose of the disciplinary procedure is the protection of the public by the maintenance of professional standards …

[24] The first stage of the test is met because Ms SE departed from minimum professional standards by breaching the rules. With reference to the second stage, the Committee's decision records an exercise of a discretion in finding that the degree of Ms SE's failure was not of such a degree as to warrant sanction. I am required to exercise particular caution, and have good reason before interfering with the Committee's exercise of discretion, and in not making a finding of unsatisfactory conduct in the circumstances. There is no public protection purpose that would be served by recording a finding of unsatisfactory conduct against Ms SE for a breach of the rules. I have been unable to identify any other reason to interfere with that discretion. The decision that further action was not necessary in respect of that aspect of the decision is confirmed.

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[4] *J v A* LCRO 31/2009 at [35].
[5] *Perera v Medical Practitioners Disciplinary Tribunal* DC Whangarei MA94/02, 10 June 2004, at [42].

Fees Charged for Services Provided

[25] Ms SE says her fee was fixed for mediation and any time spent otherwise was charged for.[6] Ms SE says she reduced her fee overall from the basic time and hourly rate formula.[7] She also says she refused to act for Mr ND at a reduced hourly rate.

[26] Mr ND says Ms SE's fees exceeded her estimate and she should reduce her charges. He referred to the extensive efforts he made before he instructed her to minimise the fees Ms SE might charge him, starting with efforts to persuade her to reduce her hourly rate. When she declined, he instructed her anyway.

[27] In the course of instructing her, he attempted to reduce the time she needed to spend carrying out his instructions, for example by providing a summary and emails between him and his employer and instructing her not to read emails, but rely on his summary.[8] He says he provided a substantial amount of information to assist her in preparing his affidavit,[9] and believes if she had let him help her more she could have saved more time.[10] He also says Ms SE did not rewrite the draft affidavit he had provided, but mostly just repeated his words in his affidavit and statement of problem in his employment proceeding.[11] He does not believe her work added value.

[28] Mr ND says Ms SE should have known that there was no particular rush to file his documents with the Employment Relations Authority (ERA) on the basis that he would lose the remedy of reinstatement because the relevant legislation had changed. He says the hurried preparation of his documents prejudiced him,[12] although he also says that initially the instruction to file before the date on which the rules changed was at his instigation and on his instructions.[13] He also objects to Ms SE charging her full hourly rate for administrative work.

[29] The costs assessor concluded that Ms SE's fee for the services she provided exceeded a reasonable market rate by around $1,000. The Committee considered that report as well as the fees and Ms SE's record of the time she had spent attending to Mr ND's matter.

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[6] Above n1 at [11].
[7] At [20].
[8] Response dated 15 November 2011 at [16].
[9] At [17].
[10] At [19].
[11] At [24]-[25].
[12] At [21].
[13] At [13].

[30] The Committee did not consider the time spent was excessive, or that Ms SE had done anything unnecessary. It was not persuaded to use Mr JV's estimate as a guide. Overall it considered the fees were fair and reasonable for the services Ms SE had provided, and confirmed them.

[31] I would have to have good reason to depart from the Committee's view on the fee. The Standards Committee is made up of experienced practitioners from a range of backgrounds, and a lay member. Although the Committee did not explicitly consider the reasonable fee factors,[14] it considered the costs assessor's report in which he had considered those factors.

[32] The fee has been sufficiently scrutinised within the context of the relevant rules. Mr ND has provided no good reason on review to depart from the Committee's view that the fee was fair and reasonable. His criticisms of Ms SE cannot be sustained. If she had followed his instructions to cut corners, for example to proceed on the basis of his summary of events without reading the evidence he had provided, she would not have acted with the standard of diligence expected of a lawyer. He also does not dispute that the hurry to file documents with the ERA was a result of his instructions.

[33] Having carefully considered all of the information available on review, I am unable to identify any good reason to depart from the Committee's view that the total fee of $9,395.72 was not excessive, and was fair and reasonable. The fees aspect of the Committee's decision is therefore confirmed on review.

Summary

[34] I have carefully considered the concerns Mr ND highlights on review including his comments about Ms SE's fees, the time she spent preparing his affidavit and the quality of the finished product, her conduct of the mediation and his reasons for terminating her retainer. There is little if any new material in the concerns he raises on review.

[35] While I accept that Mr ND considers the concerns he has raised are legitimate, repeating them on review does not in this case give rise to any reason to alter the outcome. There is no reason to believe the Committee overlooked the materials Mr ND provided, or any of the concerns he raised. The fact that Mr ND disagrees with the decision is not sufficient reason to alter it on review. While there may be minor discrepancies between the Committee's findings and the evidence, overall there is no

[14] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 9.

good reason to depart from the Committee's decision to take no further action and confirm the fees as fair and reasonable. The decision is therefore confirmed.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed.

DATED this 24th day of June 2015

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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:

ND as the Applicant
SE as the Respondent
Standards Committee
The New Zealand Law Society