BEFORE THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2014] NZLCDT 33

LCDT 025/13

BETWEEN	**OTAGO STANDARDS COMMITTEE OF THE ZEALAND LAW SOCIETY**
	Applicant
AND	**AOW**
	Respondent

CHAIR

Judge BJ Kendall (retired)

MEMBERS OF TRIBUNAL

Mr W Chapman

Mr M Gough

Dr I McAndrew

Mr S Maling

HEARING

At Dunedin

DATE

23rd May 2014

COUNSEL

Mr F Barton and Ms A Cunninghame for Applicant

Mr C Withnall QC for Respondent

RECORD OF DETERMINATION BY NEW ZEALAND LAWYERS AND CONVEYANCERS TRIBUNAL CONCERNING CHARGE AND PENALTY, COSTS AND SUPPRESSION

[1] The Practitioner faced a charge of misconduct which arose in circumstances where he rendered a final account to a client approximately four and half years after the client had terminated the services of the practitioner.

[2] He was charged in the alternative with unsatisfactory conduct and then in a further alternative with negligence or incompetence in relation to the rendering of the final account.

[3] The practitioner admitted the facts alleged but denied that they amounted to misconduct, unsatisfactory conduct or negligence or incompetence.

[4] The Tribunal heard the charge in Dunedin on 30th May 2014. It found the practitioner guilty of unsatisfactory conduct. It then considered penalty and determined the following:

(a) That the practitioner apologise to the complainant for the late sending of the account.

(b) That there be no order for costs either in favour of the Standards Committee or the Respondent.

(c) That there be an order for the non-publication of the names of the practitioner and the complainant.

(d) That the New Zealand Law Society pay the costs of the Tribunal (s 257 LCA). The s 257 costs are certified at $5,059.00.

[5] This judgment contains the reasons for finding the respondent guilty of unsatisfactory conduct, and for the penalty imposed; costs and non-publication of names.

[6] The complainant had engaged the respondent's law firm between July 2006 and January 2007 in relation to an employment dispute with her former employer.

[7] The complainant was rendered an account in the sum of $1,697.50 (inclusive of GST and disbursements) for services on 30th September 2006. There is a dispute as to whether or not the complainant received that bill.

[8] The engagement for services was terminated in late January 2007. Prior to that, the complainant had been advised by copy of an email on December 12 2006 that the costs to that date were $3,100.00 plus GST and disbursements. The email had been sent to the solicitor acting for the employer of the complainant.

[9] The complainant had not paid the interim bill of September 2006. The respondent advised the complainant by letter of 26th January 2007 that if the account of 30th September 2006 was "*disputed or if payment is not made in full by 31 January 2007 we reserve the right to withdraw that account and issue an amended bill for full amount properly claimable".*

[10] The interim bill was not paid. The complainant had advised the respondent on January 31st 2007 that the bill was under dispute and that she was taking steps to engage a new lawyer.

[11] The respondent sent a final bill in September 2011 which resulted in the complainant making a complaint about lapse of time.

[12] The respondent gave evidence at the hearing and was cross-examined. He did not consider that the length of time between January 2007 when instructions were terminated and September 2011 was an unreasonable length of time in the circumstances of the case. He advanced the following matters:

(a) That the complainant had been aware since December 2006 of what the final invoice amount would be.

(b) That he had put the file aside while waiting for another counsel to call for the file after being instructed by the complainant.

(c) That he had got the file ready and had checked it for correctness.

(d) That serious personal health concerns distracted him away from finalising the file.

(e) That he had not received a call for the file from other counsel.

(f) That he chose not to write off the amount of fees after he had taken into account all the circumstances of his engagement with the complainant and that the interim bill had not been paid.

[13] The applicant submitted that;

(a) It was quite unacceptable to render a fee more than four years after the supply of legal services had ceased.

(b) Six months is a reasonable time within which to render a bill.

(c) The complainant was entitled to order her affairs no more than twelve months later on the assumption that there were no sums owing to the respondent.

(d) The above matters amounted to misconduct. There was an excessive passage of time. The respondent's decision to issue a second bill was a wilful one. It did not occur through mistake or oversight. A reasonable practitioner would have written off the fee.

(e) The complainant had deposed that she felt threatened by the tone of the letter that the respondent had written on 26th January 2007.

(f) The respondent has challenged the good faith of the complainant when she has chosen to exercise her legitimate rights by making a complaint. This reflects poorly on the profession.

(g) On a plain reading of Rule 9.6 of Lawyers and Conveyancers Act (Lawyers Conduct and Client Care) Rules 2008 the rendering of the bill so long after the ending of the supply of services was not within a reasonable time and thus must amount to misconduct.

[14] The respondent's submissions are:

(a) That the jurisdiction of the Tribunal in respect of the respondent's conduct occurring before 1st August 2008 depends on the conduct being such that it could have been proceeded against under the Law Practitioners Act 1982.[1]

(b) That Rule 9.6 was not in force as at July 2007 when the reasonable time contended for by the Committee expired.

(c) That there was no corresponding obligation under the rules then in force under the Law Practitioners Act 1982.

(d) That there was no obligation to render a final account within a reasonable time from termination of the retainer until 1st August 2008. The rules cannot be construed to retrospectively apply to conduct occurring over a year before they came into force.

[15] The Tribunal does not accept the submissions of Mr Withnall for the following reasons:

(a) The conduct of the respondent that is complained of is the rendering of a final account not only in excess of four years after the termination of the

[1] *C v Legal Complaints Review Officer and Others* [2012] NZHC 3258, Dobson J.

engagement for services, but more than three years after Rule 9.6 came into force.

(b) That the respondent was subject to that Rule at the time of his action and should have been aware of it.

(c) That his conduct in rendering an account in September was caught by the rule.

[16] The Tribunal determines that, if it is wrong in the finding it has made in paragraph [15], the conduct of the respondent has to be considered under the provisions of ss 7(1)(a) and 12 of the Lawyers and Conveyancers Act 2006.

[17] The Tribunal finds that the respondent's conduct is a breach of Rule 9.6 and also generally of s 12(b)(i) of the Act. It does not find the conduct to amount to misconduct. The respondent acted unwisely in rendering a bill so long after the termination of his services leading to the conclusion that to do so was unbecoming of a lawyer.

[18] Having made the finding of unsatisfactory conduct, the Tribunal heard submissions regarding penalty.

[19] Mr Withnall for the respondent urged the Tribunal to exercise its discretion against making any formal finding or orders. He submitted that;

(a) The respondent had simply delayed for a lengthy period the right he had to recover reasonable fees for work done.

(b) There had been minimal harm done.

(c) There was no need for deterrence having regard to the long years of practice of the respondent with an unblemished record; and

(d) That the health issues he suffered must have contributed to the delay in issuing a final bill.

[20] The Tribunal accepted those submissions and they are the basis for the order for non-publication of the names that it has made.

[21] The Tribunal has declined to exercise its discretion against the making of formal findings or orders. The delay in rendering a final account was excessive. The receipt of a bill after such a delay would have had an unsettling impact on the complainant when the circumstances of termination of engagement are taken into consideration. The respondent was unwise to have acted as he did and it was unbecoming of him to do so.

[22] It was with those matters in mind that the Tribunal has made the formal finding of unsatisfactory conduct by the Respondent and ordered him to write an apology to the complainant.

[23] Mr Withnall was critical of the Standards Committee's decision to lay a charge against the respondent before the Tribunal. He submitted that the matter could and should have been dealt with by the Committee having regard to the nature of the complaint. That is a view that the Tribunal has adopted and it is reflected in the orders that are set out in paragraph [4] of this decision.

DATED at Auckland this 17th day of June 2014

BJ Kendall
Chairperson