

LCRO 218/2010

CONCERNING

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

AND

CONCERNING

a determination of the National Standards Committee

BETWEEN

CT
of Auckland

Applicant

AND

XD
of Auckland

Respondent

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

DECISION

Background

[1] On 24 October 2008 the Applicant entered into a contract of retainer with CU Chambers in which CU was retained to get the best possible result in respect of the Respondent's employment matter against XC. The Respondent agreed to pay the sum of \$3,000 for the services to be provided by CU which included research, file perusal, negotiation and mediation work and all steps necessary to resolve the matter as well as any hearings. The contract of retainer provided that should the employment matter proceed to Court then the fee was to be agreed between the parties.

[2] The contract was signed on behalf of CU by Mr CV, but all contact by the Applicant was with the Respondent.

[3] Although not recorded in the contract of retainer, the Applicant alleges that it was agreed between him and the Respondent, that if the case proceeded to the

Employment Court, the fee to be charged would be payable on a contingency basis, with CU receiving 20% of any sums awarded in excess of \$20,000.

[4] Following the conclusion of the contract of retainer, it would appear that the extent of the Respondent's involvement in the progress of the case was limited, although his counsel refers to a plethora of telephone conversations.

[5] At some stage between 5 March 2009 and 29 May 2009, the Respondent ceased his association with CU and the Applicant's file was in the care of other lawyers engaged by CU.

[6] The Applicant's claim was unsuccessful following a ruling by the Employment Relations Authority that the Applicant was not an employee and a costs order was made against him.

[7] The Applicant alleges that he was led to believe by the Respondent that his claim would be successful and that he could expect an award in the sum of \$40,000. He was therefore unhappy with the outcome and lodged a complaint with the Complaints Service of the New Zealand Law Society.

The complaint

[8] The Applicant raises a number of issues in his complaint, the content of which I discern to be as follows:-

1. He complains that "the explanation of the contract and prediction of the case by [the Respondent] was misleading me into the contract." By this, I understand the Applicant to be saying that the Respondent had some discussion with the Applicant about the terms of his employment, and concluded that XC had breached its obligations to the Applicant, for which the Applicant could be expected to receive compensation to the extent of \$40,000.

2. He then goes on to say that the Respondent's "explanation of the contract was an authorised one as I was advised. However, nobody honoured his explanation." He also raises the Respondent's status within CU, and effectively asks the question as to who was supervising the Respondent's work. I understand him to be stating that he understood the Respondent was representing CU in the advice that he was providing, but that CU seems to be resiling from any responsibility for the advice given.

3. The matter was delayed by reason of the fact that Ms D was not properly briefed.

4. That he was not kept advised as to the progress of the case and that after the Respondent left CU nobody assumed any responsibility for the file.

5. That CU did not acknowledge its obligations under the contract of retainer and tried to charge extra for the work that it had agreed to undertake for the sum already paid.

6. That the decision to file proceedings with the Employment Relations Authority was wrong and that CU considered that it had fulfilled its obligations under the contract of retainer once the Authority had issued its unfavourable decision.

7. That the fee charged was not a fair and reasonable fee for the service provided.

[9] He sought

1. an apology from CU
2. a full refund from CU
3. payment to cover all costs arising from its misconduct
4. compensation of \$10,000
5. payment of the sum of \$20,000 being one half of the amount suggested by the Respondent that he could expect to receive from XC

The Standards Committee

[10] The Standards Committee resolved to inquire into the complaint and held a hearing on the papers. It considered all the circumstances of the case and formed the view that any action was unnecessary or inappropriate taking into account the retainer signed by the Applicant and the work carried out by CU/Mr CV. The Committee therefore determined that no further action was necessary pursuant to section 138(2) of the Lawyers and Conveyancers Act 2006.

[11] The Applicant has applied for a review of that decision and requests an investigation into the Respondent's role in relation to the service provided by CU.

Review

[12] The Complaints Service of the New Zealand Law Society processed the Applicant's complaints as complaints against the Respondent and Mr CV. This review is a review of the Standards Committee decision concerning the complaint against the Respondent.

[13] When the matters complained of are considered, it is only the matters numbered 1 and 3 in paragraph [8] above that relate to the Respondent. Presumably, the other matters are addressed in the complaint against Mr CV, although it does seem that it may have been appropriate to treat the Applicant's complaint as a complaint against CU, which was, and is, an incorporated company.

Jurisdiction

[14] The conduct complained of took place between 24 October 2008 and 5 March 2009. The Respondent was not admitted to the bar in New Zealand until X February 2009 and his first practising certificate in New Zealand was issued on X March 2009.

[15] The Respondent has submitted that he was self-employed during the period when the conduct complained of took place and that therefore he is not subject to the jurisdiction of the New Zealand Law Society as he was neither a barrister (or solicitor) or an employee.

[16] On 10 March 2011, I issued a decision in which I held that the New Zealand Law Society did have jurisdiction over the Respondent on the basis that he was an employee, but indicated to the Respondent that it was open to him to provide evidence to the contrary which he advised he was still seeking to do.

[17] On 28 April 2011 the Respondent's counsel forwarded a copy of the Respondent's 2009 GST records as well as a statement from the Respondent. Counsel also noted that after the Respondent had obtained his practising certificate he was listed in the New Zealand Law Society records as a barrister and not as an employee as is currently recorded in respect of his present employment. The conduct complained of took place from October 2008 to March 2009 and the relevance of that comment is not apparent to me.

[18] With regard to the GST return and the Respondent's statement, I note as follows:-

1. The GST return is for the period from X March 2009 to X May 2009. The conduct complained of took place prior to that period.
2. The statement by the Respondent is a statement of what he “remembers” unsupported by any evidence. For example, the Respondent has not provided any copies of invoices rendered by him or income tax or GST returns for the relevant period that he remembers he had to provide.
3. The relevance of whether or not an employment contract existed was addressed in the decision of 10 March 2011.

[19] In the circumstances, the Respondent has still not provided any evidence in support of his contentions that he was not an employee of CU and this review will proceed on that basis.

I do note, however, that if what the Respondent states is correct, then he was providing legal services in circumstances where he was neither an employee or an admitted barrister and solicitor.

The Respondent's involvement

[20] The Applicant's contract of retainer was with CU. CU was an incorporated company, although this was not apparent from the contract of retainer.

[21] The Applicant's initial point of contact was with the Respondent, but the Respondent did not apparently conduct any significant work on the Applicant's file.

[22] The Applicant considers that he did not receive an appropriate level of service, and/or that the fee paid for the services provided was excessive.

[23] The extent of the Respondent's involvement in this matter is that he was engaged in the initial stages when instructions were taken and the contract of retainer entered into. Thereafter, the extent of his involvement with the file seems to have been limited, with another practitioner instructed to attend the meeting with the Employment Relations Authority on 5 March 2009.

[24] On 29 May 2009 the Respondent advised the Applicant that he had left CU some months previously.

[25] The aspect of the complaint with which the Respondent was involved relates primarily to the circumstances in which the Applicant entered into the contract of retainer with CU. The essence of the complaint in this regard is that the Applicant was

induced to enter into the contract of retainer on the basis of representations by the Respondent, namely that the merits of the Applicant's case were strong, that CU provided quality service, and that the Respondent expected that an outcome would be achieved whereby the Applicant received a compensation package of \$40,000.

The service provided

[26] There is limited evidence as to what advice was given to the Applicant as to the merits of his case. It does not appear that any formal opinion was either sought or offered. However, what is clear, is that proceedings were filed with the Employment Relations Authority which subsequently declined jurisdiction on the grounds that the Applicant was not an employee. That was the end of the proceedings for the Applicant, and a costs Order was also made against him. This was far from the promised compensation package of \$40,000.

[27] The question to be considered, is whether by commencing the proceedings in the Authority, rather than bringing proceedings in the Court for breach of contract, the Respondent's conduct could be considered to constitute unsatisfactory conduct pursuant to section 12(a) of the Lawyers and Conveyancers Act, being conduct which fell short of the standard of competence and diligence that a member of the public could expect from a reasonably competent lawyer.

[28] The determination of the Authority shows that it did not consider there was any doubt that the Applicant was not an employee and the Authority does not refer to any evidence that could support that view. However, that is not to say that there was none, and there were no comments made by the Authority critical of the Respondent or CU for bringing the proceedings in the Authority. In short, there is no evidence available to the Standards Committee or myself, to support a finding of unsatisfactory conduct in this regard. If the Applicant considers that the Respondent, or CU, was negligent for bringing proceedings in this forum, then he has remedies available to him through the Court. Section 138(1)(f) of the Lawyers and Conveyancers Act provides that a Standards Committee may, in its discretion decide to take no action if there is an adequate remedy that it would be reasonable for the person aggrieved to exercise, and this provides further support for the Committee's decision.

[29] The other point to note, is that it is by no means certain that the decision to bring proceedings in the Authority was a decision of the Respondent and in any event, the contract of retainer was with CU. Overall therefore, there are no grounds on which the

Respondent's conduct could be considered unsatisfactory in connection with this aspect of the complaint.

[30] The other aspect of the service complained of with which the Respondent was associated related to the meeting of 5 March 2009.

[31] The Applicant attended at the Employment Relations Authority expecting to meet the Respondent there. When he contacted the Respondent by text, the Respondent replied saying that he would not be there as he was engaged in another matter and that the Respondent would instead be represented by Ms D.

[32] The meeting did not go well and was adjourned as Ms D had not been properly briefed.

[33] The Respondent had not advised the Applicant that he was not going to be at the meeting, and then failed to properly brief Ms D. Beyond that, the Respondent had limited or no involvement in the service provided by CU.

[34] I have again considered whether the Respondent's conduct in these matters could constitute unsatisfactory conduct as that term is defined in section 12(a) of the Lawyers and Conveyancers Act.

[35] The failure by the Respondent to advise the Applicant that he would not be attending the meeting is a lapse which would not encourage confidence from a client. However, it is more in the nature of what could be expected as a matter of courtesy, rather than being categorized as a lack of competence or diligence.

[36] The breakdown in communication between Ms D and CU resulted in the meeting of 5 March being adjourned. It is unsurprising that the Applicant is unhappy about this, and looked at in isolation, this could be considered to constitute unsatisfactory conduct. The question would be however, as to who was at fault. Was it the Respondent, Ms D, or CU? There is insufficient evidence to lay the blame for this entirely at the door of the Respondent. In addition, the Applicant's position was protected by the steps taken by Ms D to adjourn the meeting, and when considered in the context of the overall proceedings, it would be somewhat harsh to single out the conduct relating to this meeting as constituting unsatisfactory conduct, and to lay the blame for this solely on the Respondent.

[37] In all of the circumstances, and for the reasons set out above, I have come to the view that the decision of the Standards Committee to take no further action is the correct one.

Decision

[38] Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the National Standards Committee is confirmed.

DATED this 10th day of June 2011

Owen Vaughan
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 CT as the Applicant
Mr XD as the Respondent
Counsel for the Respondent
The National Standards Committee
The New Zealand Law Society