

LCRO 22/2017

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

BM

Applicant

AND

YN

Respondent

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

DECISION

Introduction

[1] Mr BM has applied for a review of a decision by the [Area] Standards Committee that further action in respect of his complaint concerning Mr YN and the whereabouts of \$2,000 was not necessary or appropriate.

Background

[2] Mr BM instructed Mr YN to assist him in resolving a dispute with his former employer.

[3] The dispute was resolved in August 2016 on the basis that Mr BM's employer would pay him \$5,500 plus costs of \$3,000. In the course of the negotiations Mr BM says Mr YN agreed to give him "a \$2,000 credit as part of the mediation agreement". In the days that followed the mediation and Mr YN's bill, Mr BM could not understand how Mr YN had delivered on his part in that agreement. He wants \$2,000 from Mr YN.

[4] Mr BM says that in trying to gain an understanding from Mr YN as to the whereabouts of the \$2,000 he was “called a ‘jerk’ and treated like [he] was stupid”. Mr BM says he made various attempts to obtain an explanation he could understand from Mr YN and Mr D, his supervising principal, without success. Mr BM says in early September 2016 Mr YN explained for the first time that he had reduced Mr BM’s bill by a total of \$5,999 and the \$2,000 “credit” was encompassed in that. Mr BM did not accept that explanation.

Complaint

[5] Mr BM made a complaint to the New Zealand Law Society Lawyers Complaints Service (Complaints Service) saying he wanted Mr YN to pay him \$2,000 together with compensation for him having to chase his money, and an apology from Mr YN. Mr BM attached documents including an email sent to him by Mr YN’s PA in which she described Mr BM as a “jerk”.

[6] The complaint was referred to the Complaints Service Early Resolution Service, which notified Mr YN and his principal of Mr BM’s complaint, and indicated the Committee was unlikely to take further action on it, but offered an opportunity to respond.

[7] Neither lawyer responded.

[8] When it considered Mr BM’s complaint the Committee focussed on the \$2,000 Mr BM believed he was to receive by way of a credit, and considered how Mr YN had calculated his fees. Effectively the Committee found that the \$2,000 was not a payment due from Mr YN to Mr BM, and decided that further action on the complaint was not necessary or appropriate pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act).

Application for review

[9] In his application for review Mr BM focuses on Mr YN not having given him \$2,000. He refers to a lack of clarity in the bills and statements he received, and to the PA’s email in which she described him as a “jerk”.

[10] Mr YN responded to this Office, providing a copy of an explanation Mr D had sent to Mr BM on 13 September 2016. He confirmed that the PA had been

admonished for calling Mr BM a “jerk” in the email, saying she sent that to him accidentally, and had personally apologised to Mr BM.

[11] In his letter of 13 September 2016, Mr D recorded that Mr BM had instructed Mr YN to reach settlement because he did not want to take his claim to a hearing. He referred to the total write-off on time recorded to the file as being \$5,999, and confirmed that amount would not be billed to Mr BM. Mr D provided trust account records, and correspondence between Mr BM and Mr YN. He acknowledged that in the course of the mediation Mr YN had offered to reduce his fees by \$2,000 to facilitate Mr BM accepting the final settlement offer put to him by his former employer. Mr D explained that:

In contrast to a credit note a reduction in fees does not mean that [the firm] would pay anything to you but rather that your legal fees can simply be reduced by way of a write-off. There was never any mention by us of a credit note.

Review hearing

[12] Mr BM attended a review hearing by telephone on 30 August 2017. Mr YN was not required to attend and did not exercise his right to do so.

Nature and scope of review

[13] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:¹

... 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.

¹ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

[14] More recently, the High Court has described a review by this Office in the following way:²

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.

Discussion

The PA's email

[15] Mr BM remains offended by the PA's email.

[16] Mr YN confirms that the PA has been admonished, and has apologised to Mr BM.

[17] Beyond suggesting that the PA's apology be re-sent to Mr BM who says he did not receive it, there is nothing further to be made of that issue on review. The actions taken were proportionate and appropriate. The PA's email was not conduct on Mr YN's part, and will receive no further attention on review.

The \$2,000

[18] Mr BM wants \$2,000 from Mr YN or his firm, and compensation for the time and trouble he has taken in trying to recover what he considers to be his money. Mr BM says he did not receive Mr D's email of 13 September 2016 until it was provided in the course of this review.

[19] Mr YN's evidence is that he did not agree to pay Mr BM \$2,000. He conceded \$2,000 worth of time he would otherwise have considered properly billable to Mr BM.

[20] Mr BM's complaint discloses a number of misapprehensions.

[21] Mr BM appears to have been under the misapprehension that Mr YN was somehow a party to the mediation, because Mr BM said in his complaint that Mr YN agreed to give him "a \$2,000 credit as part of the mediation agreement". Mr YN was not a party to the agreement reached between Mr BM and his former employer. While a concession on the part of Mr YN in relation to his fees may have affected Mr BM's

² *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

view of the overall benefit of settlement to him, any such concession is an entirely separate issue from Mr BM's dispute with his employer. I consider it unlikely that Mr YN intended to give Mr BM the \$2,000 Mr BM thinks he should have.

[22] There appears to have been a miscommunication between Mr BM and Mr YN, resulting in Mr BM not fully appreciating the distinction between the recording of time to which lawyers attach a value as a guide to billing, and what he might actually be billed.

[23] The \$5,999 write-off to which Mr YN and Mr D refer in the draft bill they provided to Mr BM is not an actual sum of money. It represents the value to them of the time recorded by Mr YN in providing services to Mr BM. As between Mr YN and Mr D, time recording is a management tool. As between the lawyers and Mr BM, the amount of time recorded as having been expended was one of several factors the lawyers could take into account when setting a fair and reasonable fee. They were not professionally obliged to disclose the detail of their time records to Mr BM, although doing so might possibly have helped Mr BM to understand how they had calculated the fee.

[24] The lawyers could have billed Mr BM \$6,900, issued a credit note for \$2,000, and effectively written off time to the value of \$2,000. Mr BM says he would have understood and accepted that. That seems an unnecessarily long-winded way of going about it.

[25] The \$2,000 was a notional amount representing the value of time recorded in providing legal services to Mr BM. The draft bill evidences Mr YN and Mr D had decided not to charge Mr BM for the whole of the value of the time recorded. The fact that the \$2,000 did not appear in an invoice to Mr BM does not translate into a professional standards issue. The lawyers simply wrote recorded time off as unrecoverable because Mr YN had agreed with Mr BM it would not form part of the fee charged to him, effectively capping his fee at \$4,900. The net effect is to leave \$2,000 in Mr BM's pocket. It is difficult to understand why he considers that objectionable, except to say he had an expectation based on a misunderstanding, and his misplaced expectation was not met.

[26] In the circumstances, no professional standards issue arises for Mr YN.

[27] As there is no other basis on which further action is necessary or appropriate, it follows that the Committee's decision is 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 31st day of August 2017

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:

Mr BM as the Applicant
Mr YN as the Respondent
Mr D as a Related Party
[Area] Standards Committee
The New Zealand Law Society
Secretary for Justice