LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2020] NZLCRO 102

Ref: LCRO 042/2019

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of [Area] Standards Committee [X]
BETWEEN	**EW** Applicant
AND	**BL** Respondent

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

Introduction

[1] EW has applied for a review of the determination by [Area] Standards Committee [X] to take no further action with regard to her complaints about a number of matters arising out of BL's conduct and advice relating to a potential sale of her business to [AAA].

[2] One of EW's complaints relates to BL's fee in which he has included a premium of 50 per cent of the fee calculated with reference to the time recorded.

[3] Another unusual aspect of this matter is that EW had instructed BL and another lawyer (LD) with regard to the same matter and was taking advice from, and liaising with, both lawyers at the same time. EW was referring advice from each lawyer to the other for comment/action.

Background

[4] EW was/is the sole director/shareholder of [Company 1].

[5] The following paragraphs contain quoted comments taken from the report issued by the costs assessor (WK) appointed by the Committee to consider and report on BL's fees.[1]

[6] The company "predominantly sold [AAA] life and health insurance policies. It had been a successful business for some years."

[7] In or about 2011, EW fell ill, and made claims on two policies held with [AAA]. One of the claims was declined for reasons unknown and not relevant to this decision.

[8] In 2013, EW entered into a settlement agreement with [AAA]. "As part of the terms of that settlement, EW agreed to sell her business to [AAA] within a negotiated timeframe."[2]

[9] EW was unsuccessful in her attempts to sell the business. She "alleged that [AAA] had breached the terms of the 2013 settlement agreement in several respects and that [AAA] had effectively interfered with her attempt to sell the business" and "this was the essential dispute that had to be resolved".[3]

[10] As noted in [3] above, EW instructed both LD and BL with regard to these matters. It would seem that LD had expertise in litigating such matters whilst EW regarded BL as having expertise in negotiating settlements of such a nature.

[11] EW instructed BL in December 2015. BL terminated the retainer in March 2017 and rendered an invoice which comprised three elements:

Professional services and attendances	$9,205.00
50% premium	$4,602.50
Office services (excluding GST)	$450.00
GST	$2,138.63
Total	$16,396.13

[1] Cost assessor's report (23 October 2018).
[2] At [20].
[3] At [21].

[12] In the settlement negotiated with [AAA], it had been agreed that [AAA] would contribute a maximum of $10,000 towards EW's legal expenses.

[13] EW's complaints about BL arise from that sequence of events.

EW's complaints

[14] EW's complaints are succinctly summarised by the Standards Committee in [6] of its determination:[4]

- Did BL fail to follow EW's instructions and fail to respond to inquiries from her in a timely manner? (rule 3, 7.1 & 7.2)
- Did BL fail to charge a fee that was fair and reasonable for the services provided? (rule 9)
- Did BL breach an agreement reached with EW when he attempted to charge interest on his invoice?
- Did BL fail to advise EW about the basis on which fees will be charged and when payment of fees is to be made? (rule 3.4(a))
- Did BL terminate the retainer without good cause and fail to give reasonable notice to EW specifying the grounds for termination? (rule 4.2(c))

The Standards Committee determination

Failing to follow instructions

[15] At [9] of its determination, the Committee said:[5]

> It appears that BL may have failed over the course of the retainer to respond to each and every request that EW made. The ones that EW remains concerned about largely relate to the settlement agreement. In the Committee's view, these oversights over the course of the retainer, although regrettable, do not reach the threshold for a finding of unsatisfactory conduct.

The Committee determined to take no further action on this complaint.

Fees

[16] At a meeting on 20 June 2017, the Standards Committee resolved to appoint a costs assessor to "undertake an assessment of the bill of costs" and "prepare a report for the Standards Committee".[6]

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[4] Standards Committee determination (19 February 2019).
[5] At [9].
[6] Pursuant to s 184(1) of the Lawyers and Conveyancers Act 2006.

[17] The Committee appointed WK to undertake this task. Having conducted a thorough investigation, and meeting with the parties, WK recommended to the Committee that BL's fee be reduced to $10,938 plus GST (total: $12,578.70) calculated by way of a small reduction to the time recorded, a reduction of the amount charged for office services to $60,[7] and the 'premium' reduced to 20 per cent of the fee calculated on the time recorded, rather than 50 per cent as invoiced.

[18] At [15] of its determination, the Committee said:

> The Committee turned its mind to the reasonable fee factors set out at Rule 9 of the RCCC. The Committee noted that BL charged on a time and attendance basis as was set out in his terms of engagement which were supplied to EW. BL's hourly rate was $350.00 plus GST. The Committee agreed with WK's view that, in light of BL's qualifications and experience, his hourly rate was fair and reasonable.

[19] WK had identified a "relatively minor attendance of 4 units that EW raised in her complaint and noted that BL was unable to accurately advise what the attendance related to"[8] and "recommended that the time-recorded fee be reduced by $140.00".

[20] The Committee then observed that it was:[9]

> … required to form its own view on the reasonableness of BL's fees and is not bound by the findings of the cost assessor. …[It] considered that a result was achieved by BL. He had managed to negotiate an increase in [AAA]'s offer. EW chose not to accept that offer. EW's rejection of the offer should not result in a discount of the premium charged.

[21] The Committee agreed with BL that the negotiations with [AAA] were difficult and:[10]

> … considered it significant that WK had formed the view that BL's fees, when looked at in the round, were fair and reasonable, save for the minor attendance reduction and the reduction of the premium charged. A difference in opinion about the premium charged, particularly where the margin is relatively small, does not mean that the fee is unreasonable or that BL's conduct amounts to unsatisfactory conduct.

[22] The Committee determined to take no further action on EW's complaint about BL's fee.

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[7] Reduced from $450.
[8] At [16].
[9] At [18].
[10] At [21].

Interest on unpaid invoice

[23] EW argued that her agreement with BL was that his fees would be paid from the payment to be received from [AAA], and consequently, as [AAA] had not made any payment, no interest was payable. With regard to this matter "the Committee did not consider that EW had provided any evidence to support her assertion that BL had attempted to charge interest on the invoice." It determined that "[w]hether such agreement existed [was] not for the Committee to determine.[11]

[24] It consequently determined to take no further action on this complaint.

Failure to advise basis on which fees to be charged

[25] EW complained that she did not expect to receive an invoice from BL until [AAA] had paid her for her business, including the contribution towards her legal fees. She also objected to the imposition of the premium.

[26] The Committee noted[12] that BL's terms of engagement stated that "while fees are calculated principally on an hourly basis, other factors may be taken into account, including the importance of the matter and results achieved, as well as the urgency and circumstances and any time limits".

[27] Other clauses "set out when invoices would be issued and when payment of fees is to be made".

[28] The Committee determined to take no further action with regard to this complaint but suggested "that BL consider making appropriate changes to his terms of engagement to ensure that future clients understand the basis for any premium charged".[13]

Termination of retainer

[29] The Committee noted that:[14]

> EW received an email from BL (the same email attaching the invoice) which stated "…I now understand you are back working with LD. We understand our engagement is now at an end…"

[11] At [24].
[12] At [26].
[13] At [28].
[14] At [29].

[30] EW's complaint was that:

> …BL was aware that she was working with LD throughout 2016 but was also seeking his advice when needed. She maintains that BL did not give any reasonable notice to her for grounds of termination.

[31] The Committee noted that the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) allow a lawyer to terminate a retainer for good cause "after giving reasonable notice to the client specifying the grounds for termination".[15] It recorded that "good cause includes the inability or failure of the client to pay a fee on the agreed basis and the client failing to provide instructions to the lawyer in a sufficiently timely way". It continued:[16]

> The Committee considered that EW, by seeking to engage with [AAA] directly, and then seeking to engage LD again had effectively discharged BL from the engagement. Even if that is not accepted, EW had failed to provide instructions to BL in a sufficiently timely way and BL at that stage had good cause for terminating the retainer.

[32] The Committee determined to take no further action with regard to this complaint.

Further issues

[33] With regard to additional issues:[17]

> … The Committee considered that any other issues raised by EW were ancillary to the main issues considered above and were not borne out by the evidence provided nor raised any professional conduct issues.

EW's application for review

[34] EW included comprehensive reasons for her application for review:

1. BL did not follow instructions. She referred specifically to her instruction that the settlement document was not to be amended so that the payment from [AAA] went to BL rather than to her as was originally provided.

2. On five separate occasions EW had requested BL to provide her with an itemised invoice and it was not until 8 March 2017 when he did so, at the same time as terminating his retainer.

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[15] At [30].
[16] At [31].
[17] At [32].

She considers BL's conduct "shows a trail of deception over the financial part of [their] relationship".

3. EW considers her complaint about BL's fee to be "about dishonest recording and charging time that [he] did not spend on [the] file". In this regard EW comments on specific entries on BL's time sheets, which she says, either did not take place, or were inflated. She provided an amended timesheet which would have the effect of reducing the fee based on time to $5,600.

4. EW's complaint about the premium included by BL centres on "non-disclosure" of the premium before including it in the invoice, and then "a dishonest attempt sighting [sic] urgency and result achieved, to justify it".

   EW also refers to the comment by the Committee that BL was "ill advised to charge a premium without clearly setting out in his terms of engagement when he would charge a premium and what the premium would be" but takes exception to the fact that the Committee determined to take no further action with regard to that issue.

5. EW disagrees with the Committee's acceptance of BL's submission that he achieved a result.[18]

6. She says there was no urgency to settle the matter and that she was only prepared to settle when, what she considered to be a fair price, was agreed.

7. EW takes issue with the fact that the Committee did not address the charge of $450 for office services in any detail.

8. EW says that BL was aware of the working arrangement whereby she sought advice from LD at the same time as taking advice from him and that this did not provide a valid reason for BL to terminate his retainer, as had been accepted by the Committee in [31] of its determination.

9. She asserts that BL made dishonest remarks in his reply to the Committee. This particular matter will not be referred to further in this decision as it amounts to a new complaint. New complaints cannot be considered on review.

[18] At [18].

[35] The numbered summary above is not intended to be a comprehensive reference to all of the issues raised by EW in her application for review but I record here that all of the detail in the application has been considered in the course of undertaking this review.

Review

Procedure

[36] This review has been completed on the basis of the material to hand, as provided for by s 206(2) of the Lawyers and Conveyancers Act 2006, the requirements of s 206(2A) having been complied with.[19]

Not following instructions

[37] The first issue addressed in this regard is that the settlement deed prepared by SI of [AAA] provided that the payment to be made by [AAA] was to be made directly to EW. This draft was sent to EW and to BL on 30 November 2016.

[38] A considerable amount of the correspondence between EW and BL at this time centred around how much BL's fees would be. EW had been requesting BL since (at least) 28 November 2016, to advise what his fee would be, and in an email to BL on that day EW made it clear that she was trying to have all legal fees paid for within the amount ($10,000) that [AAA] had agreed to contribute.

[39] On 12 December 2016, BL sent the 'updated agreement' to EW for comment. He had amended cl 2 of the Deed to provide that payment would be made into his trust account. In her complaint EW says that she advised BL that she was 'unhappy with this procedure' but if BL provided his invoice, the clause could provide for the amount of his fee to be paid to his firm.

[40] EW expressed her concerns in an email to BL (23 December 2016) in which she said:

> I am concerned that I have been requesting an invoice since 28 November and that you request payment without providing this invoice.

[19] Section 206(2A) requires a review officer to provide the parties with a reasonable opportunity to comment on whether the review should be dealt with in this manner. BL agreed by email (3 July 2019) that this was the 'best way forward'. EW did not object to a hearing on the papers (email dated 16 July 2019) but offered to attend in person if that would assist. I have not considered that was necessary as the material on the file is comprehensive.

> I noted on 23 November the amount advised was $7600 & this amount is over estimated. Law Society stipulates all fees must be fair and reasonable.
>
> I am concerned you did not act in accordance with my instructions and send the revised Settlement Deed back to [AAA].

[41] In her complaint she says:

> Consequently as he [BL] didn't provide any invoice, I requested him to change the wording under "Payment Terms" back to its original wording (and all funds paid direct to me) and then forward the Settlement Agreement to the purchaser. I asked again for a breakdown of his fees. Neither of these instructions were carried out.

[42] BL has not responded to this issue.

[43] The Committee referred to these matters as "oversights"[20] and said "although regrettable, do not reach the threshold for a finding of unsatisfactory conduct." It therefore determined to take no further action on the issue.

[44] Although this issue was clear in EW's application for review, BL's response was overall brief and did not address the issue in any way.

[45] In the context of the complaint, and now on review, it is a minor issue as it had no consequences at the end of the day. Nevertheless, it is quite clear that BL did not follow instructions, presumably because he was concerned that he may have difficulties in recovering payment of his fees. This concern does not provide grounds to terminate a retainer. More importantly, it is a fundamental obligation of a lawyer to follow a client's instructions unless there is good reason not to do so.[21]

[46] I do not intend to make an adverse finding against BL with regard to this issue on its own, but it is included in an overall consideration of BL's conduct.

BL's fee

[47] EW's objections to the determination of the Committee to take no further action with regard to BL's fee covers a number of matters:

- the recorded time
- the 50 per cent premium
- urgency

[20] Standards Committee determination, above n 4, at [9].
[21] For example, if the client's instructions would result in a breach of the law by the lawyer.

- no result
- interest

The recorded time

[48] Programmes used by lawyers to record the time expended on a particular file operate so that as soon as a lawyer starts working on a file the programme starts to allocate the time spent to that file. At the commencement of an attendance, it is unclear how long will be spent on the matter. The minimum time that can be recorded is one unit and consequently, regardless of whether one minute, or six, is expended, a unit of time will be recorded.

[49] EW asserts that, in some instances, more time was recorded than was necessary for the task referred to. Overall, she calculates that the total time spent by BL on her file would have amounted to 160 units, whereas BL had recorded 263 units.

[50] Rule 9 of the Rules says:

> A lawyer must not charge a client more than a fee that is fair and reasonable for the services provided, having regard to the interests of both client and lawyer and having regard also to the factors set out in rule 9.1.

[51] An assessment of what constitutes a fair and reasonable fee for the work undertaken is required, not a minute audit of each time entry. That is an impossible task.

The premium

[52] This is the major aspect of BL's invoice that attracts attention. A premium can only be added to an invoice based on the various factors set out in r 9.1 of the Rules which are set out in full in [14] of the Standards Committee determination. Consequently, the process that must be carried out is to assess whether any, or all of these factors combined, would justify the premium added by BL.

[53] In addition, BL's terms of engagement must be reviewed to ascertain whether they alerted EW to the fact that there may be a percentage fee based on the time recorded, added to the fee.

[54] BL's letter of engagement provided his and his associates' hourly rates, and then says:

> Our terms of engagement also provide that in calculating a fee we may take into account other factors in addition to the hourly rate.

[55] The terms of engagement provided to EW state:

> *The time spent is recorded in six-minute units, with time rounded up to the next unit of six minutes. In addition, we will take into account:*
>
> *1. The importance of the matter and the results achieved;*
>
> *2. The urgency and circumstances in which the matter is undertaken and any time limits which are imposed.*

There is no indication that a percentage premium on time will be added.

[56] I turn now to the report provided by WK. He referred to the comment made by the High Court in *Gallagher v Dobson* "where the Court made it clear that determining whether fees were 'fair and reasonable'" was "…an exercise of balanced judgement not an arithmetical calculation…".[22]

[57] Although the costs assessor set out all of the r 9.1 factors in full, he did not consider each of these in turn to ascertain whether, in the end, a 50 per cent uplift on time was appropriate.

Time

[58] WK addressed the time records which EW had called into question and ultimately concluded that there was a single entry of four units which could not be sustained. That amounted to a reduction on time in the sum of $140.

[59] He then moved to consider the premium added and noted that BL's terms of engagement had referred to the possibility of an 'uplift'. BL submitted that he had achieved a 'good result', and this together with the urgency required, as well as the importance of the matter, his experience and skill, all provided grounds for the premium to be added.

[60] A lawyer's experience and skill is reflected in a lawyer's hourly rate. WK concluded that BL had not achieved a 'result',[23] but did accept that the other factors applied. To reflect this, he then adjusted the premium downwards to 20 per cent on time, from 50 per cent. This is almost a similarly arbitrary arithmetical calculation.

[61] As noted above, the overall question to be determined, is whether the fee charged, taking into account all of the r 9.1 factors, results in a fair and reasonable fee.

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[22] *Gallagher v Dobson* [1993] 3 NZLR 611 (HC).

[23] The Standards Committee considered that BL had achieved a result in that AAA increased its offer, but EW chose not to accept it. This factor, and the 'urgency' factor are somewhat inconsequential in the context of this review, and it is somewhat diversionary to elevate them to the extent they have been by the Committee.

It will be immediately recognised that this is a somewhat discretionary decision, and before there can be a finding of unsatisfactory conduct, the fee charged must be without doubt, 'unfair and unreasonable.'

[62] The function of a costs assessor's report under the Lawyers and Conveyancers Act 2006, is quite different from a costs revision that was carried out under the previous legislation, whereby it was the costs reviser who made a decision as to the quantum of the lawyer's bill of costs. Under the present legislation, an assessor's report is considered by the Committee which must then determine whether or not the invoice is significantly more than what amounts to a fair and reasonable fee, sufficiently so to justify a finding of unsatisfactory conduct. A finding of unsatisfactory conduct is recorded against a lawyer's professional record. In this instance the Committee did not think the fee charged was sufficiently unfair and/or unreasonable to warrant an adverse finding.

[63] It is appropriate here to now make some general comments about the process to be followed when considering a complaint about fees under the present legislation. I set out here some comments made by the review officer in *Hunstanton v Camborne*:[24]

> [62] In *Property and Reversionary Investment Corporation Ltd v Secretary of State for the Environment* [1975] 2 All ER 436 Donaldson J observed that in considering the quantum of a bill "different people may reach different conclusions as to what sum is fair and reasonable". It is for this reason that there is a proper reluctance to "tinker" with bills by adjusting them by small amounts. His Honour however further noted that the quantum of bills for similar matters "should fall within a bracket which, in the vast majority of cases, will be narrow". It is therefore appropriate for Standard's Committees not to be unduly timid when considering what a fair and reasonable fee is.
>
> [63] There is a real danger that a Committee (or costs assessor) approaching this question will take as a starting place the fee actually charged and consider whether it is justifiable in all of the circumstances. This appears to be putting the cart before the horse. In adopting the amount charged as a starting place there is a risk that there is an unconscious presumption that the bill is appropriate. Where there is a complaint about a bill of costs there is no presumption or onus either way as to whether the fee was fair and reasonable.
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> [64] The task of the Standards Committee (with the assistance of a costs assessor if appointed) is to determine what is a fair and reasonable fee in the circumstances. This should be addressed first. This approach of determining first what a reasonable fee is was approved by Justice Ipp in *D'Alessandro v Legal Practitioners Complaints Committee* (1995) 15 WAR 198 where he noted at p 214 that "The inquiry into what amounts to grossly excessive or unreasonable costs would ordinarily involve, first, a determination of what, in the particular circumstances, would be a reasonable sum to charge". That approach is widely adopted in Australia (see recently for ex[AAA]le *Mijatovic v Legal Practitioners Complaints Committee* (2008) WASCA 115). Only when the matter of what is a fair and reasonable fee is determined can it be assessed whether the fee charged is sufficiently close to that amount to properly remain unchanged.

[24] *Hunstanton v Camborne* LCRO 167/2009 (10 February 2010).

[64] It is also helpful here to address some comments made by CH in a paper which was provided to costs assessors when the current legislation was enacted. CH refers initially, to the judgment in *Gallagher v Dobson*. He says:

> The relative importance of each of the fee factors will vary according to the particular circumstances of each transaction. It follows therefore that a detailed analysis of each of the fee factors is necessary to determine what weighting should be applied to each of those factors and, indeed, any other factors advanced by the practitioner and the complainant in support of their respective arguments.

[65] He then refers to several judgments, all of which reinforce the principle that the assessment of a reasonable fee is not an arithmetical calculation. The various comments referred to above inevitably leads to the conclusion that the imposition of an uplift of 50 per cent (or even 20 per cent) on time, is not a process which will necessarily result in a 'fair and reasonable' fee.

[66] In addition, CH is somewhat critical of the over-reliance on time recording that has developed within the profession, and so to impose a percentage on time uplift compounds this.

[67] After considering these matters, I have reached the view that any uplift calculated as a percentage of the fee arrived at by reference to the time recorded is inappropriate. I also consider that it is not appropriate to calculate office expenses with reference to the time recorded.

[68] EW provided with her complaint a revised assessment of time based on her perception of what would have occurred. This cannot be verified in any manner either.

Termination of instructions

[69] In his email (dated 8 March 2017) with which he rendered his account, BL said:

> Following your emails at Christmas and communications with SI since Christmas I now understand you are back working with LD.
>
> We understand our engagement is now at an end and accordingly please find attached a note of our costs. We look forward to receiving payment in accordance with our terms of engagement.

[70] Although EW stated in her application for review that she instructed BL "in LD's absence" it is clear from the material provided that EW was taking advice from both lawyers contemporaneously and in some cases referring advice from one lawyer to the other for a second opinion.

[71] As noted at the beginning of this decision, it would seem that she instructed LD because of his expertise in litigation, while she instructed BL for his commercial negotiating skills. Consequently, the fact that LD had returned and was involved with this matter did not in itself provide a reason for BL to terminate his instructions.

[72] As he was only rendering his account with the same email, non-payment of fees did not present a reason for termination of instructions either.

[73] The Committee's reason for determining to take no further action with regard to this complaint, is that EW had effectively discharged BL from the engagement because of the fact she had communicated directly with [AAA] and engaged with LD again.

[74] This reason has limited validity. BL had provided advice to EW for some time knowing that she was at the same time also taking advice from LD. She was thoroughly open about that and it was only when LD went on leave that she was unable to communicate with him. In addition, the fact that she had made direct contact with [AAA] does not mean that EW had ceased to instruct BL.

[75] Rule 4.2(c) of the Rules requires a lawyer to complete regulated services unless "the lawyer terminates the retainer for good cause and after giving reasonable notice to the client specifying the grounds for termination".

[76] BL did not give any notice to EW and terminated the retainer on the strength of his 'understanding'. BL has breached r 4.2.

Result

[77] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination of the Standards Committee is reversed and replaced with a single finding of unsatisfactory conduct pursuant to s 12(c) of the Lawyers and Conveyancers Act 2006 for breaches of rr 4.2 and 9.

[78] In other reviews, where this Office has reversed a Standards Committee finding on costs, it has returned the matter of costs to the Committee to reconsider the matter with or without a new costs assessor's report. However, I do not wish to do that at this stage given that this necessarily results in the matter being prolonged, and will add further to EW's stress and overall uncertainty. In addition, the imposition of a penalty as provided for in the Act does not provide the best outcome for EW.

[79] In the circumstances, I would like to give the parties the opportunity to resolve this matter between themselves. This process would necessarily commence with BL communicating to EW a proposal with regard to his fees.

[80] Both parties are to report back to this Office by no later than 17 July 2020 to advise whether they have been able to resolve the matter. If so, an addendum to this decision will be issued recording the outcome. If the parties have been unable to resolve the matter, I will then of necessity provide a decision.

DATED this 19th day of June 2020

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O 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:

EW as the Applicant
BL as the Respondent
[Area] Standards Committee [X]
New Zealand Law Society

LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

Ref: LCRO 42/2019

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of [Area] Standards Committee [X]
BETWEEN	**EW** Applicant
AND	**BL** Respondent

DECISION AS TO ORDERS

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

[1] In the findings decision of 19 June 2020 I made a finding of unsatisfactory conduct against BL pursuant to s 12(c) of the Lawyers and Conveyancers Act 2006 (the Act) by reason of breaches of rr 4.2 and 9 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[2] At [79] of the decision, I provided the parties with an opportunity to resolve the outcome of this application for review themselves.

[3] Both parties have advised they have been unable to do so. It now falls to me to address what Orders to make, following the finding of unsatisfactory conduct.

Termination of retainer

[4] The appropriate order to make with regard to this finding, is a fine.

Fees

[5] The Standards Committee referred BL's invoice to a costs assessor for independent assessment. The assessor made the following adjustments to BL's fee:

• fee calculated on time	$	9,656.00
• premium	$	1,813.00
• office services charge	$	60.00
• GST – 15%	$	12,578.70

[6] I addressed the quantum of BL's fee in [47]–[68] of the findings decision and made the following comments:

- It is an impossible task for this Office to conduct a minute audit of time entries. However, that has been undertaken by the costs assessor and his findings are accepted. Consequently, the cost of BL's time is accepted at $9,656.
- BL's letter and terms of engagement make no reference to a premium calculated as a percentage of the time recorded being imposed. Consequently, any add on by way of a premium must have a relationship to the rule 9.1 factors.[25]
- A lawyer's skill and experience are reflected in his hourly rate.
- The costs assessor did not accept BL had achieved a 'result'.
- There is a reluctance to 'tinker' with a bill by adjusting it by small amounts.
- A detailed analysis of each of the fee factors must be undertaken.
- There is some criticism of over-reliance on time recording as the basis for calculating a fee.

[7] The costs assessor met with both parties and reviewed BL's file. He made the following comments with regard to the application of the costing factors:

- BL's hourly rate of $350 was fair and reasonable.

[25] See [43] of the costs assessor's report.

- The matter was of utmost importance to EW and had reasonably significant urgency.
- BL was involved in negotiations with [AAA].
- No result was achieved but significant progress had been made.

[8] Another factor that is relevant is that the final settlement with [AAA] included a contribution of $10,000 by [AAA] towards EW's legal costs.[26]

[9] Whilst I have some reservations about the fee and the add on premium being calculated based on the time recorded, I defer to the assessment by the costs assessor. He has had the benefit of reviewing BL's file and meeting with the parties to discuss the fee. The fee as assessed by him is therefore accepted.

[10] There are no grounds on which interest may be charged.

Orders

1. Pursuant to s 156(1)(e) of the Act BL is ordered to reduce his fee to $12,578.60. No interest for late payment is to be charged.
2. Pursuant to s 156(1)(i) of the Act BL is to pay a fine of $500 to the New Zealand Law Society. This is at the lowest end of the range of fines that could be imposed as there are some mitigating factors which resulted in BL terminating the retainer. These include the fact that EW had re-engaged with Mr LD, and it was apparent that there was going to be some disagreement with regard to payment of BL's invoice.

Costs

[11] Pursuant to s 210 of the Act, and in accordance with the Costs Orders Guidelines issued by this Office BL is ordered to pay the sum of $1,200 by way of the costs of this Review.

Enforce of orders for payment of money

[12] Pursuant to s 215 of the Act, the orders for money made may be enforced in the civil jurisdiction of the District Court.

[26] There is no information about other legal costs incurred by EW but that information is not relevant to this decision.

DATED this 28th day of July 2020

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O 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:

EW as the Applicant
BL as the Respondent
[Area] Standards Committee [X]
New Zealand Law Society