

**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 [x]

**BETWEEN**

**LY**

Applicant

**AND**

**RT**

Respondent

**DECISION**

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

**Introduction**

[1] Ms LY has applied to review a decision by the [Area] Standards Committee [x] (the Committee) dated 7 November 2018, in which the Committee decided to take no further action on her complaint against her former lawyer, Mrs RT.

[2] The Committee's decision was made pursuant s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act), which allows a Committee to take no further action on a complaint if it considers that it is unnecessary or inappropriate to do so.

**Background**

[3] Ms LY was at the relevant time a real estate agent.

[4] In about September 2018, she was offered a role with an agency. The agency owner gave her a contract for services (the contract) to consider.

[5] Ms LY was concerned that the terms of the contract did not appear to reflect the role that she was being offered.

[6] On 11 September 2018, Ms LY instructed Mrs RT to advise her about the contract.

[7] Ms LY terminated the retainer with Mrs RT later in the week beginning 17 September 2018.

[8] On 21 September 2018, Mrs RT forwarded Ms LY an invoice for \$1,898.00 plus GST and an office service charge, making a total of \$2,270.04.

### **Complaint**

[9] In a complaint emailed to the New Zealand Law Society Complaints Service (Complaints Service) on 27 September 2018, Ms LY raised complaint against Mrs RT as follows:

- (a) Ms LY had been offered a sales role with a real estate agency.
- (b) She was given the contract to review and was concerned that it related to a different role, that of a licensed salesperson.
- (c) Ms LY instructed Mrs RT to review the contract and suggest amendments so that it reflected the role she had been offered.
- (d) At a meeting with Mrs RT, Ms LY took notes and was surprised that she was expected to type those up rather than Mrs RT's assistant.
- (e) Mrs RT did not advise Ms LY to ask the agency for the correct contract.
- (f) Despite the agency indicating that it would agree to "a few changes" to the contract, Mrs RT made "a significant number of changes" to it.
- (g) She did not receive Mrs RT's terms of engagement for several days after she instructed her.
- (h) Mrs RT did not estimate how long the review and amendments would take.

[10] Although invited by the Complaints Service to respond to Ms LY's complaint, Mrs RT elected not to do so.

### Standards Committee decision

[11] The Committee identified the issues as being whether Mrs RT "provided Ms LY with competent service and whether [the Committee] has jurisdiction to consider Mrs RT's fee".<sup>1</sup>

#### *Competence*

[12] After setting out the work carried out by Mrs RT on Ms LY's instructions, the Committee concluded that Mrs RT appeared to have done what was requested of her and that there was no basis for any of Ms LY's complaints about Mrs RT's service.<sup>2</sup>

#### *Fees*

[13] The Committee noted that Mrs RT's invoice was for less than \$2,000 (exclusive of GST). It pointed out that reg 29 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008 does not permit inquiry into an invoice where GST exclusive fees are less than \$2,000, unless there are special circumstances justifying otherwise.

[14] The Committee noted the following:

- (a) Mrs RT promptly provided Ms LY with terms of engagement, when instructed;
- (b) there was no evidence to support Ms LY's claim that Mrs RT had quoted a lower hourly rate;
- (c) comments by another person that the work done by Mrs RT would normally attract a fee of between \$300 and \$500, were likely to have been made without the benefit of knowing all of the work that Mrs RT carried out on Ms LY's behalf; and
- (d) Mrs RT provided competent service.

[15] In noting those matters, the Committee concluded that there were no special circumstances which justified its consideration of Mrs RT's fees.

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<sup>1</sup> Standards Committee decision at [4].

<sup>2</sup> At [5]–[13].

## Review Application

[16] Ms LY filed her application for review on 13 November 2018. The grounds may be summarised as follows:

- (a) In their first telephone discussion on 11 September 2018, Mrs RT did not inform Ms LY that her hourly charge out rate was \$365 plus GST.
- (b) Mrs RT's fees were excessive.
- (c) Mrs RT did not inform her from the outset how long the legal work would take and how much it might cost.
- (d) Ms LY preferred to email Mrs RT as Mrs RT was not always available to speak by telephone.
- (e) Ms LY does not criticise the quality of Mrs RT's legal work; merely the cost and the time taken.

[17] By way of outcome, Ms LY asks for a significant fee reduction.

[18] In subsequent correspondence with this Office, dated 6 June 2019, Ms LY has raised concerns about the following:

- (a) when advising her, Mrs RT did not inform Ms LY of the risk associated with the case — specifically, that the employer might not agree to the suggested changes to the contract, and withdraw the employment offer (which is what occurred); and
- (b) the way in which Mrs RT has responded to the application for review. Ms LY considers that Mrs RT has “[impugned her] character” and that this is “unethical and unprofessional”.

[19] In relation to the allegation that Mrs RT failed to provide advice about risk, I note that this did not form part of Ms LY's complaint to the Complaints Service.

[20] This Office may only review complaint material that has been before a Standards Committee. It is an Office of review; not an agency which deals with first-instance complaints.

[21] I am therefore unable to deal with that issue as part of Ms LY's application for review.

[22] Moreover, I note that this is at odds with Mrs LY's comments in her application for review, which I quote:

I am not criticising the quality of the work done by Mrs RT just the cost and the length of time it took.

[23] As to the manner in which Mrs RT responded to the application for review, I record that I can see no basis for a suggestion that Mrs RT's response was in any way unprofessional, unethical, disrespectful or discourteous.

[24] A defence to a complaint (or application for review) will invariably be couched using firm language. That is the nature of disputes between people: there will be disagreement and respective positions will be emphatically set out. Disagreement between them does not equate to dishonesty by one of them.

[25] Mrs RT's response does no more than provide firm rebuttal to the allegations that Ms LY had made.

#### **Response by Mrs RT**

[26] Mrs RT provided comprehensive response to the application for review in her letter to this Office dated 4 December 2018. She said the following:

- (a) Initial contact from Ms LY was on 11 September 2018. At that time Mrs RT said that her hourly charge out rate was \$365 plus GST. She has never charged less than this amount and would not have mentioned the figure of \$345 as has been alleged by Ms LY.
- (b) The instructions were urgent. They concerned the review of a real estate agency contract for services in which Ms LY was the contracting agent.
- (c) Mrs RT provided terms of engagement to Ms LY by email on 11 September 2018.
- (d) The two met at Mrs RT's office the next morning to discuss the contract.
- (e) Ms LY's instructions were that Mrs RT was to undertake a detailed review of the contract and suggest several amendments; this despite Mrs RT's advice that generally people simply raise key issues which they discuss with the employer.
- (f) The instructions involved extensive amendments and additions to the contract, including some which Mrs RT advised against.

- (g) Mrs RT effectively re-drafted the contract after an attempt to do so by Ms LY.
- (h) Ms LY telephoned and emailed Mrs RT on several occasions (including nine emails over a three-hour period one Sunday).
- (i) Ms LY instructed Mrs RT to draft a letter for her employer but terminated the retainer before the time by which Mrs RT was due to draft the letter.
- (j) Mrs RT did not record (nor did she charge for) receiving and sending several emails, or for several telephone calls from Ms LY.
- (k) Time recorded by her accurately represented work done.

[27] Finally, Mrs RT denied that she had been aggressive to Ms LY when the fees were queried.

### **Nature and Scope of Review**

[28] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:<sup>3</sup>

... 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.

(Footnotes omitted)

[29] More recently, the High Court has described a review by this Office in the following way:<sup>4</sup>

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<sup>3</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

<sup>4</sup> *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475, at [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.

[30] Given those directions, the approach on this review will be to:

- consider all of the available material afresh, including the Committee's decision; and
- provide an independent opinion based on those materials.

### **Review on the papers**

[31] Both parties have consented to this review being conducted on the papers pursuant to s 206 of the Act. Section 206 allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all the information available if the LCRO considers the review can be adequately determined in the absence of the parties.

[32] I record that having carefully read the complaint, the Committee's decision and the submissions filed in support of and in opposition to the application for review, there are no additional issues or questions in my mind that necessitate any further submissions from either party. On the basis of the information available, I have concluded that the review can be adequately determined in the absence of the parties.

### **Analysis**

[33] The only issue I am required to consider is whether Mrs RT charged Ms LY a fee that was more than fair and reasonable, contrary to r 9 of the Lawyers and Conveyancers (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

[34] As the Committee correctly pointed out, before there can be inquiry into a lawyer's fees, the invoiced amount must be for a GST exclusive sum of less than \$2,000.<sup>5</sup>

[35] Inquiry into a fee that is less than \$2,000 can only proceed if there are "special circumstances" justifying that course.

[36] The Committee noted that the Court of Appeal had described the expression "special circumstances" as involving something "abnormal, uncommon or out of the ordinary." The Committee gave as an example of special circumstances justifying inquiry

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<sup>5</sup> Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008, reg 29.

“where a lawyer had undertaken no work at all for the fees invoiced or where the work undertaken was deemed to be incompetent or negligent”.<sup>6</sup>

[37] The Committee concluded that there were no special circumstances in the present case. It noted that Mrs RT had promptly provided her terms of engagement to Ms LY and that those terms accurately reflected what Mrs RT had told Ms LY over the telephone about her hourly rate. The Committee also noted that it had not upheld the complaint that Mrs RT had not provided competent service.<sup>7</sup>

[38] I agree with the Committee’s approach to the meaning of “special circumstances”. The authority cited by the Committee is well-known and well-understood, and invariably applied when deciding whether to inquire into fees that are less than \$2,000.

[39] The position on review is narrower than that considered by the Committee: issues of competence are no longer pursued.

[40] Ms LY’s complaint now boils down to one issue, that Mrs RT did not provide an estimate of fees or time and that the fees charged were excessive.

[41] I record at this point that I accept that both on the telephone and in her follow-up email to Ms LY on 11 September 2018, in which she attached her terms of engagement, Mrs RT informed Ms LY that her hourly charge-out rate was \$365 plus GST.

[42] Ms LY does not dispute that she received the terms of engagement. It is not entirely clear when she read them, but they were sent by Mrs RT by email on 11 September 2018.

[43] Ms LY raised no concerns about Mrs RT’s hourly rate until she made her complaint on 27 September 2018. By then — according to the email to which the terms of engagement were attached — she had been aware of the rate for over two weeks. During that time there had been extensive communication between the two.

[44] Mrs RT’s terms of engagement provide that she “generally [sends] invoices on a fortnightly basis”. The retainer began on 11 September 2018 and Ms LY terminated it during the week beginning 17 September 2018. Mrs RT sent her invoice on 21 September 2018, 10 days after the retainer began.

[45] On any view of it, this was a very brief retainer: less than two weeks.

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<sup>6</sup> Standards Committee decision, above n 1 at [19] (citation omitted).

<sup>7</sup> At [20].

[46] There can be no suggestion that Mrs RT ought to have invoiced sooner.

[47] Ms LY complains that Mrs RT did not provide a fees or time estimate.

[48] Rule 9.4 of the Rules obliges a lawyer to provide an estimate of fees to their client “[promptly] upon request”.

[49] Ms LY has not complained that she asked for, but did not receive an estimate from Mrs RT.

[50] In any event, the nature of this retainer would have made it very difficult for Mrs RT to have volunteered an estimate. She had been asked to review a contract for services, provide advice about it and assist with negotiating amendments.

[51] The length of time of such a retainer would be significantly dictated to by the employer’s position in the negotiations. Given that Ms LY was concerned that the contract she had been given did not accurately reflect the position she had been offered, it seems reasonable to presume that not inconsiderable work would be required to amend the contract and secure the employer’s agreement.

[52] However, Ms LY terminated the retainer before that could be fully explored. Up until that point, the email exchanges between Ms LY and Mrs RT reveal that Mrs RT was diligently attending to the legal work.

[53] This was clearly an important matter for Ms LY — it involved her employment — and she had extensive contact with Mrs RT during the relatively brief retainer.

[54] Mrs RT’s invoice reflected time spent by her of approximately five hours. On my assessment of the work required to be and actually done, this presents as being an unremarkable amount of time and consistent with the instructions given.

[55] I agree with the Committee’s conclusion that there are no special circumstances — in the sense of their being anything abnormal, uncommon or out of the ordinary — about the retainer between Ms LY and Mrs RT, to justify inquiry into fees of \$1,898.

## **Conclusion**

[56] I am required to bring a fresh, independent and robust view to the complaint, the Committee’s decision and the application for review. In doing so, I have carefully and comprehensively considered all of the material that was provided to the Committee and to this Office on review. I have paid particular attention to the areas in which the applicant has said that the Committee was in error.

[57] Nothing raised persuades me that the Committee's conclusions on each of the issues of complaint were wrong. The Committee's decision is therefore confirmed.

**Decision**

[58] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the Committee's decision is confirmed.

**Anonymised publication**

[59] Pursuant to s 206(4) of the Act, this decision is to be made available to the public but with the names and identifying details of the parties removed.

**DATED** this 26<sup>th</sup> day of June 2019

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**R. Maidment**  
**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:

Ms LY as the Applicant  
Mrs RT as the Respondent  
The [Area] Standards Committee [x]  
The New Zealand Law Society