LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2020] NZLCRO 154

Ref: LCRO 210/2018

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [City] Standards Committee
BETWEEN	**RF** Applicant
AND	**TG** Respondent

DECISION

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

Introduction

[1] Mr RF has applied for a review of a decision by the [City] Standards Committee, which following inquiry into a complaint made by Ms TG, entered a finding of unsatisfactory conduct against Mr RF.

Background

[2] In May 2016, Ms TG instructed Mr RF to act for her on an employment dispute.

[3] Ms TG attended mediation with her former employer. The parties were unable to resolve the dispute.

[4] In October 2016, proceedings were filed in the Employment Relations Authority (ERA). The Authority delivered its decision in [month] 2017. Ms TG's claims were unsuccessful. The Authority issued a cost decision on [Date] 2017.

[5] Mr RF charged Ms TG a fee of $35,309.75 inclusive of GST and disbursements.

The complaint and the Standards Committee decision

[6] Ms TG lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on November 2017. The substance of her complaint was that:

(a) fees charged were excessive; and

(b) Mr RF had failed to provide competent representation.

[7] Mr RF responded to Ms TG's complaint on 1 March 2018.

[8] He submitted that:

(a) Ms TG's employment dispute with her employer ([AB Ltd]) was a part of a larger dispute between [AB Ltd] and a Mr VG. Mr VG's firm, G and associates, had merged with [AB] in early 2015. Mr VG was the husband of Mr RF's client.

(b) Ms TG was invoiced on a regular basis.

(c) No complaint was raised by Ms TG concerning her fees until after the ERA delivered its decision in [month] 2017.

(d) In the course of negotiations, a settlement offer had been made by Ms TG's employer but Ms TG had rejected the offer.

(e) Mr RF considered Ms TG's claims to have merit.

(f) Considerable time and effort had been expended in advancing Ms TG's case.

(g) Following the issuing of the ERA determination, he was instructed to draft submissions in response to the employer's cost application.

(h) Fees charged were charged solely on a time spent basis.

(i) He had never represented to Ms TG that her case was "strong". It was not his practice to make such statements.

(j) In making an assessment of the two issues at the core of the employment dispute, being whether Ms TG was owed holiday pay, and argument as to whether she had received a salary review, he had placed reliance on information provided by Ms TG.

(k) The case was both legally and factually complex.

(l) He had provided competent representation to Ms TG throughout.

(m) He had, as a gesture of goodwill, offered a fee reduction.

[9] The Committee identified the issues to consider as being:

(a) Were the fees charged by Mr RF to Ms TG fair and reasonable for the work done?

(b) Was the representation by Mr RF of Ms TG to the required standard?

[10] The Committee sought a report from a costs assessor (Mr X).

[11] On receipt of that report, the parties were provided with opportunity to comment on it.

[12] The Standards Committee delivered its decision on 16 October 2018.

[13] The Committee determined, pursuant to s 156(2)(b) of the Lawyers and Conveyancers Act 2006 (the Act), that there had been unsatisfactory conduct on the part of Mr RF.

[14] The Committee ordered Mr RF to reduce his fee pursuant to s 156(1)(e) of the Act.

[15] In reaching that decision the Committee concluded that:

(a) Mr RF's files provided no indication that he had provided advice to his client concerning the merits of the employment claim, prospects of success, cost and risk.

(b) A settlement offer received did not appear to have been discussed with Ms TG.

(c) Fees charged appeared high for the work undertaken.

(d) The claim was not significant from a monetary perspective.

(e) There appeared to have been a failure on Mr RF's part to apply a proportionality assessment – that is, costs vs benefit.

(f) There was no evidence that Mr RF had adequately discussed the implications of the Calderbank offer received with his client.

Application for review

[16] Mr RF filed an application for review on 15 November 2018. He submits that Committee's decision was wrong in fact and law.

[17] Mr RF included with his review application:

(a) His initial response to the complaint of 1 March 2018.

(b) His response to further submissions filed by Ms TG.

(c) His response to the cost assessor's report.

(d) Submissions for the Standards Committee's on the papers hearing.

[18] Ms TG was invited to comment on Mr RF's review application.

[19] She submits that:

(a) She placed reliance on the cost assessor's report.

(b) She considered that Mr RF had a poor grasp of her case when he represented her before the ERA.

(c) Mr RF had been recommended to her as a person with particular expertise in employment law matters.

Hearing

[20] At hearing, Mr RF identified what he perceived to be were a number of errors in the Committee's decision.

[21] He noted that the Committee had failed to record in its decision the disbursements that had been charged. Mr RF accepted that this oversight represented a modest component of the total fee, but the error nevertheless presented as a failing on the part of the Committee to provide an accurate account of the fee.

[22] Mr RF indicated that he parted company with the cost assessor in assessing what would be a reasonable fee for a one-day hearing in the ERA. It was his view that a realistic fee would be in the vicinity of $15,000 to $20,000. The costs assessor considered a fee of $10,000 to $15,000 to be realistic. Mr RF described his disagreement with the cost assessor on this issue as "the fundamental dispute I have with the costs reviser". Allied closely to this argument was Mr RF's submission that the cost assessor had failed to recognise that the hearing before the ERA was complex, and not one that could reasonably be assessed by comparative reference to a conventional one-day hearing.

[23] Mr RF argued that both the costs assessor and the Committee had neglected to take into account work preparing, serving and responding to the notice of personal grievance, and similarly, had failed to take into account the work done in attending the mediation. Costs involved in attending to work to the end of the mediation amounted to $3,805.00 plus GST and disbursements.

[24] Mr RF disagreed with the costs assessor's estimate of costs involved in defending the strike out application ($1,900 plus GST). Actual and reasonable costs incurred argued Mr RF, were $4,000 plus GST.

[25] Mr RF submitted that both the Committee and the costs assessor, had omitted to consider the additional costs incurred as a consequence of the ERA directing that the parties were to file written submissions post hearing. It was Mr RF's view that it was common practice for an ERA hearing to conclude with oral submissions, but in this case he was required to both file and respond to written submissions.

[26] Mr RF submitted that in addition to the cost assessor making errors in respect to assessing the value of the work done, the assessor had inappropriately commented in his report on the litigation strategy adopted, and in doing so, had likely adversely influenced the Committee's perception as to how the case had been managed. He contended that the assessor had suggested that he had failed to correctly identify the nature of the employment grievance that Ms TG was wishing to advance. Mr RF considered that he had been criticised by the assessor for failing to plead causes of action that were not in fact open to Ms TG to plead.

[27] Mr RF argued that it was unreasonable for him to be criticised for making submissions on costs at the conclusion of the ERA hearing. He notes that he had made specific request of Ms TG as to whether she wished for him to provide submissions and had been instructed to do so. Further, Mr RF considered that the costs assessor had underestimated the costs involved in preparing the costs submission.

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:[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.

[29] 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.

[30] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to:

(a) Consider all of the available material afresh, including the Committee's decision; and

(b) Provide an independent opinion based on those materials.

Discussion

[31] There has been a considerable delay in the delivery of this decision.

[32] I apologise to the parties for that.

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[1] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].
[2] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

[33] In light of that delay, I confirm to the parties that:

(a) All material was re-read prior to drafting the decision.

(b) The audio record of the hearing was heard in its entirety.

Analysis

[34] The issues to be considered on review are:

(a) Did Mr RF provide Ms TG with a competent level of representation?

(b) Was Mr RF required to provide Ms TG with an assessment as to her prospects of success at commencement and, if so, should that assessment have included an evaluation as to likely costs measured against best prospect of outcome?

(c) Was the fee charged fair and reasonable as it accurately reflected time spent on the file as evidenced by Mr RF's time records?

(d) Were the fees charged by Mr RF fair and reasonable?

(e) Did the costs assessor, when reviewing the fees charged, fail to take into consideration work completed by Mr RF prior to preparing for the ERA hearing?

(f) Was the Committee's decision adversely influenced by the cost assessor's criticism that Mr RF may have failed to recognise the nature of Ms TG's personal grievance?

(g) Was Mr RF required to provide Ms TG with full explanation as to the implications and possible consequences flowing from receipt of a Calderbank offer?

Did Mr RF provide Ms TG with a competent level of representation?

[35] In her initial complaint, Ms TG's criticisms of Mr RF (overarched by the overriding criticism that fees charged were excessive) were that:

(a) He had failed to call witnesses whose evidence was important to substantiate her case.

(b) Mr RF's presentation of her case before the ERA was lacklustre.

[36] In the course of providing regulated services to their client, a lawyer must act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.[3]

[37] A lawyer's conduct may be deemed to be unsatisfactory if, in the course of providing regulated services to their client, their conduct falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.[4]

[38] The duty to act competently has been described as "the most fundamental of a lawyer's duties" in the absence of which "a lawyer's work might be more hindrance than help".[5]

[39] The standard of competence is an objective one. The question is whether the lawyer under scrutiny applied the care or skill that any reasonable lawyer in the same position would have done.[6]

[40] It has been noted that lawyer competence, though pivotal to public confidence in the profession and the administration of justice, lacks any generally accepted meaning; it instead takes its flavour from the perspective of the observer.[7]

[41] Not surprisingly, neither the Act, nor the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), attempt to lay down a definitive definition of competence. A determination of competence must inevitably be attempted through an examination of a variety of factors including, but not limited to, the nature of the retainer and the context in which the conduct complaint arises.

[42] It is important to recognise that an obligation to provide competent advice does not impose an unreasonable burden on a practitioner to be always right, or to always provide the right advice.

[43] It has been noted that:[8]

> while there is an existing professional duty of competence in New Zealand, albeit one which is particularly narrow, there is no duty to provide a high level of service to clients. The duty of competence is, in reality, a duty not to be incompetent and is aimed at ensuring minimum standards of service.

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[3] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 3.
[4] Lawyers and Conveyancers Act 2006, s 12(a).
[5] Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington 2016) at [11.1].
[6] At [11.3].
[7] GE Dal Pont *Lawyers' Professional Responsibility* (6th ed, Thomson Reuters, Sydney, 2017) at [4.24].
[8] Webb, Dalziel and Cook, above n 5 at [11.3].

[44] What may on first reading present as a singularly less aspirational objective for a profession than would be expected is, on closer examination, an affirmation of a reasonable standard of expectation of the level of competency required of lawyers. All lawyers are expected to provide a competent level of service to their clients.

[45] A broad and useful expression of the indicia to be considered in determining competency was attempted by the American Bar Association in a discussion document where it said:[9]

> Legal competence is measured by the extent to which an attorney(1) is specifically *knowledgeable* about the fields of law in which he or she practises, (2) performs the techniques of such practice with *skill*, (3) manages such practices *efficiently*, (4) identifies issues beyond his or her competence relevant to the matter undertaken, bringing these to the client's attention, (5) *properly* prepares and carries through the matter undertaken, and (6) is intellectually, emotionally, and physically *capable*. Legal incompetence is measured by the extent to which an attorney fails to maintain these qualities.

[46] The Standards Committee's decision gives no indication of it having considered Ms TG's complaints that Mr RF had failed to call relevant witnesses, or had inadequately advanced Ms TG's case at the ERA.

[47] To the extent that the Committee's inquiry addressed issues that embraced in general terms questions as to the competency of the representation provided, its focus was on the question as to whether Ms TG had been adequately advised about litigation risk and the Calderbank offer, issues which are considered separately in this decision.

[48] Ms TG's more general complaints of a failure by Mr RF to provide competent representation, were that he neglected to call witnesses that were critical to her case, and advanced her case before the ERA poorly.

[49] Mr RF says he had sound reasons for electing not to call additional witnesses.

[50] It has been noted that although there are rules of engagement for litigation, such as procedural and evidential rules, as well as the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), the conduct of litigation is largely an inexact science driven by tactical and strategic decisions made by the opposing parties.[10]

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[9] American Bar Association and American Law Institute *Committee on Continuing Professional Education Model Peer Review System* (discussion document, 15 April 1980).
[10] *LCRO 262/2014* (28 June 2018) at [116]–[118].

[51] One lawyer's view of the most effective strategy to conduct litigation may be diametrically opposed to another lawyer's view and, absent incompetence, it is not always possible to determine which view is the better.

[52] Again, absent incompetence, tactical and strategic advice given by lawyers to their clients will be informed by that lawyer's experience as well as their assessment of the other party's position. It is, in many respects, a battle of wits and wills.

[53] Mr RF is a senior lawyer with considerable experience in employment litigation. That is not to say that tactical and strategic advice that he gives will always prevail in the litigation. But the advice that he gives comes from a background of experience and judgement.

[54] It is not the role of a Review Officer to attempt to critically scrutinise every decision made by a lawyer in the course of conducting litigation.

[55] In *Auckland Standards Committee 3 v Castles*,[11] the Lawyers and Conveyancers Disciplinary Tribunal considered the extent to which the tribunal was able to examine decisions made by a lawyer in the course of conducting litigation and noted, "it is not this Tribunal's role to closely analyse and second-guess every move of counsel during each piece of litigation. We consider our role is to take an overview and to look at patterns of behaviour".

[56] In formulating strategy for a particular case, lawyers are often faced with finely balanced problems.

[57] It was Mr RF's view that the evidential foundation for Ms TG's case was best laid by focusing exclusively on the evidence of Ms TG. He was concerned that the tensions within the accounting partnership could render evidence from third parties unreliable.

[58] This was a litigation call that it was open for Mr RF to make.

[59] I am not persuaded that Mr RF's decision to refrain from calling additional witnesses constituted a failure on his part to act competently.

[60] Whilst complaint is made that Mr RF was ineffective in advancing Ms TG's case before the ERA, little evidence is provided to establish precisely how Mr RF is said to have failed in this regard. The criticism appears to be that Mr RF's approach in

[11] [2013] NZLCDT 53 at [177].

presenting Ms TG's case was a little lacklustre. This is not sufficient to establish argument that Mr RF failed to provide Ms TG with competent representation.

Was Mr RF required to provide Ms TG with an assessment as to her prospects of success at commencement and, if so, should that assessment have included an evaluation as to likely costs measured against best prospect of outcome?

[61] The Standards Committee decision records that Ms TG's principal complaint concerned the fees charged by Mr RF.

[62] Whilst the Committee concluded that "overall the level of fees appears high for the work undertaken", that view arrived at following its consideration of both Mr RF's file and the cost assessor's report, the Committee was critical of what it described as Mr RF's "notable absence of written advice to the client about the merits of the employment/dispute claim including prospects of success, cost and risk".

[63] Whilst the Committee concluded that overall the level of fees charged appeared high for the work undertaken, and agreed with its cost assessor's report which had reached similar conclusion, its finding that the fees charged were excessive also flowed from its conclusion that Mr RF's representation of Ms TG fell below the standard that could reasonably have been expected of a senior practitioner, and that costs charged were too high considering the outcome achieved.

[64] Whilst this aspect of the Committee's inquiry is couched in the language of competency, stripped bare, the complaint is that Mr RF failed to sufficiently inform his client as to likely costs (and risks) involved in pursuing the litigation.

[65] Mr RF accepted at hearing that his file contained no record of him having provided advice to Ms TG either on matters relating to likely costs, or prospects of success.

[66] It was Ms TG's recollection that Mr RF had informed her at commencement that she had a strong case and that her decision to reject the settlement offer received was influenced in significant part by the confidence Mr RF had expressed in her case.

[67] Mr RF rejected suggestion that he would have advised Ms TG that her case was strong, noting that it was not his practice to make such statements.

[68] I am unable to resolve the issue as to whether Mr RF had informed Ms TG that she had a strong case, but I am satisfied that Mr RF took minimal steps to comprehensively traverse with his client what her prospects of success were likely to be.

[69] Mr RF did not dispute that he had made little attempt to discuss the potential costs of the litigation with his client. In what presented as a modest concession, he accepted at the hearing that "perhaps I should have had a more robust discussion but certainly my impression was that costs were not an issue".

[70] Whilst Mr RF accepted that he could have made more effort to discuss both prospects of success and likely litigation costs with Ms TG, he rejected suggestion that no efforts had been made to traverse these important matters with his client.

[71] It was his view that in employment cases the best opportunity to assess the merits of a client's case arises when mediation has been completed. At that point, argued Mr RF, there was a distillation of the strengths and weaknesses of the respective parties' arguments and clear decisions could be made as to whether the case was worth progressing.

[72] Mr RF advised that costs of around $5,000 had been incurred by the end of mediation.

[73] That is a not insignificant sum for a client to have to incur before they become fully informed both as to the nature of their case, and the obstacles they face in advancing that case.

[74] In *Lawyers' Professional Responsibility*, the learned author said:[12]

> Before commencing proceedings a lawyer must properly investigate the claim, or otherwise ascertain the relevant facts, to enable her or him (or counsel) to form an opinion whether a cause of action exists or is likely to succeed. Simply acting on client instructions to initiate proceedings or to pursue a claim is inappropriate; reasonable enquiries must be made.

[75] The importance of a lawyer discussing costs of advancing a claim by reference to likely outcome in the context of an employment dispute was discussed in *McGuire v New Zealand Law Society*,[13] where it was noted that "for most individual litigants, evaluating the cost of the proceeding against the likely amount to be gained is fundamental to their decision whether to proceed to a hearing".

[76] Further, it was noted in *McGuire* that consistent with one of the core requirements of a lawyer as articulated in the Preface of the Rules, "whatever legal services [a] lawyer is providing", he or she "*must* discuss [the client's] objectives and how they should best be achieved."

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[12] GE Dal Pont, above n 7 at [17.260].
[13] [2017] NZHC 2484 at [42].

[77] Mr RF was emphatic that he had, during the course of the mediation conference, discussed both merits and possible outcomes at length with his client.

[78] Ms TG accepted that the tension arising from the dissolution of the partnership may have played some part in motivating her to advance a claim against her former employer, but she rejected suggestion that this was her primary motivation.

[79] She believed that she was owed a significant sum in outstanding holiday pay, and that she had not been compensated for not having received the benefit of a salary review that had been promised to her.

[80] I have carefully considered all the submissions that were put before the Committee and have had the additional benefit of hearing from the parties first-hand.

[81] Having done so, I find myself in agreement with the Committee that Mr RF made insufficient effort to ensure that Ms TG had, at the commencement of the retainer, a realistic view of the costs she may be likely to incur, and a realistic view of her prospects of succeeding with her claim.

[82] At the hearing it was directly put to Mr RF as to whether it would not be required of him to make a cost/risk/recovery assessment at commencement.

[83] His response was to suggest that employment cases were different from conventional civil cases and that it would not be his practice in an employment matter, to provide a client with an evaluation of costs and prospect of success at commencement. It was Mr RF's view, that it was "over inflating a lawyer's responsibility" to require a lawyer to provide such an assessment.

[84] With every respect to Mr RF, I disagree with him.

[85] Mr RF emphasised that he was an experienced advocate who had 30 years' experience working in the employment field.

[86] In my view, it could reasonably have been expected of Mr RF that he would have been able at the outset to form a view as to the likely prospects of Ms TG succeeding with her claim, and that he would have been able to make a measured assessment as to likely costs. This is not to fail to recognise that the parameters of all but the simplest of retainers may be expanded by multiple events outside the lawyer's control, but rather to emphasise the importance of the lawyer discussing objectives, costs and possible outcomes with their client at commencement.

[87] In providing explanation for his failure to take a more assertive approach to informing his client, Mr RF emphasised that his client was an articulate, intelligent and sophisticated individual who had a wealth of experience working in accounting firms.

[88] Further, Mr RF submitted that it was critical to understand the context of Ms TG's dispute with her employer.

[89] Ms TG's husband was an accountant. His firm merged with a firm that traded under the name of [AB] Ltd.

[90] There were problems with the merger, culminating in what Mr RF described as an "acrimonious demerger".

[91] Mr RF suggests that Ms TG's dispute with [AB] was inextricably linked to the business dispute and, as a consequence of the intense escalation of emotions following the break up of the business, both Ms TG and her employer became entrenched in their positions.

[92] It is argument that the issue of proportionality (viewed by Mr RF as central to the cost assessors' conclusions) assumed less relevance, as Ms TG had an ulterior motive in pursuing litigation against her former employer.

[93] Mr RF, in my view, placed too great a reliance on argument that his client was an experienced professional to justify his failure to ensure that Ms TG was properly informed at the commencement of the costs that would likely accrue in the course of advancing the claim to conclusion, and to justify his failure to provide Ms TG with an evaluation of likely costs measured against likely outcome.

[94] Irrespective as to how sophisticated or experienced his client may have been, it was Mr RF's obligation to ensure that Ms TG was properly informed.

[95] In *Vallant Hooker & Partners v Toothill*,[14] a case decided with reference to the professional conduct rules that applied before the introduction of the 2008 Rules, the judge when considering (again in the context of an analysis of costs incurred in progressing an employment claim) factors to be taken into account in assessing whether a fee is fair and reasonable, concluded that he had no doubt that in "assessing whether a fee is fair and reasonable, it can be appropriate to take into account the advice given by the practitioner to the client at the outset as to likely risk and outcome".[15] It is important to note that in *Toothill* there was a substantial gulf between the fee charged by the lawyer

[14] HC Auckland CIV-2009-404-1895, 4 September 2009.
[15] At [25].

and the reasonably determinable (by reference to published data recording awards made in employment cases) sum the lawyer's client would likely have achieved if her case succeeded.

[96] The judge posed the question as to whether a practitioner, in assessing the reasonableness of a fee, should, in circumstances where the practitioner had not properly explained to their client the risks of proceeding and the realities of best case and worst-case scenarios, adjust any ultimate fee to reflect a poor final result of which the client should properly have been warned. The judge in posing that question, concluded that "a reasonable practitioner would make such an adjustment. It is part of the process of reaching a reasonable fee. It is not so much a question of compensation for negligence, but rather of the fixing of a fee that fairly takes into account the dilemma now faced by the client, caused in part by the practitioner's inadequate explanation of risk".[16]

[97] I do not suggest that there was a total absence of any discussion around issues of risk in pursuing the litigation. I think it probable that there was some discussion at the mediation conference around risk issues, but the message that Mr RF emphatically conveyed throughout the review hearing, was that:

(a) He had taken clear instructions to advance an employment claim.

(b) His client was sophisticated.

(c) He was never made aware that costs were an issue.

(d) His letter of engagement identified that his fees would be charged on a time/cost basis.

(e) Invoices were regularly rendered and no objections made to those invoices.

[98] Absent from this analysis, was any evidence of Mr RF taking stock of the escalating costs or addressing the issue as to whether the outcome contemplated (if successful) would present as a proportional return for the costs expended.

[99] Mr RF argued that Ms TG's case was not straightforward. He described it as a case of some complexity.

[100] I disagree.

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[16] At [27].

[101] I agree with the cost assessor that the claim was not overly complex.

[102] At the heart of Ms TG's claim was argument that she had not been adequately remunerated by her employer for holiday pay owing and that she had not received the benefit of a salary review to which she was entitled.

[103] It appears to be the case that the task of assembling information to support Ms TG's argument that she had not been reimbursed for hours worked, engaged a detailed and comprehensive analysis of time records, but this could not reasonably be described as an exercise engaging complex legal or evidential issues. It was a task that Ms TG herself was equipped to undertake a considerable amount of the leg work required.

[104] Mr RF indicated that the sum claimed for emotional distress was considerably inflated above what he had realistic expectation of achieving, but that it was commonplace in employment cases for those heads of claim to be exaggerated.

[105] Mr RF noted that his ability to advance Ms TG's claim for compensation for emotional harm, had been compromised by Ms TG's reluctance to release medical records to him. However, Ms TG had signalled her unwillingness to provide those records early in the retainer.

[106] Any assessment of the potential monetary value of Ms TG's claim demanded an attentive consideration of the realities of her employment situation.

[107] Ms TG's period of employment had been relatively brief.

[108] She had resigned from her employment.

[109] It was some considerable time after her resignation that Ms TG decided to progress a complaint against a former employer, by which time, her opportunity to advance argument that she had been constructively dismissed had passed.

[110] Her complaint being focused then on argument that she had not been properly compensated for holiday pay, was capable, if successfully established, of only a modest financial return.

[111] I agree with the costs assessor, that even if a full recovery (total win) had been achieved, there was strong possibility that costs would have eclipsed the recovery.

[112] Mr RF was emphatic that a realistic assessment of the costs involved in running a straightforward case before the ERA of one day's duration would be in the vicinity of $15,000–$20,000.

[113] Mr RF's costs to the conclusion of mediation were around $5,000.

[114] At mediation (and following) the employer made a settlement offer in the sum of $10,000.

[115] Ms TG rejected that offer however whilst Mr RF says that he discussed the merits of the offer with Ms TG during the course of the mediation and the risks involved in Ms TG pursuing her case further, there is no evidence of him having recorded those discussions in writing, nor did Mr RF indicate at hearing precisely what his advice had been.

[116] There is no evidence of Mr RF having cautioned Ms TG of the risk that costs incurred in advancing her claim could approximate or exceed any successful award.

[117] In advancing argument that his considerable experience provided foundation for him to provide an accurate assessment as to the costs that would be incurred in running a one-day case before the ERA, it could also have been expected of Mr RF that this experience would have also equipped him to have provided Ms TG with a realistic assessment of possible outcomes and likely costs.

[118] Having undertaken that assessment, as he was required to do, it could have been expected of Mr RF that he would have carefully discussed with Ms TG the question as to whether it was economically worthwhile for her to proceed with the case.

[119] His obligation to do so was not sufficiently met by his explanation that it was his understanding that costs were not an issue for Ms TG.

[120] Mr RF's failure to address those issues is a factor that properly deserves consideration when assessing the reasonableness of the fee charged.

Was the fee charged fair and reasonable as it accurately reflected time spent on the file as evidenced by Mr RF's time records?

[121] Pivotal to Mr RF's argument that his fee charged was fair and reasonable, was his submission that the fee charged accurately reflected the time he had spent on the file.

[122] Mr RF noted that the terms of the retainer were clearly set out in his letter of engagement, and that it was well understood by Ms TG that he would be charging a specific hourly rate, that his time would be recorded, and that invoices rendered would be calculated by reference to the hourly rate and time spent.

[123] Mr RF submitted that Ms TG, having had experience working in an accountant's office over many years, was well familiar with the practice of time recording.

[124] It was Mr RF's view that charging clients by reference to time recorded presented as the fairest and most transparent method of billing.

[125] When question was put to Mr RF as to whether it was his argument that all time recorded was to be charged, Mr RF's response was "essentially in a case like this, yes".

[126] Mr RF's argument is that the fee he was able to charge, was determined by the strict contractual rights and obligations specified in the letter of engagement.

[127] The purpose of the Act includes the maintenance of public confidence in the provision of legal services,[17] and the protection of consumers of legal services.[18]

[128] Important to the consumer protection objectives, is the guidance the Conduct Rules provide when assessing the reasonableness of a fee charged by a practitioner.

[129] Importantly, 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* (emphasis added) and having regard also to the factors set out in rule 9.1.

[130] Reference to time and labour expended is but one of 13 factors listed in r 9.1.

[131] Assessment as to whether a fee charged by a lawyer presents as fair and reasonable must be conducted by reference to a wider range of factors than simple reference to time recorded.

[132] In *Chean v Luvit Foods International Ltd* the High Court noted:[19]

> ... the obligation, which is clear from a number of authorities, for a practitioner who is using time and attendance records to construct a bill, to take a step back and look at the fee in the round having regard to the importance of the matter to the client, in some cases the clients means, the value to the client of the amount of work done, and proportionality between the fee and the interim or final result of the legal work being carried out.

[133] In response to concerns the costs assessor had raised regarding time spent on the essentially administrative task of organising a date for mediation ($720), Mr RF's response was to argue that the time had been recorded, Ms TG had been billed on the basis of the time recorded, and that was that.

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[17] Section 3(1)(a).
[18] Section 3(1)(b).
[19] HC Auckland CIV 2006-404-1047, 7 June 2006 at [23].

[134] With respect to Mr RF, this response highlights the limitations of a lawyer assessing reasonableness of a fee solely by reference to recorded time.

[135] It may have been the case that there had been a degree of "toing and froing" over confirming agreement over a date for mediation to proceed, but all that was being done was arranging a date. Expenditure of $720 on such a basic administrative task presents as excessive and falls well short of achieving the necessary balance of having regard to interests of both client and lawyer.

[136] An approach to billing calculated solely on the back of recording six minute units does not allow opportunity for a measured assessment of the reasonableness of the fee charged.

[137] It can be fairly assumed that telephone discussions and brief email exchanges confirming availability or lack of availability for attendance at a mediation conference, would not, on all occasions, have required Mr RF's attention for the full six minutes charged for. Nor would perusing brief emails have demanded more than minimal time and attention.

[138] But the cumulative effect of calculating a fee solely by reference to time recorded, is to produce the distortion identified by the costs assessor in his consideration of time charged for organising a mediation date.

[139] This reinforces the need for a lawyer, as emphasised in *Chean*, to step back and look at the fee in the round.

[140] There is no evidence of Mr RF having done this, his approach, as directly acknowledged by him, was to record time and charge for it.

[141] In calculating his fees solely by reference to time recorded, Mr RF, in my view, failed to pay sufficient regard, as required by r 9, to the interests of his client.

Did the costs assessor when reviewing the fees charged, fail to take into consideration work completed by Mr RF prior to preparing for the ERA hearing?

[142] Mr RF submitted that both the costs assessor and the Committee had, in providing its assessment as to the overall reasonableness of the fees charged, failed to take into account the work that had been undertaken prior to the ERA hearing.

[143] At hearing Mr RF argued that the costs assessor's report "made no mention at all" of the "costs of mediation and costs of serving the personal grievance notice, although steps were overlooked".

[144] I do not consider that the cost assessor's failure to specifically reference costs engaged in filing the personal grievance or in progressing the matter to mediation, is indicative of the costs assessor (or the Committee) overlooking those costs.

[145] Mr [X]'s report records him having:

(a) received three Manilla files and arch lever files which provided a complete record of the work done; and

(b) cross-checked time records with work done on the file; and

(c) specifically referenced time engaged in confirming dates for mediation.

[146] There is no indication in the Committee's decision that it had overlooked the work done by Mr RF in preparing for and attending the mediation. Its decision noted that it had been provided with Mr RF's files. The Committee's consideration of the fees charged is framed in terms that make it clear that its focus was on assessing the total fees charged. The fact that the Committee failed to specifically reference costs involved in preparing the personal grievance and in advancing the matter to mediation, does not in my view, indicate that the Committee had overlooked those components of the costs incurred.

Was the Committee's decision adversely influenced by the cost assessor's criticism that Mr RF may have failed to recognise the nature of Ms TG's personal grievance?

[147] Mr [X] suggested in his report that Mr RF may have "missed what Ms TG's personal grievance was, i.e., workplace bullying and constructive dismissal".[20]

[148] Mr RF rejected suggestion that he had incorrectly pleaded Ms TG's case.

[149] He noted that having decided to advance a claim some months after her resignation, Ms TG was unable (because of time limitations) to advance claims in the nature of those that Mr [X] suggested had been overlooked by him (workplace bullying and constructive dismissal).

[150] Mr RF was concerned that suggestion by the costs assessor that he had failed to correctly identify Ms TG's grievance, cast a pall over the Committee's decision and had influenced, in ways adverse to him, the Committee's overall approach to assessing the reasonableness of the fee charged.

[20] The costs assessor's report at [37].

[151] I accept that Mr RF was concerned at what he considered to be unfounded criticism made by the costs assessor of the manner in which he had pleaded Ms TG's case, but I am not persuaded that the comments made adversely influenced the Committee.

[152] The Committee's decision gives no indication of it having taken the concerns expressed by the costs assessor into account. Its decision gives clear indication that the factors it considered to be relevant when considering the reasonableness of the fee, were its assessment of the overall costs charged for the work undertaken, its concerns regarding the absence of advice of the costs/benefits of pursuing the claim, and the lack of advice regarding the Calderbank offer.

Was Mr RF required to provide Ms TG with full explanation as to the implications and possible consequences flowing from receipt of a Calderbank offer?

[153] Yes.

[154] I agree with the Committee that it was concerning that Mr RF took no steps to ensure that Ms TG was fully informed as to the consequences that flowed from her having received a Calderbank offer.

[155] When providing response to the question as to whether he would have considered it necessary to carefully discuss the implications of the Calderbank offer with Ms TG, and to have any advice provided recorded, Mr RF accepted that there was no record on his file of him having discussed the offer with Ms TG.

[156] Nor was he able to recall with any degree of certainty, as to whether he had explained the consequences to Ms TG of having received the offer, noting that "I think I would have, I don't have any clear recollection", and "I imagine I would have".

[157] In providing clarification as to the approach he adopted when providing advice on settlement offers, Mr RF's explanation was consistent with the approach he had adopted throughout the course of the retainer. He considered that he was acting for an intelligent professional client who was well-equipped to form her own opinion on the merits of any offer received, and ably equipped to decide as to whether she was prepared to accept a settlement proffered.

[158] Mr RF explained that he encouraged people to settle, but if they wanted to "fight" that was their choice.

[159] Prospect of settlement was first raised at the mediation conference.

[160] Mr RF explained that Ms TG was in frequent contact with her husband during the course of the mediation and that she was firm, having discussed matters with the husband, in her decision to reject the offer made.

[161] I agree with Mr RF that he was entitled to place reliance on instructions received from his client. It can be fairly argued that he was required to follow those instructions.

[162] But there was an overarching obligation on Mr RF to ensure that his client was fully informed about the consequences of her rejecting the offer made.

[163] Ms TG was made an offer of $10,000 to settle. She indicated at hearing, that her objective was to secure a $13,000 settlement.

[164] Faced with eventual legal costs of $35,309.75 (inclusive of GST and disbursements) and costs directed to be paid by the ERA of $3,500, Ms TG accepted that with the benefit of hindsight, her refusal to accept the $10,000 offer presents as approaching the inexplicable.

[165] The offer made at mediation was shortly after formally confirmed in writing and framed in the form of a Calderbank offer.

[166] That offer was presented to Ms TG and promptly rejected by her. Ms TG appears, at that time, to have considered the offer to be derisory.

[167] Whilst it is reasonable for Mr RF to emphasise that his client provided him with firm instructions, it was not sufficient for Mr RF to provide Ms TG with the offer, without ensuring that she was fully informed as to the implications of the offer.

[168] I am satisfied after hearing from Mr RF and Ms TG, that Mr RF took no steps to adequately explain the implications of the offer received.

[169] That failure presents as significantly consequential, particularly when the offer is referenced to the sum that Ms TG was prepared to accept.

[170] Informed from a background of 30 years' experience in managing employment cases, Mr RF says that he considered a reasonable cost of preparing and running a one-day case in the ERA would be $20,000.

[171] On receipt of the Calderbank offer, it was imperative that Mr RF:

(a) discuss the offer received with Ms TG; and

(b) explain to Ms TG the potential cost implications which could (and indeed did) follow from rejecting the offer in the event her claim was unsuccessful; and

(c) ensure that Ms TG was informed as to the cost implications of progressing her case to a hearing.

[172] Armed with that advice, Ms TG would have been better placed to assess the potential consequences of progressing her case.

[173] The preface to the Rules emphasises the requirement for a lawyer to act competently, to protect and promote their clients' interests, to provide the client with information about the work to be done, to provide clear information and advice, and to keep the client informed about the work being done.

[174] The Rules are not an exhaustive statement of the conduct expected of lawyers. They set the minimum standard that lawyers must observe and are a reference point for discipline.[21]

[175] Mr RF's failure to adequately inform Ms TG as to the implications flowing from the offer received, his failure to provide context for the offer by reference to his assessment of likely future costs, are factors which are properly taken into account when considering the reasonableness of the fee charged. [22]

Were the fees charged fair and reasonable?

[176] Attention then returns to a considered assessment as to whether the fees charged were fair and reasonable.

[177] Adopting the approach identified in *Chean*, the need to step back and consider a fee "in the round" and having given careful attention to the requirement for a fee charged to be both fair and reasonable, and the importance for the assessment of a fee to take into consideration the interests of both lawyer and client, I find myself in agreement with both the costs assessor and the Committee, that the overall fee charged was excessive.

[178] Considering the nature of the claims being advanced, it is my view that Mr RF's assessment that costs reasonably incurred in the preparation for and in conducting of a one-day hearing in the ERA of $15,000 to $20,000 was excessive.

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[21] Preface to the Rules.
[22] R 9.1 (c) importance of matter to client and result achieved.

[179] In arriving at that view, I do not discount the obvious, that the fee charged will inevitably reflect the complexity of the case.

[180] The fee charged by Mr RF (excluding GST and disbursements) was $30,345.

[181] Even allowing for the costs incurred in advancing the matter to mediation, and additional costs involved in defending the application to strike out the proceedings, the level of fees appear high.

[182] Ms TG, in emphasising her view that the fees charged were excessive, noted that the advocate representing the employer had charged significantly less than Mr RF for preparing and advancing the employer's case in the ERA.

[183] Mr RF argued that it was irrelevant what had been charged by the employer's advocate, fairly noting that advocates have fewer overheads than law firms, and frequently charge an hourly rate based on a "no-win/no fee basis".

[184] Those are fair and reasonable arguments, and I do not place significant weight on the comparison advanced by Ms TG, except to note that it is clear that a competent advocate was able to effectively and successfully manage a case at considerably less cost, in circumstances where Mr RF was suggesting that the case was characterised by a high degree of complexity.

[185] I accept that additional costs were incurred in responding to the strike out application, and in preparing the costs submissions, but again, I find myself in agreement with the costs assessor that costs incurred in resisting the strike out application present as high.

[186] Again, I am not persuaded that providing submissions in response to the application to strike out presented as a particularly difficult exercise.

[187] A careful reading of the ERA member's decision on the strike out application would suggest that there was an inevitability about the decision to refuse to decline Ms TG an opportunity to advance argument that she had not been adequately reimbursed.

[188] I have carefully considered the costs assessor's comments at [23], [28] and [33] of his report. I have cross-referenced those comments to the time records and invoices, and have considered the comments with reference to the conclusions reached concerning the value of the case to Ms TG, and the complexity of the case.

[189] I agree with the conclusions reached by the assessor.

[190] I consider the fee charged for preparing the cost submission was neither fair nor reasonable.

[191] Mr RF suggested that his submission was instrumental in ensuring that the costs award against Ms TG was modest, but a careful reading of the member's cost decision gives every indication that the approach adopted by the member was predictable, particularly bearing in mind the conventional and well-known approach adopted by the ERA to determine cost issues.

[192] Mr RF submits that his submission had "an impact on the result of the ERA Costs Award; with the Employer ending up getting significantly less than what it was seeking in its Application for Costs".[23]

[193] Mr RF's submissions were a little over a page long.

[194] A significant component of the submissions comprised a brief summary of the proceedings filed.

[195] The submissions proposed that costs lie where they fell and noted that the employer's application for strike out had been unsuccessful. The submission contextualised the timeframe in which the without prejudice costs offer had been received.

[196] The submission was straightforward, and capable of being drafted quickly by a practitioner of Mr RF's experience.

[197] It would be difficult to see how an experienced practitioner would be required to spend more than an hour of time in attending to drafting the submission.

[198] It appears to be the case that the employer's advocate simply filed copies of invoices recording costs charged to her client.

[199] The cost decision delivered was predictable. It noted that costs awarded in the authority were modest, and recorded as a starting point for its assessment, the daily tariff of $4,500.

[200] Predictably, the member varied the tariff in recognition of the employer's lack of success with its counterclaim and strike out applications, and to recognise the significance of the Calderbank offer, and the employer's success in defending Ms TG's claims.

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[23] Mr RF, submissions to the LCRO (28 January 2019) at [4.4].

[201] Fees charged by Mr RF subsequent to the ERA hearing were $1,715. Most of that fee appears to have been incurred perusing the ERA's decision and attending to the costs submissions.

[202] Whilst I recognise that it can be a fraught exercise to unpick time records, consistent with the conclusions reached by the Standards Committee, I consider that Mr RF's time records (although I accept that those records reflect actual time spent) do not provide a proper reflection of a reasonable fee for work completed, particularly when considering that the fee must be both fair and reasonable, and a fee which serves the interests of both parties.

[203] Having, as I am required to do, looked at the matter afresh, I find myself in agreement with the Standards Committee and its cost assessor that the fee charged by Mr RF was not fair and reasonable.

[204] In reaching that view, I have concluded that:

(a) Mr RF's over reliance on time recorded distorted the fee charged. Adherence to time records as the mainstay for fee calculation risks sacrificing substance on the altar of form; the substance of a fee must be fair and reasonable and not arithmetical.

(b) Mr RF's failure to adequately discuss litigation risk and likely costs of pursuing the claim represented a significant failure on his part to adequately inform Ms TG.

(c) Mr RF's failure to adequately inform Ms TG as to the implications of the Calderbank offer presented as a failure to competently advise Ms TG.

[205] Having concluded for the reasons set out above, that the fee charged was not fair and reasonable, and failed to sufficiently consider the interests of Mr RF's client, I am not prepared to interfere with the Committee's decision or the orders made by the Committee.

[206] Fee assessment is not an exact science. Rules 9 and 9.1 endeavour to introduce rigour to the process but even that will inevitably give rise to disagreement about what is fair and reasonable in any given situation.

[207] A panel of experienced lawyers, with the assistance of a lay observer and informed by a cost assessors report, has determined what it considers to be a fair and reasonable fee.

[208] I have, as I am required to do, independently assessed the fee charged. Having done so, I find myself in agreement with the conclusions reached by the Committee.

Costs

[209] Where a finding of unsatisfactory conduct is made or upheld against a practitioner on review it is usual that a costs order will be imposed. I see no reason to depart from that principle in this case.

[210] Mr RF is ordered to contribute the sum of $1,200 to the costs of the review, that sum to be paid to the New Zealand Law Society within 30 days of the date of this decision.

Enforcement of costs order

[211] Pursuant to s 215 of the Act, I confirm the costs order made in this decision may be enforced in the civil jurisdiction of the District Court.

Publication

[212] Pursuant to s 206(4) of the Act I direct that this decision be published so as to be accessible to the wider profession in a form anonymising the parties and bereft of anything as might lead to their identification.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed.

DATED this 27th day of August 2020

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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:

Mr RF as the Applicant

Ms TG as the Respondent
Mr ZH as a Related Person
[City] Standards Committee
New Zealand Law Society