

**LEGAL COMPLAINTS REVIEW OFFICER  
ĀPIHA AROTAKE AMUAMU Ā-TURE**

[2020] NZLCRO 112

Ref: LCRO 33/2020

**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**

**AW on behalf of [Company A]**

Applicant

**AND**

**TB**

Respondent

**DECISION**

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

**Introduction**

[1] Mr AW, on behalf of [Company A] (the company) has applied for a review of a decision by the [Area] Standards Committee X to take no further action in respect of the company's complaint concerning the conduct of the respondent, Mr TB.

**Background**

[2] In September 2018, Mr AW's company was engaged in a dispute with the [City] Council.

[3] Mr TB was instructed to represent the company.

[4] Between November 2018 and March 2019, Mr TB rendered three invoices, all of which were paid. These included:

- (a) invoice dated 27 November 2018 for \$1,932 including GST.
- (b) invoice dated 11 February 2019 for \$4,910.50 including GST.
- (c) invoice dated 27 March 2019 for \$8,935.50 including GST.

[5] Mr TB's final invoice was rendered on 11 June 2019, in the sum of \$14,490 including GST. This invoice remains unpaid.

### **The complaint and the Standards Committee decision**

[6] Mr AW lodged a complaint with the New Zealand Law Society Lawyers Complaints Service (Complaints Service) on 29 July 2019. The substance of his complaint was that:

- (a) Mr TB's retainer had been terminated because of communication problems and non-compliance with directions from the High Court.
- (b) Fees charged were excessive when measured against the service received.

[7] The Standards Committee identified the issue identified by Mr AW's complaint, as being whether the final invoice rendered by Mr TB in the sum of \$14,490, constituted a fair and reasonable fee for the services provided.

[8] The Complaints Service managed Mr AW's complaint through the Early Resolution Process.

[9] That procedure involves a Standards Committee conducting an initial assessment of a complaint and forming a preliminary view as to outcome.

[10] If the Committee forms a view that the complaint lacks substance, a Legal Standards Officer (LSO) will make contact with the respondent lawyer and inform the lawyer of the outcome of the Committee's initial assessment.

[11] On 21 January 2020, Mr TB was advised that the Standards Committee had considered the conduct complaint and reached a preliminary view that it would be taking no further action on the complaint. Mr TB was advised that he was able to provide a response to the complaint if he wished, but informed that the Committee had concluded that the complaint could be adequately decided with the information then available to it.

[12] The Standards Committee delivered its decision on 21 January 2020.

[13] The Committee determined, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act), that no further action on the complaint was necessary or appropriate.

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

- (a) Mr TB and his staff had spent a considerable amount of time on the retainer prior to its determination.
- (b) Mr TB's final invoice was fair and reasonable for the work undertaken

### **Application for review**

[15] Mr AW filed an application for review on 19 February 2020.

[16] He submits that:

- (a) Mr TB had advised him to discontinue his appeal, it was not the case as represented by the Committee, that Mr AW had provided instructions to withdraw the appeal; and
- (b) Mr TB had failed to complete work on time and was repeatedly seeking extensions from the court; and
- (c) Mr TB had not produced the work which is reflected in his time records; and
- (d) the Standards Committee had failed to evaluate the work completed by Mr TB.

[17] In providing response to Mr AW's review application, Mr TB submitted that:

- (a) Mr AW's complaint related exclusively to fees; and
- (b) the only relief sought by Mr AW was a reduction in fees; and
- (c) Mr AW had endeavoured on review to raise new issues; and
- (d) Mr AW had himself created difficulties when progressing the litigation; and
- (e) extensive work had been completed for Mr AW; and
- (f) the proceedings were relatively complex; and

- (g) fees charged were consistent with estimates provided; and
- (h) Mr AW had raised no concerns about fees charged when the retainer terminated.

## Hearing

[18] A hearing proceeded on Thursday 25 June 2020. Both parties were present.

## Nature and scope of review

[19] 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>1</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.

[20] More recently, the High Court has described a review by this Office in the following way:<sup>2</sup>

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.

[21] 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:

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<sup>1</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

<sup>2</sup> *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

- (a) Consider all of the available material afresh, including the Committee's decision; and
- (b) Provide an independent opinion based on those materials.

### **Discussion**

[22] In correspondence to the Complaints Service of 28 July 2019, Mr AW advised that "unfortunately, the services of Mr TB were terminated on 25 June 2019 on account of communication problems and non-compliance of HC directions". Mr AW noted that he considered that the services "rendered were practically negligible; whereas the invoices charged are excessive compared to services effectively rendered".

[23] Mr AW's complaint form is dated [date] 2019. In the section of the complaint form where an applicant is required to identify the nature of his or her complaint, Mr AW particularises his complaints as being that:

- (a) Mr TB had failed to provide him with a copy of submissions he had prepared.
- (b) Mr TB had failed to comply with a direction of the Court.

[24] In the section of the complaint form where an applicant is invited to particularise details of any specific costs complaints, Mr AW listed the invoices received, and recorded his willingness to pay a "reasonable amount for almost zero services rendered to me".

[25] Further, Mr AW recorded his view that he considered he had "already paid too much to receive almost nothing".

[26] Considered in its totality, the concerns identified by Mr AW as providing the basis for his complaints were:

- (a) Complaint that he had received little value for fees rendered.
- (b) Mr TB had (in one identified instance) failed to provide competent representation.
- (c) Mr TB had failed to communicate effectively.

[27] The Committee identified the focus of its inquiry as solely being an investigation into the question as to whether the final invoice rendered by Mr TB was fair and reasonable for the work undertaken.

[28] Proceeding its inquiry with this focus on a single issue, it could be assumed that Mr AW's only complaint was with the final invoice rendered.

[29] On my reading of Mr AW's complaint, it is clear that in focusing its inquiry only on the question as to whether the final account rendered by Mr TB was fair and reasonable, the Committee failed to address Mr AW's broader complaint that he had not been ably represented by Mr TB.

[30] I make no criticism of the Committee for overlooking the fact that Mr AW's complaints extended beyond a single-issue complaint regarding fees charged in the final invoice rendered.

[31] Mr AW's complaint was poorly articulated.

[32] But in signalling when filing his complaint that he had been the recipient of "zero services" and in expressing the view that he had "paid too much to receive almost nothing", Mr AW was indicating that he was dissatisfied with the representation he had received.

[33] Nor was Mr AW's fee complaint solely related to the final invoice rendered, as the Committee considered it to be.

[34] To the extent that his concern about the fees was complaint that he had received little value for costs expended, his complaint embraced the total fees that he had been charged.

[35] Mr AW recorded in his initial complaint that he had paid three of the invoices rendered but had not paid the final invoice. But this was not indication, as the Committee clearly took it to be, that Mr AW only took objection to the final invoice.

[36] At the commencement of the review hearing, Mr AW was asked to clarify the basis of his objections to the Committee decision. He advised that he considered that the Committee had failed to recognise that his complaint was not solely about the fees charged by Mr TB, but also about the quality of the representation he had received from Mr TB.

[37] Having given indication to Mr TB that I had formed a view on a preliminary analysis, that there was merit in Mr AW's argument that the Committee had overlooked an important element of his complaint, Mr TB was given opportunity to comment.

[38] Whilst Mr TB considered that the complaint was essentially a fees complaint, he accepted that Mr AW's initial complaint did raise argument (albeit loosely expressed)

as to whether he had been competently represented.

[39] I indicated to the parties that I was giving consideration to returning the matter to the Standards Committee with directions for it to consider the complaint in its expanded form.

[40] However, mindful of the desirability for the parties of having the matter resolved without further delay and inconvenience to them, I turned attention to the question as to whether there was sufficient information before me on review to enable me to determine the questions as to whether Mr TB had provided his client with competent advice, and whether fees charged were fair and reasonable.

[41] I consider that I was better placed to assess the reasonableness or otherwise of the fees than was the Committee.

[42] In assessing the fees, the only information available to the Committee were the notated invoices that Mr TB had provided to his client.

[43] The Committee did not make request of Mr TB to provide his file. Nor did it have copies of his time records. It had no evidence from Mr TB, as Mr TB was not required to provide response to the complaint.

[44] In my view, scrutinising the reasonableness of a practitioner's fee solely on the basis of a perusal of the invoices provided by the practitioner has limitations. The total fees charged were not insignificant (\$26,320). There was limited information on the Standards Committee file to inform as to the work that had been done.

[45] The Court minutes included in the file simply detailed directions made for progressing the file. There was no evidence other than the notated accounts as to what had been done by Mr TB.

[46] On review however, I had the advantage of having received both written and oral submissions from the parties.

[47] Armed with those submissions, I was satisfied that I was both well placed to determine the issues, and that it was in the interests of the parties that I do so rather than delay resolution by returning the matter to the Standards Committee.

[48] The two issues to address are:

- (a) Did Mr TB provide competent representation to Mr AW?
- (b) Were the fees charged fair and reasonable?

*Did Mr TB provide competent representation to Mr AW?*

[49] As noted, Mr AW's argument that he had not been competently represented was not well articulated in his initial complaint.

[50] Asked to clarify his position at hearing, Mr AW argued that Mr TB had adopted a litigation strategy that was manifestly wrong and doomed to fail. It was Mr AW's view that he had advised Mr TB as to a more appropriate strategy that should be adopted, but Mr TB had refused to follow his instructions.

[51] Mr AW said that after he terminated Mr TB's retainer, he took over the management of the case and, adopting the strategy he had been recommending all along, a successful settlement was negotiated with the [City] Council. To support this argument, Mr AW referred me to a document which he submitted was evidence of him achieving a successful outcome.

[52] With every respect to Mr AW, the document he relies on falls well short of establishing that he had succeeded in his case. The document records Mr AW's agreement to withdrawing his appeal, together with his undertaking to pay substantial costs to the council. The document gives no indication of the Council agreeing to remove restrictions placed over Mr AW's property. To the contrary, the document confirms that the abatement notice that Mr AW was challenging remained in force, and reinforces the continuing obligation on Mr AW to maintain ongoing compliance with a number of regulatory Acts.

[53] Mr AW referred me to a statement from an expert witness that he argued supported his contention that Mr TB's litigation strategy was flawed.

[54] The statement relied on by Mr AW did not assist in clarifying Mr AW's argument, and, as explained to Mr AW at hearing, it does not fall within the scope or expertise of a Review Officer to make judgments on the accuracy of specialist expert reports.

[55] Mr TB, in responding to Mr AW's argument that an expert witness supported Mr AW's view that Mr AW had been poorly advised, countered with argument that the expert's opinion was in fact at polar opposites to what Mr AW had argued for. Mr TB explained that he had contacted the expert witness who had confirmed to Mr TB that he was in total agreement with the litigation strategy promoted by Mr TB. Mr TB indicated that the witness had indicated that he would be happy to give evidence to that effect.

[56] I place no weight on the disputed evidence of the witness relied on by Mr AW, but would note, that it was Mr AW's responsibility to ensure that all the evidence on which



he sought to rely was put before the Standards Committee.

[57] Mr AW forwarded a bundle of documents to the Legal Complaints Review Officer two days before the Review hearing was to proceed. Whilst a Review Officer will commonly refuse to accept new evidence filed on review, (the expectation being that parties are required to put all relevant evidence before the Standards Committee), I have considered the documents filed. In large part the documentation provided has minimal relevance to the conduct complaint being advanced by Mr AW.

[58] No other significant evidence is advanced by Mr AW to support this element of his complaints.

[59] In responding to argument that he had failed to provide Mr AW with competent advice, Mr TB emphasised that he was an experienced practitioner who had developed a particular expertise in regulatory matters. He said that he had considerable experience in litigation involving the [City] Council.

[60] Mr TB was emphatic that the approach he had adopted to the litigation was the correct one. He said that he had difficulty throughout the course of the retainer, managing Mr AW, and argued that Mr AW's case was continually being frustrated by unhelpful and inappropriate interventions from Mr AW. He argued that he was frequently having to intervene to prevent Mr AW from compromising the case.

[61] Mr TB produced a series of emails in which he had cautioned Mr AW that he faced an uphill battle in advancing a successful appeal. Those emails, and there are a number of them, give indication that Mr TB was anxious to ensure that Mr AW was fully informed as to the difficulties faced with his case. A further and consistent theme running through the email trail, is the persistent attempts being made by Mr TB to dissuade Mr AW from adopting positions in the litigation that Mr TB considered were detrimental to Mr AW.

[62] The volume of the email exchanges, and the extent to which those emails reflect the degree to which Mr TB endeavoured to keep Mr AW informed about the progress of the case, persuades me that Mr TB communicated effectively with Mr AW throughout the course of the retainer.

[63] Ultimately, the forum for determining the effectiveness or otherwise of the litigation strategy advanced by Mr TB, was the court. It was in that arena, that the merits of Mr TB's argument would have been best tested.

[64] But Mr AW's decision to terminate the retainer shortly prior to the appeal proceeding, inevitably meant that Mr TB's arguments remained untested.

[65] Whilst there is abundant evidence of Mr TB and Mr AW having robust exchanges during the course of the retainer as to the approach to be adopted in advancing Mr AW's case before the court, there is no indication in those exchanges of Mr AW becoming concerned that Mr TB was not providing him with competent representation.<sup>3</sup>

[66] Mr AW conceded at the hearing that he had, throughout the course of the retainer, complimented Mr TB on the job he was doing. He accepts that he had indicated to Mr TB that he wished to instruct him on other matters.

[67] There is no evidence that Mr TB was responsible for a failure to comply with court-directed timeframes for filing of documents. It is clear however, that Mr TB's ability to meet a timeframe for filing was compromised on at least one occasion, by Mr AW's decision to change his instructions at last minute.

[68] I am not persuaded that Mr TB failed to provide Mr AW with competent representation.

*Were the fees charged fair and reasonable?*

[69] Mr AW's criticism that fees charged were excessive, overlaps to a significant degree with the criticism Mr AW makes of the value of the services provided.

[70] Fees charged were excessive says Mr AW, because the work done was of little value.

[71] To the extent that Mr AW identifies specific concerns regarding the fees (as opposed to general complaint of poor representation) his complaint is focused on argument that Mr TB's failure to meet court directed timeframes, resulted in additional paperwork having to be prepared and requests being made for extensions, this resulting in the incurring of additional and unnecessary costs.

[72] I am not persuaded that any failure to meet court deadlines was caused by Mr TB's failure to have documents prepared on time.

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<sup>3</sup> There is evidence of disagreement over strategy issues and concerns being raised over payment of outstanding fees shortly before the termination of the retainer, but no indication of Mr AW expressing concerns over any prolonged period of time.

[73] On the single occasion identified when a court deadline was not met, I am satisfied that the email correspondence between the parties establishes that the delay in filing resulted from Mr AW's decision to change his instructions at the last minute. Mr TB submits, that Mr AW had acknowledged that his change of instructions had caused the delay, and this had been explained in both a minute and memorandum provided to the court.

[74] Mr AW does not suggest that Mr TB charged him an hourly rate that was excessive. He does not suggest that Mr TB charged for work that was not completed. He does not suggest that Mr TB replicated work or carried out work that was unnecessary.

[75] Mr TB provided a comprehensive account of work that had been completed on Mr AW's file. He did so by referencing his submissions to the reasonable fee factors set out in r 9.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[76] Mr TB submitted that a significant amount of time had been spent on Mr AW's file. Whilst he had not been required to provide time records to the Standards Committee and had not brought those records to the review hearing, he advised that he was able to provide his time records if required.

[77] Mr TB explained that work completed on Mr AW's file included:

- (a) four court appearances; and
- (b) preparation of four memorandums for the court; and
- (c) preparation of detailed submissions; and
- (d) preparing a response to an application to strike out; and
- (e) preparing applications to adduce further evidence; and
- (f) briefing of experts;
- (g) preparing case authorities and document bundles;
- (h) extensive research; and
- (i) preparation for the appeal.

[78] Mr TB emphasised that the retainer was characterised by a high degree of engagement with his client, confirmed he says by what he describes as hundreds of email exchanges between himself and Mr AW, and numerous attendances.

[79] Mr TB submitted that the case had a considerable degree of complexity and that he brought to the retainer a significant degree of specialised knowledge in the area of litigation engaged by the appeal.

[80] Mr TB emphasised that there was a degree of urgency in completing the work, and that the matter was one of considerable importance to Mr AW. He considered that his hourly rate (and the overall fee charged) was consistent with fees charged in the market for similar legal services.

[81] In summary, Mr TB submitted that he had provided a high level of service to Mr AW, and that the fees charged were consistent with the estimates provided to Mr AW at the commencement of the retainer.

[82] Having carefully considered Mr AW's evidence, the extensive correspondence produced by Mr TB, and having had opportunity to hear comprehensive submissions from the parties, I am satisfied that the fees charged were fair and reasonable.

*Anonymised publication*

[83] 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 30<sup>TH</sup> day of June 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 AW as the Applicant  
Mr TB as the Respondent  
[Area] Standards Committee X  
New Zealand Law Society