

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

[2022] NZLCRO 011

Ref: LCRO 6/2022

CONCERNING

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a decision of the [Area] Standards Committee [X]

BETWEEN

ZED LIMITED

Applicant

AND

RK

Respondent

DECISION

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

Introduction

[1] On behalf of ZED Limited (ZED), Mr YP has applied to review a decision by the [Area] Standards Committee [X] (the Committee) dated 16 December 2021, in which the Committee decided to take no further action on a complaint about legal fees charged by Mr RK.¹

[2] The Committee based its decision upon s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act). This allows a Committee to dismiss a complaint at an early stage, if it considers that further action on it is neither necessary nor appropriate.

¹ For ease of reference in this decision, I will refer to Mr [YP] as the applicant, rather than to [ZED Limited].

Procedural background

[3] Mr RK had represented Mr YP in judicial review and associated proceedings, in connection with a District Council subdivision consent.

[4] The proceedings were unsuccessful.

[5] Mr YP made a competence and fees complaint about Mr RK to the New Zealand Law Society Complaints Service (Complaints Service) on 11 August 2020.

[6] In a decision dated 23 December 2020 the Committee took no further action on Mr YP's complaint, and on 28 January 2021 he applied to review that decision.

[7] I dealt with that review application on the papers and issued a decision on 24 August 2021. I upheld the Committee's decision to take no further action on Mr YP's competence complaint, but I returned the fees complaint to the Committee with a direction to reassess the fairness and reasonableness of those fees.²

[8] The Committee did so and issued a decision on the re-investigated fees complaint on 16 December 2021. Its conclusion was that Mr RK's fees for the legal work he did on Mr YP's behalf, were fair and reasonable.

Original complaint

[9] As to fees, Mr YP said the following in his 11 August 2020 complaint:

- (a) As a consequence of the unsuccessful litigation [ZED] had to pay costs to the District Council of approximately \$26,000. This was in addition to legal fees of \$18,237.50 that it had already paid Mr RK.
- (b) Mr RK made no contact after issuing his last invoice until his business partner, 20 months later, issued a letter of demand for the balance of legal fees owing.
- (c) As at October 2020, [ZED] had only paid \$18,237.50 of the invoices issued by Mr RK. Therefore, together with the court-ordered costs it had paid out a total amount of \$44,215.50 which Mr YP described as "a massive and a not foretold result."

² *ZED Ltd v RK* [XXXX] NZLCRO XXX.

Response

[10] Mr RK's response to the fees complaint was:

- (a) The legal work included an application for an injunction, an application to prevent a caveat from lapsing as well as the judicial review proceedings. All steps were "vehemently opposed".
- (b) Total legal fees were \$33,660 plus GST and disbursements, making a total of \$41,561.50. This compares with scale costs in the High Court Rules 2016 (category 2B proceedings) of \$40,913. This does not include the injunction and caveat proceedings.

[11] Mr RK attached his firm's letter of engagement to his response.

Standards Committee's 16 December 2021 decision (following referral back)

[12] The Committee resolved to appoint a cost assessor to assist with its inquiry. As well, Mr RK provided his files to the Committee.

[13] The cost assessor's report was provided to the parties, and Mr YP made submissions about that report.

[14] The Committee identified the issue as being whether Mr RK's fees were fair and reasonable.³ It noted that its assessment would be carried out "in light of the factors set out in [r 9.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules)]".

[15] The Committee observed that Mr RK's nett fees were \$33,600 which, at Mr RK's charge-out rate of \$400 per hour, represented 94 hours of his time.⁴

[16] The Committee noted the cost assessor's view that Mr RK had completed "a substantial amount of work" and that the disbursements were "properly incurred".⁵

[17] The cost assessor had also noted that Mr RK charged Mr YP a file set-up fee of \$50, but had not referred to this in his terms of engagement. Nevertheless, the Committee did not consider this to be an issue requiring any deduction from the invoices as a whole.

³ Standards Committee decision (16 December 2021) at [15].

⁴ The costs assessor's report refers to 84.14 hours; I anticipate that the Committee's reference to 94 hours is a typographical error.

⁵ At [18] and [19].

[18] In connection with Mr YP's obligation to pay costs as a result of the unsuccessful litigation, the Committee held that this was "not relevant to the matter of whether Mr RK's fees were fair and reasonable".⁶

[19] In addressing the reasonable fee factors in r 9.1 of the Rules, the Committee held that "Mr RK had the necessary skill, knowledge and expertise to undertake the work" and that the matter was "of importance" to Mr YP.⁷

[20] Further, the Committee considered that the circumstances of the litigation did not present unusual urgency and that the matter was of "medium complexity".⁸

[21] In relation to Mr YP's assertion that Mr RK's fees should be reduced because the litigation was unsuccessful, the Committee noted "that litigation is inherently risky and there was always the possibility in any litigation of an unsuccessful outcome, no matter how well a case is argued."⁹ It held that the result of the litigation was not relevant to the assessment of Mr RK's fees.

[22] The costs assessor had noted that Mr RK's terms of engagement did not refer to his charge out rate (\$400) or that of his legal executive (\$120). He recommended that these should be recorded in Mr RK's terms of engagement. Nevertheless, he considered that both charge-out rates were reasonable

[23] The Committee agreed with this conclusion concluding that "the fees charged were commensurate with what would be charged by other practitioners in the marketplace for similar services."¹⁰

[24] It was the Committee's conclusion that Mr RK's fees were fair and reasonable.

Review Application

[25] Mr YP filed his application for review on 12 January 2022. He said:

- (a) The Committee was wrong to overlook Mr RK's failure to record his and his legal executive's hourly rates in the letter of engagement.
- (b) Because the litigation was unsuccessful (when Mr RK had "touted [the case] as clearly winnable"), Mr RK's fees should be reduced.

⁶ At [20].

⁷ At [21] and [22].

⁸ At [24] and [25].

⁹ At [23].

¹⁰ At [27].

Response by Mr RK

[26] In a letter to the Case Manager dated 26 January 2022, Mr RK submitted:

- (a) Mr YP has not previously raised the issue of hourly rates not being in Mr RK's letter of engagement.
- (b) Mr YP is relitigating the competence issue which has already been the subject of an unsuccessful review application by Mr YP.
- (c) The question of the inclusion of hourly rates was raised by the costs assessor. However, it is not a requirement under the Rules for a lawyer to include their charge out rates in a letter of engagement. Rule 9.1 refers to "time and labour expended" as being one of thirteen reasonable fee factors. Mr RK's letter of engagement historically described fees as being charged on the basis of all of the factors in r 9 of the Rules.
- (d) Moreover, Mr RK's original instructions came from another firm of solicitors and in those circumstances a letter of engagement was not required, and was not requested.
- (e) Nevertheless, through the solicitors who had instructed Mr RK, he gave Mr YP a letter of engagement. Additional information was not requested and Mr YP did not raise any complaint about the invoices, until pressed to pay.
- (f) Fees charged to Mr YP were less than the High Court scale for the litigation. The fees were fair and reasonable.

Review on the papers

[35] This review has been undertaken on the papers pursuant to s 206(2) of the Lawyers and Conveyancers Act 2006 (the Act), which allows a Review Officer to conduct the review on the basis of all information available if the Review Officer considers that the review can be adequately determined in the absence of the parties.

[36] In anticipation of that process being followed, in an email from the Case Manager dated 10 February 2022 the parties were given an opportunity to make submissions as to whether they wished Mr YP's review application to proceed by way of a hearing in person, or a hearing on the papers.

[37] The parties were advised that a lack of any response would be deemed by me as consent by them to the hearing proceeding on the papers.

[38] In an email to the Case Manager dated 17 February 2022, Mr RK indicated that he had no objection to the review application being determined by me on the papers.

[39] Mr YP did not respond to the Case Manager's email, and consistent with the indication given in that email I have taken this to mean that he consents to his review application being dealt with on the papers.

[40] On the basis of the information available, I have concluded that the review may be adequately determined on the papers and in the absence of the parties. The Case Manager informed the parties of this in an email dated 18 February 2022.

[41] I record that having carefully read the complaint and response, the Committee's decision (including the costs assessor's report) 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 submission from either party.

Nature and scope of review

[42] The nature and scope of a review was discussed by the High Court in 2012, which said of the process of review under the Act:¹¹

... 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.

[43] In a later decision, the High Court described a review by a Review Officer in the following way:¹²

¹¹ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41] (citations omitted).

¹² *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475.

[2] ... A review by [a Review Officer] is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the [Review Officer's] own opinion rather than on deference to the view of the Committee.

...

[19] ... A "review" of a determination by a Committee dominated by law practitioners, by the [Review Officer] who must not be a practising lawyer, is potentially broader and more robust than either an appeal or a judicial review. The statutory powers and duties of the [Review Officer] to conduct a review suggest it would be relatively informal and inquisitorial while complying with the principles of natural justice. The [Review Officer] decides on the extent of the investigations necessary to conduct a review in the context of the circumstances of that review. The [Review Officer] must form his or her own view of the evidence. Naturally [a Review Officer] will be cautious but, consistent with the scheme and purpose of the Act ... those seeking a review of a Committee determination are entitled to a review based on the [Review Officer's] own opinion rather than on deference to the view of the Committee. That applies equally to review of a [decision] under s 138(1)(c) and (2) [of the Act].

[20] ... While the office of the [Review Officer] does not have the formal powers and functions of an Ombudsman, it can be expected to be similarly concerned with the underlying fairness of the substance and process of the Committee determinations in conducting a review.

[21] A review by the [Review Officer] is informal, inquisitorial and robust. It involves the [Review Officer] coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[44] Given those directions, my approach on this review has been to:

- (a) independently and objectively consider all the available evidence afresh;
- (b) consider the fairness of the substance and process of the Committee's determination;
- (c) form my own opinion about all of those matters.

Discussion

[45] As a preliminary observation, I note that Mr YP raised competency issues in his review application. He referred to the judge in the judicial review proceedings having "ruled" that Mr RK had poorly advised Mr YP.

[46] That issue was considered and determined by me in my 24 August 2021 decision. It was not an issue which I directed the Committee to reconsider.

[47] It is simply not correct for Mr YP to say that the judge had "ruled" that Mr RK's advice was sub-par. I addressed that issue in my 24 August 2021 decision as follows:

[88] [The judge's comments were] entirely conventional remarks made by a judge during the course of considering competing arguments, and arriving at a conclusion about those arguments. Those comments do not, even impliedly, indicate the judge's view that Mr RK's argument was entirely without merit and ought never to have been brought.

[48] To put the competence issue beyond doubt and to rest once and for all, I repeat what I said in my 24 August 2021 decision:

[92] There is no substance to Mr YP's complaint that Mr RK's advice, or indeed his conduct of the proceedings, lacked the required level of competence. To the contrary, and despite the fact that [ZED] was unsuccessful, at least from the judicial review decision, it appears that Mr RK's representation was meticulous.

Fees

[49] The only issue on review is the whether the fees charged by Mr RK were fair and reasonable.

[50] Mr YP's challenge to those fees relies on two arguments: first, that Mr RK's advice was not competent. That challenge falls away because of the emphatic findings that I have made about competence.

Costs

[51] Secondly, Mr YP argues that because the litigation was unsuccessful and ZED was required to pay costs, this should be reflected in Mr RK's fees by way of reduction.

[52] I reject this argument now, as I did in my 24 August 2021 decision. In that decision I specifically said:

[95] Those costs were ordered by the High Court, and they naturally followed the fact that [ZED] was unsuccessful in the judicial review proceedings. I have already held that there is no room for saying that [ZED] lost because of any failure by Mr RK to provide competent representation.

[96] The question of Mr RK's fees is confined to just that: invoices issued by him.

[53] The Committee also briefly addressed that issue in its reconsideration of the fees complaint and correctly, in my view, held that "the result of the litigation is irrelevant to the assessment of whether the fees were fair and reasonable."¹³

[54] There is no doubt in my mind that Mr RK is a highly experienced and very competent lawyer in this particular area of judicial review; that is to say, where it intersects with local government and resource management issues.

¹³ Standards Committee decision (16 December 2021) at [23].

[55] The judgment in this litigation gives indication of litigation that was vigorously contested by both sides. The fact that Mr RK's arguments were ultimately unsuccessful, simply reflects the nature of adversarial litigation.

[56] It diminishes the judgment of a judge to suggest that their views were informed by the arguments of a better lawyer.

[57] There is no principled basis for reducing Mr RK's fees because ZED had to pay costs as the unsuccessful party in the litigation.

[58] Nevertheless, it is necessary to consider the question of Mr RK's fees having regard to the requirement in r 9 of the Rules that:

a lawyer may not charge a client more than a fee that is fair and reasonable for the services provided, having regard to the interests of both the client and the lawyer and having regard also to the factors set out in r 9.1 [of the Rules].¹⁴

Costs assessor's report

[59] The costs assessor's report is dated 3 November 2021. It is commendably thorough and I have found it extremely helpful.

[60] The assessor's conclusion was "that overall the fee charged by [Mr RK] was fair and reasonable for the work undertaken." The costs assessor sets out eight different reasons for coming to that conclusion.¹⁵

[61] Nevertheless, the costs assessor identified a separate issue relating to Mr RK's and his legal executive's charge out rates, noting that they were not included in Mr RK's terms of engagement. The costs assessor said:

Where fees are calculated on an hourly basis, the Letter of Engagement should include the hourly rate of relevant staff who will be working on the file.

[62] The costs assessor recommended Mr RK to include more detail in his terms of engagement.

[63] Mr YP has argued that the lack of this information justifies a reduction in Mr RK's fees. His argument would appear to be that the hourly rates were contractual terms to which he had not agreed.

¹⁴ I do not intend to separately set those factors out in this decision. They are listed in the cost assessor's report, which was provided to the parties by the Committee.

¹⁵ Costs assessor's report (3 November 2021) at [94].

[64] Mr RK has countered that by noting that the Rules do not require a lawyer to set out their hourly rates in their terms of engagement, provided that the information given to a client is consistent with the requirements of rr 9 and 9.1 of the Rules. He said that his invariable approach has been to say the following in his terms of engagement:

The basis on which our fees will be calculated is in accordance with the New Zealand Law Society Rules of Professional Conduct. The fees are charged in accordance with rule 9 of the Rules of Professional Conduct.

[65] Mr RK added that he now attaches a copy of r 9.1 of the Rules to his terms of engagement.

[66] Mr RK may well be correct when he says that r 9 or any of its sub-rules do not explicitly require a lawyer to give their client indication of an hourly rate.

[67] However, I have some doubts that simple reference to the r 9.1 reasonable fee factors adequately meets the obligation to provide information on “the basis upon which ... fees will be charged.”

[68] I say this because the Rules, as a whole, emphasise the importance of a lawyer keeping their client informed about all aspects of the legal services to be and being provided.

[69] Further, providing information about hourly rates, when that is one of the bases for charging fees, presents as being consistent with the requirement in r 3.4 of the Rules that a lawyer must provide their client with information on “the basis upon which the fees will be charged”.

[70] My experience as a Review Officer, and before that a member of a Standards Committee for nine years, is that this information seems routinely to be included in lawyers’ terms of engagement, when time expended is one of the bases for fee charging.

[71] It is difficult to see why a lawyer would not want to inform their client about hourly rates (including provision for those to be increased if necessary). Quite apart from anything else, it removes a potential ground of complaint.

[72] Nevertheless, I do not need to explicitly decide whether the provision of information about hourly rates is a requirement in every case where fees are being charged on that basis. In my view, this fees complaint does not stand or fall on that issue.

[73] I say this because it is clear that Mr YP has never raised the issue of Mr RK's hourly rates and only appears to have done so following receipt of the costs assessor's report.

[74] Mr YP had paid approximately \$18,200 towards Mr RK's fees before he made his suggestion that the rest be written-off because the litigation had been unsuccessful. Even then, there was no suggestion by him that Mr RK's hourly rate was excessive.

[75] Moreover, the lack of information about hourly rates would not necessarily lead to a finding that fees charged were excessive. The conduct issue is more likely to be the adequacy of fees information given to a client at the commencement of a retainer.

Fees fair and reasonable?

[76] Thus, as indicated by me in my 24 August 2021 decision, the issue boils down to whether or not the total of the invoices issued by Mr RK reflects fees that are fair and reasonable.

[77] As I have said above, I have been considerably assisted by the costs assessor's detailed report as was, I am certain, the Committee.

[78] I also acknowledge that the Committee's analysis of Mr RK's fees indicates careful and proper attention being given to the fairness and reasonableness question.

[79] Both the costs assessor's and the Committee's conclusions were that Mr RK's fees were fair and reasonable.

[80] The process of review, however, requires me to form my own independent and objective conclusion. Whilst a Review Officer may be assisted by what a costs assessor or a Committee has had to say about a conduct issue – fees or otherwise – ultimately, the Review Officer must form their own conclusions about the issue before them, and determine whether a disciplinary response is warranted.

[81] As I have noted, the costs assessor and the Committee both had the benefit of reviewing Mr RK's files. I have not asked for those files because I am satisfied that both took full and proper account of that material.

[82] Mr RK issued four invoices over a 10-month period. The nett amount of fees was \$33,660. With GST and disbursements added, the gross amount was \$41,561.50.

[83] Fees were calculated largely, if not exclusively, on the basis of time spent, with the hourly rate being \$400.

[84] As a starting point, I am satisfied that this hourly rate fairly and reasonably reflects Mr RK's seniority, experience and competence. Even if he had been aware of this rate at the time he received Mr RK's terms of engagement, I do not consider that Mr YP would have had a principled basis for quibbling with it.

[85] Whilst the litigation may have been in the category of "medium complexity" as characterised by the Committee,¹⁶ that does not diminish the specialist nature of the legal work. This much is confirmed by the fact that Mr YP's usual solicitor referred him to Mr RK for advice.

[86] Also reflective of the need for a specialist approach is the fact that the core instructions to Mr RK of issuing judicial review proceedings, were necessarily supplemented by injunction and caveat proceedings. The supplementary litigation produced a desired result for Mr YP in that his position was protected pending disposition of the judicial review proceedings.

[87] An arithmetical calculation of the nett fees charged divided by Mr RK's hourly rate, produces total time spent on the litigation and its related issues, of some 85 hours.

[88] I have carefully read what the costs assessor had to say about the work carried out by Mr RK in connection with each of the four invoices he issued. His description of the work was comprehensive and based upon the contents of Mr RK's file and the narrations on each of the four invoices issued by him.

[89] I respectfully agree with costs assessor's analysis; even without the benefit of Mr RK's file I find that the analysis is entirely consistent with the nature of Mr RK's retainer.

[90] I also agree with the costs assessor's conclusions which, in my view, correctly note that the time spent was entirely consistent with the nature of the work carried out and recorded on the narration for each invoice.

[91] Even standing back and looking, in the round, at the work involved with the judicial review proceedings and the supplementary litigation, my assessment is that 85 hours is entirely consistent with the nature of that work.

[92] In the end, Mr YP is unhappy about Mr RK's fees, because the litigation was unsuccessful. He is quite wrong to attribute responsibility for that to Mr RK.

¹⁶ Standards Committee decision (16 December 2021) at [25].

[93] It is almost trite to observe that litigation is inherently risky, and will invariably produce a winner and a loser. In the present case, Mr YP's lack of success was not as a result of anything that Mr RK either did or did not do.

[94] I am completely satisfied that Mr RK's fees are fair and reasonable.

Decision

[95] Pursuant to s 211(1)(a) of the Act, the decision of the Committee is confirmed.

Anonymised publication

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

DATED this 21ST day of FEBRUARY 2022

R Hesketh
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 YP on behalf of ZED Limited as the Applicant
Mr RK as the Respondent
Mr LD as a Related Person
[Area] Standards Committee [X]
New Zealand Law Society