LCRO 190/2016

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[X]
BETWEEN	**IJ** Applicant
AND	**KL** Respondent

DECISION

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

Introduction

[1] Mr IJ, a lawyer, has applied to review a decision by the [City] Standards Committee [X] dated 8 July 2016, in which the Committee made findings of unsatisfactory conduct against Mr IJ, fined him and ordered him to pay costs.

[2] The findings concerned Mr IJ's conduct when acting for Mr KL.

[3] A point raised by this review is that the Standards Committee considered and ruled upon an issue that had not been part of Mr KL's original complaint. The issue about which Mr IJ has particular concern, relates to conclusions reached that he had breached s 110 of the Lawyers and Conveyancers Act 2006 (the Act). That and the provisions that deal with a practitioner's obligations to hold client funds in trust, and maintain proper records of funds received.

Background

[4] Mr IJ is the principal in a law practice called IJ & Associates (the firm). The firm describes itself as workplace law specialists. Although Mr IJ practises as a

barrister and solicitor and is principal in the firm, his firm does not operate a trust account.

[5] Since early 2013 the firm has engaged [GH Group] [(GHG)] as its contracted practice manager. [GHG] ensures that the firm complies with its tax obligations and also manages the firm's billing and receipts.

[6] In about June 2013 Mr KL retained Mr IJ to represent him in a dispute with his employer. Apparently, Mr KL's employer indicated a possible redundancy. After Mr IJ was retained, the issues changed and issues of performance were raised. Eventually an exit package was negotiated with the employer. This occurred at a mediation attended by all parties, on 28 February 2014.

[7] The terms agreed at mediation were recorded in a written agreement, signed by the parties and certified by the mediator. This latter step is required by the Employment Relations Act 2000.

[8] One of the terms agreed at mediation was that the employer would make a contribution towards Mr KL's costs of representation, in the amount of $8,000 plus GST (i.e. $9,200). This term including the amount was recorded in the written agreement. The agreement recorded that payment would be made "on submission of a tax invoice by [the firm]".[1]

[9] During the retainer, Mr IJ rendered four invoices to Mr KL, all of which he paid. The total of these invoices (GST inclusive) was $5,305.75. It appears that the invoices were rendered after particular work had been completed – in other words, the amounts invoiced were not for fees in advance.[2]

[10] The last invoice is dated 24 January 2014, and deals with attendances by Mr IJ since 23 September 2013, being the date of the third and immediately preceding invoice.

[11] At the conclusion of the mediation and on 28 February, Mr IJ forwarded the employer an invoice for $9,200 (GST inclusive).[3]

[12] This was paid by the employer, directly to the firm, on 4 April 2014. This invoice included attendances in preparing for and attending the mediation, as well as some work completed before 24 January 2014.

---

[1] Mediated agreement (March 2014), at [8].
[2] The amounts of each invoice were (including GST and disbursements) $1,785, $905.25, $1,043.25 and $1,572.25.
[3] Invoice 878.

[13] Although Mr IJ continued to do work for Mr KL throughout March 2014 in connection with enforcing the mediation agreement, he has not charged any legal fees for attendances after the invoice he sent to the employer on 28 February 2014. In other words, that invoice was for completed attendances and did not include any amount by way of fees in advance.

[14] The total of the five invoices rendered by the firm was $14,505.76. It received that amount.

[15] However in reconciling their invoices and time records after Mr KL had made his complaint, the firm with the assistance of [GHG] concluded that some of the recorded time had been double-charged and the actual amount that should have been invoiced across the five invoices was $11,184.26 (GST inclusive) and not $14,505.76. The difference between the two amounts is $3,321.50 and this sum was forwarded to Mr KL by [GHG], on 25 July 2014.

[16] This meant that the legal fees actually paid by Mr KL were $1,984.26 ($5,305.75 paid – $3,321.50 refunded). That figure does not correspond with any of the four invoices that he paid.

[17] As indicated the employment dispute was settled by mediation in February 2014. Mr KL considered he was due a refund of all the fees that he had paid the firm up to that date, based upon the contribution agreement reached at mediation.

[18] Despite several requests by Mr KL to Mr IJ, no refund was received by him and so Mr KL made a complaint about that to the New Zealand Law Society Lawyers Complaints Service.

Complaint and response

[19] Mr KL's complaint was against the firm and is dated 22 July 2014. Mr KL sought "the payment for my legal fees". He attached the mediated agreement and copies of the invoices, totalling $5,305.75, all of which he had paid.

[20] The firm's response, sent by an associate on behalf of Mr IJ, was that following a "cost reconciliation" it was noted that Mr KL was due a refund of overpaid legal fees. The firm and [GHG] each thought that it had been processed earlier, and this explained the delay in Mr KL receiving it.[4]

[4] Letter [XX]to Lawyers Complaints Service (7 August 2014).

[21] Attached to the firm's letter was one from [GHG] to Mr KL, dated 25 July 2014, attaching a refund cheque of $3,321.50. It described this as "your portion of the costs recovered from [the employer]".

[22] Mr KL's comment about this response was that he had paid more than the amount he had been refunded. He expressed concern about the firm's and [GHG]'s business methods.

Committee's initial consideration

[23] Although framed as a complaint about the delay in receiving reimbursement for legal fees, the Standards Committee on initial review considered that broader issues arose. On 1 December, on behalf of the Committee the Complaints Service wrote to Mr IJ indicating that a decision had been made to inquire into the matter pursuant to s 137 of the Act.

[24] The Committee exercised its power to request and obtain the following information from Mr IJ, pursuant to s 147 of the Act (the s 147 request):

(a) A copy of his entire file.

(b) Copies of all records relating to funds received from or on behalf of Mr KL.

(c) An explanation of how the firm dealt with or retained funds from or on behalf of Mr KL, given that it does not operate a trust account.

(d) An explanation of the relationship between the firm and [GHG] and [GHG]'s role in dealing with funds received from or on behalf of clients (including Mr KL).

Response to the s 147 request

[25] Mr IJ's response to the s 147 request, may be summarised as follows:[5]

(a) The firm does not receive funds on behalf of clients.

(b) Where an employer agrees to contribute to a client-employee's legal fees (as happened here), and the client has already paid those fees, relevant invoices are cancelled, a credit note is issued and the client receives a refund.

[5] Letter IJ to Lawyers Complaints Service (18 December 2014).

(c) [GHG] is engaged by the firm to assist with accounting and to ensure tax compliance. It does not receive or retain funds on behalf of clients. [GHG] also assists with and monitors billing and receipting, and processing any refunds (as it did with Mr KL).

(d) Mr KL did not receive a full refund as the first invoice ($1,785) was for advice not covered by the issue that was the subject of the mediation.

Further s 147 request

[26] The Committee, through the Complaints Service, sought further information from Mr IJ as follows:[6]

(a) Time records for Mr KL's retainer.

(b) Records of all funds received from and on behalf of Mr KL (including the invoice to the employer totalling $9,200).

(c) Confirmation of the date on which the refund was paid to Mr KL.

(d) An explanation for the invoice of $9,200. Mr KL had said that all his legal fees would be met by the employer, and the firm had received a total of $11,184.25. An explanation for this figure was sought.

(e) An explanation of each invoice rendered.

(f) Whether there has been duplication in the invoices.

(g) Has Mr KL been charged legal fees when no invoice was rendered?

(h) Did the firm send a final reporting letter to Mr KL?

[27] The information was requested to be provided by 8 May 2015.

[28] Despite reminders being sent to Mr IJ about delays in responding to the further s 147 request, he did not provide a substantive response until 12 November 2015. That response may be summarised as follows:

(a) $9,200 was a negotiated figure not intended to cover all costs; it was a contribution only.

[6] Letter Legal Complaints Service to IJ (23 April 2015).

(b) The first two invoices sent to Mr KL ($1,785 and $905.25) were not included in the agreed contribution as they related to a different issue (albeit with the same employer).[7]

(c) Mr KL was aware that the contribution was only that, and not intended to cover all of his legal costs.

(d) The total of the five invoices rendered (four to Mr KL and one to the employer) was $14,505.75. This meant that some time had been charged twice and so on reconciliation a refund amount of $3,321.50 was calculated as owing to Mr KL. This was not processed as quickly as is ideal.

(e) No fees were charged without an invoice being generated.

(f) It is not usual to send a final reporting letter to a client in the employment jurisdiction, if there is a written record of a mediated settlement as that document sets out the terms on which the matter was concluded.

[29] Armed with that response, the Committee considered the matter and decided to set the complaint down for a hearing on the papers.

Standards Committee hearing and decision

[30] The Committee's notice of hearing, dated 24 February 2016, identified the following issues "as being raised by the alleged conduct itself":

(a) Whether Mr IJ was in breach of ss 110, 111 and/or 112 of the Act in that:

1. He received funds ($9,200) on Mr KL's behalf on 4 April 2014.

2. He did not pay them into a trust account.

3. He held a portion of them until 25 July 2014.

4. He did not properly account to Mr KL for those funds despite enquiry by Mr KL (the trust account issues).

(b) Whether Mr IJ provided competent and timely advice to Mr KL in relation to the settlement with his employer, as required by rule 3 of the Lawyers

[7] This explanation differs from that given by Mr IJ in his letter to the Complaints Service dated 18 December 2014, in which he said that only the first of the firm's invoices to Mr KL was excluded from the costs contribution (at [5]).

and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the rules), including:

1. Advice about the employer's contribution towards Mr KL's legal fees and whether that contribution would cover all of those costs.

2. Advice and an explanation as to the calculation of the refund paid (the settlement advice issue).

(c) Whether the invoice for $9,200 breached the requirements of rule 9.3 as:

1. It appears to have included fees in advance.

2. It appears that regulations 9 and/or 10 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 have not been complied with (the fees in advance issue).

(d) Whether Mr IJ failed within reasonable time to render a final invoice to Mr KL containing sufficient information to enable Mr KL to identify the work undertaken, as required by rule 9.6 (the delayed and insufficient invoice issue).

(e) Whether Mr IJ's fees were fair and reasonable (the reasonable fees issue).

[31] The Complaints Service forwarded the notice of hearing to both Mr KL and Mr IJ on 24 February 2016, and invited submissions from them by 16 March.

[32] Mr IJ sent a brief email to the Complaints Service on 4 April 2016. The email summarised and repeated points he had earlier made. He considers that the "confusion between Mr KL and [himself]" arose because Mr KL regarded the costs contribution as applying to all four invoices whereas Mr IJ did not regard the first invoice as forming part of the employer's contribution.

[33] Mr IJ said that his firm had reviewed procedures about costs contributions and they now ensure that they "are very clear with [their] explanations".

[34] Mr KL emailed the Complaints Service on 5 April, indicating that he is "even more mystified" about the issue, given that he paid four invoices totalling $5,305.75[8] yet Mr IJ invoiced the employer an additional $9,000 (more accurately, $9,200). He describes Mr IJ has having taken that figure "out of thin air".

[8] Although Mr KL refers to the amount being $5,305.76.

Standards Committee decision

[35] The Committee considered each of the five issues set out in the notice of hearing, and made the following findings:[9]

The Trust Account issues

[36] This issue concerns the invoice sent by Mr IJ to Mr KL's employer, after the mediation, for $9,200 and which was paid directly to the firm by the employer.

[37] The Committee began its consideration of this issue by setting out the provisions of s 110 of the Act, noting the importance of consumer protection and how that is enhanced by the importance of lawyers holding client funds in a trust account.

[38] The Committee noted that Mr IJ does not operate a trust account. It saw the issue as being whether Mr IJ had received all or part of the costs from the employer for or on behalf of Mr IJ. If so, he was required to hold those funds in a trust account.[10]

[39] The Committee put it in this way:[11]

> [W]here a client has already paid all or part of the fees that are covered by a settlement payment, then to the extent that the settlement payment is on account of fees that have already been paid, it is a payment made for the client and must be held in a trust account. This approach is consistent with the underlying consumer protection purpose of [the Act]

[40] The Committee did not accept that the practice in the employment jurisdiction of lawyers receiving monies directly from an employer as a contribution towards an employee's legal fees, overcame the core obligation to hold client funds on trust and properly account for them. It considered that:[12]

> It may be acceptable for a lawyer who does not operate a trust account to receive a settlement payment on account of fees in situations where their costs have not yet been paid and **no** invoice has been rendered to the client. …[13]
>
> [Emphasis added]

[41] The Committee found that Mr IJ:[14]

---

[9] The Committee separated out from the trust account issue and separately considered as a sixth issue the question of whether Mr IJ had breached professional obligations by failing to pay Mr KL's refund in a prompt manner.
[10] Standards Committee decision at [12].
[11] At [13].
[12] At [15].
[13] I infer that the word "no" in that citation is a typographical error in the Committee's decision, and the paragraph should read " ... **an** invoice has been rendered ...". Monies may only be taken as fees once an invoice has been issued. If no invoice has been issued, then the monies must be held on trust until one has been issued (s 110 of the Act and reg 9 of the Trust Account Regulations).

> … had breached s 110(1) of the Act by failing to hold in a trust account, the amount that Mr KL was entitled to receive by way of a refund of the fees he had already paid.

[42] The Committee next considered whether Mr IJ was in peril of providing a false annual certificate under s 112(2) of the Act, to the effect that he had not received or held money in trust for any other person.

[43] The Committee concluded that Mr IJ had completed his s 112 certificate "in the sincere belief that he was complying with the Act". It also noted his indication that he will alter his practices with regards to the receipt of settlement payments on account of costs in the future. For those reasons, the Committee decided that further action on the trust account issue was unnecessary.[15]

The delayed refund issue

[44] The Committee noted that there was a delay of three months between receiving the $9,200 payment from the employer (April 2014), and processing the $3,321.50 refund to Mr KL (25 July 2014).

[45] Although noting that [GHG] contributed to the delay the Committee concluded that responsibility for it lay with Mr IJ. In the Committee's view the delay was "clearly unacceptable and unprofessional".[16]

The settlement advice issue

[46] There were two parts to this issue:

(a) Advice to Mr KL about whether the costs contribution by the employer would be sufficient to settle all of Mr KL's legal fees.

(b) Advice about how the refund was calculated.

[47] Rule 3 is engaged by this issue. That rule reads:

> In providing regulated services to a client, a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.

[48] The Committee held that Mr IJ had:[17]

> … failed to provide Mr KL with clear, competent and timely advice about the costs offer. In particular, that he failed to make it clear to Mr KL that the amount

[14] At [16].
[15] At [17] – [20].
[16] At [23].
[17] At [26].

> offered would not be sufficient to settle all costs that he would incur in his dispute with [his employer].

[49] The Committee noted Mr IJ's submission where he said "as a result of the confusion caused, we have reviewed our procedure. Where, at mediation, a party offers costs, we ensure we are very clear with our explanations".[18]

[50] The Committee also accepted that Mr KL was expecting to be reimbursed all the fees he had paid. It referred to correspondence to him from Mr IJ which simply said that "[the employer] agreed to pay our invoice which of course covers attendances we have not yet invoiced you for. Such as mediation and preparation etc".[19]

[51] In taking those matters into account the Committee held that Mr IJ had breached his professional obligations under rule 3 in connection with his lack of any advice to Mr KL about the effect of the costs contribution to be made by the employer.[20]

[52] The Committee next considered whether Mr IJ had provided competent and timely advice to Mr KL about how his reimbursement had been calculated. It noted that Mr IJ had not provided that explanation with any clarity to the Committee either.[21]

[53] In making that observation the Committee noted that the amount of the reimbursement did not marry-up with the first invoice issued to Mr KL, and that Mr KL remained confused about how the reimbursement had been calculated.

[54] In spite of holding that the advice to Mr KL about this issue "was not sufficient in the circumstances", the Committee considered that the overall fees charged by Mr IJ were fair and reasonable "and that the amount that was ultimately reimbursed to Mr KL was therefore appropriate".[22]

The reasonable fees issue

[55] Although it earlier commented that the fees charged were fair and reasonable, the Committee revisited that issue in more detail and considered that the fees charged by Mr IJ – which it identified as being $11,184.25 (GST inclusive) – were "at the high end for a matter of this type". It noted that the result obtained was "a good one", particularly the employer's contribution towards legal costs, and concluded that Mr IJ's fee was fair and reasonable.[23]

---

[18] Email IJ to Complaints Service (5 April 2016).
[19] At [28].
[20] At [29].
[21] At [30].
[22] At [30] – [31].
[23] At [31], [34] - [35].

The delayed and insufficient invoice issue

[56] This issue engages rule 9.6, which provides:

> A lawyer must render a final account to the client or person charged within a reasonable time of concluding a matter or the retainer being otherwise terminated. The lawyer must provide with the account sufficient information to identify the matter, the period to which it relates, and the work undertaken.

[57] The Committee noted the common practice in the employment jurisdiction of a lawyer issuing a "bare invoice" to an employer who has agreed to contribute towards a client-employee's legal fees. That said, it was the Committee's view that "[this did not absolve] lawyers involved with employment disputes from the requirement to provide a final account to their client as set out under rule 9.6".[24]

[58] The Committee's view was that if Mr IJ had done precisely that, then "Mr KL would have appreciated exactly how much he would be reimbursed from the costs payment and he may not have felt it necessary to make this complaint".[25]

[59] The Committee held that Mr IJ had breached rule 9.6 by failing to provide Mr KL with a final account that complied with the requirements of that rule.

The fees in advance issue

[60] This issue also concerned the $9,200 invoice issued to and paid by the employer. The concern was that the invoice may also have included work yet to be done, in which case that was fees billed in advance and that amount was required to be held in a trust account until the work was completed (and an invoice rendered).[26]

[61] It was the Committee's view that there was insufficient evidence from which a finding could be made that the invoice included an amount for fees in advance, and it decided to take no further action on that issue.[27]

Penalty

[62] The Committee held that Mr IJ's conduct was unsatisfactory contrary to s 12(c) of the Act in that it contravened both the Act and the rules.

[63] The Committee further held:[28]

---

[24] At [38].
[25] At [39].
[26] Rule 9.3 and regulations 9 and 10 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008.
[27] At [41] – [43].
[28] At [47].

> Mr IJ's failure to provide Mr KL with competent advice in relation to the costs offer, and his failure to appropriately hold client funds and pay them out in a prompt manner, was conduct that fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer and was unsatisfactory in terms of s 12(a) of the Act.

[64] To mark its disapproval of Mr IJ's conduct, the Committee fined him $2,000 and ordered him to pay costs of $1,000.[29]

Review Application

[65] Mr IJ filed an application for review on 25 August 2016. The grounds may be summarised as follows:

(a) One of the issues considered and determined by the Committee was whether Mr IJ had failed to hold client funds in a trust account as required by s 110 of the Act.

(b) This was not part of Mr KL's complaint.

(c) It was not appropriate for the Standards Committee to extend the complaint and consider that issue.

(d) The issue (of s 110 of the Act) was never put to Mr IJ and he was not afforded an opportunity to respond to it.

(e) Was the Committee correct to find that Mr IJ had inadvertently operated a trust account?

(f) Whether the penalty imposed was appropriate.

[66] In an email to this Office dated 1 September, Mr IJ said that:

> … we have no issue with findings made in regard to Mr KL. Our concern and the reason for the review is we do not understand the fine and how it relates to apparent comments that somehow I breached regulations and rules relating to trust accounts.

[67] Mr KL has advised the Office that he does not wish to respond to the application for review.[30]

Nature and Scope of Review

[68] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[31]

---

[29] At [49].
[30] Email KL to LCRO (21 September 2016).

> … 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.

[69] More recently, the High Court has described a review by this Office in the following way: [32]

> 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.

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

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

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

Hearing in person

[71] An applicant only hearing took place on 9 February 2017, by telephone. Mr KL had earlier indicated that he did not wish to respond to the application for review.

[72] At hearing Mr IJ stressed the following points:

(a) Mr KL's complaint had only ever been about fees – specifically the delay in reimbursing him the employer's costs contribution.

(b) The Standards Committee was wrong to have widened the scope of that complaint to include issues relating to keeping a trust account.

---

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

(c) Those issues had never fully been put to Mr IJ as being matters which might result in a disciplinary finding. He had no opportunity to respond to those issues.

(d) The employer's costs contribution of $9,200 was money due to him from the employer; it was not money received on behalf of Mr KL.

Analysis

Standards Committee findings

[73] The Standards Committee decision records the following professional lapses by Mr IJ:

(a) Failure by Mr IJ to hold in a trust account, the amount that Mr KL was entitled to receive by way of a refund of the fees that he had already paid. However, the Committee decided that further action on the trust account issue was unnecessary.

(b) The delay in processing Mr KL's refund. Mr IJ accepts this finding.

(c) Mr IJ's lack of clear, competent and timely advice about the costs offer. Mr IJ disputes this.

(d) Breach of rule 9.6 – the failure to provide a final account which sufficiently details the work undertaken and the period to which it related.The Committee was thus faced with deciding whether to make unsatisfactory conduct findings in relation to (b) – (d) above and, if so, whether to impose any penalty. I note that none of those three lapses engages issues about trust account requirements or management. The Committee clearly indicated that it would take no further action on the breaches it found.[33]

[74] The Committee said:

> [46] In the Standards Committee's view, Mr IJ's conduct on this occasion was unsatisfactory in terms of s 12(c) of the LCA as conduct in contravention of the LCA and the rules.
>
> [47] The Standards Committee also considered that Mr IJ's failure to provide Mr KL with competent advice in relation to the costs offer, **and his failure to appropriately hold client funds** and pay them out in a prompt manner, was conduct that fell short of the standard of competence and diligence that a

[33] At [20].

> member of the public is entitled to expect of a reasonably competent lawyer and was unsatisfactory in terms of s 12(a) of the LCA.
>
> [Emphasis added].

[75] As a preliminary observation, I consider that the Committee erred in including the trust account issue – described above as Mr IJ's "failure to appropriately hold client funds" – as part of its finding of unsatisfactory conduct. The Committee had earlier said that it was taking no further action on that issue.

[76] Having said that however, I record my agreement with the Committee in finding that Mr IJ was in breach of s 110 of the Act. I deal with that issue more fully below, at [99] – [122].

[77] Mr IJ challenges the trust account findings on two bases:

(a) The issue was not part of Mr KL's complaint. Mr IJ was not given a fair and proper opportunity to respond to the issue.

(b) In any event the Committee's conclusion that he was dealing with trust funds, is wrong.

[78] I will deal with each of Mr IJ's challenges, in turn.

Trust account issue

No proper opportunity to be heard

[79] Mr IJ quite properly submits that Mr KL's complaint was one about fees – specifically the delay in processing a refund. He submits that he always approached the complaint and any correspondence he received from the Conduct Service, as being about the fees complaint.

[80] When a Standards Committee receives a complaint about specific conduct, and in the course of reviewing the complaint and any response the Committee considers that other conduct issues may be engaged, the proper approach is for the Committee to exercise its powers under s 130(c) of the Act and initiate an own motion investigation.

[81] Having raised an own motion investigation, and after considering any response, the Committee may decide to inquire into the matter pursuant to s 140. If so, the s 141 notice requirements are triggered, which include providing the practitioner with an opportunity to be heard. Section 152 of the Act deals with a Committee's powers after inquiry and hearing.

[82] Underpinning these procedural steps is the statutory obligation for a Standards Committee to "exercise and perform its duties, powers and functions in a way that is consistent with the rules of natural justice".[34]

[83] Ordinarily a Standards Committee will inform a practitioner that it has triggered the s 130(c) own motion process, and that file will travel with although be treated separately from, the original complaint file.

[84] In the present matter, the Committee did not inform Mr IJ that it was embarking upon a s 130(c) own motion investigation into conduct issues not raised by Mr KL's complaint. Mr IJ considers therefore that he has never had those other issues put to him in a way that allowed for a full and meaningful response. He argues that the Committee has breached his natural justice entitlement to be told of the complaint and to be given an opportunity to respond.

[85] I agree that the Committee omitted to make any reference to s 130. However, in considering whether this has had the effect of extinguishing Mr IJ's natural justice rights from the beginning, it is important to examine the steps the Committee took in the lead up to its hearing on the papers and decision in July 2016.

[86] On 1 December 2014 the Complaints Service wrote to Mr IJ on behalf of the Committee, indicating that it was conducting an inquiry "into the matter" and that for the purposes of that inquiry Mr IJ was directed to provide particular information, pursuant to s 147 of the Act. Particular reference is made to the treatment of funds by the firm when it does not operate a trust account.

[87] The information sought included records of funds received from or on behalf of Mr KL and how they were dealt with by the firm, together with confirmation of [GHG]'s role in funds handling and management.

[88] Mr IJ provided his file to the Committee (as had been requested), and answered the questions asked of him, in his letter to the Complaints Service dated 18 December 2014.

[89] On 23 April 2015 the Complaints Service again wrote to Mr IJ on behalf of the Committee, seeking further and detailed information, in particular explanations for the basis of the fees calculations and payments made and whether there had been any final reporting and invoicing by Mr IJ to Mr KL

[90] Mr IJ's response was sent by him on 12 November 2015.

---

[34] Lawyers and Conveyancers Act 2006, s 142(1).

[91] On 24 February 2016 the Complaints Service wrote to Mr IJ that the "Committee has considered this complaint and resolved to set the matter down for a hearing on the papers". A notice of hearing was attached.

[92] The notice of hearing referred specifically to the trust account provisions of the Act, and posed as an issue whether Mr IJ was in breach of them. The notice particularised the areas of potential breach.

[93] The notice referred also to the Trust Account Regulations and particularised potential breaches of them.

[94] In the hearing before me, Mr IJ made the candid concession that he did not fully read the notice of hearing when he received it. He said that he had, throughout, always seen the matter as being a fees dispute in connection with Mr KL's refund.

[95] Although the Committee omitted any reference to s 130(c) of the Act when it embarked upon its investigation of the wider issues, I am nonetheless satisfied that it complied with its obligations to ensure that natural justice was followed. The Committee's letter of 1 December 2014 clearly raises the spectre of trust accounting issues. That should have put Mr IJ on notice that broader issues were at large.

[96] Whatever quibbles there may be about the lack of any reference to s 130(c), these are emphatically overcome by the very detailed notice of hearing dated 24 February 2016. Even a cursory read of that notice reveals issues that are serious and requiring of response. Mr IJ apparently gave the notice a less than cursory glance.

[97] I do not accept Mr IJ's argument that he was caught off-guard by the Committee's discussion and findings about his treatment of the $9,200 in its decision. Those concerns were apparent from 1 December 2014. The failure to specifically refer to the own motion provisions of s 130 of the Act was one of form rather than substance.

Not handling client funds

[98] In argument before me, Mr IJ was at pains to point out that his firm did not operate a trust account and that it had an exemption from doing so. He submitted that he had taken independent expert advice to satisfy himself that the way in which he handled money in his practice did not contravene any of the statutory, regulatory or other rules-based requirements to which lawyers are bound.

[99] Mr IJ's practice has one office account, into which all incoming funds are paid. This includes fees paid by clients, after an invoice has been rendered. Mr IJ said that he does not invoice clients for fees in advance.

[100] I have no reason to doubt Mr IJ's word on this. My impression is that he has taken responsible steps to address issues of compliance, such as seeking accounting advice.

[101] The difficulty arises with fees that are paid on behalf of a client, by an employer, as a contribution towards a client's legal costs. This arose in Mr KL's case and I accept (and am indeed aware) that this is a common practice in employment disputes. The clause to this effect in the mediated settlement agreement is standard and otherwise unremarkable.

[102] That clause provides that the employer will pay $9,200 as a contribution towards Mr KL's legal costs, on receipt of a tax invoice from the firm.

[103] On the very same day that the mediation was concluded, Mr IJ sent the employer an invoice for that amount. It was a bare invoice, in that the narration did not set out the work done and covered by the invoice, nor the period to which it related.

[104] In the hearing before me Mr IJ said that the invoice included work that he had done on Mr KL's behalf before the invoice he had sent him on 24 January 2014, although he was unable to say the date from which the work was done that was represented by the 28 February invoice.

[105] Mr IJ's view is that the invoice is his, and that the money represented by that invoice is his also. In this way, he argues, the funds are not client funds and he commits no breach of the trust account requirements when he pays those funds directly into his firm's office account and treats them as a fees payment.

[106] Mr IJ argues that if, for example, the employer had failed to pay that invoice then he (Mr IJ) could sue the employer for it.

[107] I do not accept this. The only basis on which Mr IJ might sue the employer directly for the amount of the invoice would be in contract, based either on the mediated agreement or the tax invoice itself.

[108] However, the parties to the mediated agreement are Mr KL and his employer. Mr IJ is not a party to that agreement. He cannot sue in his own name (or that of his firm's) to enforce any of its provisions, including the employer's costs contribution.

[109] That leaves the tax invoice itself. As described by Mr IJ, the tax invoice is addressed to the employer.

[110] The difficulty with any proceedings by Mr IJ seeking payment of the invoice directly from the employer, is that there is no contract between Mr IJ and the employer. Missing, is consideration – i.e. an exchange of promises that have some value. The services to which the tax invoice related, were legal services as between Mr IJ and Mr KL.

[111] The tax invoice is merely a convenient vehicle to ensure payment of legal fees that Mr KL had contracted to pay Mr IJ in return for the latter providing legal services. The tax invoice does not provide Mr IJ with any rights of recovery.

[112] It follows from that, that the money represented by the tax invoice is prima facie Mr KL's. Mr IJ may only take those funds as fees on production of an invoice addressed to Mr KL, which complies with rule 9.6.

[113] Unless and until that has been provided, the funds must be held in trust in accordance with the very clear provisions of s 110 of the Act. There is no middle ground: client monies must be held in a trust account and not taken for fees until consent to that effect is given; this can only occur on the rendering of an invoice.

[114] It is pertinent to set out the provisions of s 110:

> **110 Obligation to pay money received into trust account at bank**
>
> (1) A practitioner who, in the course of his or her practice, receives money for, or on behalf of, any person—
>
> (a) must ensure that the money is paid promptly into a bank in New Zealand to a general or separate trust account of—
>
> (i) the practitioner; or
>
> (ii) a person who, or body that, is, in relation to the practitioner, a related person or entity; and
>
> (b) must hold the money, or ensure that the money is held, exclusively for that person, to be paid to that person or as that person directs.
>
> (2) An incorporated firm that, in the course of its practice, receives money for, or on behalf of, any person—
>
> (a) must ensure that the money is paid promptly into a bank in New Zealand to a general or separate trust account of the firm; and
>
> (b) must hold the money, or ensure that the money is held, exclusively for that person, to be paid to that person or as that person directs.
>
> (3) For the purposes of this section, a practitioner or an incorporated firm is deemed to have received money belonging to another person if—

> (a) that person, or a bank or other agency acting for, or on behalf of, that person, deposits funds by means of a telegraphic or electronic transfer of funds into the bank account of—
>
> (i) the practitioner or incorporated firm; or
>
> (ii) a person who, or body that, is, in relation to the practitioner, a related person or entity; or
>
> (b) the practitioner or incorporated firm takes control of money belonging to that person.
>
> (4) A person commits an offence against this Act and is liable on conviction to a fine not exceeding $25,000 who knowingly acts in contravention of subsection (1) or subsection (2).

[115] Regulation 9 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 (the Trust Account Regulations) provides direction as to how a lawyer may debit a trust account with fees. In simple terms, an invoice must be generated.

[116] The fact that Mr IJ does not operate a trust account is of no relevance to the analysis. He was receiving funds on behalf of Mr KL; they were funds to be applied towards Mr KL's legal fees. He was obliged to hold those funds in a trust account and not take them as fees until he had rendered Mr KL an invoice.

[117] That invoice must comply with the requirements of rule 9.6. It could only be for attendances after 25 January 2014, being the date of Mr IJ's last invoice to Mr KL, and it must specify the work to which it relates.

[118] Mr IJ's concern is that if he did this, and at the same time sent an invoice to the employer for the same amount, then he has fallen foul of the GST legislation by "double-invoicing". However, that is an administrative issue and does not have the effect of overcoming the very clear provisions of the Act, the Trust Account Regulations and the rules.

[119] The simple expedient to overcome Mr IJ's anxiety would be to send the employer a copy of Mr KL's invoice. Mr IJ also submitted that employers in these situations do not like receiving invoices for payment with a detailed narration. Again that is an administrative issue which does not trump the legal obligations of a practitioner to properly invoice and account for money.

[120] Despite finding that Mr IJ was in breach of the trust account requirements of the Act and the Trust Account Regulations, the Committee considered that no further

action was required. It accepted Mr IJ's bona fides, and his assurance that practices within his firm have been changed.

[121] That was a generous approach for the Committee to take but one that was nevertheless open for it to take. In the circumstances I do not intend to disturb the Committee's approach.

Lack of advice about the costs offer

[122] Mr IJ submits that Mr KL could not have been in any doubt about the meaning and effect of the costs contribution agreement. He believes that he gave him competent advice about that. He makes the further point that as part of her statutory duties, the mediator would also have telephoned and spoken to Mr KL about the agreement.

[123] Mr KL has always maintained that he was unclear about the meaning and effect (and extent) of the employer's costs contribution.

[124] The Committee concluded that it was not necessary to resolve that conflict, as it "was satisfied that Mr IJ had failed to provide Mr KL with clear, competent and timely advice about the costs offer".[35]

[125] In reaching that conclusion the Committee had the benefit of Mr IJ's complete file. In reviewing that file, and in considering Mr IJ's submissions to it, the Committee noted the following:[36]

> (a) It was clear from the emails Mr KL sent to Mr IJ after this matter had concluded that he was expecting to be reimbursed all the fees he had paid to date.
>
> (b) ... there was no written advice to Mr KL about how much of his costs would be covered by the costs offer on Mr IJ's file ...
>
> (c) Mr IJ has also said that he did not have the opportunity to discuss the fact that the costs payment would not cover the fees charged in relation to the potential redundancy with Mr KL before he made his complaint.

[126] The Committee noted its own confusion about the calculation of Mr KL's refund. To this I would also add the inconsistencies in Mr IJ's explanations about

[35] At [26].
[36] At [28].

whether only the first, or both the first and second invoices he sent to Mr KL, were not covered by the costs contribution.

[127] There is a singular lack of any document – be it letter, email or file note recording a discussion or meeting – setting out how the $9,200 was to be applied to Mr KL's overall legal fees. At the time that the invoice was sent (28 February 2014), Mr IJ had not done a final fees calculation. That occurred in July of that year, when a reconciliation of time revealed double-charging, and the refund was calculated and processed.

[128] Mr KL's final words to the Committee were that he was "even more mystified" (after considering Mr IJ's various explanations).[37]

[129] Mr IJ has said that he regarded the $8,000 as being his. Quite apart from the trust account and invoicing issues, there could be no legal basis for such a belief. The costs contribution clause in the mediated agreement refers to the sum as a contribution towards Mr KL's costs. At that point (28 February 2014), those costs had not been quantified. The most recent invoice had been sent on 24 January. No calculation of fees owing since that date had been undertaken, and there was arguably more work to be done after the mediation (although Mr IJ has said that he decided not to invoice that for work).

[130] Mr IJ's retention of that contribution and treatment of it as his own funds, was cavalier.

[131] Mr IJ had no basis for believing that the entire amount might be applied towards Mr KL's legal fees. Indeed, as events transpired much later, it is clear that Mr IJ was wrong to have concluded that additional costs might be in the region of $8,000.

[132] I can see no basis for saying that the Committee made an error when it held that Mr IJ failed to adequately advise Mr KL about the costs contribution. I agree with its assessment that there was a singular lack of any clarity about how that sum was to be treated.

Breach of rule 9.6

[133] This finding concerns Mr IJ's failure to render Mr KL a final invoice, after the retainer had been terminated.

[37] Email KL to Complaints Service (5 April 2016).

[134] It cannot be argued that Mr IJ sent such an invoice to Mr KL. The last invoice he addressed to Mr KL was dated 24 January 2014. The invoice he sent on 28 February 2014 was addressed to the employer. Even then, the retainer had not ended as more work was required to enforce the settlement reached at mediation.

[135] Mr KL was left in the dark as to how much he might receive back from Mr IJ after payment of the employer's contribution (or even, perhaps, whether he owed further fees). Mr IJ had clearly not done a final calculation of the time spent and the fees payable against that time. That did not occur until later in 2014 when the time and fees reconciliation was done by [GHG] (and not, it would appear, by Mr IJ).

[136] There is a self-evident purpose to a final invoice as required by rule 9.6. That rule requires a lawyer to provide "sufficient information to identify the matter, the period to which it related, and the work undertaken".

[137] The Committee noted that had such an invoice been provided by Mr IJ to Mr KL, "much of the present complaint could have been avoided" and:[38]

> it was likely that [Mr KL] would have appreciated exactly how much he would be reimbursed from the costs payment, and he may not have found it necessary to make this complaint.

[138] That conclusion is speculative, but it is clear that Mr KL made his complaint because of the delay in receiving his refund; as indicated above his final words to the Committee were that he was "even more mystified" after the various explanations that had been provided by Mr IJ.

[139] Of significance is that a final account complying with the rule has still not been provided, and this clearly contributed to the Committee's confusion about the basis of the refund calculation.

[140] I agree with the Committee's description of this failure as being a breach of rule 9.6.

Other

[141] No challenge has been made to the Committee's findings that Mr IJ's overall fee of $11,184.25 was fair and reasonable. The Committee had the benefit of Mr IJ's complete file and was itself comprised of members who practise in the employment jurisdiction.

---

[38] At [39].

[142] No challenge has been made either to the finding that the $9,200 invoice did not include fees in advance. The Committee's reasoning for this finding was that it could not be sure one way or the other, and so no further action was appropriate.

[143] However, to put that matter beyond doubt at the hearing before me Mr IJ confirmed that the 28 February 2014 invoice was for work completed to that date, and did not include any element of fees in advance. He said that the additional work carried out by him during March of that year was not invoiced.

Penalty

[144] The penalty imposed by the Committee for the breaches it identified in [46] and [47] of its decision, was a fine of $2,000. Mr IJ's view is that this is excessive, particularly if his only lapse was the failure to promptly process Mr KL's refund.

[145] The Committee's conduct findings were:

(a) The delay in processing Mr KL's refund. The Committee characterised this as "clearly unacceptable and unprofessional".[39] It did not identify a rule that the conduct engaged.

(b) The lack of clear, competent and timely advice about the costs offer. The Committee treated this as a breach of rule 3. [40]

(c) The failure to render an appropriate final invoice. The Committee treated this as a breach of rule 9.6.[41]

[146] The Committee regarded the "conduct on this occasion" as being unsatisfactory in terms of s 12(c) of the Act. This provision concerns conduct which contravenes the Act, the rules or any relevant regulations.

[147] The Committee also considered that the lack of timely advice about the costs offer, the failure to appropriately hold client funds and the delay in reimbursing Mr KL, as being "conduct that fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer". It found this conduct to have been unsatisfactory in terms of s 12(a) of the Act.[42]

---

[39] At [23].
[40] At [29].
[41] At [40].
[42] At [47].

[148] In this decision I have earlier expressed my misgivings about the way in which the Committee framed its penalty conclusions, as it appears to have folded the trust account issues into those conclusions, having earlier indicated that no further action on those issues was necessary.

[149] The Committee concluded that a disciplinary response was warranted.[43] I agree with that view.

[150] In summary therefore, the conduct attracting penalty is set out above.

[151] The issue is whether the Committee's fine of $2,000 ought to be reduced having regard to its reference to the trust account issues.

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

[153] I consider that Mr IJ's failures to provide adequate advice about the costs contribution, his failure to provide a final invoice and the delay in processing Mr KL's refund, are significant issues of professional failing.

[154] Those failures involve important features of consumer protection: the right comprehensive advice about all aspects of the retainer, the right to detailed information about fees and how they are charged, and the right to the prompt return of monies owing.

[155] Even after removing the trust account issues from the overall penalty, the fine of $2,000, I consider to be a modest fine and well within the range that might otherwise have been open to the Committee for these conduct breaches.

[156] Nothing raised persuades me that the Standards Committee's conclusions on each of the issues of complaint were wrong.

[157] As to penalty, the Committee's decision is modified to the extent that there is no conduct finding made for the trust account issues. For the avoidance of doubt, those are the issues identified in [1](a)(i)–(iv) and (c)(ii) of the Standards Committee's Notice of Hearing dated 24 February 2016.

---

[43] At [48].

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the decision of the Standards Committee is modified as recorded above.

DATED this 27th day of February 2017

_____

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 IJ as the Applicant
Mr KL as the Respondent
[City] Standards Committee [X]
The New Zealand Law Society