

**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**

**RX**

Applicant

**AND**

**KL**

Respondent

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

**DECISION**

**Introduction**

[1] Miss RX has applied for a review of a decision by the [City] Standards Committee [X] in which the Committee determined Mr KL's complaint on the basis that it would take no further action pursuant to s 152(2)(c) of the Lawyers and Conveyancers Act 2006 (the Act).

[2] The Committee confirmed the amount of Miss RX's fees but was critical of her behaviour in the course of a hearing before the Committee. The Committee recorded in the decision its view that Miss RX's behaviour at the hearing had been "disappointing and inappropriate for a practitioner of her experience and standing".<sup>1</sup>

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<sup>1</sup> Standards Committee Decision at [71].

**Application for review**

[3] Miss RX's application for review proceeds on the basis that having determined it lacked jurisdiction, the Committee erred in fact and law by then making findings and comments, some of which reflect adversely on her, and to which she has had no opportunity to respond.

[4] On review Miss RX seeks to have her professional record rectified, and has responded for the first time to the Committee's comments. She says the Committee's critical comments were prejudicial to her, ultra vires and lacked a proper evidential basis. She says that the Committee's comments are arguably defamatory, because the threshold for such serious allegations as misconduct is high.

[5] Miss RX considers the cost assessor's report should be expunged because the Committee had no jurisdiction to make any comments. Miss RX says that her fees were not excessive, but reflective of a fair and reasonable fee for the work she had done, on the instructions she received from Mr KL. She dismisses the costs assessor's view that a fair and reasonable fee was \$25,000, says the litigation was not novel, but a reasonably straightforward claim for wage arrears. Miss RX is critical of the reasoning in the Committee's decision.

[6] The latter is said to be fundamentally flawed arithmetically, in fact and law, lacking balance, generally unreliable, not fair and containing defamatory remarks indicating she had perjured herself. She considers the costs assessor should have met with her and her representative before delivering his report to the Committee, and that the Committee process lacked natural justice.

[7] Miss RX says that the Committee made comments that were ultra vires, unfair and unjustified. She says the Committee denied her the opportunity to respond, and disregarded her submissions. Miss RX is critical of the Committee having linked her fees to the value of a settlement ultimately achieved for Mr KL on advice from another lawyer, of which Miss RX is also critical. She believes Mr KL's claim was worth far more than he settled for.

[8] Miss RX objects to delays in the Committee process and expresses concern over the real risk to the practitioner (her) that delays would prejudice the recovery of the outstanding fees and the securing of those fees in the District Court. Miss RX says she incurred considerable legal costs in defending herself against various allegations, and against the views expressed in the costs assessor's report. She seeks reimbursement.

[9] Miss RX says the Committee erred in finding that her view of Mr KL's prospects of success was "overly optimistic". Her view is that the Committee failed to appreciate that the claim she was handling for Mr KL was reasonably straightforward, with losses that could be precisely calculated. She says Mr KL shared her view of his claim, including that he was well poised to reap the benefits of the excellent results she had achieved on his behalf, which included his substantial entitlement.

[10] Miss RX says Mr KL was adjudicated bankrupt in August 2013, around 24 months after he had filed the complaint that is the subject of this review, and describes the possibility of her recovering unpaid fees from him as academic.

*Mr KL's response*

[11] There has been no substantive response from Mr KL on review.

**Review Hearing**

[12] Miss RX attended a review hearing in Wellington on 7 November 2016. Although Ms IS was presented as Miss RX's support person, and therefore not entitled to speaking rights, she spoke to a limited extent in support of Miss RX's position.

[13] Mr KL was not required to attend the review hearing, which proceeded in his absence, with his consent.

**Nature and Scope of Review**

[14] 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>2</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

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<sup>2</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[15] More recently, the High Court has described a review by this Office in the following way:<sup>3</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.

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

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

## **Review issue**

### *Conduct, Service and Fee Complaints*

[17] With the exception of the audio record of the Committee hearing discussed below, I have considered all of the materials available on review. I have identified nothing that suggests a different view should be taken from that of the Committee in relation to Miss RX's conduct towards, and the services provided to, Mr KL or the fees she charged.

[18] Although this Office adopts a different approach to consideration of fee complaints to that adopted by the Committee, there is no reason to believe that a different approach would have led to an adverse outcome in the present circumstances. The Committee did not lack jurisdiction to consider the fee complaint, as Miss RX contends. The approach this Office takes where fees are related to a single matter, and rendered before and after the Act came into effect, as Mr KL's fees are, is to aggregate the fees and assess the whole fee in the round pursuant to the provisions of the Act, regulations and rules made under it.<sup>4</sup> Jurisdiction to consider fees charged before the Act came into effect is not precluded in the circumstances.

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<sup>3</sup> *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

<sup>4</sup> *AA v BL, BM & BK* LCRO 264/2012.

[19] Miss RX does not challenge the substantive outcome of the Committee process: that there was no reason to take further action. Putting jurisdictional concerns to one side, her concerns relate to the Committee's findings and the way it expressed itself.

[20] The information available on review does not provide reason to depart from the Committee's view that further action in relation to Mr KL's complaints about Miss RX's conduct, service or fees was not necessary. There is no reason to take further action on review. Other than the miscalculation of a filing date, which appears to have fallen within the timeframe the Law Practitioners Act 1982 (LPA) was in effect, there is no real substance to any of the issues raised. While it is undesirable for lawyers to make mistakes, and regrettable when they do, the evidence does not support the position that any of the issues raised should result in a disciplinary outcome.

[21] The primary focus of Miss RX's application for review is to have the record rectified to accord with her account of her conduct and the relevant events. Although Miss RX has concerns, those do not give rise to sufficiently persuasive reasons to expunge the costs assessor's report. Her concern is particularly acute in relation to the comments the Committee made about her conduct at the Committee hearing which are recorded under the heading "Other Matters" at [69]–[71] of the decision. It is not necessary to repeat the detail of those paragraphs here. Suffice to say the Committee expressed concern about what it considered to have been unsupported attacks by Miss RX on Committee members and the costs assessor in the course of the Committee hearing. The decision is modified to remove those paragraphs for the reasons that follow.

## **Analysis**

### *Functions of Standards Committees*

[22] The functions of Committees are set out in s 130 of the Act. Those include inquiring into, investigating and determining complaints made under s 132;<sup>5</sup> investigating various matters of its own motion, including any act or other matter that appears to indicate that there may have been misconduct or unsatisfactory conduct on the part of a practitioner;<sup>6</sup> and laying and prosecuting charges before the New Zealand Lawyers and Conveyancers Disciplinary Tribunal.<sup>7</sup> In each case Committees are to adhere to the rules of natural justice,<sup>8</sup> which include the right of a practitioner to be heard in relation to

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<sup>5</sup> Lawyers and Conveyancers Act 2006, ss 130(a) and (e).

<sup>6</sup> Section 130(c).

<sup>7</sup> Section 130(f).

<sup>8</sup> Section 142(1).

concerns affecting that practitioner's professional conduct and that form part of the practitioner's professional record.

*Miss RX's concerns*

[23] Miss RX says the Committee did not allow her an opportunity to be heard in response to adverse comments it made about her conduct at the Committee's hearing. Miss RX objects to the Committee's criticisms being incorporated in the decision. Although she was present at the Committee hearing, she says she did not have the opportunity to respond to the Committee's criticisms of her. She believes her comments about Committee members and the costs assessor were justified.

*Discussion*

[24] I am required, amongst other things, to come to my own view of the fairness of the substance and process of a Committee's determination. While this review is not a judicial review or appeal, Miss RX is entitled to this review based on my opinion, rather than in deference to the view of the Committee.

[25] Although an audio copy of the Committee's hearing is available on review, I have not listened to that. I accept that the hearing Miss RX attended was tense, and that robust discussion occurred. Given the criticisms made by and of her, there may well have been heated exchanges. Paragraphs [69] to [71] of the decision support that view.

[26] Although the Committee's comments pertained to Miss RX's performance in her own defence, they were not relevant to Mr KL's complaint. It is clear from the decision that Miss RX's reported conduct at the Committee hearing did not result in an adverse outcome in the complaint process.

[27] However, it is important for Committees to be circumspect about the content of decisions.

[28] While a lawyer's conduct in the course of the complaint and review processes can make a difference to whether costs are ordered, and if so, how much, that is not the direction the Committee took. It recorded its dissatisfaction with Miss RX's comments, but took its concerns no further.

[29] If the Committee had significant concerns about Miss RX's conduct in the course of the complaints process or hearing, it could have taken steps to initiate an own motion inquiry that could have been carried out by another Committee pursuant to s 130(c). Any

professional concerns could have been raised, properly ventilated and objectively addressed in that process.

[30] Instead, the Committee appears to have recorded its collective view of Miss RX's conduct towards it, concluded that conduct did not warrant an adverse disciplinary finding, and then provided a copy of the decision including those comments to both parties.

[31] Although complaint and review processes under the Act are generally private as between the parties and New Zealand Law Society, the Committee's comments are incorporated in a decision that it was required to provide to Mr KL, even though the Committee's concerns were not directly relevant to Mr KL's complaint.

[32] The Committee's comments now form part of Miss RX's professional record.

[33] The record and Miss RX's professional reputation are important to her. They are relevant to perceptions of her as a lawyer.

[34] The evidence of Miss RX's conduct at the Committee hearing remains available in the form of the recording of that hearing. This Office is being invited to consider Miss RX's conduct towards the Committee at first instance on review. It would be inappropriate for this Office to do so.

[35] In the circumstances, there are good reasons to modify the decision by deleting paragraphs [69] to [71] and the subheading "Other Matters".

### **Request for reimbursement**


[36] Section 210(2)(a) of the Act provides for a LCRO to order NZLS to pay costs to a lawyer, such as Miss RX, to whom proceedings relate.

[37] I have considered Miss RX's request for reimbursement with that power in mind. I have been unable to identify any sufficiently compelling reason to exercise my discretion in Miss RX's favour. No order is made for reimbursement.

### **Decision**

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is modified to delete paragraphs [69] to [71] and the subheading "Other matters" and otherwise confirmed.

**DATED** this 10<sup>TH</sup> day of February 2017



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**D Thresher**  
**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:

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