IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-Ā-TARA ROHE

CIV-2016-485-000992
[2017] NZHC 2484

UNDER	the Judicature Amendment Act 1972 and Part 30 of the High Court Rules
BETWEEN	JEREMY JAMES MCGUIRE Plaintiff
AND	NEW ZEALAND LAW SOCIETY Respondent

Hearing: 28 June 2017

Appearances: Plaintiff in Person
P N Collins for Respondent

Judgment: 11 October 2017

JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 11 October 2017 at 11.15 am
pursuant to R 11.5 of the High Court Rules

Registrar / Deputy Registrar

Date…….

Introduction

[1] Jeremy McGuire is a provincial lawyer with a general practice. In 2013 he represented Christopher Menear-Gist in a personal grievance claim in the Employment Relations Authority (ERA). Mr Menear-Gist obtained a modest payment from his former employer but failed in his claim to be reinstated. Mr McGuire advised him to appeal and, in the meantime, to apply for urgent interim reinstatement. After obtaining a second opinion Mr Menear-Gist terminated Mr McGuire's retainer.

[2] The fees that Mr McGuire rendered exceeded the amount that Mr Menear-Gist had recovered. Mr Menear-Gist complained to the New Zealand Law Society. The complaint was determined by the Manawatu Standards Committee but its decision was quashed for breaches of natural justice.[1] The complaint was determined afresh by the Canterbury Westland Standards Committee. That Committee found that Mr McGuire had failed to provide a competent appraisal and advice of the potential rewards and risks of the proceedings and the fees charged were unreasonable given the results achieved. It determined that Mr McGuire's handling of Mr Menear-Gist's claim constituted unsatisfactory conduct for the purposes of s 152(2)(b) of the Lawyers and Conveyancers Act 2006 (LCA). It directed that Mr McGuire be censured pursuant to s 156(1)(b) of the LCA, that the fees in relation to the ERA proceedings be reduced to $10,000 plus GST and disbursements and that the fees rendered in relation to the interim reinstatement application be remitted in full.

[3] Mr McGuire has applied for judicial review of the Committee's decision. His general position has always been that his conduct cannot be regarded as unsatisfactory, given that he acted in accordance with the terms of his retainer, succeeded on the personal grievance, had good prospects of succeeding on the appeal and it was Mr Menear-Gist's decision to abandon the appeal. He regards Mr Menear-Gist's complaint as no more than an attempt to avoid paying fees properly rendered in accordance with the terms of the retainer.

---

1 *McGuire v Manawatu Standards Committee* [2015] NZHC 2100.

[4] For the purposes of the judicial review application Mr McGuire identified some 20 separate grounds of challenge, many of which overlap. The grounds of challenge attack both the correctness of the decision and the process by which it was made.

[5] The grounds of challenge of the substantive determination can be summarised as being that the determination was:

(a) erroneous in law and fact because:

(i) Mr Menear-Gist never asked Mr McGuire for an estimate of legal fees meaning Mr McGuire was not required to provide him one;

(ii) Mr Menear-Gist breached the retainer when he unilaterally and suddenly terminated it;

(iii) the Committee wrongly held that an experienced employment lawyer or advocate is aware that awards from the ERA and Employment Court are "generally reasonably modest".

(b) unfair and unreasonable because the Committee failed to take into account that:

(i) Mr Menear-Gist succeeded in his personal grievance claim and was awarded costs;

(ii) reinstatement is a discretionary remedy;

(iii) the ERA's decision could have been successfully appealed;

(iv) Mr McGuire represented Mr Menear-Gist competently and in accordance with his instructions.

(c) unfair and unreasonable on process grounds because the Committee:

(i) misstated the nature of the complaint against Mr McGuire;

(ii) did not raise aspects of the complaint with Mr McGuire in breach of natural justice;

(iii) failed to conduct a proper rehearing as directed by the High Court.

[6] The grounds of challenge to the costs determination can be summarised as being that the decision was:

(a) erroneous in law and fact because the Committee has no power to "remit" a bill;

(b) unfair and unreasonable because:

(i) the reduction of the ERA fee to $10,000 plus GST was arbitrary and unsupported by reasoning;

(ii) the remittance of fees rendered for attendances in the Environment Court was arbitrary and unsupported by reasoning.

Evidence on the judicial review application

[7] The respondent provided an affidavit by a Legal Standards Officer, Mr Ellis, which explained the process the Committee had undertaken and annexed the documents that the Committee had available to it for the purposes of the determination (and which Mr McGuire and Mr Menear-Gist both had). In his reply submissions Mr McGuire asserted that the information in Mr Ellis' affidavit was irrelevant unless it was specifically mentioned in the determination. In a similar vein Mr McGuire sought to have me ignore much of Mr Collins' submissions on the ground that they referred to matters not specifically referred to in the determination.

[8] I do not accept this approach. The Committee's obligation is to undertake its statutory decision making process in accordance with natural justice and to give reasons for its decision. It is not expected to refer to every piece of evidence before it on which it relied in reaching its determination. Nor, in reviewing the Committee's determination, am I limited to the evidence referred to in the determination.

Statutory framework

[9] The purposes of the LCA include the maintenance of public confidence in the provision of legal services[2] and the protection of consumers of legal services.[3] To that end, the LCA imposes "fundamental obligations" on lawyers, which include the obligation "to act in accordance with all fiduciary duties and duties of care by lawyers to their clients".[4]

[10] The LCA provides for the establishment of a complaints service to determine complaints made against lawyers.[5] This includes the establishment of Standards Committees, whose functions include inquiring into and investigating complaints about the conduct and standard of service provided by legal practitioners.[6] Standards Committees are required to perform their duties and functions and exercise their powers consistently with the rules of natural justice.[7]

[11] A Standards Committee has the power, after both inquiring into a complaint and conducting a hearing with regard to the complaint, to make various determinations, including a determination that there has been unsatisfactory conduct.[8] "Unsatisfactory conduct" is relevantly defined as including:[9]

> … Conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

[12] As Clifford J noted in *Lagolago v Wellington Standards Committee*, the unsatisfactory conduct under s 12(a), which refers to the reasonable expectations of the public, is a consumer driven standard.[10] This is reflected in the provisions for lay persons to be members of the disciplinary tribunal, the prohibition on legal complaints review officers being lawyers or conveyancing practitioners, and the jurisdiction of the Standards Committees and the Tribunal to award, subject to the

---

2 Section 3(1)(a).
3 Section 3(1)(b).
4 Lawyers and Conveyancers Act 2006, s 4(c).
5 Lawyers and Conveyancers Act 2006, Part 7.
6 Sections 130 and 132
7 Lawyers and Conveyancers Act 2006, s 142(1) and Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008, r 26(1).
8 Section 152.
9 Section 12.
10 *Lagolago v Wellington Standards Committee* [2016] NZHC 2867 at [56].

prescribed limit, compensation to clients of practitioners against whom complaints are established.[11]

[13] The authors of *Ethics, Professional Responsibility and the Lawyer* observe that:[12]

> It is of note that the Act looks to the standards expected by a member of the public and what they are entitled to expect from a reasonably competent lawyer. This is an articulation of the well-established "reasonable consumer test", which focuses not on the view of professional people (that is, a peer-based standard) as to proper standards but on the reasonable expectations of ordinary people. While in practice the two will frequently converge, the shift in focus is an important signal. …

[14] And, as Duncan Webb commented in a 2007 article:[13]

> [T]his may mean that what is professionally required of lawyers is more than that required under the ordinary law of contract and tort.

[15] If the Committee makes a determination of unsatisfactory conduct it has the power to make a variety of orders including an order censuring or reprimanding the person to whom the complaint relates;[14] ordering the practitioner to reduce the fees for work that is the subject of the complaint;[15] or ordering the practitioner to cancel fees for work that is the subject of the complaint.[16]

[16] Relevant to the assessment of unsatisfactory conduct are the rules found in the schedule to the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008. The preface to the rules relevantly provide that:

> Whatever legal services your lawyer is providing, he or she must –
>
> - Act competently, in a timely way, and in accordance with instructions received and arrangements made
> - …

---

11 Sections 228, 235 and 190.

12 Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at 118–119.

13 Duncan Webb "The Lawyers and Conveyancers Act: Catching up with Consumerism" [2007] NZLJ 13 at 16.

14 Section 156(1)(b).

15 Section 156(1)(e).

16 Section 156(1)(f).

- Discuss with you your objectives and how they should best be achieved

  …

- Give you clear information and advice

[17] Under r 9.4:

> A lawyer must upon request provide an estimate of fees and inform the client promptly if it becomes apparent that the fee estimate is likely to be exceeded.

Background

[18] In August 2013 Mr Menear-Gist was suspended from his managerial position pending an investigation into allegations of misappropriation of company funds through improper claiming of expenses. He engaged Mr McGuire and signed a client engagement letter dated 26 August 2013 that recorded Mr Menear-Gist's instructions to Mr McGuire to represent him at a disciplinary hearing with his employer. The letter recorded the fee arrangement as being on a time and attendance basis at $200 plus GST an hour and attached Mr McGuire's standard terms and conditions. These included the preface from the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[19] The employer's investigation and disciplinary proceeding wound up a few weeks later with the employer terminating Mr Menear-Gist's employment. Following Mr Menear-Gist's dismissal Mr McGuire filed proceedings in the ERA on Mr Menear-Gist's behalf seeking reinstatement, lost wages and compensation for hurt, humiliation and costs. Mr Menear-Gist was not asked to sign a fresh letter of engagement and the parties seem to have proceeded on the basis that the terms of the existing letter of engagement continued with the necessary alteration in the scope of the services being provided. Mr Menear-Gist did not ask for an estimate of costs.

[20] The ERA upheld Mr Menear-Gist's claim of a personal grievance. It held that Mr Menear-Gist's suspension was procedurally unfair because Mr Menear-Gist did not have a fair opportunity to respond to the allegations being made against him, have any input into the suspension or have a representative present. The ERA went

on to hold that a fair and reasonable employer would not have dismissed Mr Menear-Gist. It gave 11 reasons for that decision, including that the employer did not interview anyone named by Mr Menear-Gist who could have been helpful, that there were no written practice and procedure guidelines about claiming expenses, that Mr Menear-Gist was entitled to rely on the management of the imprest account by those responsible for it, that Mr Menear-Gist had produced receipts for the items he had claimed and had an explanation for instances of items being claimed twice (mistake). The ERA summarised the position as being that "[the employer's] failure to have any written documentation and in light of the explanations from Mr Menear-Gist, a fair and reasonable employer could not conclude that there was a "misappropriation of company money …".

[21] On the question of remedy, the ERA found that it would be impracticable to reinstate Mr Menear-Gist. This was because his conduct, mistaken or not, showed a lack of judgment given his senior position and that he had taken advantage of his right to claim for reimbursement of business expenses. In that regard the ERA noted that Mr Menear-Gist acknowledged that there were some double transactions and that he had been careless and, further, found that some of his explanations were implausible. The second reason that reinstatement was regarded as impracticable was the strained relationship between Mr Menear-Gist and his immediate superior, about whom Mr Menear-Gist had made serious allegations regarding his motives and who, in turn, had no confidence in Mr Menear-Gist.

[22] The ERA made an order for lost wages, which it reduced by 30 per cent for Mr McGuire's own conduct. The net award was $15,574.99. It also awarded compensation for humiliation, hurt feelings and loss of dignity of $7,000. Mr Menear-Gist also received a $5,250 contribution to his costs. The total recovered was therefore $27,824.99.

[23] Mr McGuire rendered invoices totalling $26,170 for the ERA proceeding. He advised Mr Menear-Gist to appeal the ERA's determination. Mr Menear-Gist signed a new letter of engagement dated 23 January 2014 in which he confirmed his instructions to Mr McGuire to represent him in the Employment Court. The hourly rate under this letter of engagement was $240 plus GST.

[24] Mr McGuire also advised Mr Menear-Gist to apply for urgent interim reinstatement pending the appeal. He prepared draft affidavits for that purpose. Mr Menear-Gist and his wife were very unhappy with the draft affidavits which included, among other things, confirmation that the couple was prepared to liquidate their assets if required to pay for any damages sustained by the employer as a result of the interim reinstatement application. After obtaining a second opinion Mr Menear-Gist terminated Mr McGuire's engagement. Mr McGuire rendered a further fee of $6,441.25 for time in relation to the proposed appeal/interim reinstatement application.

[25] Mr Menear-Gist's formal complaint to the New Zealand Law Society was that Mr McGuire's letter of engagement did not reflect the conditional fee arrangement actually agreed. But Mr Menear-Gist attached a letter to his formal complaint in which he added the following complaints: that Mr McGuire had told him not to worry about the level of fees in the ERA because the employer would be paying his fees in full; he was assured of reinstatement and a substantial pay-out; in relation to the proposed appeal/application for interim reinstatement the cost would be modest because most of the work that had already been done in preparing the ERA proceeding.

Determination by the Canterbury Westland Standards Committee

The investigation

[26] Following Mr McGuire's successful judicial review of the first determination the matter was referred to the Canterbury Westland Standards Committee. It obtained the file from the Manawatu Standards Committee and sent copies to Mr McGuire and Mr Menear-Gist to ensure that they knew what material the Committee had. It then issued a notice of hearing identifying as issues that it intended to consider:

> (1) Alleged failure to advise or to advise adequately on:
>
> (a) the likely quantum of legal costs Mr Menear-Gist would incur;
>
> (b) the likely quantum of award Mr Menear-Gist could expect to receive if successful;

(c) the risk that the legal costs incurred by Mr Menear-Gist may be more than the amount of compensation awarded even if the claim was successful;

(d) the risk the complainant would be required to meet some or all of his legal costs and that those costs would not be met by the employer;

(e) the risk that reinstatement would not be granted;

(f) the quantum of legal costs incurred in pursuing the appeal;

(g) the prospects of success on appeal;

(h) the risks of offering security over the home for damages potentially suffered as a result of the application for interim reinstatement.

(2) The orders that could be made under s 156 LCA if there were a finding of unsatisfactory conduct.

(3) The possibility of publication of the determination or decision pursuant to s 142(2) LCA.

(4) The possibility of charges being laid with the New Zealand Lawyers and Conveyancers Disciplinary Tribunal.

[27] Mr McGuire was unhappy with the issues identified in the notice of hearing and responded in his letter of 11 July 2016 with the following points:

> Mr Menear-Gist was desperate to be reinstated to his former job after he said he was unjustifiably dismissed from it. That was the only thing that mattered to him. The personal grievance was not about claiming compensation for lost income and damages. That was entirely secondary to reinstatement.
>
> I don't understand the relevance of comments about legal costs if he was unsuccessful etc. The personal grievance was successful and he did not pay any costs to the respondent.
>
> Both client engagement letters expressly stated that he was being charged on a "time and attendance basis" at a specified hourly rate. He agreed to that. I sent him a copy of my schedule of attendances in the ERA and he also agreed to that schedule of attendances.
>
> As for (e) – (h) of the notice of hearing, these matters are largely matters of conjecture as Mr Menear-Gist summarily terminated my retainer and advised the Employment Court to vacate the urgent hearing that had urgently been scheduled to consider his interim reinstatement. He instructed me to apply to the Employment Court to be temporarily reinstated as he was desperate to try and get his job back. It was impossible to assess any "risk" that he would not be temporarily reinstated as by the time the retainer was terminated I did not know the grounds that interim reinstatement would be opposed by the respondent. There was no risk of offering security over Mr Menear-Gist's

> home if he was temporarily reinstated and did not cause any damage to [the employer] while he was (such as deliberately working against the best interests of [the employer] due to an attitudinal problem for example). I would have thought that the fact that he might be prepared to put his own home potentially on the line if he intentionally caused harm to the company would not only be a personal deterrent not to but would also very much impress on the Employment Court how desperate he was to be temporarily reinstated …

[28] The Standards Committee considered Mr McGuire's letter and responded on 23 August 2016:

> The Committee considers the Notice of Hearing to be sufficiently specific in relation to the issues to be addressed.
>
> In summary, the Committee seeks an explanation from you whether and to what extent an assessment was provided by you to the complainant of the likely prospects of success of the proceedings compared to the risks of pursuing the proceeding.
>
> This includes advice of the potential outcomes of the proceedings (i.e. reinstatement and/or damages including the likely quantum to be awarded) and the likelihood of those outcomes.
>
> It also includes advice on the risk of the proceedings including the likely quantum of legal costs that would be incurred with you (and the potential to incur a costs award against the complainant if the proceedings were unsuccessful) …

[29] Mr McGuire replied on 25 August 2016:

> Mr Menear-Gist instructed me to try and get reinstated after he was dismissed. I told him that was now more difficult than it was (after the test changed). I did not make any guarantees that he would get reinstated. I warned him about the daily costs tariff of $3,500 in investigation meetings if the personal grievance was unsuccessful. I am sure there was some discussion about future lost income if the reinstatement application was unsuccessful (that would be inevitable) but I do not now recall exactly what that was. I had Mr Menear-Gist in my office on several occasions crying and telling me that "his life was in my hands". He just wanted his job back.
>
> This is on the file but an application for urgent reinstatement was made to the ERA. We had a tele-conference and the ERA said to either choose to have a hearing on that earlier, and if it was unsuccessful, expect longer relative delays getting a time for an investigation meeting (having used the earlier opportunity for interim reinstatement). The less risky option was chosen (investigation meeting) as Mr Menear-Gist and his wife were really struggling and also because of the difficulties of reinstatement without a full ventilation of the evidence and facts in the ERA. I have found that, generally, the ERA is somewhat reluctant to order reinstatements. These circumstances were also why I did not ask for any retainers or a payment plan for my legal fees despite the huge time and effort I applied to this case.

[30] On the information before me it appears that the Committee did not seek a response from Mr Menear-Gist to these assertions.

The determination

[31] In its determination dated 13 December 2016 the Committee summarily dismissed Mr Menear-Gist's complaint based on an asserted conditional fee agreement; it was clear from the client engagement letters that Mr McGuire's retainer had not been on the basis of a conditional fee agreement.

[32] The Committee summarised the other grounds of Mr Menear-Gist's complaint as follows:

> … Mr Menear-Gist says Mr McGuire failed to provide him with adequate advice about the proceeding; specifically that he had failed to advise him on:
>
> (i) The prospects of the success of his claim for reinstatement;
>
> (ii) The likely quantum of any award he would receive; and
>
> (iii) The costs he was likely to incur with Mr McGuire in pursuing the matter.

[33] The Committee started its consideration of the issues identified in its notice of hearing by stating the fundamental requirement of a competent advocate to provide a client embarking on litigation with a realistic assessment of the prospects of the claim succeeding, likely relief that could be expected, the costs likely to be incurred and the potential risks if the claim were unsuccessful, including liability for costs against the client. It added that an experienced employment lawyer is aware that awards from the ERA or the Employment Court are generally modest and ordinarily limited to three months' loss of salary or wages, $5,000 – $10,000 for humiliation, anxiety and stress and a daily costs award of $3,500.

[34] The Committee then proceeded to consider Mr McGuire's position, noting that he denied ever giving Mr Menear-Gist an unrealistic assessment of the prospects of success and denied advising Mr Menear-Gist that he would get a substantial payout and that the employer would meet all of his fees. It noted that Mr McGuire had not provided any written record of advice given to Mr Menear-Gist at the time.

[35] Taking into account the nature of the allegations against Mr Menear-Gist and the findings of the Authority, the Committee considered that the limited written advice that Mr McGuire had given, that Mr Menear-Gist could expect "a year or a bit more" by way of compensation for salary, to have been unwarranted. It was unable to identify any evidence of advice having been given about the level of costs, the prospects of success, whether the costs might outweigh the amount Mr Menear-Gist might expect to obtain, and the risk of any amount of compensation being reduced for contributory conduct.

[36] In relation to the proposed appeal the Committee found that Mr McGuire had not provided any advice in relation to the prospects of success on that appeal or of the risk of an adverse costs outcome. It was also critical of Mr McGuire's suggestion to the Menear-Gists that they use their house as security to satisfy any costs award against them and gave incorrect advice regarding the delaying of an appeal until the last possible day.

[37] The Committee concluded that:

> It follows from the above that the Committee finds the behaviour of Mr McGuire constitutes unsatisfactory conduct pursuant to s 152(2)(b) of the Lawyers and Conveyancers Act 2006.
>
> The Committee does so under two separate heads:
>
> (a) There was an absence of competent appraisal and advice of the potential rewards and risks of the proceedings provided to Mr Menear-Gist;
>
> (b) The Committee finds the costs rendered by Mr McGuire to be unreasonable given the outcomes achieved.

Grounds of challenge of the substantive determination

Scope of retainer

[38] Mr McGuire views the issues raised in the complaint in terms of the contractual rights and obligations created by the letters of engagement. He alleges that the determination was erroneous in law and fact and therefore unreasonable and unfair because: Mr Menear-Gist did not ask for an estimate of fees; Mr McGuire was not required to volunteer an estimate; it was the practice of at least two of the

Committee members not to give an estimate unless requested and to charge on a time and attendance basis[17]. Mr McGuire argued that in these circumstances he ought not to have been censured for unsatisfactory conduct.

[39] The Committee's determination was not dependent on the strict contractual rights and obligations specified in the letter of engagement. It proceeded on the basis that, as part of the substantive legal services provided, a client is entitled to advice as to whether his or her claim is worth pursuing in a monetary sense, which does not impose any obligation on the client to seek an estimate; rather, it imposes an obligation on the lawyer to warn of any risk that fees on a time and attendance basis could exceed the value of the claim. This is expressed as being a "fundamental obligation", obviously a reference to the obligations imposed by s 4 of the LCA. In the context of this case, that must mean the obligation to act in accordance with the "duties of care owed by lawyers to their clients".

[40] It is settled in New Zealand that:[18]

> Solicitors' duties are governed by the scope of their retainer, but it would be unreasonable and artificial to define that scope by reference only to the client's express instruction. Matters which fairly and reasonably arise in the course of carrying out those instructions must be regarded as coming within the scope of the retainer.

[41] Previous cases in this area have concerned lawyers' obligations to advise in relation to specific transactions rather than the cost and benefit of litigation. However, I see no reason why advice regarding the likely economic outcome of litigation should be approached differently. The following observation by Dal Pont, *Lawyers' Professional Responsibility* is apt:[19]

> Aside from giving legal advice, and financial or business advice when it comes within the terms of the retainer, lawyers owe no legal duty to furnish advice to their clients … But as a matter of good practice lawyers should supply "rounded" advice, which may involve taking into account non-legal factors. Prudent lawyers will not blithely assume that a client's best *legal* interests always coincide with the client's overall best interests.

---

17 First amended statement of claim, paragraphs 45-47.

18 *Gilbert v Shanahan* [1998] 3 NZLR 528 at 537*; Frost & Sutcliffe v Tuiara* [2004] 1 NZLR 782, (2003) 10 TCLR 912 at 787 and 916.

19 Dal Pont *Lawyers' Professional Responsibility* (6th ed, Thomson Reuters, Sydney, 2016) at 176.

[42] In my view the Committee was correct to treat the cost/benefit analysis as a matter reasonably arising in the course of carrying out Mr Menear-Gist's instructions. For most individual litigants, evaluating the cost of the proceeding against the likely amount to be gained is fundamental to their decision whether to proceed to a hearing. That is even the position where the remedy sought is not a money sum, which was the case here, to the extent that Mr Menear-Gist was seeking reinstatement. Reinstatement in this context is often a proxy for money i.e. the future earnings to be obtained from recovering the lost employment. So the same concern arises: is it worthwhile proceeding further? The client can only answer this question if he or she knows the likely risks, likely rewards and likely costs.

[43] Whilst there are some clients for whom money is no object, perhaps because of their financial circumstances or perhaps because the dispute is a matter of principle, for most the likely net recovery will be a significant matter. That is particularly so in the employment context where the litigant must assess whether he or she would be better off seeking employment elsewhere rather than incur substantial cost for little or no net gain. Therefore the likely amount of compensation, the likelihood of reinstatement and the probable cost of the litigation are matters that a competent lawyer would regard as reasonably arising in the course of carrying out his or her instructions and, in terms of s 12(a), matters that a member of the public is entitled to expect of a reasonably competent lawyer.

[44] Moreover, the Committee's conclusion is consistent with one of the core requirements of a lawyer as articulated in the preface of the Conduct and Client Care Rules. As recorded earlier, "whatever services" a lawyer is providing, he or she *must* discuss the client's objectives and how they should best be achieved. In an employment context where the client has lost his or her employment, cost assumes particular significance and should have formed part of Mr McGuire's discussion with Mr Menear-Gist as to how best achieve the latter's objectives.

[45] It follows that even if Mr Menear-Gist did not ask for an estimate of cost, the likely cost of proceeding was a matter on which Mr McGuire should have advised. The Committee made no error in this regard.

Relevance of the claim for reinstatement

[46] Mr McGuire alleges that the Committee took irrelevant considerations into account and failed to take relevant considerations into account in relation to Mr Menear-Gist's claim for reinstatement.[20] He identified seven factors, though the pleading does not specify which are said to be relevant and which irrelevant.

[47] I infer that the following are the ones relied on as relevant considerations not taken into account: that Mr McGuire was retained primarily to obtain reinstatement; reinstatement is a discretionary remedy; reinstatement was refused even though Mr Menear-Gist's personal grievance claim succeeded; the ERA awarded Mr Menear-Gist costs.

[48] I infer that the irrelevant factors said to have been taken into account are those referred to at paragraphs 12 – 15 of the determination, which Mr McGuire complains were not raised with him, either at all or adequately, by the Standards Committee. Paragraphs 12 – 15 of the determination either cite or paraphrase statements taken from Mr Menear-Gist's original letter of complaint of 27 February 2014. The issues identified in that letter and referred to in paragraphs 12 – 15 of the determination are all reflected in the issues identified in the notice of hearing of complaint, which invited submissions on them. The fact that Mr McGuire did not agree with the issues framed by the Committee did not preclude the Committee from considering them and it is not tenable for Mr McGuire to suggest that these issues were not properly raised with him.

[49] It is not at all clear the basis on which Mr McGuire claims that these matters were not raised properly with him. In the Committee's first letter to Mr McGuire of 21 September 2015, Mr Menear-Gist's letter of 27 February 2014 was included for the purposes of making it clear what documents the Committee had. No comment was sought by the Committee at that stage, but by its letter of 25 July 2016 the Committee sought submissions from the parties on the issues it saw as arising. That letter prompted correspondence between Mr McGuire and the Committee because Mr McGuire did not agree with the issues as the Committee saw them. Further, as

[20] First amended statement of claim, paragraph 49.

recorded earlier in its letter of 23 August 2016 the Committee sought an explanation from Mr McGuire of:

> Whether and to what extent an assessment was provided by you to the complainant of the likely prospects of success of the proceedings compared to the risks of pursuing proceedings.
>
> This includes advice on potential outcomes of proceedings (i.e. reinstatement and/or damages including the likely quantum to be awarded) and the likelihood of those outcomes.
>
> It also includes advice of the risk of proceedings including the likely quantum of legal costs that would be incurred with you (and the potential to incur costs awarded against the complainant if the proceedings were unsuccessful).

[50] Given that Mr McGuire already had Mr Menear-Gist's letter it is not tenable to suggest that the complaints Mr Menear-Gist was making about what he was led to believe regarding the outcome and the costs involved in the proceedings, were not fairly put to Mr McGuire. That this is so is evident from Mr McGuire's own response to the Committee of 25 August 2016.

[51] The treatment of the claim for reinstatement was, for Mr McGuire at least, the central issue. It was evident from his letters to the Committee of 11 July 2016 and 25 August 2016 that he perceived reinstatement to be Mr Menear-Gist's primary objective, with the implication that Mr Menear-Gist would willingly have taken the risks associated with the ERA hearing. Of course, this perception, even if correct, does not address the Committee's concern that inadequate advice of the risks was given. But it nevertheless raises a serious issue, to which I turn next.

[52] The Committee was conscious that Mr Menear-Gist was seeking reinstatement and specifically discussed that issue, commenting that where there are allegations of dishonesty and/or irreparable breakdown in the working relationship it would be unusual for reinstatement to be ordered. However, it did not address Mr McGuire's assertion that reinstatement was Mr Menear-Gist's primary motivation.

[53] The information available to the Committee raised an obvious issue of reliability and, possibly, credibility. Mr Menear-Gist had said that:

> I was advised from the beginning from Jeremy McGuire (Lawyer) that I would be awarded without a doubt a six figure pay-out, for winning a personal grievance against [the employer] for unfair dismissal.
>
> After the first hearing when the ERA made it clear that the compensation would be nowhere near what Jeremy had predicted, I raised concerns that his fees were probably getting high and that I would owe him more than I would receive in a pay-out. Mr McGuire told me "not to worry because [the employer] would be paying the total costs of his fees when I won the personal grievance, so it did not matter how long the case takes".
>
> I was told and assured by Jeremy McGuire (Lawyer) on numerous occasions that I would be getting my job back and a large substantial pay-out.

[54] A review of the evidence suggests that these claims should have been approached with great care. It is true that Mr McGuire provided very little by way of written advice to Mr Menear-Gist prior to the ERA hearing. But in an email of 29 October 2013 he said:

> … If you don't get reinstated I am not saying you will get three years' salary, etc as lost remuneration. That would be unprecedented and very unlikely. You would probably get a year or a bit more but nothing more than that (not in the ERA anyway).

[55] The Committee referred to this email as part of its reasoning for the unsatisfactory conduct finding on the basis that even a year's salary would be a significant uplift from the awards usually made by the Authority. But it seems to me that this piece of correspondence has other significance. It is completely at odds with the complaint made by Mr Menear-Gist set out above. It clearly contemplates the possibility of Mr Menear-Gist not being reinstated. Further, it undermines Mr Menear-Gist's claim that he had been assured of a six-figure pay-out; in its determination the ERA referred to Mr Menear-Gist's annual salary as being $89,000. Even if he had obtained a year's salary or a bit more he would not have received a six-figure pay-out. Thirdly, Mr McGuire deposed in his affidavit of 16 January 2017 that he provided Mr Menear-Gist with a copy of his costs memo to the ERA dated 15 January 2014. That memo identified the possible costs outcomes, which ranged from $5,250 to $15,000. It also referred to the actual time and attendance figure of 113 hours (i.e. $22,600 plus GST). Mr Menear-Gist appears not to have expressed any concern with that memo. It is inherently unlikely that an experienced lawyer would have given a verbal assurance of the kind claimed by Mr Menear-Gist that was contrary to the written memo he had filed in the ERA.

[56] The Committee did not consider these issues. Had it done so I think it would have been difficult to avoid the conclusion that Mr Menear-Gist's assertions could not be accepted uncritically. This, in turn, meant that the Committee ought to have considered more carefully Mr McGuire's assertions in his letter of 11 July 2016 that Mr Menear-Gist was desperate to be reinstated. The significance of this failing is relevant to the issue of penalty which I come to later. The failure of the Committee to consider these matters means that it failed to take some relevant considerations into account.

Relevance of personal grievance claim

[57] Mr McGuire argued that the determination is unfair and unreasonable because it took into account irrelevant considerations and failed to take relevant considerations into account in relation to the personal grievance claim which was upheld in the ERA, and in respect of which Mr McGuire has never been criticised by either the ERA or the Employment Court for the competency of the handling of the matter.[21]

[58] This complaint does not have any merit. At the outset, the Committee recorded the result of the ERA hearing and later, at paragraphs 23 and 24, made findings adverse to Mr McGuire in relation to his advice as to the likely size of any personal grievance award. The fact that the personal grievance claim was successful does not in itself address the issues that are at the heart of Mr Menear-Gist's complaint or of the Committee's concern. The point is that because Mr McGuire did not provide adequate advice to Mr Menear-Gist as to the probable size of a personal grievance award in comparison with the likely cost of obtaining such an award, Mr Menear-Gist was simply not in a position to make an informed decision as to whether to proceed or not. This concern is particularly acute given the obvious uncertainty that existed in relation to the reinstatement claim. Had Mr Menear-Gist had a much stronger position in relation to reinstatement, the possibility of a personal grievance award less than the cost of the proceedings might not have been such a concern. In the end, however, Mr Menear-Gist had a weak claim to

[21] First amended statement of claim, paragraphs 50–51.

reinstatement which made the cost/benefit analysis on the personal grievance claim all the more important.

Error of law in relation to employment law

[59] At paragraph 23 the Committee said:

> An experienced employment lawyer or advocate is aware that the awards from the Employment Relations Authority or an Employment Court are generally reasonably modest. They are ordinarily limited to:
>
> (a) Three months of salary or wages;
>
> (b) A payment for humility, anxiety and stress under s 123(1)(i) (a range of $5,000 – $10,000 under this head is usual); and
>
> (c) A daily award for costs. The daily award of costs is usually set by reference to a scale of $3,000 per day of hearing time.

[60] Mr McGuire alleged that these statements are wrong as a matter of law. He did not, however, expand on this issue in his written or oral submissions and provided no basis, evidential or by way of authority, to counter the Committee's view on this issue. The Committee is entitled to express its view of what reasonably experienced lawyers practicing in a particular area can be expected to know. It would be impossible for a Standards Committee to work effectively if it were not entitled to do so. The fact that Mr McGuire did not make any effort to actually demonstrate the alleged error means that this ground of challenge fails.

Reasons for ERA's refusal to grant reinstatement not relevant

[61] At paragraph 33 of the determination the Committee said:

> In considering what was realistic advice it is important to consider the nature of the behaviour Mr Menear-Gist was accused of which led to his dismissal.

[62] The Committee went on to describe and discuss the nature of the allegations that Mr Menear-Gist was facing, noting that they were allegations of dishonesty and also "of a complete breakdown in the relationship between Mr Menear-Gist and his immediate manager". It then observed that:

> That aspect of the allegations if accepted would, of itself, suggest that reinstatement was untenable and unlikely …
>
> When there are allegations of dishonesty and/or irreparable breakdown in the working relationship between the employee and their manager it would be unusual for reinstatement to be ordered by either the Authority or the Employment Court.

[63] Mr McGuire argued that the Committee acted unfairly and unreasonably in making these statements because Mr Menear-Gist had instructed him and given evidence at the investigation that he had acted honestly.[22] Mr McGuire also argued that the Committee acted unreasonably and unfairly in expressing these views because none of those concerns were raised with him and he was not given the opportunity to answer them.[23]

[64] I do not accept these criticisms. At the heart of the Committee's determination is the finding that Mr McGuire did not adequately advise Mr Menear-Gist as to the risks involved in this proceeding. In the context of an employment termination on grounds of dishonesty, credibility, particularly in relation to reinstatement claim, is a significant issue. One of the risks that a client in Mr Menear-Gist's position must grasp is the risk that he or she will not be believed or that the employer's trust and confidence has been undermined to such an extent as to make reinstatement impracticable. Competent counsel do not simply accept clients' assertions of honesty as relieving them of the obligation to point out that risk. The notice of hearing made it clear that one of the Committee's concerns was whether adequate advice had been given on the risk that reinstatement would not be granted. It is not open to Mr McGuire to say now that the issues discussed by the Committee at paragraphs 33 – 38 of the determination were not raised with him.

Not a rehearing?

[65] One of Mr McGuire's complaints is that the determination is unreasonable and unfair because it was not a rehearing of the complaint as directed by the High Court.[24] Mr McGuire did not elaborate on this pleading during submissions. The manner in which the complaint was dealt with is traversed at length by the legal

---

22 First amended statement of claim, paragraph 54.
23 First amended statement of claim, paragraph 55.
24 First amended statement of claim paragraph 57.

standards officer responsible for the matter, Mr Ellis. I am satisfied that the process that was followed, including the provision of all relevant material to the parties, the advice by way of notice of hearing and the process by which the matter was actually considered constituted a rehearing for the purposes of the LCA. There is no merit in this ground.

Relevance of Mr Menear-Gist's termination of the retainer

[66] Mr McGuire alleges that the determination is unreasonable and unfair as a result of factual and legal errors through failing to take into account the prospect of the ERA determination being successfully challenged in the Employment Court but for Mr Menear-Gist's decision to terminate the retainer.[25] Allied to that is the allegation of factual and legal error on the basis that Mr Menear-Gist breached the retainer when he unilaterally terminated it and then failed to pay for legal services.[26] Both of these allegations are misconceived.

[67] The first allegation entirely overlooks the fact that the Committee's determination was concerned with the quality of Mr McGuire's advice to Mr Menear-Gist. Whether or not an application for interim reinstatement would ultimately have succeeded is completely beside the point, which is that Mr Menear-Gist was not able to make a properly informed decision about whether he wished to proceed or not and a proper assessment of the risks in doing so. The second complaint is also without foundation.

[68] As to the assertion that Mr Menear-Gist breached the terms of the retainer by terminating it, the client engagement letter included the provision at clause 6(a) that:

> You can terminate my retainer at any time without cause or reason.

[69] Against that express term there is no basis for Mr McGuire to assert that it was Mr Menear-Gist who breached the retainer in unilaterally terminating it.

[70] It is correct that clause 6(b) required all outstanding fees to be paid in the event of termination of the retainer. But that issue is subsumed into the broader

---

[25] First amended statement of claim paragraph 58.
[26] First amended statement of claim paragraph 59.

question of whether Mr Menear-Gist had been properly advised regarding the likely size of the fee, which I have already addressed.

Failing to refer to s 12 of the LCA

[71] Although not raised on the pleadings Mr McGuire argued that the Committee's conclusions at paragraph 53 and 54 of the determination were unreasonable for various reasons, many of which had been the subject of previous, pleaded, challenges. An unpleaded one, however, was that the Committee had failed to refer to s 12 of the LCA or to specify how the impugned conduct constituted unsatisfactory conduct by reference to the prescribed elements in s 12. There is no merit in this ground. At paragraph 16 of the determination the Committee identified as the overall issue for consideration whether Mr McGuire provided adequate advice to Mr Menear-Gist and immediately went on to refer to the definition of unsatisfactory conduct in s 12. During the course of its discussion the Committee referred to what is expected of a competent lawyer. The foundation for its eventual finding was properly laid and it was unnecessary for it to repeat those matters again in its conclusion.

Challenge to costs determination

[72] Mr McGuire alleges that the Committee's decision to reduce the ERA fee to $10,000 plus GST is unreasonable because it was arbitrary and made without reasoning to justify or explain why and how the legal fees were calculated.[27] Mr McGuire is correct that the Committee gave no reasons for reaching this figure, though it is possible to discern the probable basis for it from the determination generally.

[73] There is no dispute that Mr McGuire did the work that he charged for and the hourly rate is not said to be unreasonable. But it has long been recognised that, in setting a fee on a time and attendance basis, a lawyer should nevertheless take into account the other relevant factors, one of which is the proportionality of the fee to

---

[27] First amended statement of claim paragraph 44.

the outcome.[28] It is evident that the Committee's decision reflected a view that the fee in this case was disproportionately high, given the outcome for Mr Menear-Gist. But I have concerns about the process by which the Committee reached this conclusion.

[74] First, even assuming that the reduction in the fee was intended to reflect the Committee's concern over proportionality, there is no explanation as to how the figure of $10,000 was reached. Secondly, even if Mr Menear-Gist had been properly advised of the risks and likely cost of proceeding he may still have elected to pursue his claim with the ERA. Indeed, on Mr McGuire's account, this seems quite likely because of the importance of reinstatement to Mr Menear-Gist. Any reduction in the fee would need to reflect that possibility and would require an assessment as to the likelihood of Mr Menear-Gist choosing to proceed in any event. As discussed, the Committee appears not to have considered this aspect or to have sought Mr Menear-Gist's response to Mr McGuire's assertion that the primary concern was reinstatement. For these reasons I agree that this aspect of the Committee's decision is unreasonable.

[75] Mr McGuire makes a similar complaint in respect of the decision requiring him to remit the fee in relation to the appeal and, in addition, says that the Committee has no power to remit a fee but only to cancel. There is nothing in either point. It is true that "remit" is not the word used in the LCA but it is a synonym for cancel and nothing turns on the use of the word. As to the reason for this order, I am satisfied that the cumulative effect of the determination makes it clear that, in the Committee's view, Mr McGuire's advice regarding the prospects of a successful appeal was not realistic. In particular, it would require the Employment Court to reverse the credibility findings made by the ERA and the assessment by the ERA that reinstatement was impracticable. Moreover, the draft affidavits that Mr McGuire prepared were, plainly, not prepared on the instructions of his client and could not have been charged for in any event. It is evident from this finding that the Committee did not consider there to be any basis on which Mr McGuire could

---

[28] See for exampl *Chean v Kensington Swan* HC Auckland CIV 2006-404-1047, 7 June 2006 at [23] and *Vallant Hooker v Tootill* HC Auckland CIV 2009-404-1895, 4 September 2009 at [26]–[27].

properly have charged for the work in relation to the proposed appeal and I see no error in the Committee's treatment of this aspect.

Result

[76] All but one of the grounds of challenge fail. The challenge to the order reducing the fee to $10,000 succeeds and that order only is set aside. That aspect is remitted to the Committee for further consideration of Mr McGuire's assertion that Mr Menear-Gist's primary concern was reinstatement and, if that was or was likely to have been the case, the effect of it on the decision as to Mr McGuire's fee.

[77] I will receive memoranda as to costs, though given that both parties have had a measure of success it may be preferable for costs to lie where they fall.

_____

P Courtney J