LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2021] NZLCRO 65

Ref: LCRO 184/2020

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a decision of the [Area] Standards Committee [X]
BETWEEN	**BC** Applicant
AND	**NP and RS** Respondents

DECISION

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

Introduction

[1] Ms BC has applied to review a decision made by the [Area] Standards Committee [X] (the Committee) dated 20 August 2020, in which the Committee decided to take no further action on her complaint against Ms NP and Mr RS (the respondents).

[2] The Committee based its decision upon ss 138(1)(f) and 138(2) of the Lawyers and Conveyancers Act 2006 (the Act).

[3] Section 138(1)(f) of the Act allows a Committee to dismiss a complaint if it considers that a complainant has an adequate remedy elsewhere which it would be reasonable for that complainant to pursue. Section 138(2) of the Act allows a Committee

to dismiss a complaint if it considers that further action is neither necessary nor appropriate.

Background

[4] In March 2020 Ms BC issued proceedings against her former employer RL, in the Employment Relations Authority (the employment proceedings).

[5] Ms C was the principal of RL.

[6] Amongst the allegations made by Ms BC in the employment proceedings, was that RL/Ms C had committed acts of fraud and other criminal conduct.

[7] Shortly after filing the employment proceedings, Ms BC made an application to have them transferred to the Employment Court.

[8] From May 2020, RL was represented by counsel, Ms S, in those proceedings.

[9] Ms NP was at the relevant time a member of the Employment Relations Authority (ERA), appointed by the Governor-General on the recommendation of the Minister for Workplace Relations and Safety.[1]

[10] As a member of the ERA, Ms NP had the statutory function of "resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities."[2]

[11] At the relevant time Ms NP also held a practising certificate as a barrister and solicitor of the High Court of New Zealand.[3]

[12] The employment proceedings were assigned to Ms NP to case manage, hear and determine.

[13] In the course of case managing the employment proceedings, Ms NP made or declined to make a number of procedural orders. Included amongst the orders she made was one directing the parties to attend mediation.

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[1] Section 167, Employment Relations Act 2000. On appointment, and before taking up duties as a member of the ERA, the member must swear an oath before a judge of the Employment Court to "faithfully and impartially perform [their] duties" (s 168 of the Employment Relations Act 2000).
[2] See generally, s 157 of the Employment Relations Act 2000.
[3] There is no requirement, in the Employment Relations Act 2000, for a lawyer with a practising certificate to either maintain or surrender it on appointment as an Authority Member. This contrasts with the appointment of a judge of the Employment Court, who may not simultaneously practise as a lawyer (s 200 of the Employment Relations Act 2000).

[14] Ms BC took issue with Ms NP's case management, including the mediation direction. On 17 May 2020 she wrote to the Chief of the ERA complaining about Ms NP (and others administratively involved in the employment proceedings).

[15] Mr RS is the Chief of the ERA, as well as being a duly appointed member of it. As the Chief of the ERA, Mr RS has the statutory function of, amongst other things, ensuring that members of the ERA "discharge their functions … in an orderly and expeditious way … and … in a way that meets the objectives of the [Employment Relations Act]".[4]

[16] Mr RS also held a current lawyer's practising certificate at the relevant time.

[17] Mr RS responded to Ms BC's complaint, in a letter to her dated 20 May 2020. He declined to intervene, and said that after having reviewed the employment proceedings file he was "satisfied that [Ms NP] has taken, and is taking, reasonable steps to assist [Ms BC] in the resolution of [her] employment relationship problem."

[18] Ms BC responded by inviting Mr RS to reconsider her complaint.

The complaint

[19] Ms BC lodged her complaint against the respondents in a letter to the Complaints Service dated 11 June 2020. She described her complaint as being about "unacceptable conduct and abuse of power by [Ms] NP … and [Mr] RS …"

[20] Expanding upon that, Ms BC said the following:

(a) The respondents "have acted and are continuing to act in a manner that brings the legal profession into disrepute."

(b) The respondents have "damaged [Ms BC's] position in [employment] proceedings."[5]

(c) There is "little utility in filing submissions [in the employment proceedings] as the applications appear to have already been predetermined."

[4] See generally s 166A of the Employment Relations Act 2000. The Chief of the ERA may also "issue instructions … that outline expectations in respect of the process, timeliness, or any other matter relating to the hearing and determination of matters before the [ERA]".
[5] The proceedings referred to by Ms BC were those brought by her against RL, in the ERA.

[21] Specifically, Ms BC said that Mr RS, as the Chief of the ERA, has brought the legal profession into disrepute by not addressing Ms NP's conduct and by ignoring Ms BC's complaints about her.

[22] Regarding the question of a Standards Committee's jurisdiction to consider complaints about judicial officers, Ms BC noted that both respondents were lawyers with current practising certificates. She further said that both "hold positions of power and repute within the legal profession", and that their conduct is contrary to "the fundamental obligations of lawyers to uphold the rule of law and facilitate the administration of justice."[6]

[23] Attached to Ms BC's complaint was correspondence relating to the employment proceedings, several documents that formed part of those proceedings and copies of complaint correspondence that Ms BC had sent to Mr RS.

Standards Committee processes

[24] Ms BC's complaint was initially assessed as being suitable for the Complaints Service's Early Resolution Process (ERP).

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

[26] If the Committee's preliminary view is that the complaint appears to lack substance, a Legal Standards Officer (LSO) will contact the respondent lawyer and inform them of the Committee's preliminary view, inviting a response from the lawyer.

[27] Any response is included in a file note, described as a "Call Log", prepared by the LSO and provided to the Committee, which then completes its inquiry into the complaint.

[28] On 17 August 2020 the LSO spoke to Ms NP and informed her of the Committee's preliminary view about Ms BC's complaint.

[29] The Call Log records that Ms NP "offered to provide any further information Standards Committee required from her or that available from ERA Registry, understands that this offer will be recorded in the decision…".

[30] On 18 August 2020 the LSO spoke to Mr RS, and also informed him of the Committee's preliminary view about the complaint. The Call Log records that Mr RS

[6] A reference to s 4(a) of the Act and r 2 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

"offered to provide any further information Standards Committee required, understands that this will be recorded in the decision…".

[31] Both respondents were also informed that the Standards Committee was of the view that "it had sufficient information to make its decision."

[32] The complaint, including the Call Log, was referred to the Committee for further consideration.

Standards Committee decision

[33] The Committee summarised the complaints about Ms NP as being about the way in which Ms NP had managed the employment proceedings. This included complaint that Ms NP had not protected Ms BC's position, and did not deal with the case appropriately given allegations of fraud that had been made against Ms BC's former employer.[7]

[34] In relation to Mr RS, the Committee noted that Ms BC's complaint was that he was "bringing the [legal] profession into disrepute by not addressing Ms NP's conduct and by ignoring the substance of [Ms BC's] complaints."[8]

[35] The Committee identified the issue for consideration as being whether the respondents "are undertaking regulated services or whether they have otherwise breached the Act".[9]

Regulated services

[36] The Committee noted the definition of "regulated services" in the Act, and noted that a Review Officer has previously held that "the key factor in determining whether a lawyer has engaged in regulated services is that the lawyer's services must retain a connection to a client."[10]

[37] The Committee held:[11]

> As neither [of the respondents] when acting in their capacity as members of the ERA are acting for a client or giving legal advice, their roles are not those

[7] Standards Committee decision at [5].
[8] At [6].
[9] At [11].
[10] At [15]; see *TJ v WO* LCRO 314/2013 (22 June 2018).
[11] At [16].

> that can be classified as the performance of regulated services or connected with the provision of such services.

Did the respondents' conduct otherwise breach the Act

[38] The Committee referred to ss 7(1)(b)(ii) and 12(c) of the Act, both of which provide disciplinary consequences for conduct that does not involve the provision of regulated services or a connection with regulated services.

[39] In relation to s 12(c) the Committee observed that this applied "in respect of conduct that is unrelated to the provision of legal services but is found to be a breach of the regulations or rules made under the Act."[12]

[40] The Committee noted that s 7 of the Act relates to misconduct, and that only the Lawyers and Conveyancers Disciplinary Tribunal could make such a finding. It further noted that the test for a finding of misconduct under s 7(1)(b)(ii) was whether or not the lawyer was "a fit and proper person or otherwise unsuited to engage in practice as a lawyer."

[41] The Committee held that this was "a higher threshold than that imposed by the Act for charges laid against lawyers undertaking regulated services."[13]

[42] The conclusion was reached by the Committee that there was "no suggestion that the conduct of [the respondents was] in breach of any relevant rules and regulations or would fail the fit and proper person test."[14]

[43] Finally, the Committee noted that Ms BC had applied to the Employment Court to challenge decisions made by Ms NP, including the way in which Ms NP managed the employment proceedings, and that this was "the correct forum for such matters."[15]

Application for review

[44] Ms BC lodged her review application on 30 September 2020. She said:

(a) The Committee "got things wrong … and have failed to give consideration and weight to relevant factors."

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[12] Standards Committee decision at [18].
[13] At [19].
[14] At [20].
[15] At [21].

(b) The Committee misstated aspects of her complaint.

(c) The Committee failed to address conduct issues that were raised and failed to take into account relevant evidence and information.

(d) Despite the Committee concluding that the proper forum for determining the matters raised was the Employment Court, that court has identified a preliminary issue as to jurisdiction.

(e) The Committee "failed to appreciate the gravity of the situation."

(f) The respondents ceased to hold practising certificates immediately after the complaint had been lodged.

(g) The Committee failed to consider the complaints that she had made to Mr RS, and that Mr RS had refused to address those.

(h) The respondents have breached their obligations to facilitate the administration of justice and uphold the rule of law.

[45] The outcome that Ms BC seeks is a finding of unsatisfactory conduct against both respondents, and an order that they pay the costs associated with her instructing counsel to act in the employment proceedings.

Response

[46] On behalf of the respondents [XXX] Law provided a response to Ms BC's review application, in a letter dated 19 October 2020.

[47] Counsel referred to an earlier Review Officer's decision which dealt with the issue of whether a lawyer acting in the capacity of a Child Support Officer for the Inland Revenue Department, was carrying out "regulated services".[16]

[48] Counsel referred to the following extract from the decision:

> [26] Many lawyers carry out work which is not related to the provision of regulated services. A number occupy roles as members of Tribunals or other decision-making bodies. By way of example, many hold warrants as tenancy adjudicators and dispute referees but their roles as decision-makers in those jurisdictions are quite separate and distinct from the role they play in their private legal practice.

[16] LCRO 46/2012 (21 November 2014).

> [27] In those roles, lawyers are not acting for clients, providing legal services, or carrying out legal work in the manner as described in the Act. They are fulfilling the role of decision-makers, and their functions are prescribed by the legislation which establishes the jurisdiction in which they operate.
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> [28] Parties who are disaffected with the way in which a decision-maker has conducted a hearing may raise their concerns with the person responsible for managing the particular jurisdiction or alternatively can pursue a complaint with the government department charged with the responsibility of managing the particular jurisdiction, in this case, the Inland Revenue Department. Dissatisfaction with outcome can be remedied in many jurisdictions, through an appellate process.

[49] Counsel also referred to the Committee's conclusion that there was no suggestion that the respondents had breached any rules or regulations, or would otherwise have failed the fit and proper person test.

Comment by Ms BC

[50] In an email to the Case Manager dated 13 November 2020, Ms BC provided her response to [XXX] Law's submissions.

[51] Ms BC emphasised her view that a Review Officer "has jurisdiction to examine and make a finding [about] the conduct of [the respondents] … [having regard to the nature of her complaints]".

[52] Ms BC further submitted that the respondents' conduct "falls short of [that] expected of members of the legal profession." She did not accept that, because the respondents were statutory decision-makers, their conduct was not amenable to disciplinary inquiry under the Act. She noted that both held practising certificates at the relevant time.

Nature and scope of review

[53] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[17]

> … 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.
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> 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

[17] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

> 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.

[54] More recently, the High Court has described a review by this Office in the following way:[18]

> 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.

[55] 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.

Hearing on the papers

[56] Section 206(2) of the Act allows a Review Officer to deal with a review application on the papers, if he or she considers that it can be adequately determined in that way on the basis of the available information.

[57] Before adopting that approach, a Review Officer "must give the parties a reasonable opportunity to comment on whether the review should be dealt with in that manner."[19]

[58] With that in mind, on 30 October 2020 the Case Manager wrote to the parties and indicated that my initial appraisal of Ms BC's review application was that it might

[18] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].
[19] Section 206(2A) of the Act.

appropriately be dealt with on the papers. Submissions about that were invited from the parties.

[59] In an email to the Case Manager dated 13 November 2020 Ms BC submitted that "this matter is not suitable to be dealt with on the papers as it involves conduct matters that Ms NP and Mr RS should be required to answer to". Ms BC said that her belief was "that a hearing in person with all parties present is required in this matter."

[60] Neither respondent made any submissions about the format of the hearing.

[61] I directed the matter to proceed as an applicant-only hearing, but invited the respondents and their counsel to attend if they wished.

[62] In an email from counsel for the respondents dated 23 November 2020, counsel advised that "the respondents [did] not seek to be present or be represented at the … hearing."

[63] The matter was thus scheduled to proceed before me on 30 April 2021, as an applicant-only hearing, and the parties sent a Notice of Hearing to this effect.

[64] Ms BC did not attend at the scheduled time of 9.30am. I directed the Case Manager to telephone her and enquire when she would be appearing. Ms BC informed the Case Manager that she was unwell and would not be attending the hearing.

[65] Having earlier come to the preliminary view that Ms BC's review application could adequately be dealt with on the papers on the basis of the available information, I reconsidered the position and issued a Minute to the parties on 30 April 2021 confirming that I would now be dealing with the review application, on the papers.

[66] I attach a copy of that Minute to this decision, as it deals with other procedural matters that had been raised by Ms BC.[20]

[20] One of the procedural matters referred to in that Minute was an application that I disqualify myself from completing this review, on the basis I was a lawyer member of Auckland Standards Committee 1 in 2012, which dealt with a complaint that Ms BC made against another practitioner. In responding to this Minute, Ms BC said that the Standards Committee decision/determination from 2012 was not signed by me as the Convener of that Committee. She said that she had only become aware that I had been a Convenor of that Committee, recently. Naturally I accept what Ms BC has said about that. This does not alter my earlier decision not to disqualify myself from dealing with this review application.

[67] I confirm that I have read Ms BC's complaint and the Committee's decision. I have also read the review application and the respondents' response to that.

[68] There are no additional issues or questions in my mind that necessitate any further evidence, information or submissions from either of the parties.

Discussion:

Issue

[69] Ms BC's review application raises the question of whether the reach of the lawyers' disciplinary process extends to examining the conduct of lawyers which occurs when they are acting as statutory decision-makers, appointed to those roles under specific legislation.

[70] In my view, the answer to that question is "it depends".

[71] In the case of the respondents and the complaint that Ms BC has made against them, the answer is that their conduct is not captured by the Act.

[72] That is not to say that conduct by a lawyer which occurs when they are acting as a statutory decision maker, will never be captured by the Act.

[73] I will now explain my reasons for these conclusions.

Analysis

[74] There is no doubt that at the relevant time (2020), the respondents held practising certificates. Those practising certificates entitled them to practice either as barristers, barristers with some limitations, barristers and solicitors with some limitations, or barristers and solicitors on their own account.

[75] It is not particularly important as to which category of practising certificate the respondents held. The fact that they each held a practising certificate meant that at least to some extent, they were subject to the relevant provisions of the Act and any rules or regulations made under the Act.

[76] The disciplinary reach of the Act applies to two situations: conduct said to have occurred whilst a lawyer is providing regulated services, and conduct said to have occurred whilst a lawyer is not providing regulated services. It is an either/or situation; there is no gap through which conduct can be said to fall.

[77] In the latter category (conduct which is said to have occurred whilst a lawyer was not providing regulated services), the disciplinary reach is limited. I discuss that further below.

Misconduct and unsatisfactory conduct

[78] The Act makes provision in s 12 for conduct that is unsatisfactory, and in s 7 for conduct that is misconduct.

[79] Misconduct is the more serious of the two. The jurisdiction to consider and rule upon complaints said to involve lawyer misconduct, rests with the New Zealand Lawyers and Conveyancers Disciplinary Tribunal (the Tribunal). Cases reach the Tribunal following a referral there, by way of a prosecution, by either a Standards Committee or a Review Officer.

[80] Misconduct can include conduct that occurs whilst a lawyer is providing regulated services,[21] as well as conduct by a lawyer that is unconnected with the provision of regulated services.[22]

[81] As to conduct said to be unconnected with the provision of regulated services and which amounts to misconduct, this arises when the conduct would justify a finding that the lawyer is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer. This is generally referred to as "the fit and proper person test."

[82] Sections 12(a) and (b) of the Act define "unsatisfactory conduct" as including "conduct of [a] lawyer ... that occurs when [they are] providing regulated services".

[83] Section 12(c) of the Act defines unsatisfactory conduct as including conduct by a lawyer which contravenes the Act, any regulations or practice rules made under the Act that apply to the lawyer or of any other Act relating to the provision of regulated services.

[84] Thus, s 12(c) of the Act can apply to conduct by a lawyer unconnected with the provision of regulated services but which nevertheless breaches a relevant professional, practice or ethical rule.

[85] In the present matter, the relevant "practice rules" are the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

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[21] Section 7(1)(a) of the Act.
[22] Section 7(1)(b)(ii) of the Act.

Regulated services

[86] "Regulated services" are relevantly defined in s 6 of the Act as follows:

> (a) in relation to a lawyer or an incorporated law firm,—
>
> (i) legal services; and
>
> (ii) conveyancing services; and
>
> (iii) services that a lawyer provides by undertaking the work of the real estate agent.

[87] "Legal services" are also defined in the Act as meaning "services that a person provides by carrying out legal work for any other person."

[88] "Legal work" includes:[23]

> (a) the reserved areas of work:
>
> (b) advice in relation to any legal or equitable rights or obligations:
>
> (c) the preparation or review of any document that—
>
> (i) creates, or provides evidence of, legal or equitable rights or obligations; or
>
> (ii) creates, varies, transfers, extinguishers, mortgages, or charges any legal or equitable title in any property:
>
> (d) mediation, conciliation, or arbitration services:
>
> (e) any work that is incidental to any of the work described in paragraphs (a) to (d).

[89] "Reserved areas of work" is defined to mean the work carried out by a person:

> (a) in giving legal advice to any other person in relation to the direction or management of—
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> (i) any proceedings that the other person is considering bringing, or has decided to bring, before any New Zealand court or New Zealand tribunal; or
>
> (ii) any proceedings before any New Zealand court or New Zealand tribunal to which the other person is a party or is likely to become a party; or
>
> (b) in appearing as an advocate for any person before any New Zealand court or New Zealand tribunal; or
>
> (c) in representing any other person involved in any proceedings before any New Zealand court or New Zealand tribunal: or

[23] Section 6 of the Act.

> (d) in giving legal advice or in carrying out any other action that, by section 21F of the Property (Relationships) Act 1976 or by any provision of any other enactment, is required to be carried out by a lawyer.

[90] The expression "regulated services" has been given a broad interpretation by the High Court, to include conduct which is *connected with* the provision of legal services.[24] This is to be contrasted with conduct which involves "purely personal actions."[25]

[91] Significantly, it has been held that "conduct 'that occurs at a time when the lawyer is providing regulated services' … does not require there to be a subsisting lawyer/client relationship with a particular client."[26]

Were the respondents providing regulated services?

[92] No. Despite the broad interpretation of "regulated services" as including conduct connected with the provision of regulated services, I am not satisfied that the conduct of the respondents about which Ms BC has complained, is conduct which is captured by the unsatisfactory conduct provisions in ss 12(a) and (b) of the Act.

[93] Ms NP and Mr RS were, respectively, exercising their statutory functions as a decision-maker or a jurisdiction leader under the Employment Relations Act 2000. Those roles – defined in and prescribed by the Employment Relations Act 2000 – do not fall within any of the descriptions of "legal services", "legal work" or "reserved areas of work" in the Act, as set out by me above, and were thus not "regulated services".

[94] The fact that the respondents each held a practising certificate was incidental and not essential to their statutory decision-making roles.

[95] It follows that conduct which occurs in such a setting is not amenable to a Committee inquiry and a finding of unsatisfactory conduct, pursuant to either of ss 12(a) or (b) of the Act.

[96] I now turn to consider whether the conduct of the respondents could be caught by s 12(c) of the Act.

Does the respondents' conduct engage the non-regulated services provisions of the Act?:

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[24] See *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2014] NZHC 1987 at [97] and following. This approach has been followed in the Tribunal: see *Canterbury Westland Standards Committee 2 v Eichelbaum* [2014] NZLCDT 68 at [30].
[25] See *Auckland Standards Committee 1 v Fendall* [2018] NZLCDT 26 at [44].
[26] See *A v Canterbury Westland Standards Committee 2* [2015] NZHC 1896 at [60].

Unsatisfactory conduct (s 12(c))

[97] As indicated above, s 12(c) of the Act omits reference to conduct occurring whilst there is a connection to regulated services.

[98] In *EA v ABO* LCRO 237/2010 (29 September 2011), the Review Officer said at [31]:

> …a lawyer may be exposed to a finding of unsatisfactory conduct if his or her conduct is in breach of the Act, or any of the Rules or Regulations, even if he or she is not providing regulated services. Each of the Rules are clear as to the circumstances in which it applies. In some cases there cannot be a requirement that the conduct in question take place while providing regulated services. For example, Rule 2.8 requires a lawyer to report instances of misconduct. The application of this Rule cannot be restricted to circumstances where a lawyer is providing regulated services. Other Rules are specifically prefaced with words indicating that the lawyer must be providing regulated services before the Rule is to apply – see for example Rule 3 which commences with the words "in providing regulated services to a client...". It is important therefore to examine each Rule to determine the circumstances in which it is to apply.

[99] It is reasonable to observe that the disciplinary reach of unsatisfactory conduct in circumstances where a lawyer is not providing regulated services, is limited.

[100] The rules that would appear to be most relevant to the conduct of the respondents about which Ms BC complains (and, as I have found above, was not conduct which was connected to the provision of regulated services), are rr 2, 2.2 and 10 of the Rules. These respectively provide:

> A lawyer is obliged to uphold the rule of law and to facilitate the administration of justice.
>
> …
>
> A lawyer must not attempt to obstruct, prevent, pervert, or defeat the course of justice.
>
> …
>
> A lawyer must promote and maintain proper standards of professionalism in the lawyer's dealings.

[101] Though they sit within the rules that regulate lawyer conduct and client care, rr 2, 2.2 and 10 of the Rules are arguably wide enough to encompass conduct by a lawyer that does not occur at a time when they are providing regulated services.

[102] Ms NP was exercising specific statutory functions connected with independent decision-making. Dissatisfaction with an ERA member's decision-making may be challenged in the conventional ways which apply to all decisions: rehearing, review or appeal.

[103] Indeed, Ms BC has sought to have the employment proceedings removed to the Employment Court where concerns about their case management, including directions or orders made, may be scrutinised and if necessary confirmed, modified or reversed and with such comment as the Employment Court judge considers appropriate.

[104] Having read the material provided by Ms BC in which she says Ms NP has conducted herself in a way which demands a disciplinary response under the Act, I am satisfied that those documents reflect conventional judicial decision-making of a type that one would ordinarily expect to see in any disputed litigation.

[105] The fact that Ms BC may not agree with directions made by Ms NP, does not automatically elevate those disagreements to lawyer conduct issues; even remotely.

[106] It must be remembered that every decision-maker, no matter the jurisdiction, is required to be dispassionate and objective (and indeed Ms NP would have taken an oath to that effect upon her appointment), and in coming to any decision, whether procedural or substantive, must balance competing interests.

[107] The fact that a decision-maker might conclude that one party's interests outweigh those of the other party in a particular instance, does not of itself indicate bad faith or other unethical, unprofessional or improper motive by that decision-maker.

[108] If the concern relates to an ERA member's conduct which might not otherwise be amenable to a conventional appellate process, then the Employment Relations Act 2000 provides a pathway for dealing with that, which is to do exactly as Ms BC did, and complain to the Chief of the ERA.[27]

[109] Mr RS's involvement arose after Ms BC had written to him complaining about Ms NP. In dealing with that complaint, Mr RS was clearly carrying out his role under s 166A of the Employment Relations Act 2000 of generally overseeing the conduct of members in the discharge of their duties under that Act.

[110] In relation to complaints about Mr RS in his capacity as the Chief of the ERA, there does not seem to be a complaint process embedded in the Employment Relations Act 2000 or provided for administratively by the ERA.

[111] However, given the reference in the ERA complaints process to the potential, in appropriate cases, for complaints being elevated to the Minister for Workplace Relations and Safety, it seems likely that a complaint about the Chief of the ERA would be managed in that way.

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[27] See: https://www.era.govt.nz/complaints/.

[112] I have carefully read Mr RS's brief letter to Ms BC dated 20 May 2020, responding to her letter of complaint about Ms NP. He said:

> I do not intend to respond to the matters raised by you on a particularised basis. Having reviewed the file, I am satisfied that the Member has taken, and is taking, reasonable steps to assist you in the resolution of your employment relationship problem. Suffice to say, I do not intend to take any further action in respect of any of the matters raised by you.
>
> I appreciate I have probably not provided the answers you seek. However, thank you for taking the time to write to me.

[113] Mr RS's letter presents as clear, concise and courteous. Essentially Ms BC disagrees with his view that Ms NP's management of the employment proceedings was "reasonable". But again, disagreement with that does not translate Mr RS's handling of her complaint into a matter captured by the disciplinary provisions of the Act.

[114] In my view, although the respondents were "lawyers", none of the above-mentioned rules, nor indeed any of the other rules, have application to the respondents' conduct when looked at under s 12(c) of the Act.

Misconduct

[115] I have held above that neither respondent could be said to have committed an act of unsatisfactory conduct. First, neither was providing regulated services or acting in connection with the provision of regulated services, and so the lens through which the conduct may be looked under s 12 of the Act, is narrow.

[116] I have held that it could not be said that either respondent breached any of the provisions of the Rules, which is an essential ingredient of a finding of unsatisfactory conduct under s 12(c) of the Act.

[117] I now turn to consider whether their conduct raises the spectre of misconduct.

[118] As indicated above, misconduct in circumstances when a lawyer is not providing regulated services, essentially comes down to an application of the "fit and proper person" test.

[119] That is considerably broader than the test under s 12(c), which requires a professional rules breach to be established.

[120] In considering the question of misconduct, I again acknowledge that a finding of misconduct may only be made by the Tribunal following referral there, through the vehicle of prosecution, by either a Standards Committee or a Review Officer.

[121] In short, I need only conclude that the conduct of either respondent might amount to misconduct and that it ought to be considered by the Tribunal, in order to trigger the prosecution process.

[122] Examples of where a lawyer has been found guilty of misconduct in circumstances where they were not providing regulated services or acting in connection with regulated services, include conviction for possession of methamphetamine,[28] using legal processes to wage a personal vendetta against a former partner over an extended period of time,[29] convictions for assault[30] and convictions for driving with excess breath alcohol and dangerous driving.[31]

[123] Each of the above examples involve what could only be described as egregious behaviour by the lawyers concerned. None was providing regulated services or acting in connection with the provision of regulated services, and each was either convicted of criminal offending or had engaged in a pattern of disgraceful and duplicitous behaviour over a lengthy period of time.

[124] It is hardly surprising that in each case the lawyers did not pass the "fit and proper person" test.

[125] Clearly, for the spectre of misconduct to arise in the case of either respondent, there must be prima facie evidence of very serious conduct which raises the question of whether they are fit and proper persons, suited to engage in practice as lawyers.

[126] Nothing that either respondent did, in the course of carrying out their statutory functions under the Employment Relations Act 2000, could remotely be said to trigger inquiry into their fitness to practice law.

[127] To dwell on that issue any longer, is to do a disservice to the respondents.

Decision

[128] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed.

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[28] *Auckland Standards Committee 1 v Cropper* [2017] NZLCDT 6.
[29] *National Standards Committee v Denham* [2017] NZLCDT 10.
[30] *Hawke's Bay Standards Committee v Dender* [2017] NZLCDT 39.
[31] *Auckland Standards Committee 5 v Rohde* [2016] NZLCDT 9.

Anonymised publication

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

DATED this 20th day of May 2021

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R Hesketh
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Ms BC as the Applicant
Ms NP as a Respondent
Mr RS as a Respondent
[XXX] Law (Mr TU) as counsel for the Respondents
[Area]Standards Committee [X]
New Zealand Law Society

LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

Ref: LCRO 184/2020

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a decision of the [Area] Standards Committee [X]
BETWEEN	**BC** Applicant
AND	**NP and RS** Respondents

MINUTE

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

Introduction

[130] Ms BC has applied to review a decision made by the [Area] Standards Committee [X] (the Committee) dated 20 August 2020, in which the Committee decided to take no further action on her complaint against the respondents.

Procedural background

[131] This review application was set down to proceed as an applicant-only hearing before me, beginning at 9:30 am today. That fixture had been arranged, and the parties notified of it, on 3 March 2021.

[132] Yesterday afternoon Ms BC sent an email to the Case Manager, effectively seeking an adjournment of this morning's hearing on the grounds that she had existing unresolved complaints before a Standards Committee, the outcomes of which would be directly relevant to this review application.

[133] Through the Case Manager I informed Ms BC that her adjournment application was declined. I indicated that Standards Committee decisions/determinations and decisions of Review Officers are presumptively confidential, and without specific direction from the relevant decision-maker, were not admissible in any other proceedings.

[134] Ms BC responded to that in a further email, insisting that this morning's hearing could not proceed. She also raised, for the first time, a claim that I could not deal with this review application because of a conflict of interest. She did not identify the conflict.

[135] Again through the Case manager, I informed Ms BC that the hearing would proceed as scheduled.

[136] Overnight, Ms BC forwarded the Case Manager a large number of emails and several attachments.

[137] In one of her emails Ms BC expanded upon what is effectively an application that I disqualify myself, by providing background. I deal with that further below.

[138] Across several emails Ms BC attached a number of documents which she said were relevant to the review application. I deal with those matters further below.

[139] Ms BC also repeated her submission that as yet unresolved complaints currently being considered by one or more Standards Committee, have a direct bearing on this review application. I deal with that submission further below.

[140] Finally, this morning the Case Manager telephoned Ms BC to enquire when she would be attending today's hearing. She informed him that she could not do so because she was unwell. I deal with that issue, further below.

Application that I disqualify myself

[141] Ms BC has referred to a decision of the [Area] Standards Committee [XX], of which I was a lawyer member between 2008 and 2016, in which the Committee took no further action on a complaint that she had made against another practitioner (the 2012 complaint).

[142] The Committee's decision/determination was issued in 2012. I have not seen a copy of that decision/determination since then. It appears to be the case that I was a member of the Committee which considered the 2012 complaint.

[143] I presume that Ms BC received the Committee's decision/determination. If it was signed by me as the Convenor of that Committee, then she has had notice of my involvement in that matter since then yet has only raised this issue at the eleventh hour, late in the afternoon of the day before the scheduled hearing.

[144] Ms BC applied to review that decision/determination, also in 2012, and a Review Officer considered it and issued a decision during 2015, confirming the Committee's decision.

[145] In essence, Ms BC's application that I disqualify myself from dealing with this review application, is founded on a claim of bias or predetermination.

[146] Responding to that, I can indicate that I have no independent recollection of Ms BC's 2012 complaint, nor of the Committee meeting at which it was discussed and a decision made, nor of the decision itself.

[147] To put that in context, [Area] Standards Committee [XX] met monthly, for 11 months of the year. On average, the Committee would have made as many as five decisions or determinations at each meeting. Extrapolating, that represents, whilst I was a member of that Committee, in excess of 500 decisions/determinations.

[148] As indicated, I have no recollection of Ms BC's 2012 complaint, or of the outcome.

[149] The Review Officer's 2015 decision was notified to [Area] Standards Committee [XX], as is required pursuant to s 213 of the Lawyers and Conveyancers Act 2006 (the Act). I have no recollection of ever reading the Review Officer's decision before today.

[150] Further, I observe that the Review Officer's decision in connection with the 2012 complaint, was issued by her in August 2015. I did not begin with the Legal Complaints Review Office until approximately September 2016.

[151] On the basis of the above, it could not be said that an interested observer, in possession of those facts, would reasonably conclude that I was biased either for or against Ms BC, or had otherwise in some way predetermined the review application.

[152] Moreover, the fact that a decision-maker has dealt with a matter in the past, and one of those parties subsequently appears in a different matter, does not of itself raise the spectre of bias or predetermination on the part of the decision-maker. It is a not infrequent occurrence across all jurisdictions in New Zealand.

[153] Accordingly, I decline to disqualify myself from dealing with this review application.

Outstanding complaints and fresh material

[154] I emphasise that a review application is precisely that: a review of material that was before a Standards Committee, and a consideration of the way in which the Committee dealt with that material and its decision/determination about the complaint. The word "review" makes that tolerably clear.

[155] A review application is not an opportunity for a party to raise a fresh complaint, nor is it an opportunity for a party to lodge fresh evidence or material.

[156] Further, outcomes of different complaints involving the same parties, are not relevant to the process of reviewing a specific Committee decision/determination.

[157] I therefore decline to accept and consider the material that Ms BC sent by email to the Case Manager overnight, except to the extent that some of that material is a duplication of what is already on the Standards Committee or the review file.

[158] Further, I cannot accept as part of the record of this review application, the outcomes of complaints in other matters involving Ms BC and the respondents.

[159] This review application will proceed on the basis of the material that was before the Standards Committee, together with the material submitted by Ms BC when she lodged her review application, and the respondents' responses.

Non-attendance at this morning's hearing

[160] Given my two directions yesterday to Ms BC that this morning's hearing would proceed as scheduled, the hearing room was set up for that purpose, and the Case Manager was present there from approximately 9:20 am to await Ms BC's arrival.

[161] By approximately 9:35 am Ms BC had not arrived, and nor had she advised the Case Manager that she would not be.

[162] I directed the Case Manager to telephone Ms BC and enquire as to when she would appear. She informed the Case Manager that she was sick and would not be attending.

[163] To the extent that this represents a further ground advanced by Ms BC for adjourning this morning's hearing, I do not regard it as compelling. The information was conveyed following a call to Ms BC by the Case Manager, rather than some earlier

message to that effect from Ms BC. Moreover, no medical certificate, as one might expect, has been provided.

Moving forward

[164] When responding to Ms BC's adjournment applications yesterday, and in declining them, I indicated that if Ms BC did not attend this morning's hearing then I would consider exercising my power under s 206(2) of the Act and deal with this review application on the papers, without Ms BC's consent.

[165] I have concluded that this review application can be adequately determined on the papers, and on the basis of the information that is available to me (being the information described by me above at [30]).

[166] The complaint material is extensive, as is Ms BC's review application and supporting documentation. The respondents have each provided comprehensive responses to the review application.

[167] I note that this preliminary indication was given to the parties by the Case Manager on 30 October 2020. Ms BC indicated her view that the matter was "not suitable to be dealt with on the papers". In deference to Ms BC, I directed an applicant-only hearing.

[168] However, having reconsidered the material that is before me I remain of the view expressed in the Case Manager's letter to the parties on 30 October 2020, that this matter may appropriately be dealt with on the papers.

[169] Accordingly, I will proceed on that basis and I anticipate that my decision will be issued to the parties before the middle of May 2021.

[170] I direct that none of the parties is to make any further submissions or provide any further material in connection with this review application.

DATED this 30th day of April 2021

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R Hesketh
Legal Complaints Review Officer