IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2022] NZEmpC 87
EMPC 394/2021

IN THE MATTER OF	an application for judicial review
AND IN THE MATTER OF	an application to disqualify counsel
BETWEEN	H Applicant
AND	EMPLOYMENT RELATIONS AUTHORITY First Respondent
AND	RPW Second Respondent
AND	C Third Respondent

Hearing: On the papers

Appearances: H, plaintiff in person
S W Hood, counsel for RPW

Judgment: 20 May 2022

INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH
(Application to disqualify counsel)

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[1] The genesis of this application to disqualify counsel for RPW from acting in this litigation is a judicial review proceeding brought by an employment advocate, H. He is seeking to overturn ten Employment Relations Authority determinations or decisions affecting him and his company.[1]

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[1] *R v A* [2018] NZERA Auckland 237; *R v A* [2018] NZERA Auckland 250; *R v [H]* [2018] NZERA Auckland 253; *R v H* [2018] NZERA Auckland 275; *RPW v H (No 5)* [2018] NZERA Auckland 338; *RPW v H (No 6)* [2019] NZERA 121; *RPW v H* [2019] NZERA 367, an Authority unsigned direction, a minute and proceedings.

[2] In 2018, a permanent order was made in another proceeding between the applicant and second respondent prohibiting the publication of their names or any information likely to identify them.[2]

[3] The issues in the 2018 litigation are connected with the subject matter of the judicial review proceeding. That permanent order has not been set aside and was continued in this proceeding until the substantive hearing is conducted when the topic will be revisited. For the purposes of this decision, the descriptors for the applicant and respondent from the 2018 judgment will be used.

[4] H, through his company C, operates a business representing parties involved in employment relationship disputes. While not qualified as a lawyer within the meaning of the Lawyers and Conveyancers Act 2006, H is able to act for litigants in employment relationship disputes because of s 236 to the Employment Relations Act 2000 (the Act).[3] That section confers on any employee or employer the right to be represented by any other person.[4]

[5] In March 2018, H represented an employee in resolving a dispute with that person's employer, RPW. During mediation, agreement was reached resulting in a settlement agreement under s 149 of the Act signed by the employee, RPW, H and the mediator.

[6] Before a mediator signs a settlement agreement he or she must explain to the parties the effect of s 149(3).[5] That is, that the settlement agreement becomes final, binding, and enforceable by the parties and cannot be cancelled under the Contract and Commercial Law Act 2017.[6] A mediator signing a settlement agreement means that, except for enforcement purposes, no party may seek to bring the terms of that

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2 *RPW v H* [2018] NZEmpC 120 at [28]. The exception is the first respondent, Employment Relations Authority, which was not a party to the litigation in 2018.

3 Lawyers and Conveyancers Act 2006, s 6; a lawyer is a person who holds a current practicing certificate as a barrister or as a barrister and solicitor.

4 Employment Relations Act 2000, ss 236(1) and (2) and as exempted by the Lawyers and Conveyancers Act 2006, ss 21 and 27.

5 Employment Relations Act 2000, ss 149(1)–(2). Settlement agreements endorsed by a mediator under s 149 are commonly called records of settlement.

6 Contract and Commercial Law Act 2017, ss 36–42.

agreement before the Authority or Court whether by action, appeal, application for review or otherwise.[7]

[7] A common feature of settlement agreements arising from mediation is the inclusion of what is known as a non-disparagement clause. One was included in the agreement signed by H. It read:

> Neither party, nor their representatives, shall make disparaging or negative remarks about the other. [H] has agreed to sign the Record of Settlement to indicate his agreement at being bound to this term in the Record of Settlement.

[8] H has been involved in extensive litigation in the Authority since he signed the settlement agreement. Claims were made in the Authority by RPW that H and C breached the agreement by making comments in social media contrary to the non-disparagement clause.

[9] The Authority concluded it had jurisdiction to make orders to compel H and C to comply with the settlement agreement. The Authority also held that H breached non-publication orders it had made. Eventually H and C were ordered to pay penalties. Part of those penalties was ordered to be paid to RPW and to its counsel, Samuel Hood. The balance was payable to the Crown.[8] H and C were ordered to pay costs to RPW totalling $30,000.[9]

[10] The imposition of penalties on H and C was confirmed by the Court, but an adjustment was made to remove the apportionment of part of the penalty to counsel, Mr Hood.[10] Instead that sum was directed to be paid to the Crown.[11]

[11] Against that background H has applied to judicially review the Authority proceedings referred to earlier. RPW has applied to strike out H's proceeding and in response H has sought judgment by default. Both of those applications are to be heard on 23 May 2022.

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7 Employment Relations Act 2000, s 149(3)(b).
8 *RPW v H (No 6)* [2019] NZERA 121 (Member Larmer).
9 *RPW v H* [2019] NZERA 367 (Member Larmer). The costs were divided equally between them.
10 *H v RPW* [2020] NZEmpC 141
11 At [52].

This application

[12] As already mentioned, H has now applied to disqualify RPW's counsel, Mr Hood and his firm Norris Ward McKinnon, from acting any further in the review proceeding.[12] The orders sought extend to attempting to disqualify a lawyer employed by the law firm who represented RPW at the mediation. That lawyer is no longer Norris Ward McKinnon's employee.

[13] The grounds of the application are:

(a) That the law firm is litigating its own previous advice.

(b) Mr Hood, and the firm's former employee, may be required to give contentious evidence in these or related proceedings.

(c) Norris Ward McKinnon, Mr Hood and their former employee, are potentially liable to H in a separate civil proceeding.

(d) There have been breaches by Norris Ward McKinnon and/or Mr Hood of the rules of professional conduct and "general law".

(e) There have been breaches arising from Mr Hood (and presumably Norris Ward McKinnon) in acting for RPW in bankruptcy and liquidation proceedings in relation to H and C.

[14] The application is opposed by RPW.

[15] H's application relied on alleged breaches of the Lawyers and Conveyancers Act, the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 1.20 of the High Court Rules 2016, the Evidence Act 2006, and the Crimes Act 1961. The reliance on the last two statutes was not explained in the application, or H's submissions, and they do not need to be considered any further.

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[12] Referred to in the application as seeking the recusal of counsel.

[16] H filed three affidavits. The first one was filed with the application. Leave to file H's second affidavit was needed because it had not been filed in accordance with timetabled directions. Leave was granted because he acknowledged it was to be confined to providing information about the bankruptcy and liquidation proceedings, informing the Court about H's claim against RPW and counsel in the High Court, and an allegation that there is collaboration between named lawyers wanting to shut down C. Given H's concessions about the limitations of his second affidavit, RPW did not seek leave to file an affidavit in response.

[17] H's third affidavit was filed on 17 May 2022, again outside the timetabled directions. It disclosed that he had been served with the bankruptcy proceeding and was applying to the High Court for a stay. Leave was granted for this affidavit to be filed.

[18] H's affidavits concentrated on his description of the circumstances leading to the Authority determinations and decisions he seeks to review and his concerns for the administration of justice if that application is unsuccessful. Where his affidavits addressed the actions of Norris Ward McKinnon and Mr Hood which he now criticises, his comments are best described as expressions of his opinions and beliefs.

[19] H's comments about counsel include extremely serious allegations and it would be remiss not to note they were entirely unsubstantiated. H's opinions and beliefs are clearly strongly held but they did not provide any material assistance in deciding if counsel should be disqualified.

[20] H's submissions can be summarised as:

(a) There was and is a "bogus campaign" by Mr Hood against H (and presumably C) conducted in the name of RPW.

(b) RPW has been used as a source of funds and a platform for the "bogus case" against him.

(c) There is a serious conflict between the interests of Norris Ward McKinnon and Mr Hood on one hand, and on RPW (and organisations similar to it) on the other.

(d) Mr Hood is allegedly involved in a project to persuade the Authority into making "compromising orders", presumably to H's detriment, unrelated to the interests of RPW.

(e) The Authority and Court were misled.

(f) It is important for RPW to have independent advice which it is not receiving that from Norris Ward McKinnon and/or Mr Hood.

(g) The Court is entitled to proper assistance of counsel which it is not receiving.

(h) The overall interests of justice warrant disqualifying counsel.

[21] Some of H's submissions concentrated on the substantive grounds of the judicial review proceeding. They are not relevant to this application and have not, therefore, been summarised.

[22] Mr Hood's submissions in response were succinct:

(a) There is no cogent evidential foundation to any of the claims made in the application.

(b) Any claim of a lack of independence by counsel involves unsubstantiated speculation.

(c) The allegations of serious wrongdoing attributed to counsel, the law firm and/or its former employee, are without foundation.

(d) A large portion of the submissions are irrelevant.

Analysis

[23] The issue is whether H has established a proper basis to justify the Court in disqualifying Mr Hood and Norris Ward McKinnon from acting any further in this litigation. The short answer is no. H has failed to make out any of the grounds relied on in his application.

[24] H did not refer to any authorities to support his application, relying on the grounds stated in it and his affidavits.

[25] Mr Hood referred to three decisions in which the Court has previously considered unsuccessful applications to disqualify counsel to show that H's application had not been made out; *Hurst v Eagle Equipment Ltd*, *Walker and Procare Health Ltd* and *George v Auckland Council*.[13] The age of those decisions suggests that applications such as this are rare.

[26] Norris Ward McKinnon is a firm of lawyers in private practice. The lawyers in that firm are, therefore, required to comply with the Lawyers and Conveyancers Act and the Conduct and Client Care Rules.

[27] Section 4 of the Lawyers and Conveyancers Act states the fundamental obligations of lawyers:

> **4 Fundamental obligations of lawyers**
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> Every lawyer who provides regulated services must, in the course of his or her practice, comply with the following fundamental obligations:
>
> (a) the obligation to uphold the rule of law and to facilitate the administration of justice in New Zealand:
>
> (b) the obligation to be independent in providing regulated services to his or her clients:
>
> (c) the obligation to act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients:
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> (d) the obligation to protect, subject to his or her overriding duties as an officer of the High Court and to his or her duties under any enactment, the interests of his or her clients.

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[13] *Hurst v Eagle Equipment Ltd* [2011] NZEmpC 110 at [18]; *Walker v ProCare Health Ltd* [2011] NZEmpC 95, ERNZ 173; *George v Auckland Council* [2012] NZEmpC 83, (2012) 9 NZELR 577.

[28] The obligation to facilitate the administration of justice has been described as the lawyer having a duty to assist in ensuring that it is not distorted or thwarted by dishonest or disreputable practices.[14]

[29] The obligations in s 4 of the Lawyers and Conveyancers Act find expression in the Conduct and Client Care Rules, dealing with professional behaviour. The Rules relevant to H's application are in chapters 2 and 13. In chapter 2 a lawyer is obliged to uphold the rule of law and to facilitate the administration of justice, with an overriding duty as an officer of the Court.[15]

[30] Chapter 13 provides that the overriding duty of a lawyer acting in litigation is to the Court concerned. The lawyer's duty to act in the best interests of his or her client is subject to the duty to the Court and he or she must not attempt to obstruct, prevent, pervert, or defeat the course of justice.[16]

[31] Chapter 13 also imposes on a lawyer an absolute duty of honesty to the Court. Amongst those duties is not to mislead or deceive the Court, be independent in litigation, not to be both counsel and a witness or act if he or she may be required to give evidence of a contentious nature.[17] An aspect of independence in litigation, dealt with in this chapter, is preventing a lawyer from acting in a proceeding if the conduct or advice of the lawyer, or of another member of the lawyer's practice, is in issue.[18]

[32] The Rules themselves are not a source of jurisdiction for the Court to deal with the potential disqualification of counsel but provide useful guidance as to public policy concerns that may be relevant. That is because the Rules express the legal profession's collective judgment as to the ethical standards required of practitioners.[19]

[33] A useful summary of the circumstances in which counsel may be removed was provided by the Court of Appeal in *Accent Management Ltd v Commissioner of Inland*

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14 *Rondel v Worsley* [1969] 1 AC 191 (HL); see also Webb, Dalziel and Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016).
15 Rule 2.1. Court is defined in r 1.2 as a court or tribunal before which a lawyer may appear.
16 Rule 2.2.
17 Rule 13.5.1.
18 Rule 13.5.3.
19 See the discussion in *Beggs v Attorney-General* [2006] 2 NZLR 129 (HC) at [18]–[20].

Revenue.[20] That case also involved judicial review. An application was made seeking to prevent counsel from Crown Law continuing to act in tax-related litigation. The Court held that there is jurisdiction to debar counsel from acting where that is necessary in order for justice to be done or to be seen to be done.[21] The Court said:[22]

> …Removal will usually be ordered where counsel will not be able to comply with his or her duties to the Court: where there is a conflict of interest, or where there is a real risk that a client will not be represented with objectivity. The threshold for removal is a high one, requiring something extraordinary. The Court should guard against allowing removal applications to be used as a tactical weapon to disadvantage the opposing party.

[34] Mr Hood's submissions began with an observation, drawn from *Hurst*, that the Court has no supervisory jurisdiction over lawyers which may have been intended to support a conclusion that the Court has no power to disqualify counsel.[23] That submission is correct in the sense that the High Court retains the power to admit lawyers into practice and to strike them off. *Hurst*, however, offers no other assistance in considering H's application. The Court in that case did not need to examine the potential disqualification of counsel, who may have been required to give evidence, because she withdrew.[24]

[35] This is not a case seeking to apply supervisory powers of the sort mentioned in *Hurst*. Rather, H's application asserts that removal of counsel is required in the interests of justice, relying on s 4 of the Lawyers and Conveyancers Act and the Conduct and Client Care Rules.

[36] I consider the Court has the power to disqualify counsel if there are proper grounds to do so, by exercising its inherent powers. In *Siemer v The Solicitor General* the Supreme Court discussed the inherent powers of all Courts.[25] The Supreme Court concluded that all New Zealand Courts have inherent powers and they include all, but

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20 *Accent Management Ltd v Commissioner of Inland Revenue* [2013] NZCA 155, [2013] 3 NZLR 374 at [32]-[35]; applied in *Zhang v Westpac New Zealand* [2021] NZCA 8. See also Matthew Palmer *Professional Responsibility in New Zealand* (2nd ed, LexisNexis, Wellington, 2020) at 224–225.

21 *Accent Management*, above n 20, at [32]. See also *Black v Taylor* [1993] 3 NZLR 403 (CA) at 408-409.

22 At [32] (footnotes omitted).

23 *Hurst,* above n 13, at [18].

24 The evidence was about why a deadline to file a challenge had been missed.

25 *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441.

only, such powers as are necessary to enable a Court to act effectively and uphold the administration of justice within its jurisdiction.[26]

[37] The scope of those powers extends to preventing abuses of the Court's processes and protecting fair trial rights.[27] The examples given by the Supreme Court included to control lawyers.[28] What was in issue before the Supreme Court were suppression orders made in the lead up to a criminal trial but there is nothing in the decision to suggest it does not have wider application.[29]

[38] While not touched on as part of H's application, given the extended right of audience before the Court created by s 236, I consider that the inherent powers must also be available to regulate the conduct of agents or representatives who act for employers and employees but are not admitted to practice as lawyers.

[39] The issue then becomes whether H has met the high threshold required by demonstrating something extraordinary to warrant disqualifying counsel, and as a consequence, to impose on RWP the loss of its representative of choice. That loss may take with it increased costs and, possibly, cause delay.

Litigating own advice?

[40] The first ground of the application was that allowing Mr Hood to continue to act for RPW means he would be litigating his own advice. The point was that he would therefore be unable to act objectively in discharging his duties leading to a breach of r 13.5.3 of the Conduct and Client Care Rules. H did not amplify that submission beyond commenting that Mr Hood had provided advice to RPW.

[41] In *Vector Gas Ltd v Bay of Plenty Energy Ltd* the Supreme Court expressed strong views about the role of counsel.[30] In that case the Court was critical of counsel who appeared before it, because they wrote letters exchanged on behalf of the parties

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26 At [113]; noting that jurisdiction and power and distinct concepts.
27 At [114].
28 At [114]; and relying on *Harley v McDonald* [2001] UKPC 18, [2002] 1 NZLR 1 at [45].
29 See the discussion in *Hynds Pipe Systems Ltd v Forsyth* [2017] NZEmpC 89, [2017] ERNZ 484 at [71]-[[76].
30 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444.

to the litigation the interpretation of which was both contentious and significant to the outcome of the case. The Court considered counsel could not, therefore, be objective and should not have appeared.

[42] The observations in *Vector Gas* are pertinent where counsel's actions mean that they have been injected into the dispute in some way that makes it inappropriate for them to continue. The example provided by *Vector Gas* was that counsel's letters were at the very forefront of the dispute. That case does not, however, preclude lawyers from ever acting in situations where advice has been given in anticipation of, or during, litigation.

[43] Context is important. In this case, the advice provided to RPW has not been disclosed. The determinations turn on the Authority's conclusions about what happened, in some cases on the back of admissions by H and C that they have taken the steps said to contravene the settlement agreement's non-disparagement clause and the Authority's orders, but where they argued in their defence that no breaches had occurred. None of the determinations turned on the type of analysis that brought criticism from the Supreme Court in *Vector Gas*.

[44] Effectively, H's application speculates about the advice that may have been given and reduces this part of the application to a complaint that, because a party to litigation has been represented and taken professional advice, that advisor is no longer able to act. That is an insufficient basis to disqualify counsel.

[45] Furthermore, putting aside speculation about the advice given to RPW, the judicial review proceeding is about whether the Authority had the jurisdiction to make the now disputed orders. Advice given to RPW by Mr Hood is not relevant to that issue.

[46] All that can be reliably said is that throughout the Authority proceedings Mr Hood, and his firm, continued to act for RPW. There is nothing wrong in that and it does not convey to the public any sense that the administration of justice may be compromised if Mr Hood continues to act.

[47] This part of H's application contained claims that there is a conflict of interest between RPW and Norris Ward McKinnon, Mr Hood and their former employee because they are all liable to him for damages. That was a reference to the proceeding filed by H in which they are all defendants and explains the reference in the application to High Court rule 1.20.

[48] The nature of the alleged conflict was not developed in submissions, perhaps because it was considered to be self-evident. I do not agree that the litigation by itself gives rise to a conflict of interest or engages r 1.20. It appears from the pleadings that, in fact, RPW, Norris Ward McKinnon, Mr Hood and the former employee are likely to have a common interest since they are all defendants said to be implicated in actions to H's detriment. Even if that assessment is wrong, and there are aspects of H's High Court proceeding where the defendants' interests diverge, it does not follow that Mr Hood, and/or his firm, will be unable to discharge their duties to RPW and to the Court in this litigation.

Evidence in contentious matters?

[49] The next ground relied on was that Mr Hood and/or the law firm's former employee may be required to give evidence about potentially contentious matters. H did not explain what that anticipated evidence would be. Given that the central issue to the review application is about the jurisdiction of the Authority it is difficult to see that Mr Hood could have anything relevant to say.

[50] Mr Hood appeared as counsel before the Authority and not in any other capacity. He was not, for example, referred to as a witness in any of the disputed determinations or decisions. In the absence of any information to the contrary, it follows that there is no basis on which it could be reasonably concluded that he has any evidence that is relevant to the judicial review proceeding that he could be compelled to give if required.

[51] Even if H had been able to establish that Mr Hood could give evidence it is not a foregone conclusion that his disqualification would follow. For example, in *Beggs* the High Court observed that there are sound reasons for care to be taken when

contemplating removal of counsel who is already acting, at the request of an opposing party who says it may wish to call counsel.[31] In that case the Court observed that it is commonplace for lawyers to become involved in position taking or attempts to compromise litigation before it begins, or when difficulties arise during its course. The Court noted that such events may become peripherally relevant during trial but that seldom causes difficulty.

[52] The Court concluded that, to justify removal, it is incumbent on the applicant to do more than speculate that it will call counsel as a witness.[32] The applicant must establish counsel is likely to be required as a witness. There are two elements to that requirement: a plausible assertion that counsel is a material witness and confirmation that the applicant presently intends to call counsel as a witness.

[53] Both of the ingredients referred to in *Beggs* are absent in this application.

[54] The same outcome is reached in considering the position of the firm's former employee. There has been no indication of the evidence anticipated to be given by this lawyer although she was named as counsel, together with Mr Hood, in the now disputed determinations. That lawyer attended the mediation where the settlement agreement containing the non-disparagement clause was negotiated and signed and that may be where H's attention is directed. If the evidence being contemplated is about what took place during the mediation, H faces a formidable barrier to compel it to be given. Sections 148(1) and (3) of the Act render inadmissible statements, admissions, documents or information created for the purposes of mediation.

[55] Furthermore, the application for judicial review relies on H's affidavit in which the history of the litigation was described together with his analysis to show why he considers the Authority's determinations were unlawful. No part of H's affidavit indicates there is any gap in his description of what happened, or why it happened, that must be filled by evidence from any other person.

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31 *Beggs*, above n 19, at [41].
32 At [41].

[56] There is nothing to suggest that in acting as counsel Mr Hood will be incapable of satisfying his duty to the Court.

Assistance of counsel

[57] Wrapped up in arguments about whether Mr Hood is independent, H submitted that the Court is entitled to proper assistance from counsel. He argued that Mr Hood was not suited to that task wrongly attributing to him conduct that misled the Court (or perhaps the Authority). There was no evidence, beyond H's expression of opinions and beliefs, capable of supporting this contention. I am satisfied Mr Hood has not misled the Court.

[58] In any event, some care is required in dealing with a claim about providing assistance because, as Webb comments, the duty is about the administration of justice, which may entail disagreeing with and seeking to overturn unfavourable decisions.[33] That duty necessarily requires the lawyer to act with integrity and has to exist alongside duties owed to the client. Webb, for example, commented that a lawyer has a duty of candour to the Court but is constrained from disclosing information confidential to the client. There are actually very few instances where a lawyer is compelled to act in the Court's interests to the detriment of the client.[34]

[59] Mr Hood is in the same position as many other lawyers find themselves in during difficult litigation; it is being hard fought and he is required to take a strong position on behalf of his client. There is nothing extraordinary in that and it does not follow that he is incapable of discharging his duty to the Court.

Lawyer's obligations

[60] H's application to disqualify Mr Hood quoted extensively from the Conduct and Client Care Rules. H's submissions did not separately examine the references to

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33 Webb, above n 14.

34 At 376. The example given was the obligation to disclose authorities adverse to a client's legal argument. See also Lawyers and Conveyancers (Lawyers: Conduct and Client Care) Rules 2008, r 13.11.

those Rules and it is possible they were relied on to bolster arguments about the need for RPW's counsel to act appropriately, independently, and to assist the Court.

[61] Mr Hood was critical of this part of the application because H failed to state which rule was allegedly breached. The only submission by H which appeared to relate to the Rules was his complaint that Mr Hood (or his firm) is acting for RPW in taking steps to enforce the Authority's determinations by filing bankruptcy and liquidation proceedings against him and C. Those are both enforcement-related tools available to a party successful in the Authority and the Court. Why taking those enforcement steps should call into question the appropriateness of counsel acting for RPW was not explained. RPW was entitled to appoint Norris Ward McKinnon on those matters. The fact that the firm acted on them involves no more than discharging professional duties to their client.

[62] There is nothing in H's submissions, or in his affidavits, capable of supporting a complaint that Mr Hood, his firm, or its former employee have fallen below the standards required of counsel by any of the Conduct and Client Care Rules.

"Bogus campaign"

[63] H's submissions also made complaints that the Authority's orders were "bogus" and that a "bogus campaign" is being pursued against him by Mr Hood. These allegations are largely predicated on the alleged lack of a basis for RPW's applications to the Authority against H where Mr Hood was its counsel. The submissions beg the question, because they assume that there was no jurisdiction to make the orders so that the Authority's determinations and other decisions were flawed. A decision on that subject is yet to be made so that those contentions could not be the foundation for disqualifying counsel.

Outcome

[64] H as failed to reach the high threshold required and the application to disqualify Mr Hood and his firm from continuing to act for RPW is unsuccessful. It is dismissed.

[65] RPW is entitled to costs. If they cannot be agreed RPW can file submissions within 15 working days and H can respond within a further 15 working days.

K G Smith
Judge

Judgment signed at 11.15 am on 20 May 2022