LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2021] NZLCRO 076

Ref: LCRO 223/2020

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	**LD** Applicant
AND	**BD and HW** Respondents

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

DECISION

Introduction

[1] Ms LD has applied to review a decision made by the [Area] Standards Committee [X] (the Committee) dated 2 November 2020, in which the Committee decided to take no further action on her complaint against Ms BD and Ms HW (the respondents).

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

Background

[3] In March 2020 Ms LD issued proceedings in the Employment Relations Authority (ERA) against her former employer RL, an incorporated law firm (the employment proceedings).

[4] Ms HW was one of two directors of RL.

[5] In about mid-May 2020 Ms BD was instructed to represent RL in the employment proceedings. Ms BD was assisted by her junior, Mr A.

[6] In late July 2020 Ms LD filed and served an application for special leave to remove the employment proceedings from the ERA to the Employment Court (the removal application).

[7] RL opposed the removal application and as part of that Ms BD filed and served a memorandum of counsel (the memorandum) and Ms HW affirmed an affidavit (the affidavit).

[8] The memorandum was critical of the removal application, describing it as "hopeless" and that the removal application "will be presumed to have been commenced for some ulterior motive." Indemnity costs were sought.

[9] Ms HW's affidavit annexed a number of exhibits, being documents relevant to the substantive employment proceedings.

[10] Ms HW affirmed the affidavit in front of a solicitor (Mr H) employed by the GHY (GHY).

[11] Both documents were dated 14 August 2020.

The complaint

[12] Ms LD lodged her complaint against the respondents with the Complaints Service in an email dated 20 August 2020. She said:

(a) Ms HW's affidavit in the removal application "was only required to respond to a jurisdictional point of law" yet in her affidavit "she attached as exhibits significant substantive documents that relate to [the employment proceedings]".

(b) Ms HW was not required to do this. She was selective in the documents that she annexed to her affidavit.

(c) Ms HW affirmed her affidavit in front of Mr H, knowing "that there was a very strong possibility that [Ms LD] would be trying to obtain employment with the [GHY]."

(d) As a result of the affidavit being witnessed by Mr H, the GHY now has "both a physical and digital copy of [the employment proceedings] [and this is] an unwarranted disclosure to the [GHY] as a potential prospective employer".

(e) The potential harm from this was exacerbated by the fact that Ms HW unnecessarily annexed some 298 pages of exhibits to her affidavit.

(f) Mr H is a personal friend of Mr A.

(g) Ms HW and Ms BD, both being partners in different law firms, would have had access to other lawyers to witness Ms HW's affidavit "without seeking out the criminal bar for this purpose".

(h) "Ms HW [and] Ms BD … went out of their way to put [documents involved in the employment proceedings] in the hands of the [GHY] to damage [Ms LD's] chances of obtaining employment there [including annexing irrelevant material to Ms HW's affidavit].

(i) Ms BD's and Ms HW's actions were retaliatory and in response to an earlier complaint Ms LD had made against them relating to their conduct in other aspects of the employment proceedings.

(j) In her memorandum, Ms BD attacked Ms LD's character and reputation by suggesting that she "had not filed [the removal application] for a proper purpose but 'for some ulterior motive'".

[13] Ms LD alleged that Ms BD and Ms HW had breached rr 2.3, 12 and 13.8 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

[14] Ms LD provided the Complaints Service with a copy of Ms HW's affidavit (including the annexed exhibits), as well as a copy of Ms BD's memorandum of counsel.

Standards Committee processes

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

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

[17] 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.

[18] 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.

[19] On 2 November 2020 the LSO spoke to Ms BD and informed her of the Committee's preliminary view about Ms LD's complaint.

[20] Ms BD said that she was "willing to provide any information the Committee required."

[21] Also on 2 November 2020 the LSO spoke to Ms HW, informing her of the Committee's preliminary view about the complaint.

[22] Ms HW also informed the LSO that she was "willing to provide any information the Committee required."

[23] Both lawyers were advised by the LSO that the Committee "having reviewed the complaint material … was of the view it had sufficient information to make its decision."

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

Standards Committee decision

[25] The issue for consideration was identified by the Committee as being "whether it [was] the appropriate forum to consider Ms LD's complaint."[1]

[26] The Committee noted that Ms LD was not a client of either Ms BD or Ms HW, which meant that any obligations they owed Ms LD were limited.

[27] It further observed that it had the power to dismiss a complaint "where it [considered that] there is an adequate remedy that it would be reasonable for [a] complainant to exercise."[2]

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[1] Standards Committee decision at [10].
[2] At [12].

[28] The Committee further said that:[3]

> [The] complaint related to the conduct of employment litigation that was currently before the ERA and the Employment Court [and that] whichever would ultimately hear the [employment] proceedings would be in the best position to establish whether there was any merit to [the] complaint.
>
> The judge or ERA Member would have the advantage of hearing evidence to assist in forming an opinion as to whether Ms BD or Ms HW showed any of the deliberate vindictiveness claimed by Ms LD. The Employment Court would also be best placed to decide whether it needed to see the exhibits appended to the affidavit in order to determine the application for special leave and, if not, whether it was appropriate to direct any criticism towards Ms BD or Ms HW in this regard.

[29] The Committee noted that adverse comment by the ERA or the Employment Court could give rise to a fresh complaint about Ms BD's and/or Ms HW's conduct.

[30] Next, the Committee turned its attention to the complaint that Ms HW's affidavit had been affirmed in front of Mr H, a GHY lawyer.

[31] Ms LD's complaint was that this was done deliberately, so as to undermine any employment that she might wish to take up in the future with the GHY, and that this breached rr 2.3, 12 and 13.8 of the Rules.

[32] However, the Committee held that questions of whether Ms LD might work for the GHY in the future, were "speculative". It noted that Ms LD had worked in a number of areas, as is common with junior lawyers, and that it was unreasonable to expect Ms HW to avoid affirming an affidavit in front of a criminal lawyer on grounds that one day in the future Ms LD might wish to practice criminal law.

[33] In relation to Ms BD's criticism, in her memorandum, of Ms LD's removal application in which she described it as "truly hopeless" and "presumed to have been commenced for some ulterior motive", the Committee said that it did not consider this as unprofessional or unethical. It held that "robust presentation of a position was often required during litigation particularly where, as here, Ms BD [was] representing a client whose interests oppose those of Ms LD."[4]

Application for review

[34] Ms LD lodged her review application on 8 December 2020. She said:

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[3] At [13] & [14].
[4] At [20].

(a) The Committee was wrong to "transfer the task of determining whether there was a conduct issue to the Employment Court and or the ERA".

(b) Their purposes include addressing and resolving employment related matters. The lawyers' disciplinary processes are to address conduct issues.

(c) Ms LD's complaint raised conduct issues on the part of both Ms BD and Ms HW.

(d) The [Area] Standards Committee [A] is (or then was) considering a complaint about Ms HW and two others. That complaint is relevant to the current matter involving Ms BD and Ms HW, and this matter should thus be referred to that Committee.

(e) In particular, the complaint before the [Area] Standards Committee [A] contained "information [showing] that it was not 'speculative' that [Ms LD] was likely to apply for a job with [the GHY]".

[35] By way of outcome, Ms LD asked for her complaint to be referred back to the Committee for it to discharge its statutory responsibility of considering her conduct complaints rather than deferring to the ERA or the Employment Court; alternatively, that the complaint be referred to the [Area] Standards Committee [A].

Responses:

Ms HW

[36] Ms HW said that on 30 July 2020 an Employment Court judge directed a hearing of the removal application, and made timetabling directions as to the material to be filed by RL.[5]

[37] Shortly after that directions hearing, CITY A was placed under Level 3 lockdown, which severely limited her ability to affirm and file an affidavit by the date directed by the Employment Court judge.

[5] Letter from Ms HW (18 January 2021).

[38] Ms BD's junior (Mr A) was able to arrange for a solicitor to administer the oath to Ms HW and witness her affirming it, by remote audio-video means. Mr A did not say who the solicitor was, or where they worked.

[39] At the pre-arranged time Ms HW, Mr A and the witnessing solicitor (Mr H) connected remotely by WebEx. Ms HW learnt at that time that Mr H was a solicitor employed by the GHY.

[40] Ms HW signed and affirmed her affidavit, observed by Mr H. The process took 30 minutes, and there was no discussion about the employment proceedings or the content of Ms HW's affidavit.

[41] Ms HW then forwarded an electronic copy of her signed affidavit to Mr H, who attached his signature. The document was returned to Ms HW, who forwarded to Ms BD who then filed it in the Employment Court and served a copy on Ms LD.

[42] The above represented her first and only dealings with Mr H.

[43] Ms HW submitted that, first, Ms LD has not established that Mr H "is or ought to be a key member of the GHY who has the power of influence and/or say over employment decisions for the GHY."

[44] Secondly, some six months had passed between Ms LD leaving RL's employment, and Ms HW affirming her affidavit. She said "it is unreasonable, even if I was aware that Ms LD was going to apply to GHY (which I deny), to stipulate that a GHY lawyer who witnessed my affidavit is a calculated move from me to destroy [Ms LD's] chances of securing a position with GHY."

[45] Ms HW also observed that Ms LD had not provided any "evidence to support that [she had applied for a position at] the GHY.

[46] In relation to the review ground advanced by Ms LD that the Committee was wrong to have deferred to the ERA or the Employment Court to deal with the appropriateness of material that had been filed, Ms HW supported the Committee's reasoning and said that "it [was] inappropriate for the Committee to overstep its jurisdiction in determining factual matters meant for the ERA or the Employment Court."

[47] Ms HW attached to her response several documents relating to the employment proceedings, including exchanges of correspondence between the parties.

Ms BD

[48] Ms BD said that, in accordance with the Employment Court judge's timetabling directions, she filed and served a memorandum of counsel setting out Ms HW's grounds for opposing the removal application and making submissions about the application itself.[6]

[49] At the same time, Ms BD filed and served Ms HW's affidavit. She said that the affidavit "was provided in part to give the chronology of the ERA proceedings and establish that the removal application was still on foot". To provide context, copies of the employment proceedings were annexed to that affidavit.

[50] Ms BD explained that shortly after the late-July directions conference in the Employment Court, CITY A's move to Level 3 lockdown made it difficult for Ms HW's affidavit to be affirmed and witnessed "in the usual way".

[51] For that reason, Ms BD recommended that Ms HW's affidavit should be "witnessed through remote attestation."

[52] Ms BD delegated to Mr A the task of having Ms HW's affidavit affirmed and witnessed remotely. Mr A said that he would "ask around his contacts to find someone who knew how to do remote attestation", and so Ms BD left him to do that.

[53] Mr A told Ms BD that Mr H from the GHY had agreed to assist. Ms BD did not know Mr H, and nor did his employment with the GHY "[raise any] red flags for [her] … it did not occur to [her] that Ms LD might be thinking of applying for a job there or that a GHY lawyer would be inappropriate."

[54] Ms BD assumed that Mr H was a friend or former university colleague of Mr A.

[55] Ms HW's affidavit was affirmed and witnessed remotely, then filed and served.

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[6] Letter from Ms BD (25 January 2021).

[56] Ms BD said that she had no idea that Ms LD was interested in securing employment with the GHY. She said that "there was absolutely no intention to damage Ms LD's chances of employment with [the] GHY."

[57] As to the material annexed to Ms HW's affidavit, Ms BD described the removal application as "unusual", and had included an allegation of fraud by RL. Although the Employment Court judge had narrowed the issues to be considered with the removal application, Ms BD was concerned that Ms LD might nevertheless endeavour to widen it during argument.

[58] The documents annexed to Ms HW's affidavit largely comprised copies of the employment proceedings. Ms BD said that it was her "professional judgment at the time [that there was] good cause to include them to provide context for the [Employment Court]."

[59] Ms BD submitted that the appropriate forum for considering the relevance of the material filed, was the Employment Court itself.

[60] In relation to the memorandum that she had prepared and filed, Ms BD said that it included a claim for indemnity costs. This was because her instructions from RL were that the removal application was "unfounded and without merit" and that "Ms LD had unreasonably caused it to incur costs."

[61] Ms BD submitted that the language she used was a proportionate response to Ms LD's removal application. She relied on an earlier decision of the Employment Court which discussed indemnity costs, and which she said included a description of conduct justifying such an award. Ms BD said that this was similar to the way in which Ms LD had framed and argued the removal application.

[62] In saying in her memorandum "because the [removal] application is truly hopeless, the action taken will be presumed to have been commenced for some ulterior motive", Ms BD submitted that she was relying on the earlier indemnity costs judgment. She said that this "was reasonable advocacy to protect and promote [RL's] interests, in a contentious situation where Ms LD was on the opposing side."

[63] Ms BD described her memorandum as "entirely conventional for a contested matter and does not reflect any ethical or professional shortcomings on [her] part."

Nature and scope of review

[64] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[7]

> … 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 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.

[65] More recently, the High Court has described a review by this Office in the following way:[8]

> 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.

[66] 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

[67] The matter was 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. It was to

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[7] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].
[8] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

be heard following an earlier applicant-only hearing involving the same parties and the same employment proceedings, though raising different conduct issues.[9]

[68] Although the respondents were invited to attend the hearing if they wished, both indicated that they did not intend to do so.

[69] Ms LD 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 LD informed the Case Manager that she was unwell and would not be attending the hearing.

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

[71] 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."[10]

[72] With that in mind I issued a Minute to the parties in which I indicated that an appraisal of Ms LD's review application indicated that it might appropriately be dealt with on the papers. Submissions about that were invited from the parties.

[73] I attach a copy of that Minute to this decision, as it deals with other procedural matters that had been raised by Ms LD.[11]

[74] In an email to the Case Manager dated 2 May 2021 Ms LD referred to a number of documents she had provided, and which related to other complaints concerning both these respondents and others, and submitted that these documents were relevant to her argument that this review application must proceed in person because Ms BD "should be required to appear and answer for her conduct."

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[9] *LCRO 185/2020*

[10] Section 206(2A) of the Act.

[11] 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 [Area] Standards Committee [B] in 2012, which dealt with a complaint that Ms LD made against another practitioner. In responding to this Minute, Ms LD 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 LD has said about that. This does not alter my earlier decision not to disqualify myself from dealing with this review application.

[75] In an email to the case manager dated 5 May 2021, Ms HW said that she agreed to the review application being dealt with on the papers.

[76] I have concluded that Ms LD's review application can be adequately dealt with on the papers and on the basis of the available information. I have come to that conclusion for the following reasons.

[77] First, I observe that the documents submitted and referred to by Ms LD relate to other matters in various stages of the complaint process, and about which I quite properly have no knowledge.

[78] As well, the issues engaged by this review application involve two documents – an affidavit and a memorandum of counsel. The issues which arise are stand-alone matters.

[79] Finally, although Ms LD considers that Ms BD should be required to appear at a hearing, a Review Officer has no power to compel any party's attendance at a hearing.

[80] I confirm that I have read Ms LD's complaint and the Committee's decision. I have also read the review application and the respondents' responses to that.

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

Discussion:

Referral to the [Area] Standards Committee [A]

[82] Although there is jurisdiction for me to refer a complaint, in whole or in part, back to a Standards Committee including a differently constituted Committee to the one which initially dealt with the complaint, there is no basis for me to do so in the present matter as Ms LD has asked.

[83] Ms LD referred to a complaint being considered by the [Area] Standards Committee [A] involving Ms HW and two others.

[84] First, given the regulatory presumption of confidentiality attaching to Standards Committee decisions and/or determinations, it would be wrong for the other lawyers

involved in the [Area] Standards Committee [A] complaint to be informed about Ms LD's further and unrelated complaint about Ms HW.[12]

[85] For the same reason, it would be entirely inappropriate for Ms LD's complaint about Ms BD, who has no connection with the [Area] Standards Committee [A] complaint, to be disclosed to the other lawyers involved in that complaint.

[86] As I have said above, the issues engaged by the current complaint and review application are very specific: they involve two documents – an affidavit and a memorandum of counsel. The issues are well-capable of being treated as stand-alone matters, and it is entirely appropriate that they be dealt with in that way.

The affidavit and the memorandum:

[87] Ms LD levels two complaints at Ms HW's affidavit: first, it was witnessed by Mr H, a solicitor employed by the GHY, in a cynical move designed by Ms HW and Ms BD to sabotage Ms LD's potential employment there; secondly, it was unnecessarily and unfairly lengthy and, in particular, should not have annexed copies of the employment proceedings and related documents.

[88] Ms LD also complains that Ms BD's memorandum breached rr 2.3, 12 and 13.8 of the Rules. This can be conveniently summarised as complaint that Ms BD's memorandum was a misuse of legal processes in which Ms BD attacked Ms LD's reputation without good cause and failed to treat her with integrity, respect and courtesy.

Retaining Mr H to witness Ms HW's affidavit

[89] As to the first of those two criticisms, as Ms HW and Ms BD both point out, there was no evidence before either of them as at the date that Ms HW affirmed her affidavit, that Ms LD had any interest in, let alone that she had taken any steps towards, securing employment with the GHY.

[90] There is certainly no evidence before me that this was Ms LD's short, medium or even long-term plan at the relevant time.

[91] As the Committee observed, whether Ms LD ever intended to seek employment at the GHY, was speculative and not something that either Ms HW or Ms BD could reasonably be expected to consider, when arranging and carrying out the standard and unremarkable task of having an affidavit affirmed.

[12] Regulation 31, Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008.

[92] Ms LD argues that because of the process by which the affidavit was affirmed (dictated by the Level 3 lockdown limitations as to personal contact), an electronic copy of Ms HW's affidavit (and possibly a hard copy) were on the GHY document storage system.

[93] This is also speculative. With equal (and equally unhelpful) speculation I could raise the question of whether GHY might have a policy of deleting electronic copies of affidavits witnessed by employees (and securely destroying any paper copy), on the basis that the deponents do not have a client or other relevant connection with the GHY.

[94] I do not overlook the evidence that neither Ms HW nor Ms BD took any part in organising Mr H to witness Ms HW's affidavit. This task was delegated by Ms BD to Mr A because of the exigencies of the Level 3 lockdown, and he was left to his own devices to organise that. Ms BD assumed, not unreasonably, that he would use his own networks to accomplish it.

[95] There is no substance to Ms LD's complaint about retaining Mr H to witness Ms HW's affidavit as a means of sabotaging Ms LD's future potential career in criminal law.

The contents of the affidavit and the memorandum

[96] The narrative content of Ms HW's affidavit runs to a little under three pages and comprises 20 relatively short paragraphs. In very simple terms, Ms HW set out the background to the employment proceedings, including noting that Ms LD had claimed $2.5 million in compensation, and had made allegations of fraud.

[97] Ms HW also set out procedural steps that were before the ERA and were still incomplete, including a direction that the parties attend mediation and the difficulties that had arisen about that. As well, Ms HW referred to issues of discovery that had arisen before the ERA.

[98] Ms HW's position was that despite timetabling difficulties in the ERA, the employment proceedings ought to be allowed to run their course in that jurisdiction, and that the involvement of the Employment Court was premature and had caused RL to incur unnecessary costs.

[99] Ms HW annexed 19 exhibits to her affidavit (marked "A" to "S"), which comprised approximately 280 pages and was made up of the pleadings in the employment proceedings as well as correspondence between the parties, and the parties and the ERA, in connection with the procedural issues being dealt with in that jurisdiction.

[100] Ms BD's memorandum ran to slightly over three pages (excluding the cover sheet) together with a judgment of the Court of Appeal. The memorandum traversed the jurisdictional issues raised by the removal application, noting that the Employment Court's leave can only be granted once the ERA has made a decision declining to remove the proceedings.

[101] Ms BD argued that because of this fundamental jurisdictional barrier to Ms LD's removal application being considered by the Employment Court, in dismissing it the Court should order her to pay indemnity costs.

[102] Ms BD described the removal application as "unfounded and without merit" and that it has resulted in "unnecessary time and costs [being] incurred for an application that has no prospect of success."

[103] Further, she described the removal application as "truly hopeless" and "presumed to have been commenced for some ulterior motive".

Analysis

[104] In LCRO 185/2020, Ms LD's application to review the Committee's first decision about her first complaint concerning the conduct of Ms BD and Ms HW during the course of the employment proceedings, I made the following observations:

> [94] The ERA, as with most decision making jurisdictions, has the ability to regulate and control its own proceedings and procedures,[13] and this will almost certainly include the power to impose a sanction on a party who defaults in complying with a properly made procedural order. The ERA's response to that breach would inform any subsequent disciplinary inquiry.
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> [95] It would usurp the powers and the jurisdiction of a decision-maker for the disciplinary process to pre-emptively make a finding about a lawyer's breach of a procedural order made in that jurisdiction.
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> [96] Quite apart from anything else, the principle of judicial comity applies. This means that the original decision-maker must be left to determine first, whether there has been a breach of a procedural order; secondly, the seriousness of that breach; and thirdly, the consequences.
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> [97] The rationale for this is tolerably clear.
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> [98] Decision makers are in the best possible position to assess the effects of any breach of their procedural orders on the proceedings that they are controlling. Not all breaches will be serious, even fewer will be deliberate. Every set of proceedings will have its own particular dynamic which will inform the decision-maker as to the seriousness and consequences of any procedural breaches.
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> [99] Unless and until the ERA or the Employment Court deals with Ms LD's discovery issues, as articulated by her in her complaint and review application, then there is no room for the lawyers' disciplinary process to be involved.

[13] Section 160 of the Employment Relations Act 2000.

[105] In that case, I was dealing with Ms LD's complaint that there had been breaches of discovery orders made by the ERA, and that this raised separate professional conduct issues.

[106] However, my quoted comments above apply equally to Ms LD's complaint about Ms HW's affidavit and Ms BD's memorandum.

[107] If the Employment Court judge before whom the affidavit and the memorandum are (or were) placed, expressed any concerns about their contents, then it would be (or would have been) open to them to, first, make comment to that effect and secondly (if appropriate) refer the matter to the Complaints Service.

[108] It is fundamental for decision-makers to be able to regulate and control the proceedings they are dealing with, as well as the procedures which govern those proceedings. This includes the contents of any document filed, or any submissions made.

[109] The decision-maker will be in a unique position to assess material in the context of the proceedings with which they are dealing. Bitterly fought proceedings will often, as the Committee observed, give rise to robust exchanges between the parties.

[110] I do not know whether the Employment Court has dealt with Ms LD's removal application. From the material before me, it appears that it was listed to be dealt with during October 2020, then adjourned until February 2021 – possibly for mention only at that time.

[111] I think it reasonable to presume that if the Employment Court has dealt with and decided the removal application, and in the course of doing so was critical of either or both of Ms HW and Ms BD for their conduct in opposing that application, then Ms LD would have drawn this to my attention. She has not done so, and so I infer that either the removal application remains unheard, or it has been dealt with but without critical comment about either of Ms HW or Ms BD.

[112] I emphasise that unless and until there is critical comment about the conduct of those lawyers and the way in which they responded to the removal application, made by an Employment Court judge in the context of hearing argument about and deciding the removal application, then it is entirely inappropriate for the lawyers' disciplinary process to insert itself into those proceedings, make observations about and impose disciplinary findings in connection with material put before that court.

[113] Be that as it may, and in deference to Ms LD's argument that the Committee ought to have grappled with what she submitted were plain conduct issues, I have turned my attention to the affidavit and the memorandum and applied a disciplinary lens to them.

[114] I say at once that there is nothing about either Ms HW's affidavit or Ms BD's memorandum which, from a disciplinary perspective, raise disciplinary concerns.

[115] Although Ms HW's opposition to the removal application was based upon a purely jurisdictional ground – that the ERA had not made a first instance decision about removal to the Employment Court – it was still necessary for her to lay out, for the Employment Court judge, the procedural history of the employment proceedings before the ERA, in order to show that the question of removal had not been considered in that jurisdiction.

[116] It seems to me that this would be a standard – indeed helpful – way of putting material before the Employment Court that was relevant to the jurisdiction issue that it had to deal with.

[117] In the same way, in my view Ms BD's memorandum appears perfectly conventional. Ms BD began by setting out the jurisdictional hurdle faced by Ms LD's removal application. Given that Ms BD was arguing that the removal application was doomed to fail at a very basic jurisdictional step, it is unsurprising that she would raise the question of indemnity costs.

[118] Again, in litigation terms, this appears to me to be unremarkable. Indemnity costs require a party to demonstrate reasonably significant shortcomings in the opposing party's approach, and this – again conventionally – can include descriptors such as "hopeless" or "without merit".

[119] Given Ms LD's own allegations of fraud against RL (and by implication if not expressly Ms HW), it is again unsurprising that Ms BD would meet argument of that nature with an emphatic and robust response.

[120] I can find no reason to interfere with the Committee's decision.

Decision

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

Anonymised publication

[122] 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 27th 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 LD as the Applicant
Ms BD as a Respondent
Ms HW as a Respondent
[Area] Standards Committee [X]
New Zealand Law Society