LCRO 240/2013

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [Area] Standards Committee
BETWEEN	**TM** Applicant
AND	**DC** Respondent

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

DECISION

Introduction

[1] Mr TM has applied to review a decision by the [Area] Standards Committee in respect of his complaint concerning the conduct of the respondent, Ms DC.[1]

[2] The Committee decided to take no further action on Mr TM's complaint, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act), on the basis that further action was unnecessary or inappropriate.

[3] Mr TM was a [position] with [company], and a member of [NZX], a union which acts for various sectors employed in the [X] industry. Its services include representation and advocacy in employment issues, on behalf of its members.

[4] Ms DC, an in-house lawyer employed by [NZX], acted for Mr TM in an employment dispute with [company] in Employment Relations Authority (ERA) proceedings from September 2010, into 2012.

[1] Complaint TM to Lawyers Complaints Service, 26 March 2013.

[5] Mr TM's complaint about Ms DC concerns her representation of him throughout that period.

Background

[6] From October 2008 until 14 December 2011 Mr TM was employed by [company] as a [position].

[7] A disagreement arose between Mr TM and [company] concerning certain aspects of Mr TM's role as a [position].

Reporting performance scores of staff

[8] A requirement of Mr TM's job as a [position] was that he record performance data about the staff he was managing by means of an electronic tablet provided to him by [company]. At a meeting with his manager on 30 June 2009, the manager produced a note which included [company]'s expectations of his role. She referred to Mr TM's issues which included the difficulty he explained he was having reporting data concerning staff he was managing, whilst he was overseas on [X] duty, by means of the electronic tablet provided to him by [company]. [2]

Performance issues

[9] On 9 July 2009 Mr TM met with the performance development manager for his annual review. The manager informed Mr TM of a number of shortcomings with his work which included not arranging monthly meetings with the manager. As with an earlier performance review, Mr TM's self-assessment was at variance with the manager's assessment of him. The manager proposed that Mr TM embark on a performance improvement plan (PIP).

First personal grievance – December 2009

[10] From that point Mr TM sought help from [NZX]. Discussions followed concerning how a PIP assessment would be carried out, in particular, the information that would be taken into account.

[11] With issues not having been resolved, Mr TM raised a personal grievance against [company] on 9 December 2009.

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[2] *Footnote removed*.

[12] On 26 February 2010 Mr TM reported to [company] by email that a "report" he had sent [company] on his tablet had not retained the information on "the file".[3]

ERA determination - November 2010

[13] The personal grievance was heard by the ERA on 13–15 September 2010. A determination was issued on 22 November 2010. The ERA described the root of Mr TM's grievance as "… his disagreement with the view of his manager ... that he was not doing what she regarded as necessary to meet [[company]] performance standards".[4]

[14] Significantly, as it affects Mr TM's complaint, and this review, the ERA held:[5]

> … I am satisfied that [company's] evidence established that Mr TM continued to fail to meet reasonable performance requirements ... in ways which were not the fault of equipment such as the tablet device provided to him or other difficulties of recording or accessing information in the [company]'s electronic records.

[15] The ERA was also critical of Mr TM's actions during the performance management procedures.[6] Its final conclusions on the personal grievance were that:[7]

> … [company's] concerns with Mr TM's performance were genuinely held, the steps taken by [[company]] managers to address those concerns were fair and reasonable, and [[company]] has not asked anything exceptional of Mr TM or which was inconsistent with its legitimate expectations of someone in the [position] role. … its actions, scrutinised broadly …, were what a fair and reasonable employer would have done in the circumstances.

[16] The ERA declined Mr TM's personal grievance application. It stated that the parties were in an existing employment relationship and directed them to "make arrangements necessary for [that relationship] to continue in light of this determination".[8]

[17] Mr TM did not appeal the determination.

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[3] Email TM to [[company] including his manager] (26 February 2010). Mr TM says that he provided Ms DC with this evidence for the ERA hearing held in [date].
[4] At [2].
[5] At [57].
[6] At [68].
[7] At [69].
[8] At [71].

Compliance order issue - 2011

[18] On 7 January 2011, and later on 17 May 2011, Mr TM instructed Ms DC to apply to the ERA for a compliance order of its determination.

[19] Discussions between Mr TM and [company] took place during the first half of 2011 with a view to resolving the dispute.

Interim injunction proceedings - May 2011

[20] In May 2011 Ms DC, with assistance from counsel Mr [W], brought interim injunction proceedings in the ERA against [company] to prevent a meeting taking place which may have led to Mr TM's dismissal. [Company] subsequently made application to the ERA to defer the filing of a statement in reply to which Mr [W] had responded "no objection".[9]

Dismissal - December 2011

[21] Ultimately, the dispute was not resolved and Mr TM was dismissed by [company] on [date].

Second personal grievance - March 2012

[22] On 8 March 2012 Mr TM raised a second personal grievance against [company] in relation to his dismissal. Ms DC instructed counsel, Mr [C] to prepare the letter to [company] which sought "reinstatement, lost wages, and compensation" and expressed Mr TM's wish "to resolve these issues by agreement …To that end, he proposes mediation."[10]

[23] Ms DC reported by email to Mr TM on 23 March 2012 stating that [company] "are willing to settle", suggested that the matter be kept out of mediation, asked Mr TM to give some thought to a compensation figure, and proposed that Mr [C] would assist with a deed of settlement.

[24] Mr TM instructed Ms DC that day not to have "verbal dialogue" about him with [company], and that "All dialogue … is to be on the written record and sent only with [his] express written permission".[11]

[9] Email Mr [W] to ERA and [company]'s legal representatives (3 June 2011).
[10] Letter DC to G (8 March 2012).
[11] Email TM to DC (23 March 2012).

[25] Ms DC communicated with [company] and its lawyers during the first week of April 2012, and during the second week of May 2012 to arrange for a mediation. A date was agreed for Monday 25 June 2012 which Ms DC states "had to be cancelled because Mr TM would not respond to phone calls or email".[12]

Mr TM's 8 June 2012 letter to Ms DC

[26] On 8 June 2012 Mr TM sent Ms DC a letter in which he requested that she respond to 14 questions concerning her representation of him.

[27] Ms DC's reply on 20 June 2012 is largely contained in Mr TM's complaint and Ms DC's response to the complaint.

The complaint

[28] Mr TM's complaint identified four areas of concern:

(a) ERA hearing witness statements/perjury.

(b) Conflict of interest.

(c) Compliance order.

(d) 2012 personal grievance.

ERA witness statements complaint/perjury complaint

[29] Mr TM complains that:

(a) Ms DC failed to obtain statements from three witnesses having previously been advised by Ms DC that their evidence was "vital" to his personal grievance.[13] He claims that a direct consequence of these witnesses not having been called was that his "application for a personal grievance was declined".[14]

(b) He claims that "[i]nstead …, Ms DC advised [him] to seek a summons for a different witness [Ms J] who had refused to provide a statement", and

[12] Letter DC to Lawyers Complaints Service (21 June 2013) at [6.8].
[13] Above n 1, at 3.
[14] TM to Lawyers Complaints Service (5 June 2013) at [8].

who, when appearing before the ERA, "denied … the information contained in the telephone notes Ms DC submitted".[15]

(c) Ms DC failed, as instructed by Mr TM, to lodge a perjury complaint with the Police in respect of evidence given by summonsed witness Ms [J].

Conflict of interest complaint

[30] Mr TM alleges that:

(a) Ms DC had a conflict between her professional duties owed to [NZX] on the one hand and to Mr TM in his dispute with [company] on the other hand. This, he claims, is because [NZX] was a party with [company] to the Collective Employment Agreement which provided that in selecting staff for redundancy that [company] would give due regard to the principle of "last on first off" and included the performance data scores as a redundancy criteria.

(b) Ms DC was also conflicted because she had acted for a colleague of his, Ms [S], against [company] in a redundancy, and that Ms DC knew that the performance data scores were included as criteria in [company]'s redundancy process.

Compliance order complaint

[31] Mr TM claims that Ms DC failed to obtain a compliance order of the ERA determination of 22 November 2010. He also claims that during this time Ms DC was conflicted because, whilst acting for Ms [S] on a redundancy matter against [company], she corresponded with [company]'s lawyer thereby colluding with that lawyer.

2012 personal grievance complaint

[32] Mr TM claims that:[16]

(a) He understood from Ms DC's letter to him of 23 March 2012 that Ms DC "… [had] arranged for a settlement … that did not include reinstatement, lost wages and compensation".

(b) Contrary to his instructions she had proceeded to arrange a mediation without reference to him.

[15] Above n 1, at 3.
[16] Letter TM to Lawyers Complaints Service (5 June 2013) at 8.

Response by Ms DC – letter 24 May 2013

ERA witness statements complaint

[33] Ms DC states that:

(a) The evidence of the three witnesses was likely to have been "characterised by [company] as hearsay and unhelpful."[17]

(b) One of the witnesses was profoundly deaf and may have been "attacked" by [company] because of this disability.[18]

(c) She and Mr TM had probably agreed not to lead the evidence in question, as there had been no reference to it in his brief of evidence – which "he wrote, signed and submitted … to the [ERA]".[19]

Perjury complaint

[34] Ms DC explained that Ms [J] was "a colleague and in the same rank as [Mr TM]", and was at the time also a member of [NZX].

[35] She stated that:

(a) She had "a competing set of loyalties and obligations to [Mr TM] and another fee paying member", and "[NZX] did not instruct [her] to lodge a perjury complaint …".[20]

(b) Such a complaint was not in Mr TM's overall employment interests.

(c) She did not have an accurate record of the earlier discussion with Ms [J] and so was not confident in her own mind that the witness had committed perjury.

(d) In any event, Mr TM had proceeded to make a complaint of perjury to the Police.

[17] Letter DC to Lawyers Complaints Service (24 May 2013) at [1.1].
[18] At [1.2].
[19] At [1.3]–[1.4].
[20] At [2.1].

Conflict of interest complaint

[36] Ms DC had previously acknowledged to Mr TM that she knew about the [position] Collective Employment Agreement.[21] She stated that:

(a) She was neither involved in the negotiation nor creation of the Collective Employment Agreement.

(b) In the middle of 2011 she learned that [company] had acknowledged that performance data scores from some [position]'s were missing from its system, and that these errors had occurred "for a variety of reasons".[22]

(c) [company]'s acknowledgement that a number of the tablets issued to [position]s had "synchronisation issues" did not necessarily mean that the evidence given to the ERA by [company] in September 2010 about excelerator scores, was necessarily false.

(d) Although accepting that Mr TM's tablet was faulty at the relevant time (during 2009), the ERA found that the performance issues alleged by [company] were not caused by faulty equipment or other systems errors.[23]

Compliance order complaint

[37] Ms DC's view is that the ERA's direction to the parties[24] did not come into the category of actions in respect of which compliance orders can be made by the ERA. She considers that the direction was to both parties, and not aimed at one or the other.

[38] Ms DC:

(a) Denies not taking any steps to have [company] comply with the ERA's determination.

(b) Considers that "for the employment relationship to continue both [parties] had to participate".

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[21] Letter DC to TM (20 June 2012 1), at [1](a) – she stated that the excelerator [performance data] scores "… was not a material factor in your matter; your GMT's (Performance Goals, Measures and Targets) were."
[22] Email F to [company] Performance and Development Manager, [GMT] (13 June 2011).
[23] Above n 2, at [57].
[24] Above n 2, at [71].

(c) Says that Mr TM "was not prepared to accept the findings of the [ERA]".[25]

(d) States that such an application could have had "unintended consequences" for Mr TM because the ERA could have directed Mr TM to undertake particular steps, which he was opposed to doing.[26]

[39] Ms DC also denies that she colluded with or otherwise took instructions or directions from either of [company] or its counsel.

2012 personal grievance complaint

[40] Ms DC says that she submitted the 2012 personal grievance on Mr TM's behalf in order to preserve his employment rights and remedies.

[41] She states that:

(a) With Mr TM's authority, counsel, Mr [C], was instructed by [NZX] to prepare the personal grievance letter of 8 March 2012 to [company].

(b) Mr TM provided the information to go into that letter, which "addressed all applicable claims"[27] proposed mediation and consented to the release of his records to Mr [C].

[42] Ms DC does not consider that by organising mediation that she was undermining the personal grievance in any way. She noted that there is a statutory time limit for lodging a personal grievance, and that she wanted to ensure that this was met. She does not consider that by liaising with [company] about those matters that she was acting in a way that was inconsistent with Mr TM's instructions. She states that the correspondence with [company] was not about Mr TM personally or about the substantive aspects of Mr TM's personal grievance.

[43] Ms DC states that mediation is seen by the ERA as a "fundamental step" in advancing any personal grievance. Therefore, arranging a mediation was consistent with proper and expected steps in employment cases. For this reason she says that she "did not consult" with Mr TM about the mediation because [NZX]'s president, Ms [L], was in communication with Mr TM about that.[28]

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[25] Above n 15, at [4.7].
[26] At [4.8].
[27] Letter DC to TM (20 June 2012) at [6].
[28] At [8].

Further comment from Mr TM - 5 June 2013

Witness statement complaint

[44] In reply to Ms DC's response Mr TM maintains that:[29]

(a) He instructed Ms DC to brief and call the three witnesses, and that she failed to carry out those instructions without providing adequate reasons.

(b) The witnesses were able to give important evidence corroborating his position that [company] had not acted as a fair and reasonable employer. Because of this failure, his personal grievance "was declined".[30]

Conflict of interest complaint

[45] Mr TM takes issue with Ms DC's assertion that she was not made aware of the missing performance data scores involving a number of employees, until the middle of 2011. Mr TM refers to his email to Ms DC on 1 March 2010 when he informed her of the difficulties he was experiencing with [company]'s system retaining the excelerator scores he was sending on his tablet.

2011 interim injunction complaint

[46] Mr TM maintains that Ms DC did not obtain Mr TM's instructions or consult with him before Mr [W] communicated to both the ERA and [company] that Mr TM had "no objection" to [company]'s request that the requirement for [company] to file a statement in reply be deferred.

[47] Mr TM says that this request involved a "significant decision" for him to make, and that "by acting without instructions or consulting with [him] … that enabled the termination of [his] employment".[31]

[29] Also a subsequent letter TM to Lawyers Complaints Service (26 June 2013).
[30] At [8].
[31] At 8-10.

Further response by Ms DC – letter 21 June 2013

Witness statements complaint

[48] Ms DC refers to the ERA determination that:

> … [company]'s decision to require Mr TM to cease [X] duties and attend a coaching programme may have been to his disadvantage, at least subjectively, but was not unjustified.[32]
>
> [company]'s … concerns with Mr TM's performance were genuinely held, the steps taken by [[company]] managers to address those concerns were fair and reasonable …[33]

She states that Mr TM "had final sign off on all legal pleadings, including witness statements at the [ERA]".[34]

Conflict of interest complaint

[49] Ms DC states that:

(a) "… there is no link between Mr TM's (singular) faulty tablet and all the [performance data] scores used as part of a calculation in establishing redundancy criteria in 2009".[35]

(b) She had "… been informed that all the [performance data] scores used in establishing redundancy criteria in 2009 had been collected, compiled and calculated by [company] during 2008."[36]

Compliance order complaint

[50] Ms DC contends that the ERA direction that "… the parties must make the arrangement necessary for [the existing employment relationship] to continue in light of this determination"[37] was not "a direction to [company] to return Mr TM to [X] duties without his co-operation in attending a performance improvement programme or without him gaining prior medical clearance from [company]'s medical unit."[38]

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[32] Above n 2, at [66].
[33] At [69].
[34] Letter DC to Lawyers Complaints Service (21 June 2013) at [2.3].
[35] At [4.6].
[36] At [4.9].
[37] Above n 2, at [71].
[38] Above n 10 at [5.3].

2012 personal grievance complaint

[51] She adds that:

(a) Mr TM had not responded to [NZX]'s efforts "to communicate with [him] to confirm or decline mediation set down for Monday 25 June 2012".

(b) She had "not heard from [him] at all, aside from [his] letter of questions to [her] dated 8 June 2012".

The Standards Committee decision

[52] The Standards Committee delivered its decision on 31 July 2013. In reaching its decision that no further action on the complaint was necessary or appropriate the Committee determined that:

Witness statement complaint

(a) The witness statements "are likely to have been characterised [as] hearsay" and that there was:[39]

> … nothing to indicate that admission of the witness statements would have had any bearing on the outcome of the ERA hearing … Mr TM's own statement to the ERA did not contain any reference to the proposed evidence of the three witnesses …

Perjury complaint

(b) Ms DC:[40]

> was not confident that the alleged conduct amounted to perjury therefore it would have been remiss of her to make a police complaint merely on the instruction of Mr TM … [who had] himself made a complaint to Police (however there is nothing to indicate Police took any further action) …

Conflict of interest complaint

(c) The evidence from summonsed witness Ms [J] "given under oath at Mr TM's ERA hearing was [not] necessarily false". Whilst "Mr TM

[39] Standards Committee decision at [13].
[40] At [14].

replaced his allegedly faulty tablet computer with a working personal laptop computer … issues with his performance continued".[41]

(d) It did not consider that Ms DC "was under any professional obligation to seek to re-open Mr TM's case in the ERA once the new evidence came to light" during mid-2011.[42] The Committee noted that Mr TM could have instructed another lawyer "to make a renewed application to the ERA based upon new evidence".[43] It did not consider that the conduct complained about was "in the nature of a conflict of interest" which Mr TM alleged.[44]

Compliance order complaint

(e) It "did not consider that any conduct of Ms DC was inappropriate in the circumstances". In particular, that the ERA determination:[45]

> … did not amount to a direction that [company] could be compelled to comply with … Mr TM did not fully accept the ERA finding … and this represented a barrier to the employment relationship continuing.

2012 personal grievance complaint

(f) Because a settlement between Mr TM and [company] was not achieved, and a mediation did not take place, "it could hardly be said that Mr TM's position was prejudiced in any way".[46]

[53] Overall, the Committee noted that its role was "to determine whether there had been any conduct on the part of Ms DC that warranted disciplinary action" and that it was "not empowered to reconsider or review any matter that [had] been the subject of a decision by the ERA".[47]

[54] The Committee did not include Mr TM's 2011 interim injunction complaint in its decision.

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[41] At [22].
[42] At [22].
[43] At [22].
[44] At [23].
[45] At [31].
[46] At [32].
[47] At [34].

Application for review

[55] Mr TM filed an application for review on 6 August 2013. He seeks a review of the Standards Committee's decision to take no further action and points to a number of errors he states that the Committee made in its decision.

[56] He states that his complaint about Ms DC's conduct concerns her representation in:

(a) His personal grievance in 2010 which led to the ERA hearing in September of that year.

(b) Following his dismissal on 14 December 2011, his second personal grievance raised in March 2012 which did not go to an ERA hearing.

[57] Mr TM points to errors which he claims the Committee made:

Witness statements complaint

(a) That Ms [J], the summonsed witness, did not oppose his application for leave to obtain a summons.

(b) Contrary to the Committee's statement that "admission of the witness statements would [not] have had any bearing on the outcome of the ERA hearing", Ms DC had advised Mr TM that "evidence from Ms [J] … would need to be attested to … is vital to the case".[48]

(c) Ms DC failed to obtain that evidence.

Conflict of interest complaint

(d) The Committee had misunderstood his allegation that Ms DC had a conflict of interest when acting for him on his first personal grievance in 2009 which he claims had arisen because [company]'s IT system had not received the performance data of the staff he was managing submitted by him on the tablet.

(e) Ms DC's conflict arose because she did not disclose to Mr TM that her employer, [NZX], was a party with [company] to the Collective

[48] Application for review at 2.

Employment Agreement which included the excelerator scores as a criteria for redundancy.

(f) Ms DC withheld from Mr TM that "if the evidence [she] submitted to the ERA on [his] behalf" that [company]'s IT system was faulty, then "this would have had adverse consequences for both Ms DC and [NZX]".[49]

(g) He did not have any sick leave from 20 December 2010.

2012 personal grievance complaint

(h) His March 2012 personal grievance did not proceed to a hearing.

Standards Committee decision

(i) Whilst the Committee states in paragraph [34] of its decision that it had "spent significant time considering the extent of the material provided and deciding upon the complaints", much of that paragraph had been adopted from another decision made by the Committee in respect of a complaint made by one of Mr TM's colleagues, Ms [S], against Ms DC.

(j) The Committee's decision "… demonstrates the Committee made no final consideration of my complaint but instead copy and pasted from elsewhere".[50]

(k) Because the Committee had also considered the complaint by Mr TM's colleague against Ms DC that his "preference would have been for … a different Committee [to] consider [his] complaint".[51]

Ms DC's response – 30 August 2013

[58] Ms DC states that she largely relies on her submissions made to the Standards Committee.

[59] She emphasises that:

[49] At 3.
[50] At 5.
[51] At 5.

Witness statement complaint

(a) Mr TM's colleague Ms [J] "was summonsed (as Mr TM instructed) and gave evidence," and that she considered that Ms [J]'s evidence "would be the best source of the evidence then regarded as 'vital'".[52]

(b) Mr TM had made no mention of the three witnesses' "vital evidence in his brief of evidence …".[53]

(c) Mr TM did not appeal the ERA's determination that "the performance improvement plan was not an employment disadvantage".[54]

Conflict of interest complaint

(d) "… There would have been no "adverse consequences" for [her] or [NZX] if evidence submitted to the ERA on Mr TM's behalf had been "upheld.""[55]

(e) The disagreement whether or not Mr TM was on "sick leave" was not a determining factor in the context of Mr TM's complaint.

2012 personal grievance complaint

(f) Mr TM's personal grievance raised in March 2012 did not proceed to a hearing, Ms DC expresses the view that Mr TM preferred not to progress his claim to prevent it coming to the attention of his present employer. She had hoped that Mr TM would attend mediation which was at that time scheduled for the following month (September 2013).

Mr TM's reply

[60] In his reply Mr TM submits that:[56]

(a) Ms DC did not provide any evidence to support her responses.

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[52] Letter DC to Legal Complaints Review Officer (30 August 2013) at 2.
[53] At 2.
[54] At 2.
[55] At 3.
[56] Letter TM to LCRO (received 16 September 2013). Mr TM submitted further letters to the LCRO dated 1 October 2013 concerning his perjury complaint about Ms [J] accompanied by a response from the Police; and 2 December 2013 referring to Ms DC's failure to call the three witnesses at the September 2010 ERA hearing.

(b) Her failure to follow his instructions cost him his job.

(c) She did not advise him of the right of appeal from the ERA determination to the Employment Court.

(d) He had not made a claim to the Human Rights Commissioner that "[[NZX]] deprived [him] of an entitlement to union membership".

Hearing in person

[61] Mr TM indicated that he wished to be heard in person. A hearing took place on 31 March 2017.

[62] I record that as well as hearing from Mr TM in person, I have carefully read the complaint and response, the Committee's decision and the submissions filed in support of the application for review. There are no additional issues or questions which in my mind necessitate any further submissions from either party.

[63] At the hearing Mr TM reiterated and spoke to his complaints heard by the Standards Committee, and to his reasons stated in his application for review, and in his replies to Ms DC's responses.

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:[57]

> … the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.
>
> The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" …
>
> … the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

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

[65] More recently, the High Court has described a review by this Office in the following way:[58]

> 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.

(b) Provide an independent opinion based on those materials.

Analysis

Preliminary issue

[67] Mr TM raised new issues on review in his letter and response received on 16 September 2013.[59] The Legal Complaints Review Officer (LCRO) cannot consider new complaints raised at the review stage. The jurisdiction of the LCRO is confined to addressing the complaints considered by the Committee.

(a) Witness statement complaint

(1) Witness statement

[68] Counsel conducting litigation must generally follow their client's instructions. However, latitude is extended where strategic or tactical decisions must be made. Often counsel's analysis and approach will involve an assessment of legal and evidential requirements, about which it must be assumed counsel will have expertise.

[69] As counsel, Ms DC would undoubtedly have weighed up the competing interests concerning whether to call the witnesses. Her knowledge of both her client's case, and [company]'s response to it placed her in the best possible position to make an assessment of how the hearing should be run, and what the real issues were.

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[58] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].
[59] At [59](c) and (d).

[70] Mr TM claims that Ms DC failed to call the three witnesses contrary to his instructions to do so. He does, however, acknowledge that she "advised me" to summons Ms [J].

[71] In response, Ms DC says that Ms [J] "was summonsed (as Mr TM instructed) and gave evidence".[60] She states that Mr TM did not appeal the ERA determination, and "had final sign off on all legal pleadings, including witness statements at the [ERA]".[61] Mr TM's supplementary witness statement, although making reference to his difficulties with the tablet, focussed on performance issues.

[72] Although it is evident that before the ERA hearing in September 2010 there were discussions between the parties about calling the three witnesses, it is not clear with any degree of certainty why the three witnesses were not called, and Ms [J] summonsed instead.

[73] Whilst Ms DC is unable to be definitive as to the exact nature and extent of the discussions she had with Mr TM concerning the witnesses to be called, I am satisfied that there had been a degree of discussion, as would be expected, between her and Mr TM concerning which witnesses it would be appropriate to call.

[74] If I am to be satisfied that a lawyer's conduct has been deficient to the extent that merits the imposition of a disciplinary sanction, the evidence to support that finding must be sufficiently strong to meet the requisite standard of proof. In disciplinary proceedings such as this the standard of proof is the balance of probabilities, which is the civil standard, and is to be applied flexibly according to the nature of the case.[62]

[75] The evidence Mr TM has advanced to support his allegation that Ms DC failed to follow his instructions by not calling three specific witnesses, is not conclusive. I cannot, on the evidence before me, reach the conclusion with the degree of certainty necessary, that Ms DC simply ignored Mr TM's request to call these witnesses.

[76] The overall finding in the ERA's determination was that Mr TM's performance was the main issue, and his difficulties with the tablet played no part in its overall assessment of the case. [63]

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[60] Letter DC to LCRO (30 August 2013) at 2.
[61] Letter DC to Lawyers Complaints Service (21 June 2013) at [2.2]–[2.3].
[62] *Z v Dental Complaints Assessment Committee* [2008] NZSC 55; [2009] 1 NZLR 1.
[63] Above n 2, at [57].

[77] Being mindful of the way in which the ERA case was decided, which discounted the tablet issue, I am not persuaded that Ms DC's conduct in this aspect of Mr TM's matter calls for a disciplinary response.

(2) Perjury complaint

[78] A lawyer acting in a litigation matter must take care not to make an allegation against a person that is not well founded. The Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care Rules) 2008 provides that:[64]

> Allegations should not be made against persons not involved in the proceeding unless they are necessary to the conduct of the litigation and reasonable steps are taken to ensure the accuracy of the allegations and, where appropriate, the protection of the privacy of those persons.

[79] Mr TM alleges that Ms DC failed, as instructed by him, to make a perjury complaint with the Police in respect of the summonsed witness, Ms [J], whose evidence he claims was contrary to that previously provided to Ms DC.

[80] Ms DC acknowledges that she did not lodge this complaint, and that she did not consider that it was in Mr TM's interest for her to do so. She explained that because Ms [J] was also a [position] at [company] that she had a conflict of loyalty between Mr TM on the one hand and Ms [J] another fee paying member of [NZX] on the other.

[81] She also states that she did not have an accurate record of her earlier discussion with Ms [J], and as a result was not confident that Ms [J] had committed perjury. Mr TM subsequently made the complaint to the Police.

[82] In such circumstances, particularly not being confident that that there was a prima facie case that Ms [J] had perjured herself, had Ms DC made the complaint she could have risked a professional breach and have been left open to a complaint by Ms [J].

[83] An accusation of perjury is serious accusation which is not established simply, as Mr TM contends, by Ms [J] giving evidence to the ERA which differed to the account which she had provided earlier to Ms DC.

[84] Perjury is defined in the Crimes Act 1961 as:[65]

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[64] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 r 13.8.2.
[65] Crimes Act 1961, s 108(1).

> … an assertion as to a matter of fact, opinion, belief, or knowledge made by a witness in a judicial proceeding as part of his or her evidence on oath, whether the evidence is given in open Court or by affidavit or otherwise, that assertion being known to the witness to be false and being intended by him or her to mislead the tribunal holding the proceeding.

[85] It may well have been the case that Ms [J], when put on oath and alerted to the consequences of that, determined that she would ensure that she provided an account to the ERA that provided a recollection of events that was more accurate than that she had previously provided to Ms DC. If Ms [J] had previously provided an inaccurate account to Ms DC, that does not amount to perjury.

[86] It is my view of these events that no disciplinary consequences arise in respect of Ms DC's conduct.

(b) Conflict of interest complaint

(1) Acting for another union member, Ms [S] on a redundancy matter

[87] In broad terms, a conflict can arise for a lawyer in circumstances where the lawyer is requested or is contemplating acting:[66]

> for more than one client on a matter in any circumstances where there is a more than negligible risk that the lawyer may be unable to discharge the obligations owed to one or more of the clients …

or where a lawyer lacks independence by having an interest in the client's matter.[67]

[88] Ms DC was an in-house lawyer employed by [NZX], a union. As an in-house lawyer, Ms DC was required to provide regulated services to [NZX], "the [union] by whom [she] was engaged … pursuant to a lawyer-client relationship"[68] and to its members including Mr TM on his employment dispute, and Ms [S] on her redundancy matter.

[89] By acting for different members of a union, it does not necessarily follow that an in-house lawyer would have conflicting duties to such members. The facts and circumstances of each union member's matter will be peculiar to each member.

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[66] Rule 6.1 – in a previous decision of this Office *AH v ZP* LCRO 82/201, at [46] – a conflict of interest between clients was described as "a conflict of duty".
[67] Rules 5, 5.1-5.4.
[68] Rule 15.2 "When an in-house lawyer provides regulated services to the non-lawyer by whom he or she is engaged, he or she must do so pursuant to a lawyer-client relationship". Whereas a lawyer in practice will act for a number of clients, an in-house lawyer has just one client: see G E Dal Pont *Lawyers' Professional Responsibility* (6th ed, Thomson Reuters, Pyrmont, 2017) at [13.05].

[90] Although the performance data scores was an issue that was common to each of Ms [S]'s dispute and Mr TM's dispute, it is evident that each matter was entirely separate from the other. Ms [S]'s matter concerned a redundancy. Mr TM was involved in an employment dispute.

[91] In these circumstances Mr TM has not been able to demonstrate that Ms DC's professional duty to him to protect and promote his interests was compromised by or conflicted with the corresponding duty she owed Ms [S]. It is my view that Ms DC did not have a conflict of duty in the sense described in rule 6.1, and that no disciplinary issues arise in this aspect of the complaint.

(2) Communicating with [company] about a variation of Ms [S]'s ERA determination

[92] Mr TM claims that by having communicated with [company]'s legal representative about a variation of Ms [S]'s ERA determination, to clarify that the performance data scores as a redundancy criteria ranked below the overall criteria of "last on first off", that Ms DC was colluding with [company]. He alleges that this brought her into conflict with the professional duty she owed him and says that had he known this at the time, that he would have withdrawn his instructions to her.

[93] The ERA declined the application on the ground that no such priority was made, and that in any event Ms [S] herself had not made the application for the variation - [NZX] had.

[94] Ms DC denied that her actions amounted to collusion with [company].

[95] As I have noted, Ms [S]'s matter was entirely separate from Mr TM's matter. Ms [S]'s matter concerned redundancy whereas Mr TM was involved in an employment dispute. In my view it does not follow that by having communicated with [company], and by having filed the memorandum on behalf of [NZX] in Ms [S]'s matter that Ms DC was conflicted in her duty owed to Mr TM.

(c) Compliance order complaint

[96] Mr TM claims that Ms DC informed him that she would apply for a compliance order, but that she did not do so.

[97] In her response Ms DC says that the ERA's direction was aimed at both parties[69] and did not fall into the category of instructions in respect of which compliance

[69] Above n 2, at [71] "There is an existing employment relationship and the parties must make the arrangements necessary for it to continue in light of this determination".

orders could be made by the ERA. She states that the direction required that both parties "participate" but that Mr TM "was not prepared to accept the findings of the [ERA]".

[98] Ms DC argues that if a compliance order had been granted by the ERA, "unintended consequences" for Mr TM may have included a requirement by the ERA to carry out performance related duties such as attending [L] Services with a view to commencing the PIP.

[99] The ERA accepted that [company]'s "concerns with Mr TM were genuinely held", and that the steps [company] took "to address those concerns were fair and reasonable". Also, that [company] had "not asked anything exceptional of Mr TM or which was inconsistent with its legitimate expectations of someone in the [position] role."[70]

[100] The intention of the ERA determination was to give the parties breathing space to provide them with the opportunity to resolve their differences. The sensible and proper course for Ms DC would have been to consult with and explain to Mr TM the appropriateness or otherwise of applying for a compliance order.[71] Ms DC considers that the steps she took were in Mr TM's best interests.

[101] From each party's version of events it appears that Mr TM may not have been provided with an explanation that an ERA determination such as this was a direction to the parties to work out their differences; and that it was not appropriate to apply for a compliance order where no specific steps were spelled out for each party to take. As events unfolded, in the period between the ERA determination in November 2010 and mid-2011, the parties were unable to resolve their differences. This led to the next critical point, namely the interim injunction which is discussed below.

[102] Although a failure to consult may constitute a contravention of rule 7.1, the conduct complained about must be viewed in light of these circumstances. In my view no disciplinary consequences arise out of Ms DC's conduct in acting for Mr TM on this aspect of his dispute with [company].

(d) 2011 interim injunction

[103] Ms DC instructed Mr [W] to prevent [company] going ahead with a meeting which may have led to Mr TM's dismissal. In doing so she relied on the advice and

[70] Above n 2, at [69].
[71] Rule 7.1.

experience of counsel. The steps Mr [W] took do not raise any disciplinary issues. It follows that no disciplinary issues arise for Ms DC on this aspect of Mr TM's complaint.

(e) 2012 personal grievance

[104] On 23 March 2012, Mr TM instructed Ms DC that she was not to have any communications with [company], without first consulting with him.

[105] Whilst a lawyer is required to follow his or her client's instructions, inevitably in many circumstances, a lawyer's ability to make decisions for the client in the course of running a litigation case, will not require the lawyer to take specific instructions from the client on every aspect of the case. There will be frequent occasions where a lawyer will make decisions and take actions, without seeing the need to check first with the client.

[106] However, Mr TM's instructions were very specific, and the purpose and intent of those instructions was very clear. He did not wish for Ms DC to have any communication with [company] or its legal representatives without him giving his approval for her to do so.

[107] It is evident that Ms DC did not follow Mr TM's instructions. Instead she initiated communications with [company]'s legal representatives to arrange a mediation.

[108] In response to Mr TM's complaint Ms DC points to Mr TM's stated intention to mediate the dispute, and the importance of mediation in employment matters. She states that arranging mediation was consistent with those instructions. She does not, however, refer to any discussions with Mr TM following receipt of his instructions.

[109] Whilst I am satisfied that Ms DC failed to follow her client's instructions, I am not satisfied that her failure was of the degree of seriousness and significance that would merit a disciplinary response.

[110] In my view, it was inevitable considering the circumstances of this case, that the parties would be directed to attend mediation. Underpinning much of the philosophy and approach of the law engaging employment disputes, is the intention to provide every opportunity to parties to resolve their disputes through discussions. Disputing parties are frequently directed to avail themselves of the opportunity to attempt mediation before the dispute escalates.

[111] Mr TM's objection to Ms DC communicating with [company] without his approval presents as somewhat technical in nature. His dispute had been going on for more than two and a half years. He had advised Ms DC that he would be willing to attend mediation. He had not indicated to her that he would reject the opportunity to mediate.

[112] It is my view that this contravention does not reach the threshold to warrant a disciplinary response.

Standards Committee complaint

[113] Mr TM produced an extract from the Committee's decision in Ms [S]'s complaint, showing paragraph [25] which is similar to [34] of the Committee's decision in his complaint. The Committee stated in each of those paragraphs that the Committee had "spent significant time considering the extent of the material provided and deciding upon the complaint(s)".[72]

[114] Mr TM contends that because paragraph [25] of Ms [S]'s decision represents the Committee's final comments in that matter, by "copy[ing] and past[ing]" from Ms [S]'s decision into his decision the Committee had "made no final consideration of [his] complaint…".

[115] Standards Committees are constituted under the Act, and regulations made under the Act,[73] the purposes of which include "(a) to maintain public confidence in the provision of legal services … (b) to protect the consumers of legal services: (c) …".[74] Their functions include "to inquire into and investigate complaints made under section 132."[75] They are required to "exercise and perform their duties, powers, and functions in a way that is consistent with the rules of natural justice."[76] Their members comprise lawyer members, who are volunteers and are appointed by the Board of the New Zealand Law Society, and lay members.[77] Their proceedings are confidential.[78]

[116] I stated earlier that I have carefully read the complaint and responses, the Committee's decision and the submissions filed in support of the application for review.

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[72] Mr TM does not say how he obtained a copy of this part of Ms [S]'s decision.
[73] Section 126; Part 3, Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008 SR 2008/186.
[74] Section 3(1) – "(c) to recognise the status of the legal profession …".
[75] Section 130.
[76] Section 142(1).
[77] Section 129; Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008, regs 14–19.
[78] Section 188.

[117] From my reading of the Committee's decision it does not follow that the fact that the Committee has largely adopted a paragraph from one decision, which expresses the Committee's view in a later decision, means that the Committee has not "considered the extensive material" placed before it in the later decision. In Mr TM's decision it is clearly evident that the Committee did consider the material in reaching its decision.

Conclusion

[118] For the above reasons I see no grounds which could persuade me to depart from the Committee's decision.

Decision

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

DATED this 8TH day of May 2017

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BA Galloway
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:

Mr TM as the Applicant
Ms DC as the Respondent
[Area] Standards Committee
The New Zealand Law Society