

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 341
5422543

BETWEEN

CATRIONA MADAY
Applicant

A N D

AVONDALE COLLEGE
BOARD OF TRUSTEES
Respondent

Member of Authority: T G Tetitaha

Representatives: Lawyer A, Counsel for Applicant
P Robertson, Counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 20 September 2016 from Applicant
28 September 2016 from Respondent

Date of Determination: 5 October 2016

DETERMINATION OF THE AUTHORITY

- A. I am not prepared to permit Lawyer A to represent the applicant in this proceeding pursuant to s160(1)(f) of the Employment Relations Act 2000. Costs are reserved.**

Employment relationship problem

[1] Lawyer A appeared as a witness in a preliminary hearing involving an application for leave to raise a personal grievance outside of the 90 day time limitation.

[2] The Authority found there were exceptional circumstances because the applicant made reasonable arrangements to raise the personal grievance but there was an unreasonable failure by Lawyer A to sufficiently raise the personal grievance with the employer.¹

¹ *Maday v Avondale College Board of Trustees* [2016] NZERA Auckland 300.

[3] The applicant was granted leave extending the time for raising the personal grievance to 24 October 2014 pursuant to s.114(3) of the Employment Relations Act 2000 (the Act). Costs were reserved.

[4] The applicant wishes to continue instructing Lawyer A as counsel in this proceeding. An issue has now arisen about whether the Authority ought to allow this to occur.

The applicant's position

[5] The applicant in lieu of filing submissions has filed a copy of a legal opinion from a local Queens Counsel dated 16 September 2016. I summarise his opinion below:

- There is no absolute rule that precludes a practitioner who has sworn an affidavit on a client's behalf at an interlocutory stage of proceedings from continuing to act for the client in the substantive proceeding.
- Once the interlocutory matter has been resolved, issues in contention will generally have been resolved and be no longer at issue in the substantive proceeding.
- Rule 13.5 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) required that a lawyer must not act if he or she "*may be required to give evidence of a contentious nature ... in the matter*".
- It was debatable whether the evidence Lawyer A originally gave qualified as evidence of a contentious nature.
- The Rules are 'forward looking' - you are only precluded from acting in the proceeding before the Authority if you may **in future** be required to give evidence of a contentious nature at the substantive investigation meeting.
- Objectivity is or may be undermined if the lawyer is operating both as advocate and a witness and as a witness of fact where his or her firm's conduct is directly in issue in the proceeding. None of those concerns appear to be present in your case.

- The right to choose one's legal representative is a fundamental right and part of the client's entitlement to natural justice.
- Section 173(1) of the Act requires the Authority to comply with the principles of natural justice and act in a manner that is reasonable having regard to its investigative role.
- Clause 2 Schedule 2 of the Act requires the Authority to afford her client the right to be represented by her as a barrister.
- Section 157 of the Act and Rule 4 of the Employment Relations Authority Regulations 2002 tasks the Authority with avoiding technicalities and delivering speedy, informal and practical justice. The Authority should be adopting a less rigid and technical approach than the ordinary Courts in the circumstances.

The respondent's position

[6] The Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) set guidelines that every lawyer must comply with (ss.3 and 107). Where a barrister acts or could potentially act in breach of the Rules, then a Court can intervene². Rules 5.1 and following require a lawyer to exercise his independent judgment.

[7] The respondent submits Lawyer A's judgment has been compromised because she has failed to put the applicant's interests ahead of her own in the conduct of these proceedings. These failings include:

- failure to advise the applicant with the objectivity required in breach of the above rules;
- failure to give the brief back to her instructing solicitor when it was known she could not meet the deadlines for submitting a personal grievance;

² *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZLR 444, *Walker v Procure Health Ltd* [2011] NZEmpC 95, ARC72/09

- lack of objectivity in her primary submission that the respondent had consented to the personal grievance being raised out of time when it was clear on the evidence that this was not the case;
- her reluctance to advise the applicant Lawyer A herself had unreasonably failed to raise the personal grievance within time when it became apparent that the issue of consent was unlikely to succeed.

[8] It is submitted the applicant's position at the interim hearing was driven by Lawyer A's failure to recognise the realities of what had occurred, including her failure to raise the personal grievance within time and her desire to avoid a finding by the Authority that she acted unreasonably or inappropriately.

[9] It submits her conduct to date confirms she is unable to separate her own interests from those of her client to act objectively and independently as required by the Rules going forward.

[10] Finally the respondent submits Lawyer A will be required to give evidence of a contentious nature about the issue of costs. It is unlikely the parties will be able to agree the costs to be awarded in respect of the application about the leave to raise personal grievances out of time. She is likely to be required to give evidence in respect of the reasonableness of her own costs.

Determination

[11] The application before me alleges breaches of the Rules and seeks an order about whether a lawyer should be permitted to continue to act in this proceeding.

[12] The Authority's power to restrain a lawyer from acting arises from its own statutory jurisdiction. In carrying out its role, the Authority is able to follow whatever procedure the Authority considers appropriate³ in accordance with the principles of natural justice and act in a reasonable manner having regard to its investigative role.⁴

[13] The rules that bind members of the legal profession do not bind the Courts⁵ or the Authority. However the Rules provide guidance to the Authority about the

³ Sections 157(2)(a), 160(1)(f) and 173(1)(a) of the Employment Relations Act 2000 (Act).

⁴ Section 173(1)(b) of the Act.

⁵ *Black v Taylor* [1993] 3 NZLR 403 at 417, per McKay J

appropriate standard of conduct for a lawyer and the exercise of its discretion in controlling its procedure.

[14] Rule 13.5 provides specific guidance where a lawyer is required to give evidence in a proceeding in which he or she acts:

13.5 A lawyer engaged in litigation for a client must maintain his or her independence at all times.

13.5.1 A lawyer must not act in a proceeding if the lawyer may be required to give evidence of a contentious nature (whether in person or by affidavit) in the matter.

13.5.2 If, after a lawyer has commenced acting in a proceeding, it becomes apparent that the lawyer or a member of the lawyer's practice is to give evidence of a contentious nature, the lawyer must immediately inform the court and, unless the court directs otherwise, cease acting.

13.5.3 A lawyer must not act in a proceeding if the conduct or advice of the lawyer or of another member of the lawyer's practice is in issue in the matter before the court. This rule does not apply where the lawyer is acting for himself or herself, or for the member of the practice whose actions are in issue.

13.5.4 A lawyer must not make submissions or express views to a court on any material evidence or material issue in a case in terms that convey or appear to convey the lawyer's personal opinion on the merits of that evidence or issue.

[15] The focus of the Rule is whether or not a lawyer's evidence will be of a truly contentious nature, to the extent necessary to justify disqualification⁶. This requires an assessment of how contentious or controversial the advice or conduct is in the wider context of the litigation⁷.

Is Lawyer A's advice or conduct contentious?

[16] Lawyer A's advice, evidence and conduct in respect of the preliminary issue was contentious. The applicant's primary submission was the grievance had been raised within time or the respondent had consented to any extension. A subsidiary submission was that if leave was required there was an exceptional circumstance under s115(1)(b) of the Act. This required proof Lawyer A "unreasonably failed to ensure the grievance was raised within the required time."

⁶ *Greenmount Manufacturing Ltd v Southborne Investments Ltd* (2008) 19 PRNZ 84 (HC) at [20].

⁷ *Cutting v Liu* [2014] NZHC 1063 at [60]-[62].

[17] Initially the only evidence provided was from the applicant herself. Although the applicant stated she instructed Lawyer A to raise the grievance upon her behalf within the 90 day period, she could give not give any other evidence about the preliminary issues. Only Lawyer A could give that evidence.

[18] Initially Lawyer A refused to depose any affidavit in support. After an indication that I would not accept her evidence by way of submission and therefore the application would fail, an adjournment was sought on the first day of the investigation meeting to enable her affidavit to be filed.⁸ This has created an issue of costs for the applicant of the respondent attending the adjourned hearing. Costs are yet to be determined.

[19] Lawyer A's affidavit evidence in the preliminary hearing also expressed her views about the evidence of a respondent witness, Deb Collis.⁹ Ms Collis was a material witness to the 90 day matter.

[20] Lawyer A alleged Ms Collis had consented to the extension of time for filing the personal grievance. I did not accept Lawyer A's evidence. I was not convinced on the balance of probabilities that consent by this employer was actually given, either implied or express.

[21] Ms Collis was the decision maker and is a material witness in the substantive hearing. I have concerns about Lawyer A's ability to properly examine Ms Collis and the other respondent witnesses on behalf of her client given that finding.

[22] I accept if the parties are unable to agree costs, the reasonableness of the applicant's costs may be called into question. Lawyer A may be required to give evidence, especially if costs are sought in respect of the preliminary hearing. It is likely to be contentious.

[23] The effect of Lawyer A's conduct of the preliminary hearing and its consequential effect upon costs for the applicant should be the subject of independent advice. Her costs may also affect the possibilities of settlement. Settlement often includes a contribution towards costs. The applicant ought to be independently advised about any settlement offer.

⁸ Minute dated 1 August 2016.

⁹ Affidavit Lawyer A sworn 8 August 2016 paras 23ff.

[24] Reflecting upon the above, Lawyer A's advice, evidence and conduct was and is likely to be a contentious issue in this proceeding.

Should the applicant's right to choose representation override any exercise of my discretion?

[25] The applicant has the right to choose her representative.¹⁰ This is only one factor to consider in applying the principles of natural justice.¹¹ I must also consider this alongside the possibility of an abuse of process occurring as set out above. There is no evidence this can be dealt with in a way that shall remove any potential injustice of allowing Lawyer A to continue acting.

[26] I note the applicant resides in Auckland. There is a large specialist employment bar based in Auckland comprising barristers and specialty firms available to assist the applicant. This is also a jurisdiction where the applicant may represent herself. The applicant is able to find alternative representation if required to do so.

[27] In my view the possibilities of an abuse of process occurring outweigh the applicants right to choose to utilise Lawyer A's services.

[28] In the circumstances I am not prepared to permit Lawyer A to represent the applicant in this proceeding pursuant to s160(1)(f) of the Employment Relations Act 2000. Costs are reserved.

T G Tetitaha
Member of the Employment Relations Authority

¹⁰ Section 236 of the Act.

¹¹ Sections 157(2) and 173(1) of the Act