

## **Decision No. 2 of 2017 - Issued on 6 June 2017**

*Summary of the Decision of DIFC Courts Assistant Registrar, Natasha Bakirci & Assessors Henry Quinlan (DLA Piper) and Robert Karrar-Lewsley (Al Tamimi & Company) – collectively “the Investigatory Committee” - in relation to a Complaint lodged under the Mandatory Code of Conduct for Legal Practitioners in the DIFC Courts.*

The DRA Academy of Law has issued this summary for the benefit of DIFC Courts Practitioners. This summary is an abridged and anonymised version of the decision of the Investigatory Committee.

### **The Complaint**

On 31 January 2017, the Director of the Academy of Law received a complaint against a practitioner (the "Respondent") registered under Part II of the DIFC DRA Academy of Law's Register of Practitioners ("the Register"), alleging breaches of the Mandatory Code of Conduct for Legal Practitioners in the DIFC Courts (the "Code").

The impugned conduct of the Respondent relates to Part 50 orders, alternative service orders and committal orders obtained by his client. The Complainant argues that the Respondent failed to answer the Registrar's questions put to him regarding service at an *ex parte* Part 50 hearing and positively misled the Court, notwithstanding his obligations to the Court and being aware of the gravity of the orders he sought.

Particular statements made by the Respondent in this regard are said to have ignored the provisions of the RDC in relation to service requirements in circumstances where no cover letter, no copy of the application and no Arabic translations were ever attempted to be served. The Complainant asserts that a number of misrepresentations were made and that it was only when pressed by the Registrar to further clarify how service had been purportedly effected that the Respondent accepted that the applicable procedures had not "necessarily" been followed.

According to the Complainant, the Respondent had then proceeded to attempt to persuade the Registrar that service had been effected on the basis that service through a receptionist at a business address was analogous to service via an intermediary (such as a maid) at a residential address. Due to the evidence as misrepresented to him, the Registrar had granted the Respondent's client an order for alternative service, notwithstanding that such an order was unwarranted in circumstances where no proper attempt at service had been made previously.

The Complainant further alleges that, at a second *ex parte* hearing before the Registrar, the Respondent had sought to claim that his further defective efforts to serve had amounted to effective service. This was despite the fact that the documents were delivered by courier late (on the morning of the thirteenth rather than the fourteenth day before the hearing) and again lacked any cover letter, copy of the application or any Arabic translations.

The Complainant maintains that, faced with a summary of events given by the Registrar, the Respondent was forced to accept that service had indeed been defective in terms of timing but failed to draw the Court's attention to all the other defects.

Lastly, the Complainant makes reference to a third *ex parte* hearing in which it is alleged that the Respondent neglected to inform the Court that the orders under consideration had been delivered without any copy application documents, nor any Arabic translations provided.

### **Specific Mandatory Code of Conduct Provisions Engaged**

The Complainant contends that the Respondent has:

- (a) Failed to deal with the Court honestly as required by **Part B-1 of the Code** which provides as follows: "Practitioners shall deal with the Court and its staff honestly, co-operatively and with civility;"
- (b) Failed to ensure familiarity with the DIFC Court Rules (RDC) and in particular with the provisions of the overriding objective to enable the Court to deal with cases justly as stipulated by **Part B-2 of the Code**, which states: "Practitioners shall ensure that they are familiar with the Rules and in particular with the provisions of the Overriding Objective;"
- (c) Knowingly or recklessly made incorrect or misleading statements of fact or law to the Court and having made such statements, failed to correct them at the earliest opportunity, contrary to **Part B-4 of the Code** which provides: "Practitioners shall never knowingly or recklessly make any incorrect or misleading statement of fact or law to the Court and shall correct any material incorrect or misleading statement of fact or law at the earliest opportunity;"
- (d) Neglected to inform the Court of all relevant decisions and legislative provisions, as required by **Part B-5 of the Code**: "Practitioners shall inform the Court of all relevant decisions and legislative provisions of which they are aware, regardless of whether the effect is favourable or unfavourable to the contention for which they argue," as supplemented by the Supplementary Code of Conduct Practice Direction No. 1 ("SPD") which provides that the "Court must be informed of all relevant decided cases ("Decisions") and legislative provisions of which the Practitioners appearing in the matter are aware" (SPD B-5(i)).

Additionally, it is argued that the Respondent breached his General Duties in that he failed to:

- (a) "not engage in conduct that undermines the Overriding Objective or which may otherwise result in procedural unfairness", contrary to **Part E-17 of the Code**;
- (b) "abstain from any behaviour which may tend to discredit the Court and the reputation of its Practitioners," contrary to **Part E-19 of the Code**;

- (c) “not engage in conduct involving dishonesty, fraud, deceit or deliberate misrepresentation,” contrary to **SPD E-17 (viii)**;
- (d) “not express his personal opinion of his client’s rights or liabilities or allow his personal feelings to affect his professional assessment of the facts or the law or to affect his duty to the Court” and to “bring any procedural irregularity to the attention of the Court during the hearing,” contrary to **SPD E-17 (xi)** while “personally responsible for the conduct and presentation of his case” and obliged to “exercise personal judgment upon the substance and purpose of the statements made and questions asked;” and
- (e) contrary to **SPD E-17 (xii) (a)**, “not to contrive facts which will assist his client’s case or draft any originating process, pleading, affidavit, witness statement or notice or grounds of appeal containing any statement of fact or contention (as the case may be) which is not supported by “reasonably credible material.”

#### The Respondent’s Reply

On 23 February 2017, the Respondent submitted his reply to the complaint made against him under the Code as follows: he did not accept that he displayed unbecoming behaviour, nor that he had acted without honesty resulting in doubts as to the truthfulness of his evidence and independence. He did not accept the allegation that he had misled the Court, knowingly or recklessly. He had never contrived facts in this case or any other. His submissions to the Court were submissions based upon what he and his team had found or believed. If he had offered facts by way of evidence, he believed those facts to be true and based upon reasonable assumptions.

As a partner, the Respondent accepted his responsibility for procedural irregularities and defects in service. If the misrepresentations complained about related to the failure to complete fully the service of the Orders and with the necessary translations and the like, the Respondent accepted those defects and apologised for them, and stated that they were unintentional.

The Respondent refutes the allegation that he positively misled the Court, has acknowledged the errors of service, and states that any mistakes he has been alleged to have made were an oversight and not intentional. The Respondent did not realise that the documents should have been translated into Arabic, regardless of the language of the recipient. This was an error.

In summary, the Respondent does not accept that he committed any acts of misconduct and has always sought to deal with any Court honestly. He accepts that he did not personally check all the Rules on Arabic translations, nor on some of the service points and concedes that his reliance on others does not excuse him for this regrettable error. He did not make any incorrect or misleading statements of law or fact to the Court, save for the incorrect description of service without the relevant attachments, and disputes that he breached his obligation to make full and frank disclosure.

#### **Procedural matters and the Investigatory Committee's jurisdiction to hear this Complaint**

The Investigatory Committee derives its jurisdiction from Part F of the Code. In particular:

Part F-24 provides that any complaint by a person or body that a Practitioner has acted in breach of the Code shall be made in writing to the Director of the DRA Academy of Law, who shall then forward the complaint to a Registrar of the DIFC Courts. The present Complaint was duly forwarded to Ms. Natasha Bakirci, who is Assistant Registrar of the DIFC Courts;

Part F-27 provides that no complaint received by a Registrar more than 12 months after the facts complained of shall be accepted, save in certain stated circumstances. Here, the Complaint was received within this time limit;

Part F-28 then requires the relevant Registrar to (i) decide on reasonable grounds whether the complaint is frivolous or vexatious (and Ms. Bakirci here decided that the Complaint was not) and (ii) proceed with a prescribed procedure culminating in a reasoned written decision.

Part F-29 permits a Practitioner against whom a complaint is made to require that it is investigated and decided upon jointly by a Registrar and two independent Assessors chosen by the Registrar from the Register of Practitioners. The Respondent duly triggered this Part, which led to the appointment of the two independent Assessors (whose appointment was agreed upon by the parties).

#### **Alleged Breach of Parts B-1 and B-4 of the Code**

The Investigatory Committee considers that the central allegation is that the Respondent knowingly or recklessly made incorrect or misleading statements of fact or law to the Court and failed to correct any such material incorrect statement of fact or law at the earliest opportunity, in contravention of his duties under Part B-4 of the Code. The complaint under Part B-1 of the Code and its requirement that Practitioners “deal with the Court and its staff honestly, co-operatively and with civility” can usefully be considered as part of the analysis of our decision in respect of Part B-4.

There are two key elements to establishing that a breach of Part B-4 of the Code has occurred: first, an incorrect or misleading statement must have been made to the Court by a Practitioner; and

second, that statement must have been made knowingly or recklessly by the Practitioner.

#### **Did the Respondent make an incorrect or misleading statement to the Court?**

The Investigatory Committee has reviewed the official transcript of the first hearing, as well as the relevant witness statement, together with the other supporting documents that were put before the Registrar for his consideration at the first *ex parte* hearing, which eventually resulted in permission to serve by alternative means being sought.

The Committee has noted the Respondent’s initial oral submissions to the Registrar to the effect that it was clear and indisputable that the individuals in question had been validly served. It was only upon further probing by the Registrar that the Respondent ultimately conceded the Registrar’s suggestion that it could be that the individuals did not know they were meant to be present at the hearing. Given the

potentially grave consequences in the context of a Part 50 hearing for those who have been summoned but who fail to attend, the Investigatory Committee finds that, had it not been for the Registrar's exploration into the exact circumstances surrounding the averred service, there was a real risk that these individuals could have been found to have been in contempt of an order of the Court which had not been duly served on them. There were also other discrepancies, some of which the Respondent has conceded were errors for which he apologised during the early course of this Complaint.

The Committee concludes that a number of the oral submissions made by the Respondent to the Court (and in particular those made at the outset of the first hearing, relating to personal service having been effected on the individuals) were incorrect or misleading statements of fact and law.

Each of these submissions was corrected or disregarded by the Court during the hearings themselves, and a number were the subject of an apology from the Respondent during the early course of this Complaint. However, the Committee considers that, but for the correspondence sent by the named individuals prior to the second hearing and the interventions of the Registrar (in particular during the first hearing), there was a risk that the Court might have been misled, and reached the wrong decision, as a result of the Respondent's oral submissions.

#### **Did the Respondent seek to mislead the Court knowingly or recklessly?**

The Committee has considered the Respondent's reply in which he repeatedly refutes the allegation that he deliberately misled the Court and emphasises that any mistakes which might have been made were an oversight and not intentional. As a partner, he also accepts responsibility for any procedural irregularities and defects in service.

Having reviewed the Complaint and the Respondent's reply (and the documents attached to those submissions, as well as the other documents which were before the Registrar at each of the hearings), the Investigatory Committee considers that the Respondent did not knowingly make any incorrect or misleading statements of fact or law to the Court.

We must therefore consider whether there has been a breach of the Code through any recklessness on the part of the Respondent.

#### **Definition of "Recklessness" in the context of Practitioners' duties**

In considering the correct definition of, and test for, recklessness which we should apply, we have reviewed decisions made by courts and tribunals in similar disciplinary proceedings in fellow common law jurisdictions, including England & Wales and Australia, which themselves inspired much of the content of the DIFC's own Code of Conduct.

These have been discussed in detail in the decision in Complaint No.1/2017 *Henry vs. Horace* issued on 9 March 2017.<sup>1</sup>

Having reviewed these authorities, the Investigatory Committee is of the view that, in order to determine whether a Practitioner has acted recklessly, we must conclude on the balance of probabilities, having carried out a subjective assessment of the relevant Practitioner's state of mind (based on the evidence available to us), that:

(a) the Practitioner was subjectively aware that there was a real risk that the statement made to the Court was incorrect or misleading; and

(b) they disregarded or closed their mind to that risk in the sense that they were indifferent as to, or did not care, whether the statement was correct or not.

### **Decision of the Investigatory Committee**

At the outset, the Committee wishes to stress the following:

- the importance of Practitioners preparing properly for Court hearings, so that they can properly fulfil their duties as officers of the Court;
- the paramount importance of Practitioners paying careful attention to their duty of full and frank disclosure in the context of all *ex parte* applications for injunctions; and
- that hearings such as those presently being considered must be dealt with very carefully by Practitioners, as the orders sought by applicants against respondents who fail to attend can include: (i) a finding that those respondents are in contempt of court; (ii) a fine; or (iii) a committal order. These are therefore applications which can result in serious sanctions for respondents.

Rule 23.11 of the RDC provides as follows:

“On all applications without notice it is the duty of the applicant and those representing him to make full disclosure of all matters relevant to the application including, in particular, disclosure of any possible defences that may be available to the respondent in response to the application.”

It is the Investigatory Committee’s view that this rule applies equally in the context of an *ex parte* hearing of which one party was never intended to have notice and a hearing which was intended to be with notice,

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<sup>1</sup> Available at <http://www.draacademy.ae/wp-content/uploads/Complaint-No.1-of-2017-Henry-vs.-Horace-issued-on-9-March-2017.pdf>

but which is only attended by one party, particularly in a case such as this, where the reason why one party did not attend was that they were not given due notice of the hearings.

Having reviewed the transcript of the hearings, the Committee is of the view that the Respondent was insufficiently prepared for at least that first hearing, and made submissions which an advocate with sufficient knowledge of the papers and the relevant Court Rules could not properly have made.

However, the Investigatory Committee observes the high threshold for establishing “recklessness” in this context, which would require us to be satisfied (on the balance of probabilities) that the Respondent was subjectively indifferent as to, or did not care, whether the statements he was making were correct or not.

We note in this regard that the Respondent did not hesitate to temper or qualify his statements once questioned by the Registrar. The Investigatory Committee's view is that there is insufficient evidence for us to conclude that the Respondent was reckless in his representations. We therefore conclude that there has been no breach by the Respondent of Part B-4 of the Code.

### **Alleged Breach of Part B-2 of the Code**

The Investigatory Committee will now turn to the question of whether the Respondent failed to ensure familiarity with the RDC as required by **Part B-2 of the Code** and to inform the Court of all relevant decisions and legislative provisions, regardless of whether the effect was favourable or unfavourable to the contention for which he argued, in contravention of his duties under **Part B-5** of the Code.

It is clear that, in this case, there were a number of procedural defects and shortfalls as regards the requirements imposed by the RDC concerning service as provided for in RDC 9.19 and RDC 23.93, and a failure to comply with the relevant notice periods. These defects and shortfalls appear to have taken place prior to the hearings in question, and the reasons for them are not known to the Committee.

As for the hearings themselves, the Investigatory Committee finds it hard to believe that the shortcomings in the Respondent's oral submissions were due to a lack of general familiarity with the RDC. The Committee rather takes the view that (for reasons unknown to us) the Respondent had failed to prepare adequately before the hearings in question, both in relation to ensuring sufficient familiarity with the specific Rules which were likely to be relevant and applicable to the hearings and in relation to ensuring sufficient familiarity with the evidence and other material before the Court. As a result, in particular at the first hearing, the Respondent made misleading submissions and was not readily able to assist the Court when answering the Registrar's questions.

The Committee again stresses the importance of Practitioners preparing adequately in advance of all hearings (but in particular hearings at which the other party is not present), and being meticulous in ensuring the accuracy of their own submissions to the Court, whether written or oral.

Turning to Part B-2 of the Code, there is no supplemental guidance as to the extent to which Practitioners must "ensure that they are familiar with the Rules". The Committee considers that Part B-2 of the Code requires Practitioners to be generally aware of the content of the RDC. While the Committee urges Practitioners to prepare properly for hearings, the Committee takes the view that it would be setting the

bar too high to find Practitioners to be in breach of their professional obligations by reason of not being fully familiar with all of the specific Rules which may potentially become the subject of consideration during a hearing.

In relation to the present case, the Committee's view is that the issues arising from the three hearings arose as a result of the Respondent being (for reasons unknown to us) inadequately prepared, rather than through any lack of general familiarity with the RDC. While, therefore, the Committee has some misgivings about the potential consequences of the initial oral submissions made at the first *ex parte* hearing in particular, it concludes that the Respondent did not breach Part B-2 of the Code through the conduct complained of.

### **The remaining allegations of breaches of the Code**

In respect of the remainder of the allegations made in relation to the Respondent's duties under the Code, having regard to all of the materials before it (and to the analysis above), the Committee does not consider that the Respondent has breached any of these duties. The Committee determines that the Respondent did not breach his duty:

- to "deal with the Court and its staff honestly, cooperatively and with civility", within the meaning of Part B-1 of the Code. The Committee considers that the Respondent acted honestly throughout each of the hearings;
- to "inform the Court of all relevant decisions and legislative provisions of which they are aware, regardless of whether the effect is favourable or unfavourable to the contention for which they argue", within the meaning of Part B-5 of the Code. The Committee does not consider that there is sufficient evidence to prove, nor is it persuaded, that the Respondent breached this Part of the Code;
- not to "engage in conduct that undermines the Overriding Objective or which may otherwise result in procedural unfairness", within the meaning of Part E-17 of the Code. The Committee does not consider that the Respondent's conduct amounted to a breach of this Part of the Code;
- to "abstain from any behaviour which may tend to discredit the Court and the reputation of its Practitioners", within the meaning of Part E-19 of the Code. The Committee does not consider that the Respondent's conduct amounted to a breach of this Part of the Code;
- not to "engage in conduct involving dishonesty, fraud, deceit or deliberate misrepresentation", within the meaning of SPD E-17 (viii). Again, the Committee considers that the Respondent acted with honesty throughout each of the hearings;
- not to "express his personal opinion of his client's rights or liabilities or allow his personal feelings to affect his professional assessment of the facts or the law or to affect his duty to the Court" and to "bring any procedural irregularity to the attention of the Court during the hearing", within the



meaning of SPD E-17 (xi). The Committee does not consider that there is sufficient evidence to prove, nor is it persuaded, that the Respondent breached this Part of the Code. While there were procedural irregularities, particularly in relation to service, these matters were raised during the hearing and the Respondent engaged with the Registrar on these matters;

- not to "contrive facts which will assist his client's case or draft any originating process, pleading, affidavit, witness statement or notice or grounds of appeal containing... any statement of fact or contention (as the case may be) which is not supported by... reasonably credible material", within the meaning of SPD E-17 (xii). The Committee does not consider that the Respondent's conduct amounted to a breach of this Part of the Code

Although we have not considered it appropriate to impose any sanction on the Respondent as a result of this Complaint, we seize this opportunity to emphasise the deleterious effect of Practitioners failing to prepare properly for hearings, and the potential impact which such failures may have on (i) the proper functioning of the Court and the administration of justice, as well as (ii) the individual reputation of the legal Practitioner concerned and the legal fraternity of which he forms part.