

MBIE investigations: Duty owed to workers by Employers, Lawyers and Inspectors

Do we need to regulate to protect the interests of workers?

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Introduction

An investigation by the Ministry of Business Innovation & Employment (MBIE) following a serious harm incident in the workplace gives rise to a number of issues, not least of which is the possibility that any duty holder under the Health & Safety in Employment Act 1992 (HSE Act) could be subject to prosecution¹. Depending on the scale and complexity of a MBIE investigation, there will be a vast array of issues to consider. This paper does not provide authoritative analysis of all the potential issues involved. Rather it will look at one particular issue; that is the role played by lawyers providing regulated services to employers. It will focus, in particular, on the situation where the same lawyer provides legal services to both the employer and employees in relation to the same matter and ask the question “does this give rise to a fundamental conflict of interest for the lawyer involved?” Do we need specific regulation to ensure the rights of workers are properly protected during a MBIE investigation or are existing protections adequate?

It is important to note that it is not my intention to vilify lawyers who provide such services or suggest their actions are necessarily negligent, reckless or otherwise amount to professional misconduct. My intention is to raise an issue that has, to date, not been properly addressed. It appears that it has generally been accepted that an employer is entitled to instruct a lawyer to act for it during a MBIE investigation and part of that legitimate representation is to provide legal services to employees, such as advice and representation during official interviews. It is my contention that this is not done for the benefit of the affected employees but is done for the benefit of the fee paying employer. In other words, the interests of employees are treated as being the same as those of the employer or worse, treated as subservient to those of the employer. In any event, there is an inherent conflict of interest between the interests of two statutory duty holders in relation to the same matter, which should preclude any lawyer offering legal services to both employer and employees.

So, what is the problem?

The problem is that, in attempting to protect the interests of employers and minimise their chances of prosecution, the legitimate interests of workers are sometimes ignored or treated as being an extension of the employer’s interests. In doing so, it is arguable that employers are failing in their duty of good faith owed to employees and the MBIE investigation is, at the very least, made more difficult because of improper interference by the employer and its lawyer. Lawyers, acting

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NB: Greg Lloyd was unable to attend the conference to deliver this paper. He kindly continued to make it available to conference delegates and through publication in this issue of the Journal.

¹ This paper is concerned with only two duty holders (the employer and employees)

for the employer, are arguably failing in their responsibilities under the Lawyers & Conveyancers Act 2006 (L&C Act) and the Conduct & Client Care Rules 2008.

Two examples are cited to highlight the problem. The first concerns events that took place in the immediate aftermath of the Pike River tragedy. The second concerns the advice and strategies lawyers offer to employers when facing the prospect of an investigation by MBIE.

Pike River

In the days following the Pike River explosion, there was, as one can imagine, a lot of activity in and around Greymouth. The police and MBIE (or the Department of Labour as they were at the time) were on the scene immediately, and began developing what proved to be a well-executed joint investigation process. That process included undertaking extensive interviews with all employees.

Pike River Coal Ltd was also busy. It had, among other things, engaged public relations experts and a law firm to represent its interests. The company and its senior management were (rightly) concerned that they would be held criminally responsible for the deaths. As to be expected that was a significant focus of the police and MBIE investigation. It was appropriate that the company should engage lawyers to assist. It was the form in which assistance took that is of concern. Among other things the company:

- Attempted to set up a parallel investigation in which all employees would be interviewed by the company before they were interviewed by the police and MBIE².
- Instructed employees that, before attending interviews with the police and MBIE, they were to report to the company's office. There they were encouraged to take advantage of the company's offer of free legal representation by lawyers engaged to act for the company.
- Had its lawyers presenting themselves at the police station and asserting a right, on behalf of the company, to be present during the police/MBIE interviews of employees.
- Had its lawyers approaching employees as they entered the police station and offering to represent them during the interviews.
- First demanded, and then requested, copies of the audio and visual recordings of the employee interviews.

The company asserted that it was motivated by a desire to protect the rights and interests of the employees as well as those of the employer. It was not. The company was interested in protecting its own interests and it did so by attempting to influence and control what employees said in their interviews. In the case of Pike River, it was patently obvious that the interests of employees were very much in conflict with the interests of the employer.

Lawyers' servicers to employers

Lawyers offer a range of services to employers facing investigation by MBIE following serious harm incidents in the workplace. Such services may concern compliance with the HSE Act and the Employment Relations Act 200 (ERA) as well advice on strategies for minimising the likelihood

² Employees were warned that failure to attend interviews may be treated a misconduct by refusing to follow a reasonable and lawful instruction

of prosecution or other enforcement action. There is nothing inherently wrong with this, provided it does not impinge upon other interests, such as the rights of workers to enjoy a safe and healthy workplace and the interests of workers who may themselves be subject to a MBIE investigation. Nor should it give rise to a conflict of interest for the lawyers involved. The following are examples of the sort of advice lawyers offer to employers facing a MBIE investigation³:

- Immediately contact a lawyer
- Manage the response by, among other things, ensuring employees are properly prepared to ensure that they do not say anything that could incriminate the employer
- Ensure employer's lawyers are present during MBIE interviews with employees

There are obvious similarities between this generic advice and the approach adopted by Pike River Coal Ltd and its lawyers. In both cases the objective is to protect the interests of employers by controlling and manipulating the actions of employees.

Before looking at the role of lawyers, it is necessary to briefly touch on the obligations MBIE and the employer.

MBIE obligations to employees

Following the Pike River incident referred to above, the NZ Council of Trade Unions, and NZ Amalgamated Engineering Printing & Manufacturing Union Inc. made a formal complaint to the Office of the Ombudsman. The complaint centred on the employer's efforts to have its lawyers represent employees being interviewed by the police and MBIE. The union argued that it was fundamentally wrong for state agencies to allow employees to be placed in such a situation without professional and independent advice. The Ombudsman rejected the complaint on the basis that it only had jurisdiction to look at the conduct of MBIE. In that respect, MBIE inspectors have no control over who an interviewee chooses to have represent them or be present during the interview. While it may be undesirable to have the employer representative present during the interview, the Ombudsman reasoned that it is a decision for the interviewee alone. The Ombudsman did not comment on the professional obligations of the lawyers involved. Nor did she comment on the actions of the employer.

It is certainly the view of the union that, to place such a burden on an employee, particularly in circumstances such as those of the Pike River tragedy, is manifestly unreasonable and unfair. This is especially so when it is unlikely that affected employees will have been provided with sufficient information to make an informed decision and are likely to be labouring under the misapprehension that their employer and the employer's lawyer are acting in their best interests.

Employer obligation to employees

It is arguable that the actions of employers outlined above are inconsistent with their good faith obligations under the ERA. Section 4 of the ERA sets out the general good faith obligations owed in the employment relationship. The good faith relationship is wider than the implied mutual obligation of trust and confidence. It requires the parties to be responsive and communicative and to not do anything that is, or is likely to be misleading and deceiving. Engaging a lawyer to represent its interests and then offering that same lawyer's services to the employee is misleading

³ This is representative of the advice offered to employers in seminars and other forums

and deceiving. It is misleading and deceiving because the true motivation of the employer is not the protection of the employee's interests but the protection of its own interest.

Consideration also has to be given to the inherent inequality in power in the employment relationship. There is little doubt that without independent advice, an employee is likely to feel considerable pressure to acquiesce to an employer's demand that their representative be present during a MBIE interview. That is not consent freely given.

The lawyer – is there a conflict of interest?

The issue for lawyers providing services to employers facing a MBIE investigation is, among other things, whether or not there exists a conflict of interest. Section 4 of the L&C Act sets out the fundamental obligations of lawyers and includes the obligation to be independent in providing regulated services to his or her client.

Regulated services means, in relation to lawyers, legal services (s4). Legal services are services that a person provides by carrying out legal work (s4) for any other person, and legal work includes advice in relation to any legal or equitable rights or obligations. In the context of a MBIE investigation in which an employer engages a lawyer to represent its interests, a solicitor-client relationship is formed, the lawyer will provide regulated services and these fundamental obligations will apply. The solicitor-client relationship is a fiduciary relationship.

The relationship between lawyer and client automatically gives rise to a fiduciary relationship. The existence of such a relationship imposes onerous duties on a lawyer. This reflects an assumption that the features giving rise to a fiduciary relationship will almost invariably exist between lawyer and client. Those features include an imbalance of power, the vulnerability of one party, a relationship of trust and confidence, and an assumption by one party of a duty to act in the other's interests. The obligations imposed by the fiduciary relationship are heavy and have been stated as duties to:

- Avoid conflicts of interest between client and self, former client or existing clients;
- Not make a personal gain (or other fees) from the relationship;
- Disclose all matters that are material to the client to the client;
- Maintain all information disclosed or gained in the course of the relationship as confidential;
- Account for all money held on the client's behalf.⁴

So, once instructed to represent the employer's interests, a solicitor-client relationship is formed, regulated services are provided and a fiduciary duty is owed to the client by the lawyer. But what about when the service provided to the employer includes the provision of legal services to employees, such as when the lawyer represents the employee during a MBIE or police interview. Has a solicitor-client relationship formed between the lawyer and employee? What obligations are now owed to the employee?

While an employee in this situation is unlikely to be footing the bill, there is, nevertheless, a

⁴ D Webb *Ethics, Professional Responsibility and the Lawyer* (2nd ed, LexisNexis, Wellington, 2006) at 171

solicitor-client relationship⁵. There must, surely, be a fundamental conflict of interest because the lawyer is acting for two duty holders in relation to the same matter where there is a risk those duties may come into conflict.

The lawyer cannot fully discharge his or her obligations to both the employer and employee. For example, the duty of confidentiality owed to each must necessarily conflict with the disclosure obligations owed to each. The lawyer has an obligation to disclose all relevant information to the employer, but has a corresponding obligation to keep all information relevant to the employee confidential. In the context of a MBIE investigation, a lawyer providing regulated services to both employer and employee will be in possession of information that fits both categories.

Even if it could be argued that there is no solicitor-client relationship between the lawyer and employee, there must be a relationship of trust and confidence such that the lawyer owes a fiduciary duty to the employee. That will give rise to broadly the same obligations owed under the solicitor-client relationship. There will be a significant imbalance of power between the employee and lawyer⁶, the employee, who is unlikely to have any significant understanding of what is involved in a MBIE investigation, will be extremely vulnerable and place considerable trust and confidence in the lawyer. The employee, if offered legal representation, will be entitled to assume that the lawyer providing that representation is acting in their best interests. And in the Pike River example, employees were expressly told that the provision of free legal representation was for their benefit.

It is important to note that at Pike River, and in relation to the generic advice offered to employers, employees are not advised⁵ of the existence of a conflict of interest. In *Farrington v Rowe McBride & Partners*,⁷ Richardson J stated:

A solicitor's loyalty to his client must be undivided. He cannot properly discharge his duties to one whose interests are in opposition to those of another client. If there is a conflict in his responsibilities to one or both he must ensure that he fully discloses the material facts to both clients and obtain their informed consent to his so acting.

Imagine this hypothetical but entirely plausible situation. An employer engages a lawyer to act for them during a MBIE investigation following a serious harm incident. The employer, then, offers an employee who is to be interviewed by MBIE free legal representation by the same lawyer. During the lawyer's discussions with the employee, the employee discloses to the lawyer that he was responsible for the serious harm incident. The lawyer is now in possession of information that can incriminate the employee but exonerate the employer. What does the lawyer do? He or she cannot discharge their duty under rule 7 of the Conduct and Client Care Rules without falling foul of rule 8⁸.

It is possible to conceive of other scenarios which should be avoided. For example, a lawyer who represented an employee during a MBIE interview may, should a defended hearing follow, find him or herself cross examining that same employee who is now a witness against the employer. Employees are not pawns to be moved and manipulated and, if necessary, sacrificed in the interests of protecting the employer. Employees have their own interests that deserve protection. Those

⁵ The definition of 'client' in Butterworths New Zealand Law Dictionary (5th Edition, 2002) is "A person who consults a solicitor".

⁶ This is especially so, given the inherent power imbalance in the employer-employee relationship

⁷ *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83 at 90.

⁸ Rule 7 requires that a lawyer must disclose to a client all information relevant to the matter. Rule 8 requires a lawyer to protect and hold in strict confidence all information concerning a client.

interests cannot be protected by a person who is acting for and being paid by another duty holder whose interests may conflict with those of the employee.

It may be argued that the interests of both the employer and employee can be protected because should a conflict arise, the lawyer involved can cease acting for one or both of the parties. Such an approach is untenable because the potential for a conflict of interest arises from the very outset by virtue of the fact that the employer and employee have different and potentially conflicting interests. In other words, it is the statutory obligations that give rise to the conflict, not the specific circumstances of a case. In any event rule 6.1, despite limited exceptions, provides a strong presumption against entering into any arrangements in which there is more than a negligible chance of a conflict of interest arising⁹. Because the employer and employee are separate duty holders under the HSE Act, the risk of a conflict is considerably greater than negligible.

Subject to the overriding obligations to the Court, lawyers have an obligation to ply their trade solely for the benefit of their client. Rule 5.2 of the Conduct and Client Care Rules provides: “The professional judgement of a lawyer must at all times be exercised within the bounds of the law and the professional obligations of the lawyer solely for the benefit of the client”. Rule 5.3 provides: “A lawyer must at all times exercise independent professional judgement on a client’s behalf. A lawyer must give objective advice to the client based on the lawyer’s understanding of the law”.

Providing regulated services to both an employer and employees falls foul of these rules. This can be illustrated by another example. In the event of a serious harm incident, MBIE will investigate whether or not an employee has complied with s19 of the HSE Act to take all practicable steps to ensure no action or inaction causes harm to another person. There is a very real likelihood that any defence to such an allegation will involve some blame being laid at the feet of the employer. “I did not receive the necessary training to operate that machine” is a common complaint by workers and gives rise to an allegation that the employer has failed to comply with its statutory obligations.

To comply with his or her professional obligations, a lawyer must use his or her professional judgment to advise one client that a possible defence may lie in blaming another client. That is a conflict that cannot be managed. It **must** be avoided.

...a solicitor may have a duty on one side and a duty on another...If he puts himself in that position it does not lie in his mouth to say to the client “I have not discharged that which the law says is my duty towards you, my client, because I owe a duty to the beneficiaries on the other side”.¹⁰

What can be done?

There is, of course, a very simple solution to this problem. If an employer genuinely wants to offer its employees legal representation following a workplace death or serious harm incident, it should make sure that representation is entirely independent. When an employer refuses to do so and insists on having the same lawyer provide representation to employees, their true motivation is revealed. Lawyers should not allow themselves to be placed in the situation in the first place. If a client asks the lawyer to provide representation to employees in relation to the same MBIE investigation the

⁹ Rule 6.1: A lawyer must not act 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 1 or more clients.

¹⁰ *Moody v Cox & Hyatt* [1917] 2 Ch 71 at 781 per Lord Cozens-Hardy MR.

lawyer should refuse.

Conclusion

Workers deserve better. If they do not have the benefit of union representation, they are often placed in an extremely vulnerable position. They may face questioning from their employer, their employer's lawyer, an inspector and/or police. It is unlikely that they will have an in-depth understanding of the various rights and obligations under the HSE Act, and will simply do what they are told without knowing whether the instruction is given for their benefit or the benefit of their employer.

It is this vulnerability that needs to be addressed, so is there a need to regulate to protect the interests of employees during a MBIE investigation? In relation to MBIE, there needs to be regulations in place preventing an employer, whether through a lawyer or otherwise, from being present during an interview with an employee. That decision cannot be left to employees themselves to make without any advice or support. It would not be difficult to develop regulations which regulate the way an inspector conducts an investigation. This would include a prohibition on employers (or their representatives) being present during interviews with employees under any circumstances. If an employee does have representation, a declaration by the representative that they are not acting for any other actual or potential duty holder involved in the same matter would suffice.

In relation to employers, the good faith provisions of the ERA should be adequate. However, given the matter is untested, a case may need to be taken to test the extent to which statutory good faith obligations offer protection to employees in these circumstances.

It is my view that the Lawyers Conduct and Client Care Rules, if applied properly, are sufficient to address the issue of a conflict of interest for lawyers. That is because the rules are such that, if applied properly, no lawyer would allow themselves to be put in the position of providing regulated services to two duty holders under the HSE Act in relation to the same matter. They would refuse any request by an employer to provide regulated services to any employee in relation to the same matter. It may be that a complaint to the Law Society will be necessary to allow proper consideration of and direction on how the L&C Act and rules should be applied in the context of a MBIE investigation.