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The Price of Informality

by Richard Steinecke
May 2013 - No. 176

While discipline proceedings do not require the formality of a court hearing and while it is recognized that disciplinary tribunal members are not judges, a degree of formality is still required. At some point informality creates confusion. This principle was nicely illustrated in the recent case of Nanson v Saskatchewan College of Psychologists, 2013 SKQB 191.

The case involved a joint submission on allegations that were at the less serious end of the spectrum. The Court on appeal described the hearing as follows:

An agreed statement of facts was presented. Originally nine complaints were in issue. The appellant [Nanson] accepted six charges as framed, which the Committee saw as the equivalent of entering a plea of guilty to those charges. The agreement also dealt with remedies, which consisted of certain undertakings from the appellant to conduct her future practice in a specific manner. It had been agreed that no sanctions would be levied against the appellant, and that she would pay costs in the sum of $2,500.00. The Discipline Committee reserved decision. The entire hearing lasted five minutes, according to the transcript.

Without expressing any concerns to the parties and without first inviting any additional submissions the Committee made findings of professional misconduct on the six allegations, converted the undertakings into an order directing future behaviour, imposed a reprimand that no one had asked for and increased the costs payable by 20%. Nanson appealed.

The Court upheld the Committee's decision to make findings of professional misconduct. It rejected Nanson's assertion that by accepting the allegations she was not "pleading guilty" to the allegations. In discipline proceedings one either accepts or disputes the allegations. One cannot straddle the fence and kind of admit the allegations and kind of dispute them.

The Court also upheld the Committee's decision to convert the undertakings into formal orders. The Court found that the formal orders were substantially the same as to what the undertakings promised. Again the Court frowned on the informal attempt to avoid the imposition of an order, which is what the statute contemplated, with something else that had no authority under the enabling statute.

Likely this decision by the Court is not a criticism of informal resolution in complaints and investigation matters. Rather, it is a criticism of being so informal that ambiguity results.

The Court was, however, quite concerned about the imposition of a reprimand, for two reasons. First of all, it was unfair to make a substantial change to a joint submission without first expressing the Committee's concerns with it and permitting the parties to make submissions on those concerns. That resulted in procedural unfairness.

Secondly, the Committee did not give the deference that is required for joint submissions. Courts have repeated reversed tribunals who have rejected joint submissions unless there are exceptional circumstances (namely a conclusion that the joint submission is "unfit, unreasonable, or contrary to the public interest"). The Court went on at some length as to the reasons for this approach in language that is worth quoting (since many discipline tribunals are destined to hear it verbatim for the foreseeable future):

An accord following discussions between prosecution and defence (in either the criminal or regulatory context), who generally have spent more time and are more familiar with the intimate strengths and weaknesses of their case than is the sentencing judge or tribunal, is desirable for a large number of reasons:

- charges are resolved promptly

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- the problems arising from extended pre-trial custody, or regulatory proceedings, are avoided

- the public is protected from some offenders who might re-offend while on pre-trial release or otherwise awaiting adjudication

- saving resources expended on trials which may not be necessary

- importantly, sparing complainants the ordeal of having to testify, perhaps numerous times

- allowing a transgressor to express an early and meaningful sense of remorse; and

- providing the offender, the profession, and the complainant with a measure of certainty about the ultimate resolution of the charges.

Generally, the negotiations that are needed to arrive at a joint submission can only work effectively if both the offender and the prosecutor are able to proceed with a considerable amount of confidence that the agreement will be implemented. There is, of course, no guarantee that this will be done by the sentencing judge. However, the cases clearly state that such a judge should only depart from a joint submission after applying carefully considered principles. This law respecting the rejection of a joint submission is well known, and ought to have been known to the Discipline Committee here given the reference to Rault. The trial judge should not reject a joint submission unless it is unfit or unreasonable. A joint submission should only be departed from where the proposed sentence is contrary to the public interest, and, if accepted, would bring the administration of justice into disrepute. The obligation of a trial judge to give serious consideration to a joint sentencing submission stems from an attempt to maintain a proper balance between respect for the arrangement reached, and the sentencing court's role in the administration of justice. The certainty that is required to induce accused persons to waive their rights to a trial or hearing can only be achieved in an atmosphere where judges and tribunals do not lightly interfere with a negotiated disposition that falls within, or at least is very close to, the appropriate range for a given offence. These negotiations will certainly be undermined if the resulting joint submission is too readily rejected by the person(s) doing the sentencing. Detailed reasons for rejecting any joint submission must be provided - especially here, where highly capable and experienced counsel had arrived at the joint submission.

The Court removed the reprimand that was not part of the joint submission and approved the reduction of the costs order to its original amount. The rest of order (i.e., directions about future practice) was maintained.

This result could probably have been avoided if the formality of the discipline process had been retained. Formality, particularly in using the language of the enabling statute, can bring precision and clarity.

The Nanson case can be found at www.canlii.org.

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