

**IN THE SUPREME COURT OF TONGA  
APPELLATE JURISDICTION  
NUKU'ALOFA REGISTRY**

*Solicitor General*

*Sean + file*

*AK*

**AM 15 of 2014** *28/4/15*

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**BETWEEN: KELEPI PIUKALA - Appellant**

**AND: SEMISI TONGIA - First Respondent**

**'AFELE TONGIA - Second Respondent**

**THE DISCIPLINARY COMMITTEE  
OF THE TONGA LAW SOCIETY - Third Respondent**

**BEFORE LORD CHIEF JUSTICE PAULSEN**

**Date of Hearing: 10 March 2015**

**Date of Ruling: 27 April 2015**

**Appearances: Mr. K. Piukala in person**

**Ms. L. Tonga for the third respondent.**

**RULING**

[1] Mr. 'Afele Tongia lives overseas and in 2012 he decided he wanted a divorce from his wife here in Tonga. Mr. Piukala is a legal practitioner and was instructed. Mr. Piukala said he would act without a fee but he was paid \$1,200 on account of Court fees that he said would be

*Rec'd 28/4/15*

incurred. Things did not go smoothly. Mr. 'Afele Tongia changed his mind about the divorce and requests were made of Mr. Piukala to return the money. He did not do so. A complaint was made by Mr. Semisi Tongia, representing his nephew Mr. 'Afele Tongia, to the Law Society Disciplinary Committee. This is an appeal by Mr. Kelepi Piukala from the decision of the Disciplinary Committee dated 8 July 2014 which found that he had breached the Rules of Professional Conduct for Law Practitioners in that he misled and lied to his client and the client's representatives in various respects. The Disciplinary Committee made recommendations under section 21 of the Law Practitioners Act 1989 (the Act) including that Mr. Piukala be suspended from practice for 3 months.

[2] The substantive issues that arise are:

[2.1] Whether the Disciplinary Committee was wrong to have regard to a letter of 28 April 2014 from Mr. 'Afele Tongia without providing Mr. Piukala with an opportunity to comment upon it.

[2.2] Whether the Disciplinary Committee was wrong to make recommendations under section 21 of the Act without giving Mr. Piukala an opportunity to be heard as to penalty.

**The facts**

[3] Towards the end of 2012 Mr. Piukala accepted instructions to file divorce proceedings on behalf of Mr. 'Afele Tongia. The Committee found that:

Mr. Piukala informed that the cost to the court would be \$1,200.00 and because they were family, he would not charge his lawyer's fees.

[4] The \$1,200 was paid to Mr. Piukala. Mr. 'Afele Tongia then decided not to proceed with the divorce.

[5] Requests were made for the \$1,200 to be repaid by Mr. 'Afele Tongia's relatives. Mr. Piukala said that he was waiting to hear from Mr. 'Afele Tongia to repay the money. Mr. Semisi Tongia went to his offices on 14 March 2013 and telephoned Mr. 'Afele Tongia from his mobile phone. He handed the phone to Mr. Piukala. The Committee found that Mr. Piukala was told by Mr. 'Afele Tongia to give the money to Mr. Semisi Tongia.

[6] A number of further requests were made for the money. The Committee found that Mr. Piukala advised Mr. Semisi Tongia that the petition had been filed (it had not) and that a filing fee of \$800 had been incurred. He said he would try to get the money back from the Court. On another occasion Mr. Piukala is alleged to have said that his hourly rate was \$300 per hour and there was no money left.

- [7] Mr. Semisi Tongia went to Mr. Piukala's offices on 22 March 2013 where, the Committee found, 'he was chased out by... [Mr. Piukala]'. It was alleged that at this meeting Mr. Piukala presented a gun and threatened to shoot Mr. Semisi Tongia. Mr. Piukala does not respond to this allegation except to say in his letter of 6 June 2013 that he told Mr. Semisi Tongia to leave his office or he would 'beat the water out of him'.
- [8] Mr. Semisi Tongia said in the complaint that he then discovered that it cost only \$103 to file a divorce petition and not \$800 as Mr. Piukala had said. Mr. Semisi Tongia then filed a complaint to the Law Society as Mr. 'Afele Tongia's representative which is dated 15 May 2013.
- [9] The complaint was sent to Mr. Piukala. He wrote two letters of explanation dated 6 June 2013 and 21 August 2013. I do not need to go into the content of those letters in detail. It is enough to get the flavor of the dispute that Mr. Piukala has repeatedly taken a technical point that Mr. Semisi Tongia has no right to represent Mr. 'Afele Tongia and also that he had no instructions to pay back the money from Mr. 'Afele Tongia.
- [10] Mr. Piukala was given an opportunity to appear before the Committee in person at a hearing but he did not do so. Mr. Piukala was however sent a notice that a hearing before the Committee would be held on 14 May 2014. He did not appear at the hearing but Mr. Semisi Tongia did do so. In light of Mr. Piukala's submission that he had no authority to

represent Mr. 'Afele Tongia, Mr. Semisi Tongia said he would get a written authority from Mr. 'Afele Tongia. Subsequently a letter was delivered to a Committee member, apparently from Mr. 'Afele Tongia, dated 28 April 2014 which stated as follows:

I would like to submit herein my whole consent that Semisi Tongia represent me in the proceedings with Kelepi Piukala. I had already contacted Kelepi via phone to the same matter last year and I wish to inform you again herein to assist you with this subject matter. I am currently in Australia and I cannot travel back but I wholly authorize Semisi Tongia to represent me.

[11] The Committee met again on 3 July 2014 and issued its written decision on 8 July 2014 upholding the complaint. The relevant part of the decision for present purposes reads:

On the facts outlined above and recorded in the documents on file the Committee finds that the respondent, Mr. Kelepi Piukala has completely mislead his client, Mr. 'Afele Tongia who was represented by his uncle Mr. Semisi Tongia, into the payment of \$1,200.00 for a divorce petition which had not yet been filed, and if filed would cost only \$103.00. He also lied to his client, though his representative that the cost of the petition was \$800.00. The responded [sic] also lied to the representative of his client that his hourly rate was \$300.00 and therefore there was no money left from the \$1,200 paid.

The Committee finds that Mr. Kelepi Piukala has breached Rule 1.01 of the rules of Professional Conduct for Law Practitioners, which provides:

'The relationship between practitioner and client is one of confidence and trust and shall not be abused.'

**The grounds of appeal**

*No opportunity to respond to 'Afele Tongia's letter*

[12] Mr. Piukala's principal ground of appeal is that the Committee was wrong when it failed to provide him with a copy of Mr. 'Afele Tongia's letter of 28 April 2014 and an opportunity to respond to it before making a decision. There is no dispute that Mr. Piukala was not provided with a copy of this letter.

[13] Under section 21(3) of the Act the Committee must serve a copy of a complaint on the law practitioner and give him adequate time to investigate the complaint and submit a written response. Section 21(4) provides that the rules of natural justice shall apply to the 'hearing of a complaint'. It goes on to provide that the law practitioner shall be entitled, either personally or by a law practitioner, to be present at the hearing, examine and cross-examine witnesses, produce witnesses and make submissions. I do not consider that these provisions limit the application of the rules of natural justice to

any part of the complaints process other than the hearing. This is implicit in *Tu'utafavia* (AM 27 of 2012, 4 December 2012) where Scott CJ noted that the cardinal rule of natural justice in disciplinary proceedings applied at the hearing stage and also in considering penalty.

[14] The rules of natural justice are concerned with fairness and in disciplinary proceedings of this sort fairness includes a duty of disclosure to the parties to the complaint. This duty of disclosure generally extends to all material considered relevant by the decision maker. The duty need not be acted upon in a rigid or formalistic fashion and its scope will vary from case to case. There may be no breach of the duty should undisclosed material give rise to no prejudice. However, the absence of prejudice should not be lightly inferred and a decision maker who fails to make full disclosure does so at his peril.

[15] It is clear from the Committee's decision that it considered the letter of 28 April 2014 as relevant to its determination of the complaint. It said at page 2 of its decision:

The complaint had nothing further to add but said that he would get the written authority from Mr. 'Afele Tongia to represent and act on his behalf. Subsequently in a letter dated 28 April 2014 delivered to Committee member Ms Lesina Tonga, Mr. 'Afele Tongia expressed his giving full authority to Mr. Semisi Tongia to represent him in the

dispute with Mr. Kelepi Piukala. He also said that that he had informed Mr. Piukala of the same on a telephone conversation last year which he is now putting in writing.

The Committee met on 3 July 2014 to discuss the case and make its decision. There was no oral hearing and the Committee considered the written evidence on file being the complaint and responses referred to in paragraph 2 above which the respondent has agreed to be the basis for a decision, and the letter of 28 April from Mr. 'Afele Tongia confirming the full authority given to Mr. Semisi Tongia to represent him.

[16] And later at page 4 of the decision it says:

In the letter dated 28 April 2014, Mr. 'Afele Tongia, the client of the respondent clearly states that his uncle Mr. Semisi Tongia represents him in the dispute with the respondent. He also confirms that he had a telephone conversation last year with the respondent where he told him the same thing, that he was represented by Mr. Semisi Tongia. This ties in with the telephone conversation on 14 March 2013 referred to in the previous paragraph and the money to be paid to Mr. Semisi Tongia

[17] What these extracts demonstrate is that the Committee considered that the letter from Mr. 'Afele Tongia had a bearing on two matters. First, whether Mr. Semisi Tongia had authority to represent Mr. 'Afele Tongia. Secondly, as confirming Mr. Semisi Tongia's evidence that Mr.

Piukala was told during the telephone conversation with Mr. 'Afele Tongia on 14 March 2013 to pay the \$1,200 to Mr. Semisi Tongia. This is important as Mr. Piukala's evidence was that he had not spoken to Mr. 'Afele Tongia on the phone. What Mr. Piukala said in his letter of 21 August 2013 was:

It is a lie that 'Afele called me. Semisi gave me the telephone to talk to 'Afele but when I talked it was not 'Afele. **There has not been any evidence since 14 March 2013 to any new comments regarding this issue not any contact from Afele Tongia.**

[18] In a case where the complaint includes a disputed allegation that Mr. Piukala lied to his client about fees Mr. Piukala's credibility was inevitably in issue. The letter was used by the Committee to determine credibility against Mr. Piukala. By way of example, at page 4 of the decision the Committee relies upon the letter to make findings

The respondent appeared to change his story later..

and

This is another example of the respondent trying to twist the facts

and

This ties in with the telephone conversation on 14 March 2013 referred to in the previous paragraph and the money to be paid to Mr. Semisi Tongia

[19] The letter of 28 April 2014 was prejudicial to Mr. Piukala and I cannot discount the possibility that had Mr. Piukala been given an opportunity to comment on the letter he might have been able to provide some relevant information favorable to his case or even to cast doubt on its authenticity (which is what I understood was his submission to me). I find in those circumstances that the failure to allow him to comment on the letter was a breach of natural justice.

*No opportunity to make submissions on penalty*

[20] This was not a matter raised in Mr. Piukala's notice of appeal but he raised it at the hearing in his oral submissions. In *Tu'utafaiva* (at paragraphs 17 – 21) Scott CJ said:

17. Turning to the question of penalty, it was accepted by Mr. Niu in his written submissions that: a cardinal rule of law applies to the Committee. S 20 (4) provides:

'the rules of natural justice shall apply to the hearing of a complaint by the committee.'

18. In my opinion the requirement for procedure fairness applies not only to the proceedings prior to the finding of guilt but also

to Section 21 of the Act. Not only would it make no logical sense for the position to be otherwise but there is also undoubted authority for the proposition that a party is entitled to an opportunity to be heard before a penalty is imposed upon him (see eg. *PSC v Epeli Lagiloa*, Fiji Court of Appeal 38/96; *Sat Narayan Pal v PSC* Fiji Court. of Appeal 72/98; *Stone v Law Society* [1992] 108 FLR 332 and see generally: *Aronson and Dyer* Judicial Review of Administrative Action 2<sup>nd</sup> Edn LBC 2000 page 443).

19. As a matter of fact, the Appellant did not make any further representations to the Committee after it found him guilty of professional misconduct and the question that then arises is whether he was as a result deprived of procedural fairness.
20. While it might be argued that Mr. Niu's letter of 11 May [paragraph 3 above] was sufficient notice to the Appellant that he should either attend the hearing or make representations as to penalty in the event of a finding of guilt, the letter makes no mention of the post section 20 proceedings. In my view, the Appellant should either have been warned beforehand that the Committee would proceed to consider penalty immediately after any finding of guilt or the hearing should have been adjourned in order to give the Appellant a final opportunity to make representations as to penalty.
21. In my opinion the Committee did not give the Appellant any adequate opportunity to mitigate after it reached the decision

that he was guilty of professional misconduct. In these circumstances the recommendation must be quashed and the matter of penalty remitted to the Committee for reconsideration according to law.

[21] Each case must be decided upon its own facts but in my view, generally speaking, fairness will require the law practitioner to be asked to make submissions on penalty at some part of the complaints process before the Committee makes a decision.

[22] Mr. Piukala should have been given the opportunity to be heard on penalty. The failure to give him that opportunity was a breach of natural justice also.

### **Summary of findings**

[23] I find that the Disciplinary Committee was required to apply the rules of natural justice in determining the complaint. The Committee breached the rules of natural justice by failing to disclose the letter of 28 April 2014 to Mr. Piukala and in failing to give him an opportunity to make submissions on that letter and in relation to penalty.

**The result**

- [24] The breaches by the Disciplinary Committee of the rules of natural justice were material and its decision of 8 July 2014 and the recommendations made by it are quashed and the complaint is remitted back to the Committee for reconsideration. I make no order as to costs.
- [25] In reconsidering the complaint, and subject to it observing the rules of natural justice, the Committee may investigate any matters fairly arising from it. There is a serious allegation that Mr. Piukala presented a gun to Mr. Semisi Tongia and an acknowledgment from Mr. Piukala that he threatened Mr. Semisi Tongia which have not been addressed by the Committee.
- [26] In relation to costs a number of adjournments were required because of Mr. Piukala's failure to join the Committee as a party. He then accepted a date of hearing before seeking an adjournment at the eleventh hour. In addition one of the two grounds upon which he has been successful on appeal was not raised by him in his notice of appeal but only at the hearing. If raised earlier a defended hearing might well have been avoided.

**NUKU'ALOFA: 27 April, 2015.**



A handwritten signature in black ink, consisting of a large, stylized letter 'Q' followed by a flourish.

**CHIEF JUSTICE**