

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

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AM 27 of 2012

SG
07/12/12

IN THE MATTER OF : SIOSIFA TU'ITUPOU TU'UTAFAlVA

AND

IN THE MATTER OF : PART VI of the Law Practitioners Act (21/1989)

Appellant in person.

JUDGMENT

1. The Appellant is a senior Law Practitioner and a member of the Legislative Assembly.
2. On 11 April 2012 the President of the Tonga Law Society (Mr. Niu) took delivery of two letters of complaint against the Appellant. The two complainers were named 'Aisea Vaitaki and Sione Vao. Mr. Niu wrote to the Appellant seeking his response within 14 days.
3. On 11 May 2012 Mr. Niu again wrote to the Appellant, as follows:

"11th May, 2012

Siosifa Tu'utafaiva
Nuku'alofa

Dear sir,

Hearing of complaints by Aisea Vaitaiki and Sione Vao

Further to my letters to you of 12/4/2012 conveying the complaints of the abovenamed persons, and having received no response from you about them, I wish to advise that a disciplinary committee has been appointed (myself, Vuna Fa'otusia and Petunia Tupou) to deal with this matter, and that the committee has directed that I inform you as follows:

1. If, in consequence of the hearing, the Committee is satisfied that you had undertaken that, if the respective clients paid you the respective money you wanted, you would file their respective claim

in court, and that the clients did pay you those monies and that you failed to file their respective claim in Court, the Committee may find that you may have abused your relationship of confidence and trust with them, in breach of Rule 1.01 of the Rules of Professional Conduct 2002, and find that you are guilty of professional misconduct under s.21 (1)(a) of the Law Practitioners Act 1989.

2. The Committee has therefore directed that it will hear these complaints at the Law Society library at 2:00pm, Thursday 17/5/2012 and you may attend and be heard and be represented by counsel (whom you shall instruct in time for the same).

Yours Faithfully

Laki. M. Niu (Signed)
Chairman"

4. On 22 June 2012 after the hearing of the complaints by the Disciplinary Committee had been adjourned three times to accommodate the Appellant, two letters were received from him and were considered by the Committee. The Appellant himself did not attend the hearing and was not represented.
5. In both letters the Appellant accepted that he had received the sums claimed by the complainers by way of legal fees, that he had not performed the services for which he had been paid and that he had not complied either in whole or in part with the complainers' requests for repayment. He concluded his letter by stating

"Just make your decision and I await it."

and

"That is my response and just make your decision."

6. On 27 June, Mr. Niu wrote to the Appellant giving him a final opportunity to repay the complainers. He was warned that failure to repay within two months would have the result that:

"the complainants will proceed with their complaints and will seek the recommendation of the Committee for an order that you be struck off the roll of the Law Practitioners."

7. On 4 September 2012, having been advised by the complainers that no repayment of any sum had been received by them, the Disciplinary Committee proceeded to dispose of the complaints.

8. The Committee reached a total of twelve findings. These are set out in full in the Report of the Committee dated 4 October 2012. In summary, the Committee found that in respect of each complainer the Appellant had been retained to provide legal services, had failed to perform the services for which he had been paid and, despite repeated requests, had failed to repay any part of the fees paid to him for over three years after he had received them.
9. The Committee found that the Appellant had abused the relationship of confidence and trust between himself and the complainers and was accordingly in breach of Rule 1.01 of the Law Society's Rules of Professional Conduct 2002. The Committee found that the Appellant was guilty of professional misconduct in each case.
10. Having found the Appellant guilty of two counts of professional misconduct the Committee immediately moved to consider its recommendations pursuant to the provisions of Section 21 of the Act. The Committee recommended that the Appellant's practising certificate be suspended for a period of three years.
11. This is an appeal brought under the provisions of Section 23 of the Act.
12. The grounds of appeal are as follows:
 - "a) Suspension of the practising certificate is not warranted in the circumstances of the complaints made.
 - b) Alternatively, suspension of the practising certificate for 3 years is too excessive in the circumstances of the complaints."
13. When the appeal was filed the two complainers were named as the Respondents however, for reasons which will be detailed later, I was of the view that either the Law Society or the Disciplinary Committee of the Law Society was the proper Respondent. I directed that notice of the appeal be served on Mr. Niu.
14. On 20 November 2012 Mr. Niu appeared. He explained that his view was that neither the Society nor the Committee was the proper Respondent but that the complainers were the proper Respondents to the appeal. In order to allow Mr. Niu to file written submissions the hearing of the appeal was adjourned to 28 November.

15. On 23 November detailed and careful submissions were filed by Mr. Niu explaining his position. On 28 November I gave leave to Mr. Niu to withdraw and the appeal proceeded to hearing ex parte.
16. Notwithstanding the terms of the grounds of appeal, Mr. Tu'utafaiva first submitted that the Committee had erred by not satisfying itself of his guilt to the "high standard of proof" referred to in *'Etika v Tonga Law Society* [2002] To.L.R 75. When I pointed out to the Appellant that the Committee had satisfied itself that the Appellant had been guilty of professional misconduct after taking into account the admissions contained in his two letters sent to the Committee, the Appellant did not pursue the point (which, as will have been noted, was not included in the grounds of appeal).
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."

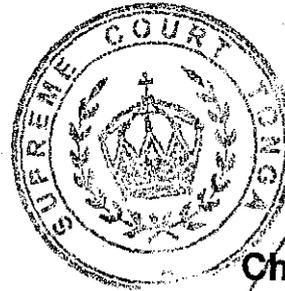
18. In my opinion the requirement for procedural fairness applies not only to the proceedings prior to the finding of guilt but also to Section 21 of the Act. Not only would it make no logical sense for the position to be otherwise but there is also undoubted authority for the proposition that a party 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* 2nd 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.
22. Before leaving the matter I wish briefly to consider the question of the proper respondent to this appeal already mentioned as the subject of written submissions by Mr. Niu. I agree with him that the Disciplinary Committee is a body distinct from the Law Society. I also agree that section 74 and 75 of the Magistrate's Courts Act apply to appeals against the recommendation of a Disciplinary Committee. I do not however agree that these provisions have the consequence that the Committee should not be the proper respondent to an appeal against its recommendation.
23. The provisions of Part VI of this Act embody what may be called a statutory judicial review procedure and in such cases the proper respondent is the public body which has acted in a public law capacity to determine the rights of the appellant (see *Judicial Review* Gordon, Sweet & Maxwell 1996 chapter 5).
24. The complainers in this type of situation are not the persons whose decision is being impugned by the Appellant. It is not suggested by the Appellant that the complainers are in any degree at all at fault. Furthermore, the complainers are laymen, former clients of the Appellant, and there is no reason to suppose that they are in any position to assist the Court to decide whether the proceedings of the Disciplinary Committee were according to law. Mr. Niu referred to the unsatisfactory situation in Papua New Guinea (paragraph 19 & 20 of his submissions). Suffice it to say that the profession in Tonga is in a much happier position with disciplinary proceedings against law practitioners comparatively rare.

Result

The recommendation of the Disciplinary Committee dated 4 October 2012 is quashed and the matter is remitted to the Committee for reconsideration.



[Signature]
Chief Justice

4 December 2012

E. Takataka

4/12/2012