NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

Decision No. [2010] NZLCDT 3

LCDT 14/2009

IN THE MATTER of the Law Practitioners Act 1982

BETWEEN **AUCKLAND STANDARDS COMMITTEE**

Applicant

AND **NALESONI TUPOU**

Respondent

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr W Chapman

Mr J Clarke

Mr P Radich

Mr W Smith

HEARING at AUCKLAND on 22 December 2009 and 31 March 2010

APPEARANCES

Mr P David and Mr M Treleaven for applicant

Mr C Cato for respondent

DECISION OF THE TRIBUNAL

Introduction

[1] Mr Tupou has pleaded guilty to two charges of misconduct under s.112(1)(a) of the Law Practitioners Act 1982. These charges were brought under the transitional provisions of the Lawyers and Conveyancers Act 2006 and thus come to be determined in terms of penalty pursuant to the Law Practitioners Act 1982. The charges involve breaches of the rules of professional conduct: rules 6.01, 6.02 and 8.01; it should be noted that the practitioner pleaded guilty to an amended charge that he was reckless in filing a memorandum with the Court, containing false and misleading particulars.

Factual Background

[2] We rely in part on the closing submissions of counsel for the Standards Committee, Mr David, in respect of the statement of factual background. The two charges arise out of the same circumstances in which Mr Tupou represented Mr F in a family dispute in the Family Court. Mr and Mrs F had five children and Mr F was seeking a parenting order in respect of the children. Counsel for the child had been appointed and another practitioner, the complainant, represented Mrs F. On behalf of Mrs F the complainant filed the notice of defence and there was brief correspondence between counsel, the last being only a month or two prior to the events which led to the complaint. The matter had been given a backup mediation conference by the Court for 12 June 2008.

[3] On Saturday 7 June Mr Tupou was holding his usual Saturday clinic at his practice when Mr F arrived to see him together with his wife Mrs F. They were dressed formally in Tongan formal costume because they were wishing to be respectful of, and were on their way to see, the minister of their church. Mr and Mrs F had clearly had conversations already with their church minister who had assisted them in reaching the decision that they wished to reconcile their marriage. The purpose of Mr and Mrs F's visit to Mr Tupou that morning was to ensure that he

concluded with the proceedings on behalf of Mr F so that Mr F would be in a position to preach the sermon at church the very next day. Mr Tupou spoke with Mr F by himself and confirmed his instructions to have the proceedings withdrawn and vacate the mediation conference date. Mr Tupou dictated a memorandum in Mr F's presence which carried out these instructions.

[4] It is Mr Tupou's evidence that the memorandum was typed up and signed by his client on the following Tuesday, at which time Mrs F who was also present, and protested that she also wished to be a party to the memorandum. Mr Tupou indicated that he was not her lawyer and did not feel it proper for this to occur but says that both on the occasion on Saturday and on the following Tuesday that Mrs F was completely insistent and indeed was crying until he finally relented and added her name to the memorandum. It is noteworthy however that the memorandum also stated that Mrs F was not represented by counsel despite Mr Tupou knowing that was not the case. But he indicated in his evidence that he thought she was no longer in contact with her lawyer.

[5] The memorandum itself was incorrect in at least three respects. Firstly, that the wife was not unrepresented and secondly, it was incorrect to state that she had not filed a notice of defence to the application. It was also incorrect to state that Mrs F had left the family home during the dispute.

The complainant, although having been sent a copy of this memorandum at the same time as it was filed in the Court (approximately 10 June 2008), did not receive this before telephoning the Court to inquire whether the backup mediation was to proceed. At that stage she discovered that the mediation conference had been vacated because a consent memorandum had been filed. She was somewhat taken aback by this having not seen any such memorandum or having been consulted by Mr Tupou, the practitioner for the opposing party.

[6] The complainant contacted her client and it is her evidence that Mrs F had not understood the contents of the memorandum correctly. Mr Tupou in his evidence denied that. He said that he did read the entire memorandum to her in Tongan prior to her having signed it.

[7] Mr Tupou acknowledges that the memorandum was in fact incorrect in a number of ways but denied that it was in any way intentionally misleading of the Court. Indeed, the charge was amended to one of recklessly filing incorrect information with the Court rather than attempting to mislead the Court. Mr Tupou's explanation for such inaccuracy relates to the pressures which were upon him at the time, to which we later refer.

[8] Mr Tupou accepts that seeing Mrs F and filing a memorandum which included her signature and referred to the parties' joint decision making was a breach of his professional obligations. He further acknowledges that it was quite wrong for him to have been so careless in his preparation of the memorandum which was factually inaccurate.

The Practitioner's Explanation

[9] The reasons provided by Mr Tupou for the above breaches in his professional standards were comprehensive.

[10] Firstly, he acknowledges a desire to please the client and accede to his wishes, and those of his wife. Mr Tupou, although a barrister sole, has an enormous number of files, mainly for Pacific Island clients in South Auckland. He is clearly a leader in the Tongan community and as such can, we believe, be called upon to meet quite unreasonable demands by his community and clients. We accept his evidence (supported by some of the references provided by him to the Tribunal) that it is culturally difficult, if not impossible, to say "no" to a Tongan client making a request of someone such as Mr Tupou who is a senior and experienced legal practitioner on whose knowledge and expertise the client and the community relies.

[11] In submissions on his behalf, Mr Cato referred to Mr Tupou's "natural desire to please not only Mr F who was his client but also to accede to the apparent wishes of Mrs F both of which (sic) wanted to continue their relationship and have a harmonious relationship with their church."

[12] The second explanation or contextual matter provided by the practitioner is the pressure of his work in general and in particular at that time. Dealing firstly with the pressure of his work Mr Tupou filed as an exhibit to his affidavit, a schedule of his files for the years 2000 to 2009. His workload clearly increased significantly after 2006 and by 2008, the year in question, he was managing over 800 files. Our understanding is that he did this with only the support of two full-time secretaries. Mr Tupou deposed that he works six days a week, often beginning in his office in the early hours of the morning and not leaving them until late.

[13] The more intense pressure at that time in June arose out of Mr Tupou's membership of the Pro-Democracy Movement in Tonga and more specifically, his wish to obtain proper legal representation for two young men who were accused of murder following the riots in Nukualofa. These two young men faced the death penalty and no legal aid system existed in Tonga at the time. We understand Mr Tupou took it upon himself to attempt to raise funds for their defence and when these were not forthcoming, personally undertook much of the legal work and was absent from his practice for six weeks during the trial. Mr Cato, who appeared for Mr Tupou, was counsel representing one of these accused and was able to confirm firsthand the pressure upon Mr Tupou as firstly, he sought to obtain funding, and secondly, he funded all of the expenses of the legal team out of his own pocket. Mr Tupou's accountant deposed that he also would have lost approximately $60,000 in gross income during his absence from his practice during the trial, as well as considerable out of pocket expenses to cover accommodation and other costs of himself and co-counsel.

At the time in early June when the offending under consideration arose Mr Tupou was on the verge of leaving for Tonga to begin the trial and clearly had his mind on that and the very serious consequences that entailed. Mr Tupou indicated that he was very preoccupied at that time.

[14] The third grounds relate to personal family problems which were also impacting on the practitioner at the very time that these events occurred. We do not propose to entirely detail these circumstances since they are of a personal nature but suffice it to say they involved a serious illness being suffered by the practitioner's

daughter who was overseas. The practitioner's son-in-law had left to serve for the Armed Forces in Iraq and it was left to Mr Tupou and his wife to bring their daughter and her two young children back to New Zealand for treatment and to assist her in caring for the children. Clearly this was a time of significant emotional turmoil for the practitioner and we accept that this may well have had a bearing on his judgment and level of concentration.

[15] In submissions and mitigation Mr Cato referred to the nature of Mr Tupou's practice and the difficulties of working in South Auckland. Clearly he is very hard working and is operating in some of the tougher areas of law, including Family, Immigration and Criminal trial work.

[16] There are a number of facets to the large file numbers (even this year there are in excess of 400 files), although Mr Tupou indicated that he had handed on all work involving indictable criminal matters which ought to relieve some of the pressure. Whilst the large number of files since Mr Tupou last appeared on a disciplinary matter in 2002 demonstrate that he has carried a huge workload without any single complaint from a client (we estimate 2871 files over this period), this also represents a potential risk of overwork and too much pressure to pay sufficient attention to each matter. We accept that it is not greed which drives the acceptance of so much work by Mr Tupou, rather an inability to refuse people.

Practitioner's Character References

[17] Mr Tupou provided 15 references from many leaders of the Pacific Island community and from fellow practitioners. They all speak of his integrity, hard work, respect from his community and of his courtesy and respectfulness of his colleagues and the Court.

[18] There is no doubt that Mr Tupou enjoys huge respect amongst the Tongan community. Nor is there any doubt that he has devoted a huge amount of time and energy to the Tongan Pro-Democracy Movement and to community affairs generally. We accept Mr Cato's submission that this must be weighed in his favour when considering a sanction to be imposed upon him.

[19] The Law Society seeks that we suspend Mr Tupou from practice for a period. They take this approach because this is his fourth appearance on a charge of professional misconduct. He has not appeared for some eight years but in the eight years preceeding that appeared three times before the Tribunal. At the conclusion of the hearing on 22 December the Tribunal indicated to Mr Tupou and his counsel that we were concerned about penalty in his case because we did not consider that the offending of itself would have been sufficient serious to justify the imposition of a period of suspension. However we did consider that when taken as a fourth offence it might well tip the balance into suspension. However rather than taking that step immediately we invited Mr Tupou, through his counsel, to take the opportunity of an adjournment of the hearing, part heard, until the New Year for him to make inquiries about his future manner of practice. We invited him to explore offers, to which he had referred in evidence, of merger of his practice or employment by another firm. We considered that if he were able to make satisfactory arrangements to work in a structure where there was more supervision, ability to delegate and the ability to say "no" to people, as part of a bigger enterprise, that the risk of any repetition of the situation which occurred was unlikely.

[20] On that basis that matter was adjourned with directions made that Mr Tupou was to file by 1 March an undertaking or further affidavits to outline his future intentions. We also requested details of his financial circumstances. A firm proposal was requested.

[21] This information was not forthcoming in a timely way and it was only after prompting that the practitioner filed three further affidavits and his counsel filed submissions the day before the scheduled hearing on 31 March. The Society was, quite properly critical of this and was also critical of the content of the affidavits which, in the Society's view were only in "embryonic" form.

[22] We consider that is somewhat harsh. The affidavits were from a practitioner who was offering to employ Mr Tupou from 1 July and continue to supervise and mentor his practice from that time. The second affidavit was from Mr Tupou himself setting out his financial circumstances and his proposals for employment and the third affidavit was from a senior and respected Auckland practitioner who indicated

her willingness to mentor Mr Tupou and indicated that she already had a mentoring relationship with the firm who had agreed to employ him. The Tribunal called both Mr Tupou and the proposed employer to give evidence. Mr Tupou has clearly struggled with the huge changes to his practice which are going to be involved by the proposal put forward by him and the seriously depleted financial circumstances that might create. But we understand that although he made attempts early in the New Year to pursue other opportunities he was hindered in this by the responsiveness of others and we consider that he has provided at least a partial reason for the delay in filing his documents.

[23] As to the proposed employer, the Tribunal was most impressed with the manner in which he gave evidence. He had clearly taken a considered and careful approach to the employment of Mr Tupou, his evidence was measured and indicated a degree of responsibility which gave the Tribunal considerable confidence. He described certain protocols and practices within his firm which we considered would benefit the practitioner enormously. After further consideration of the matter and submissions from both counsel the Tribunal determined to follow the course proposed by the practitioner through his counsel and made formal orders reserving the reasons to be delivered in this written decision.

[24] In summary the Tribunal takes into account the seriousness of the offending and of previous offending, the significant contextual matters which surrounded the time of this offending, the numerous testimonials to the practitioner's good character, the fact that no dishonesty or greed was involved in the misconduct and finally, the calibre of the employment relationship proposed by the practitioner. The orders made at the hearing and confirmed in this decision are as follows:

(1) Censuring the practitioner s.112(2)(e).

(2) Ordering that the practitioner from 1 May 2010 is not to practice as a solicitor on his own account, whether in partnership or otherwise, unless authorised by the Tribunal to do so pursuant to s.112(2)(c). This order is made on the condition that the practitioner is to give an undertaking that he is to be employed initially by the firm proposed in

the evidence to employ him or such other firm as in future the New Zealand Law Society may approve.

(3) Costs of the Law Society of $10,000 are to be paid by the practitioner.

(4) The name of the practitioner and a summary of the misconduct may be published but not that of the firm where he will be employed which is suppressed.

DATED at AUCKLAND this 12th day of April 2010

Judge D F Clarkson
Chair