

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2014] NZLCDT 87

LCDT 028/14

IN THE MATTER

of the Lawyers and Conveyancers
Act 2006

BETWEEN

**AUCKLAND STANDARDS
COMMITTEE No. 1**

Applicant

AND

ILAISAANE VALU-POME'E

Respondent

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr S Grieve QC

Ms C Rowe

Mr W Smith

Mr I Williams

HEARING at Specialist Courts and Tribunals Centre, Auckland

DATE OF HEARING 1 December 2014

APPEARANCES

Mr P Davey for the Standards Committee

The Respondent did not appear

RESERVED DECISION OF TRIBUNAL
ON LIABILITY AND DECISION No. 1 ON PENALTY

[1] Ms Valu-Pome'e faced 13 charges (some laid as alternatives) which were considered by the Tribunal on 1 December. Ms Valu-Pome'e did not appear, but a little over one hour before the scheduled hearing, sent an email to say she was unwell and sought to be excused. She did not seek an adjournment and said she would abide the decision of the Tribunal. She briefly referred to family deaths over recent years.

[2] This was the lawyer's only participation in the disciplinary process.

[3] All charges arise out of her conduct in acting for the complainants on an adoption application and connected immigration applications. Although only one set of complainants are involved, the failures of the lawyer are numerous and serious and cover a period of six years.

[4] Having heard formal proof of the charges, the Tribunal found 8 established: 2 misconduct; 2 negligence;¹ and 4 unsatisfactory conduct. Five alternative charges were dismissed.

[5] The Tribunal considered penalty, and reached the unanimous view that the seriousness of the offending demanded the ultimate sanction which had been sought by the Standards Committee, of striking the lawyer from the roll of barristers and solicitors. We reserved our reasons for that order.

[6] We also provided Ms Valu-Pome'e with the opportunity of informing us further as to her personal and financial circumstances, in relation to costs orders sought. We reserved our decision in relation to those orders.

¹ Under both the Law Practitioners Act 1992 and the Lawyers and Conveyancers Act 2006.

Background

[7] We adopt paragraphs 4 to 28 as follows, of the submissions of the Standards Committee, which we consider fairly sets out what happened in this case:

- “4. Ms Valu-Pome’e does not hold a current practising certificate. She previously held a practising certificate as a barrister for the year ended 30 June 2013. She did not renew her practising certificate in time but applied for a practising certificate in August 2013. She subsequently agreed to withdraw her application pending the outcome of these complaints but provided no response to them to the Committee and has not responded to the charges that have been filed with the Tribunal. The factual background set out below is therefore based on the affidavit evidence and inferences to be drawn from that evidence, which includes documents obtained from the Family Court file and Immigration New Zealand.
5. In about June 2007 Mr and Mrs L instructed Ms Valu-Pome’e to commence adoption proceedings for them to adopt S and to apply to Immigration New Zealand for a permit for her so that she could remain in New Zealand. S was Mr L’s niece and she had been living with them in New Zealand. She was less than one year old at the time.
6. At that time, Ms Valu-Pome’e was employed as a solicitor by another lawyer, Mr F. She prepared the necessary court documents for Mr and Mrs L to adopt S, which were filed with the Manukau Family Court in July 2007. By letter dated 31 August 2007 Ms Valu-Pome’e also applied to Immigration New Zealand for a temporary visitor’s permit for S while the adoption proceedings were being pursued.
7. For some reason, Ms Valu-Pome’e advised Mrs L that S’s permit had not been granted and that they needed to appeal to the Minister of Immigration. By letter dated 19 October 2007 she wrote to the Minister of Immigration advising that the permit had been declined and sought a special direction from the Minister to intervene in the case. However, by letter dated 9 November 2007 Immigration New Zealand advised that S had been granted a temporary visitor’s permit. A letter dated 28 January 2008 on behalf of the Associate Minister of Immigration also confirmed that S’s permit application had been approved in November 2007 and that she held a valid permit until 29 May 2008.
8. In the meantime, the adoption proceedings had been allocated a hearing in the Registrar’s List on 13 November 2007, following which there was an adjournment to 10 January 2008 for a social worker’s report to be prepared. It appears that the social worker’s report was filed with the Court on that date but Ms Valu-Pome’e had not yet received a copy of that report, which recommended that the adoption not proceed. On that date the Court made an order that a copy of the social worker’s report be provided to Mr F (Ms Valu-Pome’e) and that he was to advise if the application was to be pursued.
9. On 16 May 2008 Mr and Mrs L again met with Ms Valu-Pome’e and paid her \$280.00. Mrs L states that the purpose of the meeting was to extend S’s permit and they gave S’s passport to her together with two passport photos.

10. However, Ms Valu-Pome'e failed to file an application to extend Ss permit and she was effectively unlawfully in New Zealand from the end of May 2008. Mrs L contacted Ms Valu-Pome'e multiple times between May 2008 and August 2009 but was advised that she was waiting a response from Immigration New Zealand. On 4 February 2009 she sent an email to Ms Valu-Pome'e to check up on progress with S's case and was advised that the Court had appointed a lawyer to act for S. Ms Valu-Pome'e also falsely advised her that the immigration matter for S had been refused and that the next step was to appeal to the Minister of Immigration, which would cost a fee of \$450.00.
11. The adoption proceedings were set down for hearings in the Family Court on 13 May 2009 and then on 3 August 2009. On 13 May 2009 the Court requested an updated social worker's report and a further report dated 28 May 2009 was provided to the Court, which was much more positive and the writer considered that Mr and Mrs L to be "fit and proper" persons. It appears that Ms Valu-Pome'e advised the Court on 3 August 2009 that the social worker's report had not been provided to her. On that basis, the Court made orders which included adjourning the proceeding for 14 days to the Registrar's List and requiring counsel to file a joint memorandum for the next step including details of any hearing required. Subsequently, the proceeding was adjourned to the Registrar's List on 16 October 2009 and 21 January 2010 to monitor compliance with the Judge's directions.
12. On 28 October 2009 Ms Valu-Pome'e sent a letter to the Family Court advising that updated affidavits would be filed by Mr and Mrs L shortly but Mrs L did not receive any contact from her at that time.
13. By letter dated 28 January 2010 the Family Court advised Ms Valu-Pome'e that the case would be reviewed on 21 April 2010 and that "updated affidavits may be filed urgently by applicants."
14. No affidavits were filed and by letter dated 21 April 2010 the Family Court requested Ms Valu-Pome'e to advise whether she had instructions to proceed with the application and, if so, what directions were sought to progress the matter. It also advised that if she was without instructions then the matter would be referred to a Family Court Judge on 21 July 2010 for consideration as to the striking out of the proceedings.
15. By letter dated 18 May 2010 Mr and Mrs L requested copies of all communications relating to the adoption of S from the Manukau District Court. The Court subsequently sent copies of letters to them and requested that they advise whether Ms Valu-Pome'e was still representing them. By letter dated 3 June 2010 Mrs L advised the Family Court that Ms Valu-Pome'e was still their lawyer.
16. No steps were taken by Ms Valu-Pome'e and on 21 July 2010 the Court struck out the proceedings for want of prosecution. A copy of the Judge's minute was sent to Ms Valu-Pome'e by letter dated 22 July 2010.
17. Mrs L also received a copy of the letter from the Court. She phoned Ms Valu-Pome'e and the person she spoke to said that she was in Tonga. Mrs L recognised Ms Valu-Pome'e's voice but when she enquired further she was told that it was her sister. She rang again the following week and Ms Valu-Pome'e said that she had not responded to the letter from the Court because she had been in Tonga. She said that she would follow it up and get back to her but did not do so.

18. Ms Valu-Pome'e did not make any further application to the Court but on 7 September 2010 she sent an email to Mrs L setting out questions for her to answer so that she could draft an updated affidavit the following week. Mrs L responded the following day with the information that had been requested but no further affidavit was filed.
19. Mrs L did not hear anything further and eventually on 14 March 2011 she sent an email to Ms Valu-Pome'e requesting that their file for S be returned to them. The file was not returned and Ms Valu Pome'e was still holding their marriage certificate, their daughter's birth certificate and S's passport.
20. S started school in September 2011 as a domestic funded student. Without obtaining instructions, Ms Valu-Pome'e made an application to Immigration New Zealand for a student visa for S. As part of that application, her letter stated that she was seeking the visa so that S could "remain on a valid permit awaiting a decision on her adoption application filed with the Manukau Family Court." The letter further stated that "[h]er adoption matter is awaiting a home study report from the home country and this may take some time as Tonga does not have a similar welfare system like NZ." These statements were untrue as the adoption proceedings had been struck out over one year earlier in July 2010.
21. The file from Immigration New Zealand also includes letters that are identical to letters had previously been submitted to Immigration New Zealand in 2007 as part of the original permit application but with the dates of those letters altered to read 2011. Immigration New Zealand are unable to confirm that the letters were received as part of the application that was made in 2011 but the logical inference is that they must have been sent at that time because the letter dated 2 August 2011 from Ms Valu-Pome'e refers to "letters of support" that were submitted with that letter. It is unknown whether Ms Valu-Pome'e altered these letters herself but she must have been aware that they were false because she appears to have certified two of them as being true copies on 1 August 2011 but the letters purport to be dated over month later in September 2011.
22. Further, Mrs Valu-Pome'e also appears to have also included an altered letter from the Manukau Family Court which gives the impression that it is dated 18 August 2011 and appears to advise her that the case would be reviewed on 16 October 2011. Again, the letter is false because the proceeding had already been struck out at that time and it appears to be a copy of a previous letter dated 18 August 2009 from the Family Court advising that the matter would be reviewed on 16 October 2009.
23. By letter dated 4 October 2011 Immigration New Zealand advised Ms Valu-Pome'e that the application was granted on the conditions that S provide a completed student visa application form, a valid passport, application fee of \$300.00 and updated evidence of the progress of the adoption application.
24. By email dated 18 October 2011 Ms Valu-Pome'e falsely advised Immigration New Zealand that she had received instructions from her client's adopted parents for an extension of the visa application on the basis that there had been a death in the family and they had to contribute financially to the funeral.
25. Immigration New Zealand allowed an extension for a further two weeks but on 1 November 2011 Ms Valu-Pome'e sent a further email advising

that she had received a phone call from the client's parents advising that one of three young men who had drowned on Labour Day in the Waikato River was the brother of the mother of S (Mrs L). She sought a further extension as they were unable to afford the application fees. Again, this was untrue.

26. During that time, Mr and Mrs L were not able to afford to instruct a lawyer but in 2013 they instructed Mr S of P L to act for them and he requested their file from Ms Valu-Pome'e by letter dated 8 October 2013. There was no response by her to that request.
27. Mr S assisted them to obtain a student visa from Immigration New Zealand for S until 24 March 2015. In the meantime, Mr and Mrs L had paid the sum of \$2530.00 to Ms Valu-Pome'e and the sum of \$4942.13 to P L. Mr and Mrs L have now instructed the Mangere Community Law Centre to file further adoption proceedings in the Family Court.
28. On or about 10 December 2013 Mr S sent a detailed written complaint to the New Zealand Law Society on behalf of Mr and Mrs L. This complaint was forwarded to Ms Valu-Pome'e for her comment. She failed to respond and failed to take part in the subsequent proceedings conducted by the Committee. As stated above, she has also failed to file a response to these charges in the Disciplinary Tribunal."

Charges and Failures

Charges 1 and 2

[8] These charges alleged, respectively, misconduct or negligence prior to 31 July 2008 and therefore under the Law Practitioners Act 1982 ("LPA"). The conduct in question was the lawyer's failure to apply for a further temporary permit for the child who was the subject of an adoption application, resulting in that child remaining in New Zealand unlawfully. (**Failure No. 1**)

[9] The Standards Committee did not pursue the misconduct charge, which we dismissed. We found the alternative charge established, which was negligence or incompetence in her professional capacity of such a degree as to reflect on Ms Valu-Pome'e's fitness to practice or to tend to bring the profession into disrepute. This serious failure had potentially catastrophic consequences for the child and the complainants, seeking to adopt her.

[10] The test for negligence, as to the second limb, confirmed by the Court of Appeal in *W* is:

"... Whether reasonable members of the public, informed of all relevant circumstances, would view *W*'s conduct as tending to bring the profession into

disrepute. We agreed too that the issue is necessary to be approached objectively, taking into account the context in which the relevant conduct occurred ...”²

[11] We note that this decision was also authority for the relevance of consequences, in terms of assessment of seriousness.

Charges 3 and 4

[12] These were both laid under the Lawyers and Conveyancers Act 2006 and pleaded misconduct and negligence respectively. Misconduct was again abandoned by the Standards Committee and they relied on the alternative charge of negligence or incompetence (again such as to reflect on fitness to practice or bring the profession into disrepute). The conduct relied on in relation to this charge was her failure to diligently pursue the adoption application on behalf of the complainants.

(Failure No. 2)

[13] The practitioner not only “sat on” this file but failed to respond to requests and directions by the Court both through a Judge and a Registrar. The ultimate outcome of this conduct was that the proceedings were struck out on 21 July 2010 for want of prosecution. Again very serious consequences ensued for her clients, not only the delay but the loss of their application some three years after their instructions had been given to the practitioner. We have no difficulty in finding that this behaviour would certainly tend to bring the profession into disrepute and indeed is so incompetent as to reflect on the practitioner’s fitness.

Charge 5

[14] This is less serious but still a major failure to her clients. We find unsatisfactory conduct established between 1 August 2008 and 22 July 2010. The practitioner failed to keep the client’s informed about progress of the proceedings and in particular did not advise them the proceedings had been struck out. **(Failure No. 3)**

² *W v Auckland Standards Committee No. 3 of the New Zealand Law Society* [2012] NZCA 401, [2012] NZAR 1071, at [45].

Charges 6 and 7

[15] Alternative charges of misconduct and unsatisfactory conduct were laid but only the latter was pursued by the Standards Committee and we dismissed Charge 6. The conduct in relation to this charge was the failure to respond to inquiries and requests for information from the female complainant in a prompt and timely manner. This is a clear breach of Rules 3.2 and 7.2 of the Rules of Conduct and Client Care.³
(Failure No. 4)

[16] These rules read as follows:

3.2 A lawyer must respond to inquiries from a client in a timely manner.

And

7.2 A lawyer must promptly answer requests for information or other inquiries from a client.

Charges 8 and 9

[17] Misconduct was pleaded (with unsatisfactory conduct in the alternative) in relation to the following conduct. Ms Valu-Pome'e failed to advise the complainants that the child was no longer lawfully in New Zealand. Furthermore she lied to them that she was awaiting an answer from Immigration New Zealand in respect of the child's permit. **(Failure No. 5)**

[18] In August 2009 for some unfathomable reason the practitioner had also falsely advised the clients that Immigration New Zealand had decided to refuse the child's permit and that there ought to be an appeal lodged at a cost to them of \$450.
(Failure No. 6)

[19] This was entirely unnecessary because the child remaining in New Zealand had actually been approved.

[20] Furthermore in September 2010 Ms Valu-Pome'e falsely advised the female applicant that she required the answers to various questions in order to file an

³ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

affidavit, despite knowing that the adoption proceedings had already been struck out two months previously. (**Failure No. 7**)

[21] These deceptions and false representations to her clients were a total abrogation of her role as a lawyer and of her duty of absolute trust and integrity that was owed to them. This professional failure was, in our view, clearly at the level of misconduct. There is no doubt that lawyers of good standing would regard this conduct as disgraceful and dishonourable. It therefore meets the definition of misconduct.

Charge 10

[22] This charge of unsatisfactory conduct was established by the evidence that the complainant paid to the lawyer between 6 August 2009 and 21 August 2009 the sum of \$450. Ms Valu-Pome'e was by this time a Barrister Sole and breached Regulation 10 of the Trust Account Regulations⁴ by failing to retain this sum in a trust account when no invoice for professional services had been issued. This charge was also clearly established. (**Failure No. 8**)

Charges 11 and 12

[23] These were alternative charges of misconduct or unsatisfactory conduct between 1 August 2011 and 19 October 2011. The conduct in this matter was, in our view, clearly at the higher level charged. It related to the practitioner's false representations to Immigration New Zealand that she had instructions to act for the child to seek a student visa pending a decision on her adoption application. That application had been struck out the previous year. (**Failure No. 9**)

[24] The aggravating feature of these representations to Immigration New Zealand was that the evidence raises the very strong inference, which we find established on the balance of probabilities, that the practitioner had submitted letters on which dates had been altered by some four years to make them appear as though they had been prepared in support of the application she was making in 2011. The letters had in fact been written in 2007. A further lie to Immigration New Zealand was that an extension was required because of family bereavements, details of which were provided. This information was entirely false. (**Failure No. 10**)

[25] The dates are altered in a very obvious handwritten way. Furthermore the practitioner has certified the documents as “true” on a date before the purported date of the document itself.

[26] We consider this charge to be perhaps the most serious of all because of the blatant dishonesty involved. Immigration New Zealand relies on the integrity of lawyers who certify and provide documents to them in support of applications which are related to very important aspects of the lives of the client. Any departure from complete integrity in the processing of such documents is a very serious matter and reflects on the profession. It is, in our view, serious dishonesty. We dismiss the charge of unsatisfactory conduct and find misconduct proven.

Charge 13

[27] This is a charge of unsatisfactory conduct that from the time a request was made of her on 8 October 2013 the practitioner has failed to respond to the complainant’s request to uplift all documents from her. The documents which remain with the practitioner include the child’s birth certificate, passport and the parties’ marriage certificate. While not in the same league as the preceding charge it is a further failure towards the client. **(Failure No. 11)**

Penalty

[28] We remind ourselves that the predominant purpose of penalty to be considered by the Tribunal is protection of the public and maintenance of professional standards in order to enhance public confidence in the legal profession.

[29] Mr Davey submitted to us that “*proven dishonesty, whether or not leading to criminal proceedings and criminal penalties, normally justifies an order being made to strike a practitioner off the roll.*”⁵

[30] We were very concerned at the notion of striking off a relatively inexperienced practitioner for transactions which effectively surrounded one client only. We were conscious of the concept of the least restrictive intervention as formulated in

⁴ Lawyers and Conveyancers Act (Trust Account) Regulations 2008.

⁵ *Bolton v Law Society* [1994] 2 All ER 486.

Daniels.⁶ Had the practitioner engaged in the disciplinary process or in any way displayed behaviour or characteristics which would be indicative of a wish to seek rehabilitation we might well have been able to stop short of strike off. This is particularly so since this is the practitioner's first disciplinary finding.

[31] Without the practitioner engaging and attempting to provide some explanation for her actions, protection of the public must prevail. We refer in this regard to the decision of *Sisson*⁷ at [59]:

“[59] Our evaluation of the case brings us to the same conclusion as was reached by the Tribunal, that striking off was the only appropriate penalty. The professional misconduct was serious in itself, and the manner of the appellant's participation in the disciplinary process further limited the available penalty options. Had she been able to recognise her wrongdoing, obtain professional help and present a realistic proposal for her rehabilitation while practicing in a supporting environment, an outcome less than striking off may have been appropriate. However, the Tribunal was confronted with a practitioner in a downward spiral, so that protection of the public and the legal profession left but one option. For these reasons the appeal must be dismissed.”

[32] In the absence of any explanation as to her dishonesty and actions in relation to the 11 noted failures arising out of her carriage of this file for some six years, we find the practitioner is not a fit and proper person to continue in practice.

[33] Having reached that unanimous view the Tribunal made an order striking the practitioner's name from the roll at the conclusion of the hearing and following deliberation, on 1 December 2014.

Other Orders Sought

[34] The Standards Committee seeks a contribution, having regard to the lawyers' means, to their costs of \$13,182.16. It also seeks reimbursement of the Tribunal costs in relation to the hearing. These are certified at \$1,990.

[35] In addition the Standards Committee seeks an order for compensation for the complainants pursuant to s 156(d) of the LCA. The sum sought is \$7,472.13. This relates not only to the \$2,530 fees that were paid to the practitioner but also

⁶ *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850.

⁷ *Sisson v The Standards Committee (2) of the Canterbury-Westland Branch of the New Zealand Law Society* [2013] NZHC 349.

\$4,942.13 paid to the new solicitors for the complainants to seek to resolve the situation.

[36] Ms Valu-Pome'e has filed an affidavit which discloses that she has no assets and relies on a benefit and a small board payment for income.

[37] Having regard to Ms Valu-Pome'e's financial circumstances the Tribunal considers that only a reimbursement of the Tribunal hearing costs should be ordered, by way of reimbursement to the New Zealand Law Society in the sum of \$1,990.

[38] As to compensation, we do consider it proper to make an order which reflects the amount the clients paid to Ms Valu-Pome'e to reflect the loss her actions have caused, but decline to make any further order under s 156(1)(d).

Summary of Orders

1. ILAISAANE VALU-POME'E is struck from the Roll of Barristers and Solicitors, pursuant to s 242(1)(c).
2. No order is made for contribution to the New Zealand Law Society Costs.
3. The Tribunal's s 257 costs are certified at \$1,990 and awarded against the New Zealand Law Society.
4. The practitioner is to reimburse to the New Zealand Law Society the s 257 costs in the sum of \$1,990 pursuant to s 249.
5. Pursuant to s 156 (1)(d) the practitioner is to pay compensation to the complainants in the sum of \$2,530.

DATED at AUCKLAND this 22nd day of December 2014

Judge D F Clarkson
Chair