

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

Decision No. [2009] NZLCDT 17

LCDT 13/2009

IN THE MATTER

of the Lawyers and Conveyancers
Act 2006

BETWEEN

**AUCKLAND STANDARDS
COMMITTEE**

Applicant

AND

BERNADETTE ETEUATI

Respondent

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr O Vaughan

Mr G Craig

Ms C Rowe

Mr B Smith

HEARING at AUCKLAND on 26 November 2009

APPEARANCES

Grant Illingworth QC on behalf of applicant

Gerard Curry on behalf of respondent

**DECISION OF NEW ZEALAND LAWYERS AND
CONVEYANCERS TRIBUNAL**

Introduction

[1] Mrs Eteuati faces one charge laid by the Auckland Standards Committee Number four of the New Zealand Law Society that of misconduct in her professional capacity. Rather than read the particulars of the charge I will refer to the background facts which are contained in the submissions of counsel for the Society Mr Illingworth.

[2] I record that this matter first came before the Tribunal in October and had been set down for a formal proof because no steps had been taken by Mrs Eteuati but that she appeared at that hearing and sought an adjournment in order to obtain legal advice. Fortunately that she has now done and is today represented by Mr Curry who one or two days ago, indicated to the Society and the Tribunal that the charge would be accepted by Mrs Eteuati and so I record that plea which was received through her counsel and I have also been advised today that the facts are able to be read as agreed facts and they are as follows:

- [a] Mrs Eteuati has until recently held a practicing certificate as barrister sole issued under the Law Practitioners Act 1980;
- [b] In about May of 2007 or even earlier if one refers to Mrs Eteuati's indication today the complainant Mrs B requested Mrs Eteuati to accept instructions in respect of an appeal against an accident compensation decision;
- [c] Having indicated, at an earlier time to the client that it was not within her particular area of expertise, the client apparently returned to Mrs Eteuati and indicated that she had not been able to engage other legal assistance, particularly on legal aid and Mrs Eteuati it seems, rather took pity on Mrs B and agreed to act to assist her in putting her case together and helping to find another lawyer who could be engaged to conduct the actual hearing;

- [d] Without requiring the intervention of an instructing solicitor Mrs Eteuati agreed to act for the complainant on legal aid and requested a legal aid contribution from her and the sum of \$50.00 was paid by the client to the practitioner;
- [e] On or about 5 July 2007 Mrs Eteuati wrote to the District Court requesting a three month adjournment of the accident compensation appeal to allow her to obtain disclosure of documents and a decision from the Legal Services Agency in respect of legal aid;
- [f] The adjournment was granted but the practitioner failed to apply for legal aid on behalf of the client and failed to prosecute the appeal on behalf of her client;
- [g] On about 28 June 2008 after Mrs Eteuati had failed to attend at least three scheduled hearings at the District Court in respect of the appeal, the appeal was struck out;
- [h] Mrs Eteuati failed to inform Mrs B of the failure to apply for legal aid, the failure to prosecute the appeal, the failure to attend the scheduled hearings or the fact that the appeal had been struck out;
- [i] Mrs Eteuati wrongfully retained the sum of \$50.00 having failed to pay the legal aid contribution to the Legal Services Agency or refund it to the complainant;
- [j] Following the practitioner's initial meeting with the complainant she failed or refused to meet with her client on request or otherwise communicate with her or her representatives concerning the appeal. She failed or refused to hand over the file in respect of the appeal on request as a result of which the complainant has suffered a loss of important records concerning her medical history.

[3] The conduct of the practitioner exposed the complainant in the submission of the Society to the following: ongoing difficulties in obtaining legal redress in relation to her accident compensation decision which was to have been the subject of the appeal; ongoing difficulties in obtaining medical assistance in relation to relief of physical pain arising from the injuries that were to have been the subject of the

appeal; and unnecessary costs and expenses including legal costs and emotional distress.

[4] I will come to the specifics of the breaches of the rules, but just indicate at this stage that the Society has submitted that these very serious charges have been aggravated by the practitioner's approach to these proceedings and to the complaint itself and it seeks strike off or if not strike off, a substantial period of suspension.

[5] Mr Curry has addressed the Tribunal at some length particularly about the circumstances in which Mrs Eteuati found herself at the various times in the chronology of what occurred between her and her client. He says as I have indicated that the approach was in fact the first time by the client in March at which time she was rather gently sent away by Mrs Eteuati to find someone else. But that when she returned his client was well motivated to help and assist Mrs B and thus indicated that she would take the case on in the manner which has been described.

[6] The adjournment request occurred in July 2007 and there is then a large gap in which it is accepted that Mrs Eteuati had what might be termed colloquially as a mental block in relation to this file and certainly did not do anything further at that stage.

[7] On 17 May 2008 Mrs Eteuati's husband suffered a heart attack and was hospitalised until mid June during which time he had a quadruple by-pass operation and in mid June he was returned home to the primary nursing care of his wife, the practitioner. Thus Mr Curry points out that Mrs Eteuati's focus and responsibility and feelings of loyalty were on her husband rather than her professional obligations. He describes this as a period of personal trauma and it was during this period that, a couple of weeks later, the appeal was struck out.

[8] The complaint was made in September 2008 and there is an indication that Mrs Eteuati would have responded to the complaint were it not for a number of subsequent unfortunate events which occurred. Although it has to be pointed out that these did not occur for some two months.

[9] Firstly she travelled to Samoa on 1 December to undertake professional duties as we understand it and it was on 2 December that the Society wrote to her further insisting on a response to the earlier complaint in which she had taken no steps. Mrs Eteuati returned on 19 December just before Christmas and closed up her

practice to take time out but sadly on 30 December her mother died and she then left for Samoa for the funeral.

[10] While she was there on 13 January her sister died in New Zealand and she returned to attend to all of the difficulties that ensued as a result of that second family death. Sometime later she requested an extension of time from the Society but this was denied.

[11] We have some difficulty accepting that these circumstances entirely explain the default during the first 12 months of acting for Mrs B. Certainly after her husband's heart attack we accept that circumstances became extremely stressful and difficult for Mrs Eteuati. We sympathise with that but note that a lawyer must be able to live to professional obligations even during stressful life events.

[12] We understand that the personal difficulties were compounded when the death of two close family members occurred and that Mrs Eteuati's response to the Society was initially affected. Because of this no satisfactory resolution was able to be achieved and this charge followed. So the matter has been aggravated in its seriousness partly as a result of the events in Mrs Eteuati's life.

[13] We accept that Mrs Eteuati had good intentions when she took on Mrs B as a client but given her inability to act effectively and professionally, this was clearly an error of judgement. We are told that her practice now is not to take on work where she lacks experience and that is a commendable improvement.

[14] Were this the first incident of misconduct we might take a different approach to the matter. But Mrs Eteuati was censured and fined five years ago for very similar behaviour where she also badly let a client down. We have the benefit of the Tribunal's decision in relation to that previous offending which involved three charges following which the practitioner was fined and censured.

[15] After that hearing Mrs Eteuati should have been in no doubt of her professional obligations to a client and the seriousness with which lapses of defaults in those obligations are taken. The public has a right to expect high standards of lawyers. The profession has a right to demand that its reputation as a whole is not dented or tarnished by its members.

[16] In his submissions Mr Illingworth has set out the rules of professional conduct which have been breached by the practitioner. Although only one charge of professional misconduct is faced today, eight breaches of the rules are involved. Those are as follows:

- [a] By abusing the relationship with her client – rule 1.01;
- [b] By continuing to act for the complainant after a conflict of interest had arisen as a result of the negligence of the practitioner in carrying out her duties for the complainant – rule 1.03;
- [c] By failing to advise the complainant of the conflict of interest that had arisen as a result of the practitioner's negligence – rule 1.07;
- [d] By failing to advise the complainant to obtain independent advice – rule 1.07;
- [e] By failing to disclose to the complainant all information which related to the complainant's affairs – rule 1.09;
- [f] By failing to disclose to the complainant that a potential claim for negligence had arisen which meant that the complainant should seek independent advice and that the practitioner could no longer act for the complainant unless the client so requested after receiving independent advice – rule 6.06;
- [g] By failing to act in the best interests of her client including acting in a manner that was grossly negligent and in breach of the professional obligations to the complainant – rule 8.01;
- [h] By accepting direct instructions from a lay client – rule 11.03.

[17] While the seriousness of the offending is accepted by the practitioner and through her counsel, Mr Curry asks that a sanction short of strike-off is considered. He submits that his client has much to offer in serving the public.

[18] We are of the view that the public interest will be best served by Mrs Eteuati having a period to reflect on her manner of practice and a period of oversight as an employee with guidance available for her rather than being a sole practitioner.

[19] She has indicated that she is prepared to undertake a period of employment accordingly. Mrs Eteuati clearly also has other business interests which absorb much of her time and energy. We would refer her to rule 5.5 of the Code of Conduct in Client Care Rules in this regard. If she wishes to recommence fully the practice of law, she may need to withdraw from other business activities to the extent that enables her to better meet her professional responsibilities to her clients.

[20] Four submissions have been made in relation to orders sought by the Society under ss.249 and 257 of the Act and for the sake of completeness I should record that because the conduct complained occurred prior to the commencement of this Act that the penalties to be imposed are to be those that could have been imposed under the previous Act. In all other respects the matter is determined in accordance with the new Act, the charges having been laid under this Act.

[21] Respectably Mrs Eteuati has indicated a willingness to contribute to costs. We have taken account of her personal circumstances, her family has two incomes but has commitments to a teenage daughter and a mortgage.

[22] We are satisfied it is proper to make costs orders particularly having regard to Mrs Eteuati's failure to engage in the process at an earlier date. The sanctions therefore that are imposed are as follows:

- [a] Pursuant to s.112(2)(b) of the Law Practitioners Act 1982 there will be an order suspending Mrs Eteuati from practice as a barrister or solicitor for 12 months forthwith;
- [b] Pursuant to s.106(4)(e) of that Act she is to pay compensation to the client Mrs B of \$50.00 in respect of the legal aid contribution and a further \$2,000.00 in respect of fees paid to reinstate her appeal as accepted by both counsel;
- [c] Pursuant to s.112(2)(c) she is not to practice as a solicitor on her own account unless authorised by the Tribunal to do so and we record her undertaking that she will not practice as a barrister sole without being similarly authorised by the Tribunal;
- [d] Mrs Eteuati was censured on the charge.

[23] Mr Illingworth has just pointed out to me that I should clarify that the Rules referred to as having been breached by the practitioners are under the old Act. The rule to which the Tribunal has referred Mrs Eteuati for her future attention is in respect of the new set of Code of Conduct.

[24] We make a further order pursuant to s.240 that the name of the client is to be suppressed permanently:

- [a] On the issue of costs the practitioner is to pay firstly in relation to the costs of the Law Society pursuant to s.249(1) the sum of \$3,933.40;
- [b] Pursuant to s.257 of the Act there will be a reimbursement order against the Society. The precise quantum is to be advised in due course in respect of the costs of the hearing;
- [c] Pursuant to s.249(1) the practitioner is to pay to the New Zealand Law Society the sum ordered yet to be fixed by the Chair in respect of the costs of the Tribunal so that the practitioner fully compensates the New Zealand Law Society in respect of the s.257 Crown reimbursement order.

DATED at AUCKLAND this 26th day of November 2009

Judge D F Clarkson
Chairperson