IN THE SUPREME COURT OF SAMOA

HELD AT MULINUU

MISC-472/11

IN THE MATTER: of sections 40 and 41 of the Law Practitioners Act 1976.

BETWEEN: **OLINDA WOODROFFE**

Appellant

AND: **THE SAMOA LAW SOCIETY**, a body duly established by section 13 of the Law Practitioners Act 1976.

Respondent

Counsel: S Hughes for the appellant
P Chang for the respondent

Hearing: 16 January 2012

Written Submissions: 13 January 2012

Judgment: 26 March 2012

JUDGMENT OF SLICER J

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1. The Appellant seeks review of two orders of the Law Society ("the Council"), a statutory body established under the Law Practitioners Act 1976 ("the Act"). The findings were made by its Disciplinary Tribunal ("the Tribunal") exercising delegated disciplinary powers afforded by the Act Part VIII. The general

procedures and statutory model have been set out by this Court in *Ponifasio v The Samoa Law Society* [2011] WSSC unreported 22 December 2011. Those principles stated in that case will be followed here.

2. Two complaints were made to the Society concerning:

(1) the conduct of the Appellant in dealing with a member of the Court Registry staff, Nele Eti, on 25 September 2008; and

(2) the contents of a letter written to the Minister of Justice, with copies to the Chief Justice and the Prime Minister on 9 October 2008, relating to the events of 25 September.

3. This hearing has been complicated by a number of procedural and evidentiary matters which include:

(1) the existence at one stage of court proceedings brought by way of Informations alleging an offence or offences against the Police Offences Ordinance 1961 section 4(g) (using abusive or insulting words) which were later withdrawn;

(2) the absence of a transcript of the hearing before the Disciplinary Tribunal and conflicting claims by Counsel as to whether the Chairperson of the

Disciplinary Tribunal clearly stated that no transcript could or would be provided or whether senior Counsel for the Appellant was under a mistaken assumption that one would be available;

(3) the provision of the notes taken by the Chairperson of the Tribunal and which were challenged by senior Counsel for the Appellant as to their accuracy;

(4) the attempted tendering by the Respondent of an affidavit explaining her limited role as Secretary of the Society in these proceedings and her ability to remain on the Tribunal without the perception of bias; and

(5) the desire by the Court not to place Counsel in a difficult position of cross-examining each other.

4. Complication 1 will be ignored. Both Counsel have made use of material collected by the Attorney General or his officers and used varying statements created during that period. There are differences between them and it is not certain which were provided to whom. The Court will look to the substance of the allegations and determine whether the finding of the Tribunal was open on the evidence more favourable to the Appellant. The Tribunal was required to apply the test applied by the High Court of Australia in *Briginshaw v Briginshaw* (1938) 60 CLR 336, and the New Zealand case of *Z v Dental Complaints Assessment*

Committee (2008) NZSC 55.

5. Complication 2 permits no remedy other than a quashing of the findings and remittal. Many tribunals do not have the resources for a full transcript. The parties ought be mindful to the fact that in Samoa the District Court does not have recording facilities. If the parties sought a transcript they ought to have made their own arrangements or ensured that such arrangements had been made.

6. Complication 3 has for present purposes been answered by the Court agreeing to allow the Appellant to provide an alternative version allowing both Counsel to tender their own notes albeit in incomplete form. In hindsight, the Court regrets its decision to agree to this request by Counsel. The Court has not read the copy of the notes taken by the Chairperson. It ought to have examined the best of the material placed before it on the hearing of this appeal, and determined the case on that material. It will proceed in relation to the claimed grounds of error on the primary documents. But the Court will honour its word, despite the costs to the parties, to allow those alternative versions to be placed before it. It will make provisional determinations on the basis of that primary material and impose a time for the provisions of voluminous material provided to the Court over a relatively minor matter at the expense of the parties and the Court. The practitioner was neither suspended nor struck off. The fine imposed was, by comparison with the hourly rate charged by some practitioners, relatively minor.

7. Complication 4 will be addressed following the Court's examination of the detailed reasons for the Tribunal's refusal to require refusal or withdrawal of the impugned member of the Tribunal namely, the Secretary of the Society.

General Background

8. There is no issue that on 25 September, the Appellant acted in an inappropriate manner. It would appear that there had been previous disputes between the Appellant and Registry staff concerning the requirement to use blue foolscap paper (July), A4 documents on white paper (23 July) and a Summons on single-sided paper (25 September). There is no issue that the Appellant was angry and frustrated on 25 September and used inappropriate language and intemperate conduct. The primary question argued by the Appellant was that any intemperate language was directed against general policy and not the staff member. There is no issue that she was the author of the letter dated 9 October.

9. Following the above events, a complaint was made to the Law Society by the Chief Executive Officer and Principal Registrar of the Ministry of Justice. The second complaint concerning the letter was made by the Prime Minister.

10. Complaints were referred by the Council to the Disciplinary Committee for investigation and report back to the Council. The Court accepts that such is an ordinary process. The Council might, in some instances, decline to refer the matter if the complaint is vexatious or of no consequence. There is nothing to

suggest that the Secretary did anything other than act as a conduit for that procedure and except for an exercise of discretion not to refer the complaint, took no other steps. The Disciplinary Committee considered the referral and recommended to the Council that disciplinary proceedings be initiated by Counsel against the Practitioner.

11. Most of the correspondence contained in the appeal books concerns the Attorney General, the Courts Administration and relates to the court proceedings. The two complaints were referred by the Council to the Disciplinary Committee on 20 October 2008. The Secretary undertook those procedural measures, as required by statute and the delegated powers of the Council, in bringing the matters to the Committee. The Committee in turn afforded the Appellant the right to reply to the complaints. In November, Semi Leung Wai withdrew as a participating member and was replaced by another practitioner, Ms Ruby Drake.

12. On 4 June 2009, the Disciplinary Committee reported to the Council recommending the laying of charges against the Appellant. The Council met on 11 June, endorsed the recommendations and requested the Disciplinary Committee to draft the charges. That was done and the Council approved the draft.

13. The charges were ones of conduct unbecoming of a barrister or solicitor and/or professional misconduct when the Appellant:

"…at the Court Registry Office in Apia on 25 September 2008, the Respondent, committed conduct unbecoming of a barrister or solicitor of the Supreme Court of Samoa and/or professional misconduct when the Respondent:

(1) verbally abused a member of the court staff, namely Nele Eti, by uttering insulting words such as "e leai ma se tou feau e taofi ai pepa" AND/OR "you bloody shit" AND/OR "e leai se tou feau tou te taofi ai matou pepa pau le tou mea e fai o le ave sao o matou mataupu i le Faamasinoga" AND/OR "o mea ga o policies e tatau ona faavae mai i luga o tulafono" AND/OR "you stupid stupid" AND/OR "you bloody hell" or words to that effect in the presence and within the hearing of other fellow employees and members of the public; and/or

(2) showed no self restraint but created an embarrassing scene including the slamming of the Court Registry door; and/or

(3) brought the Law Society into disrepute by her actions and her words."

14. The second charge was:

"…on or about the 9th day of October 2008, the Respondent committed professional misconduct or the conduct unbecoming a barrister or solicitor of the Supreme Court of Samoa when she wrote to the Honourable Minister of the Ministry of Justice, Courts & Administration and the Honourable Chief Justice of Samoa, with copies to the Prime Minister of Samoa and others requesting the withdrawal of criminal charges against the Respondent."

15. The Secretary, as required by statute directed a process server to serve notice of

the charge on the Appellant.

16. Following service, the Council decided to appoint Ms Drake and Ms Chang to act for the Society on the disciplinary proceedings. The Appellant had the benefit of a distinguished Queen's Counsel, Ms Hughes.

17. The hearing was conducted by Raymond Schuster, Rosella Papalii, Tima Leavai-Peteru, Leslie Petaia and Ioane Okesene. The Tribunal received evidence on 15 and 16 November 2010, received written submissions in February and delivered its written decision on 23 February 2011. Significant to this appeal the decision was unanimous.

18. The Tribunal found both charges proven. It gave the parties the opportunity to make submissions as to penalty and further considered the matter. On 7 April 2011, it delivered its written reasons for its decision:

> "1. Mrs. Woodroffe is fined and ordered to pay to the Law Society the amount of $1,000 tala within 14 days from the date of this decision;
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> 2. Mrs. Woodroffe in future is to conduct herself with utmost integrity expected of her as a member of the Law Society and should such behaviour or conduct arise again, the Tribunal may not be so considerate notwithstanding Mrs. Woodroffe seniority;
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> 3. Mrs. Woodroffe is ordered to write a formal apology to the Chief Executive Officer, Mrs. Nele Leilua, Mrs. Fa'atupu O'Brien and

the staff of the Ministry of Courts and Justice Administration within 14 days from the date of this decision;

4. Mrs. Woodroffe is also ordered to write a formal apology to the Minister of Justice and Chief Justice within 14 days from the date of this decision;

5. Mrs. Woodroffe shall pay to the Society, in respect of the costs and expenses of the inquiry, and the investigation preceding it, the amount of $3,000 tala. This amount shall be paid in full within 30 days of the date of this decision."

19. The orders were applied by the Council as its own. The Appellant appeals to this Court on the grounds that:

"1. Of the members hearing the charges against the Appellant, namely Rosella Viane Papalii had a conflict of interest and should have recused herself from this proceeding, but refused to do so.

2. The Respondent applied the wrong evidential burden to their consideration of the charges and therefore misdirected themselves as to the law.

3. The finding of the Respondent was contrary to the evidence to which end an error of law occurred.

4. The penalties imposed by the Respondent are in any event excessive relative to the charge and include matters by way of penalty in excess of the powers permitted by Section 37 of the Law Practitioners Act 1976."

Conflict of Interest

20. It would be preferable, in future, that the Secretary of the Society not sit as a member of the Tribunal. The advantages of having an organiser who has carried out the statutory duties and procedures, and is aware of and can communicate between Counsel and the Tribunal might be convenient but invites challenges on the grounds of actual or perceived bias.

21. The Court does not accept that Ms Papalii crossed the line and that her conduct would cause an objective observer who had knowledge of the whole of the proceedings to perceive bias. The Court follows the relevant statements of principle stated in *Ponifasio* (supra) at paragraphs 17 – 19. There is no evidence that the impugned member did other than carry out formal and statutory duties. The Appellant claimed that Ms Papalii had exceeded her remit, by stating that she had spoken with the media as stated in an affidavit to which the Appellant had argued should have been excluded. The Appellant did not establish that the Secretary of the Council had done other than respond to questions about hearing dates, the nature of charges, progress and the like.

22. The Court, with one caveat, would dismiss this ground. It had agreed to permit the Appellant to provide an alternative version of the exchanges and reasons for the decision of the Tribunal to reject an application for receiving or withdrawal of Ms Papalii at trial.

23. The Tribunal had in its reasons for decision on the question of perceived bias rejected the application made to the Tribunal stating:

> "We are in agreement with the objection laid by the Prosecution that under section 36 of the LPA, all notices relating to disciplinary matters are required to be served by the Secretary and therefore are statutory duties regulated by the LPA. It would perhaps be different if the Secretary was involved as part of the disciplinary committee conducting preliminary enquiries, investigate the complaint and recommend charges to the Council. The Council, not just the Secretary, initially receives complaints and refers them to the disciplinary committee for their necessary action and recommendation. Upon receipt of the disciplinary committee's recommendation to lay charges, the Council will appoint a prosecutor to draw up the charge(s) to be signed off by the Secretary and served on the respective Practitioner. This process is an attempt to keep the Council as the trier of fact and law separate from the investigatory and prosecutorial arm of the Society."

24. The reasons were similar to the approach taken in *Ponifasio* (supra). Counsel for the Appellant relied heavily on the decision of the Privy Council in *Man O'War Station Limited et. Ors v Auckland City Council (No. 1)* [2002] 3 NZLR 577, *Saxmere Company Limited v Wool Disestablishment Company Limited* [2009] NZSC 72 and *Sisson v Canterbury District Law Society* [2011] NZCA 55, in support of her perceived bias. *Saxmere* involved a financial connection between one of the judicial officers and counsel appearing on the hearing. *Man O'War* concerned an undisclosed acquaintance and association with the first respondent. The Council relied on the supreme importance of context and the particular circumstances. It approved of the statement of Gault J (a member of the Court of

Appeal appealed from) that:

> "Senior legal practitioners with busy commercial and conveyancing practices must come into contact and establish business associations with a considerable proportion of the professional practitioners in related fields such as surveying and civil engineering. The proposition that because of such an association they should be regarded as in danger of failure to carry out judicial functions impartially eight years after retiring from practice is unreal."

25. Here there was no suggestion of association, financial relationship, the known position of Ms Papalii as an officer of the Council, her lack of any particular interest of the outcome other than merit which would come within the tests of the Privy Council or *Saxmere* (supra). *Sisson's* (supra) appeal was dismissed. In that case the basis of the bias argument was the relationship between a member of the Tribunal and a person with an interest in the result or outcome of the proceedings. The claim was rejected.

26. A further basis for rejection of the ground is unanimity of five members of the Tribunal. Even if the Secretary was compromised the observer would note that four members of the Tribunal upheld the complaints and the Secretary's vote was therefore of little or no consequence.

27. The Court does not regard, except for its caveat earlier expressed, the above cases as supporting the Appellant's case and would dismiss this ground. It will make a provisional ruling subject to terms which, if not elected or obeyed by the

Appellant, will become final orders.

Evidentiary Burden

28. The Tribunal applied the test required by the New Zealand Court in *Z v Dental Complaints Committee*, *Briginshaw* and *Ponifasio* (supra). There is no merit in this ground.

Finding Contrary to the Evidence

29. Central to the Appellant's argument is the claim that her words and conduct were against policy and the system, not a member of the staff. The claim is belied by the Appellant herself. She maintained her claim of entitlement in her affidavit sworn on 15 November 2010. She repeated it in her letter of 9 October 2008 to the Prime Minister and Chief Justice, and her response to the Disciplinary Committee of 20 November 2008. The claim was repeated by her counsel in the sentencing hearing.

30. Those claims are belied by her 'remedies sought', contained in the section of her in the letter dated 16 October 2008 addressed to:

- the Minister of Justice
- the Chief Justice
- the Prime Minister
- the Consul General
- Nele Eti

inviting

(1) an apology for the negligent act of**…**Nele Eti, the department's employee;

(2) the movement of Nele Eti to a position where she no longer cause damage to the public.

31. That passage destroys any claim that the Appellant was venting her anger on the system. She wished for personal humiliation and vengeance on a person, with lesser status, who worked (and without whom the legal system including Judges) for the State of Samoa could not function and was entitled to courtesy. One may object to the abuse of power by a minor official who seeks to use the power of the State to oppress an ordinary citizen. The same principle ought apply in reverse whether that person be Judge, matai or pastor.

32. The secondary argument is that the conduct of and words used by the Appellant were not used and the version of the Appellant that she had but used minor criticism is likewise rejected. Criticism ought be encouraged. Bullying, abuse of status and humiliation ought not.

33. The secondary argument was that the words used and conduct employed had not been proved to the requisite degree and the Society had not proved their occurrence. This ought remain the provence of the Tribunal. It had before it the testimony of members of the Registry staff. The Tribunal found at paragraph 44:

> "Considering all the evidence, we accept the evidence by the Registry staff and Masinalupe and find that the Respondent did utter insulting words in the presence of the Registry staff and members of the public. We also accept that the Respondent showed no self restraint and created an embarrassing scene and brought the law society into disrepute."

34. This is not a hearing de novo but the Court has examined the evidence placed before the Tribunal and it was open on the evidence for the Tribunal to make that finding. It is clear that the Appellant was angry because of the policy which according to Masinalupe had been in place since 1975 but she had no right to abuse a member of the Court staff in the manner described by the witnesses.

35. The Court notes the statement in the Tribunal's decision at paragraph 30 that:

> "Under cross examination, Ms Woodroffe said that Mrs Eti and Mrs Lauina were not telling the true version of events and the 5 witnesses for MJCA were lying. Ms Woodroffe was adamant that she was the person who talked to Mrs Lauina and Mrs Eti before the Respondent intervened after her telephone call and that she was the one who presented the documents for filing. She was asked to explain why her version was completely different from that of 5 other witnesses and respondent that she cannot speculate as to why other people do such things."

36. The Tribunal was entitled to prefer the evidence of the five witnesses of the MJCA staff and such evidence was sufficient to enable the Tribunal to be satisfied to the requisite degree as stated in *Ponifasio* (supra).

37. The ground is dismissed.

Penalty

38. The Court does not accept that the penalty was excessive. The Tribunal was entitled to exact a more severe sanction (the Act ss10, 37). In a paper reported in *Law Society (NSW)* Vol. 31, December 1993, Kirby J, the distinguished jurist observed that 'professional discourtesy was on the rise. The U.S. Model Rules r17.2, the Australian Barristers Model Rules, provide that a barrister when exercising forensic judgments are 'not made to harass or embarrass the person.' The same can be said of solicitors in their dealings with court staff who are the administrators of the judicial arm of government. The same rules (e.g. NSW and Queensland r4) provide that 'barristers owe duties to the Courts, to other bodies and persons before whom they appear, to their clients and to their barrister and solicitor colleagues.' The Appellant acted in an unprofessional manner to a court officer who was required by her superiors to apply procedural tests and standards in relation to the filing of documents. In *Kennedy v The Council of the Incorporated Law Institute of NSW* [1939] 13 AL5 563, the High Court of Australia stated the general common law definition of misconduct as:

> "…a charge of misconduct as relating to a solicitor need not fall within any legal definition of wrongdoing. It need not amount to an offence under the law; it is enough that it amounted to grave impropriety affecting the solicitor's professional character, and was indicative of a failure either to understand or to practice the precepts of honesty or fair dealing in relation to the courts, his or her clients or the public. The particular transaction which is the subject of the charge must be judged

> as a whole, and the conclusion whether it betokens unfitness to be held out by the court as a member of a profession in whom confidence can be placed; or, on the other hand, although a lapse from propriety, is not inconsistent with general professional fitness and habitual adherence to moral standards, is to be reached by a general survey of the whole transaction.
>
> Dixon J, in the *Kennedy* case (at 564), said that:
>
> His fitness to continue on the roll must be judged by his conduct and his conduct must be judged by the rules and standards of his profession; his unfitness appeared when he did what solicitors of good repute and competency would consider disgraceful or dishonourable. He made a bold attempt by irregular means to interfere with that part of the course of justice which affected the ascertainments of facts by the testimony of witnesses."

39. The Legal Practice Act (Vic) 1996 section 137 defines unsatisfactory conduct as including:

> "conduct by a legal practitioner or firm in the course of engaging in legal practice that would be regarded by a legal practitioner or firm in good standing as being unacceptable, including –
>
> (i) conduct unbecoming of a legal practitioner or firm;
> (ii) unprofessional conduct."

40. It was open to the Tribunal to impose two fines of $1,000 through the Council. It did not. The attempt to have the member of staff apologise and be transferred from her position in a letter intended to be read by a number of senior officers of State exacerbated the matter.

41. The Tribunal was exercising delegated statutory power. The Council was afforded power by the Act section 37 which does not refer to an order requiring a practitioner to apologise. The provisions of the Act are flexible enough to enable the Tribunal to suspend portion of the fine or sanction or punishment on condition that the Appellant made an apology to the relevant staff members of the Court. The Tribunal could not do both at the same time. Commonsense would suggest that the Tribunal ought be able to require one although it is preferable that an offending practitioner do so voluntarily. Given the Act section 37 orders 3 and 4 of the Tribunal are set aside.

42. The ground is dismissed, except as stated above.

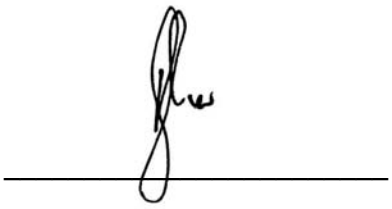
ORDERS

(1) Grounds 2 and 3 of the appeal are dismissed.

(2) Ground 4 is upheld in relation to Orders 3 and 4 of the Tribunal but is otherwise dismissed.

(3) A formal order of dismissal of Ground 1 will be made in the absence of a request that the Court reads and takes into account the Chairperson's and Counsel's notes relevant to the disqualification issue. Any such request must be provided to the Court in writing (allowing for Easter) on or before 4 p.m. 10 April 2012.

(4) The question of costs will be reserved until after the operation of Order 2.



JUSTICE SLICER