

**IN THE INDEPENDENT
LEGAL SERVICES COMMISSION**

NO. 006/2011

BETWEEN: CHIEF REGISTRAR

Applicant

A N D: SITERI ADIDREU CEVALAWA

Respondent

Applicant : Ms V Lidise
Respondent : In Person

Date of Hearing³ : 5th December 2011
Date of Ruling : 5th December 2011

EXTEMPORE JUDGMENT ON COUNTS 9 & 10

1. The Respondent has pleaded not guilty to counts 9 and 10 of this application. These counts both allege unsatisfactory professional conduct and are particularised as follows:

Count 9

Siteri Adidreu Cevalawaa legal practitioner, on the 14th day of June 2011, being employed as a Senior Legal Officer by Telecom Fiji Limited, appeared in the Suva Employment Relations Tribunal on behalf of the company in the matter between Labour Officer (Joseph Waqanui) v Telecom Fiji Limited ERT WC No. 70 of 2011 without a practising certificate, which conduct was a contravention of the provisions of Section 52(1)(a) of the Legal Practitioners Decree 2009.

Count 10

Siteri Adidreu Cevalawaa legal practitioner, on the 30th day of June 2011, being employed as a Senior Legal Officer by Telecom Fiji Limited, appeared in the Suva Employment Relations Tribunal on behalf of the company in the matter between Labour Officer (Joseph Waqanui) v Telecom Fiji Limited ERT WC No. 70 of 2011 without a practising certificate, which conduct was a contravention of the provisions of Section 52(1)(a) of the Legal Practitioners Decree 2009.

BACKGROUND

2. On the 5th of May 2011 the Respondent made application to renew her practicing certificate.
3. The application was made notwithstanding the due date was the 28th of February 2011.
4. Following receipt of the application the office of the Chief Registrar wrote by email and by letter dated 18th of May 2011 and said in paragraph 2:
"Given the lateness of the application, we are interested to know if you have made any appearance in any of the courts of Fiji since the expiry of your previous practising certificate on the 28th of February 2011"
the letter went on to seek, if the answer was in the affirmative, details of those appearances.
5. By letter dated the 24th May 2011 the Respondent wrote to the Chief Registrar detailing 8 occasions on which she had appeared in the High Court and in the Employment Tribunal.
6. These appearances were between 4th of March 2011 and the 13th of May 2011.
7. On the 10th June 2011 the General Manager Corporate Services, Telecom Fiji Limited wrote to the Chief Registrar High Court of Fiji acknowledging the oversight on the part of the Respondent to promptly renew her practicing certificate and asking that the matter be investigated taking account of her untarnished past.
8. A further letter was written to the Chief Registrar on the same date by the Respondent again referring to the appearances made and detailing the structure of the legal office within Telecom Fiji.
9. The allegations before the Commission are allegations relating to alleged appearances after the date of the correspondence to which I have referred.

THE EVIDENCE

10. There is before the Commission evidence on behalf of the Applicant by way of copies of head sheets from the Employment Tribunal, with respect to the alleged appearances on the 14th and 30th of June and on other occasions.

11. The head sheet for the 14th June 2011 shows what appears to be the word "Siteri" as appearing for the employer.
12. The head sheet for the 30th June 2011 has a similar notation.
13. I note that neither head sheet details the number of the matter or the parties to the matter.
14. Evidence was given on behalf of the Tribunal by the deputy Registrar of the Tribunal who also describes herself as been a clerk in the Tribunal and says that she was in the Tribunal on the 14th of June 2011 but not on the 30th of June 2011.
15. She says that it is her duty and practice to note on the list which has been tendered as [Ex A23] the name of the person appearing for the parties.
16. She says that at the conclusion of the hearings she then compares her list with the notations of the Chairman of the Tribunal to confirm their accuracy.
17. [Ex A23] being the list for the 14th June 2011 relevantly shows Matter 10 as being *ERT WC 70/2011 Joseph Waqanuivs. Telecom Fiji Limited* and on the right hand side near the words *Telecom Fiji Limited* is what appears to be "Siteri C".
18. The evidence of the witness is that this is a reference to the Respondent and she says that indicates that the Respondent appeared on that day.
19. The evidence before the Commission is that as these matters both the 14th June 2011 and 30th June 2011 were merely directions or mentions and no audio recording was made.
20. There is therefore no record other than that to which I have already referred.
21. On behalf of the Respondent evidence was given by the General Manager Human Resources of Telecom Fiji Limited Mrs Salaseini T Nadakuitavuki who said upon her being informed by senior management of the Respondent's situation she appointed a person from Human Resources to appear in matters before the Employment Tribunal she said this person was Ms FinauDrova.
22. She then identified email communications between the Respondent and Ms FinauDrova with respect to appearances before the Employment Tribunal on the 14th and 30th June

2011 with respect to a matter that in the emails is referred to as "Joe or Joseph Rosa".

23. There is then evidence before the Commission that Joe or Joseph Rosa is in fact the same person as the person referred to as Joseph Waqanui in Matter ERT WC 70/2011.

24. The series of emails show instructions being given by the Respondent to Ms FinauDrova and Ms Drova reporting back to the Respondent and copied to Mrs Nadakuitavuki.

EMPLOYMENT RELATION PROMULGATION

25. Section 229 of the Employment Relation Promulgation states

"(1) A party to a proceeding before the Tribunal or Court may—

(a) appear personally;

(b) be represented by a representative whom the Tribunal or the Court is satisfied has authority to act in proceedings; or

(c) be represented by a legal practitioner.

and may produce before the Tribunal or the Court witnesses, documents, books, and other evidence as the party thinks fit.

26. It is clear from this provision that a person appearing on behalf of a party such as Telecom Fiji Limited before the Employment Relations Tribunal need not be a legal practitioner that is need not be a person holding a practicing certificate pursuant to the provisions of the Legal Practitioners Decree.

STANDARD OF PROOF

27. The relevant standard of proof to be applied to disciplinary proceedings was considered at length by The Court of Final Appeal of the Hong Kong Special Administrative Region in *A Solicitor and The Law Society of Hong Kong* Final Appeal No. 24 of 2007 (Civil). There the court considered inter alia relevant authorities from the Privy Council, the High Court of Australia and the High Court of New Zealand (whose decision in *Z and Dental Complaints Assessment Committee*, [2007] NZAR 343, was subsequently confirmed by the Supreme Court of New Zealand [2008] NZSC 55).

28. The Privy Council in *Campbell v Hamlet* [2005] UKPC 19 held that the criminal standard of proof was to be applied in all disciplinary proceedings concerning the legal profession.

29. The High Court of Australia in *Rejtek v McElroy* (1965) 112 CLR 517 held that the civil standard of proof applied but said at paragraph 10:

"The "clarity" of the proof required where so serious a matter as fraud is to be found, is an acknowledgment that the degree of satisfaction for which the civil standard of proof calls may vary according to the gravity of the fact to be proved: see Briginshaw v Briginshaw (1938) 60 CLR 336 per Dixon J.."

30. And at paragraph 11 the court said:

"No matter how grave the fact which is to be found in a civil case, the mind has only to be reasonably satisfied and has not with respect to any matter in issue in such a proceeding to attain that degree of certainty which is indispensable to the support of a conviction upon a criminal charge: see Helton v Allen (1940) 63 CLR 691 per Dixon, Evatt and McTiernan JJ."

31. The Supreme Court of New Zealand in *Z v Dental Complaints Assessment Committee* [2008] NZSC 55 in applying the flexible application of the civil standard said at paragraph 116:

"We acknowledge the serious impact that adverse disciplinary decisions can have on the right of individuals to work in their occupation and on personal reputations. The flexible application of the civil standard will, however, give all due protection to persons who face such proceedings."

32. In *A Solicitor and The Law Society of Hong Kong* the Chief Justice at paragraph 116 said:

"In my view, the standard of proof for disciplinary proceedings in Hong Kong is a preponderance of probability under the Re H approach. The more serious the act or omission alleged, the more inherently improbable must it be regarded. And the more inherently improbable it is regarded, the more compelling will be the evidence needed to prove it on a preponderance of probability. If that is properly appreciated and applied in a fair-minded manner, it will provide appropriate approach to proof in disciplinary proceedings. Such an approach will be duly conducive to serving the public interest by maintaining standards within the professions and the services while, at the same time, protecting their members from unjust condemnation."

33. I am therefore of the opinion that the appropriate standard of proof to be applied is the civil standard varied according to the gravity of the fact to be proved, that is the approach adopted in amongst other places, Australia, New Zealand and Hong Kong.

CONCLUSION

34. In balancing the conflicting evidence as to whether or not the Respondent appeared before the Employment Tribunal on the 14th and 30th June 2011 in matters listed for mention on each occasion I am obliged to consider the words of the Chief Justice of Hong Kong in *A Solicitor and The Law Society*.

35. The act or omission alleged is indeed serious, it is the nub of the allegation against the Respondent.

36. I must then look as to whether or not it is inherently improbable.

37. Before the Commission is, as I have detailed, evidence that the Respondent was put on notice of the Applicant's investigation into her appearances before courts.


38. She responded to that investigation detailing the appearances she had made and her employer corresponded with the Chief Registrar and following this correspondence it is alleged that there were then these two further appearances by the Respondent.

39. It is therefore, in my opinion, to again use the words of the Chief Justice in *A Solicitor and The Law Society of Hong Kong*, inherently improbable and therefore the evidence needed to prove the essential fact in this matter, the appearance before the Tribunal, must be more compelling.

40. Applying that test I find that I cannot be satisfied that the Respondent in fact appeared before the Employment Tribunal as alleged on the 14th June 2011 and the 30th June 2011.

ORDERS

1. Counts 9 and 10 are dismissed.


JOHN CONNORS
COMMISSIONER



5 DECEMBER 2011