IN THE INDEPENDENT
LEGAL SERVICES COMMISSION

No. 001 of 2017

BETWEEN:

CHIEF REGISTRAR

Applicant

AND:

ASERI VAKALOLOMA

Respondent

Coram: Dr. T.V. Hickie, Commissioner

Applicant: Mr. T. Kilakila
Respondent: Ms. B. Malimali

Date of Hearing: 7th June 2017
Date of Judgment: 13th June 2017

JUDGMENT ON SANCTIONS

1. The offence - professional misconduct – *appearing without a valid practising certificate*

[1] This is a judgment as to what sanction/s should be imposed for the offence of professional misconduct whereby a legal practitioner appeared in the High Court on 1st March 2017 without a valid practising certificate. The practitioner's previous valid practising certificate had expired the day before, that is, on 28th February 2017.

[2] Even though the Commission endeavours to provide, as soon as practicable after a judgment has been handed down, copies to various stakeholders including the Fiji Law Society, due to the nature of this offence and issues that have been raised during the hearing of submissions, **I have asked the Acting Secretary of the Commission to ensure that a copy of this judgment is forwarded to the President of the Fiji Law Society for dissemination to her members as a matter of priority**. In particular, all legal practitioners in Fiji should make themselves aware as to the requirements set out in sections 42(1) and (2) of *the Legal Practitioners Act 2009* **in relation to applying for, as well as the obtaining of, their yearly practising certificates.**

[3] In this matter, the legal practitioner was charged with and pleaded guilty to one count of professional misconduct as follows:

'Count 1

ALLEGATION OF PROFESSIONAL MISCONDUCT: pursuant to Section 52(1), Sections 82(1)(a) and Section 83(1)(a) of the Legal Practitioners Act of 2009

PARTICULARS

ASERI VAKALOLOMA, *a Legal Practitioner being the sole proprietor of* ***VAKALOLOMA & ASSOCIATES*** *on the 1st day of March, 2017 appeared without a valid practicing [sic] certificate at the Lautoka High Court for Civil Case No. HBE 02 of 2016 between Peceli Gale v Raivotu Limited wherein the legal practitioner was counsel for the Plaintiff which is a contravention of* ***Section 52(1)*** *of the* ***Legal Practitioners Act of 2009*** *contrary to* ***Section 83(1)(a)*** *of the* ***Legal Practitioners Act of 2009*** *which in turn is a breach of* ***Section 82(1)(a)*** *of the* ***Legal Practitioners Act of 2009****.*

[4] Sections 82(1)(a) and 83(1)(a) of *the Legal Practitioners Act 2009* state:

> *'82.—(1) For the purposes of this Decree,* ***"professional misconduct" includes*** *–*
>
> *(a) unsatisfactory professional conduct of a legal practitioner, a law firm or an employee or agent of a legal practitioner or law firm,* ***if the conduct involves a substantial*** *or consistent* ***failure to reach or maintain a reasonable standard of competence and diligence****';*
>
> and
>
> *'83.—(1) Without limiting sections 81 and 82,* ***the following conduct is capable of being*** *"unsatisfactory professional conduct" or "****professional misconduct****" for the purposes of this Decree:*
> *...*
>
> *(a) conduct consisting of a contravention of this Decree ...'.*
> [My emphasis]

[5] In summary, **the offence is professional misconduct**. **The general particulars of the offence** are that on 1st March 2017, **the legal practitioner appeared** in the High Court at Lautoka with '*without a valid practising certificate'* which**,** as a breach of certain sections of the *Legal Practitioners Act 2009*, is professional misconduct. The question then is what are the relevant sections that were contravened as this will have a bearing when considering the range of sanctions to be imposed.

2. A clarification as the applicable section/s

[6] On the first return date of this application (being 5th June 2017), the only issue raised by Counsel for each party was whether the single count of professional misconduct (evidenced by appearing in court without a valid practising certificate) should continue to be heard as a separate application or joined with a later application filed by the Applicant Chief Registrar (ILSC Application No. 001 of 2017(A) renumbered as No. 004 of 2017) involving other allegations against the legal practitioner. I agreed with the oral submission of Counsel for the Respondent that the present count was separate and distinct from those other allegations and thus I set this application down for a plea in mitigation hearing.

[7] As I read the submissions filed by Counsel for the Applicant prior to the sanctions hearing on 7th June 2017, I was considering asking him to clarify as to whether the two sections 83(1)(a) and 82(1)(a) *'are to be read together as one offence, to be read separately as different offences, or as alternate offences'*, as was previously raised by me in ***Chief Registrar v Vosarogo*** and, therefore, whether the count was duplicitous. (See *Chief Registrar v Vilimone Vosarogo (AKA Filimoni WR Vosarogo,* Unreported, Independent Legal Services Commission, No. 002 of 2016, 6 February 2017, at [75].) I was also considering asking why section 52(1) of *the Legal Practitioners Act 2009* was included both as part of the offence of professional misconduct (together with sections 83(1)(a) and 82(1)(a)) as well as part of the particulars substantiating the offence of professional misconduct.

[8] As I read the submissions of Counsel for both parties shortly prior to the sanctions hearing on 7th June 2017, however, what became of greater concern to me was **how an alleged breach of section 52(1) of *the Legal Practitioners Act 2009* could be said to be both the basis for satisfying the civil offence of professional misconduct** (pursuant to both sections 83(1)(a) and 82(1)(a) of *the Legal Practitioners Act 2009* and thus punishable by the civil sanctions set out in 121(1)) **but also be a criminal offence and thus subject to the criminal penalty provisions set out in section 52(2)**. Surely, it could not be both a civil and criminal offence?

[9] As noted above, pursuant to section 83(1)(a) of *the Legal Practitioners Act 2009, '**conduct is** **capable of being** … **"professional misconduct"*** where it is ***'conduct consisting of a contravention of this Decree'***. Further, pursuant to section 82(1)(a) of the Act, *'"professional misconduct" includes – (a) unsatisfactory professional conduct of a legal practitioner … **if the conduct involves a substantial … failure** to reach or maintain a reasonable standard of competence and diligence'.*

[10] Section 52(1) of *the Legal Practitioners Act 2009* states:

> *'Practising without a certificate*
>
> *'52.—(1) **A person shall not**, unless that person is the holder of a current practising certificate—*
> *(a) **practice or act as a legal practitioner** of the Fiji Islands or as a Notary Public;*
> *(b) **pretend to be entitled to practise as a legal practitioner** of the Fiji Islands or as a Notary Public; or*
> *(c) draw or prepare any instrument relating to any real or personal estate or property or any legal proceeding or grant of probate or letters of administration, whether as agent for any person or otherwise, unless he or she proves that the act was not done for or in expectation of fee, gain or reward, either direct or indirect.'*
> [My emphasis]

[11] The penalty for a breach of section 52(1) is set out in section 52(2) as follows:

> *'(2) **A person who fails to comply with a provision of this Section shall be guilty of an offence** and shall be **liable to a fine not exceeding $5000.00** and for a second or subsequent offence, to **imprisonment for any period not exceeding one year** in addition to or in substitution for such fine.'*
> [My emphasis]

[12] By way of contrast, sections 42(1) and (2) of *the Legal Practitioners Act 2009* state:

> *'Application for and issue of practising certificates*
>
> *42. —(1) **Every person admitted to practice as a practitioner shall** before commencing practice and thereafter, while continuing in practice, **during the month of January in each and every year apply for and obtain from the Registrar a certificate** (in this Decree*

known as a practising certificate) ***certifying that that person is entitled to practice as a legal practitioner*** *according to the laws of the Fiji Islands. The certificate shall be issued by the Registrar. "Practice" includes employment as a legal practitioner, whether in private practice or otherwise.*
(2) ***A law firm shall not be entitled to operate*** *in the practice of law* ***unless*** *all partners or* ***the sole practitioner of that law firm have been issued a practising certificate*** *by the Registrar in accordance with this Part.'*
[My emphasis]

[13] **Apart from stating that a legal practitioner shall apply for and obtain a practising certificate in January of each year** and that a law firm shall not be entitled to operate unless the partners or sole practitioner have a practising certificate, **there is no mention of any sanctions in section 42 itself compared with the specific sanctions set out in section 52(2).** That is because, **in my view, section 52 is a criminal offence** and section 52(2) sets out the penalty that is to be applied by a criminal court for a breach of that section. **On the other hand, sections 42(1) and (2), are civil offences, the alleged breaches of which are heard as proceedings before this Commission and, if proven, sanctions are applied in accordance with the powers of the Commission set out in section 121(1) of *the Legal Practitioners Act 2009*.**

[14] For the record, the sanctions that may be imposed by the Commission (such as for a breach of sections 41(1) and/or (2)), are as follows:

'Powers of the Commission on hearing

121.—(1) ***If, after completing the hearing of an application for disciplinary proceedings*** *against a legal practitioner or law firm or any employee or agent of a legal practitioner or law firm pursuant to this Decree,* ***the Commission is satisfied that the legal practitioner or law firm*** *...* ***has engaged in professional misconduct*** *...* ***the Commission may make one or more of the following orders***—

(a) an order that the name of the legal practitioner or the partner or partners of the law firm be struck from the roll;
(b) an order directing that the law firm cease to operate as or engage in legal practice;
(c) an order that the practising certificates of the legal practitioner or the partner or partners of the law firm be cancelled or suspended for such period as the Commission deems fit;

(d) an order that the practising certificate of the legal practitioner or the partner or partners of the law firm not be issued for such period as the Commission deems fit;
(e) an order that the legal practitioner or the partner or partners of the law firm must not apply for a practising certificate for such period as the Commission deems fit;
(f) an order that imposes conditions on the issued or to be issued practising certificates of the legal practitioner or the partner or partners of the law firm;
(g) an order reprimanding the legal practitioner or the partner or partners of the law firm;
(h) an order that the legal practitioner or the partner or partners of the law firm be removed from the roll of Notaries public;
(i) an order that the legal practitioner or the partner or partners of the law firm pay a fine or penalty to either the Commission or Registrar, of such sum not exceeding $500,000.00*;*
(j) an order requiring the legal practitioner or the partner or partners of the law firm to pay compensation to any complainant of such sum as directed by the Commission;
(k) an order directing the legal practitioner or the partner or partners of the law firm to make ledgers, books of accounts records, deeds, files and other documents relating to the practitioner's practice available for inspection at such times and by such persons as are specified in the order;
(l) an order directing the legal practitioner or the partner or partners of the law firm to make reports on their legal practice in such manner and at such times and to such persons as are specified in the order;
(m) an order directing the legal practitioner or the partner or partners of the law firm to comply with conditions, including attendance at continuing legal education programmes and other educational programmes and seminars relating to legal education, practice management and other related topics in respect of the conduct of legal practice;
(n) an order that the legal practitioner or the partner or partners of the law firm engage in legal practice under supervision, upon such terms and such periods as stated in the order;
(o) an order that the legal practitioner or the partner or partners of the law firm do or refrain from doing something in connection with their legal practice;
(p) an order that the legal practitioner or the partner or partners of the law firm stop accepting instructions as a notary public for such period as the Commission deems fit;
(q) an order directing that any fees or costs paid to the legal practitioner or law firm by any person in relation to the subject matter of the disciplinary proceedings be reimbursed by the legal practitioner or law firm to such person;
(r) such other orders as may be provided for in the rules of procedure made pursuant to this Decree.'

[15] Further, section 122 of the *Legal Practitioners Act 2009* states:

> ***'Orders of the Commission***
>
> *122. —(1) The Commission must give a written copy of any orders made by the Commission in an application for disciplinary proceeding to:*
> *(a) the legal practitioner, or the partner or partners of the law firm, against whom the application for disciplinary proceedings was made;*
> *(b) the Registrar; and*
> *(c) the Attorney-General.*
> *(2)* ***The Commission must, within 14 days of an order being made, file the order in the High Cour****t.*
> *(3)* ***Once an order made by the Commission is filed in the High Court under subsection (2), the order becomes an order of the High Court, and may be enforced accordingly in accordance with the Rules of the High Court****.'*
> [My emphasis]

[16] Therefore, **any sanction imposed by the Commission is a civil penalty** order under section 121 which is then filed with the High Court such that the Commission's *'order becomes an order of the High Court, and may be enforced accordingly in accordance with the Rules of the High Court'.* Even though section 2 of the *'Interpretation'* section of the *Legal Practitioners Act 2009* does not define "High Court" or "Rules of the High Court", it is clear, in my view, that this means the High Court Civil Registry and the Rules of the High Court applicable to civil proceedings. In that regard, I also note the ***Practice Direction No.1 of 2009*** issued by Commissioner Connors on 22nd October 2009, which states in part:

> *'Pending the formulation of rules to the contrary the Court of Appeal rules [Cap 12] shall apply as if* ***the proceedings before the Independent Legal Services Commission were civil proceedings before the High Court****.'*
> [My emphasis]

[17] **Therefore, proceedings before the Commission are civil 'disciplinary proceedings' where the onus upon the applicant is to prove professional misconduct on the civil onus, that is, on the balance of probabilities. By contrast, a breach of section 51(1) would be brought in a criminal court and, if proven beyond a reasonable**

doubt, criminal penalties (including imprisonment for a second or subsequent offence) can apply.

[18] **Following the finalisation of any criminal proceedings in a criminal court, the Chief Registrar can make application before this Commission for the legal practitioner to be dealt with for professional misconduct as a civil offence pursuant to section 83(1)(d)(i)**, the particulars of the conduct being '*a finding of guilt or conviction for: (i) a criminal offence'* that has taken previously in a criminal court.

[19] **Alternatively, without the need for any criminal proceedings, an application can be filed by the Chief Registrar with the Commission alleging a breach by the legal practitioner of sections 42(1) and/or 42(2), and if that is proven on the balance of probabilities, then one of the multitude of possible civil sanctions can be imposed pursuant to section 121(1).**

[20] In addition, separate to making any application to the Commission alleging professional misconduct, the Chief Registrar has the power, pursuant to s.44(1)(b) of the *Legal Practitioners Act 2009* to *'cancel a practising certificate … if … the holder of such certificate … (b) has been convicted in the Fiji Islands or elsewhere of an offence which involves moral turpitude or fraud on his or her part'*. The legal practitioner can then appeal that decision of cancellation by applying pursuant to section 46 of the *Legal Practitioners Act 2009* to a *'court or judge … who may make such order in the matter, excluding any order for damages or costs against the Registrar or the State'*.

[21] Therefore, in light of the above, before I proceeded to hear the plea in mitigation in the present matter, I sought the views of Counsel for each party as to whether or not they agreed with my understanding that section 42 of the *Legal Practitioners Act 2009* was the applicable section that had been breached by the Respondent legal practitioner (when he appeared in the High Court at Lautoka on 1st March 2017 without a valid practising

certificate) and that conduct amounted to professional misconduct pursuant to section 83(1)(a) of *the Legal Practitioners Act 2009,* being *'conduct consisting of a contravention of this Decree'* and also pursuant to section 82(1)(a) of *the Legal Practitioners Act 2009* '*conduct [which] involves a substantial … failure to reach or maintain a reasonable standard of competence and diligence'*.

[22] Counsel for the Applicant Chief Registrar noted my view, however, (as I understood his submission) that previous applications before the Commission involving a practitioner allegedly practising without a valid practising certificate were based upon a breach of section 52(1) and, therefore, he was of the view that section 52(1) was still the section applicable to the current matter. Counsel for the Respondent Legal Practitioner, on the other hand, (whilst noting that she would be surprised if many practitioners realised the effect of section 42(1) requiring them to apply and obtain in January of each year a practising certificate), agreed with my view but, despite the problems with the count, maintained the plea of guilty to the offence of professional misconduct on behalf of her client.

[23] Having viewed the Commission's records over the past weekend, it would seem that the confusion as to what is the actual civil offence for appearing in a court without a valid practising certificate and what should be particularised as the contravention of the *Legal Practitioners Act 2009* said to amount to *"unsatisfactory professional conduct"* or *"professional misconduct"* pursuant to section 83(1)(a), may well have arisen from when the first such case alleging such misconduct was lodged and heard before the Commission in 2011. In ***Chief Registrar v Cevalawa*** (Unreported, Independent Legal Services Commission, No. 006 of 2011, 5 December 2011, Commissioner Connors; Paclii: [2011] FJILSC 15, <http://www.paclii.org/fj/cases/FJILSC/2011/15.html>, Commissioner Connors noted at [17]-[18] and [22]:

'[17] The Applicant highlights that ***the provisions of section 52 of the Legal Practitioners Decree creates a criminal offence*** *for a person practicing [sic] without a practicing [sic] certificate.*

[18] ***The proceedings before this Commission*** *are not criminal proceedings and* ***are allegations of conduct contrary to section 83(1)(a) of the Legal Practitioners Decree*** *that is conduct that amounts to unsatisfactory professional conduct.*

...

[22] ***The dominant purpose of disciplinary proceeding[s] is to protect the community*** *as opposed to punishing the legal practitioner or other professional.'*
[My emphasis]

[24] Despite Commissioner Connors explaining in *Cevalawa* that the offence for appearing in court without a practising certificate is *unsatisfactory professional conduct* (or professional misconduct) *'contrary to section 83(1)(a) of the Legal Practitioners Decree'*, (which, as the section states, is '*conduct consisting of a contravention of this Decree')*, applications thereafter continued to be lodged with the Commission alleging a breach of both section 52 as well as section 83(1)(a) and were dealt with accordingly. Indeed, in an ex tempore judgment in ***Chief Registrar v Naliva*** (Unreported, Independent Legal Services Commission, No. 004 of 2011, 5 December 2011, Commissioner Connors; PacLII: [2011] FJILSC 7, <http://www.paclii.org/fj/cases/FJILSC/2011/7.html>), delivered the same day as *Cevalawa*, Commissioner Connors noted at [15]-[17]:

'[15] The need for there to be a licensing requirement with respect to professionals including legal practitioners is obvious. The Legal Practitioners Decree sets up a regime to facilitate that occurring.

[16] ***The Legal Practitioners Decree creates a criminal offence for a person who practices without a practicing certificate and prescribes a monetary penalty for that offence.***

[17] ***Indeed it is equally obvious that if there were not a regime that was properly monitored and managed that the control of the profession would disappear*** *and the consequences of that would be that* ***the community, would not be protected which is the intent of the licensing requirements*** *of legislation such as the Legal Practitioners Decree.'*
[My emphasis]

[25] The most recent judgment of the Commission involving a valid practising certificate issue (prior to the present matter) was in ***Chief Registrar v Pal*** (Unreported, Independent Legal Services Commission, No. 012 of 2014, 23 October 2015, Justice Madigan; Paclli: [2015] FJILSC 3, <http://www.paclii.org/fj/cases/FJILSC/2015/3.html>). In that application, the legal practitioner who was based in Sydney, Australia, had been attempting to establish a branch office in Fiji and was charged with *'professional misconduct: contrary to* ***section 42(2)*** *and 83(1)(a) of the Legal Practitioners Decree 2009'.* [My emphasis]

[26] I also note that by way of comparison, trust account matters have been dealt with before the Commission as professional misconduct pursuant to sections 82 or 83 of the *Legal Practitioners Decree 2009* and not section 28(1) of the *Trust Accounts Act 1996* (which is the criminal sanctions provision) wherein it is stated:

'Offences and penalties

> ***28. - (1) A person who-***
> *(a)* ***contravenes or fails to comply with any provision of this Act is guilty of an offence*** *against this Act and* ***is liable on conviction to a penalty of $3,000****; or*
> *(b) with intent to defraud contravenes or fails to comply with any provision of this Act is guilty of an offence against this Act and is liable on conviction to a penalty of $10,000 or to imprisonment for 3 years.'*
> [My emphasis]

[27] In summary, it is my view that the Respondent is now being sanctioned before the Commission for *professional misconduct* as follows:

(1) Pursuant to section 83(1)(a) of *the Legal Practitioners Act 2009*, for appearing in court without holding a valid practising certificate which is '*conduct consisting of a contravention of this Decree', that is:*

(i) it is a contravention of section 42(1) to not apply and obtain in January of each year a practising certificate; and

(ii) it is also **a contravention of section 42(2) as '*not [being]… entitled to operate'* as a law firm**, *'unless … the sole practitioner … [has] been issued a practising certificate';* and

(2) Pursuant to section 82(1)(a) of *the Legal Practitioners Act 2009*, **the contravention of both sections 42(1) and (2)** is '*conduct [which] involves a substantial … failure to reach or maintain a reasonable standard of competence and diligence'* and thus also "professional misconduct".

[28] **Therefore, the range of sanctions that I will now consider whether to impose in this matter will be in accordance with section 121(1) of *the Legal Practitioners Act 2009* and not the criminal penalties set out in section 52(2).**

3. Factual background to the offence

[29] This matter appears to have come to light when, on 1st March 2017, a lawyer from the Respondent's firm appeared in an ongoing trial in Suva in Criminal Case No. HAC 56 of 2014 without his principal. This is the subject of other applications before the Commission.

[30] On the same date, that is, 1st March 2017, the Respondent legal practitioner appeared in the High Court at Lautoka as Counsel for the petitioner in a winding up petition (High Court Civil Case No. HBE 02 of 2016).

[31])n 9th march 2017, the Chief Registrar wrote to the Respondent legal practitioner seeking details to the Respondent's alleged appearance on 1st March 2017. The Respondent replied on 12th March 2017 confirming his appearance for which he provided the following explanation at paragraphs [3.3]-[3.4] of his letter:

> *'3.3 It is admitted that I did appeared [sic] before the Lautoka High Court on the 1st day of March 2017, before His Lordship Justice Sapuvida in the Winding Up Action No HBE No. 2 of 2106. To be honest, I admit that I totally forgotten that my Practising [sic] Certificate had expired on 28th February 2017.*
>
> *3.4 As usual, for my matters in the West, I usually guided by my Diary, in this case, I had to travel to Nadi on the afternoon of 28th February 2017, slept at Nadi and rushed to Lautoka High Court in the morning at 9.30am to attend to the Lautoka High Court matter … I honestly forget that my Practicing [sic] Certificate has expired.'*
>
> [My emphasis]

[32] The Applicant then filed on 9th May 2017 the current application before the

Commission returnable on 5th June 2017, alleging professional misconduct by the Respondent for his having appeared on 1st of March 2017 in the High Court at Lautoka without a valid practising certificate.

[33] On the first return date of this matter before the Commission, Counsel appearing on behalf of the Respondent legal practitioner advised that she had been instructed to enter a plea of guilty to the single count. The matter was then set down for a sanctions hearing. Orders were then made for Counsel for each party to file written submissions, noting that I would be considering the 5th edition of the *'Guidance Note on Sanctions'* published by the Solicitors Disciplinary Tribunal of England and Wales on 8th December 2016 as a guide as to what sanction/s should be imposed in this matter. (See <http://www.solicitorstribunal.org.uk/sites/default/files-sdt/GUIDANCE%20NOTE%20ON%20SANCTIONS%20-%205TH%20EDITION%20-%20DECEMBER%202016.pdf>.) I then set the matter down for a "sanctions" hearing at 1.30 pm on 7th June 2017.

[34] As I have noted in previous sanctions judgments that have come before me in the Commission, in the 5th edition of the ***'Guidance Note on Sanctions'***, the Tribunal has explained (at page 6, paragraph [7]) that its 'approach to sanction' is based upon the three stages set out in ***Fuglers and Others v Solicitors Regulation Authority*** **[2014] EWHC 179 Admin** (per The Honourable Mr Justice Popplewell, at paragraph [28]) (see <http://www.bailii.org/ew/cases/EWHC/Admin/2014/179.html>). That is:

> *'The first stage is* ***to assess the seriousness of the misconduct****. The second stage is* ***to keep in mind the purpose for which sanctions are imposed by such a tribunal****. The third stage is* ***to choose the sanction which most appropriately fulfils that purpose for the seriousness of the conduct in question****.'*
> *[My Emphasis]*

[35] This judgment, therefore, has taken into account the written submissions filed by Counsel for each party, as well as the further oral submissions made by each of them before me at the sanctions hearing on 7th June 2017.

3. Applying the approach to sanction based upon the three stages in *Fuglers*

(1) THE FIRST STAGE – 'to assess the seriousness of the misconduct'

[36] In assessing the seriousness of the misconduct, the 5th edition of the *Guidance Note on Sanctions* has explained at paragraph [16] as follows:

> *'The Tribunal will assess the seriousness of the misconduct in order to determine which sanction to impose.* ***Seriousness is determined by a combination of factors****, including:*
> - *the respondent's* ***level of culpability*** *for their misconduct.*
> - ***the harm caused*** *by the respondent's misconduct.*
> - *the existence of* ***any aggravating factors****.*
> - *the existence of* ***any mitigating factors****.'*
>
> [My emphasis]

(a) 'The respondent's level of culpability for their misconduct'

[37] Counsel for the Applicant Chief Registrar submitted in response (*'Submissions on Penalty'*, 6th June 2017, page 2, paragraphs [4]-[8] and [10]) that:

> *'[4] The Respondent has pleaded guilty to a charge of professional misconduct which is a more serious offence than unsatisfactory professional conduct.*
>
> *[5] The Respondent is a senior practitioner in Fiji having been admitted to the Fiji Bar on 13th September 2002. He therefore, has been in active practice for 15 years.*
>
> *[6] The Respondent had a responsibility to ensure that he was the proper holder of a valid practicing [sic] certificate by 1st March 2017, before acting in the capacity of a legal practitioner, which included making any appearance before any court of law.*
>
> *[7]* ***It is disturbing that the Respondent despite his years of experience in legal practice, failed to take consciousness of the fact that he needed to apply for the renewal of his practicing [sic] certificate well in advance before the expiry date and more alarming that he still failed to realize that on the said date, he was without a valid practicing [sic] certificate.***
>
> *[8] The Respondent, as principal and sole proprietor of his law firm was responsible for the legal and administrative operations of his practice. As such,* ***he was obligated to obtain and hold a valid practicing [sic] certificate in order to maintain his firm and continue to act in the capacity of a legal practitioner in Fiji.***
>
> *...*
>
> *[10] Consequently, in light of the Respondent's failure, members of the public would lose confidence in the legal profession as members of public engage the services of a law firm or legal practitioner with the expectation that the legal practitioner or firm adheres to established forms of procedure which underpin the regulation of the legal fraternity, and ensure the smooth*

operation of the court process in Fiji, which ultimately benefits persons who access the justice system.'
[My emphasis]

[38] According to Counsel for the Respondent in her written submissions (*'Mitigation and Sentencing Submissions'*, 7th June 2017, page 2, at paragraph [5]), paragraphs 7-10 of the above submissions made by Counsel for the Applicant Chief Registrar should be disregarded. I agree that paragraph 9 of those submissions (in that they refer to the disruption that the Respondent's non-appearance caused to both the court and the Respondent's clients in another matter then continuing in the High Court at Suva) are the subject of a different application and are irrelevant to the present charge. I do believe, however, that paragraphs 7, 8 and 10 of the above submissions of Counsel for the Applicant are relevant to the present application and, hence, why I have reproduced them in this judgment.

[39] In relation to the serious of the offence, Counsel for the Respondent legal practitioner noted in her *'Mitigation and Sentencing Submissions'*, on page 4, at paragraph [5], (which submissions were not disputed by Counsel for the Applicant at the sanctions hearing on 7th June 2017) that:

'Mr. Vakaloloma had fulfilled most requirements prior to February 2017, especially:

- *The 10 CLE points which were obtained in September 2016*
- *The issuance of an Audited Trust Account Certificate by Naiveli & Co.'*

[40] Counsel for the Respondent further submitted (at page 6, paragraph [25]):

*'**In determining the seriousness in this case**, it is submitted that whilst Mr. Vakaloloma is a practitioner of over a dozen years standing and this mistake was one that could have been easily avoided, **it was one that is nevertheless common**.'*
[My emphasis]

[41] **Applying the criteria set out in the 5th edition of the '*Guidance Note on Sanctions'* on culpability, I have assessed the Respondent legal practitioner's level of culpability in this matter as follows**:

(i) 'The respondent's motivation for the misconduct'

- I accept the submission of Counsel for the Respondent (*'Mitigation and Sentencing Submissions'*, 7th June 2017, page 4, paragraph [15]),

that the misconduct occurred as follows:

> *'On 23rd February 2017 to 10th May 2017 Mr Vakaloloma was involved in a High Court Trial … Because of his involvement, he instructed his office to ensure Application for renewal of his practicing [sic] certificate is to be made out before the 28th February 2017.*
> *Note from* ***his Application for renewal was signed by Mr Vakaloloma on the 27th February 2017****.* ***This was left entirely to his office to get it witnessed and lodged*** *with LPU, unfortunately this was left on his table while he attended to the trial. Only after he was told that he had no Practicing [sic] Certificate, he checked and took it to a Commissioner for Oath on 2nd of March 2017 to be witnessed.'*
> [My emphasis]

- I also accept the submission of Counsel for the Respondent (page 4, paragraph [28]):

> *'In relation to motivation for the conduct,* ***there was no evil motive*** *or malintent [sic]. Mr Vakaloloma left for Lautoka on 28/02/1 [sic] and appeared on 01/03/17.'*
> [My emphasis]

(ii) 'Whether the misconduct arose from actions which were planned or spontaneous'

- I accept the submission of Counsel for the Respondent (at page 4, paragraph [15]) wherein she has titled the misconduct as an *'unfortunate happening'*, however, this was because the Respondent had "left it to the last minute" so to speak to apply for and obtain a valid practising certificate.
- By applying at the end of February 2017, the conduct was clearly in breach of section 42(1) that requires '*a practitioner* ***shall*** *…* ***during the month of January*** *…* ***apply for and obtain*** *from the Registrar … a practising certificate'.* Further, the conduct was also clearly in breach of section 42(2) requiring that '*a* ***law firm shall not be entitled to operate*** *… unless … the sole practitioner … [has] been issued a practising certificate'.*
- It is of **serious concern** that the Respondent seems to have been oblivious to the requirements of both sections 42(1) and 42(2), that is, **he SHALL apply and obtain during January of each year** his practising certificate and that **he SHALL NOT operate his firm unless he has been issued with a practising certificate**.

(iii) 'The extent to which the respondent acted in breach of a position of trust'

- The breach involved here was that the Respondent appeared in the High Court at Lautoka without a valid practising certificate – **it is a breach of trust of the judge before whom he appeared as a presiding judge should not have to ask each and every practitioner whether they hold a valid practising certificate when announcing their appearance**. Instead, an appearance is taken on trust that the practitioner holds a valid practising certificate.
- In addition, **it is a breach of trust of his client who would expect that their lawyer held a valid practising certificate so as to be able to appear in court and argue their case. It is why the legal practitioner has been retained by the client.**

(iv) 'The extent to which the respondent had direct control of or responsibility for the circumstances giving rise to the misconduct'

- **I do accept the submissions of Counsel for the Chief Registrar cited above that the Respondent had direct control of and responsibility for the circumstances giving rise to the misconduct demonstrated by the following:**
  (1) The Respondent is a senior practitioner in Fiji of 15 years Call;
  (2) **It was the Respondent's sole responsibility** '*as the principal and sole proprietor of his law firm was responsible for the legal and administrative operations of his practice … **in order to maintain his firm and continue to act in the capacity of a legal practitioner** in Fiji'*;
  (3) The Respondent *'failed to take consciousness of the fact that **he needed to apply for the renewal of his practising certificate well in advance before the expiry date** and … still failed to realise that on the said date, he was without a valid practicing certificate'*.

(v) 'The respondent's level of experience'

- The Respondent legal practitioner was admitted to the Fiji Bar in

2002. Therefore, he has been a legal practitioner for nearly 15 years.

(vi) 'The harm caused by the misconduct'

- I note that, arguably, the harm caused was only for a single day when the Respondent appeared on 1st March 2017 with a valid practising certificate.
- I am concerned, however, that it is also arguable that had it not been for the vigilance of other persons the harm may well have gone unnoticed and continued for an extended period.
- Further, it was only by good fortune that the matter proceeded in the High Court at Lautoka on 1st March 2017 and objection was not raised by Counsel appearing for the other parties as to the legal appearance on behalf of the petitioner causing the matter to be adjourned and probably wasted costs ordered.

(vii) 'Whether the respondent deliberately misled the regulator (Solicitors Regulation Authority v Spence [2012] EWHC 2977 (Admin))'

- I have not been provided with any evidence that the Respondent legal practitioner deliberately misled the regulator.

(b) 'the harm caused by the respondent's misconduct'

[42] I have noted the submission of Counsel for the Chief Registrar cited above (*'Submissions on Penalty'*, 6th June 2017, page 2, paragraph [10]) that '*members of the public would lose confidence in the legal profession as'* they *'engage the services of a law firm or legal practitioner with the expectation that the legal practitioner or firm adheres to established forms of procedure'.*

[43] According to Counsel for the Respondent ('*Mitigation and Sentencing Submissions'*, 7th June 2017, page 7, at paragraph [29]):

> *'In relation to the harm caused by his misconduct, there was no harm done to the court or to his client. The harm so far has been to his reputation as it made the news, including print an television.'*

[44] I disagree with the above submission. I note that this was a winding up application involving three Counsel: the Respondent legal practitioner

appearing for the Petitioner, Counsel appearing for the Respondent to the winding up application and Counsel appearing for the Official Receiver. After oral argument, the High Court at Lautoka made Orders as per the Resolution of the Official Receiver, however, one can only wonder what would have happened if an objection had been raised by Counsel for the Respondent had they had been aware that Counsel for the petitioner was ineligible to appear. Where would this have left the Petitioner? (See *'Application'*, dated 5th May 2017, Doc.B3, 'Orders by Justice Sapuvida in HBE 0022/16 highlighting Respondent's appearance on 1st March 2017', pp. 13-14.) Only by good fortune, '*the impact of the respondent's misconduct upon those directly or indirectly affected by the misconduct'* has been minimal, however, there is the harm caused to the reputation of the legal profession.

[45] **Applying the criteria set out in the 5th edition of the *'Guidance Note on Sanctions'*, I have assessed *'the harm caused by the misconduct'* of the Respondent legal practitioner as follows**:

(i) 'the impact of the respondent's misconduct upon those directly or indirectly affected by the misconduct, the public, and the reputation of the legal profession. The greater the extent of the respondent's departure from the "complete integrity, probity and trustworthiness" expected of a solicitor, the greater the harm to the legal profession's reputation'

- I have already noted above that according to Counsel for the Respondent legal practitioner ('*Mitigation and Sentencing Submissions'*, 7th June 2017, page 6, paragraph [25]) *'whilst ... this mistake was one that could have been easily avoided,* ***it was one that is nevertheless common****'.*
- If that submission is correct, then it provides another reason as to the potential harm caused by such misconduct and reinforces the submission of Counsel for the Applicant Chief Registrar, that is, that '*members of the public would lose confidence in the legal profession'.* Indeed, while I note the submission of Counsel for the Respondent legal practitioner as to the harm '*to his [the legal practitioner's] reputation'* in that *'it made the news, including print an television',* **surely it must also affect '*the reputation of the legal***

profession' **generally**.

- Balanced against that I do note the further submission of Counsel for the Respondent legal practitioner (page 6, paragraph [26]):

> *'To put that submission in context, in the past, it has been the Business License [sic] that has held up the application of PCs in the past. In one particular year, possibly 2013 or 2014, practitioners were issued Practising Certificates even though they did not have business licenses [sic] due to a problem with the Suva City Council. The Practising Certificates were issued anyway and upon receipt of their PCs, practitioners duly took copies in to the LPU. Whilst this does not excuse the Respondent, it is merely to show the Commission that the LPU was flexible and took into account human frailties in the past.'*

- Although this submission was not addressed by Counsel for the Applicant Chief Registrar in his oral submissions at the sanctions hearing on 7th June 2017, **I am not sure that he really needed to do so as it carries, in my view, no weight**;
- Whilst I might understand the sentiments that were meant to be conveyed in this submission (including perhaps some underlying frustration as to a perceived inflexibility being applied to human frailties), **such submissions, without more, are not evidence**;
- **Also, this would appear to have been the granting of a more general amnesty to practitioners due to circumstances beyond their individual control – something far different than what has occurred in the present matter.**

(ii) 'the extent of the harm that was intended or might reasonably have been foreseen to be caused by the respondent's misconduct'

- Although there has been no allegation or finding of dishonesty against the Respondent legal practitioner, '*the extent of the harm that … might reasonably have been foreseen to be caused by the respondent's misconduct',* particularly on the winding up application, is of concern. More generally, I agree with Counsel for the Applicant Chief Registrar having practitioners appear without valid practising certificates would cause the '*public … [to] lose confidence in the legal profession'.*

(c) 'The existence of <u>any aggravating factors'</u>

[46] According to Counsel for the Applicant Chief Registrar (*'Submissions on Penalty'*, 6th June 2017, page 3, paragraph [13]):

> *'The Respondent has been practicing [sic] for a number of years and is well aware of the requirement to possess a valid practicing [sic] certificate by the 1st day of March in every year … an expectation that is warranted even more from a senior practitioner of his caliber and one who is also the sole proprietor and principal of a law firm.'*

[47] Counsel for the Applicant Chief Registrar has also included as aggravating factors in his submissions at paragraphs [14]-[15] referring to the disruption that the Respondent's non-appearance for a day caused to both the court and the Respondent's clients in a criminal trial in the High Court at Suva. According to Counsel for the Respondent in her written submissions in reply (*'Mitigation and Sentencing Submissions'*, 7th June 2017, page 2, paragraph [6]), *'paragraphs 14 and 15 should be disregarded as this charge has nothing to do with HAC 56/2014*'. I agree.

[48] **The 5th edition of the *'Guidance Note on Sanctions'* includes some nine criteria (though not an exhaustive list) of *'aggravating factors'*. Arguably, three of them might be applicable**:

(i) 'misconduct where the respondent knew or ought reasonably to have known that the conduct complained of was in material breach of obligations to protect the public and the reputation of the legal profession'

- I accept that the Respondent legal practitioner ought reasonably to have known that such misconduct '*was in material breach of obligations to protect the public and the reputation of the legal profession'*.

(ii) 'previous disciplinary matter(s) before the Tribunal where allegations were found proved'

- Counsel for the Applicant in his oral submissions at the sanctions hearing on 7th June 2017, raised the fact that the Respondent legal practitioner had been "struck off" the roll of legal practitioners in Naru for two counts of professional misconduct allegedly tampering with a prosecution witness, however, I was not provided with a copy of any judgment.
- Counsel for the Respondent legal practitioner in her oral submissions

in response, submitted that the Naru matters are irrelevant to the present matter.

- Counsel for the Applicant in reply submitted that the previous offences from Naru are relevant in that **the Respondent legal practitioner *'is not a stranger to disciplinary proceedings'*. I agree**.

(iii) 'the extent of the impact on those affected by the misconduct' -

- Counsel for the Applicant noted the impact of the wider harm from a regulatory perspective. On the other hand, Counsel for the Respondent legal practitioner stated that this was a technical breach.

(d) 'The existence of any mitigating factors'

[49] Counsel for the Applicant Chief Registrar in his *'Submissions on Penalty'*, 6th June 2017, page 2, paragraphs [11]-[12], set out two mitigating factors:

> *'[11] The Respondent entered an **early guilty plea** at first call of the matter, thereby saving the Commission time and resources'.*
> *[12] This is **the first time** that the Respondent is being faced with disciplinary proceedings **before the Commission**.'*
> [My emphasis]

[50] Counsel for the Respondent legal practitioner in her written *'Mitigation and Sentencing Submissions'* dated 7th June 2017, listed (at pages 2-3, paragraphs [8]-[13]) various matters in relation to *'Mitigation' 'Personal & Family Circumstances'*.

[51] According to the 5th edition of the *'Guidance Note on Sanctions'* (page 10), '***matters of purely personal mitigation are of no relevance in determining the seriousness of the misconduct'***. Such matters, however, ***'will be considered*** ... ***when determining the fair and proportionate sanction'*** to be applied. I have done the same.

[52] **Applying the criteria discussed in the 5th edition of the *'Guidance Note on Sanctions'*, I have assessed *'the existence of any mitigating factors'* as follows:**

(i) 'misconduct resulting from deception or otherwise by a third party (including the client)'

Not applicable.

(ii) 'the timing of and extent to which any loss arising from the misconduct is made good by the respondent'

Not applicable.

(iii) 'whether the respondent voluntarily notified the regulator of the facts and circumstances giving rise to misconduct'

Although this matter came to light via a third party, I do note that when contacted by the regulator, the legal practitioner readily admitted the breach.

(iv) 'whether the misconduct was either a single episode, or one of very brief duration in a previously unblemished career'

- It was a single day, 1st March 2017.
- As for whether this was '*a previously unblemished career'*, I do note the oral submission of Counsel for the Applicant at the sanctions hearing (previously cited above) that the offences from Naru are relevant in that the Respondent legal practitioner *'is not a stranger to disciplinary proceedings'*.

(v) 'genuine insight, assessed by the Tribunal on the basis of facts found proved and the respondent's evidence

Yes.

(vi) 'open and frank admissions at an early stage and/or degree of cooperation with the investigating body' -

Yes.

(2) <u>THE SECOND STAGE</u> – 'to keep in mind the purpose for which sanctions are imposed'

[53] The 5th edition of the *'Guidance Note on Sanctions'* does not explicitly discuss this stage. An insight, however, has been provided by Popplewell J in *Fuglers* at paragraphs [30]-[32],

> *32. As this and other authorities make clear, although two elements of the sanction's purpose may be to punish the solicitor in question and to deter repetition of similar or other misconduct by him, these are not the main purposes.* ***The primary purpose of the sanction is to deter others and uphold the reputation of the profession*** *(see e.g.* ***Solicitors Regulation Authority v Anderson*** *[2013] EWHC 4021 (Admin) per Treacy LJ at [72]). In determining sanction the tribunal will properly have in mind* ***the message which the sanction will send to other solicitors for the purposes of promoting and maintaining the highest standards by members of the profession, and the high standing of the profession itself in its reputation with the public at large****. This latter aspect engages not only the public's confidence in the standards maintained by practising solicitors, but also its confidence in the organs of a self regulating body to conduct effective and fair disciplinary regulation.'*
> [My emphasis]

[54] I have taken note of the discussion by Popplewell J in *Fuglers* as to '*the purpose for which sanctions are imposed'*.

(3) THE THIRD STAGE – 'choose the sanction which most appropriately fulfils that purpose for the seriousness of the conduct in question'

(i) Submission of Counsel for the Applicant: Suspension of 1-3 months

[55] Counsel for the Applicant in his *' Submissions on Penalty'* dated 6th June 2017, has cited, in summary, the following:

(1) *Chief Registrar v Naliva* – the legal practitioner pleaded guilty to five counts of unsatisfactory professional and the sanction imposed was that she was publicly reprimanded as she had not been issued with a practising certificate for six months prior to judgment;

(2) ***Chief Registrar v Kelera Baleisuva Buatoka*** (Unreported, Independent Legal Services Commission, No. 020 of 2013, 11 October 2013, Justice Madigan; PacLII: [2013] FJILSC 26, <http://www.paclii.org/fj/cases/FJILSC/2013/26.html>) – the legal practitioner witnessed two affidavits without a practising certificate and the sanction imposed was that she was publicly reprimanded and fined $300 on each charge making a total fine of $600.00;

(3) ***Chief Registrar v Laisa Lagilevu*** (Unreported, Independent Legal Services Commission, No. 001 of 2012, 16 March 2012, Justice Madigan; Paclli: [2015] FJILSC 3,

<http://www.paclii.org/fj/cases/FJILSC/2012/8.html>) – the legal practitioner faced once count of unsatisfactory professional conduct for having appeared on the 2nd day of March 2012 in the High Court at Suva without a valid practising certificate. The Respondent defended the allegation which the Commissioner found was established and then publicly reprimanded her as well as fined her $1,000 with her practising certificate suspended until the fine was paid;

(4) He has also cited ***Legal Services Commissioner v Burgess*** [2013] VCAT 350 (Unreported, Victorian Civil and Administrative Tribunal, Nos. J117/2012, J181/2012 and J24/2013, 28 March 2013, Vice-President Jenkins; AustLII: <http://www.austlii.edu.au/au/cases/vic/VCAT/2013/350.html>) where *'the Respondent legal practitioner faced a number of charges which also included charges in relation to the practitioner failing to communicate effectively and promptly with his clients'* to which the practitioner pleaded guilty. Counsel for the Applicant has noted the Tribunal's comments in relation to disciplinary proceedings as follows:

> *'[76] There are certain fundamental principles which apply to the penalty powers in a disciplinary proceeding:*
> *(a)* ***The primary aim of an order is to protect the public and to protect the reputation of the profession*** *itself'.*
> [My emphasis]

(ii) Submission of Counsel for the Respondent: A fine of $300-$1,000

[56] Counsel for the Respondent legal practitioner in her '*Mitigation and Sentencing submissions'*, 7th June 2017, has cited, in summary, the following cases and submissions:

(1) *Chief Registrar v Naliva* – despite appearing on three occasions between 22 March 2011 and 4 April 2011, *'she was only publicly reprimanded'*. (I have noted above that this was due to the legal practitioner not having been issued with a practising certificate for six months prior to the sanction being imposed by the Commission.)

(2) ***Chief Registrar v Nawaikula and Komaisavai*** (Unreported, Independent Legal Services Commission, No. 009 of 2012, 12 April 2013, Justice Madigan; PacLII: [2013] FJILSC 3, <http://www.paclii.org/fj/cases/FJILSC/2013/3.html>) – between 1 June 2011 and 1 March 2012 (some eight months) the second respondent acted

as a legal practitioner for which he was '*publicly reprimanded and his Practising Certificate suspended for 3 months'*;

(3) ***Chief Registrar v Melaia Ligabalavu*** (Unreported, Independent Legal Services Commission, No. 007 of 2012, 7 June 2013, Justice Madigan; PacLII: [2013] FJILSC 5, <http://www.paclii.org/fj/cases/FJILSC/2013/5.html>) – the legal practitioner appeared in court in March 2012 without a practising certificate and then did not apply for a practising certificate until 10th May 2012 with a practising certificate being issued on 20th June 2012. She was publicly reprimanded and suspended from practice for the rest of the then current practising year (2013) and was not eligible to apply for a practising certificate until 1st of March 2014, <u>in effect, a suspension of approximately eight months</u>;

(4) *Chief Registrar v Laisa Lagilevu* – the practitioner appeared for one day (2nd March 2012) with a practising certificate for which she was publicly reprimanded, fined $1,000 and had her practising certificate suspended until the fine was paid as well as satisfied the Trust Account requirements of the Chief Registrar;

(5) *Chief Registrar v Kelera Baleisuva Buatoka* – the practitioner was publicly reprimanded and fined $600. (I have noted above that this was for witnessing two affidavits without holding a practising certificate);

(6) ***R v Forbes*** [2005] EWCA Crim 2069 (Unreported, England and Wales Court of Appeal, Case No. Case No: 2005/01427/A1, 14 July 2005, Richards and Rafferty JJ; BaiLII: < http://www.bailii.org/ew/cases/EWCA/Crim/2005/2069.html>) - wherein Mr Justice Richards said at [12]:

> *'…What was said in* ***<u>March</u>*** *[R v March [2002] 2 Cr. App. R. (S) 448, 457] about the existence of an exception* ***where a plea, practically speaking, is inevitable needs to be viewed with some caution*** *in the light of the guidance given by the Sentencing Guidelines Council -- guidance which underlines* ***the strong policy reasons why credit is generally to be given for a plea of guilty and why that credit should not be lost just because an offender would have little prospect of acquittal if he contested the case.*** *In any event, in the particular circumstances of this case we do not think it right to deprive the appellant of the benefit of credit for his pleas of guilty.'*
>
> [My emphasis]

(7) In the present matter, the Respondent legal practitioner pleaded guilty on the first return date and the Commission is *'urged to consider giving credit for the guilty pleas [sic] as well as* ***a deduction of the sentence and penalty given in*** *the case of* the *Chief Registrar v* ***Nawaikula*** *[and Komaisavai]'.* [My emphasis] That is, where the legal practitioner was '*publicly reprimanded and his Practising Certificate suspended for 3 months'.*

[57] My summary of the 12 matters listed in the Commission's Discipline Register and the penalties applied to each is as follows:

Case No	Practitioner	Date of judgment	Particulars	Orders
006/2011	Siteri Adidreu Cevalawa	5 December 2011	**Counts 1-8:** Solicitor practising without having a valid practising certificate	(1) Publicly reprimanded; (2) Fined $1,000
004/2011	Adi Kolora Naliva	5 December 2011	**Counts 1, 2, 3, 4:** Practised without having a valid practising certificate **Count 5:** Falling short of the standards of competence and diligence that a member of the public is entitled to expect of a reasonably competent or professional legal practitioner.	(1) Publicly reprimanded
001/2012	Laisa Lagilevu	16 March 2012	**Count 1:** Appeared in High Court without a valid practising certificate	(1) Publicly reprimanded (2) Fined $1,000 (3) Practising Certificate **suspended until fine paid** and upon satisfactory of Trust Account requirements of the Chief Registrar
010/2012	Kalisito Maisamoa	23 January 2013	**Count 1:** 8 offences on the same day of appearing without a principal before completing 2 years of practice. (The 8 offences regarded as one count with concurrent penalties.)	(1) Respondent publicly reprimanded (2) Fined $1,500 to be paid by 28 February 2013.

009/2012	Niko Nawaikula	12 April 2013	**Count 1:** Instructed uncertified solicitor to act	(1) Publicly reprimanded (2) Fined $2,000 payable within 28 days or practising certificate suspended without further order.
009/2012	Savenaga Komaisavai	12 April 2013	**Count 1:** Appeared for an accused in criminal case without practising certificate **Count 2**: Prepared instruments for legal proceeding without practising certificate	(1) Publicly reprimanded (2) Practising certificate **suspended for 3 months** from judgment date
006/2012	Kini Marawai	15 May 2013	**Counts 1 to 3:** Appearing before court without a practising certificate **Count 4**: Without a practising certificate, instructed another solicitor **Counts 5:** Failed to establish and keep trust account	(1) **Suspended for three years** to run consecutively with period of suspension he is already undergoing not to apply for practising certificate until 1 March 2019. (2) Fined $1,000
007/2012	Melaia Ligabakavu	7 June 2013	**Counts 1 and 2:** Appeared in Magistrate's Court without holding valid practising certificate (1 and 19 March 2012) **Count 3 and 4:** Law firm appeared in Magistrate's Court without holding valid practising certificate	(1)Publicly reprimanded (2) **Suspended from practice for rest the current practising year** (7 June 2012-1 March 2012 = **approximately 8 ½ months**).
007/2012	Luseyane Ligabalavu	7 June 2013	**Counts1 and 2:** Being the sole practitioner of the law firm employed and instructed 1st respondent to appear in Magistrate's Court without holding valid practising certificate (1 and 19 March 2012) **Count 3:** Failed to cause accounting and other records to be audited for financial period 1st October to 30th September **Count 4:** Failed to lodge, or cause to be lodged,	(1) **Suspension for 2 years** and cannot apply for practising certificate until 1 March 2017.

			by the required date a statement signed by the trustee with Registrar and the Minster.	
005/2013	Vilimone Vosarogo	20 August 2013	**Count 1:** Instructed another legal practitioner without holding a valid practicing certificate	(1) Publicly reprimanded (2) Fined $2,500
020/ 2013	Kelera Baleisuva Buatoka	11 October 2013	**Counts 1 and 2:** Acting as a Commissioner for Oaths by witnessing an affidavit while not holding a valid practicing certificate	(1) Publicly reprimanded (2) Fined $300 on each charge
012/2014	Nitij Pal	21 July 2015	**Count 1:** Operated without a valid practising certificate (1st March-3 July – 4 months).	(1) **Suspended** for remainder of year from 21 July 2015 until 28 February 2016 (**approximately 7 months**) (2) Fined $2,000

(iii) Particular sanctions

[58] The 5th edition of the *'Guidance Note on Sanctions'* (paragraph [23], page 11) has explained that **a reprimand** *'justifies a sanction at the lowest level'*. It then explains (paragraph [25], page 11) that in relation to **a fine**:

> *'A Fine will be imposed where the Tribunal has determined that the seriousness of the misconduct is such that a Reprimand will not be a sufficient sanction, but neither the protection of the public nor the protection of the reputation of the legal profession justifies Suspension or Strike Off.'*

[59] As to the 'Level of Fine', it further notes (at paragraphs [26]-[27], pages 11-12), the following:

> *'26. The Tribunal will consider the following guidance in determining the appropriate level of Fine or combination of Fines to be imposed upon an individual and/or an entity:*
>
> - *… In deciding the level of Fine, the Tribunal will consider all the circumstances of the case, including aggravating and mitigating factors.* ***The Tribunal will fix the Fine at a level which reflects the seriousness of and is proportionate to the misconduct.***
> - *the respondent shall be expected to adduce evidence that their ability to pay a Fine is limited by their means ....*
> - ***the factors to be considered include those outlined by Popplewell J at paragraph 35 of Fuglers and Others v Solicitors Regulation Authority*** *… which may result in*

movement of the level of fine up or down the Indicative Fine Bands below. The Indicative Fine Bands provide broad starting points only. Factors to be considered include: (1) whether the seriousness of the misconduct, and giving effect to the purpose of the sanction, puts the case at or near the top, middle or bottom of the category (2) the level of fines imposed by other disciplinary tribunals or the High Court in analogous cases (3) the size or standing of the solicitor or firm in question (4) the means available to an individual or a firm. In considering means it is relevant to take into account the total financial detriment which is suffered, including any costs order, and any adverse financial impact of the decision itself.'

27. ***In the absence of evidence of limited means, the Tribunal is entitled to assume that the respondent's means are such that they can pay the Fine which the Tribunal decides is appropriate.'***

[60] As to the 'indicative fine bands', obviously, the specific monetary amounts of "fine range" is not applicable to Fiji, however, the five levels of bands matching the assessment of seriousness of the conduct does provide some guidance:

Fine Band	Overall Assessment of Seriousness of Conduct
Level 1	Lowest level for conduct assessed as sufficiently serious to justify a fine (rather than a reprimand)
Level 2	Conduct assessed as moderately serious
Level 3	Conduct assessed as more serious
Level 4	Conduct assessed as very serious
Level 5	Conduct assessed as significantly serious but not so serious as to result in an order for suspension or strike off

[61] **I do believe that this matter justifies a fine arguably at Level 2, that is, <u>moderately serious</u>. My question is whether the imposition of a fine is a sufficient sanction.**

[62] Neither party has suggested imposing a **<u>restriction order</u>** (that is, in the form of a condition upon the way in which a solicitor continues to practise) and I do not see that as an appropriate sanction in the circumstances.

[63] In relation to **suspension**, the *'Guidance Note on Sanctions'* explains when it should be imposed as follows (paragraphs [35]-[37], page 14):

> *'35. Suspension from the Roll will be the appropriate penalty where the Tribunal has determined that:*
>
> - *the seriousness of the misconduct is such that* ***neither a Restriction Order, Reprimand nor a Fine is a sufficient sanction*** *or in all the circumstances appropriate.*
> - *there is a need to protect both the public and the reputation of the legal profession from future harm from the respondent by removing their ability to practise, but neither the protection of the public nor the protection of the reputation of the legal profession justifies striking off the Roll.*
> - ***public confidence in the legal profession demands no lesser sanction.***
> - ***professional performance, including a lack of sufficient insight by the respondent*** *(judged by the Tribunal on the basis of facts found proved and the respondent's evidence),* ***is such as to call into question the continued ability to practise appropriately.***
>
> *36. Suspension from the Roll, and thereby from practice,* ***reflects serious misconduct****.*
>
> ***37.*** *Suspension can be for a fixed term or for an indefinite period.* ***A term of suspension can itself be temporarily suspended.'*** [My emphasis]

(v) Personal mitigation

[64] **The 5th edition of the *'Guidance Note on Sanctions'* has noted in relation to personal mitigation the following criteria** (page 18, paragraphs [53]-[54]):

> *'53.* ***Before finalising sanction, consideration will be given to any particular personal mitigation advanced by or on behalf of the respondent.*** *The Tribunal will have regard to the following principles*:
>
> *"****Because orders made by the tribunal are not primarily punitive****, it follows that considerations which would ordinarily weigh in* ***mitigation of punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases****. It often happens that a solicitor appearing before the tribunal can adduce a wealth of glowing tributes from his professional brethren. He can often show that for him and his family the consequences of striking off or suspension would be little short of tragic. Often he will say, convincingly, that he has learned his lesson and will not offend again. .... All these matters are relevant and should be*

considered. But ***none of them touches the essential issue, which is <u>the need to maintain among members of the public a well-founded confidence</u> that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness****. <u>Thus it can never be an objection to an order of suspension in an appropriate case that the solicitor may be unable to re-establish his practice when the period of suspension is past</u>. If that proves, or appears, likely to be so the consequence for the individual and his family may be deeply unfortunate and unintended.* ***But it does not make suspension the wrong order if it is otherwise right. The reputation of the profession is more important than the fortunes of any individual member****. Membership of a profession brings many benefits, but that is a part of the price." (Bolton above* [at paragraph [16] in Bailii]*).*

54. ***Particular matters of personal mitigation that may be relevant and may serve to reduce the nature of the sanction****, and/or its severity include that:*

- ***the misconduct arose at a time when the respondent was affected by physical or mental ill-health*** *that affected his ability to conduct himself to the standards of the reasonable solicitor. Such mitigation must be supported by medical evidence from a suitably qualified practitioner.*
- ***the respondent was an inexperienced practitioner*** *and was inadequately supervised by his employer.*
- ***the respondent made prompt admissions and demonstrated full cooperation*** *with the regulator.'*

[My emphasis]

[65] Applying the above criteria to the present case, I have assessed personal mitigation as follows:

(i) '*the misconduct arose at a time when the respondent was affected by physical or mental ill-health that affected his ability to conduct himself to the standards of the reasonable solicitor'*– not applicable;

(ii) '*the respondent was an inexperienced practitioner and was inadequately supervised by his employer'*– not applicable;

(iii) '*the respondent made prompt admissions and demonstrated full cooperation with the regulator'* ***– applicable***.

[66] I have not been provided with a Curriculum Vitae, so I am not aware as to the Respondent's career before or after being admitted as a Barrister and Solicitor of the High Court of Fiji on 13th September 2002. I have also not

been provided with evidence as to whether his ability to pay a fine is limited by his means.

[67] According to the written submissions of Counsel for the Respondent legal practitioner, the Respondent is 61 years of age, married with two children, a son aged 33, who is studying at the Auckland Maritime School in New Zealand and a daughter, aged 24, who is studying law in Fiji. He also has two nephews aged 28 and 25 who are residing with and being cared by him while they complete their studies.

[68] I do note that the Respondent was employing four lawyers at his Suva Office and one at an office in Rakiraki. According to the written submissions of Counsel for the Respondent, those five lawyers have had to be dismissed *'because of non-grant of Practitioners [sic] Certificate to allow business operation'*.

[69] As for the range of penalties imposed by the Commission in previous matters of a similar nature, I note that in the table set out above there have been 12 matters where sanctions have been imposed, in summary, as follows:

- Seven of the 12 matters have been issued with a public reprimand and six of those seven have also had a fine imposed ranging from $300.00 to $2,500.00.
- The other five matters have involved suspensions of 3 months, 7 months, 8 ½ months, two and three years respectively (the latter two also involving trust account matters).

[70] I have also taken into account the comments of Justice Madigan in *Chief Registrar v Laisa Lagilevu* (a case cited by both Counsel in their written submissions) and of which some in the legal profession in Fiji may need a further reminder. Although in that case the legal practitioner initially defended the allegation (compared to making a plea of guilty at the first opportunity as occurred in the present case), Madigan J's comments are still pertinent:

> *'[7] She [the legal practitioner] says that in the first few months of this year she did what she thought she needed to do to renew,*

including paying the certificate renewal fee and earning the 10 points of continuing legal education points that were required. The difficulties arose, the Respondent claims, over a misunderstanding over the need for a trust audit report ... ***The respondent then stresses as one of her main arguments in mitigation that she had never been told prior to her appearance in Court*** *on March 2 "either by email, letter or telephone* ***that my practicing certificate was being withheld*** *pending the submission of my trust account report",[sic]*

[8] This submission is both mendacious and misconceived ... ***She would have known on the 2nd March that she had not complied with the requirement and had therefore no right in her expectation that she was already certified. Secondly, it is unreasonable for the Respondent to expect that the Legal Practitioners Unit in the Chief Registrar's office should notify every applicant for a Certificate of the status of their application*** *...*

[9] As Commissioner Connors said in ***CR v Siteri Cevalawa*** *ISLC 006 of 2011;*

> *"There can be no doubt that for a legal practitioner to practice without a practicing certificate flies in the face of the whole principle of the Legal Practitioners legislation and accordingly impacts on the community."*

[10] The process of licensing practitioners is to maintain control over them. If there were no such system there would be chaos and no protection whatsoever of the consumer public. For this reason alone, any breach of the licensing system be it intentional or not, must be visited with stern penalties if only ***to keep practitioners vigilant in the need to fulfill requirements of the licensing process****.'*
[My emphasis]

[71] In summary:

(1) The misconduct that has been particularised in this case is that the Respondent legal practitioner appeared in the High Court at Lautoka on 1st March 2017 without a valid practising certificate. I do note, however that sections 42(1) and (2) clearly state that *'**a practitioner shall** ... **during the month of January** ... **apply for and obtain** from the Registrar ... **a practising certifcate'*** and that '***a law firm shall not be entitled to operate*** *...* ***unless*** *...* ***the sole practitioner*** *...* ***[has] been issued a practising certificate'***;

(2) Despite questions that could have been argued on his behalf as to the correctness of the count and the particularisation thereof at the first return date), the Respondent legal practitioner pleaded guilty at the first

opportunity to one count of ***professional misconduct*** pursuant to sections 82(1)(a) and Section 83(1)(a) of the *Legal Practitioners Act of 2009* which his Counsel confirmed at the sanctions hearing (despite being made aware as to potential problems with the count);

(3) I have come to the view (using the criteria set out in the 5th edition of the *'Guidance Note on Sanctions'* published by the Solicitors Disciplinary Tribunal of England and Wales as a guide), that **although the Respondent's level of culpability is high**, **the harm caused is moderately serious** and the sanction/s to be imposed in this matter should reflect that finding;

(4) I have reviewed the 12 cases recorded in the Commission's Discipline Register where sanctions have been imposed in matters involving appearing, operating as a legal firm and/or undertaking legal work without a valid practicing certificate or instructing a person who does hold such a certificate and have noted that in seven of those matters a public reprimand was issued and in six of those seven a fine was also imposed ranging from $300.00 to $2,500.00. I have further noted that in the other five matters, suspensions were imposed ranging from three months to 8 ½ months and in two of them (which also involved trust account matters) the suspensions imposed were of two and three years respectively;

(5) In addition, I have noted the comments of Commissioner Connors in *Chief Registrar v Siteri Cevalawa* as to *'the whole principle of the Legal Practitioners legislation'* together with the comments of Justice Madigan in *Chief Registrar v Laisa Lagilevu* that *'If there were no such system there would be chaos and no protection whatsoever of the consumer public*' and there must be '*stern penalties if only to keep practitioners vigilant in the need to fulfill requirements of the licensing process';*

(6) I have also noted that the Respondent has now been without a practising certificate for one month;

(7) I have come to the view that, in the circumstances, **a suspension of one month backdated from 15 May 2017 until today together with a fine of $1,000 is a sufficient sanction**.

3. Costs

[72] At the sanctions hearing on 7th June 2017, I asked Counsel to address me on costs. Counsel for the Respondent legal practitioner submitted that any costs awarded should be minimal such as $300.00. Counsel for the Applicant submitted that the Respondent should pay the costs of the Applicant for bringing the proceedings summarily assessed in the sum of $500.00.

[73] I have taken note of what the 5th edition of the *'Guidance Note on Sanctions'* has stated (at page 19, paragraphs [57]-[58]) in relation to costs:

> ***'Costs against Respondent: allegations admitted/proved***
>
> ***General considerations***
>
> *57. The Tribunal, in considering the respondent's liability for the costs of the applicant, will have regard to the following principles, drawn from* ***R v Northallerton Magistrates Court, ex parte Dove (1999) 163 JP 894:***
>
> - *it is not the purpose of an order for costs to serve as an additional punishment for the respondent,* ***but to compensate the applicant for the costs incurred by it in bringing the proceedings*** *and*
> - *any order imposed* ***must never exceed the costs actually and reasonably incurred*** *by the applicant.*
>
> *58. Before making any order as to costs, the Tribunal will give the respondent the opportunity to adduce financial information and make submissions …'*

[74] In assessing costs, I am of the view that the sum quoted by Counsel for the Applicant for the costs of bringing the application ($500.00) is more than reasonable.

[75] In addition, I note that the Commission also put aside time and resources during these Sittings to enable a plea in mitigation to be heard and finalised. As such, I am of the view that a similar sum of $500.00 should be paid to the Commission.

[76] Accordingly, pursuant to section 124(1) of the *Legal Practitioners Decree 2009,* I have summarily assessed the costs of the Applicant for bringing the proceedings in the sum of $500.00.

[77] Similarly, pursuant to section 124(1) of the *Legal Practitioners Decree 2009,* I have summarily assessed that the Respondent is to pay to the Commission the sum of $500.00 towards the reasonable costs incurred by the Commission in this matter.

[78] I note that the Respondent has not held a practising certificate since 15 May 2017 - just under one month. **Accordingly, I am prepared to allow the Respondent 28 days to pay both the fine together with the fixed costs that I have summarily assessed. That is, the three sums are to be paid within 28 days of today, that is, by 12 noon on Tuesday, 11th July 2017**.

[79] Finally, I wish to record my thanks to Counsel for the Chief Registrar and the Counsel for the Respondent legal practitioner for their succinct submissions.

ORDERS

[80] The formal Orders of the Commission are:

1. In the Application filed in ILSC Case No. 001 of 2017, *Chief Registrar v Aseri Vakaloloma*, I am satisfied that the count of professional misconduct has been proven by the Respondent's plea of guilty.
2. Pursuant to section 121(1)(c) of the *Legal Practitioners Act 2009,* the practising certificate of Aseri Vakaloloma is suspended for the period of one month (that is, the equivalent 30 days) backdated as from 15 May 2017, up to and including today, 13 June 2017.
3. In addition, pursuant to section 121(1)(i) of the *Legal Practitioners Act 2009,* Aseri Vakaloloma is fined the sum of $1,000.00 payable to the Commission with 28 days of today, that is, to be paid on or before 12 noon on 11th July 2017.
4. Further, pursuant to section 124(1) of the *Legal Practitioners Act 2009,* the costs payable by the Respondent towards the costs incurred by the Applicant are summarily assessed in the sum of $500.00.
5. Similarly, pursuant to section 124(1) of the *Legal Practitioners Act 2009,* the costs payable by the Respondent towards the reasonable costs

incurred by the Commission are summarily assessed in the sum of $500.00.

6. Both of the sums set out in Orders 4 and 5 above are to be paid within 28 days of today, that is, by 12 noon on 11th July 2017, $500.00 is to be paid to the Chief Registrar and $500.00 is to be paid to the Commission.

Dated this day of 14th June 2017.

Dr. Thomas V. Hickie
COMMISSIONER