IN THE INDEPENDENT
LEGAL SERVICES COMMISSION

No. 002 of 2017

BETWEEN:

CHIEF REGISTRAR

Applicant

AND:

NACANIELI BULISEA

Respondent

Applicant: Mr. T. Kilakila
Respondent: Mr. K. Maisamoa

Date of Hearing: 5th December 2017
Date of Judgment: 5th December 2017

Dates of Written Submissions:
1st December 2017 (Applicant)
5th December 2017 (Respondent)

JUDGMENT ON SANCTIONS

1. The offence - professional misconduct – ***knowingly mislead the High Court***

[1] This is a judgment as to what sanction/s should be imposed whereby a legal practitioner has been found guilty of one count of professional misconduct by reason of him having knowingly misled the High Court.

[2] The specific offence and particulars were as follows:

'Count 1'

ALLEGATION OF PROFESSIONAL MISCONDUCT*: pursuant to* ***Rule 3.1 of the Rules of Professional Conduct and Practice****,* ***Section 83(1)(a)****, and* ***Section 82(1)(a)*** *of the* ***Legal Practitioners Act of 2009.***

PARTICULARS

NACANIELI BULISEA, *a Legal Practitioner, on the 28th day of February, 2017 misled the court, vide HAC 56/14, that the applications for practising certificate for the period 1st March 2017 to 28th February 2018, for himself, his principal at the time, and his fellow associates then, had been lodged with the Legal Practitioners Unit that same day when in fact the applications were lodged on 1st March 2017 and he did not have sufficient proof at the time as a basis for making such a representation to court in breach of* ***Rule 3.1*** *of the*

***Rules of Professional Conduct and Practice**, which is an act of professional misconduct contrary to **Section 83(1) (a)** and **Section 82(1)(a)** of the **Legal Practitioners Act of 2009**.'*
[Underlining my emphasis]

[3] Section 83(1)(a) of the *Legal Practitioners Act 2009* states:

> *'Conduct capable of constituting unsatisfactory professional conduct or professional misconduct*
>
> *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 Act:*
>
> *(a) **conduct consisting of a contravention** of this Act, the regulations and rules made under this Act, or **the Rules of Professional Conduct**'* [My emphasis].

[4] Section 82(1)(a) of *the Legal Practitioners Act 2009* states:

> *'Professional Misconduct*
>
> *'82.—(1) For the purposes of this Act, **"professional misconduct" includes** –*
>
> *(a) unsatisfactory professional conduct of a legal practitioner ... **if the conduct involves a substantial** or consistent **failure to reach or maintain a reasonable standard of competence and diligence**'*
> [My emphasis].

[5] Rule 3.1 of the *Rules of Professional Conduct and Practice (Schedule of the Legal Practitioners Act 2009)* states:

> *'CHAPTER 3—RELATIONSHIP WITH THE COURT*
>
> *3.1 A practitioner shall not **knowingly** ... **mislead** the Court'*
> [My emphasis].

[6] Thus the offence of which the legal practitioner has been found guilty is professional misconduct pursuant to section 83(1)(a) of the *Legal Practitioners Act 2009,* i.e., '*conduct consisting of a contravention of ... the Rules of Professional Conduct'*, namely Rule 3.1 of the *Rules of Professional Conduct and Practice,* whereby '*a practitioner shall not knowingly ... mislead the Court'*. Further, pursuant to section 82(1)(a) of the *Legal Practitioners Act 2009,* such conduct is also professional misconduct as it '*involves a substantial ... failure to reach or maintain a reasonable standard of competence and diligence'*.

[7] It has been found that on the 28th day of February 2017, the Respondent legal

practitioner misled a judge of the High Court of Fiji in FIVE separate statements that the renewal applications for practising certificates '*for himself, his principal at the time, and his fellow associates ... had been lodged with the Legal Practitioners Unit'* that day, when, in fact, the applications were not lodged until the following day (1st March 2017). Further, when the Respondent legal practitioner told the judge on 28th February 2017 that the renewal applications for the practising certificates had been lodged, the Respondent legal practitioner *'did not have sufficient proof at the time as a basis for making such a representation'*.

[8] On 25th September 2017, when the charge was heard before the Commission, Counsel for the Applicant called no witnesses. Instead, he simply relied upon documentary evidence, including transcripts from the proceedings in the High Court. Counsel for the Applicant then closed his case.

[9] It was at that point that the Commission asked of Counsel for the Respondent legal practitioner whether he wished for the matter to be stood down so he could be given time to discuss with the Respondent legal practitioner his position. After taking instructions, Counsel for the Respondent legal practitioner advised the Commission that his instructions were to proceed.

[10] Thus, there cannot be any credit given for a change in plea. Perhaps, as I have noted in my judgment of 30th November 2017 wherein I found the offence proven, there was clearly, in my view, some confusion in the submissions of Counsel for the Respondent legal practitioner as to the applicable category of mens rea relevant to this offence. I can only presume that the Respondent, also being a legal practitioner, instructed and thus shared this view.

[11] In addition, even after I had arranged for the Secretary of the Commission to write to Counsel for each party, serving them with a list of the cases and a very short summary as to their possible relevance of these cases to the present proceedings, attention of Counsel for both parties drawn to a number of relevant cases from within Fiji as well as some other common law jurisdictions. The submissions of Counsel for the Respondent legal practitioner, acting presumably upon instructions, steadfastly maintained that he did not knowingly mislead the

High Court on 28th February 2017. Further, when the matter was listed for mention at the commencement of these present Sittings and both Counsel made brief oral submissions, Counsel for the Respondent legal practitioner whilst clarifying that the offence was one requiring proof of full mens rea, still maintained that his client did not knowingly mislead the High Court.

[12] I then had the matter listed on 30th November 2017, when I read a draft of my judgment to Counsel for both parties and the Respondent legal practitioner. At the end of my reading, I invited Counsel to advise as to any corrections they wished to suggest that I include before I provided them with a final typed and signed judgment. Neither made any suggestions. Counsel were advised that due to the lateness of the hour (it was then after 8.00pm), a finalised and signed copy of the judgment would be available to both Counsel after 2.00pm the following day, that is, 30th November 2017.

[13] In addition, Orders were then made for Counsel 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, a copy of which I then provided to each Counsel. (See <http://www.solicitorstribunal.org.uk/sites/default/files-sdt/GUIDANCE%20NOTE%20ON%20SANCTIONS%20-%205TH%20EDITION%20-%20DECEMBER%202016.pdf>).

[14] In addition, on 30th November 2017, I arranged for each Counsel to be contacted for a "sanctions" hearing to be held at 4.00 pm today, 5th December 2017, so as to allow each Counsel the opportunity to address any issues that they wished to address arising from the written submissions.

[15] This judgment, therefore, has taken into account the written submissions submitted by each party as well as the further oral submissions they each made before me today, 5th December 2017.

2. The *'Guidance Note on Sanctions'* and the three stages in *Fuglers*

[16] In the 5th edition of the ***'Guidance Note on Sanctions'***, the Solicitors

Disciplinary Tribunal of England and Wales has explained (at page 6, paragraph [7]) 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]*

3. Applying the First Stage – *'to assess the seriousness of the misconduct'*

[17] 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'

[18] Counsel for the Applicant Chief Registrar submitted in his *'Submissions on Penalty'*, 1st December 2017, (at [25], p. 5) that:

> *'... the Respondent in this matter represented a position regarding the applications that was not borne out of the update or information that he had on hand at the time. Further, he was asked several times by Rajasinghe J. whether that position was correct to which the Respondent answered unwaveringly in the affirmative, without taking the time to clarify that position in any way. This not only demonstrates his culpability but also goes to show the level of calculation and motivation on his part to keep the Court unawares of the actual status of the applications since he would have appreciated that it was the last valid day for his current practicing certificate'.*

[19] According to Counsel for the Respondent, in his written *'Mitigation Submissions'*, on the 5th December 2017, (p. 2 and 6):

(1) *'As soon as the Respondent admitted into the Bar he was absorbed into Vakaloloma & Associates Law firm. As usual the Respondent normally filled*

his practicing certificate renewal application and left it with the firm to lodge it. Since the firm has the responsibility to pay the Respondent's fee. This has been the practice that the Respondent normally followed for the last two years while with Vakaloloma & Associates Law firm. However, on the 28th March [sic] 2017 when the Respondent left his application with the firm before he appeared in court that morning he was given an assurance by Mrs. Vakaloloma that his application would be lodged. Little did the Respondent know that his application was still sitting with Mrs. Vakaloloma that day (28/3/17) [sic] when he was responding to his lordship's questions regarding the renewal of his practicing certificate.'

(2) Further, Counsel for the Respondent submitted that in the relation to the level of culpability of the Respondent should include reference to the following:

(i) That the Respondent *'failed to check on the position of his practicing certificate application during the break of the proceeding'*; and
(ii) That the Respondent '*continued to make misrepresentation to the court without checking the position of his practicing certificate*'.

[20] In relation to the seriousness of the offence, Counsel for the Applicant Chief Registrar submitted in his *'Submissions on Penalty'*, 1st December 2017, (p. 3) that:

(1) The offence is one of professional misconduct and *'the act of misleading the High Court as it was in this instance is very grave indeed';*

(2) It is *'reasonable to expect that the Respondent ought to have represented the truth about the status of the applications to the Court at the exact time when he was being queried by Justice Ragasinghe'*;

(3) It is of concern that *'the Respondent attempted to shift blame to the administration of Vakaloloma & Associates and sought to justify his actions as an exercise of reasonable personal judgment'*. Such conduct illustrates that *'the Respondent has not fully appreciated the nature of the professional misconduct for which he been adjudged and a failure to properly recognize the dangerous effects of his breach'*.

[21] Counsel for the Respondent submitted that:

(1) While the Respondent has been found guilty of Professional Misconduct, Counsel for the Respondent request, *'the Commission to take into account the mitigation factor of the Respondent'* by the reason of the fact he became a *'victim because of the unruly behavior of his principal – Mr. Vakaloloma by*

abandoning the proceeding and left to the Respondent to be answerable to his lordship Justice Rajasinghe'.

(2) Further, it was said that the Commission should take into account that the Respondent was *'a victim by a false assurance made by Mrs. Vakaloloma that the Respondent application would be filed on that particular day that was on 28th March 2017 [sic]'.*

(3) Similarly, it was provided that the Respondent was *'a victim because of his principal's "attitude of don't care" that led the Respondent to stand guilty in this matter*'.

(4) Finally, Counsel of the Respondent requested that the Commission *'give lenient penalty to the Respondent pursuant to Section 121 of the Legal Practitioners Act 2009 by imposing:*

a. Publicly reprimanded the Respondent;

b. The Respondent to be fined according to his means;

c. The Respondent Practising Certificate to be imposed with conditions suitable by the Commission; and

d. in the alternative the Respondent to be under supervision for certain period of time suitable by the Commission.'

[22] At the sanctions hearing held on 5th December 2017, despite the above written submissions, no evidence was tendered to support their position. Further, Counsel for the Respondent did not provide any evidence to the Respondent legal practitioner's financial means, even though a copy of the '*Guidance Note on Sanctions*' (para 27) was provided to him.

[23] **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'

- In understanding the Respondent legal practitioner's motivation for his misconduct, it is important to remember that it was the Respondent who initially raised the issue with the Court of the practising certificate and when it had been lodged (as page 15 of the Court Record on 28th February 2017 (page 21 of the Applicant's Bundle at Tab B) makes clear:

'Mr Bulisea: '... I have an administrative issue that needs to be

	taken care of, of my practicing [sic] certificate ***it's been filed today*** *and we need a response from the LPU for ...*
Judge:	*So, your practising [sic] certificate will come to an end ...*
Mr Bulisea:	*Expire today.*
Judge:	*Okay. From tomorrow, you are not allowed to appear before me.*
Mr Bulisea:	*Of course, yes, My Lord.'*

- He knew that he had to raise this issue with the Court as he had neither confirmation that the application for a practising certificate had been filed that day nor that it had been approved by the LPU.
- Thus, his motivation was that he was attempting to disguise the fact that he had not even bothered to check that his application had been lodged and could only hope that this had been the case.
- Clearly, the Bench was also unaware that mandatory requirement had not been complied with as set out in section 42(1) of the *Legal Practitioners Act 2009,* that is, that *'during the month of January in each and every year'*, a practitioner shall *'apply for and obtain from the Registrar'* a practising certificate.

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

- The Respondent legal practitioner's misconduct arose from action which was planned and deliberate.
- No doubt, after this initial exchange with the Judge, the Respondent probably hoped this would have been the end of the matter. Presumably, he did not expect the judge to then ask each of the other counsel, present at Court that afternoon, the status of their respective practising certificates and to then return to the Respondent for further clarification. Instead of apologising and clarifying with the Court that he could not say as a FACT that his application (together with those of his fellow workers and that of his principal) had been lodged with the LPU, the Respondent continued to make misleading statements, that is, knowingly misleading the Court.

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

- The Respondent legal practitioner has acted in breach of his position of trust as a legal practitioner and his duty to a court – a serious breach.

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

- The Respondent legal practitioner had direct control of, or responsibility for, the circumstances giving rise to the misconduct. He was the person who misled the Court, not the Office Administrator, Mrs Vakaloloma.

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

- The Respondent legal practitioner was admitted to the Fiji Bar on 20th February 2015. Therefore, he had just completed two years at the Bar when he committed the offence on 28th February 2017.
- According to Counsel for the Applicant Chief Registrar in his *'Submissions on Penalty'*, 1st December 2017, paragraph [16] (p. 4): '*Whilst noting the Respondent's years of practice, the Respondent still has committed a serious breach.'*

(vi) 'The harm caused by the misconduct'

- According to Counsel for the Applicant Chief Registrar in his *'Submissions on Penalty'*, 1st December 2017, (p. 4) that:
  (1) '*the court proceedings ... were unnecessarily disrupted by the Respondent's conduct which brought disrepute to court processes before the public eye and further, seriously damaged the reputation of the legal profession'*;
  (2) '... the Respondent's act resulted in the stark embarrassment of the Court before the public eye particularly when noting that in such a high profile criminal trial in which there was much public interest, the extent of that embarrassment was quite significant';
  (3) *'... the fact that the Respondent misled the Court on a number of occasions, despite being asked by the Judge a few times whether the applications had been lodged already'* and that *'his response was unchanged ... allowed his misrepresentation and the effects thereof,*

to persist';

(4) *'this episode was not a slip of the tongue occurrence and neither could it be treated as a one off'.*

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

- I cannot say that '*the respondent deliberately misled the regulator'*. As I noted in my judgment at paragraph [30], the Respondent in his letter dated 20th March 2017 to the Chief Registrar did admit to misleading the Court.
- He then attempted, however, to explain that this was '*mainly based on the assurance and confirmation, from the firm's administrator'*. This was incorrect. He had neither asked of, nor received from, the firm's administrator confirmation from that the application had **IN FACT** been lodged.
- As for any assurance from the firm's administrator that the application would be lodged, I have previously noted at paragraph [34] of my judgment of 30th November 2017 (wherein I found the offence proven), that:

> *'Interestingly, Counsel for the Respondent legal practitioner did not call Mrs Vakaloloma (the firm's administrator) to confirm that she gave any undertaking to the Respondent that the application would be filed on 28th February 2017. Even if such an undertaking had been given, the fact that he did not check with her during that day (e.g. at the morning tea or luncheon adjournments) that the application had **IN FACT** been lodged meant that its relevance would arguably be limited to mitigation.'*

- Further, no request was made by Counsel for the Respondent for the firm's administrator to be allowed to give evidence at the sanctions hearing on 5th December 2017.

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

[24] I have noted the submission of Counsel for the Applicant Chief Registrar in his *'Submissions on Penalty'*, 1st December 2017, (p. 4) that:

> *'18. ... the court proceedings vide HAC 56/14 were unnecessarily disrupted by the Respondent's conduct which brought disrepute to court processes before the public eye and further, seriously damaged the reputation of the legal profession.*

19. *Indeed, the extent of the harm caused by the Respondent's act resulted in the stark embarrassment of the Court before the public eye particularly when noting that in such a high profile criminal trial in which there was much public interest, the extent of that embarrassment was quite significant.'*

[25] According to Counsel for the Respondent in his written '*Mitigation Submissions*' 5th December 2017, (p. 6) that:

'*The harm caused by the Respondent's misconduct I would say that it is only revolves in what he was charged with, and there was no evidence that members of the public were harmed*'

I cannot agree with this submission for reasons I have explained below.

[26] **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'

- In my view, '*the impact of the respondent's misconduct*' has been considerable.

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

- In my view, the Respondent might reasonably have foreseen the harm caused to the name of the profession with the bench as well as the general public from being found to have knowingly misled the Court.

(c) 'The existence of any aggravating factors'

[27] According to Counsel for the Applicant Chief Registrar in his *'Submissions on Penalty'*, 1st December 2017 (p. 4), the aggravating factors could be summarised as follows:

(1) This is a breach of trust between the Bar and the Bench;

(2) He has '*damaged the reputation of the Bar and the faith that the Bench has toward the Bar';*

(3) The Court proceedings '*were unnecessarily disrupted by the Respondent's conduct which brought disrepute to court processes before the public eye and further, seriously damaged the reputation of the legal profession*';

(4) '*the fact that the Respondent misled the Court on a number of occasions, despite being asked by the Judge a few times whether the applications had been lodged already, his response was unchanged and he thereby allowed his misrepresentation and the effects thereof, to persist*';

(5) '*... the Respondent demonstrated by his action that not only did he have knowledge that his representation was misleading, he also by a calculated stance, deliberately kept the Court in the dark as to the actual status of the practising certificate applications*'.

[28] According to Counsel for the Respondent in his written '*Mitigation Submissions*', 5th December 2017 (p. 2 and 6), the aggravating factors could be summarised as follows:

(1) The Respondent legal practitioner acknowledges that he had failed to *'acquire from the firm the truth as to whether or not his application was lodged. Because of this failure he now stands guilty before this honorable Commission.*';

(2) However, the Respondent legal practitioner provided that '*the existence of any aggravating factor is only revolved in the laxity and failure of the Respondent to check on the position of his practicing certificate application*'.

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

(i) 'dishonesty, where alleged and proved'

- In my judgment of 30th November 2017, I noted that *'in Rule 3.1* of the *Rules of Professional Conduct and Practice in Fiji it is an offence to either 'knowingly deceive' or 'knowingly mislead' both of which are, in effect, forms of dishonesty'*.

(ii) 'misconduct which was deliberate and calculated or repeated'

- I accept, as set out in my judgment of 30th November 2017, that the '*misconduct which was deliberate and calculated or repeated*'.

(iii) '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'*.

(iv) '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. I agree with this submission.

(d) 'The existence of <u>any mitigating factors'</u>

[30] Counsel for the Applicant Chief Registrar in his *'Applicant's Submissions on Penalty'*, 1st December 2017, (p. 3 and 4, paragraphs [14]-[15]), noted two mitigating factors:

(1) The Respondent's relative inexperience having been '*admitted to the Bar on 20th February 2015*';

(2) *'This is the first time that the Respondent is being faced with disciplinary proceedings before the Commission'*.

[31] Counsel for the Respondent legal practitioner in his written *'Mitigation Submissions'*, 5th December 2017 (p. 2 and 3) raised the following mitigating factors:

'This is the first time the Respondent is being charged with such disciplinary matter just because of the false assurance given by the administrator of the firm';

a. *'The Respondent has now realized that what he did was wrong and he has asked this honorable Commission to accept his apology for what he did in the morning of 28th March [sic] 2017';*
b. *'The Respondent has promised this honorable Commission that, he will make every effort in his career life that he will not fall into such situation again in the coming future';*
c. *'The Respondent further promised that he would not appear again before this Commission to face with another disciplinary charge';*
d. *'That Respondent now know that the firm has the attitude of don't care towards him despite the contribution the Respondent has contributed to the firm in terms of financial and work';*
e. *'The Respondent in his response to the allegation made by the Chief Registrar impliedly he did not deny the allegation, but his utterance in*

court was based on the application declared on the 28th March 2017 together with the assurance made by the firm';

f. 'The Respondent was a victim in this matter because of his principal's behavior in that he abandoned the proceeding and went to Lautoka knowing very well that the Respondent was not in carriage of the files and yet the Respondent's principal let him handle the matter, which the Respondent was not supposed to handle';

g. 'The Respondent was a victim due to the principal negligence by not paying the business license on time and also not paying the Respondent's fee and because of this the Respondent suffered';

h. 'That Respondent has raised to his lordship for an adjournment of the proceeding in order for the Respondent to finalize administrative issue in relation to the practicing certificate but it was refused by his lordship – Justice Rajasinghe.'

[32] According to the **5th edition of the *'Guidance Note on Sanctions'*** (p. 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.

[33] **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)'

Although not strictly applicable, I note that there is an allegation that the misconduct arose resulting from a third party (the office administrator, Mrs Vakaloloma) not lodging the application as she had undertaken to do. As I noted in my previous judgment of 30th November 2017, Mrs Vakaloloma was not called to give evidence at the defended hearing. Further, she was not called at the sanctions hearing on 5th December 2017. I have noted however, as Counsel for the Respondent requested my judgment in *Chief Registrar v Aseri Vakaloloma* (Unreported, ILSC No. 001 of 2017, 14th June 2017; PacLII: [2017] FJILSC 10, (<http://www.paclii.org/fj/cases/FJILSC/2017/10.html>) and in *Chief Registrar v Filimone Vosarogo* (Unreported, ILSC No. 002 of 2016, 29th September 2017; PacLII: [2017] FJILSC 12, (<http://www.paclii.org/fj/cases/FJILSC/2017/12.html>). I am not quite

sure however, as to the relevance of both of these cases are to the present matter.

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

Although not strictly applicable, I note that the Respondent legal practitioner after misleading the Court on 28th February 2017, apologised to the Court the following day, 1st March 2017. I also note, however, that as soon as the Respondent realised that his application had not been lodged (as well as those of his colleagues and also that of the principal of the firm), he did not seek to have the matter relisted immediately the next morning, via His Lordship's clerk (as well as so advising the prosecutor). The apology was only offered the following afternoon after His Lordship had been made aware of the deception by the prosecutor.

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

No. The Respondent did not contact the regulator immediately the following morning to advise what had occurred in Court the previous afternoon. Instead, it was the prosecutor who checked with the Chief Registrar's Office whether the applications had been lodged (which even at that stage had not occurred). The prosecutor had a duty to advise the Court that it had been misled. Once the Court was made aware of this fact, the presiding judge requested that a representative from the Chief Registrar's Office appear before him on the same day so that the representative could be advised as to what had occurred.

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

- Although the offence occurred on a single day, 28th February 2017, there were five separate misleading statements made by the Respondent to a judge of the High Court of Fiji.
- As for whether this was '*a previously unblemished career*', I have noted above the submissions of Counsel for the Applicant Chief Registrar as to the Respondent's relative inexperience and that this is the first time that he has been before the Commission.

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

As I have discussed in my judgment of 30th November 2017, I do not believe that the Respondent has displayed before me as to what could be termed 'genuine insight' as to the inappropriateness of what occurred as well as to the seriousness of his misconduct. Further, rather than directly accepting the blame and displaying contrition, the Respondent continued to shift the blame to the firm's administrator, Mrs Vakaloloma.

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

Whilst the Respondent, in his letter dated 20th March 2017, did admit as to the misleading statements, he then continued to shift the blame to the firm's administrator, Mrs Vakaloloma.

(e) Initial conclusion on Stage 1 – the seriousness of the misconduct

[34] In assessing the seriousness of the misconduct, I have considered (as set out above) the four factors from the 5th edition of the *Guidance Note on Sanctions* and concluded:

(1) ***'level of culpability'***: **high** - it was the Respondent who raised the issue and then he commenced misleading the Court. He then continued to do so in four further misleading statements;

(2) ***'harm caused'***: it is **'moderately serious' and, thus, at least at Level 2 of the fine band discussed later below**;

(3) ***'aggravating factors'***: **I have clearly identified above four aggravating factors**. I acknowledge, however, that there might be valid argument as whether some of the factors I have discussed are, in reality, part of the Count and thus should not be taken into account as aggravating the level of the seriousness of the misconduct such as to take the level of seriousness from Level 2 into Level 3 of the fine bands, that is, from Level 2 'conduct assessed as **MODERATELY SERIOUS'** to Level 3 'conduct assessed as **MORE SERIOUS';**

(4) ***'mitigating factors'***: **I have identified possibly three mitigating factors** that go towards mitigating the seriousness of the misconduct, they being,

after misleading the Court on 28th February 2017, the Respondent apologised to the Court the following day, 1st March 2017, there was also the factor of the Respondent's relative inexperience and that this is the first time that he has been before the Commission.

I have noted there is a suggestion that, arguably, some of the fault lay with the administration of the firm, however, without more evidence, I cannot take it to the level of mitigating the seriousness of the misconduct. Counsel for the Respondent did not call Mrs Vakaloloma, neither at the hearing of the charge nor sanctions hearing. Even Mrs Vakaloloma was not prepared to give evidence, she could have been subpoenaed.

(5) Therefore, in my view, the mitigating factors perhaps do have some impact upon the level of the seriousness to some degree. That is, **the misconduct would remain within Level 2 of the fine band 'assessed as moderately serious'**.

4. Applying the Second Stage – *'to keep in mind the purpose for which sanctions are imposed'*

[35] 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]

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

5. Applying the Third Stage – ***'choose the sanction which most appropriately fulfils that purpose for the seriousness of the conduct in question'***

(a) Prior cases before the Commission

[37] I note that the only matter listed in the Commission's Discipline Register directly on point that is, where a practitioner was found to have been guilty of 'Knowingly deceiving or misleading the High Court' was ***Chief Registrar v Ram Chand*** (Unreported, ILSC No. 017 of 2013, 3rd October 2013, Justice Madigan; PacLII: [2013] FJILSC 14, <http://www.PacLII.org/fj/cases/FJILSC/2013/14.html>) where the practitioner sought an adjournment for health reasons whilst appearing on the same day in the Magistrates Court. His Lordship ordered that:

> 1. *'The practitioner is publicly reprimanded.*
> 2. *His practising certificate is suspended from the date of this judgment until 1st of March 2014.*
> 3. *He is to pay a fine of $5,000 to this Commission by the 31st October 2013, and in default his practising certificate will be suspended for a further three months.'*

[38] Thus, in *Chand*, the practitioner's practising certificate was suspended for five months together with him being required to pay a fine of $5,000 (within 28 days of the judgment) and, in default having the suspension of his practising certificate increased by a further three months to being eight in total.

(b) Submission of Counsel for the Applicant: Suspension of at least 3 months

[39] Counsel for the Applicant in his *'Submissions on Penalty'* dated 1st December 2017, has cited, in summary, the following:

(1) *Chief Registrar v Ram Chand* - Counsel for the Applicant has submitted that *'it has relevance to the instant case'* and his *'premeditated his actions'* exacerbated in the present case that when *'he was asked several times by Rajasinghe J. whether that position was correct'*, he *'answered unwaveringly in the affirmative, without taking the time to clarify that position in any way'*;

(2) ***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]

(3) ***Singh v Kumar*** (Unreported, High Court of Fiji at Lautoka, Civil case No. HBC 31 of 2008, 24 May 2016, Justice Abeygunaratne; PacLII: [2016] FJHC 447, <http://www.paclii.org/fj/cases/FJHC/2016/447.html>) - *'where a Defendant sought to set aside a default judgment'* having *'failed to turn up at the hearing date'* claiming that he had not been served, the Court found service had been effected and concluded that '*the evidence points to only one conclusion, that he deliberately failed to be present on the hearing date'*. Counsel for the Applicant has submitted that in the present case, '*similarly, the Respondent's actions were deliberate and being disciplinary proceedings for his professional misconduct, call for a stricter penalty than just a fine alone'* and thus '*a suspension term ... in addition to a fine and reprimand*'.

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

[40] Counsel for the Respondent legal practitioner in his '*Mitigation Submissions'*, December 2017, has cited, in summary, the following cases:

(1) 'After analyzing the seriousness of the misconduct in the charge I have the opinion that in contrasting to Aseri Vakaloloma's case and Vosarogo's case in which the Commission has given its sanction I would also ask this Commission to apply the same to this instant case'

(2) ***Chief Registrar v Chand [2013] FJILSC 14; No.017.2013 (3 October 2013)***

(d) Recent decisions of the Solicitors Disciplinary Tribunal of England and Wales

[41] I have also had regard to two recent decisions of the Solicitors Disciplinary Tribunal of England and Wales as follows:

(1) ***Solicitors Regulation Authority v Nicholas Samuel Usiskin***, Solicitors Disciplinary Tribunal, Case No.11673-2017, 5 October 2017 (see <http://www.solicitorstribunal.org.uk/sites/default/files-sdt/11673.2017.Usiskin.pdf>) – the legal practitioner *'signed statements of truth*

in three witness statements purporting that the signatures were' of those witnesses and then he served the statements on the Defendant as well as filed them in the Oxford County Court *'and in doing so attempted to mislead the Court that the signatures on the statements were'* legitimate. When it came to light, *'the Respondent immediately admitted what he had done and apologised and explained'*. The Respondent who had been in practice for 30 over years, was suffering depression and it was noted that the medical evidence *'constituted powerful personal mitigation'*. The Respondent was **suspended from practice for nine months** and thereafter was to work under a restricted practising certificate. He was also ordered to pay costs. I noted that a copy of this judgment was provided to both counsel at the sanctions hearing and they were given the opportunity to peruse it during a short adjournment.

(2) ***Brett v The Solicitors Regulatory Authority*** [2014] EWHC 2974 (Admin), <http://www.bailii.org/ew/cases/EWHC/Admin/2014/2974.html>, that I have previously cited in my judgment of 30th November 2017, wherein the Divisional Court of the High Court of England and Wales considered as to **whether one can act *knowingly though not dishonestly***. This was an appeal from the Solicitors Disciplinary Tribunal (*Solicitors Regulation Authority v Alastair Brett*, Unreported, Case No. 11157–2103) that *'Mr Brett should be suspended from practice as a solicitor for **6 months** ... and that he pay the costs of those proceedings summarily assessed at £30,000'*. He appealed against the finding that he had knowingly mislead the Court as well as the award of costs. As the judgment of the High Court noted, *'He does not separately appeal the sanction of six months suspension which, we are informed, he has served in full.'* The High Court found him guilty of the lesser offence of *'recklessly ... allowing the court to be misled'*, rather than knowingly mislead the Court and of *'failing to act with integrity'*. It also dismissed the summary assessment of costs.

(e) The fine sanction

[42] The 5th edition of the *'Guidance Note on Sanctions'* has explained (at 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.'*

[43] 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.***'

[44] The five 'Indicative Fine Bands' set out by the 5th edition of the *'Guidance Note on Sanctions'* (paragraph 28, page 12) are replicated in ***Table 1*** below:

Fine Band	Overall Assessment of Seriousness of Conduct	Fine Range
Level 1	Lowest level for conduct assessed as sufficiently serious to justify a fine (rather than a reprimand)	£0-£2,000
Level 2	Conduct assessed as moderately serious	£2,001-£7,500
Level 3	Conduct assessed as more serious	£7,501-£15,000
Level 4	Conduct assessed as very serious	£15,001-£50,000

Level 5	Conduct assessed as significantly serious but not so serious as to result in an order for suspension or strike off	£50,001 - unlimited

[45] As I discussed in ***Chief Registrar v Vakaloloma*** (Unreported, ILSC, Case No. 001 of 2017, 14 June 2017; PacLII: <http://www.paclii.org/fj/cases/FJILSC/2017/10.html>) at [60], *'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'.*

[46] More recently, in ***Chief Registrar v Vosarogo*** (Unreported, ILSC, Case No. 002 of 2016, 29 September 2017; PacLII: [2017] FJILSC 12, <http://www.paclii.org/fj/cases/FJILSC/2017/12.html>), I discussed at [112], that *'simply converting British Pounds to Fijian Dollars by multiplying each of the figures provided ... does not provide, in my view, a realistic comparison'.* I did, however, set out in *Vosarogo* at [113] a table as to *'the level of fines imposed by the Commission in previous cases ... (with the added rider that this may not cover all fines ever imposed especially those varied on appeal and it is to be taken instead as a broad indication)'.* Further, I set out at [115] that 'doing my best, the level of fines for misconduct by a legal practitioner in Fiji may result in the following "ballpark" figures set out in ***Table 2*** below:

Fine Band	**Overall Assessment of Seriousness of Conduct**	**Fine Range [SDT of England & Wales]**	**Perhaps Fine Range Applicable in Fiji**
Level 1	Lowest level for conduct assessed as sufficiently serious to justify a fine (rather than a reprimand)	£0-£2,000	FJD $0-$1,999
Level 2	Conduct assessed as moderately serious	£2,001-£7,500	$2,000-$7,500
Level 3	Conduct assessed as more serious	£7,501-£15,000	$7,501-$15,000
Level 4	Conduct assessed as very serious	£15,001-£50,000	$15,001-$50,000

Level 5	Conduct assessed as significantly serious but not so serious as to result in an order for suspension or strike off	£50,001 - unlimited	$50,001 - $500,000

[47] Obviously, also, in Fiji a fine can be imposed as well as a suspension.

[48] I note that the case of *Chief Registrar v Ram Chand,* fell within Level 2 of the above fine range. That is, for *'Knowingly deceiving or misleading the High Court by seeking an adjournment for health reasons whilst appearing on the same day in the Magistrates Court'*, the *'Conduct assessed as MODERATELY SERIOUS'* and the practitioner was suspended as well as fined $5,000.

[49] In the present case, the Respondent misled the Court and continued to do so in five separate statements on 28th February 2017. If there was any contrition on his part, he had that opportunity to correct his error the following morning and asking to have the matter relisted so he could apologise. He did not so. Presumably, he hoped that no one would notice.

[50] **In the circumstances, I am of the view that the level of seriousness in this matter is arguably at Level 2, that is, conduct assessed as moderately serious. At the sanction hearing this afternoon, Counsel for the Applicant suggested the starting level of fine should be $3,000.00 and in line with the *Chand* case, should that not be paid within a certain period of time then a longer period of suspension would be imposed. Counsel for the Respondent suggested a fine of $1,000.00.**

(f) Restriction Order

[51] Neither party has suggested imposing a **restriction order** (that is, in the form of a condition upon the way in which a solicitor continues to practice). I also do not see that as an appropriate final or sole sanction in the circumstances.

[52] I am of the view, however, that as I am dealing with a junior practitioner still at an early stage in his career, thus the prospects of rehabilitation are good. I am also mindful, however, as to Commission's role in the ongoing protection of the public. As such, I have come firmly to the view that there is a need for the

Respondent to complete a course in ethics over the next 12 months and will be including this as one of the sanctions that I will be imposing upon the Respondent. I raised this sanction with both Counsel at the sanctions hearing and they agreed that it could be a condition of any sanction imposed. I note the Counsel for the Applicant advised at the sanctions hearing that the cost of the ethics course conducted by the Chief Registrar's Office is usually of two days duration at a cost of $600.00. Both Counsel also agreed with my suggestion of having the Respondent undertake some legal aid trials on a pro bono basis under supervision.

(g) Suspension

[53] At the sanctions hearing this afternoon, Counsel for the applicant suggested that the starting point for suspension should be three months and considering the suspension in line with *Chand* and a further two months should be taken into account if a fine is not paid. Counsel for the Respondent suggested no suspension but if it had to be then for one month.

[54] 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]

[55] Applying the above, I have come to the view in relation to a **suspension** as follows:

(1) The seriousness of the conduct is that neither a restriction order, reprimand nor a fine is a sufficient sanction or in all the circumstances appropriate;

(2) There is a need to protect both the public and the reputation of the legal profession from such conduct, but neither justifies striking off the Roll;

(3) Public confidence in the legal profession demands no less than the minimum of a suspension when a practitioner has knowingly misled a court;

(4) A lack of sufficient insight by the respondent (demonstrated by the facts that I have found proven in my judgment of 30th November 2017 including the Respondent's evidence) requires a period of suspension;

(5) This is serious misconduct. As per the mitigating factors mentioned above, I have assessed it at Level 2 'moderately serious' rather than Level 3 'more serious'.

(h) Personal mitigation

[56] **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 the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness**. 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. 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]

[57] 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'*– this is arguably applicable and should be take into account;

(iii) '*the respondent made prompt admissions and demonstrated full cooperation with the regulator'* – although the Respondent apologised to the Court the following day, this was when the deception had been brought to the attention of the Court by the prosecutor. Apart from that apology, the case before the Commission has been vigorously defended. Thus, this is NOT a case where the Respondent legal practitioner pleaded guilty on the first return date and the Commission would be considering giving credit for such a plea. (See, for example, ***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>).

[58] 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. I have also not been provided with evidence as to whether his ability to pay a fine is limited by his means. The Respondent worked as a police officer prior to joining the legal profession. At the sanctions hearing I was advised that he is an employee of Colavanua Law under principal named Mr Sova Tabua.

[59] According to the written submissions of Counsel for the Respondent legal practitioner, the Respondent is 48 years of age, married and has a daughter.

[60] I also note that as provided in the Counsel for the Respondent legal practitioner written '*Mitigation Submissions*' that the Respondent:

> '*was a former Police Officer…He has been practicing for approximately 3 years 6 months…He was admitted to the Bar on 20th February 2015…He is a very humble man, and soft spoken gentleman, and easy to social with…*'

[61] As for the range of penalties imposed by the Commission previously, I note that there has been only once such matter, *Chief Registrar v Ram Chand,* where the practitioner was suspended for five months and fined $5,000.

6. The sanction to be imposed in this case

[62] As I have concluded that the **level of seriousness of the misconduct as 'moderately serious' to 'more serious'**, and taking into account the Respondent's relative inexperience, in my view, it would be appropriate to impose the following four sanctions in this matter:

(1) A suspension –

The Respondent's practising certificate is suspended for a period of three months as from tomorrow, up to and including 5th March 2018;

(2) A fine -

(a) The Respondent is to pay a fine. Being in the moderately serious category, a fine would usually be in the range of between $2,000 and $7,500 Fijian Dollars;

(b) I have noted, however, that the 5th edition of the *'Guidance Note on Sanctions'* states that *'The Indicative Fine Bands provide broad starting points only'* and I have taken into account the following factors that it has listed:

(i) whilst the seriousness of the misconduct puts the case at Level 2 "moderately serious", it is in the lower end of that category;

(ii) the level of fines imposed by this Commission between 2009-2017 (as set out in Vosarogo) and the fines imposed by the Solicitors Disciplinary Tribunal of England and Wales in two analogous cases as set out in this judgment;

(iii) the standing of the Respondent – I have noted here he is an employee and relatively junior at the bar;

(iv) the limited means available, including any costs order I propose to make *'and any adverse financial impact of the decision itself';*

(e) Therefore, the fine to be imposed is summarily set in the sum of $2,000.00, with such sum to be paid within three months of tomorrow, that is, by 12 noon on 5th March 2018;

(3) Legal ethics course

(a) To assist in his rehabilitation, the Respondent is, at his own expense, to enrol in an ethics course conducted by the Chief Registrar's Office, **to be completed by 30th June 2018;**

(b) If the subject in legal ethics is not completed by 30th June 2018, the Respondent's practising certificate is to be suspended without further order until the Respondent has satisfied the Chief Registrar that he has completed such a course.

(4) Three pro bono legal aid trials –

(a) Finally, to assist in making a direct contribution to restoring the public's faith in the profession, **the Respondent is to undertake three legal aid trials on a pro bono basis to be completed by 30th June 2018;**

(b) The trials are to be selected by the Director of Legal Aid;

(c) Each trial is to be no more than five days;

(d) Supervised by the principal, Mr Sova Tabua of Colavanua Law;

(e) If the trials are not completed by 30th June 2018, an automatic suspension of the Respondent's practising certificate will apply for a period of three months as from 1st July 2018 until 30th September 2018.

3. Costs

[63] At the sanctions hearing today, 5th December 2017, I asked Counsel to address me on costs. Counsel for the Respondent legal practitioner submitted that any costs awarded should be minimal according to his financial means. 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 $1,000.00.

[64] 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.* [SEP]
>
> *58. Before making any order as to costs, the Tribunal will give the respondent the opportunity to adduce financial information and make submissions ...'*

[65] In assessing costs, I am of the view that the sum quoted by Counsel for the Applicant for the costs of bringing the application of $1,000.00 is more than reasonable.

[66] In addition, I note that the Commission also put aside time and resources during the September Sittings to hear this matter, take and consider submissions, prepare a transcript, deliver a judgment in these Sittings, following which to then hear and consider both written and oral submissions in mitigation and to then deliver a sanctions judgment. As such, I am of the view that a similar sum of $1,000.00 should be paid to the Commission.

[67] Accordingly, pursuant to section 124(1) of the *Legal Practitioners Act 2009,* I have summarily assessed the costs of the Applicant for bringing the proceedings in the sum of $1,000.00.

[68] Similarly, pursuant to section 124(1) of the *Legal Practitioners Act 2009,* I have summarily assessed that the Respondent is to pay to the Commission the sum of $1,000.00 towards the reasonable costs incurred by the Commission in this matter.

[69] I note that I have just ordered the suspension of the Respondent's practising certificate for three months, that he has been fined and is required to undertake an ethics course, and that we are currently at a time of the year where there may well be particular financial pressures upon the Respondent. Accordingly, I am prepared to allow the Respondent time to pay both the fine together with one half of the fixed costs that I have summarily assessed. That is, the Commission's cost of $1,000.00 to be paid by **12 noon on 8th December 2017 directly to the Commission**. The fine as well as the cost of the Applicant to be paid within three months of tomorrow, that is, by **12 noon on 5th March 2018**.

[70] In reaching this conclusion, I can only cite again (as I did at the conclusion of my previous judgment of 30th November 2017 finding the offence proven in this matter), that is, what was said by Lord Thomas of Cwmgiedd in *Brett* (at [111]–[113]:

> *'111. ... **misleading the court is regarded by the court and must be regarded by any disciplinary tribunal as one of the most serious offences that an advocate or litigator can commit.** It is not simply a breach of a rule of a game, but a fundamental affront to a rule designed to safeguard the fairness and justice of proceedings. Such conduct will normally attract an exemplary and deterrent sentence. That is in part because **our system for the administration of justice relies so heavily upon the integrity of the profession and the full discharge of the profession's duties and in part because the privilege of conducting litigation or appearing in court is granted on terms that the rules are observed not merely in their letter but in their spirit**. Indeed, the reputation of the system of the administration of justice ... and the standing of the profession depends particularly upon the discharge of the duties owed to the court.*
>
> *112. **Where an advocate** or other representative or a litigator **puts before the court matters which he knows not to be true or by omission leads the court to believe something he knows not to be true**, then as an advocate knows of these duties, **the inference will be inevitable that he has deceived the court**, acted dishonestly and is not fit to be a member of any part of the legal profession.*

> *113.* ***As conduct that is dishonest, such as misleading the court with such knowledge will inevitably be****, is so serious,* ***it is of the utmost importance that in difficult circumstances which can confront any advocate*** *or litigator,* ***that advocate*** *or litigator* ***has at the forefront of his mind his duty to the court, the necessity to avoid breach of that duty*** *and, if he has any doubt as to how to discharge that duty, by taking independent advice'* [My emphasis]

[71] Finally, I wish to record my thanks to Counsel for the Chief Registrar and the Counsel for the Respondent legal practitioner for their submissions. I also wish to record my thanks to my staff who once again have set late in this evening to allow the Judgment to be delivered in a timely manner.

ORDERS

[72] The formal Orders of the Commission are:

1. In the Application filed in ILSC Case No. 002 of 2017, *Chief Registrar v Nacanieli Bulisea,* pursuant to section 121(1)(c) of the *Legal Practitioners Act 2009,* the practising certificate of *Nacanieli Bulisea* is suspended for the period of three months as from tomorrow, 6th December 2017, up to and including 5th March 2018.
2. In addition, pursuant to the *Legal Practitioners Act 2009,* the Respondent is fined the sum of $2,000.00 payable to the Commission within three months of tomorrow, that is, by 12 noon on 5th March 2018.
3. The Respondent is, at his own expense, to enrol in an ethics course conducted by the Chief Registrar's Office, to be completed by 30th June 2018.
4. If Order 3 is not completed by 30th June 2018, the Respondent's practising certificate is to be suspended without further order until the Respondent has provided documentary evidence to the Chief Registrar that he has satisfied Order 3.
5. Further, the Respondent is to undertake three legal aid trials, on a pro bono basis, to be completed on or before 30th June 2018, as follows:

   (1) The Respondent is to undertake three trials in the High Court of Suva on behalf of the Legal Aid Commission at no cost on or before 30th June 2018;

   (2) Such trials are to have an estimated duration of no more than five days each;

(3) The trials are to be selected by the Director, Legal Aid Commission;

(4) To be supervised by the principal, Mr Sova Tabua of Colavanua Law;

(5) This condition on the Respondent's practising certificate is to be automatically removed on the Director Legal Aid Commission certifying in writing to the Chief Registrar (with a copy to the Respondent and the Commission) that the three trials have been satisfactorily completed;

(6) Should the above condition not be removed on or before the 30th June 2018, the Respondent's practising certificate shall be automatically suspended for three months as from 1st July 2018 until 30th September 2018 inclusive without further order;

6. Pursuant to section 124(1) of the *Legal Practitioners Act 2009,* the costs payable by the Respondent towards the reasonable costs incurred by the Applicant Chief Registrar are summarily assessed in the sum of $1,000.00, payable to the Chief Registrar within three months of tomorrow, that is, by 12 noon on 5th March 2018; and

7. 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 $1,000.00, payable to the Commission by 12 noon this Friday, 8th December 2017.

Dated this 5th day of December 2017.

INDEPENDENT LEGAL SERVICES COMMISSION
SEAL

Dr. Thomas V. Hickie
COMMISSIONER