

**IN THE INDEPENDENT LEGAL SERVICES COMMISSION
AT SUVA**

ILSC No. 012 of 2020

BETWEEN: CHIEF REGISTRAR

APPLICANT

AND: ROBINSON KAMAL PRASAD

RESPONDENT

Counsel: Ms. Anish Sharma for the Chief Registrar

Ms. Renee Lal for the Respondent

Date of Hearing : 18th November 2022

Written submissions : 19th January 2023

Date of Ruling : 21st March 2023

DETERMINATION

Introduction

1. On 15th September 2020, this Application was filed by the Chief Registrar setting out an allegation of Professional Misconduct against the Respondent, Robinson Prasad particularized as follows:

COUNT 1

PROFESSIONAL MISCONDUCT: *Contrary to section 82(1)(a) of the Legal Practitioners Act 2009.*

PARTICULARS

ROBINSON KAMAL PRASAD, a legal practitioner, being the principal practitioner of **ROBINSON K PRASAD LAWYERS**, failed to provide to the Chief Registrar with a sufficient and satisfactory explanation in writing of matters contained in the complaint of **RAM SAMUJH** dated 28th February, 2020, as required by the Chief Registrar by a Notice dated 9th June, 2020, pursuant to Section 104 and 105 of the Legal Practitioners Act 2009 and thereafter failed to respond to a subsequent reminder Notice dated 7th July, 2020, issued by the Chief Registrar pursuant to section 108(1) of

the Legal Practitioners Act 2009, which conduct is a breach of section 108(2) of the Legal Practitioners Act 2009 and is an act of professional misconduct.

2. This application was instituted on 15th September, 2020 and first called on 9th October, 2020. Due to various reasons including the absence of Respondent and determining of preliminary objection, the matter was finally taken up for hearing on the 18th November, 2022. Both parties were granted time to file their written submissions. The Applicant's written submission was tendered on 19th January, 2023. However, the Respondent failed to file his written submission despite dates granted up until today. Accordingly, I proceed to consider the evidence and the submission of the Applicant, Chief Registrar and to determine this application.

The statutory basis of the charge

3. Upon the receipt of a complaint or commencement of an investigation against a practitioner, section 104 of the Legal Practitioners Act 2009 (henceforth will be also referred to as the LPA) require the Registrar to refer the substance of the complaint or the investigation to the legal practitioner or the partner as the case may be. Pursuant to section 105 of the LPA, the Registrar is empowered to require the practitioner to furnish a satisfactory explanation in writing or explanation in relation to any matter relating to that Practitioner's conduct or practice; and section 106 of the LPA, empowers the Registrar to require the production of documents. Section 105 of the LPA is as follows:

Registrar may require explanation

"105 (1) Upon receipt of a complaint under section 99 or commencement of an investigation under section 100, the Registrar may require that the legal practitioner or the law firm by written notice to furnish to the Registrar within the time specified in that notice a sufficient and satisfactory explanation in writing of the matters referred to in the complaint.

(2) The Registrar may by notice in writing require a legal practitioner or law firm to provide to the Registrar a sufficient and satisfactory explanation of any matter relating to that practitioner's or that law firm's conduct or practice. Such explanation shall be provided in writing to the Registrar within the time specified in the notice."

4. When there has been a failure by the practitioner to respond to the section 105 notice, then the Registrar is empowered to issue a notice pursuant to section 108 warning that such practitioner will be liable to be dealt with for professional misconduct which states as follows:

Failure to provide explanation or production of documents etc

108.—(1) Where any legal practitioner or law firm fails to comply with any notice issued under section 105 or section 106, the Registrar may notify the legal practitioner or law firm in writing that if such failure continues for a period of fourteen days from the date of receipt of such notice, the legal practitioner or law firm will be liable to be dealt with for professional misconduct.

*(2) If such failure referred to in subsection (1) continues for a period of fourteen days from the date of such notification to the practitioner, **such failure shall be deemed to be professional misconduct**, unless the legal practitioner or law firm furnishes a reasonable explanation for such failure. In any proceedings before the Commission, the tendering of a communication or requirement from the Registrar with which the legal practitioner or law firm has failed to comply, together with proof of service of such communication or requirement, shall be prima facie evidence of the truth of the matters contained in such communication and any enclosures or annexures accompanying such communication.' [emphasis added]*

5. Thus, when there is no response to the initial notice under Section 106, the Registrar is then empowered to issue a second notice pursuant to section 108(1) which is in effect a warning that if the failure continues for a further 14 days from receipt by the practitioner of the second notice, the practitioner is liable to be dealt with for **professional misconduct**.
6. If the practitioner still fails to respond within 14 days of the receipt by the practitioner of the second notice, then pursuant to section 108(2) such failure shall be **deemed** to be professional misconduct unless the legal practitioner or law firm furnishes a reasonable explanation for such failure.

What is professional misconduct?

7. Sections 82(1)(a) and 83(1)(g) of the LPA state as follows:

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:

...

(g) *conduct of a legal practitioner or law firm in failing to comply with any orders or directions of the Registrar or the Commission under this Act*.
[emphasis added]

8. Commissioner Dr. T.V. Hickie, in **Chief Registrar v Bukarau** [2016] FJLSC 2 (7 June 2016) expounded that;

*"[13] Put simply, if an Application is filed by the Chief Registrar with the Commission alleging professional misconduct pursuant to sections 82(1)(a), 83(1)(g) and/or 108(2), it is NOT the substance of the initial complaint lodged under section 99 or the commencement of an investigation under section 100 that become the basis of the Chief Registrar's application, rather **it is an allegation that there has been a "failure to respond" by the legal practitioner to the notice issued by Chief Registrar pursuant to s.108(1), that is, to provide a sufficient and satisfactory explanation in writing which is deemed to be professional misconduct pursuant to section 108(2).**"*

9. Thus, it is the omission of failure to respond in a timely manner to the notice issued by the Chief Registrar pursuant to Section 108(1) of the LPA that is the basis of alleging professional misconduct. These are simply, allegations of professional misconduct pursuant to sections 82(1)(a), 83(1)(g) and/or 108(2) of the LPA, that there has been a failure to respond by the legal practitioner to the notice issued by Chief Registrar pursuant to Section 108(1) of the LPA, that is, to provide a sufficient and satisfactory

explanation in writing or produce such documents which is **deemed** to be professional misconduct pursuant to section 108(2).

What is the import of the deeming provision in section 108(2)?

10. Section 108(2) incorporates a deeming provision by which the failure to provide an explanation in writing or produce such documents, is deemed or presumed to be professional misconduct. The term “deem” is often associated with statutory provisions which declare that one fact shall be "deemed" or "presumed" (the "presumed fact") on proof of another fact (the "basic fact"). Presumptions in this sense are frequently accompanied by rebuttal clauses that stipulate how the presumed fact can be displaced.
11. As Section 108(2) deem the failure to respond as being professional misconduct and when the fact of such failure (the “basic fact”) is proved or admitted, the fact of committing professional misconduct (the "presumed fact") is *ipso facto* presumed. However, this provision contains a rebuttal clause namely *the furnishing of a reasonable explanation for such failure*, by proof of which the presumed fact can be displaced.
12. Where the basic fact is treated as sufficient proof of the presumed fact in the absence of evidence to the contrary, proof of the basic fact alone will support the finding that the presumed fact (professional misconduct) also exists. Hence, there is a persuasive burden (a "reverse onus") shifted to practitioner to rebut the statutory inference and displace the presumed fact of professional misconduct. To this end, the Practitioner must adduce proof of such a reasonable explanation on a balance of probabilities (vide- *Collector of Customs v Murray* [1979] 1 N.Z.L.R. 76 (C.A.) at 82 per Cooke J]; *Esekielu v Department of Labour* [1980] 2 N.Z.L.R. 229 (C.A.) at 234 per Cooke J].
13. As to what misconduct is, in *Re A (Barrister and Solicitor of Auckland)* - HC Auckland AP 59-SW01, (10 December 2001) at 50., the High Court New Zealand endorsed the following passage from *Corpus Juris Secundum*;

‘Both in law and in ordinary speech the term ‘misconduct’ usually implies an act done willfully with a wrong intention, and conveys the idea of intentional wrongdoing. The term implies fault beyond the error of judgment; a wrongful intention, and not a mere error of judgment; ... Whether a particular course of

conduct will be regarded as misconduct is to be determined from the nature of the conduct and not from its consequences.'

14. This, in my view, will not apply to misconduct resulting from the failure to respond in view of the deeming clause of section 108(2). If there be no explanation then the consequence namely, the failure respond will *ipso facto* deemed to be professional misconduct. If there be a reasonable explanation then the reverse process is set in motion and the deemed or the presumed fact can be rebutted and, if so the nature of the conduct will determine if it is professional misconduct. However, in view of section 108(2) of the LPA, lackadaisical disregard or negligence to respond will amount to professional misconduct if such practitioner fails to maintain the minimum standards of diligence and competence expected of a legal practitioner.

Summary of Evidence

15. The Chief Registrar in proof of these charges led the evidence of Neha Chandra and Witness Tevita Cagina both from the Legal Practitioners Unit (the LPU).

The Applicant's Evidence

16. According to witness Ms. Khashal Chandra, a complaint was received by the Chief Registrar on 28th February 2020 from Ram Samujh. This complaint was against the Respondent, Mr. Robinson Prasad which was registered under LPU reference number 026/20. She has prepared the Section 104 and 105 Notices and then emailed the same to Mr. Robinson on this given email address robinsonlaw@connect.com.fj. The said notices were marked and produced as exhibit A2(a) and A2(b). The prints of the email correspondence was produced as exhibit A4. As there was no response, she had prepared the Notice under Section 108 (exhibit A5) and forwarded the same by email (exhibit A6).
17. The response to Section 105 notice was due on the 25th June, 2020 and the response to the Section 108 notice was due on the 22nd July, 2020. Ms. Chandra confirms that the LPU did not receive any response to these notices.
18. Witness Tevita Cagina confirms that the Section 108 Notice had been personally delivered by post to the Respondent and in proof of which a copy of the mail book was

marked and produced as exhibit A7. The postal and email addresses of the Respondent were obtained from his last application for the Practising Certificate tendered on 27th February, 2020. A copy of which was produced as exhibit A3. In cross-examination, the Respondent denied the receipt of these notices and put to the witness a letter written by him dated 4th April, 2019 (exhibit R1) by which he had informed the LPU of certain difficulties and delays in receiving letters and communications sent to him. He refers to power cuts, internet problems and registered mail being picked by his office staff but due to busy schedule and court commitments they remained unnoticed whilst the response time runs out. The Respondent also suggested that the posting of documents referred to in exhibit A7 is not prepaid post but normal post. He denied the receipt of any of the notices.

The Respondent's Evidence

19. The Respondent did give evidence and according to him he has been in active practice for 22 years since 2009. His main assertion is that due to the remoteness of the place of residence and his office he had been experiencing poor reception of internet facilities. He has on a previous occasions informed the Chief Registrar of the same by the letter dated 4th April, 2019. He specifically stated that he did not receive any of the emails from the LPU. He denies receiving of the emails as well as the notices sent by post. However, he admits that he was served with a notice from ILSC on the 18th September, 2020 upon the filing of this application. Upon receiving the said notice, the Respondent has by this letter dated 20th September, 2020 written to the Chief Registrar responding to the complaint of Mr. Ram Samujh. This letter was received by the Chief Registrar on the 9th October, 2020 (exhibit R4). The Respondent denies the receipt of the Notices under Section 104, 105 and 108 and also advances several probable reasons as to why he may have not received the same.

Evaluation

20. According to the evidence, the Notice under Section 104 and 105 dated 9th June, 2020 has been dispatched on 11th June 2020. Similarly, Notice under Section 108 (1) has been dispatched on 8th July 2020. The witness testified that these were sent via emails and the Notice under Section 108 (1) was also sent by post and in proof of which the copy of the mail book was marked and tendered as exhibit A7. This contains the LPU reference number, the particulars of documents and the details of the addressee, the

reference number correspond with the present allegations. The recipient is the Respondent practitioner. This proves that the said documents and Notice have been tendered for posting in the normal course of business upon the postage being paid. Therefore, it is clear evidence of the said Notice under Section 108 having been posted on a pre-paid basis. In view of the provision of section 145 of LPA, this is within the meaning of posting such notice or document by pre-paid post to that person. Apart from the documents, witness Mr. Cagina confirms the dispatch in that manner. The Notice so sent have not been returned. This for all purposes is sufficient proof and evidence of delivery and service of the said Notice under Section 108 to the Respondent practitioner

21. Independent to the said service by post, the witness Ms. Chandra testified that all these Notices were forwarded by email too. There had not been any return or any failure or delivery notice either. This to my mind is due service in accordance with the provisions of Section 145 of the LPA. Section 145 reads as follows;

“145. Any notice or other document whatsoever required under this Act to be given or served on a practitioner or former practitioner may, unless otherwise provided, be given or served by delivering such notice or document personally to that person, or posting such notice or document by pre-paid post to that person at his or her usual or last known place of business or abode or the place of business or abode last notified by that person to the Society.”

22. Section 145 of the LPA, expressly provides for two methods of service of notices. They are *by delivering such notice personally to that person, or posting such notice by pre-paid post to that person*. Whilst section 145 expressly provides for two specific methods of service of notice it does not exclude other forms of delivery where ***it is otherwise provided for***. Section 5 of the Electronic Transactions Act enables communicating in electronic form. Section 5A of the Electronic Transactions Act provides that;

“ 5A.—(1) Where any written law, for the time being in force in Fiji, requires information or documents to be presented, stored, retained or generated in its original paper based form, such requirement is deemed to be satisfied by information contained in a data message, electronic document, electronic record or other communication in electronic form, if there exists a reliable assurance with regard to assessing the integrity of the said information from the time such information was first generated in its final form as a data message,

electronic document, electronic record or any communication or otherwise, and the said information contained in the data message, electronic document, electronic record or communication is available and can be used for subsequent reference.”

23. Thus, section 145 of the LPA read with Section 5 of the Electronic Transactions Act enables serving of any notice under the LPA by electronic means in the electronic form via email.
24. The Respondent denies the receipt of any of these notices. He takes up the position that he may not have received the notices sent by post due to his busy schedule and it possibly remaining unnoticed in his office. He also denies the receipt of the said notices by email. He gives several and varied reasons as to why he may not have received the emails. They are power cuts, internet problems and that he using a small phone and also that his children use his phone. When he was asked if the emails were not seen when power and internet connection resumed he did not respond but was very evasive. I observe that the Respondent was merely attempting to set forth numerous probable reasons as to why he may not have received the electronic communications as well as the notices posted to him. When considering the totality of his evidence, it is apparent that he was giving myriad reasons as to why the notices may not have reached him. But his evasiveness and the improbability makes it apparent that his denial is false. It is with regret that I find that the Respondent was not forthright and truthful. His letter dated 4th April, 2019 addressed to the Chief Registrar before this incident too confirms his previous attempts to deny the receipt of notices on various uncertain, vague and imaginary reasons. In these circumstances the Respondent failed to convince this Commission in any degree, that he may have not received the notices as asserted.
25. The notices sent by post and emails have not returned. Thus the only inference is that in the normal course of events said notices were duly served on the Respondent. In the above circumstance, I am satisfied that it is well and sufficiently proved on the required civil standard that the Respondent practitioner was served with the said notices requiring him to furnish an explanation and that the Respondent failed and did not respond within the stipulated 14 days.

26. However, upon the institution of this application, a copy of the same was served on the Respondent on the 18th September, 2020. The Respondent has then on 9th October 2020 submitted a belated explanation, to the Chief Registrar. Though belated, the Respondent has sent some explanation on the 9th October, 2020 after this application was filed. This will if at all be taken in to consideration in determining the appropriate sanction.
27. On the evaluation of the evidence in its totality, the facts of due service of notices and the failure to respond within the stipulated time are proved. That being so the deeming provision of section 108(2) of the LPA comes into operation and now it is deemed that the Respondent did in fact commit Professional misconduct as alleged. Explanation of the Respondent is improbable and untrue. The only irresistible inference is that the Respondent did deliberately disregard the Notices and did not respond to the said Notices. Even if he was negligent, he is culpable. Any oversight or negligence is no excuse and such lapse will *per se* be attributed to the Practitioner and it was the Practitioner's duty and obligation to follow up and ensure that a response was duly sent to the LPU.
28. A legal practitioner is required to maintain a minimum standard of the due diligence and competence. For whatever reason, if he fails to maintain a minimum standard of diligence and competence, he violates the ethical rules which legal practitioners are required to abide by and is liable for professional misconduct as alleged.

Conclusion

29. Accordingly, I am satisfied that the Applicant has established on a balance of probabilities that the Respondent did fail to make a timely response to the Notices under Section 108(1) of the LPA in violation of Section 108(2) of the LPA as alleged. Accordingly, I find that the allegation particularized in this application allegation is proved and find the Respondent Practitioner culpable and accordingly liable and guilty of professional misconduct as alleged.

Sanction

30. As for sanction, I will be guided by the following dicta of Commissioner Dr. T.V. Hickie, in **Chief Registrar v Bukarau** [2016] FJLSC 2 (7 June 2016):

"[157] Let this judgment be a clear message to the profession that such professional misconduct will not be tolerated. If a practitioner comes before the Commission for a breach of a s.108 notice, the starting point for any sanction to be imposed will be a fine in the vicinity of \$1,000-\$1,500. Practitioners may or may not be suspended (sometimes indefinitely), depending upon the circumstances, including whether they have replied to the Chief Registrar in the time period between the LPU filing the Application and serving it upon the Respondent and the first return date of it before the Commission."

31. Considering the circumstances of this violation especially considering the fact of the Respondent providing an explanation after the LPU filed this Application, the age of the Respondent and his 22 years of being in active practice to my mind the minimum possible sanction in this instance will suffice. Accordingly, I make the following orders against Respondent Mr. Robinson Kamal Prasad:

ORDERS

1. The Respondent is publicly reprimanded.
2. The Respondent is fined in the sum of \$500 to be paid to the Commission.
3. The Respondent is fined in the sum of \$500 to be paid to the Chief Registrar. The said fines are to be paid within 45 days of today that is on or before 12noon on 5th of May 2023. If the Respondent fails to pay as directed, the Chief Registrar is directed to suspend his Practising certificate until payment is made in full.

Dated the 21st day of March, 2023.

