

**BEFORE THE IMMIGRATION ADVISERS
COMPLAINTS AND DISCIPLINARY TRIBUNAL**

Decision No: [2016] NZIACDT 55

Reference No: IACDT 047/15.

IN THE MATTER of a referral under s 48 of the Immigration
Advisers Licensing Act 2007

BY **The Registrar of Immigration Advisers**
Registrar

BETWEEN **Marthinus Greyling**
Complainant

AND **Sergey Gimranov**
Adviser

DECISION
(SANCTIONS)

REPRESENTATION:

Registrar: Ms C Pendleton, lawyer, MBIE, Auckland.

Complainant: In person.

Adviser: In person.

Date Issued: 15 September 2016

DECISION

Introduction

- [1] The Tribunal upheld this complaint in a decision dated 2 May 2016, *Greyling v Gimranov* [2016] NZIACDT 22 (www.justice.govt.nz). The Tribunal found Mr Gimranov breached his professional obligations:
- [2] Mr Gimranov worked in a practice styled North Shore Immigration:
- [2.1] Mr Gimranov agreed to provide the professional services to apply for a work and residence visa. His client Mr Greyling paid \$7,000 for those services;
- [2.2] Mr Woodberg, who styled himself as the managing director of North Shore Immigration provided information for Mr Greyling regarding the process for entering New Zealand, and told him what he should say to border control officers; that included counselling him to provide a false itinerary. Mr Gimranov was aware of Mr Woodberg's intervention.
- [2.3] After entering New Zealand and evaluating the potential to live here, Mr Greyling decided he did not want to live in New Zealand. He asked for a refund of fees.
- [2.4] Mr Gimranov refused to provide a refund of any fees.
- [3] The Tribunal upheld the complaint as:
- Mr Woodberg's unlawful advice*
- [3.1] Mr Gimranov failed to inform his client that Mr Woodberg was not entitled to provide immigration advice, and that what Mr Woodberg told his client was wrong. Accordingly, Mr Gimranov failed to act professionally and breached clause 1 of the 2014 Code.
- [3.2] Mr Gimranov failed to take proper steps when Mr Woodberg intervened in his professional relationship with his client. Accordingly, he failed to deliver his professional services to Mr Greyling in accordance with the Act, and breached clause 3(c) of the 2014 Code.
- Failure to refund fees*
- [3.3] When Mr Greyling terminated the contract, he was entitled to a refund deducting only a fair and reasonable fee for preliminary work.
- [3.4] Mr Gimranov, for patently unjustifiable reasons, failed to provide any refund and breached clause 24(c) of the 2014 Code.

The Parties' Positions on Sanctions

The Registrar's position

- [4] The Registrar (following an invitation from the Tribunal) set out her view that a restorative approach was open in respect of sanctions. Mr Gimranov should complete specified courses that comprise part of the Graduate Diploma in New Zealand Immigration Advice (or the full course); and the Tribunal should order a caution or censure, payment of a penalty and the refund of part or all of the fees.
- [5] However, the Registrar's position depended on Mr Gimranov reflecting on his response to the complaint, his professional duties and agreeing to the course of study.

Mr Gimranov's position

- [6] Mr Gimranov formally acknowledged his errors. However, the acknowledgement was grudging. He:
- [6.1] Said he would complete the course if the Tribunal ordered him to do so, whereas the Registrar's approach was predicated on Mr Gimranov agreeing to complete the course;
 - [6.2] He said completing the whole course would be unreasonable, as he had excellent client references;
 - [6.3] He claimed Mr Greyling could not see the client references due to privacy considerations;
 - [6.4] He expected the refund of fees to be discounted due to the work he had performed;
 - [6.5] He accepted a caution, but expected the Tribunal to discount the penalty due to the fact he was an employee.

Mr Greyling's reply

- [7] Mr Greyling responded to Mr Gimranov and said the work Mr Gimranov performed did not justify any payment.

Discussion*Perspective*

- [8] In professional disciplinary matters, reflection, insight and a commitment to redressing failings are pivotal to the response a disciplinary tribunal will make after adverse disciplinary findings. If a licensed immigration adviser does not understand the gravity of their misconduct and does not resolve to change, protecting the public is of overwhelming importance.
- [9] The consumer protection offered by the Immigration Advisers Licensing Act 2007 (the Act) requires that persons do not hold a licence, unless they are committed to maintaining the standards promised in the Act and the Code of Conduct 2014.
- [10] This complaint involved a licensed immigration adviser's practice, where an unlicensed person advised a client to prepare a false itinerary to deceive Immigration New Zealand, and kept \$7,000 of that client's fees with no justification. Exclusion from the profession is virtually inevitable given the gravity of the findings. The only obvious potential for a different result would have been mitigation because the environment where he practised caused him to misunderstand his professional rights and obligations; together with insight and an unqualified commitment to change.
- [11] The Tribunal twice drew Mr Gimranov's attention to his right to take legal advice; and the blunt and wise advice in *ZW v Immigration Advisers Authority* [2012] NZHC 1069 that "it would be foolish for any immigration adviser who contests serious aspects of a complaint not to seek some form of legal advice".
- [12] Mr Gimranov remains self-represented, which of course is his right. However, it is inevitable that the Tribunal will set sanctions based on the insight and attitudes Mr Gimranov has expressed. The Tribunal gave Mr Gimranov the clearest of messages, that reflection was necessary, and this decision would potentially affect his licence.

The gravity of providing unlicensed immigration advice

- [13] Section 63 provides that a person commits an offence if they provide immigration advice without being licensed to do so, or they are exempt from holding a licence, knowing that they are required to be licensed or exempt. It is also an offence for that conduct, where the person does so without knowledge of the Act's terms.
- [14] The range of penalties for a breach of section 63 is imprisonment for up to 7 years, a fine of up to \$100,000 or both for knowingly offending, or a fine of up to \$100,000 if the knowledge

element is absent. The courts have treated the offending as having a gravity that reflects the range of penalties. In *Hakaoro v R* [2014] NZCA 310 the Court of Appeal dealt with an appeal against a sentence of one year and eight months' imprisonment on charges under the Act. Mr Hakaoro's appeal was unsuccessful, as was his application for leave to appeal to the Supreme Court.¹

- [15] If a licensed immigration adviser is a party to an unlicensed person providing immigration advice, this involves serious criminal offending against their client. The criminalisation of unlicensed persons providing immigration services categorically excludes unlicensed persons from providing those services, whether operating under the umbrella of a licence holder or otherwise. The profession is well aware of this restriction and the consequences of such breaches, which are a recurring issue in complaints before this Tribunal.
- [16] A person seeking a licence under the Act is required to demonstrate that they understand the essential principles of immigration practice before they obtain a licence. There are numerous decisions of this Tribunal addressing licensed immigration advisers being a party to unlicensed persons providing immigration advice. The *ZW* case (above) affirmed the relevant principles, and criminal sentencing decisions further affirm the effect of the Act. Since the Act has regulated the profession, the Immigration Advisers Authority has publicised these obligations and the decisions of the Tribunal and the courts relating to the issue.
- [17] The consequences of a professional person allowing or facilitating serious criminal offending to occur in their practice are obvious.
- [18] The present case is aggravated because Mr Greyling drew Mr Gimranov's attention to Mr Woodberg's coaching to provide false information to Immigration New Zealand. Mr Greyling pointed out that it was dishonest, and he refused to behave in that way. There was no lack of notice for Mr Gimranov, and his own client understood why Mr Woodberg's advice was dishonest.

The principles relating to orders affecting Mr Gimranov's licence

- [19] The authorities indicate it is a "last resort" to deprive a person of the ability to work as a member of their profession. However, regard must be had to the public interest when considering whether a person should be excluded from a profession due to a professional disciplinary offence: *Complaints Committee of Waikato Bay of Plenty District Law Society v Osmond* [2003] NZAR 162 (HC) at [13] – [14].
- [20] Rehabilitation of a practitioner is an important factor when appropriate (*B v B* HC Auckland, HC4/92, 6 April 1993). In *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at [30]-[31], the Court stressed, when imposing sanctions in the disciplinary process applicable to that case, that it was necessary to consider the "alternatives available short of removal and explain why lesser options have not been adopted in the circumstances of the case".
- [21] The purpose of professional disciplinary proceedings was affirmed by the Supreme Court in *Z v Dental Complaints Assessment Committee* [2008] NZSC 55 at [97]:
- [T]he purpose of statutory disciplinary proceedings for various occupations is not to punish the practitioner for misbehaviour, although it may have that effect, but to ensure that appropriate standards of conduct are maintained in the occupation concerned.
- [22] The statutory purpose is achieved by considering at least four factors that materially bear upon maintaining appropriate standards of conduct:
- [22.1] Protecting the public: section 3 of the Act states "[t]he purpose of this Act is to promote and protect the interests of consumers receiving immigration advice ..."
- [22.2] Demanding minimum standards of conduct: *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 725-726 and *Taylor v General Medical Council* [1990] 2 All ER 263 (PC), discuss this aspect.

¹ [2014] NZSC 169.

- [22.3] Punishment: the authorities, including *Z v Dental Complaints Assessment Committee* (at [1], [65], [70] & [149]-[153]), emphasise that punishment is not the purpose of disciplinary sanctions. Regardless, there is an element of punishment that serves as a deterrent to discourage unacceptable conduct (*Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at [28]).
- [22.4] Rehabilitation: it is an important object to have the practitioner continue as a member of the profession practising well, when practicable (*B v B* HC Auckland HC4/92, 6 April 1993).

Background to regulating this profession

- [23] In *ZW v Immigration Advisers Authority* [2012] NZHC 1069, Priestley J observed at [41]:

In passing the Act, Parliament has clearly intended to provide a system of competency, standards, and a Conduct Code to clean up an industry which hitherto had been subject to much justified criticism. The Registrar and Tribunal have a Parliamentary mandate to enforce standards.

- [24] The Act has established a regime in which, with limited exceptions, licensed advisers have an exclusive right to provide immigration advice. Criminal sanctions are used to enforce that exclusive right.

Alternatives short of cancellation of licence

- [25] Section 51 provides for various sanctions. The key options short of cancellation or suspension of a licence are punishments intended to effect deterrence; namely censure, and financial penalties not exceeding \$10,000.
- [26] In relation to licences, there are two options:
- [26.1] Cancellation and/or a direction that the person may not apply for a licence for up to two years, or until meeting specified conditions (s 51(d) & (e)); or
- [26.2] Suspension (s 51(c)).
- [27] Other possibilities include training and directions to remedy a deficiency (s 51(b)). There are also powers relating to imposing costs and compensation (s 51(g)-(i)).
- [28] Suspension may ensure that a proportional consequence is imposed: *A v Professional Conduct Committee* HC Auckland CIV-2008-404-2927, 5 September 2008 at [81].
- [29] In making this decision, the Tribunal is required to weigh the public interest against Mr Gimranov's interests (*A v Professional Conduct Committee* at [82]).

The appropriate order in this case

- [30] The Tribunal has consistently taken a restorative approach, if the nature of the professional offending, and the licensed immigration adviser's response permits it. Mr Gimranov has unfortunately made it clear in a series of ill-advised decisions that he has a sense of entitlement, and considers he knows better than the Registrar and the Tribunal. Mr Greyling has also consistently pointed out to Mr Gimranov his lack of perspective and insight.
- [31] When Mr Greyling realised Mr Woodberg was counselling him to deceive Immigration New Zealand by creating a false itinerary he wrote to Mr Gimranov. He said what Mr Woodberg told him to do was an invitation to lie "to the first government official you meet". Mr Greyling was correct and would not be a party to such behaviour. Mr Gimranov failed to act appropriately or responsibly.
- [32] Mr Gimranov brought no greater insight to the failure to refund fees. Even at the hearing after the Registrar formulated the grounds of complaint, Mr Gimranov asserted it was fair and reasonable that he charge all of the fee as his client could have completed his own immigration applications. The proposition was devoid of logic and merit. Mr Gimranov was engaged to provide these services. His alternative proposition was that he did so much work

he was entitled to keep the whole of the fee, it was neither true nor was it what Mr Gimranov thought at the time. The substantive decision sets out the reasons for rejecting Mr Gimranov's claims.

- [33] When issuing the decision upholding the complaint, the Tribunal made Mr Gimranov's position very clear to him, noting:

[A] significant issue in Mr Gimranov's professional offending is an apparent lack of insight. He persisted in attempting to justify indefensible conduct; even after the Registrar's counsel and the Tribunal made it clear why his response to the complaint apparently provided no answer; despite, the Tribunal giving him time for reflection and consultation at the hearing. The Tribunal will give Mr Gimranov a final opportunity to consider the matters now set out in writing in this decision and, it repeats its earlier notice regarding Mr Gimranov's right to legal representation.

The Tribunal observes it will potentially make orders affecting Mr Gimranov's licence; and if he is to continue as a member of the profession, it will potentially be subject to orders regarding training and supervision. If the Registrar and Mr Gimranov address those issues, it will assist the Tribunal. [Mr Greyling], of course, should address those matters, and any matters of concern to him.

- [34] This signalled to Mr Gimranov the gravity of his situation, and extended the opportunity to pursue a restorative approach. The Registrar made it clear to Mr Gimranov her view of the terms for a restorative approach, after referring to the Tribunal's comments, her counsel said:

The position of the Registrar on this issue is that she will not be making the submission Mr Gimranov's licence ought to be cancelled if he:

- (i) Acknowledges his errors; and
- (ii) Commits to an appropriate training course within the specified timetables ...

The basis for this position is that if Mr Gimranov completes these intensive training courses which are the equivalent to full time study, and acknowledges his errors, these actions will indicate an understanding of, and commitment to, his professional obligations as an immigration adviser.

- [35] Mr Gimranov's response unfortunately demonstrates he does not understand, and is not committed to his professional obligations. His response was:

[35.1] He said, "I do acknowledge my errors". There was no apology to Mr Greyling, no expression of regret for defending the indefensible at the hearing, no contrition for his unprofessional conduct; just an empty formulaic expression, apparently only to comply with the Registrar's demand.

[35.2] He said he would enrol for study "if the Tribunal directs" him to do so. He provided a series of client testimonials, which he said showed "the requirement to complete the whole course would be unreasonable".²

[35.3] He arrogated to himself the right to declare that Mr Greyling was not entitled to see the testimonials.

[35.4] He expected the Tribunal to discount the refund of fees. Given the Tribunal found the work he did was minimal, the services were delivered unlawfully, and included counselling Mr Greyling to provide false information to Immigration New Zealand; that contention is concerning. It is not consistent with accepting the Tribunal's findings.

[35.5] Mr Gimranov concluded saying that he will accept the imposition of a penalty and requested the Tribunal take into account he was an employee in the practice where he worked, with a fixed salary.

² I give Mr Gimranov the benefit of the doubt and assume he was referring to the whole of the Graduate Diploma in New Zealand Immigration Advice, as an alternative to the four courses.

- [36] Mr Gimranov's understanding of his professional obligations as demonstrated by his professional offending, and his response to the complaint is wholly deficient. I place little weight on the client testimonials. Mr Greyling has a sophisticated understanding of professional obligations; it stands in stark contrast with Mr Gimranov's deficiencies. However, clients are not usually experts in professional standards; that many clients have been pleased with Mr Gimranov's services says little of his competence and professional standards.
- [37] In the absence of a wholehearted commitment to: accepting the reality Mr Gimranov gravely breached his professional obligations; and an unreserved commitment to both improving his understanding and changing his behaviour, I must start with the gravity of the findings.
- [38] There is simply no place in the profession for a person who is party to the provision of unlawful advice that a client should deceive Immigration New Zealand.
- [39] Dishonesty points to the need to remove a practitioner from a profession, though it is not a necessary requirement before a disciplinary sanction should include removal from a profession. In *Shahadat v Westland District Law Society* [2009] NZAR 661 the High Court commented at [29]-[31]:

A finding of dishonesty is not necessarily required for a practitioner to be struck off. Of course, dishonesty inevitably, although not always, may lead to striking off. But as said in *Bolton v Law Society* [[1994] 1 WLR 512 (CA)] at pp 491-492:

If a solicitor is not shown to have acted dishonestly, but is shown to have fallen below the required standards of integrity, probity and trustworthiness, his lapse is less serious but it remains very serious indeed in a member of a profession whose reputation depends upon trust. A striking-off order will not necessarily follow in such a case, but it may well. The decision whether to strike off or to suspend will often involve a fine and difficult exercise of judgment, to be made by the tribunal as an informed and expert body on all the facts of the case.

As a Full Court observed in *McDonald v Canterbury District Law Society* (High Court, Wellington, M 215/87, 10 August 1989, Eichelbaum CJ, Heron and Ellis JJ) at p 12:

Even in the absence of dishonesty, striking-off will be appropriate where there has been a serious breach of a solicitor's fundamental duties to his client.

It is important to bear in mind that "dishonesty" can have different connotations. (It may describe criminal acts. But it may comprise acting deceitfully towards a client or deceiving a client through acts or omissions.)

- [40] As observed by the Court in *Shahadat*, dishonest conduct "inevitably, although not always, may lead to striking off". In the present case, the form of "dishonesty" is being a party to a criminal breach of the Act, involving advising a client to deceive Immigration New Zealand. It is important to look carefully at whether rehabilitation is realistic. I have done so.
- [41] I am satisfied that if there is any prospect of rehabilitation it can only be after Mr Gimranov invests in gaining the knowledge to provide services at a standard much higher than is evident in this complaint. He needs to understand the obligations a licensed immigration adviser has to manage under the Act and the Code in a practice environment. This disciplinary process has not resulted in Mr Gimranov taking ownership of his misconduct, and demonstrating an obligation to change. Protection of the public must have priority.
- [42] Accordingly, the Tribunal will cancel Mr Gimranov's licence, and prohibit him from applying for a licence again until he completes the entry requirements for the profession, and complies with the orders of the Tribunal. However, he should not assume the Registrar would ever consider he is fit to hold a licence. Fitness is an issue for the Registrar, not the Tribunal. He would be unwise to embark on training without discussing that issue with the Registrar.

Refund of fees

- [43] *Wang v Immigration Advisers Authority* [2016] NZDC 2414 reviews the principles concerning the professional responsibilities of persons who are licensed immigration advisers employed by practices. Judge Hastings observed:

The legislation is clear that the statutory obligations of advisers are personal to the adviser. It is for the adviser to take steps to ensure her or his obligations are met regardless of the business structure in which she or he gives advice. It is not possible for advisors to use a business structure to opt out of some or all of these statutory professional obligations. ... I respectfully agree with His Honour Judge MacAskill who, in *McHugh v Immigration Advisers Authority* (CIV-2013-085-001004, Christchurch DC, 28 January 2015) observed at [20] that the fact that "Oceania [the employer company] was potentially implicated in the dishonesty in no way excuses her [the employee adviser's] conduct." His Honour went on to observe at [21] that:

It seems to me that the appellant still fails to grasp that professional responsibility is essentially a personal responsibility and that an adviser cannot shelter behind their employer's practices or general reviews by the assessors.

- [44] This Tribunal has no jurisdiction to make an order against the company operating the practice where Mr Gimranov worked. Section 51(1)(h) of the Act does give power to make an order "directing the licensed immigration adviser ... to refund all or any part of fees or expenses paid by" Mr Greyling.
- [45] The Tribunal has repeatedly warned licensed immigration advisers if they fail to have structures in place to give the adequate control, and recourse against companies operating the practice in which they work, they do so at their peril.
- [46] Mr Gimranov was personally obliged to ensure he was in a position to meet the obligation to refund fees. The Code gave him the tools to do so. Now he is personally liable for an order in relation to the fees. What arrangements he has between himself and his employer does not alter the obligation to his client, and that is the basis for the Tribunal's decision.
- [47] Mr Greyling is entitled to a refund of the whole of the fees he paid. It would be unconscionable for Mr Gimranov to keep any of the fees, given significant elements of the service were not lawful; that was in respect of both Mr Woodberg's unlawful and dishonest advice and then Mr Gimranov's unsatisfactory reasons for not refunding the money. The services provided were minimal.
- [48] The Tribunal also awards Mr Greyling compensation for the delay in repaying the fees. It will be calculated as though interest at the Judicature Act rates. I have considered whether Mr Greyling should also be awarded compensation in the nature of a modest award in the nature of general damages. However, in this case I am satisfied the return of the full fees with compensation in the form of an interest equivalent calculation for the delay in repayment, is the proper measure.
- [49] The orders will be:
- [49.1] Refund of fees of \$7,000.
- [49.2] Compensation calculated as interest: \$478.63 to 15 September 2016 calculated at 5% per annum.
- [50] The rate of interest is consistent with the Judicature (Prescribed Rate of Interest) Order 2011.
- [51] The calculation is:

Fees	Date paid	Amount	Interest to 15/9/16
First Instalment	27/03/2015	\$1,000.00	\$73.70
Second Instalment	28/04/2015	\$2,000.00	\$138.63
Third Instalment	11/05/2015	\$2,000.00	\$135.07
Fourth Instalment	25/05/2015	\$2,000.00	\$131.23
		\$7,000.00	\$478.63

Monetary Penalty

- [52] While Mr Gimranov asks that the Tribunal consider his position as an employee, for the reasons discussed, he was the licensed immigration adviser. He had the statutory duty to

protect his client. As far as the client relationship is concerned, the Act required that Mr Gimranov was in control, and that he manage the involvement of unqualified personnel, including Mr Woodberg.

- [53] Mr Woodberg had no right to interfere in the delivery of professional services. He did so in a manner that amounted to a criminal offence, both as to his involvement at all, and in relation to counselling a client to attempt to deceive Immigration New Zealand. Mr Gimranov accepted the privileges of a licence that required him to ensure he controlled Mr Woodberg, and if he could not do so, he needed to change his practice environment.
- [54] There is no mitigation in that Mr Gimranov was an employee; he held the statutory licence so the responsibility was his. This Tribunal, the courts, and the Registrar have repeatedly emphasised that licensed immigration advisers carry this responsibility. They must not be in a practice environment where they do not have control of all aspects of service delivery mandated as their responsibility under the Act and the Code.
- [55] While the starting point for a financial penalty would be \$7,500, given that Mr Gimranov will be excluded from the profession the penalty will be reduced to \$5,000. The gravity of allowing an unlicensed person to provide immigration advice is at the most serious end of the spectrum, and in this case not only was the advice provided unlawfully, the advice was dishonest; it is the very sort of conduct the Act is intended to eradicate.
- [56] The failure to refund fees was also exploitative, unconscionable, and in flagrant breach of the Code.

Costs

- [57] As there has been no application for costs, there will be no order.

Order

- [58] The Tribunal orders that:
- [58.1] Mr Gimranov is Censured;
- [58.2] He shall pay a penalty of \$5,000;
- [58.3] He shall pay to Mr Greyling:
- [58.3.1] \$7,000 being a refund of fees; and
- [58.3.2] \$478.63 being compensation for the delay in refunding fees.
- [58.4] Any licence Mr Gimranov holds under the Act is cancelled forthwith; and
- [58.5] Pursuant to section 51(1)(e) of the Act, Mr Gimranov is prevented from applying for any category of licence under the Act (or any Act replacing it) until:
- [58.5.1] He has complied with all orders made by this Tribunal; and
- [58.5.2] Enrolled in, and been issued with a Graduate Diploma in New Zealand Immigration Advice (Level 7).
- [59] The orders to make payments all take immediate effect.
- [60] The Tribunal reserves leave for the Registrar or Mr Gimranov to apply to vary the orders relating to the Graduate Diploma in New Zealand Immigration Advice (Level 7), in the event the qualification changes, or there are alternative qualifications available. This decision does not imply Mr Gimranov would meet the fitness requirements at any time in the future. That is not a decision for the Tribunal.

DATED at Wellington this 15th day of September 2016.

G D Pearson
Chair