

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

Decision No: [2011] NZIACDT 10

Reference No: IACDT 011/10

IN THE MATTER

of a referral under s48 of the Immigration
Advisers Licensing Act 2007

BY

Immigration Advisers Authority
Authority

BETWEEN

JM
Complainant

AND

AHX
Adviser

DECISION
IMPOSITION OF DISCIPLINARY SANCTIONS

REPRESENTATION:

Adviser

In person

Date Issued: 29 March 2011

Decision

The decision on the complaint

- [1] In a decision dated 21 January 2011, the Tribunal upheld the complaint in this matter.
- [2] The facts and background are set out in the earlier decision. In summary, the key findings were the Adviser:
- [2.1] Was employed by SNJ.
- [2.2] The senior person in charge of the affairs of that company was SN. He was formerly a lawyer, but not at the time. He was not a licensed immigration adviser either. Accordingly, SN could not lawfully provide immigration advice (as defined in section 7 of the Immigration Advisers Licensing Act 2007 "the Act").
- [2.3] There was at least one other licensed immigration adviser working with SNJ, DTM.
- [2.4] The Adviser was part of a joint enterprise in which he, together with SN and DTM, were providing immigration advice, as part of that process, and all three were parties to it.
- [2.5] The Adviser, and DTM and SN, were all engaged in the initial phase of taking instructions, and determining a course of action. The Adviser knew or ought to have known no client relationship with the Complainant had been established in compliance with the Code.
- [2.6] I was not satisfied the Adviser had any further role beyond the initial work, and he may have reasonably believed the other licensed immigration adviser (DTM) had taken primary responsibility for the client relationship.
- [3] Given the findings, disciplinary sanctions under section 51 of the Act may be imposed by the Tribunal.
- [4] The sanctions which are potentially open are prescribed by section 51, which provides:

"Disciplinary sanctions

- (1) The sanctions that the Tribunal may impose are –
- (a) caution or censure;
 - (b) a requirement to undertake specified training or otherwise remedy any deficiency within a specified period;
 - (c) suspension of licence for the unexpired period of the licence, or until the person meets specified conditions;
 - (d) cancellation of licence;
 - (e) an order preventing the person from reapplying for a licence for a period not exceeding two years, or until the person meets specified conditions;
 - (f) an order for the payment of a penalty not exceeding \$10,000;
 - (g) an order for the payment of all or any of the costs or expenses of the investigation, inquiry, or hearing, or any related prosecution;
 - (h) an order directing the licensed immigration adviser or former licensed immigration adviser to refund all or any part of fees or expenses paid by the complainant or another person to the licensed immigration adviser or former licensed immigration adviser;
 - (i) an order directing the licensed immigration adviser or former licensed immigration adviser to pay reasonable compensation to the complainant or other person."

Submissions on disciplinary sanctions

- [5] The Complainant made submissions following the decision which upheld the complaint.
- [6] The Complainant produced material answering some of the allegations SN made against him and further justifying factual findings already made. That is not material to the present issues. In an email of 30 January 2011, he also submitted SN was of poor character, and supported that by providing a copy of a decision of the New Zealand Lawyers and Conveyancers Disciplinary Tribunal dated 19 July 2010.
- [7] The decision of the New Zealand Lawyers and Conveyancers Disciplinary Tribunal was not before the Tribunal when the decision relating to upholding the complaint was made.
- [8] The decision does support the view SN is of poor character. The New Zealand Lawyers and Conveyancers Disciplinary Tribunal's view of SN was, to say the least, unfavourable. It found he had treated that Tribunal with contempt and disrespect.
- [9] That Tribunal expressed concern the charges it found established involved abusing the trust of immigration clients who were particularly vulnerable and regarded his conduct toward them as "particularly egregious". The conduct was aggravated by attempting to have a complaint withdrawn by a payment of money in one instance.
- [10] The decision also dealt with him having stolen from his employers, and having been convicted of a criminal offence as a result. SN claimed before that Tribunal he was otherwise of good character, which resulted in a disputed fact hearing. That hearing established he had earlier been dismissed from employment in a legal firm that acted as an immigration consultancy, after discrepancies of almost \$20,000 were discovered.
- [11] That Tribunal also found SN had acted deceptively in relation to dealings with Immigration New Zealand.
- [12] The Tribunal summarised its conclusions as being that SN had "established himself as entirely untrustworthy and unreliable". Accordingly, he was not a fit and proper person to remain on the roll of barristers and solicitors.
- [13] The Adviser did not make submissions on penalty.

Decision

- [14] DTM has been the subject of sanctions in relation to his role in this matter. His circumstances were complicated by him having had disciplinary sanctions imposed in relation to a completely separate matter.
- [15] It is necessary to ensure the relationship between the sanctions imposed on DTM and the Adviser is fair.
- [16] Sanctions imposed on DTM were:
- [16.1] He was censured.
- [16.2] His licence was cancelled.
- [16.3] He was prevented from reapplying for any licence under the Act for a period of two years from the date his licence was cancelled.
- [16.4] He was ordered to pay a penalty of \$2,000. However, that took account of the penalty, in the other case, and his means. The decision noted that the starting point for DTM's conduct in the present case would have been a penalty of \$5,000 in addition to the cancellation of licence and prohibition on applying for a new licence.

- [17] The finding against the Adviser is that he was a party to an unlicensed person providing immigration advice. Further, the professional relationship was conducted without complying with the Code of Conduct.
- [18] However, the Adviser was in a different position to DTM. I accept the Adviser was only a party of the initial phases of the misconduct engaged in by SN and DTM. I accept also, he may have placed reliance on DTM as having the primary responsibility for the professional relationship.
- [19] Nonetheless, the Adviser was knowingly a party to SN flagrantly breaching the Act, unlawfully providing immigration advice, and doing so without compliance with the Code. That in itself is a serious breach of professional standards. An unlicensed person providing advice is an offence under section 63 of the Act.
- [20] The Act has established licensed immigration advisers as a professional group. Subject to certain exceptions, they have the exclusive right to provide immigration advice. The main exception is lawyers, who are governed by professional obligations and a separate disciplinary system to ensure professional standards are maintained.
- [21] In dealing with the appropriate sanctions to impose, it is relevant to consider the reasons for the Act and its objectives. Until the profession was regulated, the great majority of advisers were professional people acting responsibly and providing skilled service. There was, unfortunately, a small minority of unskilled and unscrupulous people providing immigration services. Immigrants are a vulnerable group, and in some instances suffered serious harm from such people. The harm extended to affecting the integrity of the process for engaging with New Zealand's immigration regime.
- [22] The Act records in section 3 that its purpose is:
- “... to promote and protect the interests of the consumers receiving immigration advice, and to enhance the reputation of New Zealand as an immigration destination, by providing for the regulation of persons who give immigration advice.”
- [23] When the Act came into force, many people had a background in giving immigration advice. There were no professional qualifications specifically targeted at New Zealand immigration advisers, although of course there were various relevant qualifications that some advisers held.
- [24] To establish the profession, a relatively low threshold was applied. It required that a person demonstrate competent handling of immigration applications in the past, a knowledge and understanding of the new professional environment, and also language and communication skills. A significant number of people who had relied on providing immigration advice for their livelihood could not meet those standards. They lost their livelihoods.
- [25] The entry to the profession was quite different from the conventional entry to an established profession where an extended period of academic training and then work experience with mentoring from established members of the profession is the norm. The entry requirements for the profession will move over time to the conventional model, but it is necessary to first establish appropriate training courses.
- [26] It is difficult to overstate the value of mentoring to a new member of a profession, not only for the development of technical skills, but importantly to understand ethical and behavioural standards required of a professional person. Mentoring from senior members of a profession is not something that can be regulated when a new profession is established.
- [27] There is no doubt the Authority has required licensed immigration advisers to demonstrate understanding of their professional obligations. In addition, the Authority has established a Code of Conduct under the Act, which prescribes what the Adviser's obligations in day to day professional practice entail.
- [28] However, the inevitably low threshold for entry into the profession, in that entry has not required a long period of academic training, and mentored experience, has resulted in some

people entering the profession with no real commitment to maintaining professional standards. It is important that this Tribunal exercise the power to remove people from the profession who are in this category. In a sense, the transitional entry has put a correlative obligation on entrants to the profession to meet professional standards, having been entrusted with entry to the profession.

- [29] The material now before the Tribunal demonstrates SN's history, in relation to acting as an immigration professional, exemplifies the most egregious type of conduct the Act is intended to prevent. What has occurred is that the Adviser has been party to facilitating SN continuing with his reprehensible conduct.
- [30] I will proceed on the basis the Adviser was not aware of SN's history. However, I do not regard that as substantially altering the proper sanction. The Adviser was obliged to be aware of what conduct is lawful under the Act. He was a party to unlawful conduct and had little or no regard for compliance with the Code of Conduct.
- [31] Cancellation of an adviser's licence is a "last resort". However, I consider cancellation of the Adviser's licence and a substantial financial penalty is the starting point in this case.
- [32] There are, however, factors that mitigate in the present case. The factors are:
- [32.1] I accept the Adviser may not have adequately understood the law relating to unlicensed people providing immigration advice. His submissions on the complaint gave that impression. However, the Adviser was obliged to understand the law relating to his professional obligations, and certainly ought to have been on inquiry and aware there were breaches of the Code. Nonetheless, I am proceeding on the basis there is nothing before me that suggests the Adviser was aware of SN's record of dishonesty and abusive conduct at the material time.
- [32.2] The key distinction between the Adviser and DTM is that the Adviser was only involved in the initial part of the instruction. I accept the material before me does not establish he was the adviser with the ongoing responsibility for the professional relationship. His role was to provide strategic input, and in the course of doing so, he was party to the misconduct described, but not the person who took primary responsibility for the professional relationship with the client.
- [33] Given the distinction I have found between the conduct of DTM and the Adviser, I consider the appropriate penalty can be less than exclusion from the profession for a period of time.
- [34] Regardless, the conduct requires that the Adviser be in a professional environment where he has mentoring to gain a full appreciation of his professional obligations. He was a party to a serious breach of professional obligations. The breaches facilitated a person who has a lamentable history of abusing the trust of vulnerable migrants to have access to clients. The outcome was exactly what the Act is intended to prevent.
- [35] In relation to the financial penalty, I regarded \$5,000 as the starting point given that the penalty does not necessarily involve exclusion from the profession for a period. Having regard to the mitigating factors in this case, in particular the Adviser's secondary role, I consider a financial penalty of \$3,000 is appropriate.

Order

- [36] The Adviser is censured.
- [37] The Adviser's licence which he presently holds is cancelled, with effect two months from the date of this decision.
- [38] The Adviser is prevented from reapplying for a full licence for a period of 18 months from the date his licence is cancelled.

- [39] The Adviser is also prevented from applying for a provisional licence for a period of 18 months from the date his licence is cancelled, unless:
- [39.1] The Registrar is satisfied the Adviser will work under the direct supervision of an appropriate fully licensed immigration adviser (and meet the standards for the issue of the licence in other respects);
- [39.2] The Registrar is satisfied any supervisor has been supplied with a copy of this decision by the Adviser; and the Registrar has also approved a written protocol setting out with the terms of supervision, which have been agreed between the Adviser and the supervisor;
- [39.3] Leave is reserved to the Adviser to seek directions from the Tribunal from time to time, as to whether a particular person is appropriate to act as a supervisor, and the terms of the protocol, in the event the Registrar does not approve a person nominated or the protocol; and further that
- [39.4] The period of supervision will continue for 18 months, or until the Adviser is entitled to and has obtained a full licence.
- [40] The Adviser is ordered to pay a penalty of \$3,000.
- [41] There has been no application for an order for payment of the costs and expenses of the inquiry, so no order is made.
- [42] These orders are made with due consideration for the possibility the Adviser may not be able to obtain employment in an environment where he is supervised, and the effect may be he is effectively excluded from the profession. However, the gravity of the misconduct requires a sustained period in which he is supervised effectively. It is the Adviser's responsibility to find employment in such an environment.

DATED at WELLINGTON this 29th day of March 2011

G D Pearson
Chair