

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

Decision No: [2011] NZIACDT 26

Reference No: IACDT 03/11

IN THE MATTER

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

BY

Immigration Advisers Authority
Authority

BETWEEN

Rozina Rozmeen Nisha
Complainant

AND

Artika Archina Devi
Adviser

DECISION
IMPOSITION OF DISCIPLINARY SANCTIONS

REPRESENTATION:

Adviser

In person

Complainant

In person

Date Issued: 5 September 2011

Decision

The decision on the complaint

- [1] In a decision dated 7 July 2011 the Tribunal upheld a complaint in this matter.
- [2] The facts and background are set out in the earlier decision. The three elements of the complaint that were upheld were, in outline:
- [2.1] The Adviser accepted a professional engagement to pursue an application for a residence visa to come to New Zealand. An essential element of that engagement was to lodge an application for recognition of teaching qualifications to support the residence application. The Adviser failed to progress the work.
- [2.2] The Adviser failed to communicate with her client regarding what had occurred. That included failing to inform her the Teachers Council closed their file due to the Adviser's office failing to respond to two requests for information.
- [2.3] The Adviser has not returned personal documents.
- [3] The conduct was in breach of section 44 of the Act and the Code of Conduct.
- [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 provided a submission on the appropriate disciplinary sanction. The Complainant sought refund of fees paid, and compensation. In addition the Complainant sought the return of personal documents.
- [6] The particulars of the fees and compensation claimed were:
- [6.1] \$1,000 (\$Fiji) – fees paid.
- [6.2] \$736 (\$NZ) – fees paid.

- [6.3] \$296 (\$NZ) - registration fees paid to the Teachers Council. This was the second application fee, because the first application was not progressed and lost.
- [6.4] \$2,500 (\$NZ) - compensation for unnecessary expenses as a result of the failure to progress the application. The figure was not related to specific expenses.
- [7] The Complainant requested the Tribunal's assistance to have the personal documents returned. Thirteen birth certificates, and a marriage certificate have not been returned.
- [8] The Adviser provided submissions on the appropriate sanctions. In large part they effectively challenged the finding against her in the decision. The key elements in the submission were:
- [8.1] The Adviser delegated responsibility to staff.
- [8.2] A payment of \$700 related to initial work in the Fiji office regarding to a NZQA assessment.
- [8.3] The Adviser was not responsible for failing to progress the application to the Teachers Council as the Council changed the form required, and the Complainant failed to provide information.
- [8.4] The difficulties with the Teachers Council would not have occurred if the Complainant provided necessary information, so she should bear the financial burden.
- [9] Subsequently the Adviser said she had reviewed the file, and the original documents had been returned. She produced nothing to support this claim.

Decision

Other complaints

- [10] I note the Adviser is the subject of a series of independent complaints, which have been upheld by the Tribunal. I am approaching the issue of penalty in each complaint independently. The events in relation to the other complaints all occurred prior to the first complaint being upheld, so it is not appropriate to treat later complaints as repeat disciplinary offences.
- [11] There are however two aspects of the sanctions where it is necessary and appropriate to have regard to the penalties in the other matters.
- [12] First, the totality of the penalties should reflect the extent of the professional disciplinary offending.
- [13] Second, in relation to other complaints I have concluded the Adviser must be subject to orders that will preclude her from practising on her own account, unsupervised. That penalty makes it appropriate to ameliorate the financial penalties that would otherwise apply. That is due to the potential effect on the Adviser's means to pay a penalty, and because that restriction on her professional practice will protect the public without the need to rely solely on a financial penalty to signal the gravity of the offending.
- [14] Accordingly, the effect of the other complaints is favourable to the Adviser in terms of the penalties that will be imposed.

Penalty

- [15] The Adviser's conduct in the present case involves delinquent failure to deal with instructions, and communicate with her client. Second, the failure to return documents breaches one of the obvious and fundamental obligations a licensed immigration adviser owes to their client.
- [16] The behaviour is typical of the unprofessional conduct the Act was intended to stop. It is completely unacceptable for a licensed professional service provider to accept fees, and fail to undertake the agreed professional engagement.

- [17] The Adviser is entitled to the benefit of the doubt, and I will treat the failure to meet her obligations as falling short of an intentional taking of fees without intending to meet the corresponding professional obligation. However, the Adviser has not provided an explanation that makes the failure understandable. There is at best a complete failure to accept professional obligations, and meet the most minimal standards expected.
- [18] Furthermore, the failure occurred over an extended period of time, intervening events that ought to have alerted the Adviser she was not meeting her professional obligations were ignored, and even now she has failed to address or explain what has happened to the personal documents she was entrusted with.
- [19] The Adviser has failed to provide any basis to satisfy the Tribunal she now understands her professional obligations and has taken steps to ensure she will, in future, discharge her duties with professionalism. Her submissions on penalty show she does not appreciate that as a licensed immigration adviser she is personally responsible for all professional services. She has attempted to blame her client, but has not provided any evidence to establish that contention, as explained in the decision finding the complaint established. She has also failed to engage with her clients concern regarding missing personal documents.
- [20] In the circumstances, and particularly having regard to the orders in another matter which prevent her practising on her own account, the financial penalty imposed will be \$2,500. That should not be seen as a penalty fully reflecting the sustained absence of professional standards evident in this complaint. It is reduced due to the penalties in other complaints.
- [21] I have considered whether the grounds on which this complaint was upheld required the cancellation of the Adviser's licence. However, I take the view the events can be seen as a relatively discrete failure to address a particular professional engagement for which a financial penalty is appropriate.

Compensation - Principles

- [22] It has been a longstanding criticism of some professional disciplinary processes that they do not include jurisdiction to require a professional who is at fault to compensate the client. That had required a separate, and potentially, expensive second process.
- [23] The Act addresses that perceived shortcoming by providing this Tribunal may require an Adviser to refund fees and pay reasonable compensation when a complaint has been upheld.
- [24] Section 51 of the Act confers these powers using general language. The application of the power is relatively uncomplicated where the grounds on which the complaint has been upheld would establish a civil claim for breach of contract, negligence, or another tort given the standard of proof before this Tribunal is no less than would be the case for bringing the claim in a civil proceeding. Accordingly, in such circumstances, the Tribunal will ordinarily apply the principles that apply in a civil claim, including causation, quantum and the other principles that regulate entitlement.

Compensation – this case

- [25] I am satisfied all of the fees paid by the Complainants should be repaid. The Adviser failed to progress the immigration application, as she failed to deal with teacher registration which was a necessary part of that application. The following fees are to be refunded:
- [25.1] \$1,000 (\$Fiji) – which will be treated as \$710 (\$NZ), using the approximate current exchange rate.
- [25.2] \$736 (\$NZ) – fees paid.
- [25.3] \$296 (\$NZ) registration fees. This was the second application fee that had to be paid as the first application was not progressed and lost.
- [25.4] That is a total of \$1,742 (\$NZ).

- [26] The Adviser has referred to a payment of \$700 to the Fiji office relating to a NZQA assessment as part of the preparatory work to obtain a residence visa. The Complainant states that the \$1,000 (\$Fijian) claimed was in addition to and separate from the other payments. She was satisfied with the initial services provided. Accordingly she claims a refund of only the \$1,000 (\$Fijian), and the money later paid in New Zealand. The Adviser has not provided any information that suggests this information is not accurate.
- [27] The Complainant seeks compensation of \$2,500 for the unspecified additional expenses resulting from the breach of professional duty.
- [28] The information before me requires me to deal with this aspect of compensation as being in the nature of a claim for general damages.
- [29] The lack of itemised expenses, or even categories of expense, requires caution in relation to this claim.
- [30] Without more specific information I can only be satisfied the costs, expenses and time involved in replacing personal documents should be the subject of an order.
- [31] I reject the Adviser's claim the documents have been returned. The Complainant did not receive them, despite having expended considerable effort to have them returned. The Advisor has only recently claimed they have been returned.
- [32] If the documents were returned securely there would no doubt be a record of their return. A courier acknowledgement or receipt from a person uplifting reflects standard practice for the return of important documents. The Adviser has not provided an adequate explanation. I am satisfied the explanation is negligent laxness and want of care in document management in the Adviser's office, and she is responsible for that.
- [33] In all the circumstances, I am satisfied compensation of \$2,100 (NZ\$) is appropriate to recognise the significant inconvenience and trouble to which the Adviser has put the Complainant. The figure allows \$150 per document. Replacing each document will require a fee, and significant time and trouble.

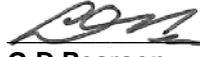
Publication

- [34] The Tribunal will routinely publish the name of an Adviser and the reasons for its decision where a complaint is upheld. That is a usual incident of open justice, and this decision will be published in the normal way.

Order

- [35] The Adviser is censured.
- [36] The Adviser is ordered to pay a penalty of \$2,500.
- [37] The Adviser is ordered to pay compensation and refund fees amounting to \$3,842 the Complainants, being:
- [37.1] Refund of fees (including expenses) \$1,742.
- [37.2] Compensation for loss of personal documents \$2,100.
- [38] There has been no application for an order for payment of the costs and expenses of the inquiry, so no order is made.

DATED at WELLINGTON this 5th day of September 2011


G D Pearson
Chair

