

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

Decision No: [2011] NZIACDT 29

Reference No: IACDT 012/10

IN THE MATTER

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

BY

Immigration Advisers Authority
Authority

BETWEEN

Brendon Barry
Vanessa Barry
Complainants

AND

Artika Archina Devi
Adviser

DECISION
IMPOSITION OF DISCIPLINARY SANCTIONS

REPRESENTATION:

Adviser

In person

Complainants

In person

Date Issued: 5 September 2011

Decision

The decision on the complaint

- [1] In a decision dated 30 June 2011, the Tribunal upheld a complaint in this matter.
- [2] The facts and background are set out in the earlier decision. The essential narrative of the complaint is:
 - [2.1] The Complainants were in Auckland, and consulted the Adviser.
 - [2.2] The Adviser told the Complainants specific employment positions were available in Marlborough. She presented employment contracts, and had them executed by the Complainants.
 - [2.3] The Adviser applied for work permits on the basis of the positions of employment.
 - [2.4] The Adviser was either indifferent as to whether the positions were available, or knew they were not. She made no proper inquiries, despite presenting the employment contracts to her clients.
 - [2.5] On the basis of the Adviser's representations the Complainants and their family travelled to Marlborough, and found no work was available as the positions they had been engaged to fulfil did not exist.
 - [2.6] The Complainants were in an invidious position, and the Adviser failed to respond to inquiries from them.
 - [2.7] The Complainants were forced to consult an immigration adviser in Marlborough.
 - [2.8] The Adviser has taken no responsibility for her clients' situation, and criticised them for consulting another adviser.
- [3] The Tribunal found the Adviser's conduct delinquent, but the material fell short of establishing the Adviser intentionally misled her clients to generate fees.
- [4] The Tribunal did find the Adviser misled her clients. The finding being on the basis:
 - [4.1] She represented positions of employment were available, and her clients were engaged to fulfil them.
 - [4.2] It was implicit in the representation her clients should have confidence she, as a licensed professional adviser, would have made proper and adequate inquiries.
 - [4.3] She intended they would have confidence the contracts were genuine.
 - [4.4] She had no foundation for that representation.
- [5] The conduct was in breach of section 44 of the Act and the Code of Conduct.
- [6] 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

- [7] The Complainants provided a submission on the appropriate disciplinary sanction. They seek compensation, and a return of fees paid, in total a sum of \$16,789.00.
- [8] The claims are particularised in the following discussion. In essence, they claim a refund of the fees paid, compensation for their costs of travel to Marlborough, loss of income, and the cost of accommodation. They referred specifically to the travel to Marlborough, and borrowing money for the return trip. I have treated the claim on the basis compensation should be provided for return travel (treating the return as the same cost as the initial journey).
- [9] The Adviser made a submission on the disciplinary sanctions. The key points made were:
 - [9.1] The Complainants were happy with the quality of the Adviser's work.
 - [9.2] The Complainants flew to Nelson to meet with the employer directly, and made contact with another adviser. That caused the difficulties that are the subject of the complaint.
 - [9.3] The Adviser did a lot of work seeking a residence and work visa, which the Complainants were satisfied with.
 - [9.4] The Complainants did not move to Nelson on the basis of any advice from the Adviser.
 - [9.5] The Complainants got the bargain they paid for.

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 is one aspect of the sanctions where it is necessary and appropriate to have regard to the penalties in the other matters, the totality of the penalties should reflect the extent of the professional disciplinary offending. The financial penalty in this case has been reduced for that reason.
- [12] Accordingly, the effect of the other complaints is favourable to the Adviser in terms of the penalties that will be imposed.

The complaint

- [13] The adviser's conduct has been at best reckless. She presented an employment contract to vulnerable migrants, and had her clients execute it. She made no inquiries to ascertain the positions of employment existed, and ought to have known they did not. Unsurprisingly, on the strength of the contracts, a family of limited means travelled at considerable expense, and arrived at their destination reliant on income from the employment they had been engaged for.
- [14] The Adviser has wholly failed to accept any responsibility for this gross breach of her professional duties. Indeed she blames her clients.
- [15] When considering the Adviser's submission in relation to the appropriate sanctions it is not possible to sensibly relate the submissions to either the events, or the findings of the Tribunal set out in the decision upholding the complaint. The submissions refer to Nelson, when none of the events occurred there. The submissions refer to the Complainant travelling by air to Nelson, when the family travelled by car to Marlborough. The submissions claim the complainants were satisfied with the Adviser's performance when it is clear they were not.
- [16] I am unable to view this complaint as less than a particularly serious example of the sort of conduct the Act was intended to eradicate by requiring professional standards.
- [17] The grounds on which the complaint has been upheld demonstrate the Adviser's failure to attain the standards required of professional practice, a disgraceful failure to accept responsibility for error, and a complete indifference to the plight of vulnerable clients harmed by her failure.
- [18] I am accordingly satisfied the grounds on which the complaint has been upheld require that the Adviser must not participate further in the profession without a basis to be satisfied the public are protected from the risk of repetition of conduct of this kind.

The Adviser is prevented from practising on her own account without supervision

- [19] The authorities make it clear 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.
- [20] Rehabilitation of a practitioner is an important factor when appropriate (*B v B* HC Auckland, HC 4/92 6/4/93; [1993] BCL 1093. In *Patel v PCC* (HC Auckland CIV 2007-404-1818; Lang J; 13/8/07), the Court stressed when imposing sanctions in the disciplinary process applicable to that case, 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] These principles apply to imposing sanctions under the Act. Licensed Immigration Advisers are a recently established profession. It is appropriate to have regard to the manner in which the profession has been established, and the mode of entry to achieve recognition as a member of the profession.
- [22] With limited exceptions, licensed advisers have an exclusive right to provide immigration advice. That exclusive right is enforced by criminal sanctions.
- [23] Until the profession was regulated, the great majority of advisers were professional people acting responsibly and providing skilled services. A small minority of unskilled and unscrupulous people provided immigration services. Immigrants are a vulnerable group and, in some instances, suffered serious harm from such people. Immigration advisers have an important professional role in assisting clients. Their honesty, professionalism, and competence are fundamental requirements.
- [24] The Act records in section 3 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.”

- [25] When the Act came into force, many people had experience of giving immigration advice. There were no professional qualifications specifically targeted at New Zealand immigration advisers, though of course there were various relevant qualifications that some advisers held. 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.
- [26] To establish the profession, a relatively low threshold was applied. It required 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.
- [27] 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. Accordingly, to this point, entry to the profession has been under a transitional regime.
- [28] Mentoring by colleagues for a new member of a profession is of inestimable value, not only for the development of technical skills, but to understand the ethical and behavioural standards required of a professional person. Mentoring from senior members of a profession is not something that can be required when a new profession is established.
- [29] The inevitably low threshold for entry into the profession, in that entry has not required a long period of academic training with 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 ensure they attain professional standards, having been entrusted with entry to the profession.
- [30] I now consider what alternatives are available in balancing the need to protect the public, and provide the opportunity for the Adviser to establish herself with full standing as a member of the profession.
- [31] I am satisfied a financial penalty is not sufficient to cause the Adviser to attain professional standards. It is apparent that at present she wholly lacks either insight or the skills and experience to self regulate the delivery of professional services. Her response to the complaint and the findings against her show incomprehension of professional obligations.
- [32] The view is open the Adviser lacks the integrity to be a member of the licensed immigration adviser's profession, which would lead to determining exclusion from the profession is necessary. Presenting an employment contract for a position of employment that does not exist, and getting instructions on the strength of it is enough to form that view.
- [33] However I will give the Adviser the benefit of the doubt, and treat the issue as one of competence. I am satisfied the material before me overwhelmingly establishes the Adviser lacks the skills to provide unsupervised services to the public; and she does not understand what is required of a professional person offering services to the public.
- [34] It follows the order of the Tribunal must prevent the Adviser continuing to practise on her own account, unsupervised, until she develops the professional skills she requires to act as a licensed immigration adviser.

- [35] The Adviser appears not to have had the benefit of a mentored entry to the profession. While I leave open the opportunity for the Adviser re-establishing herself as a member of the profession, a substantial period of supervision is necessary.
- [36] Accordingly, her full licence will be cancelled, but I will not exclude the Adviser from applying for a provisional licence on appropriate terms.

Compensation - Principles

- [37] 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.
- [38] 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.
- [39] 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 same principles as in a civil claim, including causation, quantum and the other principles that regulate entitlement.

Compensation – this case

- [40] I am satisfied all of the fees paid by the Complainants should be repaid. There has been a complete failure by the Adviser to fulfil the obligations of her professional engagement. The work undertaken was not competent, and in fact caused serious harm through incompetence.
- [41] The material before the Tribunal establishes those fees are \$3,400.
- [42] The Complainants seek the refund of travel costs of \$538 for travel to Marlborough. They also explained they had to borrow money for the return journey. They stayed at a camping ground in Marlborough, and the plight of the family was such that the proprietor lent the family funds to return to the North Island to seek work. The Complainants are entitled to be compensated for the travel to and from Marlborough, (I will treat as the costs of the return trip as being the same as the initial trip) bringing the total to \$1,076. The Complainants indicate the costs are likely understated, and I accept that. They have claimed petrol expenses rather than vehicle mileage. I am satisfied the costs of the travel should be compensated at the level of \$1,076.
- [43] The Complainants seek compensation for accommodation. They stayed at a camping ground, and minimised the expense. The conditions were difficult, the family was short of money, and some compensation would be reasonable for the stress and difficulty the family faced in this period. That included having no money, borrowing from a benefactor to live and relocate to an area where they could find work. In these circumstances I will not discount the expense on the basis the family would likely have had some costs of accommodation regardless. They were essentially put into the position of being homeless. The material before me establishes the accommodation costs were \$2,513.
- [44] The Complainants seek compensation for loss of income amounting to \$9,800. The claim is on the basis of 8 hour days in the period from when they were available for work until they found work by relocating. The Complainants claim an hourly rate of \$12.50, and fairly say there could have been factors such as weather that affected their earnings. The earnings are calculated on the basis of the hourly rate in the contract the Adviser presented to her clients.
- [45] I am satisfied the full amount of lost income claimed should be awarded as compensation. I am not satisfied the figure should be discounted. The Complainants were available for work, and seeking work. While they may have lost work due to weather conditions, equally if the Adviser had not presented the contract to them, they may have obtained better remunerated work. Accordingly I direct \$9,800 compensation for loss of wages to be paid.

- [46] While this is a case where general damages might be appropriate to recognise the stress and loss of dignity the Complainant's suffered due to the Adviser's lack of professionalism, no order will be made. Potential compensation is adequately recognised in the awards of compensation for accommodation, and loss of income on an undiscounted basis.

Penalty

- [47] The Adviser would normally face a substantial financial penalty for the misconduct established. Having regard to the compensation orders that will be made, and that her full licence will be cancelled, the penalty will be reduced to \$2,000.

Publication

- [48] 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. The decision will be published in the normal way.

Order

- [49] The Adviser is censured. She is warned the opportunity this decision gives to re-establish her professional standing will require good faith, and commitment to attain the skills she requires. Her conduct in this case has very much raised the issue of whether she is fit to be licensed as an immigration adviser.
- [50] The Adviser's licence, which she presently holds, is cancelled, with effect one week from the date of this decision. The delay is to allow her to refer clients to another licensed immigration adviser.
- [51] The Adviser is prevented from reapplying for a full licence for a period of two years from the date her licence is cancelled.
- [52] The Adviser is also prevented from applying for any other licence, except a provisional licence, for a period of two years from the date her licence is cancelled, and may only apply for a provisional licence if:
- [52.1] 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);
- [52.2] 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;
- [52.3] 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
- [52.4] The period of supervision will continue for two years, or until the Adviser is entitled to, and has obtained, a full licence.
- [53] The Adviser is ordered to pay a penalty of \$2,000.
- [54] The Adviser is ordered to pay compensation and refund fees amounting to \$16,789 to the Complainants, being:
- [54.1] Refund of fees \$3,400.
- [54.2] Travel costs \$1,076.

[54.3] Accommodation \$2,513.

[54.4] Loss of income \$9,800.

[55] There has been no application for an order for payment of the costs and expenses of the inquiry, so no order is made.

[56] These orders are made with due consideration for the possibility the Adviser may not be able to obtain employment in an environment where she is supervised, and the effect may be she is effectively excluded from the profession. However, her level of competence and lack of insight into the requirements of professional practice require her to undertake a mentored re-entry into the profession before providing unsupervised services. To require less would be to fail to protect the public in the manner the Act contemplates. It is the Adviser's responsibility to find employment in an environment where she can gain the experience and skills she requires to practise on her own account.

DATED at WELLINGTON this 5th day of September 2011

G D Pearson
Chair