

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

Decision No: [2011] NZIACDT 9

Reference No: IACDT 010/10

**IN THE MATTER**

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

**BY**

**Immigration Advisers Authority**  
Authority

**BETWEEN**

**JM**  
Complainant

**AND**

**DTM**  
Adviser

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**DECISION**  
IMPOSITION OF DISCIPLINARY SANCTIONS

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**REPRESENTATION:**

**Adviser**

In person

Date Issued: 23 March 2011

## Decision

### The decision on the complaint

- [1] In a decision dated 18 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 working in association with SNJ. 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”).
- [2.2] The Adviser failed to establish and regulate the professional relationship with the Complainant. It was primarily his responsibility, as the other licensed immigration adviser was only engaged initially, whereas the Adviser had ongoing responsibility.
- [2.3] There was a failure to provide proper terms of engagement in accordance with the Code. The Complainant believed the services would be provided without fee. That may or may not have been a reasonable belief but that is not relevant. The point is that there was a failure to provide proper terms of engagement (and ancillary initial steps under the Code), and the difficulties that arose over fees were a direct consequence.
- [2.4] The value of the services on a fixed fee basis, and potentially justified on a time and attendance basis, may have been reasonable. However:
- [2.4.1] There was a history of providing services without fee;
- [2.4.2] There was no agreement to pay fees in accordance with the Code;
- [2.4.3] The provision of services was unlawful in that SN was providing immigration advice as part of the services; and
- [2.4.4] SN acted unprofessionally in making threats to recover more fees when the Complainant refused to pay.
- [2.5] The Complainant was subjected to unprofessional communication and abuse from SN, in the context of a professional relationship, for which the Adviser was responsible.
- [2.6] SN was actively involved in unlawfully giving immigration advice as defined by the Act. The Adviser was party to that and allowed it to occur in a professional relationship for which he was responsible, along with the other licensed immigration adviser involved in the instruction. Aspects of the professional relationship the Adviser failed to regulate were:
- [2.6.1] SN’s dealings with the Complainant in relation to fees, being necessary and important parts of “immigration advice” under the Act; and
- [2.6.2] Abusive and threatening communications from SN to the Complainant were a breach of the Complainant’s entitlement to be treated professionally.
- [3] I found the material before me did not establish the Adviser was a party to SN’s misconduct in relation to claiming fees and making threats. Nonetheless, that misconduct was only able to occur as the Adviser failed to take responsibility for a key element of the professional relationship.
- [4] Given the findings, disciplinary sanctions under section 51 of the Act may be imposed by the Tribunal.

[5] 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**

- [6] Both the Complainant and the Adviser made submissions following the decision upholding the complaint.
- [7] 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.
- [8] 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.
- [9] 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 the Tribunal with contempt and disrespect.
- [10] The 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.
- [11] The decision also dealt with him having stolen from his employers, and having been convicted of a criminal offence as a result. SN had claimed before the Tribunal he was otherwise of good character, which resulted in a disputed fact hearing. That hearing established he had previously been dismissed from employment in a legal firm that acted as an immigration consultancy, after discrepancies of almost \$20,000 were discovered.
- [12] The Tribunal also found SN had acted deceptively in relation to dealings with Immigration New Zealand.
- [13] 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.

- [14] The Adviser made submissions in a letter dated 8 February 2011. The key points he made were:
- [14.1] He had been confused as to the extent of work SN was entitled to undertake,
  - [14.2] He had been under the control and influence of SN and acted naively in following instructions given by him as an employer.
  - [14.3] He was not aware of the “heated exchange of emails” between SN and the Complainant.
  - [14.4] He was “quite new in this profession”.
  - [14.5] He sought to have the matter dealt with by a censure or caution.

### **Decision**

- [15] This is not the only complaint which has been upheld against the Adviser. In relation to a separate matter, his licence has been cancelled and he has been prohibited from applying for another licence for two years, and a financial penalty of \$3,000 was also imposed.
- [16] The other complaint relates to a different position of employment held by the Adviser, and different circumstances.
- [17] I will approach this decision on the basis the penalty reflects the totality of the misconduct, but deal with the two cases on their respective merits in all other respects.
- [18] The finding against the Adviser is that he was a party to an unlicensed person providing immigration advice. He allowed the unlicensed person to conduct the professional relationship, without complying with the Code of Conduct. That unlicensed person then acted unprofessionally with results the Code is designed to prevent; and was able to do so as the Adviser failed to take responsibility for the professional relationship.
- [19] In short, the Adviser had no regard to his professional obligations, and allowed himself to be a “cover” for a person who was acting with disregard for 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. Immigration advisers have an important professional role in assisting clients to present their case to Immigration New Zealand. Their honesty in dealing with Immigration New Zealand, and their clients, is fundamental.
- [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. The entry to the profession has been under a transitional regime.
- [26] It is difficult to overstate the value to a new member of a profession of mentoring, 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 in 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, given the Adviser was a party to an ongoing course of unlawful activity, it is necessary in the present case. It was not an unlawful activity that could be regarded as either less than serious, or fleeting. Excluding unlicensed people is a cornerstone of the protection mechanism against the dishonest and unskilled harming the public. His knowing failure to protect the interests of clients is reinforced by what was essentially a complete disregard for his professional obligations, which the Code of Conduct mandates. His misconduct has facilitated continued access to clients by a person who the Act intends to exclude.
- [32] I accept the Adviser may have lacked experience and maturity, and have had regard to that as a mitigating factor. However, that is not sufficient to determine cancellation of his licence is not required. The complaint did not involve a mere error of judgment, or naivety. The Adviser had no significant regard to his professional obligations at all in this matter. Inexperience and lack of maturity do little to mitigate such conduct.
- [33] I consider cancellation of his licence and a prohibition on gaining another licence for two years is required on the facts of the present case alone. That sanction will be imposed in this case, as it has been in the earlier case. The period of prohibition will be concurrent.

- [34] The totality principle in relation to the sanction impacts on the financial penalty, and I have also had regard to the Adviser's lack of experience and maturity.
- [35] Were this matter standing on its own, I would regard the starting point as a penalty of \$5,000 (in addition to the cancellation of licence).
- [36] However, having regard to the penalty in the previous case, the loss of licence with the likely financial consequences and also the Adviser's inexperience, I consider the incremental penalty for this second course of misconduct should be a further penalty of \$2,000.

**Order**

- [37] The Adviser is censured.
- [38] The Adviser's licence, if he holds one, is cancelled with effect from this decision being notified to him.
- [39] The Adviser is prevented from reapplying for any licence under the Act for a period of two years from the date his licence is cancelled.
- [40] The Adviser is ordered to pay a penalty of \$2,000. This penalty is not intended to reflect the gravity of his conduct. It takes account of other penalties, and his means.
- [41] There has been no application for an order for payment of the costs and expenses of the inquiry, or other orders, so no further order is made.

**DATED** at WELLINGTON this 23<sup>rd</sup> day of March 2011

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**G D Pearson**  
Chair