

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

Decision No: [2012] NZIACDT 64

Reference No: IACDT 029/11

IN THE MATTER

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

BY

Immigration Advisers Authority
Authority

BETWEEN

Jonathan Mark Balich
Complainant

AND

Glen William Standing
Adviser

DECISION
IMPOSITION OF DISCIPLINARY SANCTIONS

REPRESENTATION:

Complainant: In person

Adviser: In person

Date Issued: 28 September 2012

DECISION

Introduction

Other complaints

- [1] This is one of a series of 17 complaints against Mr Standing this Tribunal has upheld. This decision deals with the sanctions to be imposed under section 51 of the Immigration Advisers Licensing Act 2007.
- [2] The attributes of the 17 complaints are summarised in the schedule attached to this decision, in the order they were submitted to the Tribunal. The schedule also sets out the sanctions imposed in each of the cases.
- [3] The series of decisions disclose that Mr Standing engaged in systematic dishonesty.
- [4] In 14 of the 17 complaints he abused his status as a licensed immigration adviser, to provide the opportunity to use misrepresentations to induce potential clients to pay fees.
- [5] He dishonestly misrepresented both the opportunities potential clients had to migrate to New Zealand, and the services he would provide to assist them. The misrepresentations were tailored to what Mr Standing thought might be effective in particular cases. His dishonest misrepresentations included deceit such as:
 - [5.1] he provided his professional services as “an immigration law firm”;
 - [5.2] prospective clients were “100% guaranteed” a residence visa; and
 - [5.3] if Mr Standing did not deliver a residence visa to a client, he could be prosecuted for the failure to do so.
- [6] It is significant that Mr Standing overtly relied on the fact he was a licensed immigration adviser to gain the trust of clients. He used this statutory privilege and status to facilitate his dishonesty.
- [7] That is a grave affront to the objectives of Parliament in enacting the Immigration Advisers Licensing Act 2007. For example, his misrepresentation that he could be prosecuted for failing to deliver a residence visa was presented as part of what his licensed status afforded clients. That was a disgraceful and cynical misuse of the Act.
- [8] The deceit was not puffery or exaggeration; it was calculated dishonesty for personal gain. His objective was to solicit fees, with the intention of not delivering the services clients were promised, and paid for.
- [9] In some cases, clients promised the opportunity to migrate to New Zealand would not be able to do so as they would not qualify for a visa; in others, employment would be difficult or impossible to gain. In some instances it appears Mr Standing simply chose not to deliver the service he promised; in others he delivered service in an unprofessional or inept manner.
- [10] In many, if not all, cases the fees Mr Standing solicited came from clients who could ill afford to lose money they had put aside to pursue a major lifestyle ambition for themselves and their family. The pattern of systematic deception involved a contemptuous disregard for the trust clients placed in Mr Standing as a licensed professional.
- [11] In some cases Mr Standing’s attitude to his clients was manifest in bullying and aggressive behaviour. For example, when faced with a client who sought legal advice about his misconduct, his response was to place blame on his client, and threaten her.
- [12] In no case has Mr Standing exhibited any indication of accepting responsibility, remorse, or endeavoured to make amends.

- [13] The amounts of money solicited through his deceit were substantial. The total fees solicited in the 17 complaints were \$134,364.07. That includes three complaints that did not involve deceit to solicit the fees. However, in those three cases, while the fees were paid without deceit as a licensed immigration adviser, Mr Standing failed to deliver the service agreed and failed to refund fees. He had no more entitlement to retain those fees than the fees he solicited through deceit.
- [14] Accordingly, each of the cases involves Mr Standing taking fees to which he was not entitled. The average fee in each case was \$7,903.77.
- [15] Each complaint involved additional misconduct, the most serious being the misappropriation of client funds held in trust. That was established in multiple complaints.
- [16] Mr Standing was required to hold client funds in a separate bank account, and did not do so. He has not accounted for this money. It is simple misappropriation of trust funds. He has offered no explanation, justification or excuse.
- [17] Mr Standing is no longer a licensed immigration adviser, as his licence was cancelled by this Tribunal with effect from 15 August 2011. That was due to professional misconduct. However, that complaint was less serious than the misconduct disclosed in the present series of complaints. When his licence was cancelled, he was left the option of applying for a provisional licence, and continuing to practice under supervision.
- [18] Each of the 17 complaints involved an independent course of conduct on Mr Standing's part. This is not a case where there is effectively one transaction with multiple victims. Mr Standing, on different times and occasions, personally tailored a deceitful misrepresentation for the individual client. For each complaint he solicited further funds, failed to deliver on an independent promise to provide services, or misappropriated separate funds.
- [19] Within each of the 17 complaints there are overlapping elements of dishonesty and unprofessional conduct. For example, funds gained by deceit were then misappropriated. I view each complaint as a single transaction, and will impose a penalty that reflects that overall transaction; it is not appropriate to regard each element of the conduct as adding to the totality of the wrongdoing.
- [20] I also have regard to the totality principle in relation to the overall misconduct. First, by determining the sanctions for each complaint on its own merits, then considering the total sanction against the general gravity of the individual complaints. If the cumulative result is disproportionate, then it is necessary to adjust the sanctions to achieve a just result.

Applying the totality principle

- [21] The first issue is Mr Standing's status as a licensed immigration adviser. He is not licensed now; he can apply for a provisional licence, and after a period of two years can again apply for a full licence.
- [22] This Tribunal only has power to prevent the issue of a licence for a two-year period. However the legislation does allow the Authority to decline a licence indefinitely after taking into account disciplinary proceedings. Accordingly, the long-term issues relating to licensing are appropriately addressed by the statute, but as a matter for the Authority rather than the Tribunal.
- [23] Given the statutory direction that the Tribunal is limited to a two-year timeframe for its directions, in each complaint I will direct that Mr Standing cannot apply for any licence under the Act for two years from the date his licence was cancelled, namely 15 August 2011.
- [24] I have necessarily considered whether there are options short of prohibition on holding a licence, as in each case the potential for rehabilitation must be taken into account. However, this is a case where there is no such option. Mr Standing's dishonesty, abuse of trust, contempt for his professional obligations, and abuse of his statutory privileges, leave no alternative. He must be excluded from his profession. His lack of either remorse, or acceptance of responsibility, affirm that conclusion.

- [25] In relation to a financial penalty, the statutory maximum is \$10,000. In each case, I am satisfied the misconduct is egregious, and the starting point will be approaching the statutory maximum.
- [26] My view is that in each case the starting point should be \$8,000. In all but one case there was dishonesty, either in procuring fees or misappropriating client funds. In the remaining case of *Brighton v Standing* [2012] NZIACDT 43, there was a disgraceful course of conduct in which Mr Standing disrespected his client and her family; he reacted unprofessionally when they sought legal advice. It too was conduct requiring condemnation in the strongest terms. There can be no tolerance of such conduct in the profession.
- [27] There is nothing that mitigates the penalty in any case.
- [28] Accordingly, a financial penalty of \$8,000 will be imposed in respect of each complaint. That results in a total penalty of \$136,000. I am satisfied the total is not disproportionate to the overall conduct.
- [29] In *R v Williams* [1988] 1 NZLR 748 (CA), in relation to criminal sentencing, the Court took the view the sentence for a series of offences should reflect the total appropriate for the whole course of criminal conduct. The total penalty on the basis of \$8,000 per complaint is similar to the fees Mr Standing gained and did not account for. The total fees were \$134,364.07, against a penalty of \$136,000.
- [30] Deterrence is an important function of the financial penalty provided for in section 51 of the Act. A penalty that is in the same order as the amount procured from misconduct is not excessive if the penalty is to serve the function of deterrence. Indeed, the statutory maximum could be seen as a constraint. Of course, Mr Standing must also account for the fees he has taken and not refunded.
- [31] The purpose of professional disciplinary proceedings was affirmed by the Supreme Court in *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97]:
- “... the 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.”
- [32] The statutory purpose is achieved by considering at least four factors which materially bear upon maintaining appropriate standards of conduct:
- [32.1] *Protecting the public*: Section 3 of the Act states “The purpose of this Act is to promote and protect the interests of consumers receiving immigration advice ...”
- [32.2] *Demanding minimum standards of conduct*: *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) and *Taylor v General Medical Council* [1990] 2 All ER 263 (PC), discuss this aspect.
- [32.3] *Punishment*. The authorities, including *Z v Dental Complaints Assessment Committee*, 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).
- [32.4] *Rehabilitation*: It is important, when practicable, to have the practitioner continue as a member of the profession practising well (*B v B* [1993] BCL 1093, HC Auckland HC4/92, 6 April 1993).
- [33] The level of penalty, overall and on an individual complaint basis, is proportionate with regard to the first three factors. For the reasons discussed, this is not a case where rehabilitation is practicable, both due to the gravity of the offending and Mr Standing’s rejection of responsibility.

Ability to pay penalty and compensation

- [34] The Tribunal would potentially have regard to Mr Standing's ability to meet the penalty and compensation payments. It raised the issue in its decision upholding this complaint.
- [35] The Tribunal was aware the liquidator of the company through which Mr Standing conducted his company had referred Mr Standing to the National Enforcement Unit, due to suspected criminal offending. That was due to Mr Standing's conduct, and the absence of funds to pay creditors.
- [36] The liquidator had reported overseas clients had paid \$635,769.49 in fees for work that had not been completed.
- [37] The Tribunal was also aware Mr Standing had banked fees into overseas bank accounts.
- [38] Accordingly, in its decision upholding this complaint the Tribunal gave Mr Standing notice that if there was an issue relating to his ability to pay, he should provide information that allowed the Tribunal to evaluate the claim with regard to the funds which had not been accounted for. In the absence of a satisfactory explanation, the Tribunal would proceed on the basis Mr Standing had the means to meet financial sanctions that fully reflect the findings against him.
- [39] Mr Standing has not responded, and the Tribunal will proceed on the basis Mr Standing has the means to meet the financial penalties and orders for the refund of fees and compensation.

Compensation and refund of fees

- [40] 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 often required a separate, and potentially expensive, second process.
- [41] The Act addresses that perceived shortcoming by providing that this Tribunal may require an adviser to refund fees and pay reasonable compensation when a complaint has been upheld.
- [42] 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.

The Decision on this Complaint

- [43] The Tribunal issued a decision upholding this complaint on 24 August 2012. The circumstances were as follows.
- [44] Mr Balich engaged Mr Standing to provide immigration services. Mr Standing failed to give him the advice he required to secure a permit. In addition an unlicensed person, at Mr Standing's instigation, unlawfully provided some of the professional services.
- [45] After the failure to provide the agreed services, Mr Standing failed to refund the fees he had been paid. Mr Balich was put to the expense of making a new application after terminating Mr Standing's engagement.
- [46] The Tribunal has found the material before it established the complaint. It was upheld on the grounds that Mr Standing was:
- [46.1] careless, negligent and unprofessional;
- [46.2] demanded and retained excessive fees; and

[46.3] was a party to the provision of advice unlawfully given in breach of the Act.

The Parties' Positions on Sanctions

[47] Mr Standing has not responded to the Tribunal's decision which invited him to make submissions on sanctions, and he did not address the issue of sanctions earlier in the process.

[48] Mr Balich has sought compensation and the refund of fees, as follows:

[48.1] Refund of fees paid to Mr Standing, £3,335.

[48.2] Compensation for additional expenses, \$4,100.

[48.3] Compensation for stress, \$2,000.

[49] Mr Balich reduced the claim for fees paid, as he understood the full £4,250 included non-refundable fees.

The Sanctions Imposed on this Complaint

Penalties

[50] For the reasons discussed, the sanctions imposed on Mr Standing in the present case will be censure, a prohibition on holding a licence for two years from the date of cancellation of his licence, and a financial penalty of \$8,000.

Compensation and refund of fees

[51] I am satisfied Mr Standing is required to refund fees he received in total, being \$10,808.75. That is the full amount of £4,250 converted to New Zealand dollars at the time it was paid. The reasons for the date of conversion are discussed in the decision upholding the complaint. Mr Standing did not provide the services promised, and indeed provided nothing of value. In effect Mr Balich had to take his own steps to achieve what Mr Standing failed to provide, and had been paid for.

[52] It is not appropriate to discount the figure from £4,250, as Mr Standing was responsible for all of the money he received, and failed to provide the services promised. He is not entitled to claim any element was not refundable.

[53] Mr Balich has also sought to recover the cost of seeking the various visas and completing the relevant processes Mr Standing failed to deliver.

[54] I do not accept that it is appropriate to compensate Mr Balich and his family for the cost of getting the visas Mr Standing failed to gain. The cost was less than Mr Standing charged (\$4,100 compared with \$10,808.75), accordingly a full refund of the money paid to Mr Standing will put Mr Balich and his family in the position they ought to have been.

[55] Mr Balich seeks compensation of \$2,000 for stress. It is inevitable that when professional services are not delivered there is a greater or lesser degree of stress suffered, and Mr Standing's attitude to his professional responsibilities was calculated to maximise the distress to his clients. However, compensation under this head must be measured, and not be permitted to add to penalties which are separate and distinct.

[56] The information before me, and the nature of the claim, requires me to deal with this aspect of compensation as being in the nature of a claim for general damages. There was no doubt a great deal of pressure, which was difficult for a family undertaking the process of migrating. There are also some expenses that were repeated, such as medical and police reports, which were separate from the fees paid to Mr Standing, and the repetition was due to Mr Standing failing to deliver services in a timely manner.

[57] I am satisfied compensation of \$1,000 is appropriate, as a restrained recognition of the additional expenses, and the stress and difficulty the complainants faced. This is not a penalty, but reasonable recognition of the time and pressure of having to take alternative steps, and meet various out-of-pocket expenses following from Mr Standing's failure to deliver the services promised.

[58] It follows that the order for the refund of fees will be \$10,808.75, and compensation \$1,000.

Order

[59] The Tribunal orders that Mr Standing:

[59.1] Is censured.

[59.2] Is prevented from applying for, or holding, any licence under the Immigration Advisers Licensing Act 2007 for a period of two years from the date his licence was cancelled by the previous order of this Tribunal.

[59.3] Will pay a penalty of \$8,000 pursuant to section 51(1)(f) of the Act, in respect of this complaint.

[59.4] Will refund fees of \$10,808.75 to Mr Balich.

[59.5] Will pay compensation of \$1,000 to Mr Balich.

DATED at WELLINGTON this 28th day of September 2012.

G D Pearson
Chair