

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

Decision No: [2013] NZIACDT 42

Reference No: IACDT 026/11

**IN THE MATTER**

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

**BY**

**Immigration Advisers Authority**

Authority

**BETWEEN**

**Chantal Geldenhuys**

Complainant

**AND**

**Christine Lai Chun Yap**

Adviser

---

**DECISION**  
IMPOSITION OF DISCIPLINARY SANCTIONS

---

**REPRESENTATION:**

**Complainant:** In person

**Adviser:** In person

Date Issued: 15 July 2013

## DECISION

### Introduction

- [1] In a decision dated 12 April 2013 this complaint was upheld.
- [2] Ms Yap was found to have acted dishonestly in relation to fees. She told her client, Ms Geldenhuys, that she was being charged fees that were “in line with industry standards”. The fees charged were in the range of \$545/hr to \$587/hr, and inflated to a higher effective rate with various devices. The fees were not “in line with industry standards”.
- [3] Ms Yap had a client who trusted her as a licensed professional but she abused her client’s trust. However, Ms Yap responded to the complaint by suggesting her client should have done her own research into the level of fees.
- [4] In addition Ms Yap charged a “sign on fee”, claiming this was non-refundable, regardless of whether services were provided or not.

### The parties’ positions on sanctions

#### *The Authority’s position*

- [5] The Registrar of the Authority wrote to the Tribunal and stated that many advisers had a practice of using “sign on fees”; and the Authority had condoned such fees.
- [6] The Authority was to take immediate steps to ensure that the profession is informed the practice is not acceptable.
- [7] The Registrar made no other comment on the sanctions to be imposed.

#### *Ms Geldenhuys’ position*

- [8] Through her attorney Ms Geldenhuys sought compensation and the return of fees:
  - [8.1] \$2,140 as a refund of fees.
  - [8.2] Interest at 6% on the fees retained (average bank interest rate in South Africa).
  - [8.3] Compensation of \$2,500 in relation to time and general damages for trauma.
  - [8.4] Compensation for legal costs of dealing with the complaint \$1,000.
- [9] Ms Geldenhuys’ attorney practised in South Africa, and was not aware of the sanctions available. The attorney did however observe, in relation to the imposition of sanctions, that Ms Yap had been found guilty of a very serious offence.

#### *Ms Yap’s position*

- [10] Ms Yap responded to the Tribunal’s decision by saying it is wrong, and the conclusions reached were incorrect. Ms Yap says she did not engage in dishonest and misleading behaviour. She reargued the substantive issues that had been decided against her.
- [11] In relation to the “sign on” fee she noted that the Authority had accepted that the Registrar had accepted the practice of a “sign on” fee.
- [12] Ms Yap said no sanction should be imposed, as she does not accept the Tribunal’s findings, and has changed her practices. She offered to write an apology to Ms Geldenhuys.
- [13] Ms Yap did accept she had identified that Ms Geldenhuys had been overcharged by slightly more than \$700. She had reduced the hourly rates from \$545 and \$560, to \$360 and \$420,

respectively. She provided no evidence that demonstrated any of the rates were fair and reasonable on the conventional grounds on which costs would be reviewed. She has never provided any direct evidence of hourly rates, or established the rates were fair and reasonable.

[14] She also sought a direction that the decision should not be published

*Ms Geldenhuys' reply*

[15] Ms Geldenhuys through her attorney responded to Ms Yap's submission:

"It would seem from the response from Ms Yap that she is still maintaining her innocence on the charges and that she is not pleading for leniency on sanctions but rather pleading for acquittal of the complaint for which she has already been found guilty of. We are of the opinion that this cannot be tolerated at this stage of the proceedings.

Our client stands by her submissions ..."

## **Discussion**

### *Preliminary*

[16] As the complaint has been upheld, section 51 allows the Tribunal to impose sanctions.

[17] Given the Registrar's acceptance that "sign on fees" were common and the Authority did not challenged them; I will entirely disregard such finding for the purpose of imposing sanctions. That is not to suggest that a sign on fee was acceptable, as it was not.

[18] Ms Yap has also had another complaint upheld against her, and sanctions are being imposed in relation to that matter. It too involves misleading behaviour in relation to fees. However, the role she had was different as a different licensed immigration adviser was involved in a crucial element of the representations regarding fees. Ms Yap was found to have engaged in misleading behaviour, but without a finding of dishonesty.

[19] In these circumstances, my view is that it is appropriate to determine sanctions in relation to each complaint alone, and not to treat the other complaint as either an aggravating matter, or as establishing a pattern of conduct.

### *The findings that determine whether Ms Yap's licence should be suspended or cancelled*

[20] The critical decision is whether Ms Yap's licence should be suspended or cancelled; and if so, on what terms.

[21] Ms Yap's submission that she should face no sanctions and that the Tribunal's conclusions are wrong is grossly misplaced. Ms Yap has been found to have acted dishonestly.

[22] This was not a case of simple overcharging. This complaint involved Ms Yap systematically making statements she knew to be untrue to Ms Geldenhuys to induce her to accept excessive fees.

[23] Telling lies to a client to get money you are not entitled to is fundamentally inconsistent with professional standards.

[24] It was therefore inevitable that the removal of Ms Yap from the profession is an outcome that must be considered by the Tribunal.

### *Principles for suspension or cancellation of licence*

[25] The authorities indicate 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 (HC).

- [26] Rehabilitation of a practitioner is an important factor when appropriate (*B v B* HC Auckland, HC4/92, 6 April 1993). In *Patel v Complaints Assessment Committee* (HC Auckland CIV-2007-404-1818, 13 August 2007), the Court stressed when imposing sanctions in the disciplinary process applicable to that case, that 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”.
- [27] 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]:
- [T]he 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.
- [28] The statutory purpose is achieved by considering at least four factors which materially bear upon maintaining appropriate standards of conduct:
- [28.1] Protecting the public: section 3 of the Act states “[t]he purpose of this Act is to promote and protect the interests of consumers receiving immigration advice ...”
- [28.2] 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.
- [28.3] 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).
- [28.4] Rehabilitation: it is an important object to have the practitioner continue as a member of the profession practising well, when practicable (*B v B* HC Auckland HC4/92, 6 April 1993).

#### *Background to regulating this profession*

- [29] In *ZW v Immigration Advisers Authority* [2012] NZHC 1069, Priestley J observed at [41]:
- In passing the Act, Parliament has clearly intended to provide a system of competency, standards, and a Conduct Code to clean up an industry which hitherto had been subject to much justified criticism. The Registrar and Tribunal have a Parliamentary mandate to enforce standards.
- [30] The Act has established a regime in which, with limited exceptions, licensed advisers have an exclusive right to provide immigration advice. That exclusive right is enforced by criminal sanctions.
- [31] 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.
- [32] The Act records its purpose in section 3 as:
- [T]o promote and protect the interests of the consumers receiving immigration advice, and to enhance the reputation of New Zealand as a migration destination, by providing for the regulation of persons who give immigration advice.

- [33] 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.
- [34] To establish the profession, a relatively low threshold was applied. It required a person to demonstrate competent handling of immigration applications in the past, knowledge and understanding of the new professional environment, and 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.
- [35] The low threshold for entry into the profession, in that entry has not required a long period of academic training with mentored experience, has inevitably resulted in some people entering the profession with no real commitment to maintaining professional standards. It is important that this Tribunal exercises the power to remove people from the profession who are in this category.
- [36] 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 the privilege of entry to the profession.

*Alternatives short of cancellation of licence*

- [37] Section 51 provides for various sanctions. The key options short of cancellation or suspension of a licence are punishments intended to affect deterrence, namely censure and financial penalties not exceeding \$10,000.
- [38] In relation to licences there are three options:
  - [38.1] cancellation and a direction that the person may not apply for a licence for up to two years;
  - [38.2] suspension; or
  - [38.3] cancellation of a full licence and the holder of the licence permitted to apply for a different class of licence. In this way a person may be prevented practising on their own account, and put in a situation where they are practising under supervision while they hold a provisional licence.
- [39] Other possibilities include training and specified conditions. There are also powers relating to imposing costs and compensation.
- [40] In this decision I am satisfied the range of possibilities to weigh are:
  - [40.1] cancellation of Ms Yap's licence and a prohibition on reapplying for a licence for a period.
  - [40.2] cancellation of Ms Yap's full licence, and allowing an application for a provisional licence (with supervision conditions).
  - [40.3] training requirements.
  - [40.4] a financial penalty on its own, or in combination with the preceding directions.
- [41] Suspension has a potential role in ensuring that a proportional consequence is imposed (*A v Professional Conduct Committee* HC Auckland CIV-2008-404-2927, 5 September 2008) and would potentially bring home to Ms Yap the nature of the professional obligations she carries.
- [42] However, restriction to a provisional licence would likely be more effective in rehabilitation than suspension, as mentoring in professional standards would likely be of more benefit.
- [43] In making this decision the Tribunal is required to weigh the public interest against Ms Yap's interests.

- [44] When dealing with integrity issues there is never any certainty that, short of exclusion from a profession, a person will not reoffend. This Tribunal must carefully weigh the circumstances. It is appropriate to place an element of considered trust in a practitioner who has shown the capacity and willingness to rehabilitate.
- [45] A significant factor in this case is that it involves dishonesty.
- [46] Dishonesty points to the need to remove a practitioner from a profession. In *Shahadat v Westland District Law Society* [2009] NZAR 661 the High Court commented:
- [29] A finding of dishonesty is not necessarily required for a practitioner to be struck off. Of course, dishonesty inevitably, although not always, may lead to striking off. But as said in *Bolton v Law Society* [[1994] 2 All ER 486; [1994] 1 WLR 512 (CA)] at pp 491–492:
- If a solicitor is not shown to have acted dishonestly, but is shown to have fallen below the required standards of integrity, probity and trustworthiness, his lapse is less serious but it remains very serious indeed in a member of a profession whose reputation depends upon trust. A striking-off order will not necessarily follow in such a case, but it may well. The decision whether to strike off or to suspend will often involve a fine and difficult exercise of judgment, to be made by the tribunal as an informed and expert body on all the facts of the case.
- [30] As a Full Court observed in *McDonald v Canterbury District Law Society* (High Court, Wellington, M 215/87, 10 August 1989, Eichelbaum CJ, Heron and Ellis JJ) at p 12:
- Even in the absence of dishonesty, striking-off will be appropriate where there has been a serious breach of a solicitor's fundamental duties to his client.
- [31] It is important to bear in mind that “dishonesty” can have different connotations. (It may describe criminal acts. But it may comprise acting deceitfully towards a client or deceiving a client through acts or omissions.)
- [47] As observed by the Court in *Shahadat*, dishonest conduct “inevitably, although not always, may lead to striking off”. It is important to look carefully at whether rehabilitation is realistic.

#### *Weighing the alternatives*

- [48] First, Ms Yap's circumstances are no doubt such that loss of her licence and the consequent loss of the ability to continue to practice as a licensed immigration adviser will be of considerable consequence to her.
- [49] However, the consequences of breaching professional standards are inevitably going to impact harshly. Ms Yap was required to understand the consequences of breaching professional standards when she chose to conduct herself in the manner she did. She had to demonstrate an understanding of professional obligations before she was licensed.
- [50] Ms Yap's conduct involves dishonestly putting her financial interests before her client's interests, and abusing the trust she was accorded as a licensed professional; she cannot expect to be immune from the consequences.
- [51] The primary issue is whether it can be reasonably considered that Ms Yap will in the future discharge her professional duties in a manner that does “promote and protect the interests of consumers receiving immigration advice”, as section 3 of the Act contemplates.
- [52] I have had to conclude that Ms Yap has exhibited none of the qualities that could lead to an expectation she will commit to meeting professional standards in the future.

#### *Ms Yap's attitude to the grounds of the complaint*

- [53] Ms Yap has made it clear to the Tribunal she rejects the Tribunal's findings against her.
- [54] I am satisfied:

- [54.1] Ms Yap was guilty of a serious professional offence which was established on clear evidence. The offence involved the dishonest treatment of a client by abusing the client's trust. Ms Yap has been uncomprehending of the gravity of such an offence. When responding to the complaint, she sought to attribute some blame to her client for failing to do her own research into fees charged by licensed immigration advisers. It appears that Ms Yap has failed to understand that clients are entitled to trust licensed professionals and that licensed professionals will be held to account when they abuse that trust.
- [54.2] She was aware of her professional obligations when she offended; the only apparent alternative explanation would be, both then and now, she has no understanding of the obligations of professionalism. Each possibility is equally concerning as to future conduct.
- [54.3] In the course of the complaint being addressed by the Tribunal, she has shown little insight. She rejects the findings against her. Ms Yap considers she is entitled to her view, and that the Tribunal is wrong. She contends she should suffer no penalty.

*Ms Yap's licence will be cancelled*

- [55] Ms Yap's offending was serious; it is an example of the conduct the Act was intended to eradicate.
- [56] The statutory disciplinary process has brought Ms Yap no meaningful insight.
- [57] Ms Yap entered the profession without having committed to a course of academic study, or the mentoring required for persons now entering the profession. That process has a significant component directed to gaining an appreciation of what professionalism means.
- [58] It is evident Ms Yap fails to understand the difference between general commerce, and the trust and respect for clients that is demanded of licensed professionals. She is in that position notwithstanding going through the process of dealing with two complaints, in what has been an exhaustive process.
- [59] At no point in the process before the Tribunal has Ms Yap shown a willingness or it seems, a capacity to accept the duties she has as a professional. As noted, when the Tribunal pointed out to Ms Yap that she was in a position where a client trusted her due to her status, her response was effectively "buyer beware". Ms Yap thought it appropriate to say that Ms Geldenhuys should have undertaken her own research on the fees in the industry despite Ms Yap's representations regarding that matter.
- [60] I am accordingly satisfied disciplinary sanctions will not be sufficient to cause Ms Yap to appreciate, accept, and maintain professional standards. The public will only be adequately protected, and the objectives of the Act achieved, by cancelling her licence. I am satisfied that the period should be two years, after that point Ms Yap would have to qualify for the profession, and satisfy the Registrar that she otherwise met the statutory requirements.
- [61] I have considered whether allowing Ms Yap to hold a provisional licence, after establishing a regime of appropriate supervision, is an option. I am satisfied that is not appropriate. When Ms Yap will not accept error on her part in the face of a reasoned disciplinary finding against her, it is unrealistic to expect her to be willing to respect, accept, and learn from a mentor.
- [62] The financial penalty will be moderated having regard to Ms Yap's loss of ability to continue as a member of the profession. A penalty of \$3,500 will be imposed. Any lesser penalty would not adequately reflect the sums of money that Ms Yap induced Ms Geldenhuys to pay using dishonest misrepresentations, notwithstanding that the financial penalty is only part of the total sanctions.
- [63] Ms Yap is not the only person holding a licence in her practice. Accordingly the cancellation of her licence will not be deferred to allow her to put her practice in order; there are others who can take over the active files she has.

### *Compensation and refund of fees*

- [64] 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 required a separate, and potentially, expensive second process.
- [65] The Act addresses such perceived shortcoming by providing that this Tribunal may require an adviser to refund fees and pay reasonable compensation when a complaint has been upheld.
- [66] 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.
- [67] Ms Geldenhuys has sought compensation under two heads:
- [67.1] Compensation of \$2,500 in relation to time and general damages for trauma;
- [67.2] Compensation for legal costs of dealing with the complaint \$1,000.
- [68] The Tribunal has from time to time awarded compensation on similar principles to general damages, but on a basis that does not become a penalty which is routinely added to other penalties. Accordingly, the Tribunal has looked for more than the time, trouble and inconvenience that inevitably follows from a professional person failing to meet their obligations to a client.
- [69] In this case I am satisfied that Ms Yap's conduct does justify an award of general damages, but it will be modest. Ms Yap has persistently resisted taking responsibility for refunding fees, and effectively put Ms Geldenhuys to the greatest difficulty possible in addressing Ms Yap's misconduct. Ms Geldenhuys has understandably found this to be a difficult and demanding process, which has required time and caused her stress. Accordingly, she is entitled to some compensation.
- [70] I am satisfied an award of \$1,500 will reflect the time, trouble and stress Ms Geldenhuys has faced.
- [71] The claim for legal costs of \$1,000 is appropriate. Ms Geldenhuys was put to this expense to deal with Ms Yap's unmeritorious submissions on penalty.
- [72] Ms Geldenhuys has also sought a refund of fees paid to Ms Yap.
- [73] I have found that Ms Yap induced Ms Geldenhuys to agree to pay fees on the basis of misrepresentations; she has had every opportunity to demonstrate what a fair and reasonable fee is, and has failed to do so. Given the fact the fees were procured dishonestly, I am satisfied that the fees should be refunded in their entirety.
- [74] There will be an order that Ms Yap refund \$2,140 as sought by Ms Geldenhuys. Ms Yap has not challenged the amount paid.
- [75] Ms Geldenhuys has sought compensatory interest at 6% on the basis she has been out of pocket since early 2011. However, Ms Yap did provide some services that were of value, in these circumstances I am satisfied that repayment of the fees in full without interest appropriately compensates Ms Geldenhuys.

### *Publication*

- [76] Ms Yap has sought non-publication of her name. She says that the Registrar's letter regarding "sign on fees" absolves her, and it would be unfair to publish the decision.



- [77] Ms Yap breached the Code in demanding a sign on fee, the Registrar's letter does not alter the Tribunal's conclusion. The Registrar has accepted his position was wrong, and given notice to the profession.
- [78] There are occasions when the Tribunal has a duty to set standards in the interest of the public, even if the standards are not universally or even generally attained.
- [79] However, the finding regarding the sign on fee was minor compared with the finding that Ms Yap dishonestly misled her client. A mitigating element relating to that aspect cannot sensibly be a reason for non-publication of the decision as a whole.
- [80] There is no specific statutory direction concerning the power to direct either publication or suppression. Directions to limit or prohibit publication are a matter within the scope of the Tribunal's power to regulate its own procedure (section 49(1)). However, for a professional disciplinary body in contemporary New Zealand to operate without its decisions being available to the public would be a truly exceptional situation.
- [81] The Court of Appeal in *R v Liddell* [1995] 1 NZLR 538 at 546 per Cooke P said, in relation to the question of name suppression:
- [T]he starting point must always be the importance in a democracy of freedom of speech, open judicial proceedings, and the right of the media to report the latter fairly and accurately as 'surrogates of the public'.
- [82] While the *Liddell* case dealt with a criminal conviction and attendant publication issues, the principles apply to a professional disciplinary body. The function of a professional disciplinary body is concerned with accountability of members of the profession to the public. Public confidence in a disciplinary body achieving fair outcomes and accountability is not well served by a process that is not open, and there is nothing in the Act indicating that it does create such a process. For the Tribunal to operate without being open and publicly accountable would not be in the interests of either the public or the profession.
- [83] Publication of the Tribunal's decisions will follow as a matter of course. There can be cases where decisions are published, and identities are withheld. However, it is necessary to establish that it is appropriate to derogate from open justice, at least to that extent.
- [84] Ms Yap cannot expect to have her conduct hidden from the community. She has been offering professional services to the community, and engaged in misleading and dishonest behaviour. The community is entitled to be aware of her behaviour.
- [85] Accordingly, the decision upholding the complaint and the present decision will be published in the usual way.

### **Determination and orders**

- [86] Ms Yap is:
- [86.1] Censured.
- [86.2] Ordered to pay a penalty of \$3,500.
- [86.3] Directed to pay Ms Geldenhuys the sum of \$4,640 in compensation and for the refund of fees.
- [87] Any licence presently held under the Act by Ms Yap is cancelled, with effect 24 hours after this decision is delivered to Ms Yap.

- [88] Ms Yap is prevented from reapplying for any category of licence as a licensed immigration adviser for a period of two years from the date her licence is cancelled.

**DATED** at WELLINGTON this 15<sup>th</sup> day of July 2013

---

**G D Pearson**  
Chairperson