

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

Decision No: [2013] NZIACDT 49

Reference No: IACDT 024/11

IN THE MATTER

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

BY

Immigration Advisers Authority

Authority

BETWEEN

Peter Wiezoreck

Complainant

AND

Anneline Joanna (Anna) McHugh

Adviser

DECISION
IMPOSITION OF DISCIPLINARY SANCTIONS

REPRESENTATION:

Complainant: In person

Adviser: In person

Date Issued: 9 August 2013

DECISION

Introduction

- [1] In a decision dated 4 June 2013 this complaint was upheld.
- [2] Ms McHugh was found to have acted in a manner that was misleading and dishonest in relation to fees.
- [3] She told her client Mr Wiezoreck in a letter dated 24 February 2010 the “industry standard” hourly rate for a licensed immigration adviser was in the range of €400 to €545 (NZ\$740 to NZ\$1,000 approximately).
- [4] Mr Wiezoreck ultimately accepted a “budget service”, which was based on an hourly rate of approximately \$315; but had 18 hours of non-refundable service i.e. “take or pay”, and required Mr Wiezoreck to undertake his own immigration work. The 18 hours of service was only in the nature of assistance.
- [5] The Tribunal found that Ms McHugh could not have honestly believed “industry standard” hourly rates were in the range of NZ\$740 to NZ\$1,000.
- [6] She used this dishonest representation with the intent of having Mr Wiezoreck accept grossly inflated rates, or accept an overpriced “budget service” thinking he was receiving a heavy discount.
- [7] Mr Wiezoreck did accept the “budget service”, and the fees set were not fair and reasonable.
- [8] Accordingly, the complaint was upheld on the basis Ms McHugh engaged in misleading and dishonest behaviour and breached the Licensed Immigration Advisers Code of Conduct 2010 by setting fees that were not fair and reasonable. It is now necessary to determine the appropriate sanctions.

The parties’ positions on sanctions

Mr Wiezoreck’s position

- [9] Mr Wiezoreck did not make further submissions on the issue of sanctions.

Ms McHugh’s position

- [10] Ms McHugh responded to the Tribunal’s decision by saying it is wrong to have found she engaged in dishonest and misleading behaviour, and accordingly no sanctions should be imposed.
- [11] She did indicate she had changed her practices as a result of the Tribunal’s decision.

Discussion

Preliminary

- [12] As the complaint has been upheld, section 51 of the Immigration Advisers Licensing Act 2007 (“the Act”) allows the Tribunal to impose sanctions.
- [13] The critical decision is whether Ms McHugh’s licence should be suspended or cancelled, and if so, on what terms.
- [14] Ms McHugh’s submission that she should face no sanctions and that the Tribunal’s conclusions are wrong is unimpressive and significant in terms of the potential for her to apprehend professional obligations.

- [15] Ms McHugh has been found to have acted dishonestly.
- [16] This was not a case of simple overcharging; this complaint involved Ms McHugh making statements she knew to be untrue to Mr Wiezoreck to induce him to accept excessive fees.
- [17] Telling lies to a client to get money you are not entitled to is fundamentally inconsistent with professional standards.
- [18] It was inevitable that the removal of Ms McHugh from the profession is an outcome that must be considered.

Principles for suspension or cancellation of licence

- [19] 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).
- [20] 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”.
- [21] 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.
- [22] The statutory purpose is achieved by considering at least four factors which materially bear upon maintaining appropriate standards of conduct:
 - [22.1] 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 ...”
 - [22.2] 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.
 - [22.3] 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).
 - [22.4] 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

- [23] 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.

- [24] 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.
- [25] 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.
- [26] 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.
- [27] 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.
- [28] To establish the profession, a relatively low threshold was applied. It required a person 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.
- [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 exercises the power to remove people from the profession who are in this category.
- [30] 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

- [31] Section 51 provides for various sanctions. The key options short of cancellation or suspension of a licence are punishments intended to effect deterrence, namely censure, and financial penalties not exceeding \$10,000.
- [32] In relation to licences there are three options:
- [32.1] cancellation and a direction that the person may not apply for a licence for up to two years;
- [32.2] suspension; or
- [32.3] 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.
- [33] Other possibilities include training and specified conditions. There are also powers relating to imposing costs and compensation.
- [34] In this decision I am satisfied the range of possibilities to weigh are:
- [34.1] cancellation of Ms McHugh's licence and a prohibition on reapplying for a licence for a period;

- [34.2] cancellation of Ms McHugh's full licence, and allowing an application for a provisional licence (with supervision conditions);
- [34.3] training requirements;
- [34.4] a financial penalty on its own, or in combination with the preceding directions.
- [35] 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 McHugh the nature of the professional obligations she carries.
- [36] 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.
- [37] In making this decision the Tribunal is required to weigh the public interest against Ms McHugh's interests.
- [38] 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.
- [39] A significant factor in this case is that it involves dishonesty.
- [40] 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.)
- [41] 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

- [42] First Ms McHugh's circumstances are no doubt such that loss of her licence and the consequent loss of the ability to continue to practise as a licensed immigration adviser are considerable.
- [43] However, the consequences of breaching professional standards are inevitably going to impact harshly. Ms McHugh 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.

- [44] Ms McHugh'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.
- [45] The primary issue is whether it can be reasonably considered that Ms McHugh 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.
- [46] I have had to conclude that Ms McHugh has exhibited none of the qualities that could lead to an expectation she will commit to meeting professional standards in the future.

Ms McHugh's attitude to the grounds of the complaint

- [47] Ms McHugh has made it clear to the Tribunal she rejects the Tribunal's findings against her.
- [48] I am satisfied:
 - [48.1] Ms McHugh was guilty of a serious professional offence on clear evidence. It involves the dishonest treatment of a client, by abusing the client's trust. Ms McHugh has been uncomprehending of the gravity of that.
 - [48.2] 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.
 - [48.3] In the course of the complaint being addressed by the Tribunal, she has shown little insight. She rejects the findings against her. Ms McHugh apparently considers she is entitled to her view, and the Tribunal is wrong. She contends she should suffer no penalty.

Ms McHugh's licence will be cancelled

- [49] Ms McHugh's offending was serious; it is an example of the conduct the Act was intended to eradicate.
- [50] The statutory disciplinary process has brought Ms McHugh no meaningful insight.
- [51] Ms McHugh 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.
- [52] It is evident Ms McHugh fails to understand the difference between general commerce, and the trust and respect for clients that is demanded of licensed professionals.
- [53] At no point in the process before the Tribunal has Ms McHugh shown a willingness or, it seems, a capacity to accept the duties she has as a professional.
- [54] I am accordingly satisfied disciplinary sanctions will not be sufficient to cause Ms McHugh 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 McHugh would have to qualify for the profession, and satisfy the Registrar that she otherwise met the statutory requirements.
- [55] I have considered whether allowing Ms McHugh to hold a provisional licence, after establishing a regime of appropriate supervision, is an option. I am satisfied that is not appropriate. When Ms McHugh 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.

- [56] The financial penalty will be moderated having regard to Ms McHugh'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 McHugh induced Mr Wiezoreck to pay using dishonest misrepresentations, notwithstanding that the financial penalty is only part of the total sanctions.
- [57] Ms McHugh 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 as there are others who can take over the active files she has.

Compensation and refund of fees

- [58] 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.
- [59] 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.
- [60] 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.
- [61] Mr Wiezoreck is entitled to have all the fees he paid refunded. He was not treated honestly when he agreed to pay the fees, and it would be repugnant to justice to permit Ms McHugh to retain any of the fees procured in that way by a professional he was entitled to trust. Total fees of €3,050 were paid, and €800 refunded. The fees were paid in instalments, a conversion date of February 2010 is reasonable. The balance of €2,250 equates to NZ\$4,417.
- [62] 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.
- [63] In this case I am satisfied that Ms McHugh's conduct does justify an award of general damages, but it will be modest. Ms McHugh has persistently resisted taking responsibility for refunding fees, and effectively put Mr Wiezoreck to the greatest difficulty possible in addressing Ms McHugh's misconduct. This behaviour included a wholly unfounded claim that Mr Wiezoreck engaged in "false pretences", in relation to his late partner who had a terminal illness.
- [64] I am satisfied an award of \$1,500 will reflect the time, trouble, and stress Mr Wiezoreck has faced.

Determination and Orders

- [65] Ms McHugh is:
- [65.1] Censured.
- [65.2] Ordered to pay a penalty of \$3,500.
- [65.3] Directed to refund fees of \$4,417.
- [65.4] To pay Mr Wiezoreck the sum of \$1,500 in compensation.

- [66] Any licence presently held under the Act by Ms McHugh is cancelled, with effect 24 hours after this decision is delivered to Ms McHugh.
- [67] Ms McHugh 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 9th day of August 2013

G D Pearson
Chairperson