

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

Decision No: [2013] NZIACDT 59

Reference No: IACDT 009/12

IN THE MATTER

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

BY

Immigration Advisers Authority

Authority

BETWEEN

PQ

Complainant

AND

Hakaoro Hakaoro

Adviser

THE COMPLAINANT'S NAME IS NOT TO BE PUBLISHED

Hearing: 26 and 27 June, and 10 July 2013

DECISION

IMPOSITION OF DISCIPLINARY SANCTIONS

REPRESENTATION:

Authority: Ms T Thompson, Ministry of Business, Innovation and Employment, Auckland.

Complainant: Mr N T Tupou, Barrister, Auckland.

Adviser: Mr J A Sutton and Mr R Rajiv, Barristers, Auckland.

Date Issued: 17 September 2013

DECISION

Introduction

- [1] The Tribunal upheld this complaint in a decision issued on 8 August 2013. The key findings were:
 - [1.1] Mr Hakaoro attempted to sexually exploit the complainant;
 - [1.2] He did not initiate his client relationship in accordance with the Code; and
 - [1.3] He dishonestly promised to provide professional services in exchange for domestic services, and did not deliver or intend to deliver those services.
- [2] This decision is to determine the sanctions to be imposed under section 51 of the Immigration Advisers Licensing Act 2007 (the Act).
- [3] This complaint is one of four that have been upheld in relation to Mr Hakaoro. The Tribunal has previously cancelled Mr Hakaoro's licence, and prohibited him from applying for another licence for two years after cancellation.

The parties' positions on sanctions

The Authority

- [4] The Authority indicated it did not wish to make any submissions on sanctions.

The complainant

- [5] For the complainant, her counsel identified she sought:
 - [5.1] Censure,
 - [5.2] Prohibition on applying for a licence for two years from the date of this decision (extending the present period of prohibition),
 - [5.3] A financial penalty of \$10,000.
 - [5.4] Compensation of \$5,000, being the value of professional services exchanged for domestic services and not delivered.
 - [5.5] Compensation of \$10,000 for the emotional and psychological effect of Mr Hakaoro's conduct.
 - [5.6] An order for the payment of her counsel's costs (though both her and Mr Hakaoro were in receipt of legal aid).

Mr Hakaoro

- [6] Through his counsel Mr Hakaoro responded and took the position:
 - [6.1] The decision had the effect of censure.
 - [6.2] The effect on Mr Hakaoro's licence should be concurrent with the existing order.
 - [6.3] Mr Hakaoro is insolvent and cannot pay his existing debts, and has no foreseeable prospect of improving his situation. That should be taken into account in relation to the financial penalty, compensation, and costs.

- [7] In relation to the issues raised by both parties being legally aided, the submission addressed section 45 of the Legal Services Act 2011 (LSA). The position taken was that the exceptional circumstances in section 45(3) existed, but in the circumstances, no order should be made.

Discussion

Licence

- [8] The gravity of the findings against Mr Hakaoro requires no elaboration. If he held a licence, or was entitled to apply for one, orders would be made cancelling his licence and prohibiting him applying for another licence for two years.
- [9] However, he does not hold a licence, and is prohibited from applying for another licence for two years from the date it was cancelled. I will however reserve leave to make an order, in the event the current cancellation and prohibition did not take full effect because of any process in that proceeding.
- [10] After the two year period has expired, while Mr Hakaoro could apply for a licence, it would not follow that he would be granted a licence. The Registrar pursuant to section 19 (1)(b) would be required to have regard to whether Mr Hakaoro was “fit to be licensed”. The fitness includes matters referred to in section 17(a), which refers to disciplinary proceedings.
- [11] It follows that in the event of applying for a licence, the Registrar would be obliged to have regard to the fact this complaint was upheld. These would be matters for the Registrar to consider at that time. This Tribunal cannot direct the Registrar; it is his decision to be made on the facts then existing, should such an application be made.
- [12] I am satisfied the statutory scheme is that this Tribunal mandates a maximum of two years prohibition on applying for a licence, and then the issue lies with the Registrar. I do not consider that it is necessary or appropriate to extend the period marginally, while successive complaints are addressed.

Financial penalty

- [13] Mr Hakaoro’s misconduct was at the most serious end of the scale, and it requires, in addition to cancellation of his licence, a penalty that is proportionate to the statutory maximum of \$10,000 and reflects the gravity of the findings.
- [14] Mr Hakaoro has already had his licence cancelled for other conduct, and in reality, the financial penalty is the only penalty.
- [15] I also have regard to the totality principle in relation to the overall misconduct, given multiple complaints have been upheld. 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.
- [16] In the circumstances I am satisfied the appropriate financial penalty is \$8,000; the real constraint is the statutory limit. This matter involved the professional, and attempted sexual exploitation of a vulnerable young person, using the statutory status of a licensed immigration adviser. It is at the highest end of offending.

Compensation

- [17] The complainant was promised professional services to a value of \$5,000, and in exchange for that, she provided domestic services. Mr Hakaoro induced her to do so using his status as a licensed immigration adviser. The complainant is entitled to be paid \$5,000 as Mr Hakaoro failed to provide the professional services he promised.
- [18] The complainant also seeks compensation for the emotional and psychological effect of Mr Hakaoro’s conduct. His attempt to sexually exploit a vulnerable young person, and his

disgraceful attack on her honesty in an attempt to cover up his own misconduct make this case exceptional. However, this Tribunal is not a vehicle for compensating emotional harm; any order must be ancillary to its function as a professional disciplinary Tribunal.

- [19] In terms of adequate compensation for harm caused, the complainant's counsel may well be justified in claiming an award of \$10,000; however there are also issues relating to rights for compensation for emotional harm. In keeping with the proper and limited function of this Tribunal, I consider that it is appropriate to moderate an award of this kind. In the circumstances, I will order that \$5,000 be paid. I expressly note this is not intended as a measure of what would be appropriate to compensate the complainant if that were the issue.
- [20] The compensation awarded is a measure of what is appropriate to recognise the complainant suffered harm in a context where an award is made in recognition of an aggravating feature of professional misconduct. In particular that this was the conduct of a licensed professional using his professional standing to gain trust and then abusing it.

Mr Hakaoro is insolvent – the effect

- [21] It is necessary to consider the issue raised by Mr Hakaoro's counsel, namely that Mr Hakaoro is insolvent. The essence of his financial situation being:
 - [21.1] He has no income other than a benefit from Work and Income New Zealand; and has had none in the past 12 months.
 - [21.2] His benefit is \$213.19 per week, and after deduction made by Work and Income he receives \$40.32.
 - [21.3] He has had outgoings of \$13,667 in the past 12 months, and present weekly expenses of \$361.19.
 - [21.4] He has dependents.
 - [21.5] He has notice to vacate his rented premises.
 - [21.6] His power supply has been cut off.
 - [21.7] He has assets of \$2,250.
 - [21.8] He has unsecured debts of \$36,000.
- [22] In short, Mr Hakaoro is hopelessly insolvent, and there is no reason to suppose he has any alternative to a debtor's application to be adjudicated bankrupt.
- [23] The question is whether in the circumstances of this case that has an impact on the sanctions imposed.

Compensation

- [24] First, there are orders for compensation. They do not have a penal component. They are effectively a statutory jurisdiction to allow complainants to recover loss and compensate for harm. The losses may well be recoverable in other civil recovery proceedings. The policy appears to be an expedient means of giving relief for civil breach of contract or other duties, and conferring it on this Tribunal as it is seized of the relevant facts.
- [25] Given the apparent policy behind the legislation, it is difficult to see any sensible basis for allowing the adviser's ability to pay having any effect on the order. It would not be a relevant consideration if the client sought recovery in the Disputes Tribunal or the Courts.
- [26] It follows; the order for compensation must be made on the merits, not the adviser's ability to pay.

Financial penalty

- [27] The financial penalty under section 51(f) is discretionary. The question is whether and in what circumstances the adviser's financial position should be taken into account.
- [28] I have no difficulty accepting there may be instances where a financial penalty imposes exceptional hardship there may be grounds for taking that into account.
- [29] However, in the circumstances Mr Hakaoro is in, the reality is that he is not going to be in a position to pay the penalty, or the other monetary orders made against him. I see no merit in moderating the penalty as though he would suffer hardship and pay it over a period.
- [30] It is important to recognise this penalty is not the same as a fine. A fine, penalty, sentence of reparation, or other order for the payment of money that has been made following any conviction or order made under section 106 of the Sentencing Act 2002:
- [30.1] Is not a provable debt in bankruptcy; and
- [30.2] Is not discharged when a bankrupt is discharged from bankruptcy.
- [31] An order made under section 51(f) of the Act is recoverable as a debt due to the Crown under section 51(5) of the Act. It does not survive bankruptcy.
- [32] I am satisfied the Tribunal should mark Mr Hakaoro's professional offending with a penalty that reflects his conduct.

Costs and Expenses

- [33] Pursuant to section 51(1)(g) the Tribunal may make an order that a adviser pay the costs or expenses of investigation, inquiry, hearing and any related prosecution.
- [34] This is a somewhat extended version of the power that commonly applies in professional disciplinary jurisdictions.
- [35] A disciplinary tribunal will consider the financial burden of a complaint on the profession as a whole. The profession is levied to fund the disciplinary regime. It is appropriate to require some or all of the burden to be borne by the person who has been found to be responsible for professional misconduct.
- [36] The principles are discussed in *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] NZLR 850. In that case actual costs of investigation of \$79,000 had resulted in an award of \$40,000. The Court commented:
- “An award of costs under s 129 of the 1982 Act (and the 2006 Act) is entirely discretionary. ... It is clear that expenses include salaries and staff and overhead expenses incurred by the societies that investigate and bring proceedings before the Tribunal.”
- [37] Those principles appear to apply, with necessary modifications, to the Act and accordingly, the present proceedings.
- [38] In *O'Connor v Preliminary Proceedings Committee HC Wellington* AP 280/89, 23 August 1990, where an order for costs of \$50,000 out of a total of \$70,500 was awarded Jeffries J said:
- “It is a notorious fact that prosecutions in the hands of professional bodies, usually pursuant to statutory powers, are very costly and time consuming to those bodies and such knowledge is widespread within the professions so controlled. So as to alleviate the burden of the costs on the professional members as a whole the legislature had empowered the different bodies to impose orders for costs. They are nearly always substantial when the charges brought are successful and misconduct admitted, or found.”

- [39] Under the Act the mechanism is less direct, as the Authority and the Tribunal are statutory bodies; nonetheless members are levied through an obligation to pay licensing fees, there can be little doubt the purpose of section 51(1)(g) is the same in effect as that applying in the authorities discussed.
- [40] The Registrar has elected not to apply for costs of investigation, and representation at the hearing. Given Mr Hakaoro's ability to meet any order, the approach is not surprising.
- [41] However, the complainant through her counsel does apply for an order for costs.
- [42] There are two components to the costs, a sum of \$3,199.47 in respect of work covered by legal aid, and \$2,105.00 invoiced to the complainant.
- [43] They are the costs of the hearing. For the reasons discussed in relation to a penalty, I am satisfied I should not alter the proper order based on Mr Hakaoro's financial position. This is not a case where Mr Hakaoro's financial situation is a basis for moderating the award of costs.
- [44] I must however consider section 45 of the Legal Services Act 2011. Counsel for Mr Hakaoro has conceded exceptional circumstances exist. However, the reality of the situation is that both Mr Hakaoro and the complainant are in receipt of legal aid, further it is evident that there is no realistic prospect of recovery.
- [45] There would be an element of futility in making an order, and I will accordingly not make such order.
- [46] However, I will indicate in accordance with section 45(5) of the Legal Services Act that if I had not considered pursuant to section 45(1) that the circumstances and the means of the parties require no order, the order would have been at the level of 80% of the actual costs for the complainant's costs. The level reflects the nature of the offending, the refusal to acknowledge any responsibility, and the characterisation of the complaint as "a fraud/forgery and trivial". Mr Hakaoro knew the complaint was genuine and has willingly caused the complainant to incur costs, and required her to respond to his allegations of dishonesty.
- [47] The costs award for the Tribunal's expenses of hearing would have been \$5,000.
- [48] Accordingly the full order would have been \$9,243.58.

Decision

- [49] Mr Hakaoro is:
- [49.1] Censured.
 - [49.2] Ordered to pay a penalty of \$8,000.
 - [49.3] Ordered to pay compensation of \$10,000.
- [50] Leave is reserved for any party to apply for orders relating to:
- [50.1] Any licence Mr Hakaoro may hold under the Act during the two years following the Tribunal's previous decision to cancel his licence, or
 - [50.2] His ability to apply for a licence under the Act during that two year period.

- [51] The Tribunal notes it has exercised the discretion under section 45(1) of the LSA and not awarded costs, and specifies the order for costs would have otherwise made against Mr Hakaoro with respect to the proceedings is \$9,243.58.

DATED at WELLINGTON this 17th day of September 2013

G D Pearson
Chairperson