

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

Decision No: [2013] NZIACDT 64

Reference No: IACDT 022/13

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

BN and MN

Complainants

AND

Hakaoro Hakaoro

Adviser

THE COMPLAINANTS' NAMES ARE NOT TO BE PUBLISHED

DECISION
IMPOSITION OF DISCIPLINARY SANCTIONS

REPRESENTATION:

Registrar: In person.

Complainants: Mr R Small, Pacific Legal Ltd., Wellington.

Adviser: Mr J Sutton, counsel, instructed by Sinisa Law Ltd, Auckland.

Date Issued: 20 September 2013

DECISION

INTRODUCTION

- [1] The Tribunal upheld the complaint in this matter in a decision dated 15 August 2013.
- [2] The grounds for upholding the complaint were:
 - [2.1] Mr Hakaoro was engaged to apply for visas under a discretion that applies when a person is in New Zealand unlawfully.
 - [2.2] He accepted his clients, the complainants, told him they had a pending complaint with the Office of the Ombudsmen. That had the effect of preventing any further immigration steps until it was resolved.
 - [2.3] Mr Hakaoro failed to make proper inquiries, and charged them \$6,000 when he could do nothing for them but led them to believe he would provide effective, professional services. He then lodged applications that were hopeless, both due to the effect of the pending complaint and because the applications did not contain cogent grounds.
 - [2.4] Mr Hakaoro provided no services of value, and then failed to refund the money when his instructions were terminated.
 - [2.5] The Tribunal found Mr Hakaoro failed wholly to provide the professional services he charged for; he was dishonest and misleading, and failed to meet minimum professional standards.
- [3] This decision is to determine the sanctions under section 51 of the Immigration Advisers Licensing Act 2007 (the Act).
- [4] This complaint is one of five 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

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

The complainants

- [6] For the complainants, their counsel identified they sought:
 - [6.1] A refund of fees of \$6,000.
 - [6.2] Compensation of \$1,200 paid in relation to an ancillary instruction concerning their son's immigration.
 - [6.3] Costs of \$2,000.
 - [6.4] A financial penalty.
 - [6.5] Continued cancellation of licence.
- [7] The submission emphasised the seriousness of the findings against Mr Hakaoro, including dishonesty.
- [8] In addition, the submission provided information regarding Mr Hakaoro's contemptuous attitudes to the disciplinary process and regulation provided by the Act. Further, the submission emphasised the significant history of professional disciplinary findings against Mr Hakaoro.

- [9] The information included Mr Hakaoro's use of negative stereotypes based on ethnicity, which he attributed to his own clients.
- [10] The submission also provided information concerning continuing misconduct.

Mr Hakaoro

- [11] Through his counsel, Mr Hakaoro responded; the key elements in the submission were:
 - [11.1] The decision has the effect of censure.
 - [11.2] The effect on Mr Hakaoro's licence should be concurrent with the existing order.
 - [11.3] 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.
- [12] Through their counsel, the complainants questioned the genuineness of Mr Hakaoro's claims as to his financial circumstances, suggesting he may well have hidden funds.

Discussion

Licence

- [13] The findings against Mr Hakaoro are evident in the decision upholding the complaint. 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.
- [14] 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 reserve leave to make an order, in the event the current cancellation and prohibition do not take full effect, because of any process in that preceding matter in which his licence was cancelled.
- [15] 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.
- [16] 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.
- [17] 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

- [18] Mr Hakaoro's misconduct was at the very 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.
- [19] Mr Hakaoro has already had his licence cancelled for other conduct, and in reality, the financial penalty is the only incremental penalty.
- [20] 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.

- [21] In the circumstances I am satisfied the appropriate financial penalty is \$7,500. This matter involved dishonesty; it was of a kind similar to dishonesty found in other complaints. Mr Hakaoro has systematically promised to provide immigration services, when he did not intend to provide the services, and in some cases such as this case, could not provide the service. His intention was to take fees, and he would fail to account for them when the services were not provided, and his instructions terminated.

Compensation

- [22] The complainants paid Mr Hakaoro \$1,200 to assist their son in relation to immigration matters. The payment was solicited in the course of the professional instructions he was dealing with. I am satisfied he used his status as a licensed immigration adviser, and the access these instructions provided, to obtain the funds. He used the money for travel. Mr Hakaoro did not undertake this element of his instructions in accordance with the Code of Conduct. He had no right to solicit the payment without complying with the Code of Conduct.

- [23] I am satisfied that Mr Hakaoro should pay compensation of \$1,200.

Refund of fees

- [24] Mr Hakaoro has wholly failed to provide the services for which he was paid, and he procured the payment dishonestly. He will be required to refund the \$6,000 he took in fees.

Mr Hakaoro is insolvent – the effect

- [25] 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:

[25.1] He has no income other than a benefit from Work and Income New Zealand and has had none in the past 12 months.

[25.2] His benefit is \$213.19 per week, and after deductions made by Work and Income he receives \$40.32.

[25.3] He has had outgoings of \$13,667 in the past 12 months, and present weekly expenses of \$361.19.

[25.4] He has dependents.

[25.5] He has notice to vacate his rented premises.

[25.6] His power supply has been cut off.

[25.7] He has assets of \$2,250.

[25.8] He has unsecured debts of \$36,000.

- [26] 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.

- [27] The question is whether in the circumstances of this case that has an impact on the sanctions imposed.

Compensation and refund of fees

- [28] First, there are orders for compensation and the refund of fees. They do not have a penal component. They are effectively the exercise of a statutory jurisdiction to allow complainants to recover loss and compensation 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 while it is seized of the relevant facts.

[29] 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.

[30] It follows; the order for compensation and refund of fees must be made on the merits, not the adviser's ability to pay.

Financial penalty

[31] 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.

[32] I have no difficulty accepting there may be instances where a financial penalty imposes exceptional hardship and there may be grounds for taking that into account.

[33] 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.

[34] 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:

[34.1] Is not a provable debt in bankruptcy; and

[34.2] Is not discharged when a bankrupt is discharged from bankruptcy.

[35] 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.

[36] I am satisfied the Tribunal should mark Mr Hakaoro's professional offending with a penalty that reflects his conduct.

[37] I note that the complainants question whether Mr Hakaoro's financial position is accurately stated. However, given that I do not consider the monetary orders are affected, it is not a relevant consideration for the Tribunal. The issues would be ones for the Official Assignee if Mr Hakaoro does not have the resources to meet the orders.

Costs and expenses

[38] 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.

[39] This is a somewhat extended version of the power that commonly applies in professional disciplinary jurisdictions.

[40] 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.

[41] 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."

[42] Those principles appear to apply, with necessary modifications, to the Act and accordingly, the present proceedings.

- [43] 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.”

- [44] 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.
- [45] The Registrar has elected not to apply for costs of investigation and representation at the hearing. Given Mr Hakaoro's lack of ability to meet any order, the approach is not surprising.
- [46] However, the complainants through their counsel do apply for an order for costs.
- [47] They are the costs of their representation in the investigation, inquiry and 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.
- [48] Given the Registrar's decision not to apply for costs, I am satisfied that Mr Hakaoro should meet 100% of the costs incurred by the Tribunal and the complainant. Mr Hakaoro has not admitted any of the matters in respect of which there are adverse findings, or recognised his professional responsibilities. He characterised the complaint as false. In short, Mr Hakaoro maximised the cost and difficulty of addressing his conduct, which was dishonest and far from the standards he was required to observe.
- [49] Accordingly, there will be an order that Mr Hakaoro pay costs of:
- [49.1] \$2,000 to the complainant, and
- [49.2] \$3,350 in respect of the Tribunal.
- [50] The Tribunal's costs are based on \$350 in respect of the directions order, \$2,000 for the substantive decision, and \$1,000 for the decision on sanctions. The amounts are a partial measure of the direct costs and overheads of the Tribunal.

Other orders

- [51] The complainants while accepting that the Tribunal may lack jurisdiction, invited the Tribunal to consider directing Mr Hakaoro to apologise, desist from providing any ongoing immigration services (and take other steps to enforce that), and to address false statements he has made in the media. This Tribunal does not have such jurisdiction. In some respects, these are matters for the Registrar; they are not matters in which the Tribunal should involve itself in the exercise of the jurisdiction in section 51.

Decision

- [52] Mr Hakaoro is:
- [52.1] Censured.
- [52.2] Ordered to pay a penalty of \$7,500.
- [52.3] Ordered to pay the complainants:
- [52.3.1] Compensation of \$1,200.

[52.3.2] A refund fees of \$6,000.

[52.3.3] Costs of \$2,000.

[52.4] Ordered to pay the Tribunal's costs of hearing of \$3,350.

[53] Leave is reserved for the Registrar or the complainants to apply for orders relating to:

[53.1] Any licence Mr Hakaoro may hold under the Act during the two years following the Tribunal's previous decision to cancel his licence, or

[53.2] His ability to apply for a licence under the Act during that two year period.

DATED at WELLINGTON this 20th day of September 2013

G D Pearson
Chair