

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

Decision No: [2014] NZIACDT 1

Reference No: IACDT 056/12

**IN THE MATTER**

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

**BY**

**Immigration Advisers Authority**

Authority

**BETWEEN**

**TU**

Complainant

**AND**

**Hakaoro Hakaoro**

Adviser

**THE COMPLAINANT'S NAME IS NOT TO BE PUBLISHED**

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**DECISION**  
IMPOSITION OF DISCIPLINARY SANCTIONS

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**REPRESENTATION:**

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

**Complainant:** In person.

**Adviser:** Mr S Kilian & Mr F Hawkins, Shane Kilian & Associates, lawyers, Auckland.

Date Issued: 15 January 2014

## DECISION

### Introduction

- [1] The Tribunal upheld the complaint in this matter in a decision dated 8 October 2013.
- [2] The grounds for upholding the complaint were:
- [2.1] The complaint dated back to the time before Mr Hakaoro was a licensed immigration adviser.
  - [2.2] His client said he offered immigration advice and job search services. During that period, he attempted to exploit her in various ways.
  - [2.3] The Tribunal deals with complaints relating to licensed immigration advisers. What happened in the time prior to Mr Hakaoro becoming licensed could not be part of the grounds of a complaint upheld by the Tribunal.
  - [2.4] The Tribunal determined Mr Hakaoro offered the complainant immigration and ancillary job search services from the outset. He took fees for those services, and failed to deliver them.
  - [2.5] After he was licensed, he failed to initiate his instructions in accordance with the Code of Conduct, failed to bank the fees as client funds, dishonestly misrepresented he was entitled to keep the fees, and failed to repay them when his instructions ended.
  - [2.6] The Tribunal has upheld the complaint on the basis of:
    - [2.6.1] Breaching the Code of Conduct; and
    - [2.6.2] Engaging in dishonest and misleading behaviour.
- [3] This decision imposes sanctions under section 51 of the Immigration Advisers Licensing Act 2007 (the Act).
- [4] This complaint is one of a number 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 complainant*

- [6] The complainant sought costs and compensation of:
- [6.1] \$3,000 in fees to be refunded.
  - [6.2] Compensation for the imposition of the professional offending quantified as \$2,500.
  - [6.3] Compensation for the cost of a support person attending the hearing being \$526.31.
  - [6.4] Cost of attending the hearing \$250.
  - [6.5] Legal advice \$75.

*Mr Hakaoro*

- [7] Through his counsel Mr Hakaoro responded, the key elements in the submission were:
- [7.1] The decision has the effect of censure.
  - [7.2] The effect on Mr Hakaoro's licence should be concurrent with the existing order.
  - [7.3] 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.
  - [7.4] The complainant paid fees of \$2,700, not \$3,000 as claimed.

**Discussion***Licence*

- [8] 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.
- [9] However, he does not hold a licence, and cannot apply 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.
- [10] After the two-year period has expired while Mr Hakaoro could apply for a licence, it would not follow the Registrar would grant 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 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.
- [14] Mr Hakaoro has systematically promised to provide immigration services, failed to bank funds a client funds, failed to provide the services, and failed to provide refunds of fees.
- [15] In short, Mr Hakaoro used his status as licensed immigration adviser to take fees, and dishonestly failed to account for them by earning them or repaying them.
- [16] Mr Hakaoro has already had his licence cancelled for other conduct, and in reality, the financial penalty is the only incremental penalty.
- [17] 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.

- [18] 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.
- [19] The use of status conferred by professional licensing to exploit consumers warrants substantial financial penalties; that penalty and the penalties arising from Mr Hakaoro's pattern of offending are not disproportionate.

*Compensation for expenses*

- [20] The complainant seeks compensation for the imposition of the professional offending quantified as \$2,500, and reimbursement for the cost of a support person attending the hearing being \$526.31
- [21] Some of the claim cannot be awarded as it relates to conduct prior to Mr Hakaoro being licensed, that included improper sexual conduct. The Tribunal only has jurisdiction over the conduct of a person who is licensed at the time, and any sanctions must follow from the conduct founding a complaint.
- [22] Section 51(1)(i) provides that "reasonable compensation" may be ordered. It is not unusual for the precise quantification of claims to be impossible, but regardless orders are made. The principles relating to an award of general damages is an illustration.
- [23] However, compensation cannot be ordered if in reality the order repeats or substitutes for the imposition of a financial penalty.
- [24] In the present case, I am satisfied an appropriate award is \$1,200 that covers:
- [24.1] Compensation for the expenses in pursuing the complaint including taking initial legal advice, and the cost of the complainant and a support person attending the hearing (travel and loss of income);
- [24.2] The inevitable cost and disruption in Mr Hakaoro not providing the services he agreed to provide, and being left to deal with the consequences; and
- [24.3] Forgone interest on the fees taken and not refunded.

*Refund of fees*

- [25] Mr Hakaoro has failed to provide the services for which he was paid; he procured the payment dishonestly then held it after he was licensed. He will be required to refund the \$3,000 he took in fees.
- [26] I accept the complainant's evidence she paid \$3,000 not \$2,700 as Mr Hakaoro claimed. I have found the complainant's evidence to be consistent; the same is not correct in relation to Mr Hakaoro, and furthermore he failed to keep the records required in relation to fees. It appears unlikely he knows what fees he received, given the fact he was receiving money from a range of clients, and has not produced the records he was required to keep. I am satisfied the complainant was very aware of what she paid, and accept her evidence she paid \$3,000.

*Mr Hakaoro is insolvent – the effect*

- [27] 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 is (as provided some months ago):
- [27.1] He has no income other than a benefit from Work and Income New Zealand and has had none in the past 12 months.

- [27.2] His benefit is \$213.19 per week, and after deduction made by Work and Income he receives \$40.32.
- [27.3] He has outgoings of \$13,667 in the past 12 months, and present weekly expenses of \$361.19.
- [27.4] He has dependents.
- [27.5] He has notice to vacate his rented premises.
- [27.6] His power supply has been cut off.
- [27.7] He has assets of \$2,250.
- [27.8] He had unsecured debts of \$36,000.
- [28] Apparently, the position has deteriorated. 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.
- [29] The question is whether in the circumstances of this case that has an impact on the sanctions imposed.

*Compensation and refund of fees*

- [30] 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.
- [31] 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.
- [32] 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*

- [33] 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.
- [34] 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.
- [35] However, in the circumstances Mr Hakaoro is in, the reality is 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.
- [36] 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:
- [36.1] Is not a provable debt in bankruptcy; and
- [36.2] Is not discharged when a bankrupt is discharged from bankruptcy.
- [37] 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.

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

*Costs and Expenses*

[39] Mr Hakaoro is in receipt of legal aid in relation to this complaint, I accept the reality there is futility of ordering costs, and any such order would only undermine the ability to pay compensation and penalties.

*Censure*

[40] In accordance with the usual practice of disciplinary tribunals, censure will be an express sanction. It is appropriate to make that finding where conduct is not a mere lapse from minimum standards; in this case the conduct included intentional dishonesty.

**Decision**

[41] Mr Hakaoro is:

[41.1] Censured.

[41.2] Ordered to pay a penalty of \$7,500.

[41.3] Ordered to pay the complainant:

[41.3.1] Compensation of \$1,200.

[41.3.2] A refund fees of \$3,000.

[42] Leave is reserved for the Registrar or the complainant to apply for orders relating to:

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

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

**DATED** at WELLINGTON this 15<sup>th</sup> day of January 2014

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**G D Pearson**  
Chair