

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

Decision No: [2014] NZIACDT 109

Reference No: IACDT 028/12

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

Between

Wei Kai Chung and Yii Hee Lok

Complainants

AND

Lip Funn (James) Yap

Adviser

DECISION
IMPOSITION OF SANCTIONS

REPRESENTATION:

Registrar: In person

Complainants: In person

Adviser: In person

Date Issued: 10 October 2014

DECISION

This Complaint

- [1] This decision imposes sanctions, following a decision upholding a complaint against Mr Yap (refer decision *Chung and Lok v Yap* [2014] NZIACDT 66; www.justice.govt.nz).
- [2] In essence, this complaint was:
- [2.1] Mr Yap used unlicensed staff to provide immigration advice and services.
- [2.2] He only addressed essential matters some two months after accepting and beginning to act on instructions, when he should have addressed them at the outset.
- [3] The Tribunal upheld the complaint and found the adviser breached clauses 1.1(a), 2.1(b) and 3 of the Code of Conduct, as he did not properly evaluate the complainants' immigration prospects and delivered services through unlicensed staff.
- [4] The full circumstances are set out in the substantive decision.

The Parties' Positions on Sanctions

The Authority

- [5] The Authority did not make any submissions on sanctions.

The Complainants

- [6] The complainants sought orders under section 51(1)(a), (b), (c), (f), (g) and (h). However, they did not advance reasons, and essentially left the matter to the Tribunal.

Mr Yap

- [7] Mr Yap did not make any submissions on this complaint. However, there is another complaint where the Tribunal made very similar adverse findings against him and in respect of which he did file submissions on sanctions. The Tribunal will consider Mr Yap's submissions regarding his intention to take steps to put his practice in order in relation to this complaint as well. This and the other complaint have their respective decisions on sanctions issued simultaneously.

Discussion

The principles to apply

- [8] 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]:
- ... the 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.
- [9] When imposing sanctions those statutory purposes require consideration of at least four factors which may materially bear upon maintaining appropriate standards of conduct:
- [9.1] *Protecting the public*: Section 3 of the Act states "The purpose of this Act is to promote and protect the interests of consumers receiving immigration advice ..."
- [9.2] *Demanding minimum standards of conduct*: *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) and *Taylor v General Medical Council* [1990] 2 AC 539; [1990] 2 All ER 263 (PC) discuss this aspect.
- [9.3] *Punishment*: The authorities, including *Z v Dental Complaints Assessment Committee*, emphasise that punishment is not the purpose of disciplinary sanctions. Regardless,

punishment is a deterrent and therefore a proper element of disciplinary sanctions (*Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818; 13 August 2007).

- [9.4] *Rehabilitation*: It is important, when practicable, to have the practitioner continue as a member of the profession practising well (*B v B* [1993] BCL 1093, HC Auckland HC4/92, 6 April 1993).

Mitigating factors

- [10] I give Mr Yap the benefit of the doubt, and consider that his use of unqualified staff occurred due to an innocent misunderstanding of the restrictions set down in the Act. I also accept that his undertaking to ensure he complies in the future is genuine.

Mr Yap's licence

The principles

- [11] 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) at 172 and 173.
- [12] Rehabilitation of a practitioner is an important factor when appropriate (*B v B* HC Auckland HC4/92, 6 April 1993). In *Patel v The Dentists Disciplinary Tribunal* HC AK AP 77/02 8 October 2002 at [30]-[31], 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".
- [13] 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.
- [14] 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.

The options

- [15] In relation to licences the disciplinary sanctions in section 51 allow three options:
- [15.1] suspension (s 51(1)(c)); or
- [15.2] 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 (s 51(1)(b) & (d)); or
- [15.3] cancellation and a direction that the person may not apply for a licence for up to two years (s 51(1)(d) & (e)).
- [16] Other possibilities to assist rehabilitation include training and specified conditions (s 51(1)(b)). There are also powers relating to imposing costs and compensation (s 51(1)(g)-(i)).

The circumstances of the offending and Mr Yap's case

- [17] When looking at the options, the first factor to consider is the gravity of the professional offending, it is not appropriate to deprive a person of membership of a profession unless their offending is sufficiently serious. The most serious element of this complaint is the finding Mr

Yap was a party to a person unlawfully providing immigration advice. The Act defines *immigration advice* widely (s 7), prohibits persons who are not licensed or exempt from providing immigration advice (s 6), and provides it is a criminal offence to do so (s 63). The maximum penalty for knowingly breaching the prohibition is imprisonment for a term of 7 years and a fine of \$100,000, and otherwise a fine of \$100,000 (s 63(4) and (5)).

- [18] The Act treats breaches as serious criminal offending. The District Court has recently imposed a sentence of imprisonment on an offender. Mr Yap was required to understand this law. The substantive decision upholding this complaint found, on the balance of probabilities, that Mr Yap operated his practice knowing clients were relying on his status as a licensed immigration adviser and unlicensed persons within his practice would provide immigration advice.
- [19] I am satisfied Mr Yap intended unlicensed persons would provide immigration advice, and directed them to do so. However, it was also held that he probably did not understand the law prohibiting him conducting his practice in that way. While ignorance of the law is no excuse, particularly as Mr Yap was required to understand the requirements for lawfully conducting his practice, the response Mr Yap has made after the Tribunal upheld this complaint does indicate a willingness to address issues. The fact he practises outside New Zealand potentially imposes some barriers to full familiarity with the New Zealand regulatory regime. That, however, does not justify him failing to understand as he had duty to do so.
- [20] Accordingly, I am willing to give Mr Yap the benefit of the doubt, and regard his offending in this instance to be a result of ignorance, rather than a direct flouting of the Act. If it were otherwise, the Tribunal would have difficulty justifying any sanction short of removal from the profession, as he has breached one of the cornerstones of the Act's regime for protecting vulnerable consumers.

Weighing the options

- [21] Accordingly, it is necessary to consider alternatives short of exclusion from the profession. The full range of possibilities to weigh are:
- [21.1] prohibition on applying for a full licence and allowing an application for a provisional licence (with supervision conditions);
- [21.2] training requirements;
- [21.3] a financial penalty on its own or in combination with the preceding directions.
- [22] Suspension is another possibility, and it has a potential role in ensuring that the consequences are proportional: *A v Professional Conduct Committee* HC Auckland CIV-2008-404-2927, 5 September 2008 at [81].
- [23] In making this decision, the Tribunal is required to weigh the public interest against Mr Yap's interests (*A v Professional Conduct Committee* at [82]).
- [24] 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.
- [25] 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] 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.)

[26] Mr Yap was a party to a serious offence, at the core of the regulation of his profession. He put his clients' affairs into the hands of a person, who he ought to have known was committing serious criminal offences at his direction. He did so when he had fiduciary and professional duties to his clients and knowing the clients had relied on his status under the Act.

[27] However, as noted, Mr Yap is entitled to the benefit of the doubt. I regard his offending as being in ignorance, rather than defiance, of the Act. If Mr Yap compensates his clients for the harm caused and undertakes and completes appropriate training, I consider this an exceptional case where the Tribunal should allow Mr Yap to continue to practice on his own account. Usually the minimum order would be cancellation of Mr Yap's licence, and a restriction he practise only with a provisional licence under supervision for a period. However, the fact he practices outside New Zealand makes that approach problematic. I am satisfied the more appropriate approach for protecting the public is to require him to undertake the appropriate training that deals with both technical, and professional standards issues. However, he must meet these requirements, discharge his obligations to the complainants, and settle the penalty promptly.

[28] There will also be a formal caution regarding the consequences of any failure to maintain appropriate standards in the future.

Training

[29] Given Mr Yap's willingness to correct the deficiencies in his practice, the requirements will focus on ensuring he undertakes training and demonstrates he is competent to practice. The relevant training will cover essential matters, which every licensed immigration adviser must understand, and apply. He will be required to complete basic elements of the Bay of Plenty Polytechnic course. The Tribunal strongly recommends he completes the full course and gains a Graduate Certificate in New Zealand Immigration Advice Level 7. This is the standard required for entry to the profession. He can complete the course through distance study.

[30] Unfortunately, this is not the only occasion when Mr Yap has been subject to a complaint the Tribunal has upheld. The two other instances arose from conduct which occurred in the same period as that giving rise to this complaint and so cannot be said to indicate any sustained course of disobedience. In relation to the first, he is already subject to disciplinary sanctions which include orders relating to training and, in regard to the second, the Tribunal will issue a decision imposing sanctions concurrently with this one. It too will include orders relating to training requirements. In each instance the training requirements are the same, and completion of the required training should adequately address the public interest concern in all three complaints.

[31] Mr Yap has a period of 18 months to complete the training successfully (running from 5 May 2014; the date the existing order commenced). If he does not do so his licence will be cancelled pursuant to section 51(4) of the Act.

Caution

[32] The Tribunal cautions Mr Yap, and puts him on notice he is required to conform to the Act and the Code of Conduct in relation to all of his professional work. He should immediately ensure that all the immigration services and advice he provides are within client relationships and service delivery structures that meet his professional obligations. He must approach existing clients where necessary, and rectify any deficiencies. Clients who have been in receipt of advice from unlicensed persons should be informed of that fact and given the opportunity to seek other representation (with a full refund), and a licensed adviser must review any immigration advice given.

- [33] The Tribunal also puts Mr Yap on notice his level of professional skills are a matter of concern based on the complaints the Tribunal has determined. He can expect no further leniency. He holds an occupational licence that assures consumers they can have confidence the holder will deliver professional services at the necessary standard. The Tribunal has directed Mr Yap to undertake training, and he is required to ensure he attains the standards required. In the interim, he must get any assistance he needs to ensure current clients are not at risk.
- [34] He should engage with the Authority in relation to any difficulties that arise.
- [35] The Tribunal cautions Mr Yap that if the Registrar finds any ongoing non-compliance, the consequences may be severe.

The financial penalty on this complaint

- [36] Mr Yap's conduct in this matter was serious. I have already referred to the finding that Mr Yap was a party to serious criminal offending.
- [37] Taking account of the other aspects of the sanctions and, importantly, the mitigating factors, the financial penalty will be \$4,000. The mitigation factors take the adviser out of the category of intentionally breaching the Act, but the breach was the result of failure to understand elementary aspects of practice. Mr Yap's failure was not a simple technical misunderstanding.
- [38] A penalty of \$4,000 is a mid-range penalty, the scale of financial penalties being up to \$10,000. I do not consider a lesser penalty adequately marks the gravity of being a party to the unlawful provision of immigration advice in these circumstances. I also considered the obligation to pay compensation, which goes some way to mark the consequences of the breach.

Compensation and the refund of fees

- [39] The complainants in their Statement of Reply identified that they sought the refund of fees, though they were willing to accept some discount. The total each of them paid was NZ\$6,300, a total of \$12,600.
- [40] The complainants are entitled to a full refund of the fees they paid. Mr Yap delivered the services illegally through persons who did not have the necessary skills. As a result, the complainants' affairs were mishandled, and they received inadequate and incorrect advice regarding their immigration opportunities. They did not receive the services to which they were entitled under the Act and the Code.
- [41] I will make a provision for interest based on the Judicature Act 1908 rate of 7.5%, though the award is compensation under section 51. The interest period runs from the date the complainants paid fees, 14 December 2011. The approximate period is 1030 days, and the amount of interest for each of the complainants is \$1,332.
- [42] Mr Yap's conduct put the complainants to considerable trouble through the defective advice. Fortunately, they approached it with some scepticism and it did not disrupt their lives as it might have if they simply relied on the advice from Mr Yap's practice. The Tribunal is concerned not to simply award compensation as a matter of routine, as that becomes little more than an additional penalty. Virtually any failure to maintain professional standards results in stress and disappointment for consumers. Given the fortunate level of awareness of the complainants, and their prudent reaction, I am satisfied they did not suffer harm to take them out of the usual range and justify an award of compensation over and above what has already been made on the basis of interest.

Costs and Expenses

[43] Neither the Registrar nor the complainants sought costs, so there is no order.

Censure

[44] 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.

Direction to remedy deficiency

[45] For the reasons I have expressed, I consider the Tribunal should allow Mr Yap to continue in practice on his own account. If he had not expressed his contrition and indicated that he now understands his responsibilities, the Tribunal would cancel his full licence and allow him to continue in practice only with a provisional licence. If he had intentionally breached the Act, the order would inevitably be for removal from the profession.

[46] Meeting professional responsibilities when a licensed immigration adviser is providing services to the public on their own account is essential. Mr Yap must discharge the obligations arising out of this complaint; until he does so, and completes the training requirements, there is a deficiency.

[47] The Tribunal will, pursuant to section 51(1)(b) of the Act, specify periods within which Mr Yap must remedy the respective deficiencies. **The Tribunal gives Mr Yap notice he must demonstrate to the Registrar he has complied with the orders in this decision within the specified periods set out below, or section 51(4) of the Act will have the effect of cancelling his licence.** The specified periods are:

[47.1] Mr Yap must pay each of the complainants \$7,632 within 28 days of this decision. In allowing this time, the Tribunal notes Mr Yap has been aware he holds a large portion of the funds as client funds, and he should have held them in a bank account with that status.

[47.2] He must pay the penalty of \$4,000 within 60 days of this decision.

[47.3] If not now enrolled, he must immediately enrol, in Modules 1, 2 and 10 of the Bay of Plenty Polytechnic course: Continuing Professional Development in New Zealand Immigration Advice, or the course for a Graduate Certificate in New Zealand Immigration Advice Level 7.

[47.4] He must successfully complete Modules 1, 2 and 10 of the Bay of Plenty Polytechnic course: Continuing Professional Development in New Zealand Immigration Advice, or the course for a Graduate Certificate in New Zealand Immigration Advice Level 7 within 18 months of 5 May 2014. *Note:* 5 May 2014 is the date of the order in an earlier complaint requiring Mr Yap to complete one of these courses.

[48] This direction does **not** suspend the enforcement of disciplinary sanctions pursuant to section 52 of the Act and the consequential processes in the District Court, it simply provides a point where sustained failure to comply with the orders has a licensing consequence.

Decision

[49] Mr Yap is:

[49.1] Censured and cautioned in the terms set out above.

[49.2] Ordered to pay each of the complainants \$7,632, being \$15,264 in total, within 28 days of this decision.

[49.3] Ordered to pay a penalty of \$4,000 within 60 days of this decision.

[49.4] Required to commence and complete the following training by 5 November 2015:

[49.4.1] Modules 1, 2 and 10 of the Bay of Plenty Polytechnic course: Continuing Professional Development in New Zealand Immigration Advice.

or alternatively

[49.4.2] He is to meet the requirements for the issue of a Graduate Certificate in New Zealand Immigration Advice Level 7.

[50] The Registrar and Mr Yap are reserved leave to apply for an amendment to the order relating to training if there are changes in the courses directed, or the range of courses available. The Tribunal also reserves leave for Mr Yap to apply regarding the specified period to enrol, and complete the requirements for further training.

[51] If Mr Yap has already repaid any of the fees, the Tribunal reserves leave to determine the amount outstanding on the application of either complainant or Mr Yap.

DATED at WELLINGTON this 10th day of October 2014

G D Pearson
Chair