

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

Decision No: [2014] NZIACDT 113

Reference No: IACDT 012/12

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Yewen Xu

Complainant

AND

Sui Schep Noon

Adviser

DECISION
IMPOSITION OF SANCTIONS

REPRESENTATION:

Registrar: In person

Complainant: In person

Adviser: In person

Date Issued: 16 October 2014

DECISION

This Complaint

- [1] This decision imposes sanctions, following a decision upholding a complaint against Mr Noon (refer decision *Xu v Noon* [2014] NZIACDT 46; www.justice.govt.nz).
- [2] In essence:
- [2.1] The complainant was in New Zealand and sought to get a further visa as his current visa was due to expire. He approached the adviser who provided advice and lodged an application, but Immigration New Zealand returned the application. It did not have all the documentation required. It was lodged successfully later, but failed, as did further applications.
- [2.2] The complaint was that Mr Noon gave poor advice on the complainant's options, failed to lodge the application on time, misrepresented what happened, and failed to refund fees.
- [3] The Tribunal upheld the complaint, only to the extent:
- [3.1] Mr Noon breached his duty of professionalism under clauses 1 of the Immigration Advisers Code of Conduct 2010 (the Code), as he failed to provide advice on immigration options in writing in a full and considered manner.
- [3.2] He also failed to comply with his obligation to have a written agreement, so breached clause 1.5 of the Code.
- [3.3] He also failed to go through the process for setting fees, took fees he was not entitled to have, and accordingly had a duty to refund fees to the complainant. He breached clauses 3 and 8 of the Code, as he did not refund the fees. That is essentially derivative from the preceding failings in relation to initiating the professional engagement.
- [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 Complainant

- [6] The complainant sought costs of \$4,081.50, and associated parking and transport costs.
- [7] He sought a refund of fees. He says the balance of fees and disbursements not refunded amounts to \$1,220.
- [8] He also sought \$5,000 in unspecified compensation, due to events following from his unsuccessful immigration applications.
- [9] The complainant took issue with an aspect of the Tribunal's findings. The point turned on a submission the complainant made. The submission stated: *And the adviser never ever told me and gave me the letter...*
- [10] The Tribunal regarded that as a statement that Mr Noon did not communicate orally and instead provided a copy of a letter. It appears the complainant intended to communicate that the adviser did not communicate orally, and did not provide a copy of the letter.
- [11] He also raised, in response to Mr Noon's submission, various issues that essentially seek to broaden the complaint, or revisit aspects of the findings.

- [12] The Tribunal has determined the complaint, and it is not appropriate to revisit the substantive findings. Accordingly, this decision will not consider those aspects of the submission further. The present matter is not like *Bonacua v Scholes* [2013] NZIACDT 3 where there was an agreed correction arising from a misunderstanding over a technical term, or a situation where a party's communication was lost. This submission revisits contested evidence; a point of finality is necessary. It is not appropriate for parties to revisit a decision simply due to their own potentially ambiguous communications.

Mr Noon

- [13] Mr Noon took the position the complainant sought orders based on fault beyond the Tribunal's findings on the complaint.
- [14] He said the complainant did not have legal representation on the complaint and should not now seek costs.
- [15] Compensation should relate to the grounds of the complaint, not other matters.
- [16] In mitigation, Mr Noon said he was under time pressure. He did not have the information he needed to provide advice at the standard he accepted is necessary. He also said the complainant understood the information that would have been in a written agreement.

Discussion

The principles to apply

- [17] 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.
- [18] When imposing sanctions those statutory purposes require consideration of at least four factors which may materially bear upon maintaining appropriate standards of conduct:
- [18.1] *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 ..."
- [18.2] *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.
- [18.3] *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).
- [18.4] *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

- [19] I accept the critical errors occurred when Mr Noon was under time pressure. However, afterwards there was time to reflect and he could have taken steps to address the issues but did not do so.

Overall evaluation of the professional offending

- [20] Given Mr Noon's willingness to correct the deficiencies that occurred and the relatively low level of offending, a financial penalty is adequate and appropriate. Orders relating to Mr Noon's licence or a imposing a training requirement is not necessary.

The financial penalty on this complaint

- [21] Mr Noon's conduct in this matter was not trivial. If he had properly documented his engagement in the manner required, it is likely the complainant would not have lodged the complaint, nor the Tribunal upheld it. The Code protects both consumers and advisers by providing a clear framework for the engagement on which both can rely.
- [22] The Tribunal's findings all flow out of a failure to provide initial advice, and then document the professional engagement. As a result, Mr Noon failed to meet the Code's requirement, and then failed to refund the fees he took without compliance.
- [23] An appropriate penalty is \$1,500 it is a low-end penalty in the range up to \$10,000.

Compensation and the refund of fees

- [24] The complainant sought a refund of the balance of fees and disbursements. An order for payment of the balance of \$1,220 will follow. It is an appropriate result given the two elements of non-compliance relevant to the issue. First, the complainant did not have the advice he should have received before agreeing to the services offered, then the fee arrangements were undocumented.
- [25] He also sought \$5,000 in unspecified compensation. It is necessary to relate a claim for compensation to losses with a nexus to findings of professional offending. I am not satisfied any of the compensation sought does relate to the Tribunal's findings. The only matter that may relate is the failure to give adequate advice at the point of engagement. However, the evidence does not establish adequate advice would have led to an alternative and more effective immigration strategy. Accordingly, the matters the complainant relies on were not the result of any professional offending established in the complaint. There is no order for compensation.

Costs and Expenses

- [26] The complainant sought costs of representation. Throughout the Tribunal's process, the complainant has represented himself, potentially to his detriment. He has now produced invoices relating to legal services, which appear to, at least in part, relate to the complaint.
- [27] The information provided does not clearly establish how much of the services related to this complaint. The amount claimed is \$4,081.50; I am not prepared to make an assumption that casual advice without representation resulted in costs at that level.
- [28] The only clear facts are the complainant represented himself, and the standard and content of the material he submitted to the Tribunal is consistent with that position; but he did get some legal advice.
- [29] I am not satisfied this is a case where substantial costs should be awarded as the complainant was self-represented. However, I am prepared to allow costs of \$750 on the basis the complainant did take some advice and reasonably required advice. I am satisfied the amount is reasonable for general assistance of an unrepresented complainant, and that he spent at least that much on advice.

Censure

- [30] 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.

Decision

- [31] Mr Noon is:
- [31.1] Censured.

[31.2] Ordered to pay the complainant \$1,970.

[31.3] Ordered to pay a penalty of \$1,500.

DATED at WELLINGTON this 16th day of October 2014

G D Pearson
Chair