

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

Decision No: [2014] NZIACDT 85

Reference No: IACDT 004/13

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Juan Carlos Sanchez Varela

Complainant

AND

Artika Archina Devi

Adviser

DECISION
IMPOSITION OF SANCTIONS

REPRESENTATION:

Registrar: In person

Complainant: In person

Adviser: Ms S Singh, Singhs Barristers & Solicitors, Auckland.

Date Issued: 15 September 2014

DECISION

This complaint

- [1] This decision imposes sanctions, following a decision upholding a complaint against Ms Devi in [2014] NZIACDT 30.
- [2] The complainant went to the adviser's practice and dealt only with unlicensed persons. He never met the adviser. It is a criminal offence for an unlicensed person to give immigration advice, as defined in the Act. It is unprofessional for a licensed person to be a party to unlawful conduct of that kind.
- [3] The Tribunal upheld the complaint, and found the adviser failed to perform her duties and allowed an unlicensed person to engage unlawfully with the complainant.
- [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 did not make any submissions on sanctions.

Ms Devi

- [7] Ms Devi claimed she could only pay \$100 per month toward any sanctions imposed. She claimed unfairness in the process, as she did not understand the meaning of an *oral hearing* (though counsel represented her). She said she should not have to refund fees in full as they were paid to the company and not directly to her. She also indicated she had no interest in being a licensed immigration adviser in the future.

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).

Multiple complaints

- [10] This complaint is one of a series of nine, where the Tribunal is imposing disciplinary sanctions on Ms Devi. The Tribunal has upheld and imposed sanctions in respect of five previous complaints, separate from the nine now under consideration. The previous complaints resulted in her being censured, ordered to pay financial penalties, refund fees, and pay compensation. Furthermore, the Tribunal cancelled her licence and restricted her to applying for a provisional licence for a two-year period, which would require her to practice only under supervision.
- [11] The present series of complaints involve findings of failing to initiate professional relationships properly, negligence, incompetence, breach of duties of care and professionalism, dealing improperly with fees and financial obligations to clients, and being a party to the unlawful provision of immigration advice.
- [12] In respect of five of the current complaints (this complaint is one of them) I have determined Ms Devi should be excluded from reapplying for a licence for two years. I explain why I do not consider rehabilitation is realistic. The sanctions relating to Ms Devi's ability to hold a licence address the protection of the public and desirability of rehabilitation. In determining the imposition of additional sanctions in this case, it is appropriate to have regard to the fact that part of the penalty is to exclude Ms Devi from practising.
- [13] Each of the nine complaints involved an independent course of conduct on Ms Devi's part. This is not a case where there is effectively one transaction with multiple victims.
- [14] Within each of the nine complaints, there are overlapping elements of unprofessional conduct. I have taken each complaint as a single transaction, and imposed a penalty appropriate to it. Some of the findings reflect overlapping provisions of the Act and the Code of Conduct. Accordingly, it is not appropriate to regard each finding as necessarily adding to the totality of the wrongdoing.
- [15] I have applied the totality principle¹ in relation to the overall misconduct. First, I determined the sanction for each complaint on its own merits, and then considered the cumulative sanction. If the cumulative result were disproportionate, the Tribunal would adjust the individual sanctions to achieve a just result. A schedule attached to this decision identifies the series of complaints currently addressed, and the sanctions imposed.
- [16] I am satisfied the penalties are at a level that discourages unacceptable conduct, having regard to the objectives of the professional disciplinary regime; and reflects the gravity of the conduct. That is both individually, and cumulatively.

Ms Devi's financial position

- [17] Ms Devi has said the Tribunal should reduce the penalty due to her financial position. She has not disclosed her financial position, but proposed that she pay \$100 per month. As she has not revealed her assets and income, I will consider the situation from a "worst case" perspective in order to determine whether any reduction can or should be made on this ground. The proposed worst-case scenario is that the result of imposing appropriate sanctions will make Ms Devi insolvent and she will have to lodge a debtor's application in bankruptcy.

Compensation

- [18] The orders for compensation do not have a penal component. They are effectively 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

1 *R v Williams* [1988] 1 NZLR 748 (CA) ; while this case deals with criminal sentencing, its principles are applicable as a guide in the context of professional disciplinary sanctions as, although punishment is not their purpose, penalties necessarily carry a punitive element in their effect.

means of giving relief for civil breach of contract or other duties, and conferring jurisdiction on this Tribunal to address the issue, when seized of the relevant facts.

- [19] Given the apparent policy behind the legislation, it is difficult to see any sensible basis for allowing the adviser's ability to pay to have an effect on the order. It would not be a relevant consideration if the client sought recovery in the Disputes Tribunal or the Courts.
- [20] It follows that the orders for compensation are on the merits, the adviser's ability to pay is irrelevant. The same applies to orders to refund fees paid by clients.

Financial penalty

- [21] The financial penalty under section 51(f) is discretionary. The question is whether and in what circumstances the adviser's financial position is relevant. I have no difficulty accepting there are instances where a financial penalty imposes hardship, and that in those instances it should be taken into account.
- [22] However, in the financial circumstances Ms Devi claims, she will only pay \$1,200 per annum. I see no merit in moderating the penalty and treating her as though she will pay the penalty over a period; she is effectively saying she cannot or will not pay any significant part of the penalty and other impositions. She has provided no particulars of her assets, liabilities, and income in order to justify that.
- [23] It is important to recognise a penalty under the Act is not the same as a fine. In criminal proceedings 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:
- [23.1] Is not a provable debt in bankruptcy; and
- [23.2] Is not discharged when a bankrupt is discharged from bankruptcy.
- [24] 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.
- [25] I am satisfied the Tribunal should mark Ms Devi's professional offending with a penalty that reflects her conduct.

Costs and Expenses

- [26] Pursuant to section 51(1)(g) the Tribunal may make an order that an adviser pay the costs or expenses of investigation, inquiry, hearing and any related prosecution.
- [27] This is a somewhat extended version of the power that commonly applies in professional disciplinary jurisdictions.
- [28] The profession is levied to fund the disciplinary regime. A disciplinary tribunal will consider the financial burden of a complaint on the profession as a whole. It is appropriate to require some or the entire burden to be borne by the person who has been found to be responsible for professional misconduct.
- [29] The principles are discussed in *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850; [2011] NZAR 639. In that case actual costs of investigation of \$79,000 had resulted in an award of \$40,000. At [43] 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."
- [30] Those principles appear to apply, with necessary modifications, to the Act and accordingly, the present proceedings.

[31] 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.”

[32] Under the Act the mechanism is less direct, as the Authority and the Tribunal are statutory bodies; none-the-less 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.

[33] The Registrar has elected not to apply for costs of investigation, and representation at the hearing. Given Ms Devi’s alleged inability to meet any order, the approach is not surprising.

[34] Ms Devi has generally resisted admitting responsibility for the complaints, and the Tribunal has incurred the cost of dealing with them. However, there would be an element of futility in making an order for the costs of the hearings, and I will accordingly not make such an order.

[35] The costs award for the Tribunal’s expenses of hearing would have been \$2,500 in each case. This, in addition to the Authority’s decision not to seek costs, is a significant concession.

Absence of significant mitigating factors

[36] There is little or no mitigation for this or any of the complaints. Ms Devi has actively resisted taking responsibility for her indefensible behaviour across a large number of complaints. That was no less so after adverse findings in the initial series of complaints. Some of the present series of complaints relate to her failure to comply with the Code of Conduct when the Tribunal cancelled her licence due to earlier misconduct.

[37] Ms Devi continues to say others, not her, should be accountable for the losses her clients suffered because of delinquent behaviour. She takes that position despite the fact she was the only person in her practice holding a licence and had the responsibility under the Act to both manage the practice and account to her clients for fees.

Ms Devi’s licence

The principles

[38] 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 -173.

[39] 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”.

[40] 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.

- [41] 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

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

The circumstances of the offending and Ms Devi's case

- [44] 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 Ms Devi was a party to a person unlawfully providing immigration advice. The Act defines *immigration advice* widely², prohibits persons who are not licensed or exempt from providing immigration advice³, and provides it is a criminal offence to do so⁴. The maximum penalty for knowingly breaching the prohibition is imprisonment for a term of 7 years and a fine of \$100,000.
- [45] The Act treats breaches as serious criminal offending. The District Court has recently imposed sentences of imprisonment on offenders. Ms Devi was required to understand this law. The substantive decisions upholding this complaint and the other four complaints with similar misconduct demonstrate, on the balance of probabilities, Ms Devi operated her practice knowing that clients were relying on her status as a licensed immigration adviser but unlicensed persons within her practice would provide immigration advice.
- [46] Furthermore, Ms Devi has a history of serious professional offending; she was well aware of the consequences of failing to meet her professional responsibilities. However, she has shown no insight, and sought to justify her indefensible conduct as a party to criminal offending.
- [47] In addition, Ms Devi has a lamentable history of providing advice that is wrong, failing to carry out instructions, putting clients into invidious situations and refusing to take responsibility for her behaviour.
- [48] Finally, Ms Devi says she will not seek a licence again.

Weighing the options

- [49] While the circumstances limit the options, it is necessary to consider alternatives short of exclusion from the profession. The full range of possibilities to weigh are:
- [49.1] prohibition on applying for a full licence and allowing an application for a provisional licence (with supervision conditions);
- [49.2] training requirements;
- [49.3] a financial penalty on its own or in combination with the preceding directions.

² Section 7

³ Section 6

⁴ Section 63

- [50] Suspension has a potential role in ensuring that a proportional consequence is imposed: *A v Professional Conduct Committee* HC Auckland CIV-2008-404-2927, 5 September 2008 at [81].
- [51] In making this decision the Tribunal is required to weigh the public interest against Ms Devi's interests (*A v Professional Conduct Committee* at [82]).
- [52] 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.
- [53] 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.)
- [54] Ms Devi was a party to a serious offence, at the core of the regulation of her profession. She put her clients' affairs into the hands of a person, who she knew was committing serious criminal offences, knowing her client would be a victim of that offending. She did so when she had fiduciary and professional duties to her client, knowing they relied on her status under the Act; that was dishonest.
- [55] Ms Devi has shown no interest in rehabilitating herself. When the Tribunal cancelled her full licence, it provided an opportunity for rehabilitation by allowing her to practise under supervision, however, Ms Devi did not do so. Instead, she committed further professional offences through failing to deal with her clients professionally when she could no longer act for them. She says she does not intend to seek a licence again.
- [56] I have to conclude Ms Devi is unwilling to take steps to meet the standards of her profession. Further, she provided no grounds to demonstrate that she has the personal integrity and skills to do so.

Ms Devi will be prohibited from reapplying for a licence

- [57] I am satisfied on the balance of probabilities:
- [57.1] Ms Devi was a party to serious criminal offending. It involved the dishonest treatment of a client, exposing them to criminal offending by abusing the client's trust.
- [57.2] She was aware of her professional obligations when she offended; the only apparent alternative explanation would be that, both then and now, she had no understanding of the obligations of professionalism. Each possibility is equally concerning as to future conduct.
- [57.3] There is no reasonable possibility Ms Devi is willing, or has the capacity, to meet the minimum standards of the profession.

- [58] These circumstances leave no alternative other than removal from the profession.
- [59] An order will prevent Ms Devi applying for any licence for a period of two years. After that point, she will have to qualify for the profession and satisfy the Registrar that she otherwise meets the statutory requirements. I note that while it is entirely a matter for the Registrar, not the Tribunal, the fact the order operates for only two years does not indicate she can expect to get a licence after that time. Aside from other standards, section 17(b) of the Act allows the Registrar to take account of Ms Devi's history of professional offending when deciding if she is fit to hold a licence.

The financial penalty on this complaint

- [60] The adviser's conduct in this matter was serious. I have already referred to finding Ms Devi being a party to serious criminal offending. Furthermore, her client's immigration issues were important to her client and his family.
- [61] Given it is in addition to Ms Devi being excluded from the profession, a penalty of \$7,000 is proportionate to the offending, in this matter and overall. However, I have regard to the financial consequences of being excluded from the profession, and will reduce the penalty to \$5,000. I am also mindful Ms Devi may not have the means to reimburse and compensate her victims, and the penalty will only make that more difficult.

Compensation

- [62] The complainant had not sought compensation, so no order will be made.

Refund of fees

- [63] The complainant is entitled to a full refund of fees for the reasons discussed in the decision upholding the complaint; Ms Devi provided no professional services of value. The fees were \$2,500.

Costs and Expenses

- [64] Neither the Registrar nor the complainant sought costs, so there is no order.

Censure

- [65] 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.

Overall

- [66] Concessions relating to the penalties and costs imposed are significant. The financial penalties in respect of the five more serious professional offences are reduced by \$2,000 each, and for in the four less serious matters by \$1,000 each. That is to account for the fact the Tribunal has excluded Ms Devi from the profession. The order for costs reduces the hearing costs from \$2,500 to nil in each of the nine cases. These concessions amount to \$36,500 in total.
- [67] I am satisfied this is appropriate having regard to the ability of the victims to recover fees and compensation, and the totality of the penalty imposed on Ms Devi.

Decision

- [68] The Adviser is:
- [68.1] Censured,
- [68.2] Ordered to pay a penalty of \$5,000.
- [68.3] Ordered to pay the Complainant \$2,500, being a refund of fees.

[69] The Tribunal orders that if Ms Devi currently holds any licence under the Act it is cancelled with immediate effect, and whether or not she currently holds a licence, she is prevented from reapplying for any category of licence as a licensed immigration adviser for a period of two years from the date this decision is notified to her.

DATED at WELLINGTON this 15th day of September 2014

G D Pearson
Chair