

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

Decision No: [2014] NZIACDT 87

Reference No: IACDT 021/12

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Achudan Nair

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 32.
- [2] The complainant lodged an expression of interest and Immigration New Zealand invited him to apply for a residence visa. Ms Devi did not lodge the application until his current visa had expired, and did not communicate adequately with the complainant so as to ensure filing could occur on time. The result was that Immigration New Zealand could not consider his application.
- [3] The Tribunal found the complainant had provided Ms Devi with all the information requested. In addition, a staff member in the adviser's practice told him Ms Devi had a relationship with Immigration New Zealand that guaranteed his application would be successful.
- [4] The Tribunal found the complainant's account was correct and upheld the complaint, as Ms Devi breached the Code of Conduct.
- [5] The full circumstances are set out in the substantive decision.

The Parties' Positions on Sanctions

The Authority

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

The complainant

- [7] The complainant did not make any submissions on sanctions.

Ms Devi

- [8] 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 her directly. She also indicated she had no interest in being a licensed immigration adviser in the future.

Discussion

The principles to apply

- [9] 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.”
- [10] When imposing sanctions those statutory purposes require consideration of at least four factors which may materially bear upon maintaining appropriate standards of conduct:
 - [10.1] *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 ...”
 - [10.2] *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.

- [10.3] *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).
- [10.4] *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

- [11] 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 practise only under supervision.
- [12] 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.
- [13] In respect of five of the complaints (this complaint is not one of them) I have determined Ms Devi should be excluded from reapplying for a licence for two years and I explain why I do not consider rehabilitation is realistic. The orders and findings in those cases address the protection of the public and the desirability of rehabilitation, which are normally factors when imposing sanctions. Accordingly, for the present complaint, the sanctions simply need to be a reasonable reflection of the lapse from minimum standards and amount to sufficient deterrence. It is also appropriate to have regard to the fact Ms Devi is excluded from practising as part of the penalty, given it is imposed simultaneously.
- [14] 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.
- [15] 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.
- [16] I have applied the totality principle¹ in relation to the overall misconduct. First, determining the sanction for each complaint on its own merits, before then considering 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.
- [17] 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

- [18] 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

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.

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

- [19] 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 means of giving relief for civil breach of contract or other duties, and conferring it on this Tribunal to address when seized of the relevant facts.
- [20] 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.
- [21] It follows that the orders for compensation are on the merits, and the adviser's ability to pay is irrelevant. The same applies to orders to refund fees paid by clients.

Financial penalty

- [22] 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.
- [23] 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 or income in order to justify that.
- [24] 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:
- [24.1] Is not a provable debt in bankruptcy; and
- [24.2] Is not discharged when a bankrupt is discharged from bankruptcy.
- [25] 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.
- [26] I am satisfied the Tribunal should mark Ms Devi's professional offending with a penalty that reflects her conduct.

Costs and Expenses

- [27] 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.
- [28] This is a somewhat extended version of the power that commonly applies in professional disciplinary jurisdictions.
- [29] 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 all of the burden to be borne by the person who has been found to be responsible for professional misconduct.
- [30] 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.”

- [31] Those principles appear to apply, with necessary modifications, to the Act and, accordingly, the present proceedings.
- [32] In *O'Connor v Preliminary Proceedings Committee HC Wellington AP280/89*, 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.”
- [33] 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.
- [34] The Registrar has elected not to apply for costs of investigation, and representation at the hearing. Given Ms Devi’s claimed inability to meet any order, the approach is not surprising.
- [35] 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.
- [36] 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

- [37] 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.
- [38] 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.

The financial penalty on this complaint

- [39] The adviser’s conduct in this matter was serious. There was a sustained series of events where Ms Devi failed to engage with her client’s instructions in an effective way. The immigration issues were important to her client and his family.
- [40] A penalty of \$3,500 is proportionate to the offending, both in this matter and overall. Part of this complaint relates to Ms Devi’s conduct when this Tribunal cancelled her licence, she was very much on notice of her professional obligations, and the consequences of not observing them. It adds to the gravity that she continued to offend, despite being in that position. This reinforces the comments previously made regarding the lack of mitigating factors.
- [41] However, the penalty will be \$2,500 having regard to the fact the Tribunal’s orders will exclude Ms Devi from the profession because of the sanctions currently imposed; and I am mindful Ms Devi may not have the means to compensate her victims.

Compensation

[42] There is no claim for compensation; accordingly there will be no order.

Refund of fees

[43] 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. I am satisfied the fees were \$3,750.

Costs and Expenses

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

Censure

[45] 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

[46] 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 (of which this is one) 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.

[47] 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

[48] The adviser is:

[48.1] Censured,

[48.2] Ordered to pay a penalty of \$2,500.

[48.3] Ordered to pay the Complainant \$3,750, being a refund of fees.

DATED at WELLINGTON this 15th day of September 2014

G D Pearson
Chair