

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

Decision No: [2014] NZIACDT 89

Reference No: IACDT 002/12

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Tai Lesa Samuelu

Complainant

AND

Theresa (Terry) Aasa

Adviser

DECISION
IMPOSITION OF SANCTIONS

REPRESENTATION:

Registrar: In person

Complainant: Robyn Ngchok, Mangere Community Law Centre, Mangere

Adviser: In person

Date Issued: 16 September 2014

DECISION

This complaint

- [1] This decision imposes sanctions, following a decision upholding a complaint against Ms Aasa in [2014] NZIACDT 67. The circumstances are set out fully in the decision upholding the complaint (refer: www.justice.govt.nz).
- [2] The complainant sought to migrate to New Zealand under the Samoan Quota.
- [2.1] He paid a substantial fee, and understood Ms Aasa had attended to all the necessary requirements.
- [2.2] One of the requirements was that the complainant would have an offer of employment in New Zealand. Ms Aasa agreed to ensure the complainant had an appropriate offer of employment and agreed to assist in getting one.
- [2.3] Ms Aasa lodged an application for the complainant and his family to migrate to New Zealand.
- [2.4] Immigration New Zealand found the job offer, an essential part of the application, unsatisfactory after making inquiries.
- [2.5] Immigration New Zealand informed Ms Aasa of the difficulty with the job offer and she failed to respond in a satisfactory manner. She provided no substantive response to Immigration New Zealand's requests.
- [2.6] She failed to inform the complainant of what had happened, he had to make his own inquiries with Immigration New Zealand.
- [2.7] Ms Aasa did not intend to, and did not, provide the professional service she promised, and she kept the fees she received for the promise of providing the services.
- [3] The essence of the complaint was that the adviser took fees, lodged an application that was not satisfactory, failed to communicate regarding the application, including both the difficulties identified by Immigration New Zealand and their consequent decision to decline the application. The Tribunal upheld the complaint on the grounds of negligence, incompetence, dishonest and misleading behaviour and breaches of the Code of Conduct.
- [4] The full factual 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 a refund of fees, and compensation of \$2,000. The fees and disbursement paid were \$2,416.

Ms Aasa

- [7] Ms Aasa did not make any submission on sanctions.

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).

Two complaints

- [10] This complaint is one of two similar complaints, where the Tribunal is imposing disciplinary sanctions on Ms Aasa.
- [11] This complaint has a finding of dishonesty, the other complaint is confined to negligence, incompetence and breaching the Code of Conduct.
- [12] Each of the two complaints involved an independent course of conduct on Ms Aasa’s part. This is not a case where there is effectively one transaction with two victims, though the circumstances are similar.
- [13] For reasons discussed below Ms Aasa will be prevented from applying for any licence for two years in relation to this complaint. The finding of dishonesty is sufficient to reach that conclusion alone; however, the incompetence finding in the other complaint does reinforce the need to protect consumers.

Absence of significant mitigating factors

- [14] There is little or no mitigation, significantly Ms Aasa has not taken responsibility for her conduct and appears to continue to deny wrongdoing.

Ms Aasa’s licence

The principles

- [15] 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 171-173.

[16] Rehabilitation of a practitioner is an important factor when appropriate (*B v B* [1993] BCL 1093; HC Auckland HC4/92, 6 April 1993). In *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at [30]-[31] (quoting a passage from *Patel v The Dentists Disciplinary Tribunal* HC Auckland 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”.

[17] 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.

[18] 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

[19] In relation to licences the disciplinary sanctions in section 51 allow three options:

[19.1] suspension (s 51(c)); or

[19.2] cancellation of a full licence with permission to apply for a different class of licence. In this way a person may be prevented from 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

[19.3] cancellation and a direction that the person may not apply for a licence for up to two years (s 51(d) & (e)).

[20] 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 Aasa’s circumstances

[21] 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 Aasa dishonestly misled her client.

[22] Ms Aasa’s licence has expired; she has not indicated whether she proposes to seek another licence.

Weighing the options

[23] 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:

[23.1] prohibition on applying for a full licence and allowing an application for a provisional licence (with supervision conditions);

[23.2] training requirements;

[23.3] a financial penalty on its own or in combination with the preceding directions.

[24] 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].

[25] In making this decision the Tribunal is required to weigh the public interest against Ms Aasa’s interests (*A v Professional Conduct Committee* at [82]).

- [26] 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.
- [27] 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* HC Wellington M 215/87, 10 August 1989 per 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.)

- [28] I have no basis to find Ms Aasa is willing, or has the personal integrity and skills, to meet the minimum standards of the profession. I am left with a concern that Ms Aasa does not have the insight and understanding to meet those standards, her lack of response when the potential findings were pointed out to her is concerning.

Ms Aasa will be prohibited from reapplying for a licence

- [29] I am satisfied:
- [29.1] Ms Aasa dealt with the complainant dishonestly.
- [29.2] She was aware of her professional obligations when she did so; 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.
- [29.3] There is no reasonable possibility Ms Aasa is either willing, or has the capacity, to meet the minimum standards of the profession.
- [30] These circumstances leave no alternative other than excluding her from the profession.
- [31] An order will prevent Ms Aasa from 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 that 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 Aasa's history of professional offending when deciding if she is fit to hold a licence.

The financial penalty on this complaint

- [32] Ms Aasa's conduct in this matter was serious. I have already referred to her dishonesty.
- [33] A penalty of \$7,500 is proportionate to the offending, in this matter. Ms Aasa was dealing with an important matter for a client, with significant consequences for him and his family. He would

have had good immigration prospects had he received the professional services promised to him; instead, at best, Ms Aasa “went through the motions”, and did not intend to provide the services promised. That resulted in serious and foreseeable consequences for the complainant. I will however reduce it to \$5,000 to take account of the fact that Ms Aasa is excluded from the profession as part of the sanctions; though she has in reality already withdrawn from the profession of her own volition.

Compensation, refund of fees, and costs

- [34] The complainant seeks a refund of fees and disbursements, which were \$2,416, and compensation of \$2,000. Ms Aasa has not challenged the claim.
- [35] Ms Aasa provided no services of value, and effectively obtained the funds by deception. The claim for compensation is a modest estimate of the direct and indirect costs of her failing to provide the promised professional services. The complainant required those services to take advantage of his opportunity to migrate under the Samoan Quota. There will be a global order to cover the refund of fees and disbursements, and compensation of \$4,216.

Censure

- [36] 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

- [37] Ms Aasa is:
- [37.1] Censured,
- [37.2] Ordered to pay a penalty of \$5,000.
- [37.3] Ordered to pay the complainant \$4,216.
- [38] The Tribunal orders that if Ms Aasa 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 16th day of September 2014

G D Pearson
Chair