

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

Decision No: [2014] NZIACDT 92

Reference No: IACDT 62/12

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Asotoelau Liufau

Complainant

AND

Ueite (Itaotemai) Letalua

Adviser

DECISION
IMPOSITION OF SANCTIONS

REPRESENTATION:

Registrar: In person

Complainant: Robyn Ng Chok, solicitor, Mangere Community Law Centre, Mangere

Adviser: In person

Date Issued: 18 September 2014

DECISION

This complaint

- [1] This decision imposes sanctions, following a decision upholding a complaint against Mr Letalu. The circumstances are set out fully in the decision upholding the complaint (refer: www.justice.govt.nz [2014] NZIACDT 43).
- [2] The grounds on which the Tribunal upheld the complaint were:
- [2.1] The complainant was in New Zealand unlawfully and sought Mr Letalu's assistance to apply for a visa. The complainant paid fees and, after a long delay, the Adviser lodged an application.
- [2.2] Mr Letalu did not have a written agreement and his conduct lacked due care and diligence.
- [3] The Tribunal upheld the complaint and found Mr Letalu failed to meet minimum professional standards in that he failed to commence the professional relationship in accordance with clause 1.5 of the Code of Conduct (2010). Additionally, his failure to act expeditiously breached the dues of care and diligence set out in clause 1.1 of the Code.
- [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 a refund of fees and disbursements of \$1,600.

Mr Letalu

- [7] Mr Letalu sought to explain his offending; he has not given any explanation that ameliorates what was a sustained failure to meet his professional obligations. He sought to minimise his conduct saying it was *administrative errors and difficulties*.
- [8] He says he is now unemployed and his only income is superannuation.

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).

Three complaints

- [11] This complaint is one in a series of three, where the Tribunal is imposing disciplinary sanctions on Mr Letalu. One of the three involves dishonest and misleading conduct. The sanctions in that complaint include prohibiting Mr Letalu from applying for a licence as an immigration adviser for two years (he does not currently hold a licence). However, in practical terms the prohibition is likely to seriously impact his ability to gain a licence in the future. As such, I will consider this prohibition and its likely impact when determining what additional sanctions should apply.
- [12] Each of the three complaints involved an independent course of conduct on Mr Letalu's part. This is not a case where there is effectively one transaction with multiple victims.
- [13] Within each of the three 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.
- [14] I have applied the totality principle¹ in relation to the overall misconduct. First, determining the sanction for each complaint on its own merits, and then considering the cumulative sanction. If the cumulative result were disproportionate, the Tribunal would adjust the individual sanctions to achieve a just result. 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.

Mr Letalu's financial position

- [15] Mr Letalu's submissions imply the Tribunal should reduce the penalty due to his financial position. He did not disclose his financial position; except he did say his only income is from superannuation. I will consider the situation from a "worst case" perspective, in order to determine whether any reductions can or should be made on this ground, namely the result of imposing appropriate sanctions will make Mr Letalu insolvent and he will have to lodge a debtor's application in bankruptcy.

Financial penalty

- [16] The financial penalty under section 51(f) is discretionary. The question is whether and in what circumstances Mr Letalu's financial position is relevant. I have no difficulty accepting there are instances where a financial penalty imposes hardship in circumstances where the hardship will have weight.
- [17] However, Mr Letalu is effectively asserting he cannot pay any financial penalty or other impositions, as he had no disposable income. He has provided no particulars of his assets and liabilities and provided nothing more than an assertion he relies on superannuation alone.
- [18] 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:

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.

[18.1] Is not a provable debt in bankruptcy; and

[18.2] Is not discharged when a bankrupt is discharged from bankruptcy.

[19] 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.

[20] I am satisfied the Tribunal should mark Mr Letalu's professional offending with a penalty that reflects his conduct. If he is insolvent, it is appropriate that he deal with that in the manner provided by law. Mr Letalu has not provided a basis for determining he could meet some level of penalty over a period so as to fall within a reasonable exercise of the Tribunal's discretion, which balances his personal circumstances and the gravity of his professional offending.

Refund of fees

[21] Orders to refund fees 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.

[22] Given the apparent policy behind the legislation, it is difficult to see any sensible basis for allowing Mr Letalu'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.

[23] It follows that orders for the refund of fees are on the merits and Mr Letalu's ability to pay is irrelevant.

Costs and Expenses

[24] 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.

[25] The Registrar has elected not to apply for costs of investigation or representation. Given Mr Letalu's claimed inability to meet any order, the approach is not surprising.

[26] Mr Letalu 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 any order.

[27] 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

[28] There is little or no mitigation for this or any of the complaints. Mr Letalu has not taken responsibility for his conduct, instead he sought to minimise his conduct saying it was *administrative errors and difficulties*.

The financial penalty on this complaint

[29] Mr Letalu's conduct in this matter was significant, but at the lower end of the scale of seriousness. However, it was far from minor as it did involve a matter of substantial importance to the complainant and further the complainant was unlawfully in New Zealand. Accordingly, the integrity of New Zealand's immigration regime required a responsible and timely response.

[30] The behaviour involved a systematic disregard for professional standards, it commenced with the failure to comply with the Code of Conduct when establishing the professional relationship, and then a failure to take necessary steps for some 20 months. The starting point would be a penalty of \$4,000. The maximum penalty is \$10,000 together with other sanctions dealing with an adviser's licence, and remedial matters. In my view, an order of \$4,000 would be necessary to mark the gravity, sustained nature of the professional offending, and the persistent refusal to accept either the fact or gravity of the offending.

[31] However, I have regard to Mr Letalu's financial circumstances and the order excluding him from the profession, and will reduce the penalty to \$3,000. I am also mindful Mr Letalu may not have the means to compensate his former clients and the penalty will only make that more difficult.

Refund of fees

[32] The Tribunal will order Mr Letalu to refund the fees of \$1,600, as he failed to perform any services of value.

Costs and Expenses

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

Censure

[34] 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

[35] Concessions relating to the penalties and costs imposed are significant. The financial penalty in respect of the most serious professional offence is reduced by \$2,500. For the two less serious matters, the reduction is \$1,000 each. That is to account for the fact the Tribunal has excluded Mr Letalu from the profession. The order for costs reduces the hearing costs from \$2,500 to nil in each of the three cases. These concessions amount to \$12,000 in total.

[36] I am satisfied this is appropriate having regard to the ability of the complainants to recover on the orders in their favour, and the totality of the penalty imposed on Mr Letalu.

Decision

[37] Mr Letalu is:

[37.1] Censured,

[37.2] Ordered to pay the sum of \$1,600 to the complainant,

[37.3] Ordered to pay a penalty of \$3,000.

DATED at WELLINGTON this 18th day of September 2014.

G D Pearson
Chair