

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

Decision No: [2014] NZIACDT 94

Reference No: IACDT 64/12

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

Between

Fungavai Afemui

Complainant

AND

Alungamonu (Laki) Tangilanu (Monu)

Adviser

DECISION
IMPOSITION OF SANCTIONS

REPRESENTATION:

Registrar: In person

Complainant: Mr R Small, Pacific Legal, Wellington

Adviser: In person

Date Issued: 1 October 2014

DECISION

This complaint

- [1] This decision imposes sanctions, following a decision upholding a complaint against Ms Tangilanu in [2014] NZIACDT 35.
- [2] The complainant engaged Ms Tangilanu to assist him to apply for residence visas for himself and his family. She failed to file the application before the visa of one of the complainant's family members expired; that had serious consequences. Additionally, the application Ms Tangilanu filed did not have the necessary information to support it.
- [3] The Tribunal found Ms Tangilanu was negligent and incompetent in her handling of the instructions and that she engaged in dishonest and misleading conduct, through misrepresentations she made to her client. She also breached clauses 1 and 5 of the Code of Conduct.
- [4] The 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 Tangilanu

- [7] Ms Tangilanu provided a submission on sanctions. It appears it is intended as a generic response for this, and 11 other complaints on which the Tribunal is imposing sanctions. The submission is difficult to understand. The material points appear to be that Ms Tangilanu says:
 - [7.1] The publicity resulting from her professional offending has had an adverse effect on her and her family.
 - [7.2] She challenges some or all of the findings of the Tribunal, and says the decisions were not fair or right.
 - [7.3] She has no income.

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 12, where the Tribunal is imposing disciplinary sanctions on Ms Tangilanu. The Tribunal has upheld and imposed sanctions in respect of two previous complaints, separate from the 12 now under consideration. The previous complaints resulted in orders that included the cancellation of her licence and a prohibition on applying for any licence for a two-year period.
- [11] The present series of complaints involve findings of dishonest and misleading conduct, negligence, incompetence, and non-compliance with the Code of Conduct.
- [12] In respect of two of the current complaints, (this complaint is one of them), where I have prevented Ms Tangilanu reapplying for a licence for two years, I explain why I do not consider rehabilitation is realistic. The sanctions relating to Ms Tangilanu's ability to hold a licence address the protection of the public and the desirability of rehabilitation. In relation to the other sanctions, the orders excluding Ms Tangilanu from practising are taken into account as part of the matrix of penalties.
- [13] Each of the 12 complaints involved an independent course of conduct on Ms Tangilanu's part. This is not a case where there is effectively one transaction with multiple victims.
- [14] Within each of the 12 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, 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.
- [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 Tangilanu's financial position

- [17] Ms Tangilanu submissions imply a suggestion that the Tribunal should reduce the penalty due to her financial position. She has not disclosed her financial position, but says she has no income. I will consider the situation from a "worst case" perspective, namely the result of imposing appropriate sanctions will make Ms Tangilanu insolvent and she will have to lodge a debtor's application in bankruptcy, in order to determine whether any reductions can or should be made on this ground.

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.

Compensation and refund of fees

- [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 means of giving relief for civil breach of contract or other duties by 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 Ms Tangilanu'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 orders for compensation are on the merits, and Ms Tangilanu'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(1)(f) is discretionary. The question is whether and in what circumstances Ms Tangilanu's financial position is relevant. I have no difficulty accepting there are instances where a financial penalty imposes hardship and that in those circumstances it should be taken into account.
- [22] However, Ms Tangilanu is effectively asserting she will not pay any financial penalty or other impositions as she had no income. She has provided no particulars of her assets and liabilities and provided nothing more than an assertion she has no income.
- [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(1)(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 Tangilanu's professional offending with a penalty that reflects her conduct. If she is insolvent, it is appropriate that she deal with that in the manner provided by law. Ms Tangilanu has not provided a basis for determining she could meet some level of penalty over a period so as to fall within a reasonable exercise of the Tribunal's discretion to balance her personal circumstances and her professional offending.

Costs and Expenses

- [26] Pursuant to section 51(1)(g) the Tribunal may make an order that a 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 all of the 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 \$76,000 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 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.”
- [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 and 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 complainant and the Registrar have elected not to apply for costs of investigation or representation. Given Ms Tangilanu’s claimed inability to meet any order, the approach is not surprising.
- [34] Ms Tangilanu 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.
- [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 Tangilanu has not taken responsibility for her indefensible behaviour across a large number of complaints.

Ms Tangilanu’s licence

The principles

- [37] 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 171-172.
- [38] 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”.
- [39] 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.

- [40] 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

- [41] In relation to licences the disciplinary sanctions in section 51 allow three options:
- [41.1] cancellation and a direction that the person may not apply for a licence for up to two years (s 51(1)(d) & (e); or
- [41.2] suspension (s 51(1)(c)); or
- [41.3] cancellation of a full licence with permission 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(1)(b) & (d)).
- [42] Other possibilities to assist rehabilitation include training and specified conditions (s 51(1)(b)). There are also powers relating to imposing costs and compensation (s 51(1)(g)-(i)).

The circumstances of the offending and Ms Tangilanu's circumstances

- [43] 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 Tangilanu dishonestly misled her client. This is not an isolated lapse. The two previous complaints where the Tribunal cancelled Ms Tangilanu's licence and the two complaints involving dishonest and misleading behaviour are all similar. Ms Tangilanu dishonestly misrepresented to clients how their instructions were progressing in order to hide her professional failings.
- [44] Ms Tangilanu has a lamentable history of providing advice that is wrong, failing to carry out instructions, and putting clients into invidious situations and refusing to take responsibility for her behaviour.

Weighing the options

- [45] While the circumstances limit the options, it is necessary to consider alternatives short of further exclusion from the profession. The full range of possibilities to weigh are:
- [45.1] a prohibition on reapplying for a licence for a period of up to two years;
- [45.2] prohibition on applying for a full licence and allowing an application for a provisional licence (with supervision conditions);
- [45.3] training requirements;
- [45.4] a financial penalty on its own or in combination with the preceding directions.
- [46] 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].
- [47] In making this decision the Tribunal is required to weigh the public interest against Ms Tangilanu's interests (*A v Professional Conduct Committee* at [82]).
- [48] 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.

[49] 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.)

[50] I have no basis to find Ms Tangilanu is willing, or has the personal integrity and skills, to meet the minimum standards of the profession.

Ms Tangilanu will be prohibited from reapplying for a licence

[51] I am satisfied:

[51.1] Ms Tangilanu dealt with the complainant dishonestly.

[51.2] 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.

[51.3] There is no reasonable possibility Ms Tangilanu is either willing, or has the capacity, to meet the minimum standards of the profession.

[52] These circumstances leave no alternative other than maintaining her removal from the profession.

[53] An order will prevent Ms Tangilanu 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 further years that 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 Tangilanu's history of professional offending when deciding if she is fit to hold a licence.

[54] As the Registrar may refuse a licence due to previous misconduct, when The Tribunal has already prohibited a person from holding or obtaining a licence it does not necessarily extend the period when dealing with additional complaints in a series. However, in the present case, the existing period of disqualification has expired and the examples of dishonesty are separate from the earlier complaints. Accordingly, to give dimension and perspective to Ms Tangilanu's professional disciplinary history, it is appropriate to apply a further period of disqualification.

The financial penalty on this complaint

[55] Ms Tangilanu's conduct in this matter was serious. I have already referred to Ms Tangilanu's dishonesty.

[56] Given it is in addition to Ms Tangilanu 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 Tangilanu may not have the means to compensate her former clients, and the penalty will only make that more difficult.

Compensation

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

Refund of fees

[58] The complainant is entitled to a full refund of fees for the reasons discussed in the decision upholding the complaint as Ms Tangilanu provided no professional services of value. The fees were \$435.

Costs and Expenses

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

Censure

[60] 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

[61] Concessions relating to the penalties and costs imposed are significant. The financial penalties in respect of the two more serious professional offences are reduced by \$2,000 each, and for in the 10 less serious matters by \$1,000 each. That is to account for the fact the Tribunal has excluded Ms Tangilanu from the profession. The order for costs reduces the hearing costs from \$2,500 to nil in each of the 12 cases. These concessions amount to \$44,000 in total.

[62] 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 Ms Tangilanu.

Decision

[63] Ms Tangilanu is:

[63.1] Censured,

[63.2] Ordered to pay a penalty of \$5,000.

[63.3] Ordered to pay the complainant \$435, being a refund of fees.

[64] The Tribunal orders that Ms Tangilanu 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 1st day of October 2014

G D Pearson
Chair