

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

Decision No: [2014] NZIACDT 95

Reference No: IACDT 68/12

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Ofa Ki Tanitini Lomu

Complainant

AND

Alungamonu (Laki) Tangilanu (Monu)

Adviser

DECISION
IMPOSITION OF SANCTIONS

REPRESENTATION:

Registrar: In person

Complainant: Ms C Giquel, Office of Peseta Sam Lotu-liga MP, Auckland.

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 published at [2014] NZIACDT 42. The circumstances are set out fully in that decision (which can be located on the Ministry of Justice website: www.justice.govt.nz).
- [2] In summary the circumstances giving rise to the complaint were:
- [2.1] The complainant engaged Ms Tangilanu to apply for a visa.
- [2.2] Ms Tangilanu failed to undertake the legislated process for client engagement (in particular an appropriate written agreement), did not do the work and did not refund the fee paid.
- [3] The Tribunal upheld the complaint and found that Ms Tangilanu had failed to meet her obligations under the Code of Conduct in relation to her duty to carryout instructions (clause 1), requirement to have a written agreement (clauses 1.5 and 8), and also failed to refund unearned fees when the engagement came to an end (clause 3(d)).

The Parties' Positions on Sanctions

The Authority

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

The complainant

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

Ms Tangilanu

- [6] Ms Tangilanu provided submissions 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:
- [6.1] The publicity resulting from her professional offending has had an adverse effect on her and her family.
- [6.2] She challenges some or all of the findings of the Tribunal, and says the decisions were not fair or right.
- [6.3] She has no income.

Discussion

The principles to apply

- [7] 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.
- [8] When imposing sanctions those statutory purposes require consideration of at least four factors which may materially bear upon maintaining appropriate standards of conduct:
- [8.1] *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 ...”

- [8.2] *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.
- [8.3] *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).
- [8.4] *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

- [9] 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. That prohibition has now lapsed.
- [10] The present series of complaints involve findings of dishonest and misleading conduct, negligence, incompetence, and non-compliance with the Code of Conduct.
- [11] In respect of two of the current complaints, (this complaint is not one of them), the Tribunal has prevented Ms Tangilanu from reapplying for a licence for two years. Those decisions explain why I do not consider rehabilitation is realistic. Those 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 imposed, the orders excluding Ms Tangilanu from practising are taken into account as part of the matrix of penalties.
- [12] 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.
- [13] 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.
- [14] I have applied the totality principle¹ in relation to the overall misconduct. First, I determined the sanction for each complaint on its own merits, then I 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.
- [15] 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

- [16] Ms Tangilanu's 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. Accordingly, 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 that the result of imposing appropriate sanctions will make Ms Tangilanu insolvent and she will have to lodge a debtor's application in bankruptcy.

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

- [17] 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.
- [18] 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 a Disputes Tribunal or the Courts.
- [19] 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

- [20] 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.
- [21] 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 or liabilities and provided nothing more than an assertion she has no income.
- [22] 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:
- [22.1] Is not a provable debt in bankruptcy; and
- [22.2] Is not discharged when a bankrupt is discharged from bankruptcy.
- [23] 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.
- [24] 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

- [25] 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.
- [26] This is a somewhat extended version of the power that commonly applies in professional disciplinary jurisdictions.
- [27] 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.
- [28] 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.

[29] Those principles appear to apply, with necessary modifications, to the Act and, accordingly, the present proceedings.

[30] 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.

[31] Under the Act the mechanism is less direct, as the Authority and the Tribunal are statutory bodies; nonetheless 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.

[32] 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 such order, the approach is not surprising.

[33] 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 an order.

[34] 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

[35] 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

[36] In the current series of complaints, the sanctions ordered in two of the decisions 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 years does not indicate she can expect to get a licence after that time. Aside from other standards she will need to meet, 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.

[37] Accordingly, I approach the imposition of other sanctions on the basis that orders of the Tribunal have, in all likelihood, permanently excluded Ms Tangilanu from the profession. Any re-entry to the profession would be subject to a requalification and rehabilitation process that would be rigorous and not within reasonable contemplation at this point. It is important that any other sanctions imposed on Ms Tangilanu take this into account, so that overall the sanctions are proportionate to the professional offending.

The financial penalty on this complaint

[38] Ms Tangilanu's conduct in this matter was serious. She accepted instructions to deal with immigration issues that were important to the complainant and her family. She failed to carry out her instructions to the standard required.

[39] Given that it is in addition to Ms Tangilanu being excluded from the profession, a penalty of \$3,500 is proportionate to the professional 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 \$2,500. 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

[40] The complainant has not sought compensation, so no order will be made.

Refund of fees

[41] The complainant is entitled to a full refund of fees as Ms Tangilanu provided no professional services of value, and put her client in an invidious position. The fees were \$500.

Costs and Expenses

[42] The Registrar and the complainant have not sought costs, so there is no order.

Censure

[43] 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

[44] 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.

[45] I am satisfied this is appropriate having regard to the ability of former clients to recover on the orders in their favour, and the totality of the penalty imposed on Ms Tangilanu.

Decision

[46] Ms Tangilanu is:

[46.1] Censured,

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

[46.3] Ordered to pay the complainant \$500, being a refund of fees.

DATED at WELLINGTON this 1st day of October 2014

G D Pearson
Chair