BEFORE THE IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2015] NZIACDT 64

Reference No: IACDT 051/14

IN THE MATTER	of a referral under s 48 of the Immigration Advisers Licensing Act 2007
BY	**The Registrar of Immigration Advisers** Registrar
BETWEEN	**Lili Mohammadalibeigy** Complainant
AND	**Lip Funn (James) Yap** Adviser

DECISION
IMPOSITION OF SANCTIONS

REPRESENTATION:

Registrar: Mr M Denyer, lawyer, Ministry of Business, Innovation and Employment, Auckland

Complainant: In person

Adviser: In person

Date Issued: 25 May 2015

DECISION

This complaint

[1] This decision imposes sanctions, following a decision upholding a complaint against Mr Yap; *Mohammadalibeigy v Yap* [2015] NZIACDT 7 (decision can be located at www.justice.govt.nz).

[2] The grounds of complaint were that Mr Yap breached elements of the Immigration Advisers Code of Conduct 2010 (the Code). In particular, he allowed unlicensed employees to provide advice to the complainant and that advice was wrong. The employees provided advice that the complainant had enough points to be able to expect to lodge an expression of interest successfully and that Immigration New Zealand would likely select her to apply for residence in New Zealand. In fact, she did not have enough points to make selection a realistic outcome. In addition, Mr Yap took money for the cost of an assessment of the complainant's qualifications in excess of what it actually cost, and did not repay the excess.

[3] The Tribunal upheld the complaint on grounds of negligence (section 44(2)(a), Immigration Advisers Licensing Act 2007 (the Act)) and the breach of clauses 1.1(a), (b); 2.1(b); 3 and 3(d) of the Immigration Advisers Code of Conduct 2010 (the 2010 Code). These grounds were upheld on the basis that the advice was wrong, that unlicensed persons provided the advice unlawfully and Mr Yap did not refund the excess funds he obtained to pay for the assessment of the complainant's qualifications.

The Parties' Positions on Sanctions

The Authority

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

The Complainant

[5] The complainant expressed concern that Mr Yap had still not properly refunded money, due to a transaction cost caused by the method of payment.

Mr Yap

[6] Mr Yap said he had repaid the fees, rectified his processes and was undertaking the study required by previous Tribunal orders.

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 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 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).

Previous offending

[9] Mr Yap has been subject to three previous complaints where the Tribunal has upheld the complaint and imposed sanctions:

[9.1] *Appalasamy v Yap* [2014] NZIACDT 63, where Mr Yap failed to get informed instructions, and refused to provide a refund. The Tribunal found he was negligent, incompetent and improperly failed to refund fees. The Tribunal ordered a financial penalty of $3,500, compensation of $4,700 and required Mr Yap to undertake training.

[9.2] *Chung and Lok v Yap* [2014] NZIACDT 109, where Mr Yap failed to evaluate his client's circumstances adequately and delivered services using unlicensed staff. The Tribunal ordered Mr Yap to pay a financial penalty of $4,000, compensation and refunds of fees of $15,264, and ordered him to undertake training.

[9.3] *Heng v Yap* [2014] NZIACDT 110, where Mr Yap allowed unlicensed staff to provide advice, and his service delivery was negligent and incompetent. The Tribunal ordered Mr Yap to pay the complainant compensation and a refund of fees amounting to $5,485, a penalty of $4,000, and ordered him to undertake training.

The gravity of the offending

[10] There are two features in the present complaint, and the past complaints that are significant. First, competence; Mr Yap has fallen substantially short of the standards of competence required of a licensed immigration adviser. Second, he has allowed unlicensed staff to deliver professional services. The former it appears, may have contributed to or caused the latter. Mr Yap, apparently, did not understand the restrictions that apply to unlicensed persons providing immigration services.

[11] The Act provides that the provision of immigration advice by a person who is not licensed or exempt is a criminal offence. The High Court's decision in *ZW v Immigration Advisers Authority* [2012] NZHC 1069, explains some of the history and policy behind that mechanism for excluding unlicensed persons from providing immigration services.

[12] The Act prohibits anyone who is not licensed or exempt from doing any work to facilitate an immigration process, though there is some relaxation in relation to purely administrative tasks. The scope of the prohibition on unlicensed persons follows from the definition in section 7 of the Immigration Advisers Licensing Act 2007 (the Act) which includes:

> using, or purporting to use, knowledge of or experience in immigration to advise, direct, assist, or represent another person in regard to an immigration matter relating to New Zealand ...

[13] Only a licensed immigration adviser or a person who is exempt may engage with or take instructions from a client, or do any work to provide immigration services. People who are not either licensed or exempt can undertake only purely administrative or mechanical matters.

[14] The mechanism to give effect to this limitation is making infringements a criminal offence. It is important to note breaches are not low end regulatory offending. Section 63 of the Act provides that a person commits an offence if they provide immigration advice without being licensed to do so, or exempt, knowing that they are required to be licensed or exempt. There is also an offence where the person provides such advice without knowledge of the Act's terms.

[15] These prohibitions apply within a licensed immigration adviser's practice. While many professional people can properly oversee unqualified staff in other professions, doing the same thing in a licensed immigration adviser's practice involves serious criminal offending.

[16] It is a harsh mechanism, but appropriate given an unfortunate history of exploitation before the Act came into force. It is clear that Parliament saw the need to exclude the potential for unlicensed people to operate within the regulated industry. The profession is well aware of this restriction.

[17] The maximum penalties for such offending are, for knowing offending, imprisonment for up to 7 years, a fine of $100,000 or both, for offending where there is no knowledge of illegality, a fine of up to $100,000 . The courts have treated the offending as having a gravity that reflects the range of penalties. In *Hakaoro v R* [2014] NZCA 310 the Court of Appeal dealt with an appeal against a sentence of one year and eight months imprisonment on charges under the Act. Mr Hakaoro's appeal was unsuccessful, as was his application for leave to appeal to the Supreme Court.[1]

[18] A person seeking a licence under the Act is required to demonstrate that they understand this essential principle of immigration practice before they obtain a licence. There are numerous decisions of this Tribunal addressing licensed immigration advisers being a party to unlicensed persons providing immigration advice, the *ZW* case affirmed the principles, and recent criminal sentencing decisions further affirm the effect of the Act. Since the Act began regulating the profession, the Immigration Advisers Authority has publicised these obligations and the decisions of the Tribunal and the Courts relating to the issue.

[19] The consequences of professional persons allowing serious criminal offending to occur in their practices are obvious. The starting point in sanction decisions, where a licensed immigration adviser has used unlicensed persons to provide immigration services, is:

[19.1] Cancellation of the licence;

[19.2] Prohibition against applying for any licence for two years (though the subject of the order could have no expectation the Registrar would then, or potentially ever, regard them as a fit and proper person to hold a licence);

[19.3] A financial penalty of $7,500;

[19.4] A refund of fees paid for the services provided unlawfully;

[19.5] Compensation for any consequent loss; and

[19.6] Costs.

[20] However, notwithstanding the Immigration Advisers Authority's efforts to ensure awareness of the gravity of breaching the Act, there has been a level of ignorance in the profession. The ignorance has related to the strictness of the boundaries, and the gravity of breaching them. Against this background, the Tribunal has taken a flexible approach to sanctions. It has given considerable weight to a licensed immigration adviser's apparent determination to comply with the Act in the future, and any element of contrition regarding the lack of care or understanding that led to offending. However, when an adviser's reaction has been to trivialise the offending, or they have continued with their non-compliance that has left little room for confidence that rehabilitation is realistic. The Tribunal cannot disregard the fact that the Act treats non-compliance as serious criminal offending; this is not a regulatory offence punishable by a small fine.

Mr Yap's licence

[21] 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.

[22] 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], the Court stressed, when imposing

[1] [2014] NZSC 169

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".

[23] In its previous decisions, the Tribunal has taken account of Mr Yap's expressions of regret and his determination to perform to the required standards. It is also relevant that Mr Yap practices outside of New Zealand. The Immigration Advisers Authority does try to include offshore licensed immigration advisers when disseminating information and advice for practitioners. However, it is more difficult for offshore advisers to obtain the collegial support available in New Zealand.

[24] Further, it is important that each of the four complaints, including this one, predate the point where the Tribunal first upheld a complaint and brought home to Mr Yap the obligations he has. This is therefore not a situation in which Mr Yap has ignored the directions of the Tribunal

[25] Mr Yap reports he is complying with the training requirements the Tribunal has previously imposed; the Registrar has not reported adversely. The Tribunal also imposed strict requirements for timely compliance with other orders.

[26] In these circumstances, I am satisfied this is a case where it is proper, notwithstanding the gravity of allowing unlicensed persons to provide immigration services, to consider that continuing the process of rehabilitation which has already been embarked on is the proper course.

This complaint in context and the penalties

[27] This complaint is in substance the fourth of a series, and I must consider the totality of the penalties. The Tribunal has already imposed penalties of $11,500 over the previous three complaints. While a separate consideration, Mr Yap has also had to compensate his clients to the extent of $25,449. He is also undertaking a substantial training programme.

[28] In these circumstances, I am satisfied there is no need for further orders that potentially affect Mr Yap's licence, or cover the training that is already underway.

[29] The penalty should be modest and only deal with the incremental aspect of this complaint. It will be $2,500, which is, much less than what it would have been if this were the only complaint rather than a fourth in a series of repeated conduct that wholly or in part was the result of lack of understanding.

Compensation

[30] The complainant in this matter has suffered considerable trouble and stress, because of the inappropriate advice she received, and the refund of fees was protracted. The Tribunal sometimes allows modest awards of compensation in the nature of general damages, being conscious they must not be an additional penalty.

[31] I am satisfied this is an appropriate a case, and an award of $1,500 will be made in the complainant's favour and deal with any outstanding dispute over the deduction from the refund of fees.

Refund of fees

[32] The fees have already been refunded.

Costs and Expenses

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

Censure and warning

[34] In accordance with the usual practice of disciplinary tribunals, censure will be an express sanction.

[35] The Tribunal warns Mr Yap that, now it has addressed this series of complaints, the consequences of any further lapse from maintaining professional standards in his practice may well be severe. He received an opportunity to rehabilitate himself; it is not an opportunity likely to follow further offending.

Orders

[36] Mr Yap is censured, warned in the terms appearing in paragraph [35] above, and ordered

[36.1] To pay a penalty of $2,500.

[36.2] To pay compensation of $1,500 to the complainant.

[37] The compensation is to be paid by 19 June 2015, and the penalty by 20 July 2015.

DATED at WELLINGTON this 25th day of May 2015.

_____
G D Pearson
Chair