

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

Decision No: [2015] NZIACDT 86

Reference No: IACDT 054/12

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Anjani Lata Prakash

Complainant

AND

Na (Fiona) Zhou

Adviser

DECISION
IMPOSITION OF SANCTIONS

REPRESENTATION:

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

Complainant: In person

Adviser: Mr G P Tyrell, lawyer, Weston Ward & Lascelles, solicitors, Christchurch.

Date Issued: 27 August 2015

DECISION

This Complaint

- [1] This decision imposes sanctions, following a decision upholding a complaint against Ms Zhou. The circumstances are set out fully in the decision upholding the complaint; [2014] NZIACDT 117 (refer: www.justice.govt.nz).
- [2] In summary the circumstances giving rise to the complaint were:
- [2.1] Ms Zhou took up employment in the practice of Richard Martin Immigration Ltd (the Practice). Mr Martin controlled the company, and was active in the Practice. Mr Martin was an ex-lawyer who had been struck off the roll and who had a history of criminal offending against clients. At the time Ms Zhou commenced employment he was facing criminal charges for breaches of the Immigration Advisers Licensing Act 2007 (the Act). The parties accepted this is the background against which this complaint arose. For the purposes of dealing with this complaint, the parties accept Mr Martin was dishonest and manipulative. Ms Zhou was, and is, entitled to any justification or excuse those circumstances provide to her.
- [2.2] Ms Zhou was the sole licensed immigration adviser in the Practice at the time of the events giving rise to the complaint. However, a former licensed immigration adviser working in the Practice had completed the initial work for Ms Prakash. Ms Zhou personally lodged the application, naming herself as the authorised licensed immigration adviser, after she commenced working in the practice.
- [2.3] The parties largely agreed on what happened:
- [2.3.1] When Ms Zhou lodged the residence application (which was largely prepared by a former licensed immigration adviser in the Practice), there was no written agreement.
- [2.3.2] When Immigration New Zealand queried the residence application, Ms Zhou consulted with Ms Prakash, prepared a response and submitted it.
- [2.3.3] Immigration New Zealand, within two days or so of getting the response, declined Ms Prakash's application.
- [2.3.4] Mr Martin, apparently, intercepted the letter from Immigration New Zealand declining the application. Ms Zhou did not know about Immigration New Zealand's decision and did not follow up until after Ms Prakash had made her own enquiries with Immigration New Zealand.
- [2.3.5] Ms Prakash was not satisfied with the service she received. Ms Zhou agreed Ms Prakash would get a full refund of the fees she paid, unless the Associate Minister agreed to intervene for Ms Prakash.
- [2.3.6] The Associate Minister did not intervene, and Ms Zhou did not refund the fees to Ms Prakash.
- [3] The issues for the Tribunal essentially turned on whether, in the circumstances, Ms Zhou should be personally responsible for the lack of a written agreement, a failure to follow up, and failure to refund fees. She said that, while there was no written agreement, she was entitled to assume the former licensed immigration adviser had attended to that matter. She said she could not have known Mr Martin intercepted correspondence and the delay in following up was reasonable. She said she endeavoured to persuade Mr Martin to refund fees and that was the extent of her responsibility.
- [4] The Tribunal upheld the complaint finding that, as a licensed adviser, Ms Zhou was personally responsible for both having a written agreement and refunding fees. However, it dismissed the complaint in respect of the failure to follow up Immigration New Zealand's decision, as the delay was not sufficient to trigger an adverse professional disciplinary finding.

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 Zhou

[7] Ms Zhou provided a submission on sanctions. Her counsel provided valuable submissions, to the effect:

[7.1] Ms Zhou answered some of the more serious concerns potentially arising from the complaint and that process has been costly for her.

[7.2] The grounds on which the complaint was upheld are mitigated by the role of a previous adviser; and Ms Zhou's genuine intentions to meet her professional obligations, hampered by an inability to effectively control Mr Martin.

[7.3] Ms Zhou apologised for the errors she made.

[7.4] She removed herself from Mr Martin's practice, and is now in a precarious financial situation. All the difficulties Ms Zhou has had arose in Mr Martin's practice, in other circumstances her professional life has been without any adverse incidents. She provided references.

[7.5] When assessing the penalty, it is appropriate to have regard to the fact Ms Zhou did not benefit directly from the fees and, accordingly, having to provide a refund is effectively a punishment. Further, as several complaints against Ms Zhou have been upheld, the totality principle is important.

[7.6] Ms Zhou has submitted that the appropriate order is censure, and to require Ms Zhou to refund \$4,500.

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 four, where the Tribunal is imposing disciplinary sanctions on Ms Zhou.
- [11] The Tribunal will take an overall view of Ms Zhou's circumstances, applying the totality principle.

Ms Zhou's financial position and its relevance

- [12] Ms Zhou is in a difficult financial position, with financial responsibilities and no income.

Compensation and refund of fees

- [13] 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 behind this element of the sanctions 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.
- [14] Given the apparent policy behind the legislation, it is difficult to see any sensible basis for allowing Ms Zhou'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.
- [15] It follows that orders for compensation are on the merits, and Ms Zhou's ability to pay is irrelevant. The same applies to orders to refund fees and expenses paid by clients.

Financial penalty

- [16] The financial penalty under section 51(f) is discretionary. The question is whether and in what circumstances Ms Zhou'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.
- [17] 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:
- [17.1] Is not a provable debt in bankruptcy; and
- [17.2] Is not discharged when a bankrupt is discharged from bankruptcy.
- [18] 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.
- [19] Ms Zhou has indicated she will endeavour to meet any orders the Tribunal makes; accordingly, I am satisfied this is a case where it is appropriate to give priority to the complainant's interests.

Costs and Expenses

- [20] 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.
- [21] This is a discretionary matter for the Tribunal.

Mitigating factors

- [22] Ms Zhou took employment in a practice operated by Mr Martin. I am satisfied he manipulated her, but she allowed that to occur. I have not found she joined in Mr Martin's wrongful conduct. Ms Zhou was wholly unequipped to take charge of Mr Martin's practice as the sole licensee. She did not have the technical knowledge to secure a professional practice against improper activity and she did not have the personal skills to deal with Mr Martin. Further, she did not comprehend the gravity of her professional failings.
- [23] The consequences for Ms Zhou have been very considerable already. She is no longer a licensed immigration adviser, is not working, and has liabilities arising from the complaints this Tribunal is now addressing. She took no steps to protect herself against those financial consequences when taking the position in Mr Martin's practice. She has surrendered her licence.
- [24] In short, Ms Zhou was an inexperienced immigration adviser, who took on the role of sole licensee in a practice where Mr Martin was engaging in dishonest practices. At present, he is serving a substantial sentence of imprisonment for his illegal activities in that practice. His history of professional and criminal offending demonstrates that Mr Martin exploited clients when working in substantial law firms, which would have had mechanisms to protect the firms and their clients. Ms Zhou naively thought she was simply an employee, as she had been in another practice and that her personal responsibilities only went as far as the work she personally performed. The reality has been her naivety has resulted in personal and professional disaster.
- [25] I also accept the points raised by Ms Zhou's counsel.

The overall approach to sanctions

- [26] This case is exceptional for the following reasons:
- [26.1] I find Ms Zhou's conduct was the result of naivety and inexperience.
- [26.2] I have found she was not a party to Mr Martin's behaviour; though she failed to control the practice properly, despite being the sole licensee.
- [26.3] At least when Ms Zhou gained some understanding of her true responsibilities, she has shown contrition. Significantly, she has changed her professional situation, and more recently surrendered her licence.
- [26.4] Ms Zhou did not gain anything from the fees clients paid, other than the fees indirectly contributing to her remuneration.
- [26.5] Ms Zhou now faces severe financial consequences given the responsibility she has for refunding fees and paying compensation.
- [26.6] Ms Zhou is willing to meet the financial obligations arising, as far as she can.
- [26.7] The reality of Ms Zhou's financial position means that imposing penalties will be to the detriment of her ability to meet any obligations to complainants.
- [27] This case is different from cases where licensed immigration advisers have belligerently refused to accept responsibility for their actions, failed to comply with orders, and taken no steps such as surrendering their licence or remediating their practices.
- [28] Accordingly, my view is that deterrence is achieved by what has happened to Ms Zhou already. The consequences of her actions have meant that she has lost her livelihood and faces serious financial obligations from orders for compensation and refund of fees; she faces these liabilities despite only being an employee in the practice where the complaints arose and apparently not having been remunerated to take account of those risks, or indemnified against them.
- [29] In these exceptional circumstances, I consider it is not appropriate or necessary to impose a financial penalty. As discussed, orders for compensation and refunds of costs are inevitable and not able to be reduced based on Ms Zhou's financial position.

[30] The remaining elements are protection of the public and rehabilitation. Ms Zhou is not currently practising, it may well be that she will not practise again. In appropriate circumstances, Ms Zhou could properly return to the profession. The complaints arose from lack of experience and judgment, not dishonesty. When a person in Ms Zhou's circumstances has not held a full licence for six months, they must complete an approved refresher course, and the Registrar must be satisfied they are otherwise fit to be licensed. I will accordingly direct that Ms Zhou may not apply for another licence until 6 November 2015, but allow her to apply to the Tribunal before then to impose specified conditions in place of the prohibition.

[31] The Tribunal will censure Ms Zhou.

[32] There has been no application for the costs of the hearing, and in these circumstances, there will be no order.

[33] Accordingly, it is only necessary to discuss the issue of compensation and refund of fees.

Compensation and refund of fees

[34] One of the grounds of complaint the Tribunal upheld was that Ms Zhou failed to refund \$4,500 of fees. She accepts she is liable to do so. The complainant has not sought other orders, so there will be no order for compensation beyond the refund of the balance of the fees.

[35] There will be an order accordingly.

Decision

[36] Ms Zhou is censured, and

[37] The Tribunal orders:

[37.1] Ms Zhou is prevented from reapplying for a licence under the Act until 6 November 2015; she is reserved leave to apply to have the Tribunal substitute specified conditions on reapplying for a licence instead.

[37.2] Ms Zhou is to pay the complainant \$4,500 being a refund of the balance of fees.

DATED at WELLINGTON this 27th day of August 2015.

G D Pearson
Chair