

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

Decision No: [2015] NZIACDT 88

Reference No: IACDT 026/14 and 45/14

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Christiaan Hendrik Muller

Complainant

Shirley Bisschoff

Complainant

AND

Sharon Gail Yerman

Adviser

DECISION

APPLICATION FOR THE TRIBUNAL TO WITHDRAW ON THE GROUNDS OF BIAS

REPRESENTATION:

Registrar: In person.

Complainant: In person.

Adviser: Mr Howard Thompson, McMahon Butterworth Thompson, Lawyers, Auckland.

Date Issued: 31 August 2015

DECISION

Background

- [1] This decision concerns an application for my recusal from the hearing of matters in two complaints. One concerns a hearing on sanctions following a complaint, which the Tribunal has already upheld in *Muller v Yerman* [2015] NZIACDT 77 (the Muller complaint); the other is Ms Bisschoff's complaint (the Bisschoff complaint) which has yet to be heard.
- [2] Ms Yerman is a licensed immigration adviser who lives and practises in South Africa.
- [3] The Tribunal issued a warning to Ms Yerman in relation a previous complaint on 31 July 2012; *Tully v Yerman* [2012] NZIACDT 39. The Tribunal formally cautioned Ms Yerman in these terms after it upheld the complaint and imposed sanctions:
- “Ms Yerman is [c]autioned that her failure to accept responsibility for professional failings, and instead attempting to blame her client, raises the question of her fitness to practice without supervision. She is strongly encouraged to reflect on the circumstances that led to this complaint, and pursue further training and education in relation to professional ethics. Should Ms Yerman have another complaint upheld against her, this caution may be considered in relation to the appropriate sanctions to impose.”
- [4] On 25 June 2015, the Tribunal upheld the Muller complaint. The Tribunal requested that Ms Yerman appear before the Tribunal to address the sanctions it would impose. That request was in part due to the warning Ms Yerman received when the Tribunal upheld the complaint in the *Tully* complaint. The decision in the *Muller* complaint observed:
- “The findings against Ms Yerman potentially open the Tribunal to find her conduct was wilful defiance of the law regulating licensed immigration advisers, or a failure on her part to comprehend elementary professional obligations.”
- [5] The unresolved Bisschoff complaint involves a serious issue; in particular, that Ms Yerman allegedly breached her professional obligations not to allow an unlicensed person to provide immigration advice. For present purposes it is sufficient to note that, under the particular regulatory regime for immigration advisers, it is a criminal offence for an unlicensed person to provide immigration advice (with extraterritorial effect), and the offence is punishable by imprisonment for up to 7 years and a fine of \$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 In this jurisdiction, where a licensed immigration adviser has conducted their practice in a manner that results in the provision of unlicensed immigration advice within their practice, the issue is inevitably of some gravity.
- [6] Ms Yerman is defending the Bisschoff complaint, and has applied for an oral hearing, which the Tribunal has allowed. Accordingly, Ms Yerman has to travel from South Africa to New Zealand both to deal with sanctions in the *Muller* complaint, and to appear at the oral hearing to defend the Bisschoff complaint. The Tribunal has endeavoured to ensure Ms Yerman will only have to travel to New Zealand once, and so has co-ordinated the two appearances. It has also offered the alternative of appearing by video link if her circumstances make an appearance too onerous, though Ms Yerman has indicated she does not wish to take up that option.
- [7] Ms Yerman applied to defer her attendance in New Zealand until November 2015, when she would deal with both matters. After the Tribunal refused the adjournments for reasons given in a minute dated 19 August 2015, on 21 August 2015 Ms Yerman made a new application for an adjournment for essentially the same reasons. In a minute dated 26 August 2015, the Tribunal again declined the application for an adjournment.
- [8] Ms Yerman has now made an application that the Tribunal not deal with either of the two complaints on the grounds of apparent bias.

¹ [2014] NZSC 169

This application

[9] This application claims the chair of the Tribunal has apparent bias as:

“The Tribunal Chair’s refusal to defer the hearings in the Bisschoff and Muller complaints, viewed against the background of the Tribunal Chair’s role in Ms Yerman’s disciplinary record are circumstances which might lead a fair-minded observer to reasonably apprehend that the Tribunal Chair might not bring an impartial mind to the resolution of the Muller matter and the Bisschoff matter.

[10] Accordingly, Mr Thompson, for Ms Yerman, contends I should have no further role in either the Muller or the Bisschoff complaints.

[11] Mr Thompson contends evidence of bias is contained in the following passages of the Tribunal’s minute of 19 August 2015:

“Ms Yerman is facing a serious complaint, and the Tribunal has indicated her initial response raised concerns regarding her practice. However, this is not the first complaint Ms Yerman has faced. When upholding the complaint in *Muller v Yerman* [2015] NZIACDT 77 on 25 June 2015 the Tribunal requested that Ms Yerman appear before the Tribunal to address the sanction it would impose. That was in part due to a warning she received when the Tribunal upheld the complaint in *Tully v Yerman* [2012] NZIACDT 39. She has not appeared before the Tribunal in relation to the Muller complaint.

The Tribunal has made it clear Ms Yerman’s disciplinary history is such that her professional future is in issue in relation to the Muller complaint. Whether the Tribunal will uphold or dismiss the present complaint is unknown. While Ms Yerman is entitled to a presumption of innocence in relation to this complaint, that is not so for the Muller complaint.”

[12] This, Mr Thompson contends, conflates the *Muller* and the *Bisschoff* complaints.

[13] In addition, Mr Thompson says the Tribunal has unfairly implicitly criticised Ms Yerman for failing to appear on the Muller complaint.

[14] The third element evidencing bias, Mr Thompson contends, is the Tribunal’s minute of 26 August 2015, in stating:

As the Tribunal has already pointed out, Ms Yerman’s history of professional offending means it is not acceptable to defer addressing sanctions for some five months. Further, this complaint is a serious matter, and it is not acceptable to defer dealing with it either.

The Tribunal expects Ms Yerman to give these issues priority; it is not satisfactory that she should continue to offer professional services to consumers while these issues remain outstanding because she chooses not to give them sufficient priority.

[15] Mr Thompson refers to the test for apparent bias in *Muir v Commissioner of Inland Revenue*².

Discussion

[16] Ms Yerman’s application confuses the two matters currently before the Tribunal. In respect of scheduling a hearing, they have one relevant connection. Ms Yerman has to come to New Zealand to deal with both matters, and the Tribunal has been willing to accommodate her and allow her to deal with both matters in the course on one trip to New Zealand. It has also offered her the opportunity of using a video link, given that she claims personal attendance is very onerous.

[17] The Tribunal has distinguished, not conflated the two matters in the passages Ms Yerman relies on the Tribunal’s minute of 19 August 2015.

² [2007] 3 NZLR 495 (CA)

The Muller complaint, which is awaiting a sanctions hearing

- [18] The Muller complaint requires a sanctions hearing. Ms Yerman contends it appears the Tribunal has predetermined this matter. However, that is not consistent with the record, of how the Tribunal has dealt with the matter. In the substantive decision on the Muller complaint, the Tribunal put Ms Yerman on notice of the issues she faced.
- [19] Ms Yerman was self-represented at the time. The Tribunal requested Ms Yerman appear in person; and pointed out why it was important that she address some of the relevant circumstances, and suggested she consider taking legal advice. One of the important issues drawn to Ms Yerman's attention was the warning the Tribunal issued in the *Tully* complaint.
- [20] Fairness requires a decision-maker to put a party on notice of potentially unforeseen adverse matters, to ensure they have the opportunity of answering the points. Mr Thompson appears to be suggesting that the Tribunal ought to have remained silent, left it to Ms Yerman to raise the Tribunal's earlier warning, discover for herself the seriousness of the findings the Tribunal had made, and identify any potential mitigating factors; that approach is not consistent with elementary concepts of fairness.
- [21] Nothing the Tribunal has said indicates that it has predetermined what sanctions it will impose; only that Ms Yerman's response to various factors may be important and that she needs to be aware the Tribunal will potentially make one of a range of orders affecting her licence.
- [22] The Tribunal has also said Ms Yerman's proposal to defer the imposition of sanctions for some five months is unacceptable. It pointed out why, namely, that it is not satisfactory that she continue to offer professional services to consumers without the Tribunal determining whether it should make orders to protect those consumers, and that it expects Ms Yerman to give the hearing priority.
- [23] The Act has a consumer protection focus (section 3) and the sanctions the Tribunal may impose include a range of orders that provide protection for consumers. It is appropriate and necessary for the Tribunal not to allow an immigration adviser to defer the imposition of any sanctions by refusing to appear when the Tribunal considers they should do so. The Tribunal has a duty to deal with sanctions in a timely manner, balancing the adviser's circumstances and the public interest.

The Bisschoff complaint the Tribunal has not determined

- [24] The Tribunal made it clear that it distinguishes the Bisschoff complaint from the Muller complaint, noting, in respect of this complaint, that Ms Yerman is entitled to a presumption of innocence.³ It also identified that Ms Yerman's trip to New Zealand is more urgent due to the Muller complaint⁴. The Tribunal has always understood Ms Yerman's trip will deal with both matters.
- [25] This Tribunal is required to issue reasoned decisions, and it is a sole member Tribunal where the member is a lawyer. Mr Thompson's claim that there is an appearance of bias relies on criticising the Tribunal for responding to its statutory mandate to address complaints and impose sanctions in a timely and fair manner.

Applying the legal principles

- [26] The Tribunal has properly put Ms Yerman on notice of the issues she faces in the sanctions hearing in the Muller complaint. That does not create an appearance of bias; it is an appropriate and necessary part of conducting a fair hearing.
- [27] The Tribunal has not given any indication of predetermining the Bisschoff complaint, and has not done so. It has only drawn Ms Yerman's attention to concerns regarding her response when first considering the complaint "on the papers" under section 49 of the Act, and gave Ms Yerman the opportunity of responding to those concerns.

³ Refer para.[11] above.

⁴ Refer para.[14] above.

- [28] This application is founded on a claim that “the Tribunal Chair’s refusal to defer the hearings ... might lead a fair-minded lay observer to reasonably apprehend that the Tribunal Chair might not bring an impartial mind”.
- [29] This submission is in essence that because I have refused an adjournment it appears I am acting unfairly. I gave grounds for refusing the adjournment, which were both fair and appropriate.
- [30] A fair-minded lay observer would take account of the fact I have a duty to ensure the Act is effective in protecting the public, and that the reasons for refusing the adjournment are not founded on caprice or personally motivated views. This is a timely and fair application of the mandate the Act gives to this Tribunal. I am accordingly satisfied this application is without merit.
- [31] In this case, the Court of Appeal’s observations in the *Muir* case regarding the duty to sit are applicable:

[35] The requirement of independence and impartiality of a Judge is counterbalanced by the Judge’s duty to sit, at least where grounds for disqualification do not exist in fact or in law. This duty in itself helps protect judicial independence against manoeuvring by parties hoping to improve their chances of having a given matter determined by a particular Judge or to gain forensic or strategic advantages through delay or interruption to the proceeding.

- [32] As are these observations:

[98] It has to be accepted that there are occasions when a Judge’s prior rulings might lead a reasonable person to question whether he would remain impartial in any subsequent proceedings. That said, this could be relevant to the question of judicial bias only in the rarest of circumstances.

[99] The reasons for this are straightforward. It is common sense that people generally hate to lose, and their perception of a Judge’s perceived tendency to rule against him or her is inevitably suspect. As Kenneth Davis has said, “Almost any intelligent person will initially assert that he wants objectivity, but by that he means biases that coincide with his own biases” (*Administrative Law Treatise* (2nd ed, vol 3, 1978), p 378). Every judicial ruling on an arguable point necessarily disfavours someone – Judges upset at least half of the people all of the time – and every ruling issued during a proceeding may thus give rise to an appearance of partiality in a broad sense to whoever is disfavoured by the ruling. But it is elementary that the Judge’s fundamental task is to judge. Indeed, the very essence of the judicial process is that the evidence *will* instil a judicial “bias” in favour of one party and against the other – that is how a Court commonly expresses itself as having been persuaded.

[100] The general approach that judicial disqualification is not warranted on the basis of adverse rulings or decisions is also justified by appropriate concerns about proper judicial administration. There is huge potential for abuse if recusal applications were permitted to be predicated on a party’s subjective perceptions regarding a Judge’s ruling.

[101] We know of no common law jurisdiction which accepts that a Judge’s adverse rulings are disqualifying *per se*. The problem is rather whether an aggrieved litigant should be permitted to seek recusal on the basis of rulings that are either so patently erroneous or so disproportionate as to suggest that something untoward must have motivated them. Even a statistical approach cannot obtain here: most Judges will be able without any difficulty to recall trials in which regrettably they have had to endorse every single point which has been advanced against a particular party.

- [33] It is a reality, professional disciplinary jurisdictions with a limited pool of members, in this case one member, often deal with multiple complaints against a particular person. There is nothing exceptional in relation to Ms Yerman. The Tribunal has upheld two complaints, dismissed one, and is yet to hear a fourth. Each decision and step has been the subject of reasoned decisions.

Decision

[34] The Tribunal dismisses Ms Yerman's application; it will hear the Bisschoff complaint at 10:00 am on Monday 7 September 2015. The sanctions hearing for the Muller complaint will commence at 10:00 am on Tuesday 8 September 2015 or as soon as the Bisschoff matter has concluded.

[35] Ms Yerman may attend in person, or by video link. If the later, Mr Thompson is to make arrangements with the Case Officer urgently.

DATED at WELLINGTON this 31st day of August 2015

G D Pearson
Chair