

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

Decision No: [2016] NZIACDT 16

Reference No: IACDT 036/15

**IN THE MATTER**

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

**BY**

**The Registrar of Immigration Advisers**

Registrar

**BETWEEN**

**Edwin Balatbat**

Complainant

**AND**

**Lindsay Charles Sparks**

Adviser

---

**DECISION - INTERLOCUTORY**  
**(FOLLOWING TELEPHONE CONFERENCE OF TUESDAY 29 MARCH 2016)**

---

**REPRESENTATION:**

**Registrar:** Ms G Kelly, lawyer, MBIE, Auckland. Christchurch.

**Complainant:** Ms R Burgess, Lexington Legal Ltd, Lawyers

**Adviser:** Mr M Smith, barrister Wellington, on instructions from Lane Neave, solicitors,  
Christchurch.

Date Issued: 29 March 2016

## DECISION

### Background

- [1] Mr Sparks through his counsel lodged an application for two orders:
- [1.1] For the issue of a witness summons for the complainant to attend the hearing at the Tribunal's direction; and
- [1.2] For the Tribunal to issue directions that the lawyers for the complainant alter their website as it "brings the integrity of the Tribunal process into disrepute".
- [2] The telephone conference provided the parties with an opportunity to respond.
- [3] The Registrar did not take any position.
- [4] The complainant took the position that the applications are a device to introduce elements external to the issues before the Tribunal. Saying:
- [4.1] The complainant does not wish to give evidence in person and wishes to rely on the papers.
- [4.2] There is no abuse of process, and the application is an unmeritorious attempt to distract the Tribunal from the issues it is required to address.

### Summoning the complainant

- [5] A professional disciplinary hearing is a civil hearing decided applying the balance of probabilities<sup>1</sup>. The process differs from usual civil proceedings in that this Tribunal is required to hear matters on the papers, except to the extent that the Tribunal determines it should request a person to appear<sup>2</sup>, it also has a power to summons witnesses<sup>3</sup>.
- [6] The Tribunal has given notice it will hear the grounds the Registrar considers the complaint may disclose, and no wider grounds. The Registrar filed the documentary material providing a foundation for those grounds. The Tribunal decided to convene an oral hearing.
- [7] The complainant and the Registrar indicated they would not call any witnesses. The Tribunal pointed out one potential matter of unfairness. There are twelve related complaints. If a single complaint proceeded without evidence called by the complainants or the Registrar, Mr Sparks may later face the other complaints on a quite different evidential basis. Mr Smith indicated he considered that possibility, and regardless wished to proceed with one case initially.
- [8] As neither the complainant nor the Registrar will call any witnesses, the oral hearing is an opportunity for Mr Sparks to answer the complaint. Mr Sparks, and any witnesses he calls, will be the only witnesses giving evidence on oath, and available for cross-examination. Effectively, he will give unchallenged evidence tested only by plausibility and measured against the contemporaneous written record through cross-examination (if the Registrar and complainant choose to do so).
- [9] The complaint concerns what Mr Sparks did, given the knowledge he had at the time, measured against the standards of professional conduct set by the Act and the Licensed Immigration Advisers Code of Conduct. In this jurisdiction, he is not responsible for what other people did. The extent of his responsibility in the professional disciplinary process is his personal actions, which may include direction and supervision of others (then his actions must be judged against his knowledge and steps he took to inquire and inform himself given what he knew at the time).

---

<sup>1</sup> *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1

<sup>2</sup> Section 49 Immigration Advisers Licensing Act 2007.

<sup>3</sup> Paragraph 6 of the schedule to the Immigration Advisers Licensing Act 2007.

- [10] Mr Sparks is accordingly in a position to have personal knowledge of any factual issue relevant to whether the Tribunal will uphold the complaint or not. Upholding the complaint is the extent of the Tribunal's jurisdiction, apart from making decisions regarding sanctions if it upholds any grounds of complaint.
- [11] Accordingly, Mr Sparks is the only witness giving evidence on oath and available for cross-examination on the facts that will determine the complaint.
- [12] Mr Smith contends that:
- “[The complainant] needs to be questioned on [contradictions] to determine the truth of written statements he has made. That will be relevant to the credibility of particular written statements, and potentially more broadly [the complainant's] overall credibility. The complainant's answers may also provide information relating to the use of Tribunal process by [the complainant] and/or parties assisting him, information that may be relevant to the credibility of evidence provided and/or to what sanctions is appropriate if any complaint is upheld.”
- [13] That submission overlooks that if there is anything the complainant said, which Mr Sparks contradicts with believable evidence on oath, the Tribunal will necessarily accept Mr Sparks' evidence. The Tribunal cannot give greater weight to unsworn statements of fact if there is credible evidence given on oath and tested by cross-examination. The Tribunal does not have any interest in conducting an inquiry into what motives the complainant may or may not have; it is dealing with a complaint against Mr Sparks.
- [14] At its simplest, it is not in Mr Sparks' interest to introduce a witness who is advancing the complaint, when otherwise Mr Sparks has the opportunity of giving evidence without facing alternative evidence. Accordingly, the Tribunal will not call the complainant as a witness when the Registrar and the complainant have decided not to do so.
- [15] If Mr Sparks wishes to call the complainant as his own witness, he may. The Tribunal will issue a summons on request. The procedure will be that:
- [15.1] Mr Sparks will give evidence first.
- [15.2] The complainant, being a party, may remain in the hearing room while Mr Sparks gives evidence; he may choose not to remain.
- [15.3] The usual constraints of not asking leading questions, and not cross-examining in the event of any unfavourable answers will apply to complainant's evidence if it is part of Mr Sparks' case.
- [15.4] The Registrar and the complainant's counsel may cross-examine the complainant.
- [15.5] Re-examination with a strict application of the no cross-examination rule (with or without using leading questions) will then apply.
- [16] If Mr Sparks proposes to summons the complainant, Mr Smith should seek the summons urgently and indicate whether an interpreter is required.
- [17] There is no property in a witness, so counsel for the complainant may continue to take instructions from the complainant whether or not he is Mr Sparks' witness.

### **Website**

- [18] The application refers to website comments regarding Mr Sparks' practice, and complaints about it. Mr Smith's contention is that the Tribunal has jurisdiction to issue directions to the legal practice representing the complainant requiring it to alter the content of its website. He contends section 49(1) of the Immigration Advisers Licensing Act 2007 gives the power to do so. The subsection provides:

“The Tribunal may regulate its procedures as it thinks fit.”

- [19] That provision on its face does not provide jurisdiction to the Tribunal to issue a direction in the nature of a mandatory injunction to the lawyers representing the complainant. Other bodies do have relevant jurisdiction if there is merit in the contention that the website is improper.
- [20] Any power the Tribunal has in such circumstances relates to abuse of process, which does not confer jurisdiction to issue mandatory orders<sup>4</sup>. Regardless, the website contains nothing that could influence the Tribunal, reflect adversely on it, or bring “the integrity of the Tribunal process into disrepute”.
- [21] The Tribunal for this hearing is a single judicial officer, who must give reasons for the Tribunal’s decision<sup>5</sup>. The Tribunal has a large number of complaints before it relating to Mr Sparks; it will deal with each complaint on its own merits and according to the evidence relating to each complaint.

### **Decision**

- [22] The Tribunal dismisses the application.
- [23] Mr Sparks may request a witness summons for the complainant if he will call him as his own witness. The Tribunal will issue the summons and Mr Sparks will be required to serve it and comply with the provisions of the regulations under the Criminal Procedure Act 2011<sup>6</sup>.

**DATED** at WELLINGTON this 29<sup>th</sup> day of March 2016

---

**G D Pearson**  
Chair

---

<sup>4</sup> *Moevao v Department of Labour* [1980] 1 NZLR 464 (CA) , *R v Horseferry Road Magistrates’ Court, Ex parte Bennett* [1994] 1 AC 42 (HL), and *Attorney-General v O’Neill* [2008] NZAR 93 (HC)

<sup>5</sup> Section 51(2) of the Immigration Advisers Licensing Act 2007

<sup>6</sup> Paragraph 7 of the schedule to the Immigration Advisers Licensing Act 2007.