

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

Decision No: [2016] NZIACDT 53

Reference No: IACDT 052/14

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

BY **The Registrar of Immigration Advisers**
Registrar

BETWEEN **Natalie Francine Adams**
Complainant

AND **Martinus Philippus (Martin) Aucamp**
Adviser

DECISION
(SANCTIONS)

REPRESENTATION:

Registrar: Ms S Blick, lawyer, Ministry of Business, Innovation and Employment

Complainant: In person

Adviser: Mr W Nelson, lawyer, Nelson & Co, Auckland

Date Issued: 14 September 2016

DECISION

The complaint

- [1] The Tribunal upheld this complaint in a decision dated 22 October 2015, *Adams v Aucamp* [2015] NZIACDT 94 (www.justice.govt.nz). The Tribunal found:
- [1.1] Mr Aucamp was a licensed immigration adviser who received instructions from the complainant, her husband, and her parents. The complaint relates to the services provided and involved several alleged irregularities:
- [1.1.1] Mr Aucamp did not identify that the complainant's IELTS score was insufficient for her to obtain teacher's registration. He submitted the registration application rather than tell her she needed to re-sit the test.
- [1.1.2] He did not report to the complainant when he lodged an application with Immigration New Zealand; he told her brother instead.
- [1.1.3] When his initial approach to gain residence for the complainant failed, he said he would prepare a work visa application without charging fees. However, after filing the application, he presented a backdated agreement requiring the complainant to pay fees.
- [1.1.4] After the professional relationship became strained, Mr Aucamp left a threatening message on the complainant's telephone.
- [1.1.5] Mr Aucamp overcharged the complainant's parents, and failed to refund the over-payment.
- [1.1.6] He did not have a written agreement for work he performed for the complainant's parents.
- [2] The Tribunal found Mr Aucamp was careless in relation to the IELTS score, he failed to report on filing the expression of interest, he did not have a written agreement and presented a backdated agreement, he threatened to make a malicious and unfounded complaint to Immigration New Zealand, he overcharged the complainant's parents (double the proper fee) and only belatedly offered a refund of half the fee, he did not have a written agreement for the work he performed for the complainant's parents.
- [3] This decision imposes sanctions following the Tribunal upholding the complaint.

The Registrar and Complainant's position on sanctions

- [4] The Registrar took the position that Mr Aucamp should not apply for a licence under the Immigration Advisers Licensing Act 2007 unless he completed the full qualification for a licence. In relation to a monetary penalty and the refund of fees and compensation, she left that to the Tribunal. She also noted Mr Aucamp's financial position and said that if it was an issue, priority should be given to refunding fees and compensation. Otherwise, a monetary penalty should be set at a level that acted as a "deterrent and to denounce the conduct of [Mr Aucamp].

[5] The complainant sought a net refund of fees of \$16,040. It is calculated in this way:

Payment May 2011	\$6,285.00
Payment Sept. 2011	\$13,505.00
Total Paid	\$19,790.00
Less Repayments	
	\$4,110.00
Balance Fees	\$15,680.00
Plus Medical Claim	
	\$360.00
	\$16,040.00

[6] The figures include the total of fees and disbursements paid to Mr Aucamp, being \$19,790. He has repaid \$4,110. Accordingly, the balance of fees and disbursements is \$15,680. In addition, Ms Adams claims \$360 for medical fees which she says would not have been required if it were not for Mr Aucamp's lack of care.

[7] The Immigration New Zealand, and New Zealand Qualifications Authority fees included in the overall fees are:

Kevin Adams and family Immigration New Zealand application fee	\$370.00
Ms Adams New Zealand Qualifications Authority fee	\$790.00
Ms Adams teacher registration	\$310.00
Ms Adams Immigration New Zealand expression of interest fee	\$440.00
ITA Fees paid to Immigration New Zealand	\$1,550.00
Ms and Mr Adams visitor visa application extension	\$280.00
	\$3,740.00

[8] Ms Adams also referred to compensation and costs, but claimed no specific figures. She also noted that Mr Aucamp made threats to recover fees from her using legal proceedings, including draft proceedings delivered to her at the commencement of the disciplinary hearing.

Mr Aucamp's position on sanctions

[9] Mr Aucamp produced information regarding his financial circumstances, generally directed to support the proposition he was not well placed to meet financial penalties. He did not provide submissions on sanctions.

Discussion

Perspective

[10] This complaint presents a concerning picture where Mr Aucamp fundamentally failed to conduct himself as a trusted professional, which the Immigration Advisers Licensing Act 2007 (the Act), and the Code of Conduct require. Particularly concerning elements of his behaviour were:

[10.1] Presenting a back-dated agreement which was part of an attempt to get fees he said he would not claim;

[10.2] Leaving a malicious and unprofessional threatening message; and

[10.3] Gross over-charging (double fees when there were spouses applying).

[11] Unfortunately, when he attended the disciplinary hearing to examine his conduct, Mr Aucamp saw fit to instruct his lawyer to serve draft legal proceedings on Ms Adams. It is not surprising that Ms Adams saw the behaviour as sinister, and intended to threaten her at a vulnerable time.

[12] At the hearing, Mr Aucamp elected not to give any evidence. The Tribunal is mindful of the observations of the Medical Practitioners Disciplinary Tribunal¹, which applied this observation found in *Bowen-James v Walten & Ors* [1991] NSWCA 29 at page 14:

In our opinion, there is no right to silence or any privilege against self-incrimination upon which a medical practitioner, answering a complaint before the Tribunal, is entitled to rely. Indeed, we would endorse the observations made by Hope AJA in *Ibrahim*. There is a public interest in the proper discharge by medical practitioners of the privileges which the community accords to them, and in the due accounting for the exercise of the influence which the nature of the occupation permits them, and indeed requires them, to exert over their patients. we are of the opinion that if a medical practitioner fails to answer by giving his or her account of the matters charged, there can be no complaint if the Tribunal draws the unfavourable evidentiary inference which absence from the witness box commonly attracts.

[13] The same principles apply to licensed immigration advisers, and other professional persons.

[14] Accordingly, Mr Aucamp behaved in a wholly unacceptable manner on a sustained basis, and then, when the Registrar provided him with particulars of his wrongful behaviour, instead of reflection and contrition, he continued to cause distress to his former client.

The legal principles relating to exclusion from the profession

[15] Mr Aucamp does not currently hold a licence, and it seems unlikely he would apply for another licence. However, I will consider what restrictions should apply to him doing so.

[16] 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 paragraphs [13]-[14].

[17] Rehabilitation of a practitioner is an important factor when appropriate (*B v B* 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 sanctions in the disciplinary process applicable to that case, that it was necessary to "consider the alternatives available to it short of removal and to explain why the lesser options have not been adopted in the circumstances of the case".

[18] The purpose of professional disciplinary proceedings was affirmed by the Supreme Court in *Z v Dental Complaints Assessment Committee* [2008] NZSC 55 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.

[19] The statutory purpose is achieved by considering at least four factors that materially bear upon maintaining appropriate standards of conduct:

[19.1] *Protecting clients*: section 3 of the Act states that "[t]he purpose of this Act is to promote and protect the interests of consumers receiving immigration advice ..."

¹ *Re White Cartwright*, PJ, Chair: Medical Practitioners Disciplinary Tribunal (MPDT), 87-98-36C, Aug 20, 1999 or *White* [1999] NZMPDT 87 (20 August 1999) at [5.13].

- [19.2] *Demanding minimum standards of conduct: Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 725-726 and *Taylor v General Medical Council* [1990] 2 All ER 263 (PC), discuss this aspect.
- [19.3] *Punishment*: the authorities, including *Z v Dental Complaints Assessment Committee* at [1], [65], [70] & [149]-[153], emphasise that punishment is not the primary purpose of disciplinary sanctions. Regardless, there is an element of punishment that serves as a deterrent to discourage unacceptable conduct (*Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at [28]).
- [19.4] *Rehabilitation*: it is an important object to have the practitioner continue as a member of the profession practising well, when practicable (*B v B* HC Auckland HC4/92, 6 April 1993).

Background to regulating this profession

- [20] In *ZW v Immigration Advisers Authority* [2012] NZHC 1069, Priestley J observed at [41]:

In passing the Act, Parliament has clearly intended to provide a system of competency, standards, and a Conduct Code to clean up an industry which hitherto had been subject to much justified criticism. The Registrar and Tribunal have a Parliamentary mandate to enforce standards.

- [21] The Act has established a regime in which, with limited exceptions, licensed advisers have an exclusive right to provide immigration advice. Criminal sanctions are used to enforce that exclusive right.

Alternatives short of cancellation of licence

- [22] Section 51 provides for various sanctions. The key options short of cancellation or suspension of a licence are punishments intended to effect deterrence. These are caution or censure, and a financial penalty not exceeding \$10,000 (s 51(a) & (f)).
- [23] In relation to licences there are two options:
- [23.1] cancellation and/or a direction that the person may not apply for a licence for up to two years, or until meeting specified conditions (s 51(d) & (e)); or
- [23.2] suspension (s 51(c)).
- [24] Other possibilities include training and directions to remedy a deficiency (s 51(b)). There are also powers relating to imposing costs and compensation (s 51(g)-(i)).
- [25] Suspension may ensure that a proportional consequence is imposed: *A v Professional Conduct Committee* HC Auckland CIV-2008-404-2927, 5 September 2008 at [81].
- [26] In making this decision, the Tribunal is required to weigh the public interest against Mr Aucamp's interests (*A v Professional Conduct Committee* at [82]).
- [27] When dealing with integrity and behavioural issues there is never any certainty that, short of exclusion from a profession, a person will not reoffend. This Tribunal must carefully weigh the circumstances. It is appropriate to place an element of considered trust in a practitioner who has shown the capacity and willingness to rehabilitate.

The Tribunal will exclude Mr Aucamp from the profession

- [28] Mr Aucamp held a licence that gave him privileges. They included being one of a narrow class of persons entitled to provide immigration advice; he had a status clients could rely on, knowing that the Act and the Code of Conduct enforced professional standards. Immigration New Zealand too would treat him as a trusted professional, relying on his status under the Act.
- [29] To enjoy those privileges, licensed immigration advisers must accept the discipline of complying with the Act and the Code; which require professional behaviour. Mr Aucamp has neither met those standards or indicated contrition and a commitment to those standards.

- [30] If there is any prospect of rehabilitation it can only be after Mr Aucamp has invested in gaining the knowledge to provide services at a standard much higher than is evident in this complaint. Accordingly, Mr Aucamp will be prohibited from applying for a licence again until he completes the entry requirements for the profession, and complies with the orders of the Tribunal. However, he should not assume the Registrar would ever consider he is fit to hold a licence. Fitness is an issue for the Registrar, not the Tribunal. He would be unwise to embark on training without discussing that issue with the Registrar.

Mr Aucamp's financial position

- [31] Ms Adams sought access to information relating to Mr Aucamp's financial position. The Tribunal set out its view of the matter in a direction. The direction also gave Mr Aucamp the opportunity to reflect on the effect of his financial position and provide submissions. I repeat the principles expressed in the direction, as they are relevant to this decision.

- [32] In other cases the Tribunal has set out the principles relating to how a person's financial circumstances affect orders made under section 51 of the Act. *BN and MN v Hakaoro* [2013] NZIACDT 64 (www.justice.govt.nz) is an example. The first point is that the principles that apply to a person's means when considering criminal sanctions are different from orders the Tribunal makes. 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:

[32.1] Is not a provable debt in bankruptcy; and

[32.2] Is not discharged when a bankrupt is discharged from bankruptcy.

- [33] In contrast, 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. An order in favour of a complainant or other person is simply a civil judgment debt, and the party can file it in the District Court for enforcement. A civil judgment debt is provable in a bankruptcy, and discharged with the bankruptcy.

- [34] It follows that of the financial orders the Tribunal could make in the present case:

[34.1] Mr Aucamp's financial circumstances will, as a matter of discretion, potentially be relevant to any financial penalty, but

[34.2] Potential orders in favour of the complainant or her family for the refund of fees or compensation are on the merits, without regard to Mr Aucamp's means.

- [35] Orders for costs are discretionary. However, a party's means in a civil process are not usually a relevant factor, though the parties' views may have a significant bearing as costs usually have to be claimed before they are awarded.

Refund of fees and compensation

- [36] The potential orders in favour of Ms Adams and her parents are:

[36.1] Refund of fees in whole, or in part;

[36.2] Costs; and

[36.3] Reasonable compensation.

- [37] The orders necessarily relate to the grounds of complaint upheld. Materially:

The complainant

[37.1] The ground of complaint was that Mr Aucamp through lack of care filed an application that did not qualify, and some months of delay in migrating resulted from the lack of care;

[37.2] Then Mr Aucamp failed to communicate adequately;

[37.3] When Mr Aucamp embarked on a strategy to work around his lack of care, resulting in the non-qualify application and delay. He did not have a written agreement as required;

[37.4] Next Mr Aucamp threatened to make a malicious and unfounded complaint to Immigration New Zealand.

The complainant's parents

[37.5] Mr Aucamp charged Ms Adams parents double (\$1,250 each), despite his former supervisor advising him against doing so, and suggesting he review his charging practices. He belatedly attempted to refund the money.

[37.6] Mr Aucamp did not have a written agreement in relation to an expression of interest he prepared for Ms Adams parents.

[38] There are three components to Ms Adams claim for the refund of fees and compensation included in the sum of \$16,040.00:

[38.1] Mr Aucamp's professional fees of \$11,940.

[38.2] Immigration New Zealand and NZQA application fees of \$3,740.

[38.3] The cost of repeating a medical examination due to delay \$360.

[39] The Immigration New Zealand and New Zealand Qualifications Authority fees of \$3,740 can be put to one side. They were an inevitable expense of Ms Adams and her family migrating to New Zealand, and not caused by or added to due to Mr Aucamp's failure to maintain professional standards.

[40] The cost of the repeated medical examination arose directly out of the findings against Mr Aucamp, namely delay resulting from his carelessness.

[41] In relation to the professional fees, in my view Mr Aucamp should refund all of them. I view the instructions relating to Ms Adams, her husband, and her parents as a combined matter. All of them were entitled to be treated with respect, fairness, and receive professional standards of service delivery. Instead, Mr Aucamp turned what ought to have been a positive migration experience into a distressing and unpleasant experience. While ultimately their immigration objectives were reached, Mr Aucamp:

[41.1] Delayed the family's migration through lack of care;

[41.2] He did not communicate with them properly;

[41.3] He backdated an agreement in an attempt to breach his promise not to charge more fees following his carelessness;

[41.4] He double charged Ms Adams' parents despite collegial advice he was wrong to do so;

[41.5] For parts of his work he failed to comply with the client engagement processes demanded by the Code of Conduct;

[41.6] When required to account before the Tribunal, he did not admit his failings, but instructed his lawyer to cross-examine Ms Adams on matters, though he was not going to give evidence; and served her with draft District Court proceedings.

[42] It is unconscionable that Mr Aucamp should be paid anything for his services, given the complete failure to deliver what the Act and Code of Conduct promised to his clients; namely respectful and professional services.

[43] Ms Adams has not quantified the effect of the delay in her family's migration. In addition to the refund of fees, Ms Adams and her family are entitled to an award in the nature of general damages, as recompense for the treatment they received and Mr Aucamp's failure to achieve migration objectives promptly through his carelessness. The Tribunal uses the award of general damages sparingly, as it must be distinct from the jurisdiction to award a monetary

penalty. However, in this case for the reasons discussed below there will be no monetary penalty, so the risk of double imposition does not arise. Regardless, the award will be modest, in the sum of \$4,500 and only for Ms Adams (the delay and abusive conduct was primarily affected, and was directed at her).

[44] The form of the order will be:

[44.1] Ms Adams will be awarded:

[44.1.1] \$9,440.00 being the balance of the professional fees (excluding disbursements) paid by her;

[44.1.2] \$360 being compensation, for the cost of the repeated medical examination; and

[44.1.3] \$4,500 being compensation, quantified as in the nature of general damages.

[44.2] Mr Robert Adams (he is Ms Adams father and entered the agreement for the services relating to him and his wife) will be awarded \$2,500 (the full amount paid for professional fees he paid).

Monetary penalty and costs

[45] The total monetary award in favour of the Adams family against Mr Aucamp is \$16,800.00. For the reasons discussed, those orders are required, regardless of Mr Aucamp's means.

[46] Putting Mr Aucamp's means to one side, the starting point for a financial penalty would be \$7,500, in addition to the other orders. Given Mr Aucamp's absence of contrition, and his response to the complaint, it would likely also be the penalty. There are no evident mitigating factors. Mr Aucamp's financial position would potentially allow some discount, however, given that he has not even seen fit to provide submissions on sanctions that would be by no means assured. Some discount might be provided because Mr Aucamp will be excluded from the profession.

[47] The Tribunal upheld the complaint, Mr Aucamp did not admit well-founded allegations, he failed to give evidence, but participated in the hearing by instructing counsel to cross-examine Ms Adams; Mr Aucamp could expect to be ordered to pay costs.

[48] Costs are a usual part of the professional disciplinary process, and provided for in section 51(1)(g) of the Act; that includes the costs of the Tribunal hearing the complaint. The section is a somewhat extended version of the power that commonly applies in professional disciplinary jurisdictions.

[49] 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.

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

[51] 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.

- [52] 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 that the purpose of section 51(1)(g) is the same in effect as that applied in the authorities discussed. The costs of investigation, prosecution, and the costs of the Tribunal are all part of costs awards.
- [53] Between the costs and the monetary penalty Mr Aucamp could expect an award of an amount that is no less than the \$16,800 awarded as the refund of fees, and compensation.
- [54] These are matters where the Tribunal has some discretion; however, impecuniosity in itself, would not usually justify a lower award. Nonetheless, I consider it is justifiable to have regard to the views of the Registrar, given that she protects the public interest, and to Ms Adams in as far as she is affected.
- [55] The Registrar has appropriately recognised, denunciation through a financial penalty is important and appropriate. She has also responsibly recognised that redressing the immediate harm to Ms Adams and her family due to Mr Aucamp's not delivering what the Act and Code of Conduct promised them should have priority. The Registrar has not sought costs.
- [56] Ms Adams has primarily focused on the fees, and has not quantified costs and compensation.
- [57] In all the circumstances, my view is that Mr Aucamp's means are such that there will be difficulty in successfully enforcing the orders for refunding fees, and compensation immediately. It is appropriate to make that the focus, and make no other orders for a financial penalty or costs.
- [58] However, in doing so I emphasise that Mr Aucamp is excluded from the profession; while it is not possible to make an order that operates as a lifetime ban on applying for a licence, Mr Aucamp would always have to establish he was a fit person to hold a licence. His disciplinary history would be taken into account, and that would be a matter for the Registrar to consider. It suffices to say, as far as the circumstances the Tribunal can foresee go; Mr Aucamp is excluded from the profession.

Determination and Orders

- [59] Mr Aucamp is:
- [59.1] Censured;
- [59.2] Ordered to pay to Ms Adams:
- [59.2.1] \$9,440 being a refund of the balance of the professional fees paid by her;
- [59.2.2] \$360 being compensation the cost of the repeated medical examination;
- [59.2.3] \$4,500 being compensation.
- [59.3] Ordered to pay Robert Adams \$2,500 being the refund of fees.
- [59.4] Pursuant to section 51(1)(e) of the Act, Mr Aucamp is prevented from applying for any category of licence under the Immigration Advisers Licensing Act 2007 (or any Act replacing it) until:
- [59.4.1] he has complied with all orders made by this Tribunal, and;
- [59.4.2] enrolled in and been issued with a Graduate Diploma in New Zealand Immigration Advice (Level 7).
- [60] The order to make payment takes immediate effect.
- [61] The Tribunal reserves leave for the Registrar or Mr Aucamp to apply to vary the orders relating to the Graduate Diploma in New Zealand Immigration Advice (Level 7), in the event the qualification changes, or there are alternative qualifications available. For the reasons

discussed, this decision does not imply Mr Aucamp would meet the fitness requirements to hold a licence. That is not a decision for the Tribunal.

DATED at Wellington this 14th day of September 2016.

G D Pearson
Chair