

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

Decision No: [2016] NZIACDT 56

Reference No: IACDT 028/14

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

BY **The Registrar of Immigration Advisers**
Registrar

BETWEEN **Jinhee Kim**
Complainant

AND **Kimberly Eyon Hee Kim**
Adviser

DECISION
(SANCTIONS)

REPRESENTATION:

Registrar: Ms F Mohammed, lawyer, MBIE, Auckland.

Complainant: In person.

Adviser: Mr S Laurent, lawyer, Laurent Law, Auckland.

Date Issued: 20 September 2016

DECISION

Introduction

- [1] The Tribunal upheld this complaint in a decision dated 22 June 2016: *Kim v Kim* [2016] NZIACDT 32 (www.justice.govt.nz). The Tribunal found Ms Kim breached her professional obligations:
- [1.1] The complainant sought a long-term business visa and engaged Ms Kim to assist. The complainant proposed to migrate from South Korea to New Zealand with her family.
- [1.2] Ms Kim breached clauses 1.5(b), and 3 of the 2010 Code:
- [1.2.1] The agreement for providing her services did not contain an adequate description of the services.
- [1.2.2] It conveyed that Ms Kim's practice had ownership and control of client information to an extent that misrepresented the law and Ms Kim's professional duties to her client.
- [1.3] Section 348(b) of the Immigration Act 2009 required a statement setting out details for the verification of information, which Ms Kim failed to complete; she breached clause 2.1(b) of the 2010 Licensed Immigration Advisers Code of Conduct (the Code).
- [1.4] Ms Kim prepared, but did not send, copies of invoices to the complainant; she breached clause 8(e) of the Code.
- [1.5] She also made a false statement to ensure her fee was paid, and thereby engaged in dishonest and misleading behaviour which is a ground for complaint under section 44(2)(d) of the Immigration Advisers Licensing Act 2007 (the Act).
- [1.6] Ms Kim breached clause 1.1(a) of the 2010 Code, as she failed to provide her client with adequate advice, and accordingly, failed to provide her services with due care, diligence and professionalism.

The Parties' Positions on Sanctions

The Registrar's position

- [2] The Registrar took the view that a restorative approach was open in this case; if Ms Kim acknowledged her errors.
- [3] The Registrar took the view that the sanctions would potentially be:
- [3.1] Censure or caution;
- [3.2] An order for the repayment of all or part of the fees and expenses;
- [3.3] Compensation; and
- [3.4] Either a requirement to complete the Graduate Diploma in Immigration Advice; or
- [3.5] Cancellation of licence, in conjunction with an opportunity to apply for a provisional licence and a requirement to complete a Graduate Diploma in Immigration Advice.

The Adviser's position

- [4] Through her counsel, Ms Kim acknowledged and accepted the adverse findings. She also asked for consideration that the complaint concerned the period from 2011 to early 2013, and since then she has practised successfully and instituted changes in her practice.

- [5] In relation to the potential sanctions, Ms Kim acknowledged that she made a dishonest representation, and it could potentially cause the cancellation of her licence; she requested that the Tribunal consider a lesser intervention.
- [6] Ms Kim accepted that a financial penalty was appropriate, and offered a full refund of fees to the complainant, notwithstanding that she had provided significant services.
- [7] She also accepted she should complete part or all of the Graduate Certificate in Immigration Advice, as directed by the Tribunal.

The Complainant's reply

- [8] The complainant provided a significant volume of material; it is not clear that all of it relates to this decision on sanctions. The complainant did question whether Ms Kim has practised since the complaint without incident, but did not provide evidence to the contrary.
- [9] The complainant expressed concern that her and her family's migration was not complete; they still hold temporary visas. She sought unspecified compensation, the refund of fees, and sought to have the Tribunal improve their immigration situation.

Discussion

Perspective

- [10] The Tribunal gives considerable weight to the views of the Registrar in respect of the appropriate sanctions. That is particularly so in relation to issues that concern competence and judgement. The Registrar has the benefit of dealing with advisers in relation to licence renewals, and holds the power to inquire into the standards in an adviser's practice.
- [11] Looking at one or two complaints in isolation often tells little of the standards of a licensed immigration adviser's day-to-day practice, and can create a distorted impression.
- [12] The starting point, as Ms Kim recognises, is that the false information and consequent finding of dishonest and misleading behaviour would result in orders affecting her licence. Indeed, without unqualified acceptance of the wrongdoing, and commitment to change, exclusion from the profession is the inevitable outcome. It has been a recurring experience for this Tribunal to have to exclude licensed immigration advisers from the profession, who when called to account for their unprofessional conduct, defend it and at best, grudgingly accept the inevitability of some consequences. In doing so, they make it evident that their understanding of, and commitment to the obligations that the Act and the Code of Conduct impose on them as trusted professionals is lacking. When there is a lack of insight, even after facing an adverse decision of the Tribunal in relation to a serious complaint, it would be naïve to think the practitioner will bring any greater insight to bear in the future when dealing with clients.
- [13] Professional standards include an absolute duty of honesty, and often require a practitioner to place a client's interests above the practitioner's commercial interests. Where there has been an isolated lapse from those standards, the Tribunal considers the potential for a restorative approach.
- [14] In some cases, conduct or a pattern of conduct is so egregious that exclusion from the profession is the only option that can deliver the public protection promised by the Act. However, the authorities indicate that it is a "last resort" to deprive a person of the ability to work as a member of their profession. 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 [13] – [14].
- [15] Rehabilitation of a practitioner is an important objective when appropriate (*B v B* HC Auckland, HC4/92, 6 April 1993). In *Patel v Complaints Assessment Committee* HC Auckland CIV-2007404-1818, 13 August 2007 at [30]-[31], the Court stressed that when imposing sanctions in the disciplinary process applicable to that case, it is necessary to consider the "alternatives

available short of removal and explain why lesser options have not been adopted in the circumstances of the case”.

- [16] The purpose of professional disciplinary proceedings was affirmed by the Supreme Court in *Z v Dental Complaints Assessment Committee* [2008] NZSC 55 at [97]:

[T]he 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.

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

[17.1] Protecting the public: section 3 of the Act states “[t]he purpose of this Act is to promote and protect the interests of consumers receiving immigration advice ...”

[17.2] 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.

[17.3] Punishment: the authorities, including *Z v Dental Complaints Assessment Committee* (at [1], [65], [70] & [149]-[153]), emphasise that punishment is not the 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]).

[17.4] 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).

Ms Kim's future in the profession

- [18] There are a number of important factors arising in Ms Kim's situation on the facts before the Tribunal. As observed, Ms Kim is responsible for a serious breach of her professional obligations. However:

[18.1] The Registrar, who is in a position to have a better picture than the Tribunal has from a single complaint, has treated this complaint as an isolated matter. I accept the complainant's point that the Tribunal can have no absolute certainty that this perspective is correct; but the Tribunal must act on evidence, not speculation.

[18.2] Ms Kim has expressed an unqualified acceptance of the Tribunal's view of her wrongdoing, and committed to never repeating the conduct.

[18.3] I have regard to the following matters that give the Tribunal some assurance Ms Kim's expression is more than a convenient self-serving statement:

[18.3.1] She has been in immigration practice for some 22 years;

[18.3.2] The complaint is, as far as the Tribunal is aware, the only incident of Ms Kim failing to maintain professional standards;

[18.3.3] The Registrar issued Ms Kim with a full licence on 8 April 2009, and has since renewed her licence annually 7 times. Accordingly, she is in a position to know of Ms Kim's practice standards. She has formed the view it is open to allow Ms Kim to continue practising with a full or provisional licence.

[18.3.4] As far as the Tribunal can assess, Ms Kim's contrition and commitment to change is genuine.

[18.3.5] Ms Kim has already instituted changes in her practice and has completed Continuing Professional Development beyond the minimum requirements.

[18.3.6] Ms Kim accepts she should complete further training, and compensate the complainant.

[19] I am satisfied this is a case where a restorative approach is open. I have considered whether a full or provisional licence is the best approach. Given Ms Kim's lengthy history of successfully practising with a full licence and the Registrar's views, I am satisfied a full licence is appropriate. Accordingly, there will be no order affecting Ms Kim's licence.

Orders in favour of the complainant

[20] Ms Kim offered to make a full refund of fees to the complainant, though she earned some, potentially all, of the fees. I have taken this concession from Ms Kim into account when deciding that she should continue to hold a full licence. There will be an order for the refund of all of the fees paid (excluding disbursements).

[21] The approximate amount is \$10,000; it was denominated in Korean currency. The order will be for \$10,000 and it is not necessary to analyse fully the extent to which the sum is respectively a refund of fees or compensation, given it is a consent order.

[22] The complainant has sought unspecified compensation. It is necessary to relate compensation to damage arising from the grounds of complaint the Tribunal upheld. In my view:

[22.1] The ground of complaint relating to the written agreement did not cause damages beyond the fees paid;

[22.2] The failure to comply with section 348(b) did not include a finding that any incorrect information was relayed, and accordingly there was no financial loss arising from that breach;

[22.3] The failure to send out invoices resulted in no monetary loss or consequences beyond the fees paid;

[22.4] The false statement relating to the fees had no monetary consequences beyond the fees.

[23] Accordingly, the only element of the grounds of complaint with potential monetary loss was the advice provided after Immigration New Zealand made an adverse decision regarding the complainant and her family's migration. There is no evidence that the inadequacy of advice regarding rights of appeal, and the legal obligations to leave New Zealand resulted in monetary loss. The complainant has written and said that, at least until recently, her family have remained in New Zealand. It seems likely that they have taken independent advice, and Immigration New Zealand has offered some concession. The adverse decision from Immigration New Zealand did not arise from any of the grounds of complaint, and there is no evidence the steps that followed were more costly because of lack of sound advice from Ms Kim following the adverse decision.

[24] Accordingly, on the material before me, the Tribunal can only award compensation beyond the fees if assessed in the manner of general damages. The Tribunal takes some care to limit compensation assessed as general damages, as there is a risk of such assessments becoming a form of penalty.

[25] If assessing the refund of fees and compensation without Ms Kim's offer to refund fees in full, an award of all of the fees would involve a significant component assessed as general damages. Ms Kim did a substantial amount of work, and the complaint did not establish that it was unsatisfactory. Accordingly, if I awarded compensation beyond the \$10,000 that Ms Kim offered, it would be doubling up elements of the compensation.

[26] Accordingly, the order will be for payment of \$10,000 by consent, as compensation and the refund of fees.

[27] This Tribunal has no power to make decisions regarding the immigration rights of the complainant and her family. They are matters for Immigration New Zealand, the Immigration and Protection Tribunal, and the Minister.

Costs

[28] Neither the complainant nor the Registrar filed a schedule and claimed costs; accordingly, there will be no award.

Training

[29] The Registrar sought orders that Ms Kim complete the Graduate Certificate in New Zealand Immigration Advice; Ms Kim consents to that.

[30] The commitment to completing the course is a significant element in satisfying me the Tribunal can and should take a restorative approach. Furthermore, the course will give Ms Kim the benefit of high-level training directed to practice standards, and skills.

Monetary Penalty

[31] The final component of the sanctions is a monetary penalty. It is necessary to impose a significant penalty. The findings against Ms Kim were on the border where exclusion from the profession becomes inevitable, denunciation and deterrence must be part of the Tribunal's response.

[32] The payment of \$10,000 to the complainant and completing the full training required for entry to the profession are onerous; however, the Tribunal has not made an order that will change Ms Kim's ability to continue in practice without interruption, or restriction.

[33] The starting point for sanctions, given the findings, would be cancellation of licence, and a monetary penalty of \$7,500. Given the very significant concession that Ms Kim may continue in practice without interruption due to the mitigating factors, in my view imposing the full monetary penalty is an appropriate outcome to give proportion to the denunciation and deterrence that is necessary in this decision. Accordingly, there will be a monetary penalty of \$7,500.

Caution

[34] The Tribunal cautions Ms Kim that this decision is significantly more favourable than it otherwise would be without her commitment to change, following the Tribunal's findings. It commends her for her commitment to restoration. The Tribunal also warns her that it has accepted her commitment, and any failure to honour that may well have severe consequences.

Order

[35] The Tribunal:

[35.1] Cautions Ms Kim in the terms set out above;

[35.2] Orders that:

[35.2.1] Ms Kim pay the complainant \$10,000; and

[35.2.2] Pay a monetary penalty of \$7,500.

[35.3] Requires her to enrol in and complete the Bay of Plenty Polytechnic's Graduate Diploma in New Zealand Immigration Advice (Level 7).

[36] Ms Kim is to enrol in the course as soon as a place is available to her; and successfully complete the course in the time provided by the Bay of Plenty Polytechnic.

[37] The Tribunal reserves leave for Ms Kim or the Registrar to apply to vary the orders relating to training; and draws Ms Kim's attention to section 51(4) of the Immigration Advisers Licensing Act 2007. That provision has the effect of cancelling her licence if she does not demonstrate compliance with the order, to the Registrar's satisfaction.

DATED at Wellington this 20th day of September 2016.

G D Pearson
Chair