IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2018] NZIACDT 50

Reference No: IACDT 009/16

IN THE MATTER	of a referral under s 48 of the Immigration Advisers Licensing Act 2007
BY	**THE REGISTRAR OF IMMIGRATION ADVISERS** Registrar
BETWEEN	**JENELLE GREEN** Complainant
AND	**BENJAMIN NEIL STEWART DE'ATH** Adviser

DECISION
(Sanctions)
Date: 13 December 2018

REPRESENTATION:

Registrar:	R Denmead, counsel
Complainant:	In person
Adviser:	P Moses, counsel

INTRODUCTION

[1] The Tribunal upheld this complaint in a decision on 1 November 2018 in *Jenelle Green v Benjamin Neil Stewart De'Ath* [2018] NZIACDT 43. The Tribunal found Mr De'Ath had breached his professional obligations.

[2] The complaint arose out of Mr De'Ath's representation of Mr S in relation to a work visa application. The prospective employer was Mrs Jenelle Green who, together with her husband, owns a dairy farm. They paid his fees. For reasons which are not relevant, the processing of the visa application by Immigration New Zealand was delayed, but it was ultimately successful.

[3] The complaint against Mr De'Ath largely arose out of his misunderstanding as to whom he owed the professional obligations under the Immigration Advisers Licensing Act 2007 (the Act) and the Code of Conduct 2014 (the Code).

[4] This misunderstanding occurred because of the tripartite nature of Mr De'Ath's contractual relationships. Mr De'Ath had contractual relationships with both Mr S (as to immigration and pastoral care matters) and with the Greens (as to recruitment and financial matters). The Tribunal noted at [47] of the decision that Mr S had not signed the "Candidate Terms of Business", so whether there was in fact any binding written agreement between Mr De'Ath and Mr S was questionable. Mr De'Ath was paid for all his services, including the immigration matters on behalf of Mr S, by the Greens. That led him to overlook his professional obligations to Mr S.

[5] The following Code violations were found against Mr De'Ath:

(1) Failed to explain the summary of licensed immigration advisers' professional responsibilities to Mr S and failing to advise him how to access a full copy of the Code before entering into a written agreement with him, in breach of cl 17(b).

(2) Failed to ensure there was a written agreement containing a record that a summary of the advisers' responsibilities had been provided and explained to Mr S, in breach of cl 19(m).

(3) Failed to ensure that Mr S signed the agreement or confirmed in writing his acceptance, in breach of cl 18(c).

(4) Failed to ensure that there was a written agreement with Mr S containing a written authority to act on his behalf, in breach of cl 19(b).

(5) Failed to maintain a record of all communications with Mr S and the Greens, in breach of cl 26(a)(iii).

[6] The Code violations are a ground for complaint under s 44(2)(e) of the Act.

SUBMISSIONS

[7] Counsel for the Registrar, Ms Denmead, notes that the Tribunal had found there had been a significant breach of the Act and the Code. The Tribunal had found it was not a one-off isolated mistake as there had been multiple violations over the period Mr De'Ath was representing Mr S. There had been a sustained failure to meet the standards set by the Code for about two months. Ms Denmead submits that the appropriate sanctions should be:

(1) caution or censure; and

(2) an order for payment of a penalty.

[8] There are no submissions from the complainant.

[9] Mr Moses, on behalf of Mr De'Ath, submits that Mr De'Ath's decision as to his obligations under the Code in relation to Mr S was not unreasonable or misguided, based on what was known at that time. The Tribunal had in earlier decisions taken the view that an immigration applicant's employer may need to be treated as a client for the purpose of the Act and the Code. Mr De'Ath had been led to believe that it was essential that he complied with the Code in relation to contracting with the employer and the fee payer.

[10] Where Mr De'Ath fell short was in his belief that he could adopt a slimmed down version of the engagement process with the immigration applicant. This was not done with any intention to shirk his obligations or to prejudice Mr S, but rather not to burden him with paperwork that was irrelevant, given that he was not paying the adviser's fees. Mr S did not speak English to a high standard.

[11] Furthermore, the Code is extraordinarily prescriptive in regard to record keeping. While clearly it would be best practice for professionals to record all advice in writing, that would likely depend on whether there was actual prejudice to the client and whether the client contested that certain advice had been given. In this instance, the lack of written confirmation of advice did not prejudice Mr S or the Greens.

[12] The Tribunal would also need to be mindful of the totality principle, given the three complaints against Mr De'Ath recently upheld by the Tribunal.[1]

[13] In relation to whether there should be further training, Mr De'Ath has already shown the requisite understanding of the deficiencies of his process. He did so on receipt of legal advice and prior to the complaints being upheld. He has a legal qualification and completed the then available Graduate Certificate of Immigration Advice at the Bay of Plenty Polytechnic. It would not therefore be helpful to require him to undertake additional training.

[14] Mr De'Ath has already had to contend with the publication of the Tribunal's decision unredacted. That has a strong punitive effect. He has also had to bear the costs of legal representation, which can be more significant than a financial penalty.

[15] Mr De'Ath had instructed that this complaint and the legal advice he had received had led him to review his approach to Code compliance and had provided him with the relevant knowledge of file management and engagement processes. He had recognised his errors two years ago when the complaint was filed in the Tribunal. It is further submitted that the relative gravity of the errors are at the lower end of the spectrum of seriousness. Accordingly, the appropriate sanction should be:

(1) censuring Mr De'Ath; and

(2) imposing a moderate financial penalty.

JURISDICTION

[16] The Tribunal's jurisdiction is set out in the Act. Having heard a complaint, the Tribunal may take the following action:[2]

> **50 Determination of complaint by Tribunal**
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> After hearing a complaint, the Tribunal may—
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> (a) determine to dismiss the complaint:
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> (b) uphold the complaint but determine to take no further action:
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> (c) uphold the complaint and impose on the licensed immigration adviser or former licensed immigration adviser any 1 or more of the sanctions set out in section 51.

[1] *Green v De'Ath* [2018] NZIACDT 43, *Foley v De'Ath* [2018] NZIACDT 44, *Carley v De'Ath* [2018] NZIACDT 45.
[2] Immigration Advisers Licensing Act 2007.

[17] The sanctions that may be imposed are set out at s 51(1):

> **51 Disciplinary sanctions**
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> (1) The sanctions that the Tribunal may impose are—
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> (a) caution or censure:
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> (b) a requirement to undertake specified training or otherwise remedy any deficiency within a specified period:
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> (c) suspension of licence for the unexpired period of the licence, or until the person meets specified conditions:
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> (d) cancellation of licence:
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> (e) an order preventing the person from reapplying for a licence for a period not exceeding 2 years, or until the person meets specified conditions:
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> (f) an order for the payment of a penalty not exceeding $10,000:
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> (g) an order for the payment of all or any of the costs or expenses of the investigation, inquiry, or hearing, or any related prosecution:
>
> (h) an order directing the licensed immigration adviser or former licensed immigration adviser to refund all or any part of fees or expenses paid by the complainant or another person to the licensed immigration adviser or former licensed immigration adviser:
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> (i) an order directing the licensed immigration adviser or former licensed immigration adviser to pay reasonable compensation to the complainant or other person.

[18] In determining the appropriate sanction, it is relevant to note the purpose of the Act:

> **3 Purpose and scheme of Act**
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> The purpose of this Act is to promote and protect the interests of consumers receiving immigration advice, and to enhance the reputation of New Zealand as a migration destination, by providing for the regulation of persons who give immigration advice.

[19] The focus of professional disciplinary proceedings is not punishment, but the protection of the public:[3]

> It is well established that professional disciplinary proceedings are civil and not criminal in nature. That is because 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.
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> …

[3] *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151] (citation omitted).

> The purpose of disciplinary proceedings is materially different to that of a criminal trial. It is to ascertain whether a practitioner has met appropriate standards of conduct in the occupation concerned and what may be required to ensure that, in the public interest, such standards are met in the future. The protection of the public is the central focus.
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> …
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> Lord Diplock pointed out in *Ziderman v General Dental Council* that the purpose of disciplinary proceedings is to protect the public who may come to a practitioner and to maintain the high standards and good reputation of an honourable profession.

[20] Professional conduct schemes, with their attached compliance regimes, exist to maintain high standards of propriety and professional conduct not just for the public good, but also to protect the profession itself.[4]

[21] While protection of the public and the profession is the focus, the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty.[5]

DISCUSSION

[22] These complaints, particularly the first four, essentially arise out of the same mistake by Mr De'Ath. He failed to recognise that Mr S was a client, perhaps the only client, for immigration purposes.

[23] The issue in the substantive decision had been the extent of obligations owed to Mr S. The Tribunal found that the full extent of Mr De'Ath's professional obligations under the Act and the Code were owed to Mr S. That is not disputed.

[24] To some extent the fifth complaint, inadequate record keeping, also relates to the failure to recognise Mr S as the immigration client. However, it goes beyond that as there must be a file record of all material communications, written and oral, with "any other person". This would include the Greens, even if they are not a client to whom the Code obligations are owed.

[25] I do not therefore accept the submission of Mr De'Ath's counsel that Mr De'Ath's approach to the obligations under the Code was not unreasonable or misguided. This argument is based on the Authority's jurisprudence in earlier decisions that the professional obligations of a licensed immigration adviser might extend beyond purely immigration services to include ancillary services such as recruitment. Whether or not Mr

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[4] *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724–725 & 727; *Z v Dental Complaints Assessment Committee* at [151].

[5] *Patel v The Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at [28].

De'Ath owed the same obligations to the Greens is not material. The critical point in this case is that Mr De'Ath overlooked his obligations to the visa applicant, to whom he should have realised he owed professional obligations, even if he took no fee from him. I regard Mr De'Ath's failure to recognise that as unreasonable and misguided. Nor do I regard it as a good reason to overlook Code obligations to Mr S that Mr De'Ath wished to spare him irrelevant paperwork he might not understand. The paperwork at issue here was not irrelevant to Mr S but was designed to protect him.

[26] I accept though that it is relevant to the level of sanctions that the procedural and record keeping failures here did not prejudice either Mr S or the Greens. The visa application was ultimately successful.

[27] While the violations relate to procedural and record keeping deficiencies, they are not unimportant. They arise from what was a fundamental mistake. As I commented in the earlier decision:[6]

> [54] However, I do not accept that Mr De'Ath's infringements of the Code can be dismissed on any *de minimis* basis. The failure to recognise Mr S as the client to whom he owed statutory and Code obligations is a significant breach of the Act and the Code. It is not a one-off isolated mistake, as it has led to multiple violations over the period he was representing Mr S. There was a sustained failure to meet the standards set by the Code over a period of about two months. Nor is this an isolated case for Mr De'Ath, as he candidly concedes.[7]

[28] Counsel for Mr De'Ath contends that the Code is extraordinarily prescriptive in regard to record keeping, such as the obligation to provide advice in writing. It is submitted that consistently complying with the obligation is onerous for advisers and some slippage is to be expected, given the ordinary pressures of professional practice.

[29] I agree that it is prescriptive, but not that it is unduly so. There is good reason for an obligation that all material communications, particularly with the client, should be in writing and that a copy should be kept on the file and therefore available for inspection by the Authority. However, the reality of practice is recognised. It is not every single breach that would warrant a disciplinary process. The breach, or more likely multiple breaches, would have to be sufficiently serious or systemic to warrant a disciplinary process.

[30] Mr Moses submits the totality principle is relevant given the Tribunal's recent upholding of three complaints (or sets of complaints) against Mr De'Ath. This is essentially a criminal law concept whereby the just cumulative sentence for multiple

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[6] *Green v De'Ath* [2018] NZIACDT 43.
[7] Affidavit Mr De'Ath, sworn 16 November 2016 at [42].

offences should reflect the total wrongdoing. This can require the downward adjustment of sentences for individual charges. I do not see that as having any relevance to the sanctions here, as each of the three complaints concerns unrelated professional misconduct different in nature to each other.

[31] However, I do accept that the individual heads of complaint at issue in this complaint arise out of one fundamental mistake. To that extent the totality principle has relevance. Indeed, I do not propose to impose sanctions for individual heads of complaint.

[32] Furthermore, I will treat Mr De'Ath as a 'first offender' since all three complaints were determined against him at about the same time.

[33] It is inevitable that Mr De'Ath will be censured.

[34] I agree with Mr Moses that there is no need for further training given Mr De'Ath's history of training, his acknowledgment of wrongdoing and his rectification of the deficient contractual arrangements.

[35] The real issue is the level of a financial penalty. In my view, the penalty should be set at a relatively low level. I do not see the need to be punitive. There was no deliberate flouting of the Code. There was a misunderstanding as to whom the professional obligations were owed. The deficiencies have been recognised and rectified. On the other hand, I do regard the failure to recognise Mr S as the immigration client to be a significant professional deficiency. As a result, there were multiple violations of a procedural and record keeping nature over a period of two months. A penalty of $1,500 adequately reflects this.

OUTCOME

[36] Mr De'Ath is:

(1) censured; and

(2) ordered to pay a penalty of $1,500.

D J Plunkett
Chair