

**IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL**

Decision No: [2018] NZIACDT 51

Reference No: IACDT 001/18

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

**BY** **THE REGISTRAR OF  
IMMIGRATION ADVISERS**  
Registrar

**BETWEEN** **MARCELLE FOLEY of  
Immigration New Zealand**  
Complainant

**AND** **BENJAMIN NEIL  
STEWART DE'ATH**  
Adviser

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**DECISION  
(Sanctions)**

**Date: 19 December 2018**

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**REPRESENTATION:**

Registrar: S Carr, counsel

Complainant: R Garden, counsel

Adviser: P Moses, counsel

## INTRODUCTION

[1] The Tribunal partially upheld this complaint in a decision issued on 6 November 2018 in *Marcelle Foley v Benjamin Neil Stewart De'Ath* [2018] NZIACDT 44. The Tribunal found Mr De'Ath had breached his professional obligations.

[2] The complaint against Mr De'Ath, a licensed immigration adviser, arose out of his communications with the staff of Immigration New Zealand while representing one of his clients on a visa application.

[3] I dismissed the allegation of dishonest or misleading behaviour but found Mr De'Ath to have been unprofessional and disrespectful to the staff in making formal complaints alleging serious misconduct by the staff without having evidence in support, and in the language of his correspondence. This was a breach of cl 1 of the Code of Conduct 2014 (the Code) and a ground of complaint under s 44(2)(e) of the Immigration Advisers Licensing Act 2007 (the Act).

[4] Mr De'Ath alleged in a formal complaint made to Immigration New Zealand that Ms L, an immigration officer, had committed a criminal offence under s 342 of the Immigration Act 2009 in that she had provided false or misleading information in her record of a telephone interview with a former employer of Mr De'Ath's client. That former employer had denied making the statement attributed to him by Ms L, but Ms L continued to maintain that the statement had been made. Mr De'Ath had also threatened a private prosecution of Ms L for what he alleged to be her misuse of public funds. He did not elaborate how this could come about.

[5] Mr De'Ath's complaint against Ms L had been investigated by Ms M, a manager at Immigration New Zealand. He then made a complaint against Ms M. The allegation against Ms M was that she appeared to be trying to cover up for another officer and had a mindset that the disadvantaged migrant, Mr De'Ath's client, would leave New Zealand. I found the allegation of a cover-up of wrongdoing and a general intention to disadvantage migrants would amount to serious misconduct of an Immigration New Zealand manager.

[6] In respect of Ms L, I accepted there was a kernel of merit to Mr De'Ath's criticism of her. However, the more serious allegations within Mr De'Ath's formal complaints against both Ms L and Ms M had been made without evidence to substantiate them. While the threat of a private prosecution was unjustified and lacked an evidential foundation, I viewed it as spur of the moment nonsense which could not be taken seriously by Ms L.

[7] Once the complaint against Mr De'Ath had been filed by the Registrar in the Tribunal, Mr De'Ath provided a written apology to Ms M.

[8] I found it to be unprofessional and disrespectful to make complaints of serious misconduct without evidence in support. Furthermore, I considered Mr De'Ath's correspondence with Immigration New Zealand to be inadequately worded, intemperate, unnecessarily abrasive, accusatory and ill-advised. It amounted to personal attacks. Despite the extravagance of his language, I accepted that there was no personal *animus* and that his language was not abusive. Mr De'Ath had allowed his frustration at the treatment of his client to overwhelm his objectivity and detachment, which was unprofessional.

### **SUBMISSIONS**

[9] Counsel for the Registrar, Ms Carr, submits that the appropriate sanctions should be:

- (1) caution or censure; and
- (2) an order for payment of a penalty.

[10] The complainant's counsel, Ms Garden, essentially agrees with Ms Carr that the appropriate sanctions should be:

- (1) censure; and
- (2) an order for payment of a moderate penalty.

[11] The complainant takes issue with the submission made on behalf of Mr De'Ath that the Tribunal can have a significant degree of confidence that he understands his obligations and will be able to amend his conduct in the future. It is contended by the complainant that Mr De'Ath has continued to communicate with Immigration New Zealand in a similar manner. Illustrations of further unprofessional communications are said to be given in more recent emails from Mr De'Ath to Immigration New Zealand, copies of which were filed with the complainant's submissions.

[12] This raises a question as to whether these communications are admissible.

[13] Ms Garden submits that while they cannot be considered as part of the complaint, they can be taken into account in assessing the sanction. They are said to be relevant to assessing whether Mr De'Ath has insight and a commitment to addressing his failings. Mr Moses, on behalf of Mr De'Ath, objects to their admissibility. He contends that the complainant is suggesting, at least by implication, that Mr De'Ath is in further breach of

the Code and that his claim to have amended his conduct should be disregarded. Mr Moses submits that the complainant appears to be treating it as self-evident that the new correspondence shows additional breaches of the Code. That could only be determined by the Tribunal on a further referral by the Registrar once the usual process of investigation had been undertaken.

[14] I agree with Mr Moses that the additional communications are inadmissible for the purpose of showing Mr De'Ath has not learned his lesson. They have no relevance unless amounting to Code violations, which has not been assessed. That assessment could only be made if the Registrar lays another formal complaint relying on them.

[15] Mr Moses, in his submissions on sanctions to the Tribunal, notes that Mr De'Ath had already acknowledged his loss of objectivity. He had allowed his frustration with the conduct of the immigration officers to lead to unprofessional correspondence. However, he had not acted with malice.

[16] It is submitted that the Tribunal could be confident that Mr De'Ath understood his obligations under the Code and would be able to amend his conduct in the future. There was no lack of knowledge on his part as to his obligations, so the imposition of further training would not be beneficial. Mr De'Ath already has a legal qualification and has completed the previously available Graduate Certificate in Immigration Advice at the Bay of Plenty Polytechnic.

[17] As for the language of his communications, it is submitted that while immigration officers are entitled to be treated with respect, forceful criticism must clearly be permitted. It may even be required in the exercise of an adviser's role. Mr De'Ath acknowledges though that criticism needs to be expressed professionally.

[18] Mr De'Ath had already suffered the sanction of publication of his name and the findings against him by the Tribunal, which clearly has a strong punitive effect. This is a very significant sanction in its own right. Mr De'Ath also has to bear the costs of legal representation responding to the complaint.

[19] Mr Moses submits that the appropriate sanction should be:

- (1) censure; and
- (2) a moderate financial penalty.

## JURISDICTION

[20] The Tribunal's jurisdiction is set out in the Act. Having heard a complaint, the Tribunal may take the following action:<sup>1</sup>

### 50 Determination of complaint by Tribunal

After hearing a complaint, the Tribunal may—

- (a) determine to dismiss the complaint:
- (b) uphold the complaint but determine to take no further action:
- (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.

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

### 51 Disciplinary sanctions

- (1) The sanctions that the Tribunal may impose are—
  - (a) caution or censure:
  - (b) a requirement to undertake specified training or otherwise remedy any deficiency within a specified period:
  - (c) suspension of licence for the unexpired period of the licence, or until the person meets specified conditions:
  - (d) cancellation of licence:
  - (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:
  - (f) an order for the payment of a penalty not exceeding \$10,000:
  - (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:
  - (i) an order directing the licensed immigration adviser or former licensed immigration adviser to pay reasonable compensation to the complainant or other person.

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<sup>1</sup> Immigration Advisers Licensing Act 2007.

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

### 3 Purpose and scheme of Act

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.

[23] The focus of professional disciplinary proceedings is not punishment, but the protection of the public:<sup>2</sup>

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.

...

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.

...

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.

[24] 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.<sup>3</sup>

[25] 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.<sup>4</sup>

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<sup>2</sup> *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151] (citation omitted).

<sup>3</sup> *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724–725 & 727; *Z v Dental Complaints Assessment Committee* at [151].

<sup>4</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at [28].

## DISCUSSION

[26] I agree with the summation of the situation by Mr Moses. There was no malice by Mr De'Ath. He allowed his frustrations at what he perceived was the unfair treatment of his client to run away with him. While Mr De'Ath did not recognise any wrongdoing in his initial response to the complaint in his letter to the Authority, he promptly did so once the complaint had been made to the Tribunal. This is not a case where remorse was expressed belatedly in mitigation, following the Tribunal's decision.

[27] Mr De'Ath has apologised to one of the officers involved, but unfortunately has not offered an apology to the other officer, Ms L.

[28] As for further training, the Registrar does not seek this sanction and I accept Mr Moses' submission that it would be of little assistance. It is not necessary to protect the public interest. Mr De'Ath understands his obligation to be respectful in communications with Immigration New Zealand and has acknowledged his wrongdoing on these occasions.

[29] Given the overlapping nature of the heads of complaint at issue in this complaint, I will take into account the overall wrongdoing upheld in this complaint in imposing the total sanctions. Indeed, I do not intend to impose sanctions for individual heads of complaint at all.

[30] Notwithstanding three complaints having been upheld against Mr De'Ath, I will treat him as a 'first offender' in respect of each complaint since the Tribunal's three decisions are recent.<sup>5</sup> All of the conduct occurred before any complaint was upheld.

[31] The parties are largely in agreement as to the appropriate sanctions being censure and a moderate financial penalty.

[32] I propose to impose a formal caution rather than censure at this juncture. Immigration officers and managers should not be unduly sensitive to criticism, even where extravagantly expressed. Those representing prospective migrants sometimes need to be bold. That is part of their role. Their criticism of staff might be unfair on occasion. Such conduct would not necessarily cross the disciplinary threshold.

[33] In this case, however, Mr De'Ath's formal complaints against Ms L and Ms M, as well as his language, were clearly unprofessional and crossed the threshold. I will treat the multiple offending communications here as isolated, rather than systemic.

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<sup>5</sup> *Green v De'Ath* [2018] NZIACDT 43, *Foley v De'Ath* [2018] NZIACDT 44, *Carley v De'Ath* [2018] NZIACDT 45.

They arose out of the perceived failing of Ms L in respect of what one employer said to her on one occasion in relation to one client of Mr De'Ath. Accordingly, the appropriate sanction is a formal warning by way of a caution. If Mr De'Ath was to repeat such conduct, the sanction would be much more severe next time.

[34] The real issue is the level of a financial penalty. I have already observed that immigration officers must expect criticism from time to time and be robust in the face of it, even where it is unfair. While Mr De'Ath's zealotry crossed the disciplinary threshold here, it was not malicious, abusive or offensive. It was not in reality intimidating. The so-called threat of a private prosecution could not be taken seriously. The penalty will be set at a relatively low level. At \$750, it is intended to have a deterrent element but to be consistent with the warning I am giving Mr De'Ath, rather than be punitive.

## **OUTCOME**

[35] Mr De'Ath is:

- (1) cautioned; and
- (2) ordered to pay to the Registrar a penalty of \$750.

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D J Plunkett  
Chair