

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2019] NZIACDT 1

Reference No: IACDT 023/18

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **MICHAEL CARLEY of
Immigration New Zealand**
Complainant

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

**DECISION
(Sanctions)**
Date: 10 January 2019

REPRESENTATION:

Registrar: S Carr, counsel

Complainant: In person

Adviser: P Moses, counsel

INTRODUCTION

[1] The Tribunal partially upheld this complaint in a decision issued on 13 November 2018 in *Immigration New Zealand v De'Ath* [2018] NZIACDT 45. The Tribunal found that Mr De'Ath had been negligent and breached his professional obligations under the Immigration Advisers Licensing Act 2007 (the Act) and the Code of Conduct 2014 (the Code).

[2] The complaint against Mr De'Ath, a licensed immigration adviser based in New Zealand, arose out of his representation of 11 Filipino visa applicants.¹ Each of the applicants had engaged Mr De'Ath's company to obtain employment in New Zealand and then to pursue an immigration application on their behalf. Once the applicant arrived in the country, the company provided pastoral care services.

[3] Mr De'Ath's business model had relied on unlicensed people in the Philippines dealing directly with the applicants on immigration matters. It appeared to the Tribunal that those people were from a different Philippines company and were not staff of Mr De'Ath's company, but this was not entirely clear.

[4] The allegation by the Registrar, upheld by the Tribunal, was that Mr De'Ath either did not personally communicate at any time with the visa applicant or only did so after their application had been filed with Immigration New Zealand. He allowed unlicensed people in the Philippines to guide each applicant through the immigration process. This is a breach of both the Act and the Code.

[5] It is a practice known in the industry as "rubber stamping". Applications are completed and supporting documents are compiled by unlicensed people who deal directly with the applicant, with the adviser doing little more than lending his or her name to the immigration application. This is what happened here, though Mr De'Ath did communicate with some of the applicants after their applications were filed and was engaged with Immigration New Zealand in correspondence concerning some of them.

[6] Even after Immigration New Zealand formally raised with Mr De'Ath his lack of engagement being a breach of the professional obligations, he continued with the same business practice. Immigration New Zealand had sent him a formal letter expressing concern that he might not be meeting his professional responsibilities, due to the lack of direct communication with certain clients who were relying on unlicensed individuals based in the Philippines.

¹ Messrs B, M, L, S, G, C, F, E, V, A and D.

[7] In his discussions with Immigration New Zealand, Mr De'Ath accepted the need to change his business practice by arranging to have a licensed adviser based in the Philippines, but it took him about two years to achieve this. The formal letter was written in December 2016, yet he did not have a licensed adviser in Manila until December 2018. Some of the 11 applicants had engaged his company after the formal letter had been sent. Even in September 2017, Mr A's application was being dealt with by unlicensed people in the Philippines. However, there is no evidence before the Tribunal that the unlawful practice continued into 2018.

[8] Mr De'Ath was found to have:

- (1) Allowed unlicensed individuals to complete the client engagement process and to perform immigration services which should have been carried out by the adviser. Hence, he did not conduct himself in accordance with the Act.
- (2) Failed to personally obtain lawful informed instructions from the applicants.
- (3) Failed to ensure that a written agreement was provided to some of the applicants and, even where provided, failed to explain to some of them significant matters in the agreement before they signed it.
- (4) Failed to be diligent and to conduct himself with due care by submitting a fraudulent document for one applicant and multiple incomplete applications for another applicant.

[9] Mr De'Ath was found to have been negligent and to have breached cls 1, 2(e), 3(c), 18(a) and (b) of the Code.

SUBMISSIONS

[10] Counsel for the Registrar, Ms Carr, submits that the appropriate sanction should be:

- (1) caution or censure;
- (2) completion of the full Graduate Diploma in New Zealand Immigration Advice;
- (3) an order for payment of a penalty; and
- (4) an order for payment of a nominal contribution of \$3,000 towards the costs and expenses of the investigation and hearing.

[11] It is contended that the investigation was lengthy and complex since it involved a considerable number of applications and client files. As the Authority does not record time, the Registrar had been unable to compile a schedule of costs and expenses with any particularity.

[12] Counsel for Mr De'Ath, Mr Moses, submits that Mr De'Ath has shown a significant degree of maturity and insight. The Tribunal can have a large degree of confidence that he understands his obligations under the Code and will be able to amend his conduct in the future. At some considerable expense in both time and money, Mr De'Ath has placed one of his licensed immigration advisers in the Philippines to engage directly with the clients. This was not straightforward and took a long time, as the law of the Philippines had to be complied with as well as the New Zealand licensing regime. There is now a clear 'line in the sand' between recruiting and immigration matters, with the New Zealand licensed adviser dealing directly with the clients on all immigration matters.

[13] Mr Moses contends that it would not be a good use of Mr De'Ath's time to undertake further study, as sought by the Registrar, since he already understands the Code obligations and has acknowledged this by changing his business structure at a significant cost to his business.

[14] The Registrar's request that some investigation costs be imposed is unusual. Only very few complaints have resulted in such a sanction. This is because the Registrar is carrying out a public function in investigating complaints, for which he is already resourced, in part through the licensing fees levied on the advisers. Given the absence of time records, it would be problematic to fix a nominal sum and it is difficult to know the extent of the cost actually incurred. While Mr De'Ath is not opposed in principle to a cost order, it is difficult to agree to this without knowing the basis of the reasonableness of the \$3,000 sought.

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

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

[16] There is a statement from Mr De'Ath (4 December 2018). He accepts the Tribunal's findings in its substantive decision and acknowledges being responsible for not meeting the professional standards. Recognising this, he has now placed a licensed adviser in the Philippines. This was time consuming and costly to attend to. Mr De'Ath had to ensure compliance with Philippines law and obtain the requisite visa for the adviser.

[17] A senior officer of Federated Farmers has provided a letter of support. He states that Mr De'Ath is well regarded in the agricultural industry and provides a service which is critical to the dairy sector. He is regarded as an upstanding professional.

JURISDICTION

[18] 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

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.

[19] 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.

² Immigration Advisers Licensing Act 2007.

[20] 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.

[21] 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.

...

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.

[22] 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

[23] 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

[24] The multiple acts of negligence and breaches of the Code in respect of the 11 visa applicants represented by Mr De'Ath all arose out of one fundamental mistake. He

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

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].

overlooked the requirement to personally discharge his professional obligations under the Act and the Code. This necessarily means personal engagement with the client. In assessing the appropriate sanction, I will consider the totality of the offending and its genesis in one overriding error.

[25] The obligation to personally engage with the client is critical to the professional relationship. Mr De'Ath had put in place an unlawful business structure, whereby he was reliant on unlicensed people to deal with clients on immigration matters. Those unlicensed people may have been committing criminal offences.

[26] While this error was a significant professional failing, I found that Mr De'Ath had not deliberately and systematically breached the Code. Rather, he overlooked his personal obligations under the Code. He had thought it a sufficient discharge of those obligations to identify himself to the clients as the adviser and make certain information as to his responsibilities available on template forms, with the opportunity of electronic communications with him. I accepted that he failed to appreciate just how narrow the clerical work exception is to the broad statutory ambit of immigration advice.

[27] The obligation to personally discharge the professional obligations and hence personally engage with the client is a critical feature of the Code. The seriousness of the breach by Mr De'Ath is compounded by two factors:

- (1) it occurred in relation to 11 visa applicants; and
- (2) Mr De'Ath continued with the same model for some time even after Immigration New Zealand had formally expressed its concerns to him.

[28] I acknowledge that Mr De'Ath, following advice from Mr Moses, now has insight into his failings and that at considerable financial and time cost, he has remedied the flawed business structure. The public are protected as to the future.

[29] I further acknowledge that the publication on the Tribunal's website of both the substantive and the sanctions decisions has a punitive effect which will adversely affect Mr De'Ath's business. Furthermore, he has had to bear the costs of legal representation.

[30] Despite three complaints having been upheld against Mr De'Ath, I will treat him as a 'first offender' in respect of each complaint. The Tribunal's three decisions are recent.⁶ All of the unprofessional conduct occurred before any complaint was upheld.

Censure

⁶ *Green v De'Ath* [2018] NZIACDT 43, *Immigration New Zealand v De'Ath* [2018] NZIACDT 44, *Immigration New Zealand v De'Ath* [2018] NZIACDT 45.

[31] I agree with the Registrar and it is not contested by Mr De'Ath that this sanction is appropriate.

Training

[32] I agree with Mr Moses that no useful purpose would be served by further training. Mr De'Ath has already completed the previously available qualification and has shown himself to be aware of his earlier failings.

Financial penalty

[33] I consider the fundamental mistake here to be a serious breach of Mr De'Ath's professional obligations. He had no contact at all with some of the clients and at least one had no written agreement with him.

[34] Mr De'Ath has accepted that it is appropriate to impose a moderate financial penalty.

[35] The level of penalty must reflect the two aggravating features of his conduct, but be mitigated by the underlying cause of the breaches. Mr De'Ath overlooked the personal nature of his professional obligations, rather than set out to deliberately circumvent the Code. It is also mitigated by his full insight and the rectification of his business model. To some extent, his insight is belated. He continued to use unlicensed people after Immigration New Zealand formally expressed its concerns and he appeared to have understood this. It was not until the Authority notified him of the complaint that he took legal advice and accelerated rectification of the flawed business model. Nonetheless, Mr De'Ath's insight now is accepted as genuine.

[36] I will have regard to earlier decisions of the Tribunal which establish a level of sanctions for rubber stamping at the upper end of the sanctions spectrum.⁷ The Tribunal denounces this practice and sets penalties designed to act as a deterrent. Had Mr De'Ath deliberately breached the Code or failed to acknowledge the breaches and modify the business model, his licence would have been cancelled.

[37] The penalty will be set at \$8,500.

⁷ *Kong v Li* [2015] NZIADCT 59, *Kong v Li* [2016] NZIADCT 11, *Almirante v Sparks* [2018] NZIADCT 12, *Ramirez v Sparks* [2018] NZIADCT 24 & 26, *Stanimirovic v Levarko* [2018] NZIADCT 25.

Costs

[38] The Registrar has sought the imposition of an order for payment of contribution towards the cost of the investigation and/or the hearing, at a nominal amount of \$3,000. The Tribunal has made such an order before at that amount.⁸ This is not opposed in principle by Mr De'Ath, though he does not formally consent since such an order would be unusual and the Registrar has no time records.

[39] I accept the Registrar's submission that such an order would be appropriate in this case. In particular, the investigation by the Authority involved more than 11 individual client files, with 11 having been the subject of complaint and upheld by the Tribunal. The supporting documents sent to the Tribunal comprise 503 pages. I do not doubt that the cost of the time spent by the Registrar's staff would have exceeded \$3,000 by a considerable margin.

[40] The Tribunal has made orders for payment of a contribution towards its own costs of a hearing before.⁹ However, I do not propose to order any payment in relation to the Tribunal's "hearing". This is because there was no oral hearing (avoided as a result of Mr De'Ath's admission of wrongdoing), nor any abuse of the Tribunal's processes by him. Furthermore, the time spent by the Tribunal on the complaint was not unduly long. In any event, I have accepted the \$3,000 sought as an appropriate level to impose based on the Registrar's costs.

OUTCOME

[41] Mr De'Ath is:

- (1) censured;
- (2) ordered to pay to the Registrar a penalty of \$8,500; and
- (3) ordered to pay to the Registrar investigation costs of \$3,000.

D J Plunkett
Chair

⁸ *Stanimirovic v Levarko* above n7 at [18] & [27.3].

⁹ *MBL v Shadforth* [2016] NZIACDT 37 at [55]–[58].