IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2019] NZIACDT 38

Reference No: IACDT 029/17

IN THE MATTER	of a referral under s 48 of the Immigration Advisers Licensing Act 2007
BY	**THE REGISTRAR OF IMMIGRATION ADVISERS** Registrar
BETWEEN	**IMMIGRATION NEW ZEALAND (DARREN CALDER)** Complainant
AND	**BRUCE ROBERT CLELAND** Adviser

DECISION
(Sanctions)
Dated 10 June 2019

REPRESENTATION:

Registrar:	J Perrott, counsel
Complainant:	Self-represented
Adviser:	Self-represented

INTRODUCTION

[1] The Tribunal upheld this complaint against Mr Cleland, the adviser, in a decision issued on 3 May 2019 in *Immigration New Zealand* (*Calder) v Cleland* [2019] NZIACDT 25. It found that Mr Cleland had offloaded the client engagement process to unlicensed persons who provided immigration advice to the clients, in breach of the Immigration Advisers Licensing Act 2007 (the Act) and the Licensed Immigration Advisers Code of Conduct 2014 (the Code). He had also committed other breaches of the Code.

BACKGROUND

[2] The narrative leading to the complaint is set out in the decision of the Tribunal upholding the complaint and will only be briefly summarised here.

[3] Mr Cleland is a licensed immigration adviser, based in New Zealand. He is a director of Novo Education Consulting Ltd, trading as Choose New Zealand.

[4] Mr Cleland entered into a business relationship with Immigration Placement Services Ltd (IPS) in 2016. It is a New Zealand company operating in both New Zealand and the Philippines. In the Philippines, it works with a company there, BNAC. Both IPS and BNAC are owned by Mr Bruce Porteous.

[5] In essence, IPS/BNAC sourced jobs in New Zealand for Filipino workers with Mr Cleland then supposedly being responsible for providing immigration services. However, what happened was that at the same time the staff of IPS/BNAC were finding employment for the client, the immigration services for that client were also largely being undertaken by the same unlicensed staff in the Philippines.

[6] IPS entered into a contract with each of the clients to provide both employment and immigration services. While Mr Cleland signed the contract, which stated that the immigration services would be performed under his instructions, the reality was otherwise. Mr Cleland carried out a Skype interview with each client and reviewed the documents to be lodged with Immigration New Zealand and may even have lodged the applications, but otherwise left it to the staff of IPS/BNAC to engage with the client.

[7] The complaint was upheld in relation to 12 of Mr Cleland's clients.

[8] Mr Cleland was found to have failed to personally obtain the instructions of the clients and to have relied on unlicensed individuals to perform services which should have been carried out by him. This was a breach of cls 1, 2(e) and 3(c) of the Code. There was a wholesale offloading of client engagement and document gathering. He

was found to be responsible for the unlawful work of the staff. He had therefore failed to act in accordance with the legislation.

[9] Mr Cleland had also failed to ensure that before the written agreement was accepted by the client, all significant matters in the agreement had been explained. This was a breach of cl 18(b) of the Code. Nor did the agreement contain a full description of the services to be provided to each client and the fee to be charged, in breach of cl 19(e) and (f). Additionally, he had failed to advise 11 of the 12 clients when their applications were lodged, or of their outcome. This was a breach of cl 26(b) of the Code.

SUBMISSIONS

[10] Counsel for the Registrar of Immigration Advisers (the Registrar), Mr Perrott, in his submissions (22 May 2019) contends that Mr Cleland should be:

(a) cautioned or censured;

(b) ordered to pay a penalty not exceeding $10,000; and

(c) ordered to complete the New Zealand Immigration Advice refresher course available from Toi-Ohomai Institute of Technology.

[11] There were no submissions from the complainant.

[12] In his submissions (23 May 2019), Mr Cleland advises that the complaint arose within months of him first being granted a licence on 11 January 2016. With a further three years of experience in the role, including two years since he had come to understand his deficiencies, he now had direct contact with his clients and a complete record of his contact with them. In fact, he had avoided accepting clients who could not visit his office. He had built a very successful practice over three years and had not received a single complaint from any clients.

[13] Mr Cleland further advises that he will not be re-applying for a renewal of his licence at the end of the year, as he will retire then or even before that.

[14] Given that the events occurred three years ago, that he had learnt from his errors and immediately changed his process, that it had been highly stressful waiting for the complaint to be determined by the Tribunal, that all the visa applications were successful, that the clients had not suffered harm and that he was about to retire, Mr Cleland submits that no penalty is required.

JURISDICTION AND PROCEDURE

[15] The Tribunal's jurisdiction to award sanctions is set out in the Act. Having heard a complaint, the Tribunal may take the following action:[1]

> **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.

[16] The sanctions that may be imposed are set out at s 51(1) of the Act:

> **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.

[1] Immigration Advisers Licensing Act 2007.

[17] 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.

[18] The focus of professional disciplinary proceedings is not punishment, but the protection of the public:[2]

> …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.

[19] 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.[3]

[20] 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.[4]

---

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

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

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

[21] The most appropriate penalty is that which:[5]

(a) most appropriately protects the public and deters others;

(b) facilitates the Tribunal's important role in setting professional standards;

(c) punishes the practitioner;

(d) allows for the rehabilitation of the practitioner;

(e) promotes consistency with penalties in similar cases;

(f) reflects the seriousness of the misconduct;

(g) is the least restrictive penalty appropriate in the circumstances; and

(h) looked at overall, is the penalty which is fair, reasonable and proportionate in the circumstances.

DISCUSSION

[22] The starting point is the seriousness of the complaint. It was by using Mr Cleland's name as a licensed adviser that the unlicensed staff could provide immigration advice. Both Mr Cleland and the staff may have committed criminal offences. That is not for me to determine or punish, but it shows the gravity of the professional violation.

[23] Rubber stamping, as the practice is known, is insidious and robs clients of the protection to which they are entitled. Clients are entitled to have their immigration matters personally handled throughout the process by an adviser who is licensed and therefore both knowledgeable and subject to a code of professional standards.

[24] I accept that Mr Cleland's conduct was not a deliberate circumvention of his obligations, but a misunderstanding as to the scope of the permitted "clerical work" exception to the prohibition against unlicensed staff undertaking "immigration advice" work, both terms being defined in the Act. Mr Cleland had also misunderstood the nature of the work undertaken by the staff in gathering information and documents. He regarded

[5] *Liston v Director of Proceedings* [2018] NZHC 2981 at [34], citing *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354 at [44]–[51] and *Katamat v Professional Conduct Committee* [2012] NZHC 1633 at [49].

that as part of recruitment (finding a job for the client) rather than immigration. However, I found that the staff were performing that role for both purposes.

[25] I acknowledge that the visa applications at issue here were made within eight to nine months of Mr Cleland being licensed in January 2016. He is also entitled to credit for ceasing his involvement with Filipino clients during the Authority's investigation and before the complaint was referred to the Tribunal. I accept that he has changed his practice and now engages directly with his clients. It is acknowledged that complaints are stressful for the professionals involved and the process is lengthy. It is also correct that, despite his failings, most if not all his clients were successful in obtaining visas.

[26] Furthermore, there is considerable overlap between a number of the individual heads of complaint. The first three heads, if not all six, arise from one fundamental flaw in his business practice, delegating the client engagement process to unlicensed staff in another company and another country. There will be no double counting in setting the sanctions.

[27] I will deal with the potential sanctions in the order in which they appear in s 51 of the Act.

Caution or Censure

[28] A censure is appropriate to mark the Tribunal's disapproval of Mr Cleland's conduct. A caution would not reflect the seriousness of the breaches nor that they concerned 12 clients.

Training

[29] If Mr Cleland is to continue practising, he would benefit from education in the scope of immigration advice and clerical work and should therefore undertake the refresher course offered by Toi-Ohomai Institute of Technology. While he has expressed an intention to retire, he has not done so. Indeed, Mr Cleland is maintaining an application to renew his certificate which expired on 11 January 2019. He continues to lawfully practice while the renewal application is in progress. I observe also that he may change his mind about imminent retirement.

[30] I will therefore direct Mr Cleland to undertake the refresher course. If he withdraws his licence renewal application, he need not comply with this direction.

Penalty

[31] There have been a number of decisions of the Tribunal concerning advisers who permitted unlicensed people to give immigration advice. The penalty for rubber stamping is usually set at the upper end of the sanctions spectrum.

[32] More recent decisions include *Immigration New Zealand (Carley) v De'Ath* [2019] NZIACDT 1, where Mr De'Ath was ordered to pay a penalty of $8,500 in respect of 11 clients. In *Immigration New Zealand (Foley) v Niland* [2019] NZIACDT 16, there was a penalty of $4,000 against Ms Niland in respect of four clients. In *Immigration New Zealand (Calder) v Ahmed* [2019] NZIACDT 35, there was a penalty of $4,000 in respect of four clients.

[33] I recognise that other factors were also relevant to the level of penalty in those decisions. The circumstances in each of them were not identical to those of Mr Cleland. In particular, Ms Niland had relevant personal circumstances and Mr Ahmed had a greater level of engagement with his clients than Mr Cleland.

[34] An aggravating feature of Mr Cleland's conduct is that 12 clients were involved. This was not just a one-off occurrence.

[35] The penalty will be set at $7,500.

OUTCOME

[36] Mr Cleland is:

(1) censured;

(2) ordered to enrol and complete the New Zealand Immigration Advice refresher course offered by Toi-Ohomai Institute of Technology at its next intake; and

(3) ordered to immediately pay to the Registrar a penalty of $7,500.

D J Plunkett
Chair