IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2019] NZIACDT 16

Reference Nos: IACDT 005/2017 & 004/18

IN THE MATTER	of a referral under s 48 of the Immigration Advisers Licensing Act 2007
BY	**THE REGISTRAR OF IMMIGRATION ADVISERS** Registrar/Complainant
BETWEEN	**IMMIGRATION NEW ZEALAND (MARCELLE FOLEY)** Complainant
AND	**LYNN NILAND** Adviser

DECISION
(Sanctions)
Dated 19 March 2019

REPRESENTATION:

Registrar:	R Denmead, counsel
Complainant:	Self-represented
Adviser:	P Moses, counsel

INTRODUCTION

[1] The Tribunal upheld the first complaint against Ms Niland in *The Registrar of Immigration Advisers v Niland* [2018] NZIACDT 52, issued on 21 December 2018. A second complaint was upheld in *Immigration New Zealand (Foley) v Niland* [2019] NZIACDT 5, issued on 5 February 2019.

[2] The sanctions for these complaints will be dealt with together due to the very similar nature of the unlawful conduct.

First complaint

[3] In brief, the first complaint arose out of Ms Niland's representation of three citizens of the Philippines who had unsuccessfully sought work visas in New Zealand. Each had a client agreement with Immigration Placement Services Ltd (IPS), a New Zealand registered company operating in both New Zealand and the Philippines. None of its staff were licensed immigration advisers. IPS secured jobs in New Zealand for Filipino workers, who would then be represented by Ms Niland for their visa application. Ms Niland was a party to what was a tripartite agreement between IPS, the client and herself.

[4] The Tribunal found that Ms Niland did not take charge of the engagement with the clients on immigration matters, as she was required to do under the Code of Conduct 2014 (the Code). Indeed, apart from one skype interview with each client, Ms Niland had no real engagement with these three clients. She had left it to the employees of IPS in the Philippines to obtain from the client all the information necessary for immigration purposes.

[5] According to the Tribunal, it was therefore inevitable that those employees would have assisted and advised the clients as to the specific information and documents required by Immigration New Zealand. The staff of IPS had interviewed the clients, completed the application forms, compiled the supporting documents, lodged the applications with Immigration New Zealand and communicated with the clients. It was acknowledged that Ms Niland did undertake much of the communication with Immigration New Zealand.

[6] Ms Niland was found not to have conducted herself in accordance with the Immigration Advisers Licensing Act 2007 (the Act) as she had allowed unlicensed persons to provide immigration advice which was contrary to the Act. This was the case in respect of all three clients.

[7] Ms Niland was found to have breached the following obligations of the Code:

(1) Failed to personally obtain and carry out instructions from the clients, in breach of cl 2(e).

(2) Failed to personally assess one client's employment documents and discuss them with him, thereby failing to obtain the client's instructions, in breach of cl 2(e).

(3) Presented a declaration to two of the clients for signature which incorrectly stated that the client had read the employment documents that were not in fact then available to read, in breach of the obligation in cl 1 to be professional and diligent.

(4) Allowed unlicensed persons to provide immigration advice, in breach of the obligation in cl 3(c) to conduct herself in accordance with the Act.

(5) Failed to provide in the written agreement for each client a full description of the services she should have provided, in breach of cl 19(e).

(6) Failed to explain to each of the clients significant matters in the written agreement before they signed it, in breach of cl 18(b).

(7) Failed to advise the three clients when their applications were lodged or of the concerns of Immigration New Zealand or of the decline of their applications, in breach of cl 26(b).

(8) Allowed a visa application for one client to be lodged based on eligibility criteria which had not been assessed, in breach of the obligation in cl 1 to exercise diligence and due care; and

(9) failed to assess one client's employment agreement accurately against the relevant immigration instructions, in breach of the obligation in cl 1 to exercise diligence and due care.

Second complaint

[8] The second complaint concerned a citizen of Sri Lanka who successfully obtained a work visa for New Zealand. He instructed a migration company in Sri Lanka which in turn instructed IPS to secure employment for him and provide immigration services. The latter were to be provided by Ms Niland under her arrangement with IPS. The Sri Lankan company had no New Zealand licensed staff. Again, there was a tripartite client

agreement, though in fact only the client and Ms Niland signed. There was a skype interview between Ms Niland and the client but no other communication between them. Furthermore, the client received no communication from IPS.

[9] The visa application was lodged by the Sri Lankan company, though Ms Niland managed communications with Immigration New Zealand. The work visa was approved, but the employer then immediately withdrew the offer of employment. Notwithstanding this, the Sri Lankan company advised the client he could travel to New Zealand and work for another named employer. He did travel here and unlawfully worked for a number of employers, though also did a short stint with the approved employer.

[10] Ms Niland was found to be in breach of the Code as follows:

(1) Failed to obtain instructions, in breach of cl 2(e).

(2) Allowed unlicensed individuals to provide immigration advice, in breach of cl 3(c).

(3) Failed to provide a written agreement with the client, in breach of cl 18(a).

(4) Failed to explain to the client significant matters in a written agreement, in breach of cl 18(b).

(5) Failed to ensure that a written agreement contained a full description of the services to be provided by her and which were tailored to the circumstances of the client, in breach of cl 19(e).

(6) Failed to notify the client when the application was lodged and then update him as to its progress, in breach of cl 26(b).

(7) Failed to maintain a proper file and to make it available for inspection to the Immigration Advisers Authority (the Authority), in breach of cl 26(e).

[11] The Tribunal further found Ms Niland to have had a particularly casual approach to having even the semblance of a professional and legal relationship with the Sri Lankan client.

SUBMISSIONS

[12] In respect of the first complaint, there is a joint memorandum from the Registrar of Immigration Advisers (the Registrar) and Mr Moses, counsel for Ms Niland. It is submitted that the appropriate sanctions would be:

(1) caution or censure;

(2) an order that Ms Niland undertake the New Zealand Immigration Advice Refresher Course available from Toi-Ohomai Institute of Technology; and

(3) imposition of a penalty of $2,000.

[13] In respect of the second complaint, Ms Denmead, counsel for the Registrar, contends the appropriate sanctions would be:

(1) caution or censure;

(2) an order that Ms Niland undertake the New Zealand Immigration Advice Refresher Course available from Toi-Ohomai Institute of Technology;

(3) an order for payment of a penalty in excess of the $2,000 which had been agreed in respect of the first complaint. Ms Denmead noted that the client had travelled to New Zealand on the advice of the Sri Lankan company, had worked contrary to his visa and subsequently become liable for deportation. While this was unknown to Ms Niland, her conduct in failing to personally engage and her breaches of the Code may have led to this course of action;

(4) an order for payment of reasonable compensation to the client; and

(5) an order for payment of any of the costs of the investigation. As the Registrar did not undertake actual time recording, a nominal figure of $1,000 was sought.

[14] In respect of the second complaint, Mr Moses submits that a suitable sanction would be:

(1) caution or censure;

(2) an order that Ms Niland undertake the New Zealand Immigration Advice Refresher Course available from Toi-Ohomai Institute of Technology; and

(3) a penalty of $2,000, making a total penalty of $4,000 in respect of both complaints.

JURISDICTION

[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:

[1] Immigration Advisers Licensing Act 2007.

> (i) an order directing the licensed immigration adviser or former licensed immigration adviser to pay reasonable compensation to the complainant or other person.

[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 Ms Niland's name as a licensed adviser that the unlicensed staff of IPS could provide immigration advice. They may have committed criminal offences. 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 by an adviser who is licensed and therefore both knowledgeable and subject to a code of professional standards.

[23] In the earlier substantive decisions, I agreed with Mr Moses' submission that there was a considerable overlap between the heads of both complaints in that to a large extent they arose from the flawed tripartite relationship between IPS, the client and Ms Niland. There was a lack of clarity as to the respective responsibilities of Ms Niland and IPS. In addition to the muddled contractual arrangements, I found there was a breach by Ms Niland of the critical obligation to personally engage with each client.

[24] In respect of each of the two complaints, there will be no double punishment of what is essentially the same underlying misconduct, despite the numerous individual heads of each complaint which have been upheld.

---

[5] *Liston v Director of Proceedings* [2018] NZHC 2981 at [34], relying on *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].

[25] I accepted in the earlier decisions that Ms Niland's conduct could be described as negligent, rather than deliberately employing a business model in clear and flagrant breach of her professional obligations. She was careless as to the contractual arrangements and did not understand the limits of the clerical work exclusion to the statutory definition of immigration advice. Ms Niland had overlooked that the agreement was entirely unsuited to her needs and those of her clients. All the resulting code breaches were incidents of that negligence.

[26] I have taken into account the personal circumstances of Ms Niland outlined in her statement of 12 February 2018. They are offered as an explanation of her conduct and not an excuse or defence. She describes them as shocking and traumatic. These matters came to a head in 2015 when she was representing the clients affected by the complaints. They were concluded by February 2017. By April 2017, Ms Niland had taken legal advice on the complaints from her present counsel and immediately appreciated the clarity he brought in recognising her professional lapses. She acknowledges that her early responses to the complaints were a mistake.

[27] According to Ms Niland's statement, she now has peer support and is not professionally isolated. She has benefitted from professional guidance and collegiality. She accepts the need to be supervised. Ms Niland concludes by expressing an ongoing commitment to practising in this rewarding industry and adhering to the obligations that come with the privilege of being a licensed adviser.

[28] As Mr Moses contends, the publication of the Tribunal's decisions naming the adviser is a significant sanction in its own right.

[29] I will deal with the potentially relevant sanctions in the order in which they appear in s 51 of the Act.

Caution or censure

[30] A censure is appropriate to mark the Tribunal's disapproval of Ms Niland's conduct. A caution would not reflect the seriousness of the breaches, nor that they concerned four clients.

Training

[31] Ms Niland, who previously held a full licence, now has a provisional licence and is supervised by another licenced adviser, a requirement of the Registrar since June 2017.

[32] There is agreement between the Registrar and Ms Niland that she would benefit from the available refresher course, so that will be ordered.

Penalty

[33] In respect of the first complaint, the Registrar and Ms Niland jointly submitted that a penalty of $2,000 would adequately hold Ms Niland to account and denounce her conduct, while also supporting her in continuing to practice in a safe and responsible manner.

[34] Mr Moses contends that another $2,000 would be appropriate in respect of the second complaint. Ms Denmead seeks a further penalty of more than $2,000, reflecting the Sri Lankan client's unlawful conduct.

[35] The Tribunal is not bound by any agreement between the parties as to an appropriate penalty, but I find that the total penalty for both complaints should be $4,000. The underlying misconduct was serious and affected four clients, but there has been full acknowledgement of the breaches since before the complaint was lodged in the Tribunal. Ms Niland had ceased working with IPS and the Sri Lankan company before late 2016. I agree with Mr Moses that she has shown insight into her failings. Her acceptance of professional misconduct has been coupled with an acknowledgment as to appropriate sanctions. I note also her personal circumstances through 2015.

[36] While there is merit in Ms Denmead's contention that Ms Niland's failure to engage with the Sri Lankan client increased the risk of him coming to New Zealand and working unlawfully, Ms Niland is not responsible for his conduct.

Investigation costs

[37] Ms Denmead seeks a nominal $1,000 for the Authority's costs of the investigation.

[38] The Registrar is funded to investigate complaints, probably from both advisers' fees and the taxpayers. The Tribunal does not routinely make orders for costs. The investigation was not unduly complex. Ms Niland was co-operative in the investigation.

She was somewhat tardy producing the complete files but explains this in her statement of 11 December 2017.[6] I decline to order costs.

Compensation to the Sri Lankan client

[39] Ms Denmead contends that compensation should be payable to the Sri Lankan client. No reasons are given, no losses are identified and no amount is advanced as being appropriate.

[40] The Sri Lankan client did not make the complaint himself and has played no role in the Tribunal's process. There is no evidence from him as to his losses, if any. The visa application was actually successful and it was not Ms Niland's fault the employer immediately withdrew support. While he came to New Zealand and worked unlawfully, this was unbeknown to Ms Niland. Furthermore, the client's complicity cannot be known. I cannot know whether he was well aware of the unlawful nature of his work in New Zealand but decided to run that risk anyway.

OUTCOME

[41] Ms Niland is:

(1) censured;

(2) ordered to enrol at the next available intake and complete the New Zealand Immigration Advice Refresher Course available from Toi-Ohomai Institute of Technology; and

(3) ordered to pay to the Registrar immediately a penalty of $4,000.

D J Plunkett
Chair

[6] Ms Niland's statement, 11 December 2017, at [49]–[51].