

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2019] NZIACDT 23

Reference No: IACDT 008/17

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 **JOHN WIREMU HORAN**
Adviser

**DECISION
(Sanctions)
Dated 23 April 2019**

REPRESENTATION:

Registrar: S Carr, counsel
Complainant: In person
Adviser: In person

INTRODUCTION

[1] The Tribunal upheld the complaint against Mr Horan in *Immigration New Zealand (Calder) v Horan* [2019] NZIACDT 13.

[2] Mr Horan was found to have communicated with Immigration New Zealand in an unprofessional way, withheld information from one of his clients and copied correspondence concerning his clients to people unconnected to the immigration applications. Such conduct was in breach of various provisions of the Code of Conduct 2014 (the Code).

BACKGROUND

[3] The background narrative leading to the complaint is set out in more detail in the Tribunal's earlier decision. It will be repeated here in summary only.

[4] The complaint concerns Mr Horan's written communications to Immigration New Zealand on behalf of a number of clients during 2017. Extracts from his communications are set out in the earlier decision.

[5] Mr Horan accused multiple immigration officers in numerous communications of being amongst other things, inept, callous, arrogant, insensitive, uncaring, unconscionable and unprofessional, of being unable to distinguish basic human rights and ignoring the principles of fairness, of treating clients worse than New Zealanders treat animals and of being corrupt, overzealous and overbearing.

[6] Furthermore, Mr Horan declined to copy to a client an important communication from Immigration New Zealand and seek instructions on Immigration New Zealand's concerns with her application. This was because he was disgusted with the officer's arrogance and inability to distinguish basic human rights, which he considered would bring stress to his pregnant client and adversely affect her health and that of the unborn child.

[7] Mr Horan also copied correspondence concerning clients to his personal lawyer and to another person who was a licensed immigration adviser, both of whom were unconnected to the immigration matters.

[8] In its decision of 11 March 2019, the Tribunal upheld the following complaints, with Mr Horan's conduct found to be a breach of the specified Code provisions:

- (1) Expressed criticisms of Immigration New Zealand and its staff in a manner which was contrary to the obligation to be professional and respectful, in breach of cl 1.
- (2) Raised concerns with Immigration New Zealand in a way which was inconsistent with his obligation to be professional, diligent and respectful, in breach of cl 1.
- (3) Withheld information from one of his clients and did not obtain her instructions, in breach of the obligation in cl 2(e) to obtain and carry out his client's instructions.
- (4) Copied correspondence with Immigration New Zealand concerning his clients to individuals who were not connected with the immigration matter, disclosing their personal information without their consent, in breach of the obligation in cl 4(a) to preserve the confidentiality of his clients.

SUBMISSIONS

[9] Ms Carr is counsel for the Registrar of Immigration Advisers (the Registrar), the head of the Immigration Advisers Authority (the Authority). In her submissions of 3 April 2019, she contends that the appropriate sanctions should be:

- (1) caution or censure; and
- (2) an order for payment of a penalty not exceeding \$10,000.

[10] In his submissions of 2 and 16 April 2019, Mr Horan rejects the Tribunal's previous decision. He repeats his explanation and justification for his conduct given earlier to the Tribunal. He states that he will continue to stand by his actions which, if necessary, will be vindicated on appeal. Mr Horan describes the Code as a ridiculous "Code of Entrapment". He denies that "we" (immigration advisers) are "the slaves of Africa". According to him, the Authority and the Tribunal amount to a counterproductive collective organisation aimed at destroying the very agents striving to assist migrants.

[11] Mr Horan claims that his clients authorised the copying of communications to the other two recipients, but presents no evidence of this.

[12] Mr Horan provides one relevant piece of information. In respect of the client from whom he withheld Immigration New Zealand's correspondence, he states that he confided in her life partner who agreed with him that the information should be withheld. Additionally, she had delivered her child within 48 hours of his decision to withhold the letter and shortly afterwards he calmly and empathetically explained the letter to her. This was followed by a response to Immigration New Zealand within the extended time allowed.

JURISDICTION

[13] The Tribunal's jurisdiction to award sanctions is set out in the Immigration Advisers Licensing Act 2007 (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.

[14] 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:

¹ Immigration Advisers Licensing Act 2007.

- (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.

[15] 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.

[16] 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.

[17] 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

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

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

[18] 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

[19] 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

[20] The first two heads of complaint concern the language and content of Mr Horan's correspondence with Immigration New Zealand. I made the point in the earlier decision that staff of a government agency should not be unduly sensitive in the face of criticism. The communications crossed the disciplinary threshold but are not at the upper end of unprofessional communications.

[21] Mr Horan made personal attacks against individual officers. His target was not just the immigration system. He personalised the attack. The communications were not isolated but systemic. Mr Horan, who was successful on behalf of numerous clients in the past, appears to have developed a deep-seated dislike of Immigration New Zealand and many of its officers.

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

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, [2013] NZAR 320 at [49].

[22] The communications cast doubt on Mr Horan's judgement as to how best to represent his clients' interests. He does not understand that it cannot possibly be in the interests of his clients to make such gratuitous personal attacks on the very immigration officers from whom his clients are seeking favourable decisions.

[23] I also regard Mr Horan's communications as bringing the profession into disrepute. He is one of a small number of advisers who persistently attack Immigration New Zealand and its staff. They are an embarrassment to the profession.

[24] However, despite the extravagant language, I do not regard the communications as abusive, offensive, threatening, malicious or motivated by ill-will. He sincerely believes, quite wrongly, that Immigration New Zealand is 'out to get' him and his clients.

[25] Mr Horan had been put on notice by the Authority as to the inappropriate nature of his communications well before he wrote those the subject of this complaint. He had been sent a warning letter in 2014 as a result of an earlier complaint from Immigration New Zealand.

[26] Another violation of professional standards by Mr Horan was refusing to inform one client of Immigration New Zealand's concerns with her application and seeking her instructions. He considered he had good reason to do so, being his client's health as a pregnant woman. I suspect Mr Horan is exaggerating her health condition. Her health would potentially have been an issue in her residence application, but he has not referred the Tribunal to any medical evidence supporting his apparent concern. The surrounding correspondence with Immigration New Zealand does not establish any serious concern with his client's health.

[27] The incident, however, is isolated. I note his recent evidence that he disclosed Immigration New Zealand's communication to his client's life partner who agreed to his approach of withholding the information from her. She gave birth 48 hours later and shortly afterwards he discussed it with her, obtained her instructions and responded to Immigration New Zealand. It would seem that the ultimate decline of the application by Immigration New Zealand, on one of the grounds raised in the letter which he initially refused to discuss with his client, did not arise from his initial refusal to take instructions.

[28] There is also the fourth head of complaint, the copying of correspondence with Immigration New Zealand concerning clients to people who had no legitimate connection with the clients' immigration matters. Even after Immigration New Zealand had pointed out to him the need for his clients' consent, he belligerently refused to do so.

[29] Mr Horan continues to express no remorse. He acknowledges no wrong-doing. He is contemptuous of the Code setting out the professional standards and the entire disciplinary regime.

[30] Mr Horan no longer holds a licence as a renewal application was refused on 17 August 2016, for reasons unknown to the Tribunal.

[31] I will deal with the potentially appropriate sanctions in the order in which they are listed in s 51(1) of the Act.

Caution or censure

[32] Ms Carr seeks a caution or censure. I find Mr Horan's conduct, cumulatively, to be of sufficient gravity to warrant censure.

Training

[33] If Mr Horan had a current licence, I would have ordered that he undertake the Graduate Diploma in Immigration Advice offered by Toi-Ohomai Institute of Technology. No such order will, however, be made as he does not hold a licence and there is no indication that he proposes to seek one in the future. Mr Horan is also of an age where he is less likely to be contemplating that.

Prohibition from applying for a licence.

[34] Mr Horan's steadfast refusal to acknowledge his wrong-doing and his dismissive attitude to professional standards and discipline means that it is not appropriate for him to hold any form of licence. He has learned nothing from this complaint. A prohibition order was not sought by the Registrar, a stance with which I agree since there is no indication he contemplates reapplying. The only point I will make is that Mr Horan must undertake retraining if he intends to return to the profession.

Financial penalty

[35] I dealt with an adviser's unprofessional communications with Immigration New Zealand in *Immigration New Zealand (Foley) v De'Ath* [2018] NZIACDT 51. The communications there were also not at the upper end of a violation of the appropriate standard for communications. There was a financial penalty of \$750.

[36] I regard the third and fourth heads of complaint as more serious than those relating to the tone of Mr Horan's correspondence with Immigration New Zealand. The third is, however, considerably mitigated by early remedying of the error. The fourth head is more concerning. Mr Horan has little understanding of the obligation to keep the affairs of his clients confined only to those directly concerned with the immigration application or permitted by the client to know. All of the professional violations are aggravated by Mr Horan's contempt of the Code and the disciplinary regime.

[37] The penalty will be set at \$2,500.

OUTCOME

[38] Mr Horan is:

- (1) censured; and
- (2) ordered to immediately pay to the Registrar a penalty of \$2,500.

D J Plunkett
Chair