

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2019] NZIACDT 8

Reference No: IACDT 002/16

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **NILESH GOVIND**
Complainant

AND **ASHWINI CHANDRA**
Adviser

**DECISION
(Sanctions)**
Date: 19 February 2019

REPRESENTATION:

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

INTRODUCTION

[1] The Tribunal (Mr Pearson) upheld this complaint in a decision issued on 15 November 2018 in *Govind v Chandra* [2018] NZIACDT 46. The Tribunal found that Ms Chandra, the licensed adviser, failed to have a written agreement with her client, Mr Govind, the complainant. The Tribunal regarded this as an elementary feature of all engagements. It was found to be a breach of cl 16(a) of the Code of Conduct 2014, which provides that before an initial consultation the adviser must obtain the client's written consent to the fee and the payment terms and conditions.

[2] The background narrative was set out briefly in the Tribunal's decision. There is no need to duplicate it here.

[3] In its decision, the Tribunal advised that unless there were contrary submissions, it would order Ms Chandra to refund fees of \$500 paid to her by Mr Govind. This was only a partial refund, as the full fee was \$700 or \$1,500.¹ The parties' submissions on sanctions were invited.

SUBMISSIONS

[4] Counsel for the Registrar submits that the appropriate sanction would be a refund of fees of \$500, as well as a caution or censure of Ms Chandra.

[5] There were no submissions from Mr Govind.

[6] In an email of 20 November 2018 to the Tribunal, Ms Chandra states that she is happy with the decision and intends to refund \$500 forthwith.

JURISDICTION

[7] The Tribunal's jurisdiction is set out in the Immigration Advisers Licensing Act 2007. 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.

¹ *Govind v Chandra* [2018] NZIACDT 46 at [10].

² Immigration Advisers Licensing Act 2007.

[8] 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.

[9] 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.

[10] 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.

...

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

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.

[11] 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

[12] 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

[13] The most appropriate penalty is that which:⁶

- (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.

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

⁶ *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].

DISCUSSION

[14] It is clear from the Tribunal's decision of 15 November 2018 that Ms Chandra's professional misconduct was considered to be at the lower end of the scale. The circumstances which led to the failure to obtain a written agreement are not set out in that decision and I decline to undertake that investigation at the sanctions stage of the process. Nor is it necessary to do so as there is broad agreement between the Registrar and Ms Chandra as to the appropriate sanction.

[15] Ms Carr has requested consideration of a caution or censure, but I will not do so because the circumstances leading to the failure to obtain the written agreement are not clear to me and the previous decision gave notice of the sanction proposed, omitting a caution or censure. Mr Pearson assessed the complaint after an oral hearing and did not consider it necessary to go further than propose a partial refund of the fees. I will adhere to his view as to what is appropriate.

OUTCOME

[16] Ms Chandra is ordered to make a payment of \$500 to Mr Govind and provide evidence of this to the Registrar. If this payment has already been made, Ms Chandra is to provide evidence to the Registrar.

D J Plunkett
Chair