

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2019] NZIACDT 9

Reference No: IACDT 024/15

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **MANJEET SINGH**
Complainant

AND **HARJEET GOLIAN**
Adviser

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

REPRESENTATION:

Registrar: S Carr, counsel

Complainant: In person

Adviser: R E Harrison QC, counsel

INTRODUCTION

[1] The Tribunal apologises for the inordinate delay in issuing this decision. The assessment of sanctions was overlooked.

[2] This complaint was upheld in a decision of the Tribunal (Mr Pearson) issued on 12 September 2017 in *Singh v Golian* [2017] NZIACDT 14. The Tribunal found that Mr Golian breached his professional obligations under the Code of Conduct 2010 (the Code) in that he failed to perform his services with due care, diligence and professionalism.

BACKGROUND

[3] The complaint against Mr Golian, a licensed immigration adviser, arose out of his representation of Mr Manjeet Singh, the complainant. He was approached by Mr Singh in August 2012. An application for a work visa by Mr Singh had already been declined by Immigration New Zealand, so he was in New Zealand unlawfully and could not apply for a further visa without leaving. The only other option was to apply to the Minister of Immigration for a visa under s 61 of the Immigration Act 2009, as an exception to the immigration instructions. Such a request is discretionary and the Minister is not required to give reasons, so it is not an ideal approach if there are other alternatives.

[4] Mr Singh proposed to apply under s 61. He had already paid tuition fees at an education institution in order to enrol in a national diploma. Mr Golian recommended to Mr Singh that he should withdraw from the course, submit a formal complaint to Immigration New Zealand regarding the decline of his work visa and pursue an appeal on humanitarian grounds against deportation with the Immigration and Protection Tribunal. Mr Singh accepted this advice and pursued both courses of action in August 2012.

[5] Immigration New Zealand refused to consider the complaint, as the decline of the visa had already been reconsidered. Mr Golian therefore escalated it to the Deputy Chief Executive of Immigration New Zealand. He was advised in October 2012 that the complaint would not proceed to the next stage as no appropriate grounds had been articulated. A complaint against Immigration New Zealand was then submitted to the Ombudsman, but this was dismissed in February 2013 as there were no grounds for an investigation.

[6] In December 2013, the Immigration and Protection Tribunal declined the appeal against deportation.

[7] Mr Golian then advised Mr Singh to lodge a request for a student visa under s 61, as the latter had proposed to do at the start.

[8] In December 2013, Mr Singh engaged a new licensed adviser.

[9] Mr Singh made a complaint against Mr Golian to the Immigration Advisers Authority (the Authority), which in turn filed a statement of complaint in this Tribunal.

[10] In its decision issued on 12 September 2017, this Tribunal found that Mr Golian had no justification for failing to accept Mr Singh's initial instruction to lodge a request under s 61. It was found that Mr Golian's approach in lodging successive complaints and an appeal to the Immigration and Protection Tribunal was wholly misguided and devoid of merit. Even at the hearing, Mr Golian maintained that his approach was correct. Mr Golian was found to be so lacking in judgement and skill that he was either unable to appreciate the errors made or unwilling to consider that he might be wrong.

[11] Mr Golian's advice to lodge a complaint and pursue an appeal rather than to follow the approach proposed by Mr Singh was found to be entirely ill-conceived. What Mr Singh had requested was sensible and appropriate, as Mr Golian ultimately realised. However, by that time, the intervening events had seriously compromised any prospects of success.

[12] While the Tribunal found that it was impossible to be sure whether a request under s 61 would have succeeded, the prospects of success would have been far higher if the application had been made earlier than after Mr Golian's strategy had failed. This was because the s 61 application was essentially re-litigating the same point made in the earlier failed processes. Mr Singh was, by the time he made the s 61 application, presenting himself as someone abusively wasting Immigration New Zealand's time and resources. The Tribunal found that Mr Golian's strategy had been costly to Mr Singh, in terms of both the professional fees paid and his immigration prospects.

[13] According to the Tribunal's decision, no competent licensed immigration adviser would have recommended to Mr Singh that he lodge the complaints and appeal. Mr Golian therefore failed to exercise sufficient care and diligence, nor did he apply the professionalism required to determine what was in his client's best interests. The failure to perform his services with due care, diligence and professionalism was found to be a breach of cl 1.1(a) of the Code. In failing to carry out Mr Singh's original proposal to make an application under s 61, Mr Golian also breached cl 1.1(b) of the Code (a failure to carry out instructions).

SUBMISSIONS

[14] Ms Carr is counsel for the Registrar of Immigration Advisers (the Registrar), who is head of the Authority. Ms Carr submits that the appropriate sanctions would be:

- (1) refunding the fees of \$2,900 (plus GST);
- (2) an order for payment of a penalty not exceeding \$5,000; and
- (3) an order that Mr Golian undertake training in the form of an approved refresher course.

[15] Mr Singh seeks an order for compensation of \$45,000 to \$50,000, being the amount which he says he spent while in New Zealand unlawfully and represented by Mr Golian.

[16] Counsel for Mr Golian, Dr Harrison QC, submits that in respect of any order to refund part or all of the fees, the Tribunal should take into account that the humanitarian appeal ensured that Mr Singh, who was otherwise at considerable risk of deportation, was able to remain in New Zealand for a time. That was his objective and a significant indirect benefit to him. As for the claim for compensation, it is submitted Mr Singh could not possibly assert that he had suffered damage in relation to his living expenses since they would have been incurred in any event.

[17] Dr Harrison QC contends a penalty should not be imposed on top of any compensation or a refund of the fees. As for the prospect of further training, Mr Golian does not accept it is necessary or appropriate.

[18] There is a bundle of documents supporting the submissions of Dr Harrison QC. Some of those documents are dealt with below. Additionally, I note Mr Golian's extensive history of community and charitable engagement. He is prominent in the Indian community in this country.

JURISDICTION

[19] The Tribunal's jurisdiction 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:

¹ Immigration Advisers Licensing Act 2007.

- (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.

[20] 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.

[21] 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.

[22] 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.

[23] 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

[24] 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

[25] 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;

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].

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].

- (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

[26] There is a preliminary point concerning the presence of the Registrar in the process. Dr Harrison QC submits the Registrar has no role in the Tribunal's process and it should disregard the submissions filed on behalf of him (and the Authority). It is contended that the complaint is to be prosecuted before the Tribunal by the complainant.

[27] I do not propose to hear full argument on this issue given the delay in issuing this decision. It is a long-standing practice of the Tribunal to hear the Registrar on the substantive complaint and, if upheld, on the appropriate sanction. Irrespective of who, if anyone, is the prosecutor, the Tribunal can hear from any person with an interest. The Tribunal can regulate its own procedures as it thinks fit and can request information from any person.⁶ It cannot be doubted that the Registrar and/or the Authority have a legitimate interest.⁷

[28] While breaches of two subclauses of cl 1.1 of the Code were found, it was the same conduct which led to both. In recommending the strategy of complaints and an appeal, Mr Golian was failing to carry out Mr Singh's instruction to make a s 61 application. As the Tribunal found, it does not add materially to the critical error.⁸

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

Training

[30] Ms Carr for the Registrar submits Mr Golian should undertake an approved refresher course. I am aware of only one such course, which is offered by Toi-Ohomai Institute of Technology, formally the Bay of Plenty Polytechnic.

⁶ Immigration Advisers Licensing Act 2007, s 49(1) & (4).

⁷ See the Authority's functions at s 35 of the Act.

⁸ *Singh v Golian* [2017] NZIACDT 14 at [38].

[31] Mr Golian takes the position that further training is not necessary or appropriate. I note from his curriculum vitae that he has previously practised as a lawyer in New Zealand and then practiced as an immigration consultant for many years before becoming a licensed adviser in 2008. He has successfully assisted over 15,000 migrants. He explains how he has kept himself up-to-date on immigration law and practice over the years. There are testimonials from other licensed advisers and a lawyer as to his experience and skills as an adviser.

[32] However, it is clear from the Tribunal's decision that Mr Golian's breach of the professional standards was no isolated error of judgement. Over a period of about 17 months, Mr Golian guided Mr Singh through a series of unmeritorious complaints to multiple entities and a failed appeal to the Immigration and Protection Tribunal, all of which was found to be wholly misguided.

[33] Even at the hearing before this Tribunal, Mr Golian did not recognise his errors. He said he would have advised Mr Singh precisely as he had done earlier. It was not until Mr Golian received this Tribunal's decision, according to Dr Harrison QC, that he appreciated the errors he had made. No doubt that was facilitated by advice from senior counsel.

[34] Mr Golian's breaches of cl 1.1(a) & (b) of the Code go directly to his knowledge of, and skill in, immigration law and practice. I find that he lacks sufficient knowledge and skill and would benefit from a refresher course. He will be ordered to undertake the available course.

Penalty

[35] Ms Carr seeks a penalty not exceeding \$5,000, which I note is half of the available maximum.

[36] Having regard to the training and the refund of fees, both of which I will require, I do not consider an additional financial penalty necessary in the public interest. The focus of sanctions in respect of this complaint should be rehabilitation of the adviser and recompense to the complainant, rather than any punitive element. There is also an element of unfairness to Mr Golian, and Mr Singh for that matter, resulting from the Tribunal's delay in issuing this decision. I have taken that into account.

[37] I decline to order payment of a penalty.

Refund of fees and expenses

[38] Ms Carr submits it is appropriate to order a refund of \$2,400 paid in fees plus a \$500 filing fee said to have been paid to the Immigration and Protection Tribunal. Mr Singh seeks the recovery of this sum. I do not detect from the submissions of Dr Harrison QC that this is opposed. He contends that it is material to take into account the indirect benefit to Mr Singh of being able to remain in New Zealand. That may be so, but it not a reason not to order the repayment of the cost of futile applications. I see that indirect benefit as more relevant to the claim for compensation.

[39] Clearly, the fees paid to Mr Golian and the cost of the appeal were wasted. It is not just that the applications and appeal were not successful, but they were also wholly unmeritorious.

[40] This Tribunal's earlier decision states Mr Singh paid Mr Golian \$2,400.⁹ The standard fee for a humanitarian appeal to the Immigration and Protection Tribunal has varied between \$550 and \$700, but only \$500 is sought by Mr Singh. Ms Carr contends GST should be added, but this is not claimed by Mr Singh and the evidence shows that the payments of both the professional fees and the filing fee were GST inclusive.¹⁰

[41] I agree that Mr Golian should be ordered to repay the fees and the appeal filing fee.

Compensation

[42] Mr Singh seeks \$45,000 to \$50,000, comprising:

- | | | |
|---|---|-----------|
| 1. Rent, water, power, internet | – | \$ 20,800 |
| 2. Fuel, clothing, telephone | – | \$ 12,480 |
| 3. Student fees | – | \$ 4,000 |
| 4. Fees paid to another adviser (including expenses) | – | \$ 2,700 |
| 5. Fees paid to Mr Golian (including expenses) | – | \$ 2,900 |

[43] I am aware the individual items do not add up to \$45,000 to \$50,000. No supporting evidence has been provided. While Mr Singh has claimed expenses for two years, it appears Mr Golian may have only represented him from August 2012 to December 2013, a period of 17 months.

⁹ Above n8, at [11].

¹⁰ The Registrar's supporting documents at 11–12 & 151.

[44] The fees and expenses paid to Mr Golian have been dealt with separately.

[45] Dr Harrison QC contends that Mr Singh could not possibly claim compensation or even assert he suffered damage in relation to his living expenses, as he would have incurred them anyway. Furthermore, Mr Singh achieved, at least temporarily, what was his goal, namely the ability to stay in New Zealand while the humanitarian appeal was pursued.

[46] I agree with counsel that the Tribunal cannot order reimbursement of Mr Singh's living expenses. They do not flow from Mr Golian's unprofessional advice.

[47] As for the fees and immigration expenses paid to another licensed adviser, Dr Harrison QC submits Mr Golian cannot be expected to refund these. I am not even sure what they are for. Possibly they are for the s 61 application belatedly made. If so, they would have been incurred anyway, as that is what Mr Singh originally wanted to do. They cannot be recovered.

[48] I decline to order any compensation.

OUTCOME

[49] Mr Golian is ordered:

- (1) to enrol and complete the New Zealand Immigration Advice Refresher Course provided by the Toi-Ohomai Institute of Technology at its next intake;
and
- (2) to pay Mr Singh \$2,900.

D J Plunkett
Chair