IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2020] NZIACDT 15

Reference No: IACDT 016/19

IN THE MATTER	of a referral under s 48 of the Immigration Advisers Licensing Act 2007
BY	**THE REGISTRAR OF IMMIGRATION ADVISERS** Registrar
BETWEEN	**KBN** Complainant
AND	**PHILIP LESLIE WHAREKURA** Adviser

HEARING: 5 March 2020

SUBJECT TO SUPPRESSION ORDER

DECISION
(Sanctions)
Dated 10 March 2020

REPRESENTATION:

Registrar:	M Denyer, counsel
Complainant:	M Urquhart, counsel
Adviser:	P Moses, counsel

INTRODUCTION

[1] The complainant, [KBN], instructed Mr Philip Leslie Wharekura, the adviser, to seek residence in New Zealand. The complainant is dyslexic. Mr Wharekura told him that he had sought from the Associate Minister of Immigration an exemption from the English criterion for residence. In fact, Mr Wharekura never sought the exemption, but he created fake emails from the Associate Minister's office which he provided to the complainant to pretend that he had done so.

[2] A complaint by the complainant to the Immigration Advisers Authority (the Authority) was referred to the Tribunal by the Registrar of Immigration Advisers (the Registrar), the head of the Authority. It was upheld in a decision issued on 9 December 2019 in *KBN v Wharekura*.[1] It found that Mr Wharekura's behaviour was dishonest, a ground of complaint under the Immigration Advisers Licensing Act 2007 (the Act).

[3] It is now for the Tribunal to determine the appropriate sanctions.

BACKGROUND

[4] 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.

[5] Mr Wharekura is a licensed immigration adviser. He is a director of NZ Educational and Training Services Limited, based in Rotorua. His licence was suspended by the Tribunal on 26 September 2019 as a result of the matters giving rise to this complaint.[2]

[6] The complainant is a foreign national who has been working in New Zealand since 2015 on temporary work visas. He is dyslexic and unable to score a high enough mark on the IELTS test to meet Immigration New Zealand's written English threshold.

[7] In May 2018, the complainant contacted Mr Wharekura for assistance with a residence application. Mr Wharekura suggested that he seek a special direction from the Minister of Immigration exempting him from the writing component of Immigration New Zealand's English language criterion.

[8] The complainant instructed Mr Wharekura to go ahead with seeking a special direction in about November 2018, but he did not do so. This was because Mr Wharekura had by then formed the view that there was little chance of the special

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[1] *KBN v Wharekura* [2019] NZIACDT 80.
[2] *KBN v Wharekura* [2019] NZIACDT 66.

direction succeeding and that a better approach for the complainant would be to seek residence based on his life partnership with a New Zealand woman. However, the complainant did not want to seek residence based on his partnership.

[9] When contacted by the complainant about progress of the special direction, Mr Wharekura continued to maintain that he had sought the direction but, for various reasons, it was not progressing. He sent an email to the complainant's partner on 10 May 2019 advising that nothing was moving on the special direction.

[10] On 30 May 2019, Mr Wharekura sent an email to the complainant and his partner attaching two emails purportedly from the Associate Minister's office:

(1) The first email was from a named person at Parliament addressed to Mr Wharekura, dated 17 January 2019. It stated that the application for a special direction for the complainant had been accepted for consideration and a final decision would be made by the Associate Minister of Immigration in due course.

(2) The second email from the Associate Minister himself (using the email address of a Parliamentary staff member) was dated 28 February 2019. It was addressed to Mr Wharekura's company. The Minister regretted to advise that all special direction assessments were on hold until further notice. He would be in Nelson monitoring the fires and preparing a relief package once the extent of the damage had been established.

[11] The complainant's partner soon found out that the emails had not been sent by the Minister's office.

[12] Mr Wharekura admitted in an email to the partner on 10 June 2019 that he had falsified the emails from the Associate Minister's office and had not lodged the special direction request at all. He accepted it was a gross violation of his responsibilities to the complainant. He had done so because the special direction would not be successful and would cost the complainant time and money. He acknowledged that it had not been his call to make and apologised.

[13] Later in June 2019, Mr Wharekura refunded his $400 fee to the complainant.

Decision of the Tribunal

[14] Mr Wharekura admitted his misconduct. It was found that his behaviour was dishonest, a statutory ground of complaint. He had intended to deceive the complainant

into believing that a request for exemption from the English criterion had been lodged with the Minister.

SUBMISSIONS

[15] The Tribunal received written submissions from Mr Denyer, representing the Registrar and Mr Moses, representing Mr Wharekura. In light of the unusual circumstances and apparent mitigating features of the wrongdoing, a sanctions hearing was set down. The Tribunal heard from Mr Denyer and Mr Moses. Mr Wharekura gave brief evidence.

Submissions from the Registrar

[16] Mr Denyer, in his submissions, notes the Tribunal's description of Mr Wharekura's behaviour as towards the upper end of the spectrum of professional misconduct. While it is Mr Wharekura's first appearance before the Tribunal, the penalties should reflect the serious dishonesty involved. It occurred over a lengthy period and became more complicated and involved over time, going from merely giving reasons for delays to passing on to the complainant falsified emails. There should be stern sanctions.

[17] It is acknowledged that there appears to be limited prejudice to the complainant, although Mr Wharekura did waste his time for over six months. The misconduct was one-off in the sense that it involved only one client, but there was more than one dishonest act. He deceived the complainant on a number of occasions as well as sending the fake emails.

[18] Mr Denyer submitted that Mr Wharekura should be:

(1) censured;

(2) have his licence cancelled;

(3) prevented from reapplying for a licence for a period not exceeding two years; and

(4) ordered to pay a penalty in the vicinity of $8,000.

Submissions from the complainant

[19] Ms Urquhart, on behalf of the complainant, did not appear at the hearing by leave of the Tribunal. This had followed discussions between Ms Urquhart and Mr Moses

regarding an apology and compensation, the fee having already been refunded. Mr Wharekura provided a full written apology to the complainant on 25 February 2020. He has also paid the complainant's legal fees of $948.88. Once the complainant had read the apology, he recognised the serious consequences for Mr Wharekura and waived any entitlement to compensation. The complainant has been generous and magnanimous in his approach.

Submissions from Mr Wharekura

[20] In his submissions, Mr Moses repeats Mr Wharekura's acknowledgement of his wrongdoing and says that his contrition is genuine and clear. It is the first time he has appeared before the Tribunal. Furthermore, there was no commercial reason for the misconduct and Mr Wharekura did not benefit from it at all. It is in many ways inexplicable and he is not able to offer an explanation. Additionally, any prejudice to the complainant will be very limited, since the intended special direction request had a negligible likelihood of succeeding.

[21] It is accepted that a fine in the upper half of the range might be considered commensurate with the misconduct.

[22] As for further training, Mr Wharekura is willing to undertake a suitable course, but Mr Moses questions whether this is appropriate or necessary. Mr Wharekura's misconduct was not the result of lacking knowledge or skills. The same can be said for a condition requiring supervision. Not only will this be difficult to arrange in Rotorua where there are few other licensed advisers, but it is not feasible for him to be supervised by a practitioner from outside Rotorua.

[23] Mr Moses contends that the key issue is whether Mr Wharekura must be removed from the immigration industry as a result of his dishonest misconduct, or whether an order for suspension will be sufficient in the circumstances. Striking off a practitioner is a sanction of last resort and the Tribunal is required to consider alternatives short of removal from practice.

[24] The Tribunal can be confident that allowing Mr Wharekura to continue practising will not endanger the public or undermine the integrity of the licensing regime.

[25] It is pointed out that the disruption of an adviser's practice as a result of suspension is severe. Reviving a dormant consultancy business is difficult in any event but in this case, Mr Wharekura must also deal with the adverse publicity attendant upon publication of the Tribunal's decisions on interim suspension, liability and sanctions.

[26] It is submitted that Mr Wharekura's circumstances present a suitable case for adopting a rehabilitative approach.

[27] Mr Moses contends that suspension, rather than cancellation, is sufficient. The total duration of suspension should be six months, including the time spent on interim suspension.

Evidence from Mr Wharekura

[28] There is an affidavit from Mr Wharekura (sworn 22 October 2019), a witness brief (12 February 2020), and he gave brief oral evidence at the hearing. There is no need to repeat what is set out in the earlier decision. He emphasised that the greatest penalty for him has, in effect, been self-imposed. Over the past few months he has faced his clients, family, friends and the community acknowledging his wrongdoing.

[29] In giving evidence, Mr Wharekura was contrite, embarrassed, remorseful and well understood the effect of his conduct on the complainant and the public's confidence in the immigration system and in licensed advisers generally.

JURISDICTION

[30] The Tribunal's jurisdiction to impose sanctions is set out in the Act. Having heard a complaint, the Tribunal may take the following action:[3]

> **50 Determination of complaint by Tribunal**
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> After hearing a complaint, the Tribunal may—
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> (a) determine to dismiss the complaint:
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> (b) uphold the complaint but determine to take no further action:
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> (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.

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

> **51 Disciplinary sanctions**
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> (1) The sanctions that the Tribunal may impose are—
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> (a) caution or censure:
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> (b) a requirement to undertake specified training or otherwise remedy any deficiency within a specified period:

[3] Immigration Advisers Licensing Act 2007.

(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.

[32] In determining the appropriate sanction, it is relevant to note the purpose of the Act:

> **3 Purpose and scheme of Act**
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> 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.

[33] The focus of professional disciplinary proceedings is not punishment, but the protection of the public:[4]

> …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.
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> …
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> 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.
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> …

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

> 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.

[34] 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.[5]

[35] 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.[6]

[36] The most appropriate penalty is that which:[7]

(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

[37] It is self-evident, as Mr Wharekura and his counsel acknowledge, that his misconduct is serious. He did more than just deceive his client regarding an immigration application which he told the client had been made, but in fact had not been.

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[5] *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724–725 & 727; *Z v Dental Complaints Assessment Committee,* above n 4, at [151].

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

[7] *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, [2013] NZAR 320 at [49].

Mr Wharekura fabricated two emails to bolster his lie, one from the Associate Minister and one from an official in the Associate Minister's office.

[38] While the deception went on for a period of about six months and involved discussions with Mr Wharekura's client and partner on multiple occasions, in addition to the fabrication of two emails, it was an isolated incident within his practice. I accept the evidence of Mr Wharekura and his character witnesses that it is not in his character to be dishonest or to fabricate documents and that he has not done so on any other occasion. As Mr Moses put it, Mr Wharekura's moral compass went astray on this occasion but it is not broken. Mr Denyer accepted that there has been no systemic dishonesty in Mr Wharekura's practice.

[39] This was not fraud in the usual sense where a benefit, invariably financial, is acquired by falsifying documents. Indeed, as Mr Wharekura himself comments, his misconduct is inexplicable. He describes it as "completely idiotic". I accept he did not do it for the money. The $400 fee was particularly modest and he had already undertaken the work to draft the application to the Minister, so would have been entitled to the fee merely by lodging the application. It did not benefit him at all. I do not really know why he did it. He struggles to explain it himself.

[40] As I said in my earlier decision, I doubt that there has been any real prejudice to the complainant. Mr Moses is in my view correct in his submission that the likelihood of success with a special direction was negligible.

[41] I take into account that Mr Wharekura immediately admitted his wrongdoing to his client and made an early apology to him. This was done before a complaint had been made to the Authority. Indeed, it was Mr Wharekura who alerted the complainant to the formal complaint process. Mr Wharekura has now provided a formal apology. He has refunded the fee and reimbursed the complainant for his legal expenses. He offered the complainant compensation, but the complainant has graciously waived any such entitlement.

[42] There are three affidavits from witnesses attesting to Mr Wharekura's good character, his integrity, his concern and assistance to his clients which go well beyond merely handling immigration applications on their behalf, as well as his community service. Mr Wharekura has a long history of helping the migrant community in Rotorua through the Rotorua Community Law Centre and the Citizens Advice Bureau.

[43] I will now consider the potentially appropriate sanctions in the order in which they appear in s 51.

Caution or censure

[44] The only appropriate sanction for dishonest behaviour is censure. Mr Wharekura's conduct is denounced.

Training

[45] I accept Mr Moses' submission that further training is unnecessary. Mr Wharekura does not lack knowledge or skills, even as to his professional obligations. At the time, he would have known what he was doing was wrong and he certainly recognises that now.

Suspension, cancellation or prohibition

[46] I agree with Mr Moses that the key issue is whether Mr Wharekura should be removed from the profession or whether an order for suspension is sufficient. This depends on whether the Tribunal can be confident that allowing Mr Wharekura to resume practising does not endanger the public as prospective clients, or undermine the confidence of the general public in the integrity of either the immigration system or the licensing regime.

[47] Depriving a professional person of his or her livelihood indefinitely or even over a finite period is a sanction of last resort. The Tribunal must consider whether a lesser punishment would satisfy the public interest objectives of these sanctions.[8]

[48] Having heard from Mr Wharekura in person and read the character references, I have concluded that there is no risk to the public (prospective clients) of any repeat of this misconduct. His insight into his wrongdoing, including its effect on the complainant and the public's trust in the immigration system and the advisers' profession, is abundantly clear. Mr Wharekura's remorse is genuine. His acknowledgement of wrongdoing occurred immediately on being confronted by his client, not belatedly during the formal complaint process in a self-serving way.

[49] Dishonest behaviour does not automatically lead to cancellation of a licence in any profession. Nor does the Act prohibit persons convicted of dishonesty offences from being licensed.[9] There is a wide spectrum of dishonesty. At the extreme end is the

[8] *Patel*, above n 6, at [29] & [81].
[9] Immigration Advisers Licensing Act 2007, s 16(a); *Nagra v Registrar of Immigration Advisers* HC Auckland, CIV-2010-404-4045, 11 March 2011.

egregious conduct of Mr Ryan who set up a scam involving fake jobs for financial reward and admitted no wrongdoing.[10]

[50] Mr Wharekura is at the lower end of the spectrum. He was certainly dishonest in falsifying two emails and lying to his client about having lodged an exemption application. But there was no reward for Mr Wharekura. Furthermore, the harm to the immigration system and the profession is limited. Nor do I consider that there has been any real prejudice to the complainant. Moreover, Mr Wharekura, unlike Mr Ryan, has shown insight and genuine remorse.

[51] For these reasons, I do not intend to cancel Mr Wharekura's licence, nor ban him from renewing his licence. I do not, however, lose sight of the real nature of his misconduct, which is dishonesty. As Mr Denyer says, falsifying official communications must be punished. It is at the lower end of the scale, but it is dishonesty nonetheless. The suspension of his licence was warranted, as is its continuation for a further limited period.

[52] Mr Wharekura has been suspended since 26 September 2019, a period of almost six months. This has already imposed a significant financial burden for him. It is his primary income. He was a busy practitioner prior to suspension. I regard a total period of six months, as suggested by Mr Moses, to be somewhat short of what would be appropriate to punish this type of dishonesty. I will suspend Mr Wharekura for nine months, starting from 26 September 2019.

Financial penalty

[53] Mr Denyer submits that a penalty of $8,000 would be appropriate. Mr Moses accepts that it will be in the upper half of the range (the maximum being $10,000)

[54] The serious nature of this misconduct on the one hand, and Mr Wharekura's insight and remorse on the other hand, are set out above. This is his first appearance before the Tribunal. His misconduct was out of character. He has suffered a high financial burden already and this will continue for some time, not only to serve out the remaining period of suspension, but also because it will take him an even longer period to regain the trusted position he had in the community. Mr Moses is correct in pointing out the consequences of publication of the Tribunal's decisions, which is a punishment in itself.

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[10] *Registrar of Immigration Advisers v Ryan* [2020] NZIACDT 13, *Singh v Ryan* [2020] NZIACDT 14.

[55] There must be an appropriate discount from the far more serious misconduct of Mr Ryan who was directed to pay $10,000 on each complaint. One of those complaints involved multiple clients.

[56] The penalty will be $6,500.

OUTCOME

[57] Mr Wharekura is:

(1) censured;

(2) suspended until 5 pm on 25 June 2020, a total period of nine months; and

(3) ordered to immediately pay to the Registrar the sum of $6,500.

ORDER FOR SUPPRESSION

[58] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.[11]

[59] There is no public interest in knowing the name of Mr Wharekura's client.

[60] The Tribunal orders that no information identifying the complainant is to be published other than to Immigration New Zealand.

D J Plunkett
Chair

[11] Immigration Advisers Licensing Act 2007, s 50A.