

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2020] NZIACDT 16

Reference No: IACDT 033/18

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **NL**
Complainant

AND **ASHAR JOSEPH**
Adviser

SUBJECT TO SUPPRESSION ORDER

**DECISION
(Sanctions)
Dated 12 March 2020**

REPRESENTATION:

Registrar: S Pragji, counsel
Complainant: A McClymont, counsel
Adviser: Self-represented

INTRODUCTION

[1] The complainant, Ms NL, instructed Mr Ashar Joseph, the adviser, to seek a work visa based on a job offer from a business in which Mr Joseph had an interest. He told a staff member to sign the relevant employment documents in the name of the business owner. They were provided to Immigration New Zealand. The owner initially denied knowledge of the offer when contacted by the agency, but later retrospectively approved it.

[2] The complaint was referred by the Immigration Advisers Authority (the Authority) to the Tribunal. It was upheld in a decision issued on 31 January 2020 in *NL v Joseph*.¹ Mr Joseph was found to have breached the Licensed Immigration Advisers Code of Conduct 2014 (the Code).

[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 Joseph is a licensed immigration adviser, trading under the name Ashar Joseph. He is based in Auckland. He was first licensed in February 2014.

[6] The complainant, a national of India, engaged Mr Joseph in July 2017 to assist with her immigration matters. Mr Joseph then offered her a job as an assistant business manager in a company in which he had an interest. The complainant was provided with an offer of employment and an employment agreement. Both documents purportedly bore the signatures of the owner and director of the employer company. The signatures of the owner and the complainant were dated 23 July and 24 July 2017 respectively.

[7] On 28 July 2017, Mr Joseph filed online with Immigration New Zealand a visa application on behalf of the complainant.

[8] On 9 August 2017, Immigration New Zealand contacted the owner by telephone to verify the offer of employment. He advised that he was not aware of the offer and had not signed the employment agreement.

[9] Immigration New Zealand then wrote to Mr Joseph on the same day outlining its concerns with the visa application. The employment agreement was not genuine and

¹ *NL v Joseph* [2020] NZIACDT 6.

the complainant did not meet the good character requirements of the immigration instructions. Her comments were invited.

[10] Mr Joseph advised Immigration New Zealand on 16 August 2017, that he was acting as both the immigration adviser for the complainant and as a partner of the employer company. He was authorised to act on behalf of the company and make director-level decisions.

[11] According to Mr Joseph, once he had advised the owner of the offer, the latter approved what he had done. The owner wrote a letter to Immigration New Zealand, also dated 16 August 2017, explaining that Mr Joseph was his business partner and was authorised to make offers of employment. The offer to the complainant was genuine and remained open.

[12] Immigration New Zealand declined the visa in about August 2017, as the employment agreement was not valid. The complainant was not a *bona fide* applicant. A record of providing a false employment agreement would be kept by the agency. She would be subject to a full character assessment in her future applications.

[13] Following the decline by Immigration New Zealand, the complainant's stay in New Zealand became unlawful. She subsequently engaged Mr McClymont, counsel, who has since been able to obtain a visa for her to remain in this country.

[14] The complainant made a complaint against Mr Joseph to the Authority on 3 April 2018. It was referred by the Registrar of Immigration Advisers (the Registrar), the head of the Authority, to the Tribunal on 5 November 2018.

Decision of the Tribunal

[15] The Tribunal found that Mr Joseph had filed three false documents with Immigration New Zealand, being the offer letter, the employer's supplementary form and the employment agreement. All were purportedly signed by the owner. This was done by a staff member on the instruction of Mr Joseph. The staff member had not signed on behalf of the owner but using the name of the owner. None of the documents had actually been signed by the owner.

[16] The Tribunal found that the purported signature of the owner was a fabrication. The staff member had in effect been instructed to pretend to both the complainant and Immigration New Zealand that the owner had personally signed the document. This was unprofessional and a breach of cl 1 of the Code.

[17] Mr Joseph had also failed to enter into a client services agreement with the complainant, as he admitted. This was a breach of cl 18(a) of the Code.

[18] Furthermore, Mr Joseph had failed to retain on his client file a complete copy of the work visa application made by the complainant and his written and material oral communications with her and Immigration New Zealand. This was a breach of cl 26(a)(i) and (iii) of the Code.

SUBMISSIONS

Submissions from the Registrar

[19] Ms Pragji, counsel for the Registrar, provided submissions on 24 February 2020. She notes that this is Mr Joseph's second appearance before the Tribunal. I will discuss the earlier complaint shortly. The misconduct here and that dealt with earlier occurred at about the same time. Ms Pragji informs the Tribunal that Mr Joseph satisfied all the sanctions imposed on that occasion.

[20] Counsel further advises the Tribunal that in 2013, prior to licensing, Mr Joseph completed the Post Graduate Certificate in Immigration Advice.

[21] It is submitted that the breach of cl 1 of the Code is serious in nature. Mr Joseph should be censured, suspended until he completes the Professional Practice Module (LAWS7015) offered by Toi-Ohomai Institute of Technology and ordered to pay a penalty in the vicinity of \$4,000.

Submissions from the complainant

[22] There are no submissions from the complainant.

Submissions from Mr Joseph

[23] There are submissions from Mr Joseph (9 March 2020) with supporting documents. He contends that the Tribunal should adopt a rehabilitative and restorative approach, so suspension should be a sanction of last resort. The mistakes made here, like those in the earlier complaint against him, were in 2017, which was his first year of full-time professional practice. He had previously been in practice only part-time since being licensed. Recently, he completed a refresher course which has improved his understanding of the Code and competency standards. Mr Joseph points out that he

has not since had a complaint, proof of his improvement. He repeats his offer to pay compensation to the complainant.

JURISDICTION

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

[25] 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:

² 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.

[26] 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.

[27] 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.

...

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.

[28] 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

[29] 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

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

⁴ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724–725 & 727; *Z v Dental Complaints Assessment Committee*, above n 3, at [151].

⁵ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at [28].

[30] 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.

DISCUSSION

[31] Mr Joseph orchestrated the creation of three documents which falsely bore the signature of the business owner. The documents concerned an offer of employment to the complainant. The employment was genuine, but the documents falsely represented to the complainant and Immigration New Zealand that they had been signed by the business owner.

[32] While the documents are false, they do not amount to fraud in the conventional sense. The job was genuine. Mr Joseph had an interest in the business himself and was authorised to make such employment decisions. That begs the question as to why he did not personally sign them, but the answer to that might lie in having to explain to Immigration New Zealand the apparent conflict of interest in being both the adviser and the employer. This was mentioned in the Tribunal's earlier decision but raised no explanation from Mr Joseph.⁷

[33] In addition to the false documents, Mr Joseph failed to have an agreement with his client and failed to keep a proper file.

⁶ *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].

⁷ *NL v Joseph*, above n 1, at [50].

[34] As noted already, this is not Mr Joseph's first appearance before the Tribunal. An earlier complaint was upheld in *Sharma v Joseph*.⁸ It was resolved by agreement between the parties.

[35] A number of breaches of the Code by Mr Joseph were upheld by the Tribunal in that decision:

1. Missing a deadline for replying to Immigration New Zealand, resulting in the client's visa being declined and the client becoming unlawful in New Zealand. This could amount to negligence or a breach of cl 1 (no formal finding was made).
2. Not being fully frank with his client about not responding in time to Immigration New Zealand. This was found to be misleading, not dishonest, behaviour.
3. Not having a written agreement with the client, in breach of cl 18(a).
4. Failing to confirm in writing to the client the details of material discussions with him, in breach of cl 26(c).

[36] The Tribunal noted that Mr Joseph had accepted his wrongdoing and was contrite. In assessing the sanctions, the focus was on compensating the client. The Tribunal directed, by consent, that Mr Joseph complete a refresher training course with Toi-Ohomai, pay the client \$6,872 in compensation and pay the Registrar \$1,000 in costs. Mr Joseph has satisfied those sanctions.

[37] I will now turn to the sanctions that might be appropriate here.

[38] I agree with Mr Joseph that rehabilitation is an important principle in assessing sanctions. On the other hand, this is the second time he has appeared before the Tribunal. I note however that the misconduct here occurred around the same time as that which was the subject of the first complaint. It happened before the earlier complaint was upheld. Mr Joseph says 2017 was his first year of full-time practice and he has learned from those mistakes. Furthermore, the refresher course which he passed in 2019 has helped his understanding of the professional obligations.

[39] I take into account that Mr Joseph offers to pay compensation to the complainant, though no such claim has been filed so no compensation will be directed.

⁸ *Sharma v Joseph* [2018] NZIACDT 5.

Caution or censure

[40] Mr Joseph advances no explanation for instructing an employee to sign documents in the name of another person, rather than on behalf of that person or Mr Joseph signing them himself. He provided false documents to Immigration New Zealand. His conduct is denounced. The appropriate sanction is a censure.

Training

[41] Mr Joseph completed a post graduate certificate in 2013 prior to being first licensed. He then completed a refresher course at Toi-Ohomai in 2019, as directed by the Tribunal. Ms Pragji, on behalf of the Registrar, submits that Mr Joseph should be directed to undertake a further paper offered by Toi-Ohomai specifically concerning professional practice.

[42] Mr Joseph says he has learned from the complaints and the refresher course. He has since really focussed on improving his services and strictly following the Code. There have been no complaints since those relating to his work in 2017.

[43] Mr Joseph will be given the benefit of the doubt as to the learning he says has occurred. Having completed a course which would have included his professional obligations only last year, I do not see yet another course as being necessary. If he does not understand his professional obligations now, as he says he does, and breaches the Code again, the answer is more likely to lie in removing him from the profession than retraining.

Suspension

[44] Ms Pragji seeks the suspension from practice of Mr Joseph until he completes further retraining.

[45] Depriving a professional person of his or her licence and therefore livelihood is a sanction of last resort.⁹ It is a severe sanction. The same principle applies to a temporary removal from the register.

[46] There is a pattern to Mr Joseph's professional misconduct, particularly regarding his relationship with his clients. While not found to have been dishonest in either complaint, he misled both clients. Furthermore, Mr Joseph is lax, as described by the Tribunal in the earlier decision, about properly documenting the relationship with his

⁹ *Patel v Complaints Assessment Committee*, above n 5, at [29] & [81].

clients. He has now twice failed to have a written agreement with them. He fails to communicate with his clients in writing and does not keep proper records of their visa applications or his communications with them. These are not minor or technical breaches. In particular, as I said in the earlier decision, ensuring that there is a written agreement with the client is an important obligation of an adviser.¹⁰

[47] I have, however, already noted that the misconduct here occurred around the same time as that in the earlier complaint. Mr Joseph says that as a result of the complaints, he has learned a lesson. He says he has taken practical steps, which he does not specify, to ensure the misconduct does not happen again. According to him, he now has a better understanding of his obligations from the refresher course.

[48] The issue for me is whether the public need protecting from Mr Joseph, given that two complaints have been upheld. Since depriving a professional person of his livelihood is a sanction of last resort, I will again give Mr Joseph the benefit of the doubt. I will take him at his word that he has learned a lesson and the public do not therefore need protecting from him.

[49] I decline to suspend Mr Joseph's licence.

Financial penalty

[50] The provision of false documents to Immigration New Zealand is a serious complaint. I acknowledge, however, that there was no fraud as such. His conduct was more misleading than dishonest. The deception was as to who approved the employment offer and not as to whether the offer was genuine.

[51] In addition, Mr Joseph failed to have a written client agreement or keep proper records.

[52] Mr Joseph, as noted above, is a repeat offender though the misconduct here occurred before the earlier complaint was upheld.

[53] The penalty will be \$5,000.

OUTCOME

[54] Mr Joseph is:

- (1) censured; and

¹⁰ *NL v Joseph*, above n 1, at [52].

(2) ordered to immediately pay to the Registrar \$5,000.

ORDER FOR SUPPRESSION

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

[56] There is no public interest in knowing the name of Mr Joseph's client, the complainant.

[57] 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.