IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2020] NZIACDT 29

Reference No: IACDT 001/19

IN THE MATTER	of a referral under s 48 of the Immigration Advisers Licensing Act 2007
BY	**THE REGISTRAR OF IMMIGRATION ADVISERS** Registrar
BETWEEN	**IMMIGRATION NEW ZEALAND (MICHAEL CARLEY)** Complainant
AND	**CAITLIN MAREE PENTY** Adviser

DECISION
(Sanctions)
Dated 6 July 2020

REPRESENTATION:

Registrar:	Self-represented
Complainant:	No appearance
Adviser:	Self-represented

INTRODUCTION

[1] Ms Caitlin Maree Penty, then a licensed adviser, acted for 11 clients from the Philippines. She took over an arrangement that her employer, Mr Bruce Cleland, then also a licensed adviser, had with two companies operating in the Philippines to provide immigration services for Filipino workers entering New Zealand. Apart from one interview with each client early in the process, Ms Penty usually had no contact with her clients.

[2] A complaint made by Immigration New Zealand (Michael Carley) to the Immigration Advisers Authority (the Authority), was referred by the Registrar of Immigration Advisers (the Registrar), the head of the Authority, to the Tribunal. It was upheld in a decision issued on 18 May 2020 in *Immigration New Zealand (Carley) v Penty*, with Ms Penty found to have relied on unlicensed persons to perform immigration work, in breach of the Licensed Immigration Advisers Code of Conduct 2014 (the Code).[1] Her conduct was also found to be contrary to 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] At the material time, Ms Penty was provisionally licensed as an immigration adviser. She was an employee of Novo Education Consulting Limited (Novo), trading as Choose New Zealand. Her supervisor was her employer, Mr Cleland, then a full licence holder. He was a director of Novo. Neither Ms Penty nor Mr Cleland are currently licensed. Ms Penty surrendered her licence on 13 July 2019.

[6] It is relevant to record that a very similar complaint against Mr Cleland, based on the same arrangements with the companies in the Philippines, had been upheld by the Tribunal on 3 May 2019.[2]

[7] In summary, Novo had a business relationship with two companies operating in the Philippines, IPS and BNAC. These companies operated together and were owned by Mr Bruce Porteous. Ms Penty became the fourth licensed adviser to be disciplined by the Tribunal as a result of working with Mr Porteous. These complaints always arose

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[1] *Immigration New Zealand (Carley) v Penty* [2020] NZIACDT 21.
[2] *Immigration New Zealand (Calder) v Cleland* [2019] NZIACDT 25, *Immigration New Zealand (Calder) v Cleland* [2019] NZIACDT 38.

out of the adviser's lack of engagement with the client in the Philippines, the common thread being the adviser's unlawful delegation of control of the visa application and management of the client relationship to the staff of IPS/BNAC.

[8] Mr Cleland had been disciplined in respect of 12 Filipino clients, with the applications having been filed with Immigration New Zealand in September and October 2016. The complaint against Ms Penty concerned 11 Filipino clients for whom she had acted between about March 2017 and August 2018.

[9] The standard arrangement saw IPS/BNAC source both the worker in the Philippines and the job in New Zealand.

[10] The primary, and for most clients, only contact Ms Penty had with the client was one Skype interview. In respect of a small number of clients, Ms Penty attempted unsuccessfully to engage them by email.

[11] The work visa applications and supporting documents were prepared by the staff of IPS/BNAC. It was the staff who worked with the clients in advising them as to the information and documents needed, gathered the supporting material from the clients and collated it for the applications filed with Immigration New Zealand. The applications were filed online, with Ms Penty having checked the documents herself before they were uploaded.

Decision of the Tribunal

[12] It was found that Ms Penty had unlawfully used unlicensed staff to undertake work regarded as immigration advice under the Act. This was contrary to the Act and therefore a breach of cl 3(c) of the Code. This was the case in respect of nine clients. The use of unlicensed staff was also found to be unprofessional, a breach of cl 1 of the Code, but this finding would not materially add to the sanctions.

[13] Furthermore, Ms Penty had no written agreement with all 11 clients, in breach of cl 18(c) of the Code. It was further found that she had been negligent in failing to ensure that she signed the written agreements. However, this alternative charge would not add to any sanction for the breach of cl 18(c).

SUBMISSIONS

Submissions from the Registrar

[14] The Registrar notes in his submissions (10 June 2020) that the Tribunal regarded as an aggravating feature of Ms Penty's conduct that she had filed visa applications after

Immigration New Zealand had drawn to her attention that she might not have been meeting her professional responsibilities.

[15] It is accepted by the Registrar that there are mitigating factors indicating that Ms Penty should not be subject to the same level of penalties as Mr Cleland:

(1) Mr Cleland was guilty of additional breaches of the Code;

(2) Ms Penty was on a provisional licence under the direct supervision of Mr Cleland during the time the breaches occurred; and

(3) Ms Penty surrendered her licence on 13 July 2019 and would be required to complete the refresher course should she seek to be relicensed.

[16] In the circumstances, the Registrar submits that the appropriate sanctions would be:

(1) censure; and

(2) an order for payment of a penalty in the vicinity of $5,000.

[17] The Registrar further notes that this is Ms Penty's first appearance before the Tribunal.

Submissions from the complainant

[18] There are no submissions from the complainant.

Submissions from Ms Penty

[19] Ms Penty states in her letter to the Tribunal (12 June 2020) that she has voluntarily surrendered her licence and no longer works as an immigration adviser, nor in any field relating to immigration. She has an administration role for a non-profit organisation and has no intention of returning to the immigration industry.

[20] It is noted by Ms Penty that all of the applications had been made within her first year of practice and the majority within the first six months. She had been a provisional licence holder only, with her supervisor being responsible for overseeing her work.

[21] Furthermore, all of the clients involved had been successful and she notes that no complaint to the Authority had been made by any of them.

[22] Ms Penty contends that the arrangement with the offshore companies had ceased prior to the complaint being referred to the Tribunal. Novo had put in place new processes to ensure that there was no reoccurrence of the earlier wrongdoing.

[23] It is submitted by Ms Penty that the appropriate sanctions would be:

(1) caution or censure;

(2) an order preventing her from reapplying for a licence for a period not exceeding two years; and

(3) a requirement to undertake training.

[24] Ms Penty argues that the public are already protected as she has surrendered her licence and is not involved in the immigration field. Given these facts, any sanctions beyond those identified by her would feel like a punishment to make an example of an adviser who is no longer practising. It would do little to protect the standards of a profession she is no longer part of and has no intention of returning to.

[25] Ms Penty also asks that the Tribunal reasonably and compassionately take into account the COVID-19 pandemic as the New Zealand economy has taken a significant downturn. Any financial sanctions needed to be well thought out, as the requirement to pay any fine would be more difficult in the current climate.

[26] In support of Ms Penty, there is a letter from Mr Cleland (12 June 2020). He records that he has now retired.

[27] According to Mr Cleland, at no time did Ms Penty believe she was acting outside the "guidelines". When she received the warning letter from Immigration New Zealand, she discussed it with him. He told her that the client interviews with the agency had no credibility. It turned out he was wrong, but Ms Penty had no reason to disbelieve him.

[28] Mr Cleland states that he had been extremely impressed with Ms Penty's knowledge, skill and work ethic, and he deeply regretted exposing her to a complaint. It had caused her huge stress. She had left the profession, which was a great loss.

[29] In Mr Cleland's submission, a large penalty against a young woman under supervision who did not deliberately engage in wrongdoing and whose clients did not suffer would reinforce the view of beginner advisers that "this profession is unreasonable" (I understand Mr Cleland to be criticising the Authority as unreasonable). A fine of $2,000 would indicate that, while the matter was "somewhat serious", advisers can make mistakes that are not career ending.

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:
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> (c) suspension of licence for the unexpired period of the licence, or until the person meets specified conditions:
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> (d) cancellation of licence:
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> (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:
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> (f) an order for the payment of a penalty not exceeding $ 10,000:
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> (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:
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> (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:
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> (i) an order directing the licensed immigration adviser or former licensed immigration adviser to pay reasonable compensation to the complainant or other person.

[3] Immigration Advisers Licensing Act 2007.

[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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> …
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> 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]

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

[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].

[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 worthwhile to repeat what I said in the sanctions decision against Mr Cleland. The starting point is the seriousness of the complaint. It was by using Ms Penty's name as a licensed adviser that the unlicensed staff could provide immigration advice. Both Ms Penty and the staff may have committed criminal offences. That is not for me to determine or punish, but it shows the gravity of the professional violation.

[38] Rubber stamping, as the practice is known, is insidious and robs clients of the protection to which they are entitled. Clients are entitled to have their immigration matters personally handled throughout the process by an adviser who is licensed and therefore both knowledgeable and subject to a code of professional standards. They are also entitled to direct contact throughout the process by the adviser.

[39] As was the case with Mr Cleland, I accept that Ms Penty's conduct was not a deliberate circumvention of her obligations, but a misunderstanding as to the scope of the permitted clerical work exception to the prohibition against unlicensed staff undertaking immigration advice work.

[40] I acknowledge that the work for these clients at issue here was done within the first 15 months of Ms Penty being licensed in May 2017 and that she had been supervised then by Mr Cleland who introduced her to the unlawful scheme. I accept that

[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].

Novo has changed its practice and now engages directly with its clients. According to Ms Penty, the arrangement with the offshore companies had ceased prior to the complaint being referred to the Tribunal. That is true, but I note that Ms Penty continued to act for some of the clients without engaging them, even after the complaint had been made to the Authority in June 2018.

[41] In the decision upholding the complaint, I recorded that an aggravating feature of Ms Penty's misconduct was that it continued after Immigration New Zealand's letter of warning on 18 January 2018. She apparently raised that letter with Mr Cleland who was dismissive of the warning, as he was of the same complaint against him which by then had already been referred by the Authority to the Tribunal. It was understandable but not wise for Ms Penty to rely on Mr Cleland's advice in the circumstances. However, I accept that seeking advice from her supervisor does mitigate this aggravating feature.

[42] I will now assess the potential sanctions.

Caution or Censure

[43] A censure is appropriate to mark the Tribunal's disapproval of Ms Penty's conduct. A caution would not reflect the seriousness of the breaches nor that they concerned 11 clients.

Training

[44] Ms Penty is no longer licensed and has advised she will not be returning to the profession. The Registrar advises that, if she was to return, she would have to complete the refresher course available at Toi-Ohomai Institute of Technology. I do not therefore intend to direct Ms Penty to undertake training.

Financial penalty

[45] Regrettably, there has been a long line of recent cases involving rubber stamping, much of it originating from the Philippines. I do not propose to review these cases in any detail. They provide some guidance in terms of penalty, but each turns on the specific circumstances of the wrongdoing, the totality of the wrongdoing, the totality of the sanctions, and the personal circumstances of the adviser. I merely note the recent decision in *Chiv*.[8] That decision refers to earlier decisions of the Tribunal.

[8] *Immigration New Zealand (Calder) v Chiv* [2019] NZIACDT 78 at [36] & [38].

[46] The penalty for Mr Cleland was $7,500. Ms Penty's misconduct was very similar in respect of the rubber stamping, though related to fewer clients (nine instead of 12). More importantly, Ms Penty was only provisionally licensed and was being supervised by Mr Cleland himself. At the time she was acting for these clients, the Tribunal had not issued its decision upholding the complaint against Mr Cleland. I note also that other failings were upheld against Mr Cleland, but that is also the case for Ms Penty. The mix of complaints upheld for each of them is not identical.

[47] Ms Penty in her letter to the Tribunal focuses on the protection of the public as the primary objective of sanctions. While that is correct, she overlooks the secondary and legitimate purpose of punishment. Financial penalties are largely directed at punishment. But such penalties are also about deterrence, which is an element of public protection. In this case, that is not so much deterring Ms Penty herself who is no longer in the industry, but deterring other members of the profession.

[48] The COVID-19 economic downturn in New Zealand has no relevance. There is no suggestion that Ms Penty herself has been materially affected by the downturn, any more than any other New Zealander.

[49] The complaint upheld against Ms Penty is not "somewhat serious", as described by Mr Cleland, but serious. A penalty of $2,000 would not recognise the damage done to the profession by this practice of rubber stamping, nor would it be consistent with the Tribunal's earlier decisions. I note again that Ms Penty's misconduct involved nine clients. In regards to the lack of a written agreement, it concerned 11 clients. It was systemic, not an isolated incident.

[50] I accept the submission of the Registrar as to the appropriate level and will direct a penalty of $5,000.

OUTCOME

[51] Ms Penty is:

(1) censured; and

(2) ordered to immediately pay to the Registrar a penalty of $5,000.

D J Plunkett
Chair