

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2020] NZIACDT 9

Reference No: IACDT 019/18

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **DKD**
Complainant

AND **GREGORY FRANCISCO
SMITH**
Adviser

**DECISION
(Sanctions)
Dated 13 February 2020**

REPRESENTATION:

Registrar: T Gray, counsel
Complainant: Self-represented
Adviser: No appearance

INTRODUCTION

[1] Mr Smith, the adviser, was instructed by the complainant to obtain a residence visa. While an Expression of Interest (EOI) was filed by Mr Smith, he failed to file a residence application within the time set by Immigration New Zealand. The complaint was upheld in a decision issued on 12 December 2019 in *DKD v Smith*.¹

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

BACKGROUND

[3] 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.

[4] Mr Gregory Francisco Smith was at the relevant time a licensed immigration adviser based in Auckland. He was a director of Impact Migration Services Ltd. A renewal of his licence was refused by the Registrar of Immigration Advisers (the Registrar), the head of the Immigration Advisers Authority (the Authority), on 20 October 2015.

[5] The complainant, a national of South Africa, had been living in New Zealand since 2011 and for most of that time had held an essential skills work visa. She was working as a children's programme coordinator. She had used Mr Smith for earlier immigration applications.

[6] The complainant was granted a work visa in April 2014, due to expire in April 2015. She approached Mr Smith in about April 2014 for assistance in applying for residence for her and her family. At the time, her husband lived in South Africa. Unfortunately, he is now deceased. Her daughter is understood to be with her in New Zealand.

[7] Mr Smith duly lodged an EOI for residence under the skilled migrant category on behalf of the complainant on 8 December 2014.

[8] Immigration New Zealand issued an invitation to the complainant to apply for residence on 19 January 2015, with its expiry due on 20 May 2015. It was sent by email to Mr Smith.

¹ *DKD v Smith* [2019] NZIACDT 82.

[9] As Mr Smith did not advise the complainant of the invitation, she contacted Immigration New Zealand on 23 March 2015 and was told that an invitation had already been issued in January 2015. Mr Smith did not contact her until April 2015 at which time he confirmed she had been invited to apply for residence. He contacted her again that month to advise that he would hand-deliver her residence application to Immigration New Zealand within time.

[10] Mr Smith undertook no further work on the residence application and the invitation duly expired on 20 May 2015. Through 2015 and into 2016, the complainant contacted Mr Smith enquiring as to the progress of the residence application which she thought had been made, but received either no reply or no satisfactory reply from him.

[11] On 20 October 2015, the Registrar refused to renew Mr Smith's adviser's licence.

[12] By April 2016, the complainant had become aware that Mr Smith had no licence and that he had not lodged her residence application. She raised this with him and he refunded \$2,000 to her on 28 July 2016.

[13] In September 2016, the complainant's husband passed away from a heart attack in South Africa. The complainant attributes this to the failure to obtain residence.

[14] A complaint was made by the complainant to the Authority which was referred by the Registrar to the Tribunal.

Decision of the Tribunal

[15] The Tribunal found that Mr Smith did not contact the complainant regarding the invitation until April 2015, three months after it had been issued. He received instructions from her to file a residence application but did not do so and the invitation expired. He was found to be negligent, a statutory ground of complaint.

[16] Furthermore, Mr Smith had failed to provide the complainant with a written client agreement, in breach of cl 18(a) of the Licensed Immigration Advisers Code of Conduct 2014.

SUBMISSIONS

Registrar's submissions

[17] Counsel for the Registrar, Mr Gray, notes that the Tribunal has previously sanctioned Mr Smith for misconduct of a similar character and also that he failed to

respond to the present complaint. He was a relatively experienced adviser at the time of his negligence. He had been fully licensed since July 2011, approximately four years before his negligent conduct.

[18] Mr Smith's negligence represented a fundamental failure to attend to his professional obligation to advance an application. It is troubling that only after the complainant had made her own enquiries of Immigration New Zealand did Mr Smith give her an assurance that her residence application would be hand-delivered within the prescribed period. He then went on to receive \$1,803 from her, two months after the expiry of the invitation to file a residence application. By this time, he should have been aware that he had not attended to the filing of the application.

[19] It is submitted that Mr Smith should be censured and a financial penalty in the vicinity of \$5,000 should be imposed.

[20] The public also need protecting from Mr Smith, so a prohibition on reapplying for a licence for two years should be imposed. He should also be required to undertake the Graduate Diploma in New Zealand Immigration Advice, the gold standard for training licensed advisers. This is to allow for Mr Smith's rehabilitation, to ensure a higher level of competence and to protect the public. It is in the interests of the public that this be undertaken prior to any reapplication from him for a licence.

The complainant's submissions

[21] In her email to the Tribunal on 20 January 2020, the complainant stated that Mr Smith's negligence had put her family through much pain and suffering, for which he had shown no remorse. She had lost her husband and the father of her child, so the mental strain was "just horrible", something she had to live with every day. They have been robbed of a future in New Zealand where they have been welcomed and feel at home. It was unacceptable that she still had to apply for an ongoing work visa which was a huge financial burden considering that she was now a widow.

[22] The complainant asked that "the Authority" help them to obtain permanent residence, given that Mr Smith's incompetence was not her fault. Despite the family trauma and financial losses, she was immensely grateful that New Zealand had afforded her an opportunity in a beautiful country which she did not take for granted. They considered themselves very fortunate.

The adviser's submissions

[23] Mr Smith was invited to file submissions but has not done so.

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 Smith has been found by the Tribunal to be negligent, in that he failed to file a residence application within the time prescribed by Immigration New Zealand. This is despite the complainant herself having raised this with him, only a few weeks before the deadline and receiving his assurance that it would be filed. Mr Gray correctly describes this as failing to perform a fundamental obligation of a professional adviser.

[32] Furthermore, Mr Smith did not enter into a written client agreement. This is another important professional obligation. The agreement provides critical information for a client, including about the adviser's professional obligations and complaint process. It sets out clearly the services to be performed by the adviser and the fees.

[33] Mr Smith's misconduct is aggravated by earlier disciplinary findings against him.⁷

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 *Allen v Smith* [2015] NZIACDT 5, [2015] NZIACDT 97; *Choudhary v Smith* [2015] NZIACDT 8, [2015] NZIACDT 98; *Hettige & Gerreyn v Smith* [2015] NZIACDT 9, [2015] NZIACDT 99; *February v Smith* [2015] NZIACDT 10, [2015] NZIACDT 100, [2015] NZIACDT 100 (addendum).

[34] Mr Smith has what can only be described as a poor disciplinary record. Four previous complaints against him have been upheld by the Tribunal. They are for conduct similar to that found here, including negligence (failing to carry out instructions, failing to carry out instructions in a timely manner, failing to apply for a visa and failing to respond to Immigration New Zealand within the time limits set), lying to a client regarding work done and as to the whereabouts of the client's passport, and having an inadequate client agreement. He has been censured on multiple occasions, ordered to make refunds and on 10 December 2015, he was prevented by the Tribunal from applying for a licence renewal for one year.

[35] There is another aggravating feature of Mr Smith's conduct and that is declining to engage with the Authority and the Tribunal. He has provided no explanation to the complainant for his conduct. Nor has he shown any remorse.

[36] There was evidence adduced before the Tribunal during the previous complaints that Mr Smith was unwell at the time of the earlier wrongdoing. The Tribunal accepted this played a significant role in his misconduct. The nature of this illness is not known to the current Tribunal chair. As Mr Smith has not engaged with the Authority or the Tribunal, there is no submission, let alone supporting evidence, that Mr Smith was unwell at the time of his wrongdoing concerning the complainant. His earlier illness is not a relevant factor in assessing sanctions here.

Caution or censure

[37] Mr Smith will again be censured to mark the Tribunal's condemnation of his conduct. He offers no explanation as to how he missed the deadline after discussing it with the complainant only a few weeks beforehand.

Training

[38] The Registrar considers it desirable that Mr Smith undertake training. I agree, given his disciplinary record and multiple professional flaws. He should not be relicensed until he has completed the Graduate Diploma in New Zealand Immigration Advice available from Toi-Ohomai Institute of Technology.

Prohibiting licence renewal

[39] Depriving a professional person of a licence to practice is regarded as a sanction of last resort. However, the public plainly need protecting from Mr Smith. He has already been subject to a ban for one year. Given his record and the absence of any reassurance

from him that he has learned any lesson, the public interest demands that he be prohibited from practising. He will be prevented from applying for a renewal of his licence for the maximum period of two years.

Financial penalty

[40] The failure to apply for a residence visa within the time permitted is likely to have had serious consequences for the complainant. I cannot say she would have been granted residence, as her invitation did not guarantee that residence would have been approved if she had applied. However, Immigration New Zealand only issue invitations when there is no obvious flaw in the EOI. That being the case, it must follow that she had a good chance of success. In other words, Mr Smith bears a high degree of responsibility for the complainant's failure to obtain residence.

[41] Mr Smith's conduct in receiving fees from the complainant after the expiry of the period for a valid application and neglecting to notify her at that time that he had not applied for residence is also worthy of adverse comment.

[42] I particularly note Mr Smith's poor disciplinary record.

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

Compensation

[44] The Tribunal has a discretion to award reasonable compensation. This can include a modest sum for inconvenience, stress and anxiety where that arises out of the adviser's wrongdoing.⁸

[45] The complainant has not sought compensation for any specific loss, but I will award a sum by way of general damages for Mr Smith's negligence, including additional work visa application fees, inconvenience, anxiety and stress. It will have been profoundly disappointing and frustrating for the complainant to have been offered an invitation to apply for residence, but then find that her adviser, a trusted professional, overlooked doing so. With some justification, the complainant feels Mr Smith has robbed her of a future in the country she has come to regard as home.

[46] Compensation will be set at \$5,000.

⁸ *Unnikrishnan v Goldsmith* [2017] NZIACDT 22 at [30]–[31].

Concluding remarks

[47] I have considerable sympathy for the complainant. Mr Smith bears responsibility for her predicament, as I have noted. I am, however, constrained by legislation in what I can achieve in sanctioning Mr Smith. I have no power to grant residence or even to recommend that to Immigration New Zealand. She may wish to show the Tribunal's decisions to the agency to establish how ill-served she was by her former licensed adviser.

OUTCOME

[48] Mr Smith is:

- (1) censured;
- (2) ordered to undertake and complete the Graduate Diploma in New Zealand Immigration Advice;
- (3) prevented from applying for a renewal of his licence for two years from today's date;
- (4) ordered to immediately pay to the Registrar the sum of \$5,000; and
- (5) ordered to immediately pay to the complainant the sum of \$5,000.

D J Plunkett
Chair