

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2021] NZIACDT 17

Reference No: IACDT 04/21

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **TI**
Complainant

AND **TIMOTHY JAMES MALCOLM**
Adviser

SUBJECT TO SUPPRESSION ORDER

**DECISION
(Sanctions)
Dated 20 July 2021**

REPRESENTATION:

Registrar: Self-represented

Complainant: Self-represented

Adviser: No appearance

INTRODUCTION

[1] Mr Malcolm, the adviser, acted for TI, the complainant, on an immigration application, but was tardy in making the application and failed to keep the complainant properly informed of progress. More seriously, he lied to her as to when the application was made.

[2] A complaint to the Immigration Advisers Authority (the Authority) was referred by the Registrar of Immigration Advisers (the Registrar) to the Tribunal. It was upheld in a decision issued on 8 June 2021 in *TI v Malcolm*.¹ Mr Malcolm was found to have misled his client, contrary to the Immigration Advisers Licensing Act 2007 (the Act), and 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 earlier decision of the Tribunal and will only be briefly summarised here.

[5] Mr Timothy James Malcolm is a former licensed immigration adviser. He practised under the name TM Immigration, in Auckland. His licence expired on 3 February 2021.

[6] The complainant is TI, a national of Germany.

[7] The complainant and Mr Malcolm entered into terms of engagement on about 7 August 2020 and shortly afterwards he completed the appropriate visa application form.

[8] On 11 August 2020, Mr Malcolm advised the complainant that the application would be filed “tomorrow” and on 24 August 2020, he informed her that he had not heard from Immigration New Zealand.

[9] Mr Malcolm did not file the application with Immigration New Zealand until 1 October 2020.

[10] Immigration New Zealand wrote to Mr Malcolm on 23 October 2020 raising issues which it was said could have a negative impact on the outcome of the application. Mr Malcolm did not copy this letter to the complainant, nor did he reply to it.

¹ *TI v Malcolm* [2021] NZIACDT 13.

[11] Mr Malcolm failed to reply to numerous communications from the complainant seeking advice or updates as to the progress of the application.

Decision of the Tribunal

[12] It was found that Mr Malcolm:

- (1) had lacked due care in respect of five matters, in breach of cl 1;
- (2) misled the complainant in –
 - (a) advising her on 11 August 2020 that he would send the application to Immigration New Zealand “tomorrow” when he did not file it until 1 October 2020; and
 - (b) advising her on 24 August 2020 that he had not heard from Immigration New Zealand, blaming a backlog there, when he had not actually filed the application at all;
- (3) failed to maintain a relationship of confidence and trust with the complainant and to provide her with objective advice, in breach of cl 2(a);
- (4) failed to provide written advice as to the progress of the application, in breach of cl 26(b); and
- (5) failed to maintain a client file and to make it available to the Authority, in breach of cl 26(e).

SUBMISSIONS

Submissions from the Registrar

[13] In his submissions of 30 June 2021, Mr Connor, the Registrar, notes that this is Mr Malcolm’s first appearance before the Tribunal. He was found to have been dishonest or misleading, in addition to multiple breaches of the Code.

[14] It is submitted that conduct involving dishonesty is at the serious end of the spectrum, which is important when determining sanctions. Often where a practitioner had been found to be dishonest, it would lead to being struck off. This might adversely affect the practitioner, but the Tribunal has a significant responsibility to uphold professional standards and mitigate risk to the public. It is noted that Mr Malcolm has chosen not to explain his conduct to the complainant, the Authority or the Tribunal.

[15] The Registrar submits that the appropriate sanctions would be:

- (1) censure;
- (2) an order preventing Mr Malcolm from reapplying for a licence for one year;
- (3) an order requiring Mr Malcolm to complete the Post Graduate Professional Practice Module (LAWS 7015) offered by Toi-Ohomai Institute of Technology prior to reapplying for a licence;
- (4) an order for payment to the Registrar of a penalty in the vicinity of \$2,000; and
- (5) an order to refund to the complainant \$850.

Submissions from the complainant

[16] In her letter to the Tribunal (undated but emailed on 27 June 2021), the complainant seeks a refund of the fee of \$850. She says the mishandling of her visa caused a job offer to be rescinded. If her application had been filed and processed normally, she would have started work on 17 August 2020. Her hourly rate would have increased from \$22 to \$25.50 when the Teaching Council registered her on 20 November 2020. As it transpired, she was unemployed until 7 December 2020. The complainant therefore seeks compensation of \$14,388 for lost wages (69 working days x 8 hours daily x \$22 hourly + 11 days x 8 x \$25.50). The total compensation sought is \$15,238.

[17] Additionally, the complainant contends that Mr Malcolm should be prevented from reapplying for a licence given his egregious behaviour.

Submissions from the adviser

[18] There are no submissions from the adviser.

JURISDICTION

[19] The Tribunal's jurisdiction to impose sanctions is set out in 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—

² Immigration Advisers Licensing Act 2007.

- (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.

[20] 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:
 - (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.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.

[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 collective reputation and public confidence in the profession itself.⁴

[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.⁵

[25] 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;

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

⁴ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724–725 & 727; *Bolton v Law Society* [1994] 2 All ER 486 (EWCA) at 492; *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].

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].

- (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

[26] The starting point is the seriousness of a finding of misleading conduct, having lied to his client. This is aggravated by Mr Malcolm's refusal to engage in the disciplinary process. He has failed to explain his conduct, or to apologise or express any remorse to the complainant, the Authority and the Tribunal. There can be no confidence that Mr Malcolm has learned any lesson, or would change his practices if he was to regain his licence or would conduct himself honestly. The same can be said for his numerous breaches of the Code. The Tribunal is not confident he would comply with his Code obligations in the future.

Caution or censure

[27] I agree with the Registrar that Mr Malcolm should be censured. This is necessary to mark disapproval of his conduct. It is too serious for a mere caution.

Training

[28] I also agree with the Registrar that, should Mr Malcolm seek a renewal of his licence, he needs to learn his professional obligations. He is directed to complete the LAWS 7015 paper in the event he seeks to be relicensed.

Prohibition against renewal

[29] It is concerning that Mr Malcolm has, in the face of a serious allegation of deceit of his client, chosen not to explain himself. There is no expression of remorse. There is no evidence of any lesson learned. He has displayed a contempt for his client and the disciplinary process. The evidence before the Tribunal shows that Mr Malcolm has learned nothing. He has not shown that he is fit to practice. He will be prevented from reapplying for a licence for the maximum period of two years.

Financial penalty

[30] Given the gravity of the complaint of misleading his client, together with the multiple breaches of the Code, I agree with the Registrar that a penalty of \$2,000 is appropriate.

Refund

[31] I accept the complainant's request to order a refund of the fee of \$850.

Compensation

[32] The Tribunal can award reasonable compensation arising from an adviser's wrongdoing.

[33] The complainant seeks substantial compensation of \$14,388. This is alleged to be her lost wages arising from the late visa application.

[34] There are a number of imponderables in this claim. It is not known when Immigration New Zealand could have been expected to approve the complainant's application, even if it had been filed shortly after 7 August 2020. It must be borne in mind that the filed application was inadequate, which may not have been Mr Malcolm's fault, leading to an adverse information letter from the agency three weeks after the application was finally filed. Nor is it known when the visa was ultimately granted. It is not known whether the complainant could have been immediately employed at that point. I notice also that the complainant's registration with the Teaching Council was not issued until 20 November 2020. This might have impacted on her ability to obtain a position at the time of the agency's approval, if it was before 20 November 2020.

[35] Furthermore, the complainant claims gross wages, but taxation and expenses associated with working reduce what might be regarded as her net loss.

[36] It has not been shown that the complainant's claimed losses arose from Mr Malcolm's wrongdoing. I decline to award any compensation.

OUTCOME

[37] Mr Malcolm is:

- (1) censured;

- (2) ordered to complete LAWS 7015 at Toi-Ohomai, prior to applying to be relicensed;
- (3) prevented from reapplying for a licence for two years from today's date;
- (4) ordered to immediately pay to the Registrar \$2,000; and
- (5) ordered to immediately pay to the complainant \$850.

ORDER FOR SUPPRESSION

[38] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.⁷

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

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

D J Plunkett
Chair

⁷ Immigration Advisers Licensing Act 2007, s 50A.