

**IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL**

Decision No: [2021] NZIACDT 24

Reference No: IACDT 05/21

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

**BY** **THE REGISTRAR OF  
IMMIGRATION ADVISERS**  
Registrar

**BETWEEN** **HT**  
Complainant

**AND** **SARFRAZ SAIF SHAIKH**  
Adviser

**SUBJECT TO SUPPRESSION ORDER**

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**DECISION  
(Sanctions)  
Dated 7 October 2021**

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**REPRESENTATION:**

Registrar: Self-represented  
Complainant: No appearance  
Adviser: P Moses, counsel

## INTRODUCTION

[1] Mr Sarfraz Saif Shaikh, the adviser, acted for HT, the complainant, on an application to renew a work visa. However, due to the absence of one supporting document, the application was not made on time and the complainant's immigration status became unlawful. That document had been sent to Mr Shaikh's employee before the deadline, but neither he nor the employee were aware of this.

[2] A complaint to the Immigration Advisers Authority (the Authority) against Mr Shaikh was referred by the Registrar of Immigration Advisers (the Registrar) to the Tribunal. It was upheld in a decision issued on 27 August 2021 in *HT v Shaikh*.<sup>1</sup> It was found that Mr Shaikh was not professional or diligent and failed to exercise due care, contrary to the Licensed Immigration Advisers Code of Conduct 2014 (the Code).

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

## 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 Shaikh, a licensed immigration adviser, is a director of Immigration Advice New Zealand Ltd (Immigration Advice), of Auckland.

[6] The complainant, a national of India, was in New Zealand on a work visa due to expire on 25 September 2020. Mr Shaikh was aware of the complainant's circumstances, having previously acted for him. The relevant documents needed to support a renewal of the visa were sent to him on 22 September 2020. Not later than the following day, the complainant instructed Mr Shaikh to go ahead with the renewal. He signed Mr Shaikh's services agreement that day.

[7] An online application was immediately created by an employee. Mr Shaikh reviewed the supporting documents in the evening of 25 September 2020 and noticed that one of them was not in the required format. He asked an employee to inform the complainant. The latter emailed the document to the employee about 50 minutes later. However, both Mr Shaikh and the employee had turned off their electronic devices by then and were not aware the document had been sent until a few days later.

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<sup>1</sup> *HT v Shaikh* [2021] NZIACDT 20.

[8] As a result, the complainant became unlawful in New Zealand, so the application could not be made. A request for a discretionary visa made by Mr Shaikh was refused by Immigration New Zealand.

#### *Decision of the Tribunal*

[9] It was found that Mr Shaikh was not professional or diligent, nor did he exercise due care. He had breached cl 1 of the Code. His conduct was not mere inadvertence or administrative oversight. There were multiple failures by him:

- (1) Waiting more than 24 hours to assess the documents.
- (2) Making no arrangement with the complainant and/or his staff as to how to send the correct document.
- (3) Turning off his laptop and forgetting about the imminent deadline.

## **SUBMISSIONS**

#### *Submissions of the Registrar*

[10] In his submissions (13 September 2021), the Registrar, Mr Connor, submits that the appropriate sanctions would be:

- (1) caution; and
- (2) a penalty in the vicinity of \$1,000.

#### *Submissions from the complainant*

[11] There are no submissions from the complainant.

#### *Submissions of the adviser*

[12] There are submissions (30 September 2021) from Mr Moses, counsel for Mr Shaikh.

[13] Mr Moses says that Mr Shaikh accepts the Tribunal's finding of a breach of the Code. He regrets his professional error in missing the filing deadline and apologises to the complainant. As the Tribunal had acknowledged in the earlier decision, Mr Shaikh had been forthright with the complainant and Immigration New Zealand. He had correctly and promptly assessed the complainant's options, and refunded the monies held.

Importantly, according to the Tribunal, he learned from the complaint and made changes to his internal processes to prevent any repeat.

[14] While the Tribunal found there were multiple failures by Mr Shaikh, this is not the same thing as multiple breaches of the Code. There was, in essence, a single breach of clause 1, though there were steps towards that breach.

[15] Mr Moses points out that Mr Shaikh is an extraordinarily busy practitioner, who handles a large volume of applications in addition to his managerial workload. He has a very high success rate. This was an isolated error by a highly conscientious and competent adviser.

[16] It is acknowledged that being cautioned is a likely consequence of the complaint being upheld.

[17] Mr Moses notes that the Registrar seeks a fine towards the lower end of the possible range. It is contended there is a live question as to whether a financial penalty is required at all. There have been a significant number of cases in the last three years where such a penalty had not been imposed (counsel lists 12). In *Emberson*, an adviser's tardiness resulted in an application no longer meeting the criteria and there was no fine, despite the adviser not engaging with the Tribunal.<sup>2</sup> In *Guich*, also where an adviser's breach led to an appeal being filed out of time, there was a fine of \$1,000 yet the adviser did not adopt a mature attitude, showed no remorse and learned nothing from the complaint.<sup>3</sup>

[18] Mr Moses submits that Mr Shaikh will already have to contend with the Tribunal's decisions being published. His name on a readily searchable database is likely to adversely affect his practice. While it is acknowledged this is an aspect of consumer protection, rather than punitive in nature, it is a very significant sanction in its own right.

## **JURISDICTION**

[19] 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:<sup>4</sup>

### **50 Determination of complaint by Tribunal**

After hearing a complaint, the Tribunal may—

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<sup>2</sup> *WQ v Emberson* [2019] NZIACDT 39.

<sup>3</sup> *DMX v Guich* [2020] NZIACDT 30.

<sup>4</sup> 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.<sup>5</sup>

...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.<sup>6</sup>

[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.<sup>7</sup>

[25] The most appropriate penalty is that which:<sup>8</sup>

- (a) most appropriately protects the public and deters others;
- (b) facilitates the Tribunal's important role in setting professional standards;
- (c) punishes the practitioner;

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<sup>5</sup> *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151].

<sup>6</sup> *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 5, at [151].

<sup>7</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at [28].

<sup>8</sup> *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] Mr Shaikh failed to file a work visa renewal application on time, resulting in the complainant becoming unlawful and losing the right to make another application as of right. A request for a discretionary visa was declined. Mr Shaikh was found to be in breach of cl 1 of the Code in that he had not been professional or diligent, nor had he exercised due care.

[27] As Mr Moses says, the multiple failures by Mr Shaikh led to only one breach of the Code. The Tribunal accepted in the earlier decision that Mr Shaikh had been mature and professional in his response to his mistake. He had informed his client and sought to remedy the problem, in doing so explaining the circumstances to Immigration New Zealand. Mr Shaikh has learned from the mistake and made changes to his internal systems. He engaged with the complaints process in a candid way.

[28] The consequences for the complainant were serious in that his immigration status became unlawful. However, it cannot be known if the application would have been successful if made on time. Nor is it known whether it had any longer-term effect on him, as his current status and whereabouts are unknown to the Tribunal. He has not engaged with the Tribunal.

[29] This is Mr Shaikh's first complaint. He has been licensed for more than 12 years.

### *Caution or censure*

[30] There is no dispute that a caution is appropriate. The Tribunal agrees. Mr Shaikh is hereby cautioned.

*Financial penalty*

[31] The Registrar submits that a penalty in the order of \$1,000 would be appropriate. Mr Moses submits that there is an issue as to whether there should be any penalty, given the isolated mistake by a busy and otherwise conscientious and competent practitioner who has learned from the mistake.

[32] The decisions of the Tribunal relied on by Mr Moses have been reviewed and it is accepted by the Tribunal that, at most, a very modest penalty might be appropriate. But there is no public interest in a punitive sanction in this case. There will be no penalty.

**OUTCOME**

[33] Mr Shaikh is cautioned.

**ORDER FOR SUPPRESSION**

[34] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.<sup>9</sup>

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

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

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D J Plunkett  
Chair

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<sup>9</sup> Immigration Advisers Licensing Act 2007, s 50A.