

**BEFORE THE IMMIGRATION ADVISERS
COMPLAINTS AND DISCIPLINARY TRIBUNAL**

Decision No: [2012] NZIACDT 39

Reference No: IACDT 021/10

IN THE MATTER

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

BY

Immigration Advisers Authority
Authority

BETWEEN

Jennifer Tully
Complainant

AND

Sharon Gail Yerman
Adviser

DECISION
IMPOSITION OF DISCIPLINARY SANCTIONS

REPRESENTATION:

Complainant: In person

Adviser: In person

Date Issued: 31 July 2012

DECISION

The Decision on the Complaint

- [1] Ms Yerman was engaged by Ms Tully and her family to assist with applying for residence visas so the family could migrate to New Zealand. Both Ms Yerman and the Tully family were in South Africa.
- [2] The application was not successful and there was a right of appeal to the Residence Review Board. An appeal was lodged. However, due to Ms Yerman's errors the appeal was lodged out of time and could not proceed.
- [3] Ms Yerman thought the appeal had been lodged in time, but has had to accept it was filed late.
- [4] Unfortunately, Ms Yerman's response has been to attempt to place the blame for her own failings on her client. The complaint has been upheld in a decision issued on 9 May 2012.
- [5] The Tribunal found Ms Yerman:
- [5.1] Breached clause 1.1 of the Code as she failed to act with care, diligence and professionalism in performing her services. In particular:
- [5.1.1] She was careless in failing to identify the date by which the appeal had to be lodged.
- [5.1.2] She was not diligent, as she failed advise her clients, ensure she had instructions, and undertake the necessary work early enough to be in a position to file the appeal in time.
- [5.1.3] Her conduct lacked professionalism, as she admits she failed to take responsibility for the appeal, and looked to her clients to ensure she undertook the work.
- [5.2] Breached the standards in section 44(2)(a) and (b) of the Act, as she:
- [5.2.1] Was negligent in failing to identify the date when the appeal was to be lodged, and ensuring it was lodged on time (which does not materially add to the duty of care under clause 1.1 of the Code).
- [5.2.2] She confused her role as a professional adviser, and the role of her client who is reliant on her advice and direction. That amounted to incompetence. A licensed immigration adviser is required to understand their role, and the obligations it carries.

Submissions on Disciplinary Sanctions

Ms Tully

- [6] Ms Tully has consistently sought that Ms Yerman accept responsibility for her professional shortcoming, and complains of a lack of remorse and failure to take responsibility for refunding fees for work that was not completed.
- [7] Following the decision, Ms Tully produced records showing that the fee paid was ZAR21,660 (including VAT at 14 per cent). She sought the refund of those fees.

Ms Yerman

- [8] Ms Yerman's submissions focused on her experience of some 19 years giving immigration advice. She said she had assisted thousands of families successfully migrate to New Zealand.

- [9] She made it clear she regards the Tribunal's decision was flawed, as "It is not possible to make an informed decision without having access to telephone calls."
- [10] She sought name suppression.

Decision

- [11] Ms Yerman's failures in relation to identifying when an appeal had to be lodged, putting her clients on notice, and then gathering information and preparing the appeal, are significant. They are nonetheless the sort of mistakes that responsible and engaged professionals make.
- [12] Such errors will in ordinary circumstances require the imposition of disciplinary sanctions, as at best they will amount to inexcusable carelessness.
- [13] This case is unfortunate and unusual for an error of this kind. The professional failure is not recognised by the practitioner as a departure from the standards of conduct she aspires to.
- [14] The record clearly demonstrates Ms Yerman, through her own negligence, failed to identify when the appeal period expired and inform her clients of that. Regardless of that reality, she expressed resentment that her personal commitments should be affected by the time pressure in relation to lodging the appeal. She apparently still feels she is justified in doing so.
- [15] Ms Yerman's attitude puts the Tribunal in a position where it is important to have regard to the purpose of the sanctions to be imposed. The Tribunal's duty is not simply to impose a penalty that reflects the magnitude of the professional transgression.
- [16] In *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1, the Supreme Court held:
- "... 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 appropriate standards of conduct are maintained in the occupation concerned."
- [17] The statutory purpose is achieved by considering at least four factors which materially bear upon maintaining appropriate standards of conduct:
- [17.1] *Protecting the public*: Section 3 of the Act states "The purpose of this Act is to promote and protect the interests of consumers receiving immigration advice ..."
- [17.2] *Demanding minimum standards of conduct*: *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC), and *Taylor v General Medical Council* [1990] 2 All ER 263 (PC), discuss this aspect.
- [17.3] *Punishment*: The authorities, including *Z v CAC*, emphasise that punishment is not the purpose of disciplinary sanctions. Regardless, there is an element of punishment that serves as a deterrent to discourage unacceptable conduct (*Patel v Complaints Assessment Committee* (HC Auckland CIV-2007-404-1818; 13 August 2007).
- [17.4] *Rehabilitation*: It is important, when practicable, to have the practitioner continue as a member of the profession practising well (*B v B* [1993] BCL 1093, HC Auckland HC4/92, 6 April 1993).
- [18] In this case, the first consideration is a financial penalty. The gravity of the failure, the sustained nature of it, and the failure to take responsibility for her failure, require a significant financial penalty to encourage the maintenance of standards. However, it must be kept in proportion to the maximum penalty of \$10,000. This is not a case of gross negligence or dishonesty. I am satisfied a penalty of \$2,500, pursuant to section 51(1)(f) is appropriate.
- [19] The more difficult issue is having to deal with a practitioner who shows no insight into elementary principles of professional responsibility.

- [20] Ms Yerman has been given the privilege of holding the status of being a licensed immigration adviser. It gives her profession, with limited categories of other service providers, the exclusive right to provide immigration services.
- [21] The duty that corresponds with the privilege is to be aware of and maintain professional standards. The Code of Conduct has been developed and implemented under the statutory process prescribed in sections 37–39 of the Act. The opening obligation in clause 1 of the Code is:
- “A licensed immigration adviser must, with due care, diligence, respect and professionalism:
- a) perform his or her services; ... ”
- [22] Ms Yerman has demonstrated no evident commitment to the obligations to maintain these standards. Her approach has significant similarities to *ZW v Immigration Advisers Authority* [2012] NZHC 1069. That case commented on the Act being intended to mandate standards in an industry which had been subject to “much justified criticism”. In *ZW*, the practitioner had a similar attitude to his failure to maintain professional standards. The court commented:
- “Unfortunately for the appellant, possibly because he was acting for himself, he made no attempt to express contrition. Nor did he produce to either the Tribunal or the District Court any information about the nature of his work, how he might be able to accommodate concerns in the short term, or other traditional mitigating factors. Instead he tried unsuccessfully to deny any culpability.”
- [23] In the present case, not only has Ms Yerman made no attempt to express contrition for her unacceptable conduct, she has persistently attempted to blame her client.
- [24] The question is what is reasonable and necessary to expect Ms Yerman will understand her professional obligations, and maintain them.
- [25] One approach would be to cancel Ms Yerman’s full license and permit her to apply for a provisional license, so she has the benefit of mentoring before resuming the unsupervised delivery of professional services to the public. However, I am reluctant to take that course. First, Ms Yerman’s practice is in South Africa and getting supervision would be problematic. But, more importantly, the error was negligence, not intentional wrongdoing, and not at the level of gross negligence. The mistake was serious but not egregious, and the consequences must be proportionate.
- [26] The fact that Ms Yerman suffers a financial penalty and is censured, cautioned, and faces this case being published will no doubt have an impact on her.
- [27] I have considered the possibility of requiring that Ms Yerman undertake specified training. However, the most relevant training is still being developed. It is not ideal to take make an order for training that is not immediately available.
- [28] In all the circumstances, I am satisfied a financial penalty, censure and caution are on this occasion appropriate. Ms Yerman should pay close attention to the terms of the caution.

Compensation and refund of fees

- [29] It has been a longstanding criticism of some professional disciplinary processes that they do not include jurisdiction to require a professional who is at fault to compensate the client. That often requires a separate, and potentially expensive, second process.
- [30] The Act addresses that perceived shortcoming by providing that this Tribunal may require an adviser to refund fees and pay reasonable compensation when a complaint has been upheld.
- [31] Section 51 of the Act confers these powers using general language. The application of the power is relatively uncomplicated where the grounds on which the complaint has been upheld would establish a civil claim for breach of contract, negligence, or another tort, given the

standard of proof before this Tribunal is no less than would be the case for bringing the claim in a civil proceeding. Accordingly, in such circumstances, the Tribunal will ordinarily apply the same principles as in a civil claim, including causation, quantum and the other principles that regulate entitlement.

- [32] Ms Tully has raised various impositions on her and her family as a result of Ms Yerman's failure to lodge the appeal. However, I am not satisfied they reach the level that there is a quantifiable loss. I include the cost of Ms Tully applying for teacher registration; however that was a cost which was necessarily incurred to pursue the original residence application.
- [33] I am satisfied that all the fees paid should be refunded. Ms Yerman determined the appeal had sufficient merit to proceed and she failed to progress it. For Ms Yerman to now pursue the process, she would have to go through the whole process again commencing with a new residence application under current policy.
- [34] The application was always going to be complex and uncertain. Ms Tully and her family decided to embark on that process, and down to the time of the failed appeal it appears that the application was progressed satisfactorily.
- [35] I do not consider any compensation could be awarded up to that point.
- [36] However, having failed to lodge the appeal, to test the claim again the process has to start again. Accordingly, Ms Yerman's professional services have been of no real value as the work would need to be redone to pursue the grounds on which the appeal was to rely.
- [37] It follows that Ms Yerman has breached her agreement to provide professional services in a careful and professional manner, and she should fully refund all fees paid to her for her professional services.
- [38] Accordingly, I direct that Ms Yerman refund Ms Tully ZAR21,660. However, if that is not done and it is necessary to enter judgment in the District Court, the amount for which judgment on this item is to be entered is NZD3,250 (being the approximate amount converted from Rand to New Zealand dollars as at the date of this decision).

Publication

- [39] As noted, Ms Yerman has sought non-publication of her name, and identity.
- [40] There is no specific statutory direction concerning the power to direct either publication or non-publication of decisions. However, for a professional disciplinary body in contemporary New Zealand to operate without its decisions being available to the public would be a truly exceptional situation.
- [41] The Court of Appeal in *R v Liddell* [1995] 1 NZLR 538 (CA) at 546, Cooke P said, in relation to the question of name suppression:
- "[T]he starting point must always be the importance in a democracy of freedom of speech, open judicial proceedings, and the right of the media to report the latter fairly and accurately as 'surrogates of the public'."
- [42] While the *Liddell* case dealt with a criminal conviction and attendant publication issues, the principles apply to a professional disciplinary body. The function of a professional disciplinary body is concerned with accountability of members of the profession to the public. Public confidence in a disciplinary body achieving fair outcomes, and accountability, is not well served by a secret process, and there is nothing in the Act indicating that it does create such a process. For the Tribunal to operate without being open and publicly accountable would not be in the interests of either the public or the profession.
- [43] Publication of the Tribunal's decisions will follow as a matter of course, as there is no prohibition on publication. Directions to limit or prohibit publication are a matter within the scope of the Tribunal's power to regulate its own procedure (section 49(1)).

- [44] In the present case Ms Yerman has applied for suppression of her name and identifying details, on the grounds of previous good conduct over a long period, a flawed decision upholding the complaint, and the potential impact on her practice.
- [45] If Ms Yerman wishes to challenge the decision upholding the complaint, she must appeal it.
- [46] The other two grounds carry slight weight. If Ms Yerman's claims of outstanding professional practice in the past are accepted at face value, the Tribunal is on this occasion dealing with conduct that is not acceptable, and was sustained. It is of little significance that it is the first time this has occurred. Further, many people who face professional disciplinary action will be long-standing members of their professions. It is at best a factor carrying some weight. Undue weight would lead to the absurdity of contending less experienced practitioners should face publicity, and more experienced ones be exempt, in relation to similar professional failings.
- [47] It may well be that there are adverse business consequences for Ms Yerman, however such consequences flow from her own failure to maintain professional standards. Unless there was some disproportionate consequence, this factor can carry little weight against the public interest of open justice. In this case, it appears publicity will have the consequences that may be expected to follow from failure to maintain professional standards.

Orders

- [48] Ms Yerman is:
- [48.1] Cautioned that her failure to accept responsibility for professional failings, and instead attempting to blame her client, raises the question of her fitness to practice without supervision. She is strongly encouraged to reflect on the circumstances that led to this complaint, and pursue further training and education in relation to professional ethics. Should Ms Yerman have another complaint upheld against her, this caution may be considered in relation to the appropriate sanctions to impose.
- [48.2] Censured.
- [48.3] Ordered to pay a penalty of NZD2,500.
- [48.4] Ordered to refund fees amounting to ZAR21,660 to Ms Tully. However, alternatively, judgment may be entered in the District Court in Ms Tully's favour in New Zealand dollars, being NZD3,250.
- [49] There has been no application for an order for payment of the costs and expenses of the inquiry, so no order is made.
- [50] This decision and the decision upholding the complaint may be published without restriction.
- [51] The limited duration order dated 17 May 2012 prohibiting publication until Ms Yerman's application for name suppression was considered, is rescinded as from the date of this decision.

DATED at WELLINGTON this 31st day of July 2012

G D Pearson
Chair