BEFORE THE IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2012] NZIACDT 59

Reference No: IACDT 007/11

IN THE MATTER	of a referral under s 48 of the Immigration Advisers Licensing Act 2007
BETWEEN	**Immigration Advisers Authority**
	Authority
AND	**Johan Hendrik Adriaan van Zyl**
	Adviser

DECISION
IMPOSITION OF DISCIPLINARY SANCTIONS

REPRESENTATION:

Complainant: Mr J Lill, Ministry of Business, Innovation and Employment, Auckland.

Adviser: Mr S Laurent, Laurent Law, Auckland

Date Issued: 11 September 2012

DECISION

The Decision on the Complaint

[1] In a decision dated 31 July 2012, the Tribunal upheld this complaint.

[2] It is an "own motion complaint" presented by the Registrar pursuant to section 46 of the Act.

[3] The complaint involves Mr K, a migrant worker in the Philippines, and Mr van Zyl's role in assisting him to gain a work permit.

[4] Mr van Zyl was in New Zealand. He did not personally communicate with Mr K. He received draft papers prepared in the Philippines with the assistance of a person who was not a licensed immigration adviser. He reviewed the papers in New Zealand, stated he was the immigration adviser in the application, and the papers were then filed with Immigration New Zealand.

[5] There are two components to the complaint which were upheld:

[5.1] Mr van Zyl was the licensed immigration adviser, and he did not initiate the professional relationship. He allowed unlicensed people to do so. Accordingly, he failed to act professionally and get lawful informed instructions.

[5.2] Mr van Zyl then signed an Immigration New Zealand form, which represented that he had been asked by Mr K to complete the form and Mr K had agreed the information was correct before he signed the form. The certification was not correct, given that Mr van Zyl had no contact with Mr K.

[6] The complaint was upheld as a breach of the Code of Conduct, and also misleading conduct under the Act.

Submissions on Disciplinary Sanctions

The Authority

[7] The Authority observed the Act is primarily consumer focused, and relevantly requires licensed immigration advisers to be fit and competent.

[8] In relation to this matter:

[8.1] The conduct created a risk of inaccurate information being supplied, with potentially adverse consequences for Mr K.

[8.2] It was not possible to discharge Mr van Zyl's professional obligations without engaging with Mr K.

[9] The Authority says the conduct was deliberate, and a system for dealing with potential migrants which Mr van Zyl understood. In doing so he "demonstrated a lack of awareness and understanding of [his] professional obligations" and "engaged with Immigration New Zealand in a misleading manner".

[10] The Authority referred to *Wislang v Medical Council of New Zealand* [2002] NZAR 573 (CA), and said the correct approach for sanctions in a professional disciplinary context is that the purpose is to:

[10.1] punish the practitioner;

[10.2] act as a deterrent to other practitioners; and

[10.3] reflect the public and the profession's condemnation and opprobrium of the practitioner's conduct.

[11] The Authority submitted the misleading behaviour was serious, and the number of elements amounting to a breach of the Code aggravated the seriousness of the Conduct.

[12] The Authority noted that Mr van Zyl no longer held a licence, but there was nothing to prevent him applying again for a licence.

[13] In the circumstances, the Authority said the appropriate penalty was:

[13.1] censure;

[13.2] an order preventing Mr van Zyl from re-applying for a full licence for two years;

[13.3] if a provisional license was applied for, it should only be issued subject to appropriate supervision;

[13.4] a penalty of $2,000.

[14] The Authority contended that the circumstances of the case required restrictions on the issue of a full licence, as that was necessary to maintain standards.

Mr van Zyl

[15] Mr van Zyl made submission through his counsel.

[16] In relation to the potential order restricting the issue of a licence, the submissions noted Mr van Zyl was now 75 years of age, has retired and is unlikely to seek to resume practice. Nonetheless, the submission said the restrictions sought by the Authority were neither appropriate nor necessary.

[17] The principles evident in authorities such as *Patel v Complaints Assessment Committee* (HC Auckland CIV-2007-404-1818, 13 August 2007) demonstrate that it is necessary to weigh alternatives to removal or prohibition from the profession, with regard to the public interest. Other cases decided by this Tribunal where prohibition on the issue of a full licence has applied were in a more serious category, such as *Ben v Devi* [2012] NZIACDT 27.

[18] In the present case, at the time giving rise to the complaint Mr van Zyl believed it was legitimate for unlicensed people to undertake some of the initial work for clients; it was not a case of him acting in bad faith. The misrepresentation was only misleading as a matter of logic.

[19] The complaint was the Authority's, and Mr K was satisfied with the service he received. In these circumstances, consumer protection is not a real concern, and Mr K confirmed this in an affidavit presented in support of the submission.

[20] Mr van Zyl produced a written statement in which he explained:

[20.1] At the time, he genuinely believed he was complying with the requirements.

[20.2] He approached the role he had in reviewing the application with care and professionalism.

[20.3] Mr K was highly educated, and Mr van Zyl believed he would have the skills to ensure the information he supplied was accurate. Accordingly, the lack of personal contact to emphasise these issues would not have been harmful.

[20.4] When the Authority approached Mr van Zyl he immediately considered the issues raised, and changed his practices.

[20.5] He did not intend to renew his licence.

[20.6] Based on the advice he received from counsel after he was questioned by the Authority, he thought his practices were acceptable.

[20.7] Mr van Zyl was a conscientious practitioner who developed and maintained his professional skills, attending seminars and courses run by Immigration New Zealand, and NZAMI.

[21] Mr Laurent submitted that a financial penalty should reflect the nature of the conduct, and have regard to an absence of intentional wrongdoing.

[22] Mr Laurent sought name suppression on behalf of Mr van Zyl.

Decision

Penalty

[23] The purpose of professional disciplinary proceedings was affirmed by the Supreme Court in *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97]:

> "... 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."

[24] The statutory purpose is achieved by considering at least four factors which materially bear upon maintaining appropriate standards of conduct:

[24.1] *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 ..."

[24.2] *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.

[24.3] *Punishment*: The authorities, including *Z v Dental Complaints Assessment Committee*, 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).

[24.4] *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).

[25] It is very important in the present case to identify the gravity of the finding against Mr van Zyl.

[26] It is evident from the Tribunal's finding that:

[26.1] Mr van Zyl's practices for initiating a client relationship were wrong; and

[26.2] he signed a statement that was misleading.

[27] They are circumstances that could amount to misconduct at the most serious end of the scale. However, there are significant factual elements that must be taken into account, and they present a much less concerning picture.

[28] The letter dated 24 July 2010 which presented Mr K's application to Immigration New Zealand said Mr Porteus was seeking a licence, and "for the meantime we are using the licence of Johan van Zyl". There can be little doubt that statement was calculated to draw attention to

the fact that Mr van Zyl was acting in an unusual capacity, which could well attract investigation.

[29] That openness is not consistent with a dishonest practice which Mr van Zyl was hiding from Immigration New Zealand.

[30] I accept too that Mr van Zyl's counsel advanced an argument that Mr van Zyl's management of the application was proper. I have found that not to be the case. Regardless, it does leave open the view that Mr van Zyl may well have failed to appreciate what the standards were; particularly the restrictions the Act places on unlicensed persons.

[31] The most concerning element of Mr van Zyl's conduct is the certification that is clearly wrong. It appears Mr van Zyl's contention is that he did not truly direct his mind to the full implications of the wording.

[32] In considering that proposition, I have had close regard to the record of a meeting on 4 November 2010 where the Authority's investigator approached Mr van Zyl, and put the Authority's concerns to him. It is evident from the notes of that meeting that Mr van Zyl was fully cooperative, and immediately fully and frankly disclosed his work practices.

[33] I am satisfied Mr van Zyl was not acting dishonestly. He did fail in his responsibilities in two important respects. First, he failed to recognise that to act professionally, it was essential that he meaningfully engage with his client. Second, he did not give the terms of the certification he issued to Immigration New Zealand the attention they required.

[34] The certification was misleading. I accept, however, that was a result of lack of care and not dishonest deception. They are very different matters.

[35] Given Mr van Zyl's retirement I am not required to consider whether he should be prevented practising on his own account, as he has retired and is not licensed. However, much the same issues apply to the potential resumption of practice.

[36] In this particular case I am satisfied:

[36.1] Mr van Zyl's retirement is genuine and he has no intention of resuming practice.

[36.2] He is contrite, and now fully appreciates the importance of the professional responsibilities he previously failed to consider adequately until the Authority drew them to his attention. I am satisfied he would now ensure that he both understood and applied the relevant standards.

[37] Given the objectives identified by the Supreme Court in *Z v Dental Complaints Assessment Committee*; the fact Mr van Zyl is no longer in receipt of income from practising and that he is retired requires orders that do not impose an undue financial penalty but ensure he would only return to practice in appropriate circumstances are appropriate.

[38] Accordingly, the Tribunal will order that Mr van Zyl is censured, and may only apply for a licence during the following two years if appropriate specified conditions are met. In the circumstances, I will reserve leave to bring the matter before the Tribunal if it is necessary to determine those conditions. The appropriate conditions would depend on the type of licence and circumstances of practice. At this time that is theoretical.

[39] A financial penalty of $1,500 will be imposed; it is at the lower end of the scale and takes account of Mr van Zyl's retirement.

Publication

[40] Mr van Zyl has sought non-publication of his name.

[41] There is no specific statutory direction concerning the power to direct either publication or non-publication. 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.

[42] The Court of Appeal in *R v Liddell* [1995] 1 NZLR 538 at 546 per 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'."

[43] 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.

[44] Publication of the Tribunal's decision 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)).

[45] In the present case Mr van Zyl, essentially on the basis of his age and retirement, sought that his name not be published. He says his age makes the stress of publication a greater burden, and his retirement lessens the public interest.

[46] However, I cannot regard either factor as of significant weight. Mr van Zyl was actively practising until recently, and this is not a case where a person faces a burden due to exceptional vulnerability. The fact a person is not practising may be grounds for being less concerned that a suppression order is made, but it is not a matter that can be elevated to being grounds for making the order.

[47] Accordingly, the decision upholding the complaint and the present decision will be published in the usual way.

Orders

[48] Mr van Zyl:

[48.1] Is censured.

[48.2] May only be granted a licence under the Act during the period of two years following this decision if he notifies this Tribunal and such special conditions (if any) are set for the issue of the licence. Leave is reserved for that purpose, and in the event of it being necessary, the Tribunal will treat the application with urgency.

[48.3] Ordered to pay a penalty of $1,500.

[49] There has been no application for an order for payment of the costs and expenses of the inquiry, so no order is made.

DATED at WELLINGTON this 11th day of September 2012

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G D Pearson
Chair