

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

Decision No: [2013] NZIACDT 17

Reference No: IACDT 032/11

IN THE MATTER

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

BY

Immigration Advisers Authority

Authority

BETWEEN

Sylvia Buarque Schiller-Cooper

Complainant

AND

Marylou (Mia) Lozano

Adviser

**DECISION
(SANCTIONS)**

REPRESENTATION:

Complainant: In person

Adviser: In person

Date Issued: 21 March 2013

DECISION

Introduction

- [1] This complaint was upheld in a decision issued on 8 January 2013.
- [2] The key elements of the findings were as follows:
- [2.1] Ms Lozano is a licensed immigration adviser. She was engaged to assist Ms Schiller-Cooper's mother, who was seeking a residence visa and, in the interim, a temporary permit to remain in New Zealand.
- [2.2] In the course of the engagement, there were some delays and miscommunication. The conclusion reached by the Tribunal was that they were relatively minor matters that did not justify an adverse disciplinary finding.
- [2.3] Ms Schiller-Cooper's mother did ultimately receive a residence visa and in that respect, the services provided were entirely satisfactory. However, towards the end of the engagement, the relationship between Ms Schiller-Cooper and Ms Lozano broke down, and Ms Schiller-Cooper lodged materials with Immigration New Zealand without Ms Lozano's assistance.
- [2.4] It took some time for Ms Schiller-Cooper's mother to receive the residence visa, and her entitlement to stay in New Zealand became an issue. The most satisfactory solution would have been for her to apply for a particular category of visitor's visa applicable to parents of persons living permanently in New Zealand.
- [2.5] Ms Lozano was not aware of this class of visa and failed to provide the appropriate advice. Ms Schiller-Cooper did her own research, ascertained this was the best solution, and completed the forms to apply for such a visa herself, on her mother's behalf. Ms Lozano still did not understand the relevant policy.
- [2.6] Ms Schiller-Cooper complained to Ms Lozano regarding her failure to give appropriate advice. Ms Lozano wrote a letter in response stating that the policy had changed and the visa was not available at the relevant time. This letter was misleading and contained incorrect information.
- [2.7] The Tribunal concluded that Ms Lozano did not understand the policy that was available for Ms Schiller-Cooper's mother. The alternative would have been to conclude that the letter was a deliberate attempt to misrepresent the position to Ms Schiller-Cooper.
- [2.8] Accordingly, the Tribunal found Ms Lozano was negligent and breached the Licensed Immigration Advisers Code of Conduct, as the options for temporary visas were elementary matters for which Ms Lozano needed to give proper and effective advice. It was something she failed to understand and address even when her client pointed it out to her.
- [2.9] In addition, the Tribunal upheld the complaint in relation to the letter in which Ms Lozano responded to Ms Schiller-Cooper's complaint, as it was misleading.
- [2.10] Another aspect of the complaint was that Ms Lozano failed to attend a meeting. The failure to attend was in itself a relatively minor matter. However, Ms Lozano misrepresented the circumstances to the Authority and/or her client. This aspect of the complaint has also been upheld.
- [2.11] Ms Lozano also failed to respond responsibly to the Tribunal's processes. Such conduct was not an aspect of the complaint itself. However, the Tribunal made findings in relation to this conduct, as the findings are potentially relevant to the appropriate sanctions.

- [2.12] The complaint was upheld on the basis of breaches of the Code, and misleading behaviour.

The Parties' Positions on Sanctions

- [3] Ms Lozano responded to the decision reviewing the Tribunal's findings, and acknowledged they were open. She expressed contrition and a determination to ensure that she would not again be responsible for lapses of this kind.
- [4] Ms Schiller-Cooper sought compensation for:
- [4.1] Unnecessary medical examinations.
- [4.2] Costs resulting from delay in notification of the outcome of the process.
- [4.3] Time and disbursements for attending a Disputes Tribunal hearing and meeting.
- [5] Ms Lozano said she should not be obliged to pay compensation.

Discussion

- [6] As the complaint has been upheld, section 51 allows the Tribunal to impose sanctions.

The findings that determine whether Ms Lozano's licence should be suspended or cancelled

- [7] The most critical decision is whether Ms Lozano's licence should be suspended or cancelled, and if so, on what terms.
- [8] As is evident from the decision upholding the complaint, the original lapses were not at the serious end of the scale.
- [9] Unfortunately, Ms Lozano's response to the issues with her client, the way she addressed the complaint with the Authority, and how she dealt with this Tribunal are serious.
- [10] The findings in relation to these matters were:

A deceptive letter to her client

- [10.1] Ms Lozano accepted she was responsible for Mr Chang's undated letter to Ms Schiller-Cooper in response to the complaint.
- [10.2] The letter was in Mr Chang's name and he presented himself as a person with knowledge of immigration matters who had taken an independent view of the issues. In fact, he was not licensed and could not lawfully provide immigration advice; he was only putting his name to Ms Lozano's response. In these circumstances the opening to the letter was misleading and deceptive, as it said:

"I have read through your letter of dispute and this is my formal response. Fortunately, I have not been involved in your application, so I have been able to view the entire case from a relatively objective standpoint."

- [10.3] It was a pretence that the response was from Mr Chang, as an independent knowledgeable person, which was a breach of clause 1 of the Code, and misleading behaviour.
- [10.4] This aspect of the complaint was upheld pursuant to section 44(2)(d) and (e) of the Act.

Misleading explanation regarding missing meeting

- [10.5] Ms Lozano told the Authority she inadvertently missed a meeting as she was shifting office and she tried to reschedule the meeting.

- [10.6] The Tribunal indicated (on the basis of the information Ms Lozano provided to the Authority) it believed Ms Lozano had been late to the meeting and the issue was no more than a minor example of human frailty.
- [10.7] Ms Lozano then remained silent and expected the Tribunal to act on the information she had supplied to the Authority.
- [10.8] Ms Lozano knew when she supplied the information to the Authority that it was misleading. She knew:
- [10.8.1] She had previously told her client she had mixed up the date and attended the meeting two weeks early (on 30 May 2011).
- [10.8.2] The explanation she provided to her client was false, as she had not arranged the meeting until 31 May 2011, and the written arrangement was “Thursday the 9th of June 2011”.
- [10.9] Ms Lozano breached clause 1 of the Code, as her conduct was unprofessional, and constituted misleading behaviour. This aspect of the complaint was upheld pursuant to section 44(2)(d) and (e) of the Act.
- [11] Ms Lozano also put the Tribunal in a position of being concerned that she had attempted to mislead the Tribunal.
- [12] The Tribunal concluded:
- [113] She has provided false and misleading information in the course of addressing the complaint; she rejects any professional responsibility, instead she maintains she is a victim and says the complainant is seeking an unfair financial advantage.
- [114] The most favourable construction of Ms Lozano’s response to the complaint and conduct before the Tribunal is incomprehension of professional obligations; the alternative is that she has provided false information dishonestly.
- [13] The Tribunal was satisfied that Ms Lozano knowingly misled her client; however, in relation to her dealings with the Tribunal the material established only a failure to take her professional obligations and the regulation of her profession seriously.

Principles for suspension or cancellation of licence

- [14] The authorities indicate it is a “last resort” to deprive a person of the ability to work as a member of their profession. However, regard must be had to the public interest when considering whether a person should be excluded from a profession due to a professional disciplinary offence: *Complaints Committee of Waikato Bay of Plenty District Law Society v Osmond* [2003] NZAR 162 (HC).
- [15] Rehabilitation of a practitioner is an important factor when appropriate (*B v B HC Auckland*, HC4/92 6 April 1993, [1993] BCL 1093. In *Patel v Complaints Assessment Committee* (HC Auckland CIV-2007-404-1818, 13 August 2007), the Court stressed when imposing sanctions in the disciplinary process applicable to that case, that it was necessary to consider the “alternatives available short of removal and explain why lesser options have not been adopted in the circumstances of the case”.
- [16] 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]:
- [T]he 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.
- [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 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).
- [17.4] Rehabilitation: it is an important object to have the practitioner continue as a member of the profession practising well, when practicable (*B v B HC Auckland HC4/92*, 6 April 1993, [1993] BCL 1093).

Background to regulating this profession

- [18] In *ZW v Immigration Advisers Authority* [2012] NZHC 1069, Priestley J observed at [41]:
- In passing the Act, Parliament has clearly intended to provide a system of competency, standards, and a Conduct Code to clean up an industry which hitherto had been subject to much justified criticism. The Registrar and Tribunal have a Parliamentary mandate to enforce standards.
- [19] The Act has established a regime in which, with limited exceptions, licensed advisers have an exclusive right to provide immigration advice. That exclusive right is enforced by criminal sanctions.
- [20] Until the profession was regulated, the great majority of advisers were professional people acting responsibly and providing skilled services. A small minority of unskilled and unscrupulous people provided immigration services. Immigrants are a vulnerable group and, in some instances, suffered serious harm from such people. Immigration advisers have an important professional role in assisting clients. Their honesty, professionalism, and competence are fundamental requirements.
- [21] The Act records its purpose in section 3 as:
- [T]o promote and protect the interests of the 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] When the Act came into force, many people had experience of giving immigration advice. There were no professional qualifications specifically targeted at New Zealand immigration advisers; though of course there were various relevant qualifications that some advisers held.
- [23] To establish the profession, a relatively low threshold was applied. It required a person demonstrate competent handling of immigration applications in the past, a knowledge and understanding of the new professional environment, and also language and communication skills. A significant number of people who had relied on providing immigration advice for their livelihood could not meet those standards. They lost their livelihoods.
- [24] The inevitably low threshold for entry into the profession, in that entry has not required a long period of academic training with mentored experience, has resulted in some people entering the profession with no real commitment to maintaining professional standards. It is important that this Tribunal exercise the power to remove people from the profession who are in this category.
- [25] In a sense, the transitional entry has put a correlative obligation on entrants to the profession to ensure they attain professional standards, having been entrusted with the privilege of entry to the profession.

Alternatives short of cancellation of licence

- [26] Section 51 provides for various sanctions. The key options short of cancellation or suspension of a licence are punishments intended to effect deterrence; namely censure, and financial penalties not exceeding \$10,000.
- [27] In relation to licences there are three options:
- [27.1] cancellation and a direction that the person may not apply for a licence for up to two years;
- [27.2] suspension; or
- [27.3] cancellation of a full licence and the holder of the licence permitted to apply for a different class of licence. In this way, a person may be prevented practising on their own account, and put in a situation where they are practising under supervision while they hold a provisional licence.
- [28] Other possibilities include training and specified conditions. There are also powers relating to imposing costs and compensation.
- [29] In this decision I am satisfied the range of possibilities to weigh are:
- [29.1] cancellation of Ms Lozano's licence and a prohibition on reapplying for a licence for a period;
- [29.2] cancellation of Ms Lozano's full licence, and allowing an application for a provisional licence (with supervision conditions);
- [29.3] training requirements;
- [29.4] a financial penalty on its own, or in combination with the preceding directions.
- [30] Suspension has a potential role in ensuring that a proportional consequence is imposed: *A v Professional Conduct Committee* (HC Auckland CIV-2008-404-2927, 5 September 2008) and would potentially bring home to Ms Lozano the nature of the professional obligations she carries.
- [31] However, restriction to a provisional licence would likely be more effective in rehabilitation than suspension, as mentoring in professional standards would likely be of more benefit.
- [32] In making this decision, the Tribunal is required to weigh the public interest against Ms Lozano's interests.
- [33] When dealing with integrity issues there is never any certainty, short of exclusion from a profession, that a person will not reoffend. This Tribunal must carefully weigh the circumstances. It is appropriate to place an element of considered trust in a practitioner who has shown the capacity and willingness to rehabilitate.
- [34] It is significant this case involves dishonesty. That is, dishonesty in the sense Ms Lozano misled her client and the Authority. However, I accept that the conduct provided did not benefit Ms Lozano, except that she may have thought it would assist in making this complaint "go away".
- [35] Dishonesty points to the need to remove a practitioner from a profession. In *Shahadat v Westland District Law Society* [2009] NZAR 661 the High Court commented:
- [29] A finding of dishonesty is not necessarily required for a practitioner to be struck off. Of course, dishonesty inevitably, although not always, may lead to striking off. But as said in *Bolton v Law Society* [[1994] 2 All ER 486; [1994] 1 WLR 512 (CA)] at pp 491–492:

If a solicitor is not shown to have acted dishonestly, but is shown to have fallen below the required standards of integrity, probity and trustworthiness, his lapse is less serious but it remains very serious indeed in a member of a profession whose reputation depends upon trust. A striking-off order will not necessarily follow in such a case, but it may well. The decision whether to strike off or to suspend will often involve a fine and difficult exercise of judgment, to be made by the tribunal as an informed and expert body on all the facts of the case.

- [30] As a Full Court observed in *McDonald v Canterbury District Law Society* (High Court, Wellington, M 215/87, 10 August 1989, Eichelbaum CJ, Heron and Ellis JJ) at p 12:

Even in the absence of dishonesty, striking-off will be appropriate where there has been a serious breach of a solicitor's fundamental duties to his client.

- [31] It is important to bear in mind that "dishonesty" can have different connotations. (It may describe criminal acts. But it may comprise acting deceitfully towards a client or deceiving a client through acts or omissions.)

- [36] As observed by the Court in *Shahadat*, dishonest conduct "inevitably, although not always, may lead to striking off". The present case is one where it is important to look carefully at whether rehabilitation is realistic.
- [37] In weighing this matter, I am willing to regard Ms Lozano's conduct as being characterised by incomprehension of the obligation to be scrupulously frank and honest with her client and the Authority, rather than dishonesty of the kind where a professional person is seeking to advantage themselves at their client's cost. However, that distinction is a fine one.

Weighing the alternatives

- [38] The loss of Ms Lozano's licence and the consequent loss of the ability to continue to practice as a licensed immigration adviser is likely considerable.
- [39] However, the consequences of intentionally breaching professional standards are inevitably going to impact harshly. Ms Lozano was required to be aware of the consequences of not complying with the standards of her profession before she was given the privileges of being a licensed immigration adviser.
- [40] The primary issue is whether the Tribunal can be reasonably satisfied Ms Lozano will in the future discharge her professional duties in a manner that does "promote and protect the interests of consumers receiving immigration advice", as section 3 of the Act contemplates.
- [41] It is concerning that the Tribunal has found that Ms Lozano has, throughout the complaint process, characterised herself as a victim and been most reluctant to deal with the complaint as a professional who values her reputation and membership of her profession. Without those qualities, a degree of scepticism as to Ms Lozano's future conduct is inevitable.
- [42] I am satisfied it is essential that there are conditions on Ms Lozano's practice that give some assurance she will meet the standards required of a licensed immigration adviser.
- [43] The minimum intervention is to require Ms Lozano to practice in an environment where she has supervision and mentoring in professional standards.
- [44] That can be achieved by cancelling Ms Lozano's full licence, allowing her to practice with a provisional licence under appropriate supervision, and requiring her to undertake appropriate training before she can apply for a full licence.
- [45] It is appropriate to impose a financial penalty. It will be \$2,500. Given the finding that Ms Lozano misled her client, and the Authority, and failed to deal professionally with the complaint before the Tribunal it is a modest penalty. It takes into account the adverse financial impact the loss of Ms Lozano's full licence will have on her.

Compensation

- [46] Ms Schiller-Cooper has sought compensation under three heads:
- [46.1] The cost of a medical examination, and 12 hours of Ms Schiller-Cooper's time to accompany her mother to the examination.
- [46.2] Consequential costs as a result of delay in being informed of Ms Schiller-Cooper's mother being granted a visa.
- [46.3] Time spent on researching immigration policies, attending a meeting that Ms Lozano failed to attend, and dealing with the Disputes Tribunal.
- [47] 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 required a separate, and potentially, expensive second process.
- [48] 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.
- [49] 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.
- [50] I am not satisfied that compensation should be awarded for the medical examination. Ms Schiller-Cooper to a significant extent took over the management of her mother's immigration process. There has been no adverse disciplinary finding in relation to advice concerning the requirement for a medical examination. I am not satisfied that a finding could be made on the material before the Tribunal that there was no negligent advice on this issue. Accordingly, this claim must fail.
- [51] Similarly there is no adverse disciplinary finding in relation to the time taken to inform Ms Schiller-Cooper that her mother's visa would be issued. I am not satisfied the material would allow a finding of negligence in relation to that issue, and accordingly that claim for compensation must also be dismissed.
- [52] Ms Schiller-Cooper's time in relation to researching immigration policies, attending a meeting, and dealing with the Disputes Tribunal are not matters that justify a compensation order. The Disputes Tribunal does not award costs, and it is not within this Tribunal's jurisdiction to make orders relating to the cost of parties pursuing such action. Ms Schiller-Cooper's actions in reviewing her mother's situation is not something that should be compensated by this Tribunal. As noted, Ms Schiller-Cooper essentially took over her mother's immigration process after the primary part of Ms Lozano's instruction was completed properly. The adverse finding related to Ms Lozano not advising Ms Schiller-Cooper regarding the entitlement to a parent visa; had she done so and been instructed to apply for one that would have been the subject of additional fees. The contract only provided for the original visitor's visa and residence applications. Ms Schiller-Cooper undertook this work herself, and it is not a loss flowing from the failure to give adequate advice.

Decision

- [53] Ms Lozano is censured. The Tribunal warns her this decision gives her an opportunity to re-establish her professional standing, which will require good faith and commitment. She must attain a full appreciation of the standards required of a professional offering services to the public. Her conduct in this case has very much raised the issue of whether she is fit to be licensed as an immigration adviser.

- [54] She should regard a period of direct supervision and professional training as essential to develop her understanding to a level where she can expect to act as an unsupervised principal offering services to the public.
- [55] Any full licence held by Ms Lozano 25 working days after the issue of this decision will be cancelled at that time. This delay is to allow her to put arrangements in place for her existing clients.
- [56] Ms Lozano is prevented from applying for any licence for a period of two years from the date her licence is cancelled, except as provided in this decision.
- [57] Ms Lozano may apply for a provisional licence, to have effect within the two-year period, provided that:
- [57.1] She has paid the financial penalty imposed in this decision.
- [57.2] The Registrar is satisfied Ms Lozano will work under the direct supervision of an appropriate fully licensed immigration adviser (and meet the standards for the issue of the licence in other respects).
- [57.3] The Registrar is satisfied any supervisor has been supplied with a copy of this decision by Ms Lozano, and the Registrar has approved a written protocol setting out the terms of supervision which have been agreed between the Ms Lozano and the supervisor;
- [57.4] Leave is reserved to Ms Lozano to seek directions from the Tribunal from time-to-time as to whether a particular person is appropriate to act as a supervisor, and the terms of the protocol, in the event the Registrar does not approve a person nominated or the protocol.
- [57.5] The period of supervision will continue for two years, or until Ms Lozano is entitled to, and has obtained, a full licence.
- [58] Ms Lozano may apply for a full licence to have effect within the two-year period provided:
- [58.1] she has held a provisional licence for a period of 6 months, and met the supervision requirements imposed in the preceding paragraph; and
- [58.2] she has successfully completed Modules 1, 2 and 10 of the Bay of Plenty Polytechnic 'Continuing Professional Development in New Zealand Immigration Advice' Course.
- Or alternatively:
- [58.3] She has met the requirements to be issued a Graduate Certificate in New Zealand Immigration Advice Level 7.
- [59] The Tribunal reserves leave for Ms Lozano to apply for any necessary or appropriate amendments to the preceding order, in the event there are changes to the professional development modules, the graduate certificate or the range of training available.
- [60] Ms Lozano is ordered to pay a penalty of \$2,500.
- [61] There has been no application for an order for payment of the costs and expenses of the inquiry, so no such order is made.
- [62] These orders are made with due consideration for the possibility that Ms Lozano may have difficulty arranging supervision and the effect may be that she is effectively excluded from the profession. However, to require less would be to fail to protect the public in the manner the Act contemplates.
- [63] It is Ms Lozano's responsibility to find a practice environment where she can gain the experience and skills she requires, before returning to practise on her own account.

[64] The claim for compensation is dismissed.

DATED at WELLINGTON this 21st day of March 2013

G D Pearson
Chair