

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

Decision No: [2013] NZIACDT 43

Reference No: IACDT 023/11

IN THE MATTER

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

BY

Immigration Advisers Authority

Authority

BETWEEN

Donnie McLeod

Complainant

AND

Christine Lai Chun Yap

Adviser

DECISION
IMPOSITION OF DISCIPLINARY SANCTIONS

REPRESENTATION:

Complainant: In person

Adviser: In person

Date Issued: 15 July 2013

DECISION

Introduction

- [1] In a decision dated 23 March 2013 this complaint was upheld.
- [2] The Tribunal found Ms Yap dealt with Mr and Ms McLeod on the basis that the fees payable for her services were at a discounted price (i.e. below the usual level of fees). However, it later transpired that the fees were actually at a premium rate and that the service provided was an inferior type of service. Mr and Ms McLeod were expected to partly manage their own immigration affairs, pay a minimum fee, and pay for any professional time which was charged at a high rate.
- [3] The complaint has been upheld on the basis Ms Yap engaged in misleading behaviour during the engagement process.
- [4] However, Ms Yap was only one of the licensed immigration advisers responsible for dealing with Mr and Ms McLeod. The Tribunal expressly found that while Ms Yap's behaviour was misleading, it could not find it was dishonest on the evidence before the Tribunal. Ms Yap was under a duty to ensure the information she provide was accurate, she failed to take the care required to ensure it was accurate. The information was in fact misleading. Accordingly, there was a failure to discharge a duty.
- [5] Ms Yap has also had another complaint upheld against her, and sanctions are being imposed in relation to that matter. It too involved misleading behaviour in relation to fees. However, the role she had was different as she was found to have acted dishonestly in relation to that complaint.
- [6] In these circumstances, my view is that it is appropriate to determine sanctions in relation to each complaint alone, and not to treat the other complaint as either an aggravating matter, or as establishing a pattern of conduct.
- [7] However, Ms Yap has had her licence cancelled as a result of her dishonesty in relation to the other complaint, and that has some bearing on the appropriate penalty. In particular, the penalty will be reduced due to her circumstances.

The parties' positions on sanctions

Mr and Ms McLeod's position

- [8] Mr and Ms McLeod indicated they would leave the issue of penalties to the Tribunal, and sought a refund of what they had paid, and compensation for the stress caused by Ms Yap's behaviour.

Ms Yap's position

- [9] Mr Yap said she had not "intentionally misled" her clients. She said that no sanctions should be imposed as she had altered her practice.
- [10] Ms Yap indicated she accepted the Tribunal's findings, and would refund the balance of the fees.

Discussion

Preliminary

- [11] As the complaint has been upheld, section 51 allows the Tribunal to impose sanctions.
- [12] Ms Yap's submission that she did not intentionally mislead her clients is correct; the finding of the Tribunal was that she misled her clients through lack of care.

- [13] Ms Yap is also entitled to credit for accepting the findings against her, making changes in her practice, and showing an expression of contrition.
- [14] I note that Ms Yap took a different view in relation to the complaint where she was found to be dishonest, where she continued to contest the Tribunal's findings. In that matter she accepted a need to change practices, but did not recognise what was required of her as a professional. I will not have regard to her attitudes regarding that complaint for present purposes.
- [15] The misleading behaviour in this case, as it was through lack of care rather than dishonesty, does not warrant sanctions that affect Ms Yap's licence.

Principles for imposition of sanctions

- [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 sanctions, they should have regard to:
- [17.1] Protecting the public: section 3 of the Act states “[t]he 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).

The appropriate sanctions

- [18] I am satisfied that the circumstances founding the complaint are adequately addressed by a financial penalty.
- [19] The starting point is \$3,000. Ms Yap is entitled to credit for acknowledging the findings against her and the reasons for them, refunding fees, and expressing a determination to change her practices, and contrition.
- [20] I also take account of the fact Ms Yap is no longer a licensed immigration adviser due to the sanctions imposed on her for dishonest behaviour arising from another complaint.
- [21] Having regard to all of these circumstances, I consider that the penalty should be reduced to \$1,500.

Compensation and refund of fees

- [22] Mr and Ms McLeod have sought compensation for the pressure arising from the matter.
- [23] The Tribunal has from time to time awarded compensation on similar principles to general damages, but on a basis that does not become a penalty which is routinely added to other penalties. Accordingly, the Tribunal has looked for more than the time, trouble and

inconvenience that inevitably follows from a professional person failing to meet their obligations to a client.

[24] I am not satisfied compensation is justified in this case.

[25] Mr and Ms McLeod have also sought a refund of fees paid to Ms Yap.

[26] Ms Yap has indicated she will refund the balance of the fees, being £300. There will be an order that she do so.

[27] Mr and Ms McLeod have sought interest on the refunded fees, however I do not consider that is appropriate in the present case, given the voluntary repayment of fees.

Determination and Orders

[28] Ms Yap is:

[28.1] Censured.

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

[28.3] Directed to refund the balance of any fees not already refunded to Mr and Ms McLeod.

[29] Leave is reserved for 28 days, to apply to quantify the amount of any fees not already refunded if the parties do not agree.

DATED at WELLINGTON this 15th day of July 2013

G D Pearson
Chairperson