

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

Decision No: [2013] NZIACDT 46

Reference No: IACDT 045/11

IN THE MATTER

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

BY

Immigration Advisers Authority

Authority

BETWEEN

NQE

Complainant

AND

Alyssa Lopez Tan

Adviser

THE COMPLAINANT'S NAME IS NOT TO BE PUBLISHED

DECISION
IMPOSITION OF DISCIPLINARY SANCTIONS

REPRESENTATION:

Complainant: In person

Adviser: In person

Date Issued: 1 August 2013

DECISION

Introduction

- [1] In a decision dated 13 June 2013 this complaint was upheld.
- [2] Ms Tan breached the Licensed Immigration Advisers Code of Conduct 2010 (“the Code”) and engaged in misleading behaviour.
- [3] The specific conduct being that Ms Tan:
 - [3.1] Failed to enter into an appropriate agreement for the provision of professional services, and then failed to deliver services on the terms agreed and in accordance with the Code.
 - [3.2] Withheld a communication from Immigration New Zealand to the complainant for the purpose of improperly demanding fees.
 - [3.3] Attempted to demand fees to which she was not entitled by withholding professional services she agreed to provide.
 - [3.4] Was unprofessionally being a party to the unlawful provision of immigration advice by an unlicensed person.

The parties’ positions on sanctions

The complainant

- [4] The complainant sought the refund of fees, and the return of all original documentation.

Ms Tan’s reply

- [5] Ms Tan challenged each of the findings against her, and indicated she expected to retain the fees she had been paid.

Discussion

- [6] As the complaint has been upheld, section 51 of the Immigration Advisers Licensing Act 2007 (“the Act”) allows the Tribunal to impose sanctions.

The findings that determine whether Ms Tan’s licence should be suspended or cancelled

- [7] The most critical decision is whether Ms Tan’s licence should be suspended or cancelled; and if so, on what terms.
- [8] As is evident from the decision, the grounds on which the complaint has been upheld are serious. In essence the findings amount to a systematic failure to comply with the Act and the Code in her dealings with the complainant. The circumstances are sufficiently serious to warrant a determination that Ms Tan should have her licence cancelled.
- [9] Ms Tan has not mitigated the position.
- [10] Ms Tan continues to deny any wrongdoing. She has no insight into her conduct and says the Tribunal’s decision was wrong.
- [11] Accordingly, the Tribunal must address the issue of Ms Tan’s licence. Serious misconduct has occurred and the Tribunal has not received from the adviser any response that contains an element of contrition or insight.

- [12] Indeed that understates the position. Ms Tan made a personal attack on her client in response to the complaint. It extended to allegations of dishonesty and claims he threatened personal violence. That attack by Ms Tan was without foundation, evidenced a lack of respect for her client and was devoid of the professional dignity expected of a licensed immigration adviser.
- [13] The combination of the gravity of the complaint that has been upheld and the absence of commitment to rehabilitation makes it inevitable that removal from the profession is an outcome that must be considered.

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). 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 “[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).

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, knowledge and understanding of the new professional environment, and 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 exercises 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 Tan's licence and a prohibition on reapplying for a licence for a period;

- [29.2] cancellation of Ms Tan's full licence, and allowing an application for a provisional licence (with supervision conditions);
- [29.3] training requirements; and
- [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 Tan 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 Tan's interests.
- [33] When dealing with integrity issues there is never any certainty that, short of exclusion from a profession, 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] A significant factor in this case is that it involves dishonesty.
- [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". It is important to look carefully at whether rehabilitation is realistic.
- [37] Withholding the communication from Immigration New Zealand for the purpose of demanding additional fees, withholding services for the same purpose, and importantly, being party to an unqualified person providing immigration advice all go to question Ms Tan's honesty. They involve serious breaches of the trust and honesty that is required in the relationship between a licensed immigration adviser and their client.

Weighing the alternatives

- [38] Ms Tan indicated she is no longer practising as a licensed immigration adviser. The impact of exclusion from the profession may not impact as severely as it would otherwise. However, I

will not allow that to alter the threshold. If Ms Tan is to be barred from the profession, it must be justified without reference to her personal choice.

- [39] The primary issue is whether it can be reasonably considered that Ms Tan would 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.
- [40] This complaint is one of two that the Tribunal has upheld against Ms Tan, however the other complaint is less serious, and I do not give it weight for this purpose. It is appropriate to consider cancellation, and other orders relating to Ms Tan in relation to this complaint alone, and I will do so.
- [41] I have had to conclude Ms Tan has exhibited none of the qualities that could lead to an expectation she would commit to meeting professional standards in the future.

Ms Tan’s attitude to the grounds of the complaint

- [42] Ms Tan has made it clear to the Tribunal she rejects the Tribunal’s findings against her, and does not accept the obligations of professionalism the Tribunal has determined she has breached.
- [43] I am satisfied:
- [43.1] Ms Tan was guilty of a serious professional offence on clear evidence. It has elements of both dishonesty and undermining New Zealand’s immigration system as it included both failing to pass on communications from Immigration New Zealand, and being party to an unlicensed person acting in breach of the Act.
- [43.2] In the course of the complaint being addressed by the Tribunal, she has shown lack of respect for the regulatory processes that govern her profession. She is entirely unwilling to accept the findings against her. Ms Tan clearly thinks she is entitled to her view, and the Tribunal is wrong.

Ms Tan’s licence will be cancelled

- [44] Ms Tan’s offending was serious.
- [45] The statutory disciplinary process has brought Ms Tan neither insight, nor a determination to rehabilitate herself.
- [46] I am accordingly satisfied alternative disciplinary sanctions would not be sufficient to cause Ms Tan to accept and maintain professional standards. The public will only be adequately protected, and the objectives of the Act achieved, by cancelling her licence.
- [47] I have considered whether allowing Ms Tan to hold a provisional licence, after establishing a regime of appropriate supervision, is an option. I am satisfied that is not appropriate. When Ms Tan will not accept error on her part in the face of a reasoned disciplinary finding against her, which is evident in her submissions addressing sanctions, it is unrealistic to expect her to be willing to respect, accept direction and learn from a mentor.

Financial penalty

- [48] The financial penalty will be moderated having regard to Ms Tan’s loss of ability to continue as a member of the profession. A penalty of \$5,000 will be imposed. Any lesser penalty would not adequately reflect the systematic disrespect for her professional obligations.
- [49] As Ms Tan is no longer practising, the cancellation of any licence held, and the period of prohibition from applying for a licence will be immediate.

Compensation and refund of fees

- [50] The Authority has not sought an order under section 51(1)(g) for the payment of costs or expenses. Accordingly, no order will be made. The complainant has not sought compensation, other than the return of payments he has made to Ms Tan.
- [51] The complainant has sought a complete refund of fees. I am satisfied that an order to that effect should be made. Ms Tan claims she did some work, and should keep all the fees she received.
- [52] The difficulty with Ms Tan's position is that her professional engagement was flawed from the outset. She failed to enter into an appropriate agreement for the provision of services. She then compromised her client's immigration opportunities by withholding a communication from Immigration New Zealand. That was compounded by improperly withholding professional services required to achieve the immigration objective her client engaged her to secure.
- [53] At every step Ms Tan failed to meet her professional obligations; her client not surprisingly became disheartened. I am satisfied there should be a complete refund of fees and disbursements. Ms Tan has failed to provide a clear account of fees and disbursements. She has however said she received PHP 29,000 for an initial assessment, PHP 32,600 for disbursements, and two payments of PHP 50,000 for fees. That is PHP 161,600.
- [54] The current value of PHP 161,600 is approximately NZD 4,700. An order will be made on that basis.

Publication

- [55] Ms Tan has sought non-publication of her name. She refers to the fact she is not practising as a licensed immigration adviser, has relocated to New Zealand, and her family circumstances.
- [56] There is no specific statutory direction concerning the power to direct either publication or suppression. 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)). 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.
- [57] 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'.
- [58] 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. A process that is not open poorly serves to maintain public confidence that a disciplinary body is achieving fair outcomes and accountability.
- [59] There nothing in the Act indicating it does contemplate a less than open 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.
- [60] Publication of the Tribunal's decisions will follow as a matter of course. There can be cases where decisions are published and identities are withheld. However, it is necessary to establish that it is appropriate to derogate from the open justice, at least to that extent.
- [61] Ms Tan has relied on her opportunities in the community and the impact on her family. However, I cannot regard either factor as of significant weight.
- [62] Ms Tan cannot expect to have her conduct hidden from the community.

[63] The impact on Ms Tan's family and herself, unfortunate as it is, is an inevitable consequence of her own behaviour. It does not reflect on her family.

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

Determination and Orders

[65] Ms Tan is:

[65.1] Censured.

[65.2] Ordered to pay a penalty of \$5,000.

[65.3] Directed to pay the complainant the total sum of \$4,700 in compensation for disbursements and for the refund of fees.

[66] Any licence presently held under the Act by Ms Tan is cancelled, with effect from the issue of this decision.

[67] Ms Tan is prevented from reapplying for any category of licence as a licensed immigration adviser for a period of two years from the date her licence is cancelled.

Leave reserved

[68] Ms Tan has indicated that the personal documents she has will be returned. If Ms Tan fails to deliver those documents to the complainant, the Tribunal reserves leave for the complainant to apply for compensation to cover the cost of obtaining replacement documents.

DATED at WELLINGTON this 1st day of August 2013

G D Pearson
Chairperson