

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

Decision No: [2014] NZIACDT 111

Reference No: IACDT 48/12

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Ahmed Muhsen Ikbarieh

Complainant

AND

Osama (Sam) Hammadieh

Adviser

DECISION
IMPOSITION OF SANCTIONS

REPRESENTATION:

Registrar: Ms Turfrey, Ministry of Business, Innovation and Employment, Wellington.

Complainant: In person

Adviser: In person

Date Issued: 13 October 2014

DECISION

This complaint

- [1] This decision imposes sanctions, following a decision upholding a complaint against Mr Hammadih in [2014] NZIACDT 49; the decision can be located at <http://www.justice.govt.nz/>.
- [2] The complainant engaged with the adviser's practice in the United Arab Emirates (UAE). There were difficulties, and the adviser says there were concerns that one or more persons in that office behaved improperly.
- [3] The practice in the UAE closed, and the adviser offered to continue the instructions through his Australian office. He offered a contract, which the complainant signed. However, the contract document was not on letterhead, had no logo and did not name any legal entity as the service provider.
- [4] Mr Hammadih advised the complainant that he had a good prospect of selection for migrating to New Zealand if he lodged an expression of interest. In fact, the "points" the complainant held made selection impossible or extremely unlikely.
- [5] The complainant also expressed concern about the authenticity of the contract, and asked the adviser to sign the document. He refused to sign the document, but drafted a new contract and attempted to charge \$720 for doing so.
- [6] The Tribunal upheld the complaint on three grounds:
- [6.1] Mr Hammadih delivered defective advice on the complainant's immigration prospects, and did so without the care, diligence and professionalism required by clause 1.1(a) of the Licensed Immigration Advisers Code of Conduct 2010 (the Code);
- [6.2] He also breached the requirement to set out fees and obtain an agreement in writing as required by clause 8 of the Code (or by written agreement under clause 3(c)); and
- [6.3] He charged the sum of \$720 when he had no right or justification, and breached clause 8(a) of the Code of Conduct in that regard.
- [7] The circumstances are set out in the substantive decision.

The Parties' Positions on Sanctions

The Authority

- [8] The Authority did not make any submissions on sanctions.

The Complainant

- [9] The complainant sought compensation as Mr Hammadih failed to provide the immigration service he required. He noted his IELTS had expired, his age now allows fewer points, and he deferred his potential migration while the complaint was outstanding.

Mr Hammadih

- [10] Mr Hammadih provided a submission on sanctions:
- [10.1] He said New Zealand immigration is less than 4% of his practice, takes half of his time, and is "the source of all of my business headaches".
- [10.2] His licence expired on 30 April 2014, and he is not going to renew it.
- [10.3] This Tribunal predetermined the penalty, and accordingly his only submission is that there was no contract due to lack of consideration.
- [10.4] He offered the complainant immigration services to migrate to Australia without charge.

Discussion

The principles to apply

- [11] 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.
- [12] When imposing sanctions those statutory purposes require consideration of at least four factors which may materially bear upon maintaining appropriate standards of conduct:
- [12.1] *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 ...”
- [12.2] *Demanding minimum standards of conduct*: *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) and *Taylor v General Medical Council* [1990] 2 AC 539; [1990] 2 All ER 263 (PC) discuss this aspect.
- [12.3] *Punishment*: The authorities, including *Z v Dental Complaints Assessment Committee*, emphasise that punishment is not the purpose of disciplinary sanctions. Regardless, punishment is a deterrent and therefore a proper element of disciplinary sanctions (*Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007).
- [12.4] *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).

Absence of significant mitigating factors

- [13] There is little or no mitigation. Mr Hammadieh has not taken responsibility for his deficiencies. On the contrary, his attitude and behaviour to his client and the Tribunal has consistently been one of disrespect and arrogance.

Mr Hammadieh's licence

The principles

- [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) at 171-172.
- [15] Rehabilitation of a practitioner is an important factor when appropriate (*B v B* [1993] BCL 1093; HC Auckland HC4/92, 6 April 1993). In *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at [30]-[31] (quoting a passage from *Patel v The Dentists Disciplinary Tribunal* HC Auckland AP 77/02, 8 October 2002 at [30]-[31]), 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] 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.
- [17] 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.

The options

- [18] In relation to licences the disciplinary sanctions in section 51 allow three options:
- [18.1] cancellation and a direction that the person may not apply for a licence for up to two years (s 51(1)(d) & (e)); or
- [18.2] suspension (s 51(1)(c)); or
- [18.3] cancellation of a full licence with permission 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 (s 51(1)(b) & (d)).
- [19] Other possibilities to assist rehabilitation include training and specified conditions (s 51(1)(b)). There are also powers relating to imposing costs and compensation (s 51(1)(g)-(i)).

The circumstances of the offending and Mr Hammadieh's situation

- [20] When looking at the options, the first factor to consider is the gravity of the professional offending, it is not appropriate to deprive a person of membership of a profession unless their offending is sufficiently serious.
- [21] The most serious element of this complaint is the findings regarding how Mr Hammadieh treated his client. The conduct discussed at paragraphs 25 to 32 of the substantive decision raises serious concerns regarding Mr Hammadieh's understanding of, and commitment to, professionalism. His client made polite and reasonable inquiries. Mr Hammadieh had two responses:
- [21.1] He used obfuscation to deflect proper inquiries, and refused to deal with the substance of his client's proper and reasonable concerns;
- [21.2] He attempted to impose a fee of \$720 for drafting a new agreement which the complainant had not requested. He had no right to claim that fee, and knew or ought to have known that was the case.
- [22] I reached the view Mr Hammadieh's attitude was irreconcilable with acting in a professional manner in good faith toward his client. Due to these findings, the substantive decision put Mr Hammadieh on notice he was at risk of having his licence cancelled, being restricted to a provisional licence that would require that he practise under supervision, and being required to undertake further training.
- [23] Faced with the Tribunal's reasoned findings Mr Hammadieh has not accepted responsibility, or indicated he will change. He has instead elected not to renew his licence. He has also indicated his present attitude to New Zealand's immigration regime and the disciplinary process; implying New Zealand's immigration regime is defective rather than his own compliance. He also alleged this Tribunal has predetermined an issue.
- [24] I must conclude Mr Hammadieh has no intention of accepting responsibility, or changing his conduct.
- [25] I am also satisfied the offending is sufficiently serious to consider excluding Mr Hammadieh from the profession. The fee in issue was \$720, and is a modest amount of money in absolute terms; but none-the-less a substantial sum for many migrants. However, integrity in relation to money is a cornerstone of professional standards, and quantum is secondary. Practitioners make mistakes that are genuine, and understandable. Other errors reflect poor judgment, and ultimately reflect a practitioner putting their own interests above their clients. When conduct falls short of dishonesty, the practitioner's attitude is significant when weighing the gravity of findings of this kind.
- [26] In the present case, Mr Hammadieh attempted to take the sum of \$720 from a client when he had no right to do so, that is different from charging an excessive fee and more serious. His attitude to a client who made reasonable inquiries motivated this unacceptable conduct. If the circumstances arose because of a moment of poor judgment or emotion, I would not consider

the matter of sufficient gravity to make an order affecting Mr Hammadih's licence. Unfortunately, that is not the case. Mr Hammadih attempted to exploit his client, and sought to justify doing that. He has expressed neither contrition nor an intention to change. I have unfortunately had to conclude Mr Hammadih has exhibited the very sort of conduct the Act intended to eradicate;¹ it is not in the public interest for Mr Hammadih to hold a licence under the Act. Holding a licence is an important approbation of integrity conveyed to consumers. Consumers should not suffer unprofessional conduct of this kind. Accordingly, I am satisfied the proper order is to exclude Mr Hammadih from the profession.

Weighing the options

- [27] While I have indicated my conclusion, it is necessary to explain why alternatives short of exclusion are not appropriate. The full range of possibilities I have considered are:
- [27.1] a prohibition on reapplying for a licence for a period of up to two years;
- [27.2] prohibition on applying for a full licence and allowing an application for a provisional licence (with supervision conditions);
- [27.3] training requirements;
- [27.4] a financial penalty on its own, or in combination with the preceding directions.
- [28] 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 at [81]. However, as Mr Hammadih does not currently hold a licence, that is not one of the options. Regardless, I would not consider suspension in itself as an effective means of ensuring Mr Hammadih commits to delivering professional services at the standard required.
- [29] In making this decision, the Tribunal is required to weigh the public interest against Mr Hammadih's interests (*A v Professional Conduct Committee* at [82]).
- [30] When dealing with integrity and attitudinal 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.
- [31] 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] 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.)

¹ As noted with reference to *ZW v Immigration Advisers Authority* para.[16] above.

- [32] This matter falls short of dishonesty, which was not a ground of the complaint the Tribunal upheld. It does however involve a serious breach of Mr Hammadieh's fundamental duties to his client. He attempted to take \$720, which he was not entitled to have, and attempted to achieve that objective by failing to comply with the Code. The attempt did involve an element of deceit, both in his attempt to deflect proper questions, and the attempt to demand money without complying with the Code.
- [33] Accordingly, I have no basis to find Mr Hammadieh is willing, or has the personal integrity and skills, to meet the minimum standards of the profession. His attitude to his offending leaves me with no confidence that an order short of excluding him from the profession will provide sufficient assurance the order adequately protects consumers.
- [34] An order will prevent Mr Hammadieh applying for any licence for a period of two years. After that point, he will have to qualify for the profession and satisfy the Registrar that he otherwise meets the statutory requirements. I note that while it is entirely a matter for the Registrar, not the Tribunal, the fact the order operates for only two years does not indicate he can expect to get a licence after that time. Aside from other standards, section 17(b) of the Act allows the Registrar to take account of Mr Hammadieh's history of professional offending when deciding if he is fit to hold a licence.

The financial penalty on this complaint

- [35] Mr Hammadieh's conduct in this matter was serious for the reasons discussed.
- [36] Given a financial penalty is in addition to excluding Mr Hammadieh from the profession, a penalty of \$5,000 is proportionate to the offending. It is a mid-range penalty; the maximum is \$10,000.

Compensation

- [37] The complainant seeks compensation.
- [38] It is not evident why Mr Hammadieh submitted there was never a legal contract between himself and the complainant. The submission is without merit, as Mr Hammadieh provided advice in return for payment by the client. The provision of advice and the promise to pay are both adequate consideration. Regardless, technical arguments about whether Mr Hammadieh had entered into the initial agreement, which the complainant requested he sign, are unlikely to assist him. The Tribunal found there was an engagement, which Mr Hammadieh failed to set out appropriately in writing. This submission simply highlights that failure.
- [39] The Tribunal has discretion in relation to awarding compensation, but generally applies standard legal principles relating to rights to recover, to determine whether to make an order.
- [40] In the present case the issue arises in relation to a negligent failure to provide appropriate advice. That provides a basis for recovering damages in contract and tort. The complainant has identified that his IELTS certificate has expired, and the time that has passed in having this complaint resolved has been adverse to his interests. However, the complainant could have taken steps to advance his migration plans when he knew Mr Hammadieh was not delivering the services he needed.
- [41] Accordingly, the extent of damages will be limited to an award in the nature of general damages for the disruption and distress caused by the defective advice and other breaches of the Code. However, the Tribunal is concerned not to simply award such compensation as a matter of routine, as it becomes little more than an additional penalty. Virtually any failure to maintain professional standards results in stress and disappointment for consumers.
- [42] I am satisfied the particular circumstances of this complaint went beyond the usual. In particular, the service delivery involved both negligence, and unacceptable treatment in response to proper and reasonable inquiries. Migration to a new country in a remote part of the world has a major impact. The complainant and his family were proposing a life-altering move; they were entitled to accurate advice, as their ability to migrate would likely affect the employment, housing and other decisions. In these circumstances I am satisfied an award of \$2,000 is appropriate under section 51(1)(i) to recognise the distress caused by Mr Hammadieh's conduct, and the disruption to the complainant's migration initiative.

Costs and Expenses

[43] Neither the Registrar nor the complainant sought costs, so there is no order.

Censure

[44] In accordance with the usual practice of disciplinary tribunals, censure will be an express sanction. It is appropriate to make that finding were conduct is not a mere lapse from minimum standards.

Decision

[45] Mr Hammadieh is:

[45.1] Censured,

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

[45.3] Ordered to pay the complainant \$2,000.

[46] The Tribunal further orders that Mr Hammadieh is prevented from reapplying for any category of licence as a licensed immigration adviser for a period of two years from the date this decision is notified to him.

Further direction

[47] The Tribunal requests the Registrar deliver a copy of this decision, and the substantive decision on this complaint, to the office of the Australian Migration Agents Authority.

DATED at WELLINGTON this 13th day of October 2014

G D Pearson
Chair