

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

Decision No: [2014] NZIACDT 93

Reference No: IACDT 09/13

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Soteria Valoaga Toilolo

Complainant

AND

Ueite (Itaotemai) Letalu

Adviser

DECISION
IMPOSITION OF SANCTIONS

REPRESENTATION:

Registrar: In person

Complainant: In person

Adviser: In person

Date Issued: 18 September

DECISION

This complaint

- [1] This decision imposes sanctions, following a decision upholding a complaint against Mr Letalu in (refer: www.justice.govt.nz [2014] NZIACDT 52). The circumstances are set out fully in the decision upholding the complaint.
- [2] In essence the grounds of the complaint were:
- [2.1] The adviser accepted his instructions and took fees of \$800.
- [2.2] He did not complete the client engagement process.
- [2.3] He did not lodge an appeal, but dishonestly told his client he had done so.
- [2.4] He did not treat the unearned fee as client funds and instead took the money.
- [2.5] When his licence expired, he did nothing to protect his client.
- [3] The Tribunal found Mr Letalu was negligent as he failed to lodge an appeal as instructed, then failed to revisit his instructions and was dishonest and misled his client as he fabricated an explanation. Further, he failed to engage in the process required for client engagement (so breached clauses 1.5 and 8 of the Code of Conduct 2010), he failed to terminate his engagement properly (so breached clause 1.1 of the Code), he failed to refund fees when required to do so (so breached clause 3 of the Code), he also breached his obligations in relation to client funds (breaching clause 4 of the Code).
- [4] The full circumstances are set out in the substantive decision.

The Parties' Positions on Sanctions

The Authority

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

The complainant

- [6] The complainant did not make any submissions on sanctions.

Mr Letalu

- [7] Mr Letalu sought to explain his offending, the only point of potential significance was ill health suffered in early 2012, though the professional offending was largely complete at that point. Mr Letalu has not given any explanation that significantly ameliorates what was a sustained and delinquent failure to meet his professional obligations.
- [8] Mr Letalu did claim he agreed with the complainant to make a section 61 application rather than lodge an appeal. However, that is not consistent with the findings made, and he has not produced records to support that claim. It would have been an important issue, potentially compromising his client's situation, given the strict time limits for an appeal. The Code required Mr Letalu to record and confirm discussions about matters of that kind in writing (clause 3 of the Code of Conduct 2010).
- [9] Mr Letalu was obliged to respond to the substantive issues prior to the Tribunal making its decision, regardless he has not provided any information that calls into question the findings made on the information before the Tribunal when it made the decision.
- [10] He sought to minimise his conduct saying it was an *administrative error*, and his client was to blame for not providing information.
- [11] He says he is now unemployed and his only income is superannuation, but has refunded fees of \$800.

Discussion

The principles to apply

- [12] 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.”
- [13] When imposing sanctions those statutory purposes require consideration of at least four factors which may materially bear upon maintaining appropriate standards of conduct:
- [13.1] *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 ...”
- [13.2] *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.
- [13.3] *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).
- [13.4] *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).

Three complaints

- [14] This complaint is one of a series of three, where the Tribunal is imposing disciplinary sanctions on Mr Letalu. This complaint is the only one of the three that involves dishonest and misleading conduct.
- [15] For reasons explained below, I do not consider rehabilitation is realistic, and the Tribunal will prohibit Mr Letalu from applying for a licence as an immigration adviser for two years (he does not currently hold a licence). However, in practical terms the prohibition is likely to have a significant impact on his ability to gain a licence in the future. As such, I will consider this prohibition and its likely consequences when determining what additional sanctions should apply.
- [16] Each of the three complaints involved an independent course of conduct on Mr Letalu’s part. This is not a case where there is effectively one transaction with multiple victims.
- [17] Within each of the three complaints, there are overlapping elements of unprofessional conduct. I have taken each complaint as a single transaction and imposed a penalty appropriate to it. Some of the findings reflect overlapping provisions of the Act and the Code of Conduct. Accordingly, it is not appropriate to regard each finding as necessarily adding to the totality of the wrongdoing.
- [18] I have applied the totality principle¹ in relation to the overall misconduct. First, determining the sanction for each complaint on its own merits, and then considering the cumulative sanction. If the cumulative result were disproportionate, the Tribunal would adjust the individual sanctions to achieve a just result. I am satisfied the penalties are at a level that discourages unacceptable conduct, having regard to the objectives of the professional disciplinary regime and reflects the gravity of the conduct. That is both individually and cumulatively.

1 *R v Williams* [1988] 1 NZLR 748 (CA); while this case deals with criminal sentencing, its principles are applicable as a guide in the context of professional disciplinary sanctions as, although punishment is not their purpose, penalties necessarily carry a punitive element in their effect.

Mr Letalu's financial position

[19] Mr Letalu's submissions imply the Tribunal should reduce the penalty due to his financial position. He did not disclose his financial position; but says his only income is superannuation. I will consider the situation from a "worst case" perspective in order to determine whether any reductions can or should be made on this ground, namely the result of imposing appropriate sanctions will make Mr Letalu insolvent and he will have to lodge a debtor's application in bankruptcy.

Financial penalty

[20] The financial penalty under section 51(f) is discretionary. The question is whether and in what circumstances Mr Letalu's financial position is relevant. I have no difficulty accepting there are instances where a financial penalty imposes hardship in circumstances where the hardship will have weight.

[21] However, Mr Letalu is effectively asserting he cannot pay any financial penalty or other impositions, as he had no disposable income. He has provided no particulars of his assets and liabilities and provided nothing more than an assertion he relies on superannuation alone.

[22] It is important to recognise a penalty under the Act is not the same as a fine. In criminal proceedings a fine, penalty, sentence of reparation, or other order for the payment of money that has been made following any conviction or order made under section 106 of the Sentencing Act 2002:

[22.1] Is not a provable debt in bankruptcy; and

[22.2] Is not discharged when a bankrupt is discharged from bankruptcy.

[23] An order made under section 51(f) of the Act is recoverable as a debt due to the Crown under section 51(5) of the Act. It does not survive bankruptcy.

[24] I am satisfied the Tribunal should mark Mr Letalu's professional offending with a penalty that reflects his conduct. If he is insolvent, it is appropriate that he deal with that in the manner provided by law. Mr Letalu has not provided a basis for determining he could meet some level of penalty over a period so as to fall within a reasonable exercise of the Tribunal's discretion, which balances his personal circumstances and the gravity of his professional offending.

Costs and Expenses

[25] Pursuant to section 51(1)(g) the Tribunal may make an order that an adviser pay the costs or expenses of investigation, inquiry, hearing and any related prosecution.

[26] The Registrar has elected not to apply for costs of investigation or representation. Given Mr Letalu's claimed inability to meet any order, the approach is not surprising.

[27] Mr Letalu has generally resisted admitting responsibility for the complaints, and the Tribunal has incurred the cost of dealing with them. However, there would be an element of futility in making an order for the costs of the hearings and I will accordingly not make such any order.

[28] The costs award for the Tribunal's expenses of hearing would have been \$2,500 in each case. This, in addition to the Authority's decision not to seek costs, is a significant concession.

Absence of significant mitigating factors

[29] There is little or no mitigation for this or any of the complaints. Mr Letalu has not taken responsibility for his conduct. He sought to minimise his conduct in his submissions on sanctions, saying he was responsible for an *administrative error*, and his client was to blame for not providing information.

[30] However, I have given weight to the fact Mr Letalu did repay the fees he received from the complainant.

Mr Letalu's licence

The principles

- [31] 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 171-173.
- [32] 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".
- [33] 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.

- [34] 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

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

The circumstances of the offending and Mr Letalu's case

- [37] 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. The most serious element of this complaint is the finding Mr Letalu dishonestly misled his client. Mr Letalu dishonestly misrepresented to his client how his application was proceeding in order to cover up his failure to progress his instructions.

Weighing the options

- [38] While the circumstances limit the options, it is necessary to consider alternatives short of further exclusion from the profession. The full range of possibilities to weigh are:
- [38.1] prohibition on applying for a full licence and allowing an application for a provisional licence (with supervision conditions);
- [38.2] training requirements;

- [38.3] a financial penalty on its own or in combination with the preceding directions.
- [39] 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].
- [40] In making this decision the Tribunal is required to weigh the public interest against Mr Letalu's interests (*A v Professional Conduct Committee* at [82]).
- [41] 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.
- [42] 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.)

- [43] I have no basis to find Mr Letalu is willing, or has the personal integrity and skills, to meet the minimum standards of the profession.

Mr Letalu will be prohibited from reapplying for a licence

- [44] I am satisfied:
- [44.1] Mr Letalu dealt with the complainant dishonestly.
- [44.2] He was aware of his professional obligations when he did so; the only apparent alternative explanation would be that, both then and now, he had no understanding of the obligations of professionalism. Each possibility is equally concerning as to future conduct.
- [44.3] There is no reasonable possibility Mr Letalu is either willing, or has the capacity, to meet the minimum standards of the profession. The three complaints present a compelling and consistent body of evidence Mr Letalu will not meet the most elementary standards of professional practice. There are elements of both incompetence and dishonesty disclosed in this unfortunate conduct by a licensed professional; and even now he endeavours to minimise and excuse that conduct.
- [45] These circumstances leave no alternative other than excluding Mr Letalu from the profession.
- [46] An order will prevent Mr Letalu 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 further 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 Letalu's history of professional offending when deciding if he is fit to hold a licence.

The financial penalty on this complaint

- [47] Mr Letalu's conduct in this matter was serious. I have already referred to Mr Letalu's dishonesty.
- [48] Given it is in addition to Mr Letalu being excluded from the profession, a penalty of \$7,500 is proportionate to the offending, in this matter and overall. The behaviour involved a systematic disregard for professional standards. It commenced with the failure to comply with the Code of Conduct, it included a failure to comply with the Code in relation to handling funds, and it extended to dishonesty to cover up a failure to meet obligations. Viewed discreetly each aspect justifies a significant sanction.
- [49] However, I have regard to Mr Letalu's financial circumstances and that he is excluded from the profession, and will reduce the penalty to \$5,000. I am also mindful Mr Letalu may not have the means to compensate his former clients and the penalty will only make that more difficult.

Refund of fees

- [50] Mr Letalu has refunded the fees.

Costs and Expenses

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

Censure

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

Overall

- [53] Concessions relating to the penalties and costs imposed are significant. The financial penalties in respect of the most serious professional offence are reduced by \$2,500, and two less serious matters by \$1,000 each. That is to account for the fact the Tribunal has excluded Mr Letalu from the profession. The order for costs reduces the hearing costs from \$2,500 to nil. These concessions amount to \$12,000 in total.
- [54] I am satisfied this is appropriate having regard to the ability of the complainants to recover on the orders in their favour, and the totality of the penalty imposed on Mr Letalu.

Decision

- [55] Mr Letalu is:
- [55.1] Censured,
- [55.2] Ordered to pay a penalty of \$5,000.

[56] The Tribunal orders that if Mr Letalu currently holds any licence under the Act it is cancelled with immediate effect, and whether or not he currently holds a licence he 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.

DATED at WELLINGTON this 18th day of September 2014.

G D Pearson
Chair