

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

Decision No: [2015] NZIACDT 4

Reference No: IACDT 07/12

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Ghulam Yasin & Sibgha Nawaz

Complainants

AND

Osama (Sam) Hammadieh

Adviser

**DECISION
(SANCTIONS)**

REPRESENTATION:

Registrar: In person

Complainant: In person

Adviser: In person

Date Issued: 27 January 2015

DECISION

Introduction

- [1] In a decision dated 29 August 2014 the Tribunal upheld this complaint. The events occurred in Mr Hammadih's practice in the United Arab Emirates (UAE).
- [2] The grounds of complaint were:
- [2.1] The complainants went to the adviser's practice and engaged with a person who is not a licensed immigration adviser. The agreement they signed said Mr Hammadih would carry out the immigration work. He was the only person in the practice who held a licence.
- [2.2] The complainants did not have the educational qualifications to be eligible to migrate to New Zealand under the skilled migrant category. However, the person they first engaged with in the adviser's practice did not tell them that, nor did she say an assessment was required to advise on immigration prospects. When the Qualification Recognition Service (a division of the New Zealand Qualification Authority) assessed their qualifications it became evident the complainants were not likely to be able to migrate to New Zealand, unless they completed further qualifications.
- [2.3] When they realised they could not migrate to New Zealand, and the professional services they had engaged were of no value, the complainants asked for a refund. The adviser did not refund the fees.
- [3] The Tribunal held:
- [3.1] Mr Hammadih acted unprofessionally as he was a party to a person in his practice unlawfully providing immigration advice (clause 1 of the Licensed Immigration Advisers Code of Conduct 2010 (the Code of Conduct), and he failed to commence the client engagement in accordance with the Code of Conduct:
- [3.1.1] He failed to set out all significant matters relating to the service delivery agreement, in particular he failed to accurately advise on his client's immigration opportunities (clause 1, and 5 of the Code of Conduct);
- [3.1.2] He failed to set out fees that were fair and reasonable for the work required to investigate and advise on his client's immigration opportunities (clause 8 of the Code of Conduct); and
- [3.1.3] Also failed to explain and provide a copy of his internal complaints procedure (clause 9 of the Code of Conduct).
- [3.2] He continued to act with a lack of care, diligence and professionalism breaching clause 1 of the Code of Conduct in failing to:
- [3.2.1] Take charge of the instructions and client relationship, and
- [3.2.2] Ensure he delivered professional advice and services meeting the requisite standard to the complainants.
- [3.3] He failed to refund fees due when his instructions were terminated (clause 3(d) of the Code of Conduct).

The Parties' Positions on Sanctions

The complainants' and the Registrar's positions

- [4] Neither the Registrar nor the complainant presented submissions in respect of sanctions.

Mr Hammadiéh's position

- [5] Mr Hammadiéh presented a submission challenging the Tribunal's decision, adding factual information not previously presented to the Tribunal. The Tribunal has issued a decision and only in particular and limited circumstances can further information can be received and considered by the Tribunal after a decision. Mr Hammadiéh has not presented grounds that justify reviewing the Tribunal's decision; he had a full opportunity to present information to the Tribunal before it made its decision. Further the information does not assist him, for reasons discussed below.
- [6] The key matters Mr Hammadiéh raised were:
- [6.1] A person the Tribunal understood was an employee was in fact Mr Hammadiéh's business or equity partner in the corporation through which he conducted his practice.
- [6.2] He spent more time in the UAE office than the Tribunal understood.
- [6.3] The refundable amount of fees should be limited by the terms of the agreement for the provision of professional services, and the capital of the corporation operating the practice in the UAE.
- [6.4] The complainants were familiar with New Zealand immigration processes.
- [6.5] The complainants' threatened him.

Discussion

The principles to apply

- [7] 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.”
- [8] When imposing sanctions those statutory purposes require consideration of at least four factors which may materially bear upon maintaining appropriate standards of conduct:
- [8.1] *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 ...”
- [8.2] *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.
- [8.3] *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).
- [8.4] *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).

The factors Mr Hammadiéh presented in his submissions

- [9] While Mr Hammadiéh's submission appeared to be largely directed at challenging the Tribunal's findings, they do in some respects concern sanctions. I will accordingly consider their merits.
- [10] The fundamental misconception upon which Mr Hammadiéh's submission is founded is that he overlooks the fact he was the sole licensee in his practice. It is unimportant whether a person

in his practice was a partner, co-owner, shareholder or employee. As the licence holder, Mr Hammadih was responsible for supervising them. Similarly, it does not alter Mr Hammadih's position because he was in the UAE more than the original information indicated. It was Mr Hammadih's responsibility to be in the UAE as much as necessary to manage, supervise and control his practice and the personnel in it effectively.

- [11] Furthermore, Mr Hammadih cannot limit his liability to clients through the terms of a contract, or a business structure. He is personally liable under the Code of Conduct, and the Act. This Tribunal is required to make orders under that legislation, not under contractual or corporation law principles. Mr Hammadih elected to enjoy the benefits of being a licensed immigration adviser, and is personally accountable for the responsibilities that go with that status.
- [12] Mr Hammadih's submission that the complainants understood New Zealand immigration principles is unimpressive; they consulted his practice to seek assistance. They were entitled to receive assistance in accordance with the Code of Conduct and the Act; they did not.
- [13] The claim that Mr Hammadih was threatened is unsupported by evidence, and outlandish. It does him little credit, if a professional person makes an attack on a client of this kind, they must establish grounds for doing so. Mr Hammadih's attack is supported by no more than his own assertions founded on speculation.

Prior disciplinary sanctions

- [14] Mr Hammadih has previously been subject to an order preventing him applying for a licence, due to a complaint regarding exploitation of a client (*Ikbarieh v Hammadih* [2014] NZIACDT 111). On its own, this complaint would result in a less severe sanction. I do not consider it appropriate to set the penalty in this matter on the basis it is repeat offending, as the earlier complaint had not been determined when this complaint arose.
- [15] There will be no further order concerning Mr Hammadih's ability to apply for a licence. The existing order applies for a period of two years. After that point, he will have to qualify for the profession and satisfy the Registrar 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 Mr Hammadih 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 Hammadih's history of professional offending when deciding if he is fit to hold a licence. Both the previous complaint and this complaint may be considered.
- [16] I am satisfied the public interest is adequately protected by the existing orders and it is not appropriate or necessary to address licensing issues further. As Mr Hammadih has already been excluded from the profession, rehabilitation is not a relevant consideration here.
- [17] With regard to the principles of minimum standards and punishment (to the extent that it is a deterrent) I consider the following financial penalties, refund of fees and compensation, are necessary.

The financial penalty on this complaint

- [18] Mr Hammadih's conduct in this matter was serious, but essentially founded on his failure to maintain control of his practice. The most serious aspect is that he allowed an unlicensed person to perform actions that were unlawful unless a licensed or exempt person carried them out. I will give Mr Hammadih the benefit of the doubt and treat that as the result of him not understanding the Act.
- [19] While I can regard the conduct as beginning with an unwitting but unacceptable error, Mr Hammadih was then responsible for further unacceptable conduct. He continued not to engage adequately with the instructions, and failed to deal properly with a refund. The latter is significant, as he refused to take personal responsibility, and told his clients to look to an unlicensed person to compensate them.
- [20] In all the circumstances, the financial penalty will be \$4,000, which balances the factors discussed in a context where there is no finding of dishonesty.

Compensation

- [21] The complainants are entitled to an award of \$1,500 to compensate them for the treatment they received and its consequences for them. The Tribunal is reluctant to order compensation in the nature of general damages routinely. In this case the complainants were making substantial life changing decisions, and did not receive the professional assistance they sought and paid for. Then Mr Hammadieh failed to take responsibility for what occurred in his practice.
- [22] The refund of fees has been delayed; rather than calculating interest that element has been taken into account as part of this award of compensation.

Refund of fees

- [23] The complainants are entitled to a full refund of fees. The work was not performed lawfully, and the complainants would not have commissioned the work if they received an accurate evaluation of their immigration prospects.
- [24] The order will be for a refund of \$2,400 in fees (approximately AED 6,540 plus bank fees).

Costs and Expenses

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

Censure

- [26] 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.

Decision

- [27] Mr Hammadieh is:
- [27.1] Censured,
- [27.2] Ordered to pay a penalty of \$4,000.
- [27.3] Ordered to pay the complainants \$3,900, being a refund of fees of \$2,400, and compensation of \$1,500.

DATED at Wellington on 27 January 2015

G D Pearson
Chair