

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

Decision No: [2015] NZIACDT 93

Reference No: IACDT 024/14

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

A Q

Complainant

AND

Viveg Lingam Mudaliar

Adviser

**THE NAME AND ANY PARTICULARS IDENTIFYING THE COMPLAINANT ARE NOT TO BE
PUBLISHED**

DECISION
IMPOSING SANCTIONS

REPRESENTATION:

Registrar: Ms S Blick, lawyer, Ministry of Business Innovation and Employment, Auckland.

Complainant: In person.

Adviser: In person.

Date Issued: 16 October 2015

DECISION

This complaint

- [1] This decision imposes sanctions, following a decision upholding a complaint against Mr Mudaliar (*AQ v Mudaliar* [2015] NZIACDT 76 (www.justice.govt.nz)). The grounds of complaint were that:
- [1.1] Mr Mudaliar received instructions and entered an agreement to provide immigration services in relation to a work visa application for the complainant.
 - [1.2] He lodged a visa application when the complainant's current visa was about to expire. If Immigration New Zealand had accepted the application as lodged, the complainant would have retained his lawful status in New Zealand while Immigration New Zealand considered the application.
 - [1.3] However, Immigration New Zealand did not accept the lodgement of the application. As a result, the complainant became unlawfully in New Zealand after his current visa expired. There were two reasons for Immigration New Zealand not accepting the application. First, there was no police clearance and, second, the job description lacked detail.
 - [1.4] There was a potential answer to the failure to provide a police clearance; as the complainant was not staying in New Zealand long enough to require the police clearance. However, Mr Mudaliar did not raise this point with Immigration New Zealand.
 - [1.5] Mr Mudaliar decided to proceed to obtain a police clearance. Because the complainant was in New Zealand unlawfully, he lodged a request under section 61 of the Immigration Act 2009. This is a discretionary provision. He submitted the police clearance, but resubmitted the same job description that Immigration New Zealand had earlier rejected. He did not provide reasons why Immigration New Zealand should now accept the job application they had already rejected.
 - [1.6] Immigration New Zealand declined the section 61 request, and a further request made pursuant to section 61, but Mr Mudaliar did not notify the complainant.
 - [1.7] The other aspect of the complaint is that Mr Mudaliar had an agreement with the complainant for the original application, but did not do anything to establish the professional engagement for the two section 61 requests.
- [2] The Tribunal found:
- [2.1] Mr Mudaliar failed to take proper care with lodging the application, and making the requests under section 61;
 - [2.2] he did not notify the complainant when the second section 61 request failed; and
 - [2.3] he was required to have a further agreement for the section 61 requests and did not have one.
- [3] Accordingly, the Tribunal upheld the complaint on those grounds.

The Parties' Positions on Sanctions

The Authority

- [4] The Authority took the position that based on this complaint, a remedial approach was open. However, the Tribunal later upheld another complaint that Mr Mudaliar dishonestly misrepresented his client's employment to Immigration New Zealand. The Authority then took the view that the Tribunal should cancel Mr Mudaliar's licence.

The complainant

- [5] The complainant did not provide submissions.

Mr Mudaliar

- [6] Mr Mudaliar accepted the Tribunal's decision in part and contested it in others. He made no specific submissions on sanctions.

Discussion

Relevant principles

- [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]:

[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.

- [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 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 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 BHC* Auckland HC4/92, 6 April 1993).

The concurrent complaint

- [9] The Tribunal is concurrently imposing sanction on a more serious complaint. It involved dishonesty, and will result in cancellation of Mr Mudaliar's licence as an immigration adviser. This present complaint is not sufficiently serious to warrant the cancellation of Mr Mudaliar's licence. I will take the loss of Mr Mudaliar's licence into account, and that makes it unnecessary to order training. The overall penalties for the two complaints are potentially less than each may warrant in isolation.

The gravity of the offending

- [10] The complaint involved substandard service that is indicative of competence issues. However, the findings are at the lower end of the scale. The competence issues, particularly the resubmission of an already rejected document, may point to a need for training; although that is not a relevant issue as Mr Mudaliar's licence has been cancelled.

This complaint in context and the penalties

- [11] Given the importance of the immigration issues for the complainant and the series of failures that arose, the starting point would be a penalty, and a training requirement. The penalty would be \$3,000. However, given the impact of the loss of Mr Mudaliar's licence, the penalty will be reduced to \$1,500.

Refund of fees and compensation

- [12] The complainant submitted that he had paid money and the Immigration New Zealand fee of \$270 to Mr Mudaliar; and he also complained of the distress caused by the failure to give effect to his instructions.
- [13] The complainant is entitled to a refund of any outstanding fees, and disbursements. The quantum is not clear. If necessary, the Tribunal will determine the quantum.
- [14] On some occasions, the Tribunal will make a modest award of compensation in the nature of general damages, being conscious such awards must not be an additional penalty. I am satisfied this is an appropriate case, and an award of \$1,500 will be made in the complainant's favour. Mr Mudaliar's client was in New Zealand unlawfully, despite giving Mr Mudaliar proper instructions, and was concerned to ensure he did not breach his immigration obligations.

Costs and expenses

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

Censure

- [16] In accordance with the usual practice of disciplinary tribunals, censure will be an express sanction.

Orders

- [17] Mr Mr Mudaliar is censured, and ordered:
- [17.1] To pay a penalty of \$1,500.
- [17.2] To pay compensation of \$1,500 to the complainant.
- [17.3] To refund all fees and disbursements paid to him in respect of the instructions to which this complaint relates.
- [18] The Tribunal reserves jurisdiction to quantify the fees and disbursements that are unpaid in respect of the order set out at paragraph [17.3] above.

Order prohibiting publication of the complainant's name and identity

- [19] As the complainant was in New Zealand unlawfully, the Tribunal orders that his name, and any information that may identify him, is not to be published.
- [20] This order recognises that persons are entitled to complain regarding professional misconduct, without fear of publication that may adversely affect them. In this case that may be unlikely, however the complainant could be affected in jurisdictions other than New Zealand.
- [21] The Tribunal reserves leave for the complainant or the Registrar to apply to vary this order. The order does not prevent:
- [21.1] the complainant disclosing the decision to his professional advisers, or any authority he considers should have a copy of the decision; or
- [21.2] the adviser disclosing the decision to any barrister or solicitor of the High Court of New Zealand in its original form for the purpose of obtaining legal advice.

DATED at WELLINGTON this 16th day of October 2015

G D Pearson
Chair