

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

Decision No: [2015] NZIACDT 98

Reference No: IACDT 013/14

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Shiv Prashant Choudhary

Complainant

AND

Gregory Francisco Smith

Adviser

DECISION
(IMPOSING SANCTIONS)

REPRESENTATION:

Registrar: Mr A Dumbleton, lawyer, MBIE, Auckland.

Complainant: In person.

Adviser: Mr R Hesketh, barrister, Auckland.

Date Issued: 10 December 2015

DECISION

Background

- [1] This is one of four complaints the Tribunal upheld against Mr Smith, the grounds the Tribunal upheld were:
- [1.1] In *Allen v Smith* [2015] NZIACDT 5 (IACDT 010/14) Mr Smith did not have an agreement with the required information, and issued a non-complying invoice.
- [1.2] In *Hettige and Gerreyn v Smith* [2015] NZIACDT 9 (IACDT 035/14) and *February v Smith* [2015] NZIACDT 10 (IACDT 037/14) Mr Smith accepted instructions to provide immigration services. He failed to provide the services, and failed to communicate. He failed to produce his file when the Registrar required him to do so to investigate the complaint.
- [1.3] In this complaint *Choudhary v Smith* [2015] NZIACDT 8 (IACDT 013/14) in the course of his professional relationship with the complainant:
- [1.3.1] Mr Smith's written agreement failed to include details of the services he would provide;
- [1.3.2] He failed to do the work he agreed to do.
- [1.3.3] He dishonestly told the complainant he had lodged an application with Immigration New Zealand, they were considering it and held his passport; knowing he had not lodged the application and he had the passport.
- [1.3.4] He failed to return the passport when requested.
- [1.3.5] He failed to comply with the Authority's statutory request for his file.
- [2] The circumstances are set out fully in the respective decisions (www.justice.govt.nz).
- [3] Each complaint was serious due to its effect or potential effect on Mr Smith's clients. The failure to produce his file when the Registrar required him to do so, withholding a passport, and dishonestly saying he lodged an application when he had not done so are all very serious issues.
- [4] Furthermore, Mr Smith failed to respond to the complaints when the Registrar lodged them with the Tribunal.
- [5] These circumstances clearly raise concerns, as the services Mr Smith provided and his response to the complaints fall far short of the standards required of licensed immigration advisers. However, until the process of determining the sanctions issue the Tribunal had no information that explained why Mr Smith acted as he did.

Rehearing

- [6] Mr Smith had lodged an oral application for a rehearing of the finding he dishonestly provided incorrect information in this complaint *Choudhary v Smith* [2015] NZIACDT 8. However, he withdrew that application.

Discussion

Further information provided by Mr Smith

- [7] When Mr Smith engaged counsel to represent him the Tribunal had already upheld these complaints without Mr Smith providing an explanation. His counsel provided information that establishes at the time the complaints arose Mr Smith was unwell, and it appears he was unaware of his illness or the extent of it at the time. Mr Smith should fully recover from his illness.

- [8] Generally, the grounds of complaint all relate to Mr Smith's failure to do things he was required to do. Where a professional person is unwell and fails to get medical attention, it is not a surprising outcome. However, neither is it necessarily a matter of complete justification, or excuse. It is important that professional service providers responsibly monitor factors affecting their ability to deliver services to their clients. The dishonestly involved a misrepresentation relating to a matter Mr Smith failed to progress. While serious, a deception to hide that a person is not coping with their practice is quite a different matter from a similar deception for personal gain.
- [9] Accordingly Mr Smith's illness is a significant mitigating factor, affecting the grounds for complaint and Mr Smith's failure to deal properly with the complaints.

The Registrar's position on sanctions

- [10] The Registrar, prior to being informed of Mr Smith's illness, took the view the appropriate sanction was to cancel Mr Smith's licence, and prohibit him from reapplying for a licence for two years (the statutory maximum). She took the view that if the Tribunal prohibits Mr Smith from practising, then rather than a financial penalty the focus should be on compensation. The financial consequences of not continuing in the profession, she says, make that the only realistic option.
- [11] As there were delays in dealing with sanctions, Mr Smith had to apply to renew his licence and the Registrar refused to renew it, because of these complaints and the adverse finding on them. He applied to the District Court, and received a temporary authority to continue providing services, that authority ends on the issue of these decisions. Accordingly, Mr Smith does not hold a licence under the Act.
- [12] The Registrar maintained her position regarding the appropriate sanctions; though rather than cancellation, the only order required after she did not renew his licence is that Mr Smith not re-apply for a licence.

Mr Smith's position on sanctions

- [13] Through his counsel, Mr Smith provided information that explains how he had faced significant adversity in his life, been in positions of trust; and lived an admirable life where he has enjoyed and deserved a high level of trust and respect in the community. He has never before faced any issue of the kind the Tribunal must deal with, or indeed any other issue with the law.
- [14] His counsel attributed the present matters to Mr Smith's illness. He provided evidence that while the matters subject to the complaints give an appearance of lack of competence; that was not so, when Mr Smith's professional services as a whole are examined. On the contrary, otherwise he has an impressive record of professional service. Initially Mr Smith sought to be able to continue to practise under supervision; however, later he accepted he should withdraw from practice for a time, and accordingly did not oppose a prohibition on him applying for a licence for a period.

The complainant's positions on sanctions

- [15] I take the view, as the Registrar submitted, that I should regard these four complaints as a composite, where I have regard to a prohibition on Mr Smith practising as the primary sanction, and giving priority to compensation over financial penalties. Accordingly, I will review the position of each of the four complainants.
- [16] Ms Allen sought a refund of the fee she paid; Mr Smith had no complying agreement, and issued a receipt that did not meet the requirements of the 2010 Code of Conduct. The fees were \$1,223.
- [17] Mr Hettige and Ms Gerreyen did not make any specific request regarding sanctions. However, they did complain they paid \$1,546.50 (including bank fees), and did not receive the services promised.

- [18] Ms February's initial complaint was concerned with an outcome that ensured Mr Smith would not repeat the conduct leading to the complaint. She had paid \$900, and Mr Smith had not provided the services promised.
- [19] Mr Choudhary sought an order preventing Mr Smith practising; he did not make specific submissions on the refund of fees or compensation. However, he paid \$1,200 for services Mr Smith did not provide.
- [20] Accordingly, there is in total \$4,869.50 in fees that relate to the grounds of complaint. In each case, Mr Smith failed to provide services, or he failed to provide the information required for clients to agree on the level of fees. I am satisfied all the fees should be refunded.

Principles for suspension or cancellation of licence

- [21] The authorities relating to cancelling occupational licences provide context to consider Mr Smith's circumstances. They 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 [13] – [14].
- [22] 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 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".
- [23] The purpose of professional disciplinary proceedings was affirmed by the Supreme Court in *Z v Dental Complaints Assessment Committee* [2008] NZSC 55 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.
- [24] The statutory purpose is achieved by considering at least four factors which materially bear upon maintaining appropriate standards of conduct:
- [24.1] 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 ..."
- [24.2] Demanding minimum standards of conduct: *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 725-726 and *Taylor v General Medical Council* [1990] 2 All ER 263 (PC), discuss this aspect.
- [24.3] Punishment: the authorities, including *Z v Dental Complaints Assessment Committee* (at [1], [65], [70] & [149]-[153]), 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 at [28]).
- [24.4] 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).

Alternatives short of cancellation of licence

- [25] In the unusual situation where Mr Smith has provided evidence of providing professional services to a high standard, except where he became unwell without a full awareness of his condition, I would consider allowing him to continue in practice under supervision. However, Mr Smith accepts that it is not presently in his or his clients' interests and accordingly put that option to one side.

Mr Smith's licence

- [26] I have sufficient information to be satisfied, on the balance of probabilities, that Mr Smith's health had a significant role in the conduct leading to these complaints. However, I do not have sufficient information to make a truly informed decision as to whether his recovery and recuperation mean if he returns to practising after any particular period of stand down that adequately protects the interests of the public. The imposition of sanctions in a disciplinary process is seldom an occasion where it is possible to make an adequate review of issues of this kind that relate to competence, which may be far wider than the narrow focus of the disciplinary process.
- [27] Mr Smith does not currently have a licence, and he will have to apply to the Registrar to obtain a licence. While it is a matter for her, she could well consider she requires medical reports and other information to make an informed decision. She also has power to grant a provisional licence where she considers that for any reason supervision is required or appropriate.
- [28] In these circumstances, the reason for imposing a minimum period of prohibition is to give some dimension to the overall sanctions. Excluding Mr Smith from the profession for a period is a factor providing balance in the absence of financial penalties.

The penalties

- [29] The starting point for sanctions in the respective matters would be:
- [29.1] *Allen v Smith* [2015] NZIACDT 5 (IACDT 010/14) relates to a non-complying agreement and invoice. There are no aggravating factors, so the penalty without aggravating or mitigating factors would be a financial penalty of \$2,500.
- [29.2] *Hettige and Gerreyn v Smith* [2015] NZIACDT 9 (IACDT 035/14) and *February v Smith* [2015] NZIACDT 10 (IACDT 037/14) both involve accepting instructions, and failing to provide services. In addition, Mr Smith failed to provide the Registrar with records under a statutory request. For both complaints, context is critically important; failing to comply with a statutory direction from the Registrar is always a serious matter, likely to lead to orders affecting a licensed immigration adviser's licence. If a licensed immigration adviser solicits fees while not intending to provide services, it is a form of dishonesty that will likely lead to exclusion from the profession and a high financial penalty. In these cases, there was no evidence of deception, and the failure to comply with the statutory direction neither involved wilfulness nor an attempt to hide professional failings. The starting point would be an order requiring training and/or supervision, and a financial penalty of \$5,000.
- [29.3] For this complaint *Choudhary v Smith* [2015] NZIACDT 8 (IACDT 013/14), it involved a failure to perform work, deception of Mr Smith's client, failing to return a passport, and a failure to provide records to the Registrar. In the absence of mitigating factors, the series of matters present a concerning picture of delinquent conduct that mandates removal from the profession, the starting point would be cancellation of licence, a two year prohibition on an application for a licence, and a financial penalty of \$7,500.
- [30] The role Mr Smith's illness played in his professional offending, and the exemplary prior record both in his professional and personal life require that I view this point in Mr Smith's life as one where it is just to focus on him recovering, while protecting the public.
- [31] I also have a high degree of regard to the fact Mr Smith accepts it is not in his or his clients' interests that he continue practising at present. That demonstrates insight, which provides assurance. The financial consequences of Mr Smith not continuing to practise will be substantial. I accept the Registrar's submission that it is appropriate in this case not to make orders for a financial penalty.
- [32] I further note that Mr Smith has not applied for name suppression, and publication is in effect one of the sanctions.
- [33] The totality principle also mediates the total penalty. However, the overwhelming factor is that the circumstances allow a compassionate response, for Mr Smith to recover and continue the successful life he led before becoming unwell. None of the interested parties opposed this

course, and the Registrar has not expressed concern regarding protection of the public, given her power to decide on whether Mr Smith can hold a licence in the future.

[34] Accordingly, I will make the same order in each of the four proceedings:

[34.1] Mr Smith will be prevented from reapplying for any category of licence as a licensed immigration adviser for a period of one year from the date of this decision.

[34.2] He will be ordered to refund the fees he received from the complainant.

[35] I do not imply that when the year expires I expect that Registrar would grant Mr Smith a licence. That is an issue for her. If Mr Smith wishes to apply for a licence in the future, he should contact the Authority well before doing so. I anticipate the Registrar will explain her views; what she requires to understand his circumstances, and whether he should take any steps before applying.

[36] I expressly record that while Mr Smith has accepted the dishonesty finding must stand, it did not involve any element of deceiving his client as part of a scheme to take advantage of him. It was a situation where Mr Smith had failed to perform obligations due to being unwell, and rather than disclosing his shame and embarrassment to his client, he was untruthful. It was a serious lapse, but I do not consider Mr Smith should not return to practising as a licensed immigration adviser if he wishes to do so and meets the Registrar's requirements.

Determination and Orders

[37] Mr Smith is:

[37.1] Censured.

[37.2] Ordered to refund \$1,200 to the complainant; and

[37.3] Prevented from reapplying for any category of licence as a licensed immigration adviser for a period of one year from the date of this decision.

DATED at Wellington this 10th day of December 2015

G D Pearson
Chair