

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

Decision No: [2015] NZIACDT 1

Reference No: IACDT 001/13

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Syed Muhammad Asad

Complainant

AND

Dharmendrakumar Patel

Adviser

DECISION
IMPOSITION OF SANCTIONS

REPRESENTATION:

Registrar: In person

Complainant: In person

Adviser: In person

Date Issued: 21 January 2015

DECISION

This Complaint

- [1] This decision imposes sanctions, following a decision upholding a complaint against Mr Patel (refer decision *Asad v Patel* [2014] NZIACDT 61; www.justice.govt.nz).
- [2] This complaint arose when the complainant engaged the adviser's practice to assist with lodging an expression of interest. As a result of systemic failure in his Practice, Mr Patel failed to comply with his professional obligations:
- [2.1] He did not undertake the compulsory steps relating to disclosure and recording in writing the terms of the engagement;
- [2.2] His practice delivered the professional services unlawfully using unqualified staff; and
- [2.3] He failed to refund fees he had not earned.
- [3] The Tribunal determined Mr Patel breached his professional duties under clause 1.1(a) of the Immigration Advisers Code of Conduct 2010 (the Code) by allowing unqualified staff to provide immigration advice unlawfully. However, the finding was limited to allowing that to occur due to lack of supervision rather than being a party to it. The difference is significant as the provision of unlicensed advice is a criminal offence and the gravity of Mr Patel's actions is significantly reduced as he was not a party to the offence.
- [4] In addition, Mr Patel failed to complete the client engagement processes; in particular, not having a written agreement and not documenting fees. As such, he breached clauses 1.5 and 8 of the Code. Following those breaches, he failed to refund fees, in doing so he breached clause 3(d) of the Code.
- [5] The full circumstances are set out in the substantive decision.

The Parties' Positions on Sanctions

The Authority

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

The Complainant

- [7] The complainant sought the recovery of all fees and disbursements paid.

Mr Patel

- [8] Mr Patel took issue with the findings against him. He said he did not respond to the Statement of Complaint, which set out reasons for potential findings against him, as the Registrar had been given an explanation some 16 months previously. According to Mr Patel, the explanation clearly identified there were no breaches of the Code.
- [9] He generally claimed he had not offended, and impliedly claimed no sanctions should be imposed for that reason.

Discussion

Mr Patel's submission that the Tribunal's findings are wrong

- [10] Mr Patel's submission that he did not respond to the Statement of Complaint due to his previous submission to the Registrar is unimpressive. The Statement of Complaint set out reasons why the findings the Tribunal made were potentially open. It is obvious the Registrar prepared and filed the Statement of Complaint, despite Mr Patel's earlier submission, and gave reasons why the findings eventually made were potentially open to the Tribunal. The circumstances in which a response should be filed were also set out. The Tribunal took Mr

Patel's earlier response into account when coming to its conclusions in the substantive decision, but the content was unpersuasive. The response failed to show insight into the adviser's professional responsibility to maintain professional business practices relating to staff management and his obligations to clients who engaged with his practice.

- [11] While the Tribunal accepts that Mr Patel's staff members withheld information regarding the complainant and his instructions, Mr Patel's initial response did not set out what business practices he had implemented to prevent staff from misleading clients to whom they had access. The Tribunal accepted he moved swiftly to dismiss the employees once matters had come to his attention, however, his remedial action did lack some insight into his responsibilities to the clients of his practice. Having outlined no specific actions that he had taken to ensure his client's could not be misled by staff members, Mr Patel's initial response attempted to put blame on the complainant for failing to inquire into the licensing status of the person who was providing advice. Such an argument cannot assist Mr Patel as potential migrants cannot be expected to be aware of the New Zealand's licensing regime, they are entitled to expect, unless put on notice, that an adviser's practice is operating in accordance with the licensing requirements. Mr Patel has had every opportunity of responding to the complaint, and a decision made on the material he presented.
- [12] Mr Patel chose only to rely on his initial response, did not respond to the Statement of Complaint, and now challenges the Tribunal's findings. While the initial response did raise a number of valid points which were duly taken into account, the failure to respond specifically to the allegations put in the Statement of Complaint has meant that the Tribunal was without the benefit of the adviser's direct comment on a number of points. The choice not to respond to the Statement of Complaint was Mr Patel's, and he cannot now, without a compelling reason, attempt to challenge the decision made. The Tribunal's decision is final, subject to limited exceptions *Bonacua v Scholes* [2013] NZIACDT 3 and Mr Patel has not established any reason to reconsider the decision.

The principles to apply

- [13] 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.
- [14] When imposing sanctions those statutory purposes require consideration of at least four factors which may materially bear upon maintaining appropriate standards of conduct:
- [14.1] *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 ..."
- [14.2] *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.
- [14.3] *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).
- [14.4] *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).

Mitigating factors

- [15] Mr Patel's submissions on sanctions, although seeking to challenge the Tribunal's findings, do show some insight into his understanding of professional responsibilities. While he does still seek to minimise his failings, he has in general accepted that he had a responsibility for

supervising his employees. It is also important to recognise that the professional offending in relation to unqualified staff did not extend to being a party to the criminal offending.

The gravity of the professional offending

- [16] This decision largely turns on the gravity of the professional offending. That principally concerns the failure to ensure persons engaging with the practice were properly protected by establishing professional business practices relating to staff management. Also significant, was Mr Patel's failure to recognise that his professional responsibility, to the client who had engaged his practice, is a personal one.
- [17] To Mr Patel's credit, he appears to have acted swiftly to dismiss the employees once aware they had been a party to the criminal offence of providing unlicensed advice. Additionally, the advice which Mr Patel did provide, although limited, was correct and as a result his understanding of New Zealand's immigration requirements is not in question.
- [18] His failure of supervision is a matter that has affected both him and the Complainant; I regard the matter is lack of insight and experience of supervision rather than any more serious lapse.

Training

- [19] Given my view of the gravity of the offending, I have determined the appropriate course is to require Mr Patel to undertake training. He will be required to complete modules 1, 2 and 10 of the Bay of Plenty Polytechnic course: Continuing Professional Development in New Zealand Immigration Advice. They are parts of the course which is the minimum for entry to the profession.

Monetary penalty

- [20] Given my view of the gravity of the offending, the appropriateness of training, and the obligation to pay compensation and refund fees this is a case where I do not consider a monetary penalty is appropriate or necessary.

Compensation and the refund of fees

- [21] Mr Patel was required to refund all money the complainant paid (including money paid to a previous adviser prior to referral). The substantive decision discussed the point. The complainant has identified he paid £1,519.25, Mr Patel has not challenged the figure. He did not get the money as the unlicensed persons misappropriated the fees; however, he is personally responsible for the conduct of persons in his practice. Further, the financial irregularities were the result of his failure to supervise his practice adequately.
- [22] The Tribunal will order Mr Patel to repay the money with interest. Interest will be at the Judicature Act 1908 rate of 7.5%, though the award is compensation under section 51. Accordingly, it will be for the period from the date of the last payment (3 February 2012) until 14 October 2014 being 984 days at 7.5% on £1,519.25, which amounts to £307.18.
- [23] Accordingly, the total for the refund of fees and compensation for interest is £1,826.43. The order will be for the payment of NZ\$3,728.69.
- [24] Mr Patel's conduct resulted in the complainant and his family encountering considerable difficulty as he was given the expectation he could migrate to New Zealand when that was not possible. A step of this kind is life changing; it involves both a great deal of activity, and emotional stress. Furthermore, it affects decisions regarding employment and living arrangements. However, the Tribunal is concerned not to simply award compensation as a matter of routine, as that becomes little more than an additional penalty. Virtually any failure to maintain professional standards results in stress and disappointment for consumers. However, I am satisfied the particular circumstances of this complaint went beyond the usual. In particular, the service delivery involved criminal offending, by unlicensed persons giving unsatisfactory immigration advice; and the unrealistic expectation would have affected important aspects of the complainants living arrangements. The compensation for that will be an award of NZ\$2,000. While Mr Patel was not personally party to the wrong, it occurred in his office and he was responsible for ensuring clients were protected in his office.

Costs and Expenses

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

Decision

[26] Mr Patel is:

[26.1] Ordered to pay the Complainant NZ\$5,728.69 within 28 days of this decision.

[26.2] Required to enrol and successfully complete modules 1, 2 and 10 of the Bay of Plenty Polytechnic course: Continuing Professional Development in New Zealand Immigration Advice, within 18 months of this decision.

[27] The Registrar and Mr Patel are reserved leave to apply for an amendment to the order relating to training if there are changes in the course directed, or the range of courses available. The Tribunal also reserves leave for Mr Patel to apply regarding the specified period to enrol, and complete the requirements for further training.

DATED at WELLINGTON this 21st day of January 2015.

G D Pearson
Chair