

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

Decision No: [2015] NZIACDT 106

Reference No: IACDT 014/13

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Roshan Shalini Shankar

Complainant

AND

Madhur (Maddox) Ahuja

Adviser

DECISION
(IMPOSING SANCTIONS)

REPRESENTATION:

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

Complainant: Mr M Dreaneen, Barrister, Auckland.

Adviser: Mr R Chambers and Mr D Shellenberg, Barristers, Auckland.

Date Issued: 21 December 2015

DECISION

BACKGROUND

- [1] This is one of three complaints the Tribunal upheld against Mr Ahuja, the respective grounds for the complaints the Tribunal upheld were:
- [1.1] In *Chand v Ahuja* [2014] NZIACDT 119 (IACDT 012/13) the Tribunal upheld the complaint on the basis Mr Ahuja failed to refund fees of \$2,288.50, when the Licensed Immigration Advisers Code of Conduct 2010 (the 2010 Code) required him to do so.
- [1.2] In *Kumar v Ahuja* [2014] NZIACDT 120 (IACDT 013/13), the Tribunal has upheld the complaint on the basis Mr Ahuja failed to refund fees of \$1,490.00, when 2010 Code required him to do so..
- [1.3] In this complaint, *Shankar v Ahuja* [2015] NZIACDT 36 (IACDT 014/13), in the course of his professional relationship with the complainant:
- [1.3.1] Was negligent and breached the service delivery standards in the 2010 Code, as he failed to manage issues relating to passport expiry, and he lodged an application with several sections incomplete. He then negligently managed the process of lodging a further application as a result of the first application failing; notwithstanding Immigration New Zealand communicating with him, and that he was informed of the importance of the issues.
- [1.3.2] He breached the Licensed Immigration Advisers Code of Conduct 2010 in relation to his obligations to communicate with his client.
- [2] The circumstances are set out fully in the respective decisions (www.justice.govt.nz).
- [3] Given the complainant in this complaint seeks substantial compensation, and that affects Mr Ahuja's ability to meet a financial penalty I will consider the three complaints together. There is also a need to consider the totality principle, though that is secondary in the particular circumstances.
- [4] Given the interrelationship, I will discuss both the positions taken by the respective complainants, Mr Ahuja, and the Registrar for each complaint.

The Registrar and the Complainant's positions in relation to this complaint

- [5] The Registrar noted the three complaints occurred in a short space of time after Mr Ahuja became a licensed immigration adviser. She further placed some emphasis on Mr Ahuja's evidence in response to this complaint, and submitted it illustrated the high degree to which Mr Ahuja is unfit to practise. In short, the Registrar's position is that Mr Ahuja's response involved an attempt to deceive this Tribunal; and that was all the more serious as Mr Ahuja has a legal background.
- [6] Because of Mr Ahuja's conduct the complainant suffered severe consequences, and his response to the complaint failed to address the harm he caused.
- [7] The Authority submitted the Tribunal should bar Mr Ahuja from the profession for two years, and then re-entry would require that he satisfied the Registrar of the statutory criteria. She also said a penalty was appropriate to denounce the conduct, but if that compromised Mr Ahuja's ability to pay compensation and other orders in favour of the complainants, those orders should have priority.
- [8] The Complainant sought an order for the refund of fees and compensation amounting to \$93,721.00. In essence, the grounds for the compensation were that the complainant lost her ability to work due to Mr Ahuja's negligence, with competent representation, she regained her immigration status, and her employment resumed. In the interim her losses were:
- [8.1] Lost wages of \$87,696.00
- [8.2] Legal and professional fees to restore her immigration status \$4,300; and

[8.3] A refund of fees of \$1,725.00.

Mr Ahuja's response to this complaint

- [9] Mr Ahuja through his counsel acknowledged the findings against him, and said he was anxious to make amends as best he could. By that time, he had surrendered his licence as a licensed immigration adviser, and said he would not seek to renew it in the future.
- [10] He had recently qualified in law in New Zealand, his counsel indicated Mr Ahuja understood if he sought to practise, he would have to disclose his disciplinary history to the New Zealand Law Society, and it was unlikely the Law Society would allow him to practise, at least for a considerable time.
- [11] It suffices to say that Mr Ahuja has responsibilities for a young child, and his personal financial situation is not good. He did not contest the quantum of the claim for compensation, but said he was not in a position to meet reasonable compensation as it was far beyond his means.
- [12] His counsel submitted that *Guinness v New Zealand Police* [2015] NZHC 883 is authority for the Tribunal not making a compensation order if it causes undue hardship.

The parties' position in the *Chand* and *Kumar* complaints

- [13] Parties made no separate submissions in respect of the Chand and Kumar complaints.

Discussion

The key factors

- [14] Mr Ahuja plainly had little understanding of his professional responsibilities in relation to fees, or the fact his status as a licensed immigration adviser was the foundation to operate the practice where he worked. He lacked experience; unfortunately, as the Registrar noted, his attempt to deceive the Tribunal reflects more adversely on his fitness for professional practise than the grounds for complaint themselves.
- [15] The failure to refund fees, even after time for reflection is a significant matter. This complaint in relation to a series of negligent actions, and failure to communicate with his client is more serious. The negligence was at the high end, as Mr Ahuja was dealing with a vulnerable client, and Immigration New Zealand put him on notice of their requirements. He never treated his client's instructions with the seriousness her circumstances required. The outcome for her and her family were devastating. Mr Ahuja has shown little comprehension of either his responsibilities or the gravity of the consequences for his client.
- [16] It is important to consider Mr Ahuja's conduct in the course of the hearing dealing with this complaint. Mr Ahuja was required to respond honestly to the Registrar when he answered the complaint, and again when he gave evidence on oath regarding what occurred. The decision upholding the complaint sets out what Mr Ahuja said, and the Tribunal's findings. The short point is Mr Ahuja blamed his client, to avoid responsibility. He effectively said his client broke into his office and took away the incomplete papers Mr Ahuja had signed, and his client filed the defective papers. He also claimed his clients took a file note from his office, so he could not produce it. Further, he claimed his client had not made a payment; until confronted with his own handwriting, acknowledging the payment. After examining the evidence, I had to conclude:

"I am satisfied Mr Ahuja has developed his response to the complaint as matters have emerged, and I cannot rely on his evidence. Mr Ahuja's essential claim that his clients took over their own immigration affairs is implausible, inconsistent with the record, and developed through changing evidence presented by Mr Ahuja."

The starting point

- [17] For the two matters relating to a failure to refund fees, the starting point would be orders to refund the fees, and a financial penalty of \$2,000. Given Mr Ahuja's reluctance to accept his professional responsibilities, a warning would accompany the orders.

- [18] In relation to the negligence and failure to communicate, the starting point would be a financial penalty of \$6,000, mentored practice, and a requirement to undertake approved training.
- [19] However, Mr Ahuja's response to this complaint puts it into a quite different category. I have found his response to the complaint involved an attempt to deceive the Tribunal, and that raises the question as to whether Mr Ahuja has the personal qualities to practise as a licensed immigration adviser. Where a person has attempted to evade their professional responsibilities by fabricating a false explanation on oath, for them to hold a licence under the Act may not be consistent with the consumer protection the Act provides.

Principles for suspension or cancellation of licence

- [20] 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 [13] – [14].
- [21] 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".
- [22] 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.
- [23] The statutory purpose is achieved by considering at least four factors which materially bear upon maintaining appropriate standards of conduct:
- [23.1] 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 ..."
- [23.2] 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.
- [23.3] 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]).
- [23.4] 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).

Background to regulating this profession

- [24] 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.
- [25] 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.

Alternatives short of cancellation of licence

- [26] Section 51 provides for various sanctions. The key options short of cancellation or suspension of a licence are punishments intended to effect deterrence; namely censure, and financial penalties not exceeding \$10,000.
- [27] In relation to licences there are two options:
- [27.1] cancellation and/or a direction that the person may not apply for a licence for up to two years (s 51(d) & (e); or
- [27.2] suspension (s 51(c)).
- [28] Other possibilities include training and directions to remedy a deficiency (s 51(b)). There are also powers relating to imposing costs and compensation (s 51(g)-(i)).
- [29] In this decision the range of possibilities to weigh are:
- [29.1] As Mr Ahuja does not have a licence at present, a prohibition on reapplying for a licence for a period of up to two years;
- [29.2] Imposing requirements on Mr Ahuja if he were to practise;
- [29.3] A financial penalty on its own or in combination with the preceding directions.
- [30] Suspension may ensure that a proportional consequence is imposed: *A v Professional Conduct Committee* HC Auckland CIV-2008-404-2927, 5 September 2008 at [81], and would potentially bring home to Mr Ahuja the nature of the professional obligations he carries. However, as Mr Ahuja does not currently hold a licence, that would have to be given effect by an order prohibiting Mr Ahuja applying for a licence for a period.
- [31] In making this decision, the Tribunal is required to weigh the public interest against Mr Ahuja's interests (*A v Professional Conduct Committee* at [82]).
- [32] 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.
- [33] 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.)

- [34] As observed by the Court in *Shahadat*, dishonest conduct “inevitably, although not always, may lead to striking off”. It is important to look carefully at whether rehabilitation is realistic.
- [35] Mr Ahuja does not hold a licence under the Act currently, and says he does not propose to apply for one in the future. Accordingly, rather than cancellation or suspension the relevant order is an order preventing Mr Ahuja from reapplying for a licence for up to two years. However, that is simply the period of absolute prohibition, as the Registrar would need to then be satisfied Mr Ahuja met the statutory criteria after the period expired.

Mr Ahuja will be excluded from the profession

- [36] In my view, the Tribunal must completely exclude Mr Ahuja from the profession for the maximum statutory period.
- [37] He failed to deliver services his client paid for in this complaint, in accordance with the standard the Act required; and then attempted to evade responsibility by deceiving this Tribunal.
- [38] Mr Ahuja’s attempt to evade responsibility in the manner he did makes protection of the public far more significant than rehabilitation. Rehabilitation is only possible where a person is willing to work toward that goal, and a decision-maker is satisfied they have the integrity to be trusted in a position of responsibility. Mr Ahuja’s response to this complaint satisfied me, the Tribunal can place no trust in Mr Ahuja’s integrity. His attempt to deceive the Tribunal was not a momentary lapse of judgement, he embarked on a systematic attempt to mislead this Tribunal while he gave evidence on oath, after a lengthy period to reflect on and evaluate his circumstances, and the harm he caused to his client.

Mr Ahuja’s financial position

- [39] I accept the Registrar’s view that if Mr Ahuja is unable to pay both a financial penalty, and refund fees and pay compensation, then the orders to meet obligations to the complainants should take priority.
- [40] However, I do not accept the submission for Mr Ahuja that either directly, or by analogy, the decision in *Guinness v New Zealand Police* [2015] NZHC 883 is relevant to the orders this Tribunal will make. The *Guinness* case relates to reparation under the Sentencing Act 2002. This Tribunal imposes sanctions under section 51 of the Immigration Advisers Licensing Act 2007. There is a key difference between the Sentencing Act, and the Immigration Advisers Licensing Act. An order for reparation under the Sentencing Act is not provable in a bankruptcy, and endures through and after a bankruptcy. That is not the position for sanctions imposed under the Immigration Advisers Licensing Act.
- [41] The Tribunal has set out the principles in a number of cases such as *BN and MN v Hakaoro* [2013] NZIACDT 64. 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:
- [41.1] Is not a provable debt in bankruptcy; and
- [41.2] Is not discharged when a bankrupt is discharged from bankruptcy.
- [42] 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. An order in favour of a complainant or other person is simply a civil judgment debt, and the party can file it in the District Court for enforcement. A civil judgment debt is provable in a bankruptcy.
- [43] As already noted, as a matter of discretion, I will impose no financial penalties under section 51(f), and no party has claimed costs under section 51(g).
- [44] However, the Tribunal will impose proper orders for:
- [44.1] The refund of fees under section 51(h), and
- [44.2] Compensation under section 51(i).

- [45] Orders for compensation and the refund of fees do not have a penal component. They are effectively the exercise of a statutory jurisdiction to allow complainants to recover loss and compensation for damage. The losses may well be recoverable in other civil recovery proceedings. The policy appears to be an expedient means of giving relief for civil breach of contract or other duties, and conferring it on this Tribunal while seized of the relevant facts.
- [46] Given the apparent policy behind the legislation, it is difficult to see any sensible basis for allowing the adviser's ability to pay have any effect on the order. It would not be a relevant consideration if the client sought recovery in the Disputes Tribunal or the Courts.
- [47] It follows; the Tribunal will make the order for compensation and refund of fees on the merits, not the adviser's ability to pay. Mr Ahuja has not contested the quantum of the claim for compensation, and the Tribunal made findings regarding the refund of fees. The claim for compensation is founded on the principle that the negligence in failing to carry out his instructions properly resulted in the complainant in this case being unable to remain in New Zealand and work. She then gave evidence that after intervention she was able to restore her immigration status and go back to work in her former employment. I am satisfied Mr Ahuja's negligence caused the loss claimed, it was foreseeable, there is no claim of a failure to mitigate, and the quantum is not in dispute. Accordingly, there will be an order that Mr Ahuja pay the full amount of the compensation sought.

The orders in the three matters

- [48] I will make the order prohibiting Mr Ahuja from applying for a licence in each of the complaints, on the basis that in respect of the two lesser matters it is the reason for not imposing other penalties. I record, that if those matters stood alone, then the orders would be for a financial penalty of \$2,000, and for the refund of fees. There are no significant mitigating factors. There will be a censure in each case.
- [49] The other orders will be:
- [49.1] In the *Chand* complaint an order the Mr Ahuja refund fees of \$2,288.50 to the complainant.
- [49.2] In *Kumar* complaint, an order that Mr Ahuja refund fees of \$1,490.00 to the complainant.
- [49.3] In this complaint, that Mr Ahuja refund fees of \$1,725.00, and pay compensation of \$91,996.00.

Determination and Orders

- [50] In this complaint, Mr Ahuja is:
- [50.1] Censured.
- [50.2] Ordered to refund \$1,725.00 in fees to the complainant;
- [50.3] Ordered to pay compensation in the sum of \$91,996.00 to the complainant, and
- [50.4] Prevented from reapplying for any category of licence as a licensed immigration adviser for a period of two years from the date of this decision.
- [51] The orders all take immediate effect.

DATED at Wellington, on the 21st day of December 2015

G D Pearson
Chair