

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

Decision No: [2015] NZIACDT 78

Reference No: IACDT 016/14

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Padam Bahadur Tamang

Complainant

AND

Nelchor Orquina Varquez

Adviser

DECISION
IMPOSITION OF SANCTIONS

REPRESENTATION:

Registrar: In person

Complainant: In person

Adviser: In person

Date Issued: 31 July 2015

DECISION

This complaint

- [1] This decision imposes sanctions, following a decision upholding a complaint against Mr Varquez: *Tamang v Varquez* [2015] NZIACDT 39 (the decision can be located at www.justice.govt.nz).
- [2] The grounds of complaint were that Mr Varquez took over instructions to lodge an expression of interest for the complainant, then:
- [2.1] Failed to comply with the requirements for commencing a professional relationship, as his client had not accepted a written agreement and he did not attend to the various disclosure requirements. In doing so he breached clauses 1.5(a), (b) and (d) of the Licensed Immigration Advisers Code of Conduct 2010 (the 2010 Code).
- [2.2] He also failed to document the fees and disbursements as required by clause 8(d) of the 2010 Code.
- [2.3] In addition, he negligently failed to evaluate the points his client could claim when lodging an expression of interest, in breach of section 44(2) of the Act.
- [3] The Tribunal upheld those grounds of complaint.

The Parties' Positions on Sanctions

The Authority

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

The Complainant

- [5] The complainant did not make any submissions on sanctions.

Mr Varquez

- [6] Mr Varquez did provide submissions within the timeframe for filing submissions on sanctions. His submissions, however, sought to take issue with the substantive findings.
- [7] The Tribunal's procedure commences when the Registrar lodges a statement of complaint, which sets out the complaint. In that document, she identifies the grounds of complaint the evidence potentially support. The complainant and the adviser then have the opportunity to respond. The complainant can potentially seek to expand the grounds of complaint and the adviser has an opportunity to answer the complaint. In each case, the relevant document is a statement of reply.
- [8] The Tribunal makes it clear to the parties that if they disagree with anything in the Statement of Complaint they should file a statement of reply. In this case, Mr Varquez did not file a statement of reply. That is not unusual, as a significant number of advisers do not dispute the complaint as set out by the Registrar.
- [9] After the Tribunal issues a decision upholding a complaint, it invites the Registrar and the parties to provide any submissions on sanctions. Mr Varquez responded with a submission on 5 May 2015. His submission, for the most part, took issue with the substantive findings. He said he had responded to the complaint and said the Tribunal had not considered his response; though, he appeared to accept he had not filed a statement of reply.

The Tribunal's minute

- [10] Given Mr Varquez's apparent misunderstanding regarding the Tribunal's processes, the Tribunal issued a minute setting out what it considered had likely occurred.

- [11] The minute referred to Mr Varquez's submissions on sanctions and noted that he had referred to:
- [11.1] His email dated 19 October 2014, which appears to contain an admission he failed to initiate the client engagement, but a general denial of any professional offending.
- [11.2] An earlier email in which:
- [11.2.1] He claimed to have had discussions with his client. However, that email did not attach written notification as clause 3(f) of the Licensed Immigration Advisers Code of Conduct 2010 required.
- [11.2.2] He said his client instructed him to lodge an application that would not qualify, but it fails to refer to his obligation to obtain written acknowledgement under clause 2.2 of the Code.
- [11.2.3] He failed to address the gross disparity between the points claimed in an expression of interest and the points his client could claim.
- [11.3] He generally denied any professional offending against the Code or the Act.
- [12] The minute went on to give Mr Varquez the opportunity to apply for a rehearing, but noted that it had already considered the response Mr Varquez had provided to the Registrar during the initial investigation and before she filed her Statement of Complaint. The Tribunal noted that it did not consider it amounted to a reasoned response or an answer to the complaint as it contained admissions, failed to deal with the key issues, and made only general denials of liability. In contrast, the Registrar had subsequently filed a clearly reasoned statement of complaint, which Mr Varquez failed to answer with a statement of reply.
- [13] The minute said if he did not want to apply for a rehearing, Mr Varquez could instead make submissions on appropriate sanctions.

Mr Varquez's response to the minute

- [14] Despite the minute giving Mr Varquez clear instructions on how to apply for a rehearing or provide submissions on sanctions, Mr Varquez instead provided submissions challenging the substantive findings and the hearing process. In effect, he claimed that an email referring to his correspondence with the Registrar operated as a statement of reply (though that was not how he expressed the point). He blamed others for the findings against him regarding client engagement and relied on documents, which he claimed existed but could not produce. He then asked for a rehearing, without complying with the procedure set out for doing so. He also presented documents, including what appear to be public criticisms, from an internet source, of the practice where he formerly worked.

Discussion

Rehearing

- [15] Mr Varquez has consistently failed to comply with the Tribunal's processes for presenting a response to this complaint. He received a form on which he could present a statement of reply, and failed to do so. The Tribunal gave him a specific process and set a timetable for the steps to apply for a rehearing; he failed to take the necessary steps.
- [16] Mr Varquez was required to establish he had the skills to deal with complex administrative processes, and have the capacity to understand procedural requirements. He has persistently failed to comply with the opportunities to answer this complaint. Even if the Tribunal were to waive the formal process, Mr Varquez's submissions do not provide a sufficient basis to justify a rehearing.
- [17] Apart from attempting to blame others in mitigation, he has presented little of substance bearing on the appropriate sanctions.
- [18] Accordingly, the Tribunal will impose sanctions appropriate to the findings against Mr Varquez.

The principles to apply

- [19] 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.
- [20] When imposing sanctions those statutory purposes require consideration of at least four factors which may materially bear upon maintaining appropriate standards of conduct:
- [20.1] *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 ...”
- [20.2] *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.
- [20.3] *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).
- [20.4] *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 gravity of the offending

- [21] In effect, the findings against Mr Varquez concern a substantial failure to deliver professional services to the standards promised by the Act and the 2010 Code. First, he failed to comply with the requirements for commencing a professional relationship. The 2010 Code is clear and prescriptive in that regard; there were significant defects in his compliance. He then failed to comply properly with the requirements for documenting fees and disbursements. He then performed the professional services negligently. In short, Mr Varquez provided service delivery repeatedly falling far short of the standards in the Act and the 2010 Code. The very purpose of the Act was to protect consumers from systematic substandard service delivery of this kind.
- [22] Mr Varquez has shown no contrition, no understanding of his responsibilities, and appears not to comprehend why his conduct was unacceptable. He apparently suggests the practice where he delivered his professional services was dishonest or worse. However, he personally held the licence as a licensed immigration adviser, not the practice, so he was personally responsible for professional service delivery. If he worked in an unsatisfactory practice that reflects badly on Mr Varquez, it does not mitigate his non-compliance.
- [23] I can readily accept that a series of mistakes can occur in the course of dealing with a particular client; and may occur at the hands of a committed professional. However, a competent and committed professional will understand their mistakes with the benefit of hindsight, and be committed to taking responsibility and ensuring nothing of the kind occurs again. Mr Varquez does not take responsibility for his professional failings and appears to be of the opinion that there is no reason why he should behave differently in the future. Accordingly, while the professional failings are not at a particularly high level, the Tribunal has a duty to ensure that, if Mr Varquez is to hold a licence under the Act, he will deliver the standards promised to consumers. I have no confidence that will occur without intervention by the Tribunal.

Mr Varquez's licence

- [24] 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 171-173.

- [25] Rehabilitation of a practitioner is an important factor when appropriate (*B v B* [1993] BCL 1093; 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”.
- [26] Mr Varquez’s licence expired on 17 October 2013; he renewed it on 12 May 2015, after the Tribunal upheld this complaint. Given Mr Varquez’s absence of apparent insight into his responsibilities, lack of contrition and his failure to deal with the complaint before the Tribunal in a professional manner, I am concerned that consumers are exposed to Mr Varquez continuing to provide professional services as a licensed immigration adviser.
- [27] 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.

Weighing the options

- [28] It is necessary to consider alternatives short of exclusion from the profession. The full range of possibilities to weigh are:
- [28.1] prohibition on applying for a full licence and allowing an application for a provisional licence (with supervision conditions);
- [28.2] training requirements;
- [28.3] a requirement to compensate the complainant and or pay costs;
- [28.4] a financial penalty on its own or in combination with the preceding directions.
- [29] Suspension has a potential role in ensuring that a proportional consequence is imposed: *A v Professional Conduct Committee* HC Auckland CIV-2008-404-2927, 5 September 2008 at [81].
- [30] In making this decision, the Tribunal is required to weigh the public interest against Mr Varquez’s interests (*A v Professional Conduct Committee* at [82]). It would be appropriate to place an element of considered trust in a practitioner who has shown the capacity and willingness to rehabilitate; however, Mr Varquez has shown no such willingness thus far.
- [31] Dishonesty points to the need to remove a practitioner from a profession (*Shahadat v Westland District Law Society* [2009] NZAR 661), that is not relevant in this case.
- [32] I expect Mr Varquez to demonstrate commitment to meeting his professional responsibilities, maintaining professional standards and to commit to developing his professional skills. Accordingly, the Tribunal will suspend Mr Varquez’s licence until he pays the financial orders made against him in this decision, once he makes those payments the suspension will lapse and Mr Varquez will be able to resume practicing under the Act. The Tribunal also requires him to undertake the mandatory training of persons entering the profession. In terms of the impact on Mr Varquez, I note his practice is in Australia; he holds a licence to practice there and has only recently renewed his New Zealand licence. The effect of suspension is therefore not disproportionate to the public interest of ensuring a person holding a licence under the Act is committed to professional service delivery; the suspension will be very brief if he discharges his responsibilities arising from this complaint promptly.

Financial penalty

- [33] The penalty should be at a mid-level to reflect the multiple elements of non-compliance. An appropriate penalty would be \$4,000. There is nothing in Mr Varquez’s original conduct, or his

response to the complaint to discount that figure; however, given the suspension and the financial orders I will discount the penalty to \$2,500.

Compensation

- [34] The complainant in this matter has suffered considerable trouble and stress, because of the inappropriate advice. The Tribunal sometimes allows modest awards of compensation in the nature of general damages, being conscious such awards must not serve as an additional penalty.
- [35] I am satisfied this is an appropriate case, to allow a modest amount of compensation in the nature of general damages, and compensation for the fee paid for employment services. Those services were of no value given the negligent advice regarding immigration opportunities. The complainant paid \$1,100 AUD for employment services in connection with the immigration services.
- [36] I will award compensation of \$1,000 NZD for the trouble and stress, and \$1,250 NZD for the employment services (rounded to approximate the current exchange rate and fees).

Refund of fees

- [37] The complainant paid fees of \$3,300 AUD and a lodgement fee of \$420 NZD; however, he did not receive any services of value. He is entitled to have the fees refunded to him. There will be an order for a refund of \$4,100 NZD (rounded to approximate the current exchange rate and fees).

Costs and Expenses

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

Censure and warning

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

Orders

- [40] Mr Varquez is censured, and ordered
- [40.1] To pay a penalty of \$2,500.
- [40.2] To pay compensation of \$2,250 to the complainant.
- [40.3] To refund fees of \$4,100 to the complainant.
- [41] The Tribunal further orders that Mr Varquez's full licence is suspended until the pays the penalty, and the compensation and refund of fees being a total of \$8,850.
- [42] Mr Varquez is also required to enrol in the 2016 course for the Graduate Diploma in Immigration Advice Level 7, and graduate from that course. He is to apply to enrol in the course by 15 November 2015, and to complete the requirements to graduate from the course within two years of the course commencing.
- [43] The Tribunal reserves leave for Mr Varquez or the Registrar to apply to amend the orders relating to the course for the Graduate Diploma in Immigration Advice Level 7, in the event of circumstances arising that make any aspect of compliance impracticable.

[44] The Tribunal gives Mr Varquez notice that section 51(4) requires him to satisfy the Registrar he has complied with the time limits for enrolling in and completing the course, or the Act cancels his licence by operation of law without further notice.

DATED at WELLINGTON this 31st day of July 2015

G D Pearson
Chair