

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

Decision No: [2015] NZIACDT 84

Reference No: IACDT 019/12

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Mallikarjun Eppanapally

Complainant

AND

Na (Fiona) Zhou

Adviser

DECISION
IMPOSITION OF SANCTIONS

REPRESENTATION:

Registrar: Mr M Denyer, lawyer, Ministry of Business, Innovation and Employment

Complainant: In person

Adviser: Mr G P Tyrell, lawyer, Weston Ward & Lascelles, solicitors, Christchurch

Date Issued: 27 August 2015

DECISION

This Complaint

- [1] This decision imposes sanctions, following a decision upholding a complaint against Ms Zhou. The circumstances are set out fully in the decision upholding the complaint; [2014] NZIACDT 118 (refer: www.justice.govt.nz).
- [2] In summary the circumstances giving rise to the complaint were:
- [2.1] Mr Eppanapally was an existing client of Richard Martin Immigration Ltd. (the Practice), when Ms Zhou took up employment in the Practice. Mr Martin controlled the company that owned the Practice and was personally active in the Practice. Mr Martin had been a lawyer, before the Lawyers and Conveyancers Disciplinary Tribunal struck him off the roll of Barristers and Solicitors. He has a history of criminal offending against clients, and at the time Ms Zhou commenced employment he was facing criminal charges for breaches of the Immigration Advisers Licensing Act 2007 (the Act).
- [2.2] Ms Zhou took over Mr Eppanapally's file soon after she started working in the Practice. She was the sole licence holder in the Practice at that time. She wrote a submission in response to a query from Immigration New Zealand. However, Immigration New Zealand was not satisfied with the response, requested more information and provided a deadline for the reply. Ms Zhou rang Mr Eppanapally's agent (though he disputes the person was authorised) and requested the particulars.
- [2.3] Further than that, Ms Zhou did not follow up and Immigration New Zealand declined Mr Eppanapally's application as it had said it would. Immigration New Zealand wrote to the Practice stating that Mr Eppanapally's application had failed due to the non-response.
- [2.4] The decline was not initially communicated to Mr Eppanapally. Some months later when Mr Eppanapally made inquiries, Mr Martin wrote and told him the application had failed and falsely represented that this was because he had not met the attendance requirements of his previous student visa. Later Ms Zhou sent a further letter; it blamed the delay on Mr Martin for not passing on mail.
- [3] The Tribunal found Ms Zhou breached the Licensed Immigration Advisers Code of Conduct 2010 (the Code of Conduct) in these respects:
- [3.1] Clause 1.1(a) - Ms Zhou failed to perform her services for Mr Eppanapally with due care, diligence and professionalism in relation to managing the Practice, and his instructions.
- [3.2] Clause 1.1(a) - Ms Zhou failed to deal adequately with Immigration New Zealand's letter requesting further information.
- [3.3] Clause 3(a) and (f) - Ms Zhou failed to provide timely updates (clause 3(a) of the Code of Conduct), and confirm in writing the details of a material discussion (clause 3(f)), in relation to responding to Immigration New Zealand's letter requesting further information.
- [3.4] Clause 3(d) - Ms Zhou failed to provide a refund of fees pursuant to clause 3(d) of the Code of Conduct.
- [4] However, the Tribunal found Ms Zhou did not breach her professional responsibilities by becoming a party to any potential offending by Mr Martin, or that she assisted him in any unlawful or improper activity.

The Parties' Positions on Sanctions

The Authority

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

The Complainant

- [6] The complainant sought compensation. It is difficult to ascertain how much, as his provided figures that do not apparently reconcile, and in some cases the amounts have commas in the wrong place. It appears the total figure was \$247,000. In essence, he sought compensation for a failed attempt to migrate to New Zealand, losses incurred while in New Zealand and a refund of fees and expenses.
- [7] His submissions do not provide a reasoned link between losses and the findings against Ms Zhou.

Ms Zhou

- [8] Ms Zhou provided submissions on sanctions. Her counsel also provided valuable submissions, to the effect:
- [8.1] Ms Zhou answered some of the more serious concerns potentially arising from the complaint; that process has been costly for her.
- [8.2] The grounds on which the complaint was upheld are mitigated by Ms Zhou's genuine intentions to meet her professional obligations, hampered by an inability to effectively control Mr Martin.
- [8.3] Ms Zhou apologised for the errors she made.
- [8.4] She removed herself from Mr Martin's practice and is now in a precarious financial situation. All the professional difficulties Ms Zhou has arose in Mr Martin's practice, in other circumstances her professional life has been without any adverse incidents. She provided references.
- [8.5] When assessing the penalty, it is appropriate to have regard to the fact Ms Zhou did not benefit directly from the fees and, accordingly, having to make good on a refund is effectively a punishment. Further, looking at the multiple complaints the Tribunal is addressing, the totality principle is important.
- [8.6] There is some uncertainty regarding the quantum of the refund of fees, as Ms Zhou was not engaged for all of the relevant instructions. Her counsel suggested 60% of the total fee was reasonable and accordingly the correct figure would be \$3,000.
- [9] In reply to the complainant's submissions Ms Zhou personally submitted that the complainant's difficulties with his immigration were of his own making, and not linked to the findings against her.

Discussion

The principles to apply

- [10] 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.”
- [11] When imposing sanctions those statutory purposes require consideration of at least four factors which may materially bear upon maintaining appropriate standards of conduct:
- [11.1] *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 ...”
- [11.2] *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.

- [11.3] *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).
- [11.4] *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).

Multiple complaints

- [12] This complaint is one of a series of 4, where the Tribunal is imposing disciplinary sanctions on Ms Zhou. In determining the appropriate sanctions, the Tribunal will take an overall view of Ms Zhou's circumstances, applying the totality principle.

Ms Zhou's financial position and its relevance

- [13] Ms Zhou is in a difficult financial position, with financial responsibilities and no income.

Compensation and refund of fees

- [14] Orders for compensation do not have a penal component. They are effectively a statutory jurisdiction to allow complainants to recover loss and compensation for harm. These losses may well be recoverable in other civil recovery proceedings. The policy behind this element of the sanctions appears to be an expedient means of giving relief for civil breach of contract or other duties, by conferring jurisdiction on this Tribunal to address the issue when seized of the relevant facts.
- [15] Given the apparent policy behind the legislation, it is difficult to see any sensible basis for allowing Ms Zhou's ability to pay to have an effect on the order. It would not be a relevant consideration if the client sought recovery in a Disputes Tribunal or the Courts.
- [16] It follows that orders for compensation are on the merits, and Ms Zhou's ability to pay is irrelevant. The same applies to orders to refund fees and expenses paid by clients.

Financial penalty

- [17] The financial penalty under section 51(f) is discretionary. The question is whether and in what circumstances Ms Zhou's financial position is relevant. I have no difficulty accepting there are instances where a financial penalty imposes hardship and that in those circumstances it should be taken into account.
- [18] It is important to recognise that a penalty under the Act is not the same as a fine. In criminal proceedings a fine, penalty, sentence of reparation, or other order for the payment of money made following any conviction or order made under section 106 of the Sentencing Act 2002:

[18.1] Is not a provable debt in bankruptcy; and

[18.2] Is not discharged when a bankrupt is discharged from bankruptcy.

- [19] 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.
- [20] Ms Zhou has indicated she will endeavour to make good on the orders the Tribunal makes; accordingly, I am satisfied this is a case where it is appropriate to give priority to the complainant's interests.

Costs and Expenses

- [21] Pursuant to section 51(1)(g) the Tribunal may make an order that a adviser pay the costs or expenses of investigation, inquiry, hearing and any related prosecution.
- [22] This is a discretionary matter for the Tribunal.

Mitigating factors

- [23] Ms Zhou took employment in a practice operated by Mr Martin. I am satisfied he manipulated her, but she allowed that to occur. I have not found she joined in Mr Martin's wrongful conduct; however, she was wholly incapable of taking charge of Mr Martin's practice as the sole licensee. She did not have the technical knowledge to secure a professional practice against improper activity, and she did not have the personal skills to deal with Mr Martin. Further, she did not comprehend the gravity of her professional failings.
- [24] The consequences for Ms Zhou have been very considerable already. She is no longer a licensed immigration adviser, is not working and has liabilities arising from the complaints this Tribunal is now addressing. She took no steps to protect herself against those financial consequences when taking the position in Mr Martin's practice. She has surrendered her licence.
- [25] In short, Ms Zhou was an inexperienced immigration adviser, who took on the role of sole licensee in a business where Mr Martin was engaging in dishonest practices. At present, he is serving a substantial sentence of imprisonment for his illegal activities in that practice. His history of professional and criminal offending demonstrates that Mr Martin had previously exploited clients when working in law firms, which would have had mechanisms to protect the firms and their clients. Ms Zhou naively thought she was simply an employee, as she had been in another practice. She believed that her personal responsibilities only went as far as the work she personally performed irrespective of what else went on in the Practice. The reality has been that her naivety has resulted in personal and professional disaster for Ms Zhou.
- [26] I also accept the points raised by Ms Zhou's counsel.

The overall approach to sanctions

- [27] This case is exceptional for the following reasons:
- [27.1] I find Ms Zhou's conduct was the result of naivety and inexperience.
- [27.2] I have found she was not a party to Mr Martin's behaviour, though she failed to control the practice properly despite being the sole licensee.
- [27.3] When Ms Zhou gained some understanding of her true responsibilities, she has shown contrition. Significantly, she has changed her professional situation, and more recently surrendered her licence.
- [27.4] Ms Zhou did not gain anything from the fees clients paid, other than the fees indirectly contributing to her remuneration.
- [27.5] Ms Zhou now faces severe financial consequences given the responsibility she has for refunding fees and paying compensation.
- [27.6] Ms Zhou is willing to meet the financial obligations arising, as far as she can.
- [27.7] The reality of Ms Zhou's financial position is that imposing penalties will be to the detriment of her meeting obligations to complainants.
- [28] This case is different from cases where licensed immigration advisers have belligerently refused to accept responsibility for their actions, failed to comply with orders and taken no steps demonstrating their contrition, such as surrendering their licence or remediating their practices.
- [29] Accordingly, my view is that deterrence is achieved by what has happened to Ms Zhou already. The consequences of her offending have included losing her livelihood, and facing serious financial obligations from the compensation and refund of fees; she faces these liabilities despite only being an employee in the Practice and apparently not having been remunerated to take account of those risks, or indemnified against them.

- [30] In these exceptional circumstances, I consider it is not appropriate or necessary to impose a financial penalty. As discussed, orders for compensation and refunds of costs are inevitable and not discretionary decisions based on Ms Zhou's financial position.
- [31] The remaining elements are protection of the public and the potential for rehabilitation. Ms Zhou is not currently practising, it may well be that she will not practise again. In appropriate circumstances, Ms Zhou could properly return to the profession. The complaints arose from lack of experience and judgment, not dishonesty. When a person in Ms Zhou's circumstances has not held a full licence for six months, they must complete an approved refresher course and the Registrar must be satisfied they are otherwise fit to be licensed. I will accordingly direct that Ms Zhou may not apply for another licence until 6 November 2015, but will allow her to apply to the Tribunal before then to impose alternative conditions in place of that prohibition.
- [32] The Tribunal will censure Ms Zhou.
- [33] There has been no application for the costs of the hearing, and in these circumstances, there will be no order.
- [34] Accordingly, it is only necessary to discuss the issue of compensation and refund of fees.

Compensation and refund of fees

- [35] In the substantive decision, the Tribunal found the complainant's instructions were first dealt with by another licensed immigration adviser, not Ms Zhou. Ms Zhou commenced working in the Practice and was the sole licensed immigration adviser from 30 May 2011. She first engaged with the complainant's instructions on 1 June 2011.
- [36] The material adverse findings against Ms Zhou were:
- [36.1] She failed to take charge of in the instructions from 1 June 2011;
- [36.2] As a result she failed to respond to a letter from Immigration New Zealand of 29 June 2011, and the complainant's application with Immigration New Zealand necessarily failed.
- [36.3] She also failed to manage the refund of fees properly.
- [37] The substantive decision makes no finding that the complainant's application would have been successful if Ms Zhou did respond in the most effective possible way to Immigration New Zealand's 29 June 2011 letter. The finding was simply that failing to reply inevitably resulted in the complainant's application failing due to the lack of a reply. Immigration New Zealand raised a number of serious issues, which arose due to events before Ms Zhou was involved in Mr Martin's practice, and before she had knowledge of the complainant's immigration affairs.
- [38] If I were to make a finding on the papers available, I would find it probable that nothing Ms Zhou could have done would have satisfied Immigration New Zealand's concerns, which were due to matters that were unrelated to her professional work. It appears likely that the complainant's attempt to migrate to New Zealand was inevitably going to fail before Ms Zhou was involved in the matter. Immigration New Zealand's letter of 29 June 2011 raised a number of serious concerns. There is nothing before me that answers those concerns, or suggests they could be answered satisfactorily. Accordingly, on the papers before me I would necessarily find the material does not establish the complainant is entitled to any compensation from Ms Zhou, as I cannot find Ms Zhou's conduct resulted in the losses for which the complainant seeks compensation.
- [39] Section 51(1)(i) provides the Tribunal "may" impose an order for compensation. The jurisdiction is not exclusive, and the Disputes Tribunal and the Courts may make orders. Accordingly, my view is that the proper approach is not to make any finding on the incomplete evidence before me. As a matter of discretion, I simply find that in this case, the Tribunal is not in a position to decide on compensation. The matter was not in issue at the substantive hearing, and the parties have not provided a foundation to make adequate factual findings to reach a decision on the issue.

- [40] I accept the submission that \$3,000 is a reasonable portion of the fees to refund. The complainant has not provided evidence of any further entitlement. On the papers, I am satisfied Ms Zhou came to deal with this matter late, and for reasons she had no control over, the complainant was already in a very difficult situation. While some refund was due because of Ms Zhou's failings, it appears a substantial portion of the fee was probably refundable at an earlier point in time for reasons unrelated to Ms Zhou.
- [41] Accordingly, the only order for compensation and the refund of fees will be for a refund of \$3,000.

Decision

[42] Ms Zhou is censured, and

[43] The Tribunal orders:

[43.1] Ms Zhou is prevented from reapplying for a licence under the Act until 6 November 2015; she is reserved leave to apply to have the Tribunal substitute specified conditions on reapplying for a licence instead.

[43.2] Ms Zhou is to pay the complainant \$3,000 being a refund of the balance of fees.

DATED at WELLINGTON this 27th day of August 2015.

G D Pearson
Chair