

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

Decision No: [2015] NZIACDT 92

Reference No: IACDT 020/14

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

E B T

Complainant

AND

Viveg Lingam Mudaliar

Adviser

THE NAME AND ANY PARTICULARS IDENTIFYING THE COMPLAINANT ARE NOT TO BE PUBLISHED

INTERIM DECISION
(IMPOSING SANCTIONS)

REPRESENTATION:

Registrar: Ms S Blick, lawyer, Ministry of Business Innovation and Employment, Auckland.

Complainant: In person.

Adviser: Mr N King, Lawyer, Auckland.

Date Issued: 16 October 2015

DECISION

Introduction

- [1] The Tribunal upheld this complaint in a decision dated 6 August 2015, *EBT v Mudaliar* [2015] NZIACDT 79 (www.justice.govt.nz). The Tribunal found Mr Mudaliar breached his professional obligations in two respects:
- [1.1] He failed to complete the client engagement documentation, and accordingly breached clauses 1.5(a), (b), (d), 3, and 8(b), (c) and (d) of the Licensed Immigration Advisers Code of Conduct 2010 (the 2010 Code).
- [1.2] He dishonestly prepared and submitted documentation to Immigration New Zealand to support his client's residence application. In essence, he drafted a job description to fit an immigration requirement, rather than one that described what his client in fact did. Accordingly, the Tribunal found Mr Mudaliar engaged in dishonest and misleading behaviour, which is a ground of complaint under section 44(2)(d) of the Act. He also breached clause 5.2 of the 2010 Code.
- [2] The Tribunal observed that the deficiencies in the client engagement documentation were at the lower end. However, dishonestly misrepresenting a client's circumstances to Immigration New Zealand is inevitably an extremely serious matter. That conduct not only undermines the reliance Immigration New Zealand places on licensed immigration advisers, but it may also have serious consequences for an innocent client. In this case, Mr Mudaliar's client and her employer were innocent parties.

The Parties' Positions on Sanctions

The Registrar's position

- [3] The Registrar submitted that the finding of dishonestly made cancellation of Mr Mudaliar's licence appropriate.

The complainant's position

- [4] The complainant sought a refund of fees, and costs of \$3,684.35.
- [5] The complainant also sought an order regarding Mr Mudaliar's conduct, and compensation.

The adviser's position

- [6] Mr King, for Mr Mudaliar, emphasised the significance of Mr Mudaliar losing the ability to earn a living; and contended there was no need to protect the public from him. He said the Tribunal should impose the least restrictive sanction possible, have regard for Mr Mudaliar's 20 years as an immigration adviser, and consider the effect that cancelling his licence would have on him and his family.
- [7] Mr King also supplied submissions from Mr Mudaliar, which indicate he disputes the Tribunal's findings.

The complainant's reply

- [8] The complainant pointed out that Mr Mudaliar's response appeared to focus on the consequences for him, and he was oblivious to the effect his conduct had on the complainant and his family. Further that the Tribunal's findings involved deliberate dishonesty and the sanctions should be proportionate.

Discussion

Preliminary

- [9] As the Tribunal has upheld the complaint, it may impose sanctions under section 51 of the Immigration Advisers Licensing Act 2007 (“the Act”). The critical decision is whether Mr Mudaliar’s licence should be suspended or cancelled; and if so, on what terms.
- [10] The Tribunal found Mr Mudaliar acted dishonestly. The first consideration is the gravity of the complaint the Tribunal upheld. The reasons for the finding are set out in the decision upholding the complaint.
- [11] Put simply, the complainant’s wife was a vulnerable migrant; Mr Mudaliar undertook immigration work for her. She never attempted to mislead Mr Mudaliar; she and her employer were in a position to give Mr Mudaliar an accurate account of her employment. Mr Mudaliar never made proper inquiries; instead, he constructed a fictitious job description around an occupation that would meet the requirement for granting residence. If Immigration New Zealand had not identified the attempted deception, a grant of residence on inappropriate grounds would have resulted. As Immigration New Zealand identified the deception, the complainant and his wife are in an invidious position. Mr Mudaliar compromised their immigration prospects.
- [12] A function of the licensing regime is to eradicate behaviour of this kind. Mr Mudaliar’s dishonesty concerns responsibilities at the heart of the professional obligations he accepted when he became a licensed immigration adviser. It is therefore inevitable that the Tribunal must consider removing Mr Mudaliar from the profession.

Principles for suspension or cancellation of licence

- [13] The authorities indicate that 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].
- [14] 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”.
- [15] 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]:
- [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.
- [16] The statutory purpose is achieved by considering at least four factors which materially bear upon maintaining appropriate standards of conduct:
- [16.1] *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 ...”
- [16.2] *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.
- [16.3] *Punishment*: The authorities, including *Z v Dental Complaints Assessment Committee* (at [1], [65], [70] and [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* at [28]).

- [16.4] *Rehabilitation*: it is an important object to have the practitioner continue as a member of the profession practising well, when practicable (*B v B*).

Background to regulating this profession

- [17] 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.

- [18] 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

- [19] 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.

- [20] In relation to licences, there are two options:

[20.1] cancellation and an order that the person may not apply for a licence for up to two years (section 51(d) & (e)); or

[20.2] suspension (section 51(c)).

- [21] 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)).

- [22] In this decision, the range of possibilities to weigh are:

[22.1] suspension or cancellation of Mr Mudaliar's licence and a prohibition on reapplying for a licence for a period of up to two years;

[22.2] imposing training requirements on Mr Mudaliar;

[22.3] a financial penalty, either on its own or in combination with the preceding directions.

- [23] 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 Mudaliar the nature of the professional obligations he carries.

- [24] In making this decision, the Tribunal is required to weigh the public interest against Mr Mudaliar's interests (*A v Professional Conduct Committee* at [82]).

- [25] 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.

- [26] 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.) ...

- [27] 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.

Mr Mudaliar's attitude to the grounds of the complaint

- [28] Mr Mudaliar has consistently attempted to minimise his conduct and suggests that the Tribunal should revisit the findings of dishonesty. He continues to blame the complainant and her employer. Had Mr Mudaliar admitted the complaint promptly, expressed contrition and shown insight, a more optimistic view would potentially be open to the Tribunal. He has done none of those things.

- [29] I am satisfied:

[29.1] Mr Mudaliar was guilty of serious dishonesty. It involved a dishonest representation to Immigration New Zealand and the abuse of his client's trust. His was a vulnerable client. Mr Mudaliar has been, and is, uncomprehending of the gravity of his conduct.

[29.2] Mr Mudaliar was aware of his professional obligations when he offended; the only apparent alternative explanation would be that, both then and now, he had no understanding of the obligations of professionalism. Each possibility is equally concerning as to future conduct.

[29.3] In the course of addressing this complaint, Mr Mudaliar has shown little insight. He rejects the findings against him. He contends he should continue to practice as he is no danger to the public.

- [30] The only thing that I consider has changed since his offending, is that Mr Mudaliar may now have a greater apprehension of the risk of detection. That is not sufficient for me to accept Mr Mudaliar now understands and accepts the duties of professionalism and now commits to the high standards those duties demand.

Weighing the alternatives

- [31] Mr Mudaliar's circumstances are no doubt such that loss of his licence and the consequent loss of the ability to continue to practice as a licensed immigration adviser are considerable. However, the consequences of breaching professional standards are inevitably going to impact harshly. Mr Mudaliar was required to understand the consequences of breaching professional standards when he became a licensed immigration adviser. When he offended, he knew the potential consequences of attempting to deceive Immigration New Zealand.

- [32] The primary issues are whether:
- [32.1] the dishonest conduct was so serious that there is no alternative to removal from the profession; and if not
- [32.2] whether it can be reasonably considered Mr Mudaliar will in the future discharge his professional duties in a manner that does “promote and protect the interests of consumers receiving immigration advice” as section 3 of the Act contemplates.
- [33] I have had to conclude that the findings require removal from the profession and that Mr Mudaliar has exhibited none of the qualities which could lead to an expectation that he will commit to meeting professional standards in the future.

Cancellation of licence and financial penalty

- [34] I am satisfied the proper sanctions for the two elements in the complaint are cancellation of Mr Mudaliar’s licence, and an order preventing him from reapplying for a licence for a period of two years. That reflects the gravity of the attempted deception of Immigration New Zealand. He should not assume the Registrar will find he is entitled to hold a licence after that period has elapsed; however that is a matter for the Registrar’s discretion, not the Tribunal.
- [35] The financial penalty must reflect the dishonesty. I consider the starting point is a penalty of \$8,000, which must relate to the statutory maximum of \$10,000. I will discount the figure having regard to Mr Mudaliar’s previous good standing, and the loss of his livelihood. A financial penalty of \$5,000 against Mr Mudaliar is appropriate after allowing for those factors.
- [36] Mr Mudaliar may have a substantial number of active files and it will take time to arrange for substitute licensed immigration advisers to take over the files. It is a matter of some concern that Mr Mudaliar should undertake that process without supervision; however, there is no jurisdiction to impose conditions. The Tribunal will allow a period of three weeks for Mr Mudaliar to inform his clients, get their instructions, and transfer their files to another licensed immigration adviser, or exempt person.
- [37] The Tribunal formally warns Mr Mudaliar, pursuant to section 51(1)(a) of the Act, that he is required to meet the standards of the profession while he continues to hold a licence. Any failure to do so in the face of this warning will be addressed sternly. He must refund fees in accordance with the Licensed Immigration Advisers Code of Conduct 2014.

Compensation, refund of fees and costs

- [38] In relation to compensation, the complainant seeks an order that his wife’s immigration status is rectified. This Tribunal has no jurisdiction to order that. I have already found she was not at fault in any way; Mr Mudaliar was solely responsible for dishonestly misrepresenting her circumstances to Immigration New Zealand. The complainant’s wife relied on a person licensed by the New Zealand Government, and she provided correct information. She relied on Mr Mudaliar to present the information to Immigration New Zealand for her, and did not know Mr Mudaliar dishonestly misrepresented her true circumstances, using his knowledge of immigration processes.
- [39] The complainant also seeks the costs of pursuing the complaint, a refund of fees, and compensation. He seeks \$3,684.35 for the refund of fees and costs, and \$105,815 in compensation.
- [40] While Mr Mudaliar has not defended the claims, I am not satisfied I should simply make awards on the basis they are undefended.
- [41] It would appear that the proper principles to apply are as follows:
- [41.1] The refund of fees should be for the work where Mr Mudaliar did not have written agreements, had not set out fees correctly, and he performed dishonestly. Accordingly, the Tribunal must determine which fees come under those headings.

[41.2] In relation to the costs of the complaint, those costs should relate to the actual expenses of pursuing the complaint. As a lawyer did not represent the complainant, the Tribunal must identify those actual costs, and how much money was expended.

[41.3] Compensation is likely to relate to loss caused by Mr Mudaliar's dishonest conduct in relation to the complainant's residence application. The Tribunal will need to know whether the complainant and his wife had a prospect of a different immigration outcome if Mr Mudaliar had taken the best possible course of action. The Tribunal will also need to know what the financial consequences are of what actually happened compared with what would or may have happened, had Mr Mudaliar provided proper advice and implemented it.

[42] The Tribunal will provide a timetable to allow the parties to address the issues. The Tribunal will take the approach that it must have sufficient information to decide, on the balance of probabilities, whether a refund of fees and compensation is justified.

Determination and Orders

[43] Mr Mudaliar is:

[43.1] Censured.

[43.2] Ordered to pay a penalty of \$5,000.

[44] The Tribunal orders that any licence Mr Mudaliar presently holds under the Act is cancelled at 5:00pm on the 15th working day after this decision is delivered. Further, Mr Mudaliar is prevented from reapplying for any category of licence as a licensed immigration adviser for a period of two years from the date his licence is cancelled.

[45] The Tribunal cautions Mr Mudaliar that during the period he continues to hold a licence, the Code of Conduct applies to him. He will be accountable for ensuring he conducts himself in a professional manner, including providing refunds of fees to the extent they are payable, as required by the Code.

Timetable for Addressing Refunding Fees, Costs, and Compensation

[46] The complainant may, within 10 working days of this decision issuing, provide the information identified in paragraph [41] above; and any other information he wishes to provide. That information should set out how much money he and his wife seek for:

[46.1] the refund of fees;

[46.2] costs of pursuing the complaint; and

[46.3] compensation.

In each instance, the complainant is to relate the grounds of complaint to the amount of money claimed.

[47] Mr Mudaliar may, within a further 10 working days, identify what (if any) elements of the claims he disputes, and why he disputes them.

[48] The Tribunal will hold a telephone conference to discuss the extent of any dispute over the claims, what evidence is required, and how the Tribunal will hear the claim.

Order Prohibiting Publication of the Complainant's Name or Identity

[49] As the complainant's wife will potentially be embarrassed by the consequences of Mr Mudaliar's conduct on her immigration status, the Tribunal orders that the names of the complainant and his wife, and any information that may identify them, is not to be published.

[50] The Tribunal reserves leave for the complainant or the Registrar to apply to vary this order. The order does not prevent:

[50.1] the complainant or his wife disclosing the decision to their professional advisers, or any authority they consider should have a copy of the decision, or

[50.2] the adviser disclosing the decision to any barrister or solicitor of the High Court of New Zealand in its original form for the purpose of obtaining legal advice regarding this complaint.

DATED at WELLINGTON this 16th day of October 2015

G D Pearson
Chair