

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

Decision No: [2016] NZIACDT 1

Reference No: IACDT 027/14

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Mary Goher

Complainant

AND

Osama (Sam) Hammadieh

Adviser

DECISION
IMPOSITION OF SANCTIONS

REPRESENTATION:

Registrar: Mr A Dumbleton, Ministry of Business, Innovation and Employment, Wellington.

Complainant: In person

Adviser: In person

Date Issued: 13 January 2016

DECISION

This complaint

- [1] This decision imposes sanctions, following a decision upholding a complaint against Mr Hammadieh in [2015] NZIACDT 44; the decision can be located at www.justice.govt.nz.
- [2] Mr Hammadieh accepted instructions to lodge an expression of interest, and application for residence. He:
- [2.1] Gave negligent advice, telling the complainant she could claim skills in an occupational category for which she did not have the qualifications or experience. He then proceeded to lodge an expression of interest with Immigration New Zealand, as the complainant did not qualify, the work he did was wholly wasted.
- [2.2] He claimed additional fees, without having a written agreement with the complainant.
- [2.3] He initially refused to return documents until paid the fees to which he was not entitled.
- [3] The Tribunal upheld the complaint on three grounds:
- [3.1] Mr Hammadieh was negligent in respect of his advice regarding the complainant's immigration opportunities;
- [3.2] He increased fees without complying with the Licensed Immigration Advisers Code of Conduct 2014 (the 2014 Code), and
- [3.3] He failed to meet his commitments regarding returning personal documents.
- [4] The circumstances are set out in the substantive decision.

The Parties' Positions on Sanctions

The Registrar

- [5] The Registrar did not make any submissions on sanctions, but she provided information regarding Mr Hammadieh's failure to comply with previous orders this Tribunal has made in respect of complaints against Mr Hammadieh.
- [6] It appears Mr Hammadieh has not complied in any respect with the orders that:
- [6.1] In *Yasin & Nawaz v Hammadieh* [2015] NZIACDT 4, he pay a penalty of \$4,000, and a refund of fees and compensation of \$3,900.
- [6.2] In *Ikbarieh v Hammadieh* [2014] NZIACDT 111, he pay a penalty of \$5,000, and compensation of \$2,000.
- [7] In *Ikbarieh v Hammadieh* [2014] NZIACDT 111 an order prevented Mr Hammadieh from reapplying for any category of licence for a period of two years from 13 October 2014. The period is the statutory maximum for a fixed period.

The Complainant

- [8] The complainant said she had paid a total of \$6,800 (Australian dollars) for services and disbursements, and that Mr Hammadieh had attempted to withhold her documents unless she withdrew her complaint.

Mr Hammadieh

- [9] Mr Hammadieh did not provide conventional submissions on sanctions, instead:

- [9.1] He provided information indicating he had lodged a complaint with the Privacy Commissioner, but provided no information regarding the nature of his complaint. It is not evident what material complaint he could have made.
- [9.2] He said he had not received “the rights of natural justice”, and was engaging a lawyer to represent him to appeal the Tribunal’s decision. In addition he claimed that:
- [9.2.1] He had not been negligent, and provided some information from his file.
- [9.2.2] He had not increased fees beyond his agreement.
- [9.2.3] He had taken reasonable steps to deliver documents.
- [9.2.4] The complainant had not paid as much as she claimed.

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).

Mr Hammadieh’s claims

- [12] This Tribunal has granted applications for rehearing, on the rare occasions when issues have arisen regarding the non-notification of processes before the Tribunal.
- [13] In its substantive decision on this complaint the Tribunal noted:
- Mr Hammadieh indicated to the Registrar he was taking leave, and modified address details. He was aware of the complaint, and he was required to maintain a current address, and be available to deal with the complaint. He has not made an application to adjourn any of the Tribunal’s processes.
- [14] Mr Hammadieh had every opportunity to respond to the Registrar before she lodged her Statement of Complaint. If Mr Hammadieh has any grounds to justify not responding to the Tribunal’s processes, he has not lodged an application for a rehearing providing proof of that. It appears he has not engaged counsel though he said he would. Counsel has not contacted the Tribunal regarding Mr Hammadieh’s claims. In these circumstances, the Tribunal will

impose sanctions based on the findings in the substantive decision, which upheld the grounds in the Statement of Complaint.

- [15] The material Mr Hammadieh provided does not answer the complaint, and is not inconsistent with the Tribunal reaching the conclusions it did reach. For example, Mr Hammadieh claims a questionnaire completed by the complainant was sufficient for him to rely on to provide advice, however that is unlikely to be correct. A licensed immigration adviser is required to make adequate inquiries. While I have considered all the material Mr Hammadieh provided, I find it is out of time, and inadequate as a response to the Statement of Complaint.
- [16] The Tribunal notes Mr Hammadieh disputed the amount paid to him, but he provided neither sworn evidence nor records that establish his claim. Accordingly, I accept the complainant's account and written record as probably correct.

Absence of significant mitigating factors

- [17] There is little or no mitigation. Mr Hammadieh has not taken responsibility for his deficiencies.

Mr Hammadieh's licence

The principles

- [18] 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 171-172.
- [19] 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] (quoting a passage from *Patel v The Dentists Disciplinary Tribunal* HC Auckland AP 77/02, 8 October 2002 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".
- [20] 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.
- [21] 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.

The options

- [22] In relation to licences the disciplinary sanctions in section 51 allow three options:
- [22.1] cancellation and a direction that the person may not apply for a licence for up to two years (s 51(d) & (e)); or
- [22.2] suspension (s 51(c)); or
- [22.3] cancellation of a full licence with permission to apply for a different class of licence. In this way a person may be prevented from practising on their own account and put in a situation where they are practising under supervision while they hold a provisional licence (s 51(b) & (d)).
- [23] Other possibilities to assist rehabilitation include training and specified conditions (s 51(b)). There are also powers relating to imposing costs and compensation (s 51(g)-(i)).

The circumstances of the offending and Mr Hammadieh's situation

- [24] Imposing sanctions on this complaint follows the Tribunal having already made an order preventing Mr Hammadieh from applying for any licence for a period of two years down to 12 October 2016. The reasons are set out in *Ikbarieh v Hammadieh* [2014] NZIACDT 111, in significant part the decision was inevitable due to Mr Hammadieh's apparent unwillingness to comply with the obligations of professionalism. That is an essential element in restoring a practitioner to safe practice. The Tribunal should have confidence consumers will not be at undue risk of a practitioner failing to deliver the protections offered by the Act. Nothing in Mr Hammadieh's response to this complaint indicates he is committed to professionalism, has insight regarding his deficient service delivery, or has a strategy to attain an acceptable standard of professionalism.
- [25] When looking at the options, the first factor to consider is the gravity of the professional offending, it is not appropriate to deprive a person of membership of a profession unless their offending is sufficiently serious.
- [26] Mr Hammadieh has failed to provide services with care, failed to maintain proper professional practices relating to fees, and not accepted responsibility for returning documents. They are issues that are consistent with his lack of professionalism in the other two complaints the Tribunal has addressed. The complainant did not receive services meeting even a bare minimum standard and Mr Hammadieh exploited her financially. As this was not an isolated event, these matters are sufficiently serious to require consideration as to whether Mr Hammadieh should be entitled to apply for a licence, until meeting specified conditions.
- [27] I make no judgement regarding Mr Hammadieh's prospects of successfully applying for a licence, and confine my decision to the issue of this Tribunal's power to prohibit an application. In my view, particularly given Mr Hammadieh's failure to comply with the existing orders of this Tribunal, the proper order is to require that Mr Hammadieh take adequate steps to demonstrate professionalism before he is permitted to apply for a licence. Accordingly, I will require pursuant to section 51(e), that he complete the training required of all entrants to the profession, and comply with all orders the Tribunal has made against him, before he applies for any licence under the Act. The order will not affect the current two-year fixed term prohibition on applying for a licence.
- [28] While I have indicated my conclusion, it is necessary to explain why other alternatives are less appropriate. The full range of possibilities I have considered are:
- [28.1] a prohibition on reapplying for a licence for a period of up to two years (concurrent or in addition to the present ban);
- [28.2] prohibition on applying for a full licence and allowing an application for a provisional licence (with supervision conditions after the current ban expires);
- [28.3] a financial penalty without additional licence restrictions.
- [29] In making this decision, the Tribunal is required to weigh the public interest against Mr Hammadieh's interests (*A v Professional Conduct Committee* HC Auckland CIV-2008-404-2927, 5 September 2008 at [81]).
- [30] When dealing with integrity and attitudinal 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. I am satisfied that before Mr Hammadieh applies for any licence, a fair and balanced approach is that he undertakes the training required to qualify for entry to the profession to address his lack of competence and insight. The training includes ethical training, which is one of the areas where Mr Hammadieh appears to have a deficit in his skill set. Further, he will be required to discharge his obligations arising from existing complaints.

The financial penalty on this complaint

- [31] Mr Hammadieh's conduct in this matter was serious for the reasons discussed.

- [32] Given a financial penalty is in addition to excluding Mr Hammadieh from the profession, a penalty of \$3,000 is proportionate to the offending. It is a low mid-range penalty; the maximum is \$10,000.

Compensation and refund of fees

- [33] The Tribunal has discretion in relation to awarding compensation, but generally applies standard legal principles relating to rights to recover to determine whether to make an order.
- [34] In the present case the issue arises in relation to a negligent failure to provide appropriate advice. That provides a basis for recovering damages in contract and tort. The complainant has identified that Mr Hammadieh failed to make adequate inquiries, and provided defective advice regarding the complainant's immigration opportunities. However, there is no claim for specific loss that followed.
- [35] Accordingly, the extent of damages will be limited to an award in the nature of general damages for the disruption, and distress caused by the defective advice and other breaches of the Code. However, the Tribunal is concerned not to simply award such compensation as a matter of routine, as it becomes little more than an additional penalty. Virtually any failure to maintain professional standards results in stress and disappointment for consumers.
- [36] I am satisfied the particular circumstances of this complaint went beyond the usual. In particular, the service delivery involved both negligence, and unacceptable treatment in relation to fees. Migration to a new country in a remote part of the world has a major impact. The complainant was proposing a life-altering move; she was entitled to accurate advice. I am satisfied an award of \$2,000 is appropriate under section 51(1)(i) to recognise the distress caused by Mr Hammadieh's conduct, and the disruption to the complainant's migration initiative.
- [37] Mr Hammadieh provided no services of value, and accordingly the complainant is entitled to a full refund of all the money she paid, which I find was A\$6,800 that currently converts to approximately NZ\$7,300.
- [38] Accordingly, the order will be that Mr Hammadieh pays the complainant a total of NZ\$9,300.

Costs and Expenses

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

Censure

- [40] In accordance with the usual practice of disciplinary tribunals, censure will be an express sanction. It is appropriate to make that order where conduct is not a mere lapse from minimum standards.

Decision

- [41] Mr Hammadieh is:
- [41.1] Censured,
- [41.2] Ordered to pay a penalty of \$3,000.
- [41.3] Ordered to pay the complainant \$9,300.
- [42] The Tribunal further orders that Mr Hammadieh is prevented from reapplying for any category of licence as a licensed immigration adviser until he has:
- [42.1] Enrolled in and completed the requirements for the issue of the Graduate Diploma in New Zealand Immigration Advice (Level 7); and
- [42.2] Complied in full with the orders in this decision, *Yasin & Nawaz v Hammadieh* [2015] NZIACDT 4, and *Ikbarieh v Hammadieh* [2014] NZIACDT 111.

Further direction

- [43] The Tribunal requests that the Registrar deliver a copy of this decision, and the substantive decision on this complaint, to the office of the Australian Migration Agents Registration Authority.

DATED at WELLINGTON this 14th day of January 2016

G D Pearson
Chair