

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

Decision No: [2016] NZIACDT 7

Reference No: IACDT 005/14

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

O J

Complainant

AND

Apurva Khetarpal

Adviser

No information identifying the complainant is to be published.

DECISION
(IMPOSING SANCTIONS)

REPRESENTATION:

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

Complainant: Mr D Ryken, lawyer, Auckland

Adviser: Mr S Laurent, lawyer, Auckland.

Date Issued: 22 January 2016

DECISION

Background

- [1] This is one of three complaints the Tribunal upheld against Ms Khetarpal, the respective grounds for the complaints the Tribunal upheld were:
- [1.1] In *Khan v Khetarpal* [2015] NZIACDT 45 (IACDT 033/14) the Tribunal upheld the complaint on the basis Ms lodged a defective application through lack of care and professionalism, and failed to properly advise her client in the course of that process.
- [1.2] In *Prajapati v Khetarpal* [2016] NZIACDT 5 (IACDT 023/14), the Tribunal has upheld the complaint on the basis Ms Khetarpal failed to handle client funds in accordance with the Licensed Immigration Advisers Code of Conduct 2010.
- [1.3] In this complaint, *J v Khetarpal* [2015] NZIACDT 95 (IACDT 005/14), in the course of her professional relationship with the complainant:
- [1.3.1] Ms Khetarpal failed to carry out her instructions properly.
- [1.3.2] She was dishonest or engaged in misleading behaviour in her dealings with the complainant.
- [1.3.3] She failed to deal properly with fees.
- [2] The circumstances are set out fully in the respective decisions (www.justice.govt.nz). However, the Tribunal is issuing its decision in *Prajapati v Khetarpal* [2016] NZIACDT 5 contemporaneously with this decision, and it will not be taken into account in deciding the sanctions for the other two complaints. That is because the Tribunal does not yet have submissions on the appropriate sanctions in that matter. It is not appropriate to delay this present decision until completing the *Prajapati* complaint, as that complaint is not of a nature that will affect the Tribunal's decision regarding Ms Khetarpal's licence. This and the *Khan* complaint may well reduce any penalties in the *Prajapati* complaint under the totality principle, however that can be addressed when considering sanctions for that complaint.
- [3] I will however consider both the *Khan* complaint and the present complaint together, as Ms Khetarpal is entitled to have the totality principle applied, and the combined circumstances of the two complaints provide the reasons for making the orders. However, individual decisions will issue in the respective proceedings.
- [4] Accordingly, I will discuss the positions taken by the respective parties in both of these complaints.

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

- [5] The complainant sought a reimbursement of fees of \$3,450, and compensation in the nature of general damages of \$2,500, and would have sought \$1,000 costs (which were borne by the new proprietor of the practice).
- [6] The complainant made no specific submission on a financial penalty, but noted that the range of \$4,000 to \$6,000 was consistent with similar cases.
- [7] The complainant made no specific submission regarding Ms Khetarpal's licence.
- [8] The Registrar referred to the Tribunal's findings in the substantive decision in paragraphs [46], [47], [49] and [53]. She also noted the two other complaints, and said they may affect the appropriate sanctions for this complaint.
- [9] She reviewed the general principles relating to imposing sanctions in professional disciplinary matters, and submitted the sanctions on this complaint should be:
- [9.1] Cancellation of Ms Khetarpal's licence;

- [9.2] Specified conditions that Ms Khetarpal:
- [9.2.1] Not reapply for any licence again until she had completed the Graduate Diploma in New Zealand Immigration Advice level 7, through the Bay of Plenty Polytechnic (the diploma course).
 - [9.2.2] That she can only apply for a provisional licence when she has a supervisor approved by the Registrar.
 - [9.2.3] That she hold a provisional licence for two years before applying for a full licence.
- [9.3] Such financial penalty as the Tribunal considers appropriate.

Ms Khetarpal's response to this complaint

- [10] Ms Khetarpal through her counsel provided submissions, and supporting materials. The key contentions were:
- [10.1] Ms Khetarpal accepted the findings of the Tribunal on this complaint, but said it was not her usual standards. In particular, she did not deal well with the complainant not speaking English, as she was used to effective communication in English. She said she had taken steps after first receiving the complaint to ensure her processes for gaining informed instructions were better. Further, she now only receives fees after completing work not before.
 - [10.2] While the adverse finding on dishonest or misleading behaviour is serious, it was an isolated incident.
 - [10.3] A large number of testimonials say Ms Khetarpal usually has high standards of service delivery, and integrity.
 - [10.4] Ms Khetarpal has undertaken *pro bono* work providing immigration services through community organisations.
 - [10.5] Evidence indicated that on a previous occasion Ms Khetarpal had taken active steps to ensure her client understood the need to provide information, when faced with similar difficulties to those in the present case.
 - [10.6] The preceding circumstances justify the Tribunal not cancelling Ms Khetarpal's licence, though the submission accepts the Tribunal will consider that possibility.
 - [10.7] The loss of Ms Khetarpal's licence, and accordingly the ability to continue to practise would be harsh given her personal circumstances.
 - [10.8] Mr Laurent, for Ms Khetarpal, accepted a penalty in the range of \$4,000 - \$6,000 would be usual, but took no specific position on compensation.
 - [10.9] Mr Laurent suggested the requirement to complete the diploma course was unnecessary, as Ms Khetarpal was competent; though she might benefit from some components. In addition, he contended the study would be onerous to the point Ms Khetarpal could not study and continue in practice.
- [11] Evidence supported the contentions in the submissions.

The complainant, and the Registrar's position in the *Khan* complaint

- [12] The complainant provided no submissions on sanctions for the *Khan* complaint, but Ms Khetarpal filed an affidavit from the complainant's husband saying he did not wish to see her penalised too much.
- [13] The Registrar reviewed the findings, and characterised the deficiency in the expression of interest (EOI) Ms Khetarpal filed as "so fundamental that it should have been immediately

obvious to an immigration adviser”, when acting with care; and that she failed to give her client adequate advice on the “baseless” EOI.

[14] Having regard to the applicable principles for imposing sanctions, the Registrar addressed a further concern. In the substantive decision, the Tribunal noted in its substantive decision:

[35] For the reasons discussed, I have rejected Ms Khetarpal’s claim that she told her client the EOI could not succeed. Had I not made that finding, I would have made the far more serious finding that Ms Khetarpal filed an EOI claiming points she knew were not available.

[36] However, that finding necessarily implies Ms Khetarpal attempted to mislead the Registrar in her letter dated 2 November 2014. The sanctions that may be imposed on a licensed immigration adviser are affected not only by the gravity of their professional transgression; but also by how they address that transgression. A misleading response to a client, the Registrar or this Tribunal may well lead to orders affecting the adviser’s licence, and financial penalties at the high end of the scale; when lesser orders would have resulted if there were mitigating circumstances.

[15] That warning arose out of the finding earlier in the decision that:

[8.4] Ms Khetarpal has provided contradictory statements regarding whether the outcome of her assessment whether the husband’s current employment was “skilled”, for immigration purposes:

[8.4.1] On one occasion Ms Khetarpal said “It was my opinion that as a Heavy Plant and Equipment Operator & Construction Site Supervisor, [the husband] ... was eligible for Residence under the Skilled Migrant Policy”. (An email to the Immigration Advisers Authority dated 28 May 2014)

[8.4.2] On another occasion that “It was explained very clearly to [the husband] (by me) that his employment in New Zealand/his role was such that he did not meet the Immigration New Zealand Skilled Employment definition”. (A letter dated 2 November 2014 addressed to the Immigration Advisers Authority)

[16] The Registrar noted the finding that Ms Khetarpal’s explanations apparently left open the alternatives she attempted to mislead Immigration New Zealand when she filed an EOI knowing it did not qualify; or she attempted to mislead the Registrar by saying it was her opinion the occupation did qualify.

[17] However, the Registrar accepted the Tribunal was entitled to find the original failure was due to negligence, rather than dishonest and deceitful conduct. That mirrored the Tribunal’s finding in the substantive decision; however, the two inconsistent explanations provided to the Registrar remain an issue.

[18] In the circumstances the Registrar took the position Ms Khetarpal should complete the diploma course over two years (the period required for part-time study).

Ms Khetarpal’s position in the *Khan* complaint

[19] Ms Khetarpal, through her counsel, presented a response to the substantive decision, and the Registrar’s submissions. To a significant extent, the submissions revisited issues determined in the substantive decision and provided evidence regarding the circumstances in which Ms Khetarpal submitted the EOI, the Tribunal found she did so with a lack of care and professionalism.

[20] The submissions, an affidavit presented by Ms Khetarpal, and an affidavit from the complaint’s husband claim:

- [20.1] Ms Khetarpal was fully aware the complainant's husband (the applicant), did not have employment or qualifications that allowed him to lodge an EOI, which potentially qualified him to apply for a residence visa.
- [20.2] The applicant insisted she lodge an EOI, and Ms Khetarpal wrote him a letter saying:
- [20.2.1] He had heard of other people gaining residence due to "their employment as Heavy Plant and Equipment Operator/Construction Site supervisor".
- [20.2.2] She had looked at his employment, and that category was not "skilled" in the relevant criteria.
- [20.2.3] If he could secure employment as an operations manager, or construction project manager (a different category), that may lead to residence entitlement.
- [20.3] The applicant wrote a note on the letter saying he wished to proceed regardless.
- [20.4] Ms Khetarpal then proceeded to file the EOI she did so electronically. The electronic system prevents a non-qualifying application, so Ms Khetarpal had to file the electronic documents stating the applicant had "claimed" points for skilled employment; though she knew he did not have the points. She excuses this falsity on the basis it only says the applicant "claimed" points, not that he had the points. The electronic form also required a declaration that the applicant met the criteria, though he did not. Ms Khetarpal seeks to excuse this element of the falsity on the basis the occupation listed on the form plainly did not qualify, accordingly "any [Immigration New Zealand] officer processing the EOI would immediately determine that the job was not skilled employment". Accordingly, the false declaration of compliance was plainly wrong, and accordingly excusable. Ms Khetarpal's "extensive experience in the immigration industry [allows the Tribunal to infer] she would be likely to know that [Immigration New Zealand] would not be misled."
- [20.5] Essentially because the false information provided in the EOI could be seen as false from the information provided, Ms Khetarpal's position is that her conduct was not "dishonest or misleading", and instead a breach of clause 1.1(a) of the 2010 Code.
- [21] On this basis Ms Khetarpal's position was that the Tribunal should give her credit for experience, a previously good record and, the other factors noted in relation to this complaint, accordingly:
- [21.1] Requiring Ms Khetarpal to complete the diploma course was "excessively onerous" and would "serve little useful purpose ... [as she] has a length and breadth of experience that would render most of the course nugatory." However, she might reasonably be required to complete a module of the course, or a workshop.
- [21.2] She could expect to pay a financial penalty, and costs,

The Registrar's reply to Ms Khetarpal's position in the *Khan* complaint

- [22] The Registrar replied to Ms Khetarpal's position, her position was:
- [22.1] The new material should either be disregarded, or subject to cross-examination.
- [22.2] The new material was an attempt to challenge the findings against Ms Khetarpal, in particular, the Tribunal had:
- [22.2.1] Rejected her claim she was aware the EOI did not qualify,
- [22.2.2] Found she did not comply with her professional obligations in dealing with an unfounded application, and
- [22.2.3] That she attempted to mislead the Registrar.

[22.3] The Registrar had serious concerns regarding the new information Ms Khetarpal provided, which if admitted in evidence and tested may lead to strong finding of dishonesty and deception.

Discussion

The further evidence provided in respect of the Khan complaint

- [23] The additional evidence provided in relation to the *Khan* complaint is potentially important, and I would err on the side of admitting the evidence subject to it being examined orally using cross-examination.
- [24] However, the reality is that the new material does not improve Ms Khetarpal's position in relation to sanctions at all; rather, the reverse is the case if I have regard to it.
- [25] The Tribunal made three material findings in the *Khan* complaint:
- [25.1] Ms Khetarpal filed the EOI believing it qualified, but she was wrong and her failure to identify the true position was due to lack of care and professionalism under the 2010 Code;
- [25.2] Consequentially, and without adding to the gravity of that finding, it followed she failed to follow the provisions in the 2010 Code relating to unfounded applications.
- [25.3] Ms Khetarpal provided two inconsistent explanations to the Registrar (as set out in paragraph [15] above), first in an email of 28 May 2014, and then in a letter of 2 November 2014. The first said that when filing the EOI it was her opinion it qualified, and on the second occasion, that she explained very clearly to the applicant, at the time, that it did not qualify.
- [26] The first two findings raise potentially serious competence issues, but no more than that.
- [27] The third issue raises a serious concern regarding Ms Khetarpal's integrity in how she dealt with this complaint. One of her explanations is false, and she has never provided a plausible explanation as to why she gave the two irreconcilable explanations in circumstances where she had a professional obligation to take a great deal of care with her statements.
- [28] The reality is that the information Ms Khetarpal has provided as a response to answer the first two findings, is an explanation that involved admissions of misconduct that are far more serious than the Tribunal's findings. Ms Khetarpal now says she was fully aware of the non-compliance when she lodged the EOI; the electronic system prevented her lodging it. She circumvented the system by setting out what she knew was a false claim for points, and a false declaration that the applicant met the criteria. She excused this on the basis it was obvious he was not entitled to the points, and that the declaration was false.
- [29] It is only necessary to set out what Ms Khetarpal admits to see it is grave professional misconduct. Ms Khetarpal had obligations under the Act not to engage in dishonest or misleading behaviour, the 2010 Code required her to act professionally, uphold the integrity of the New Zealand immigration system, and not to knowingly provide false or misleading documentation. It is a wholly inadequate explanation to say that providing false information is excusable as it was obviously false. If an electronic system demands an inaccurate or incomplete statement, it is obviously necessary to provide the correct information manually. In this case the system simply prevented an improper application.
- [30] To support her contention that she should be free to claim points for her client in an EOI, knowing her client was not entitled to them, Ms Khetarpal cited the decision *YH* [2013] NZIPT 201879. The decision concerned the implications of a person lodging their own EOI, and making a mistake in claiming too many points through their own ignorance. Immigration New Zealand characterised the defective EOI as providing "misleading information". The decision found the inaccurate EOI was not "misleading information", because the unskilled person lodging it was not required to "have a complete and nuanced understanding of residence instructions". This submission reflects badly on Ms Khetarpal for two reasons:

- [30.1] First, she was not an unskilled migrant completing her own EOI; she was a licensed professional who is required to have a complete and nuanced understanding of residence instructions and offered those skills to consumers in return for payment. It is a matter of concern that, even now, she appears to seek to justify her conduct by the standard applied to a well meaning but unknowledgeable person acting on their own behalf, without training.
- [30.2] Second, the decision conveys the gravity of providing false information. Unlike the appellant *YH Ms Khetarpal* says she knew the claim for points was unjustifiable, and the declaration of compliance was false. The Immigration and Protection Tribunal decision correctly makes it clear “The integrity and success of the EOI process relies on applicants being honest and accurate.” The EOI Ms Khetarpal filed, based on her own claims in the new evidence was neither, and she knew of the falsity and lodged it.
- [31] There is no advantage to Ms Khetarpal to examine her new evidence further. If true, it will result in far more serious findings against her. If false, she has attempted to mislead the Tribunal. The information does not answer the concern that she attempted to mislead the Registrar with her irreconcilable explanations when responding to this complaint.
- [32] Making the more serious findings will not alter the key outcome either, as the material before me makes it inevitable Ms Khetarpal must be excluded from the profession.
- [33] The sanctions imposed in this decision refer to the grounds in the substantive decision in the *Khan* complaint, not Ms Khetarpal’s later admissions of more serious misconduct.

Principles for suspension or cancellation of licence

- [34] 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].
- [35] 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”.
- [36] 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.
- [37] The statutory purpose is achieved by considering at least four factors which materially bear upon maintaining appropriate standards of conduct:
- [37.1] 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 ...”
- [37.2] 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.
- [37.3] 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]).

[37.4] 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

[38] 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.

[39] 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

[40] 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.

[41] In relation to licences there are two options:

[41.1] cancellation and/or a direction that the person may not apply for a licence for up to two years, or until meeting specified conditions (s 51(d) & (e)); or

[41.2] suspension (s 51(c)).

[42] 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)).

[43] 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].

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

[45] 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.

[46] 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.)

[47] 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.

Ms Khetarpal will be excluded from the profession

The gravity of the two complaints

[48] In my view, the Tribunal must remove Ms Khetarpal from the profession. The reasons for rejecting other alternatives are as follows.

[49] The first issue is the gravity of the findings against Ms Khetarpal. As noted, the substantive finding on the *Khan* complaint is that Ms Khetarpal did not manage the EOI well. I accept the key intervention when imposing sanctions would be to require Ms Khetarpal to undertake the diploma course over a period of two years.

[50] However, Ms Khetarpal’s response to the complaint and in particular her inconsistent explanations to the Registrar are also relevant. The Tribunal invited her to explain them in its substantive decision, but she has not done so directly. She has however produced documents intended to show she was so conscious of the EOI not complying that she sought and obtained written instructions, which only exacerbates the Tribunal’s concern that she sent the Registrar an email stating positively that it was her opinion at the time that the applicant did qualify (email of 28 May 2014).

[51] The Registrar rightly raised the issue of Ms Khetarpal’s relationship with her, and the requirement for integrity and trust in that relationship. While it is unsatisfactory that Ms Khetarpal has failed to address this issue; I will not draw any inference beyond that she provided inaccurate information to the Registrar.

[52] On a standalone basis the *Khan* complaint would not result in the loss of Ms Khetarpal’s licence, but she would be required to enrol in and completing the diploma course over a period of two years (section 51(1)(b) and (4)). There are two reasons; first, the competence issues cause serious concerns regarding Ms Khetarpal’s ability. I agree with the Registrar’s description that the flaw in her service delivery was so fundamental that it should have been immediately obvious. Second, for reasons I will discuss further, I have concerns that Ms Khetarpal’s assessment of her own skills and competence is far removed from the reality exhibited in her work giving rise to these two complaints, and even more so in her response to them.

[53] In relation to the present complaint, it is inherently more serious than the *Khan* complaint.

[54] At its heart, this complaint concerned Ms Khetarpal soliciting and accepting fees and disbursements of \$3,450, which she regarded as non-refundable. In doing so, she failed to disclose the high probability she could not provide any professional services of value, failed to take the steps required to gather information to provide services, gave false assurances, and kept the money without lodging the request she promised. That, is one of the types of dishonest conduct Parliament intended the Act to eradicate. It is similar to the conduct of many licensed immigration advisers this Tribunal has removed from the profession. Taking non-refundable fees from a client, without a proper evaluation of their immigration prospects, providing no services, reporting them to Immigration New Zealand and expecting them to be deported while doing nothing to assist them has been a standard *modus operandi* of many fraudulent immigration advisers, licensed and unlicensed.

[55] The Tribunal assesses every case on its merits. It must weigh human frailty, and give weight to rehabilitation. However, there is no doubt what happened to the complainant in this present complaint is inherently serious, and raises the question of whether Ms Khetarpal should remain as a member of the profession.

[56] I have considered the numerous testimonials from satisfied clients, the potential for this to be an isolated incident, and the community service Ms Khetarpal provides on a *pro bono* basis. While impressive, virtually any busy professional will have significant numbers of satisfied

clients willing to speak of their successful work. However, clients are neither well placed to assess professional competence, and unlikely to be selected to provide a testimonial unless there was a satisfactory outcome.

- [57] I must deal with the two complaints on the basis Ms Khetarpal's practice is otherwise in order, and not speculate beyond the two complaints. None-the-less, professional disciplinary bodies must impose the sanctions the professional offending before them requires. An important element to allow conditional continuation in a profession after serious disciplinary findings is the response to the complaint. Insight, contrition and tangible steps toward addressing skill gaps and deficits carry a great deal of weight. However, I have formed a very adverse view of Ms Khetarpal's attitude.
- [58] It is telling Ms Khetarpal now resists a requirement to complete the diploma course. She says she knows all she needs to know, but concedes she could do a module or a refresher workshop. It appears to be wholly lost on Ms Khetarpal that her deficiency in the *Khan* matter involved a very high degree of incompetent conduct, on the best view. Inexplicably, she has provided evidence the reality was much worse.
- [59] This present complaint involved a sustained failure to provide the most elementary aspects of professional service delivery; her conduct mirrored the type of fraudulent deception that led to Parliament passing the Act. She took a substantial sum, kept the money without providing the services she promised, instead she reported her client to Immigration New Zealand which was calculated to trigger a deportation, and did not take any steps to address his predicament. She was deceptive both in failing to disclose the likely futility of the services at the outset, and in providing assurances that were not justified. If Ms Khetarpal has the professional competence she claims, she must have conducted herself in this way with complete insight and understanding. Any competent licensed immigration adviser is required to know enough of service delivery standards to be aware her conduct was wholly unacceptable.
- [60] I had the benefit of assessing Ms Khetarpal's attitude when she gave evidence. Notwithstanding, her indefensible conduct in this present complaint, she defended what she did she asserted it was acceptable, and met the standards of service delivery required of her. It appears clear to me, Ms Khetarpal had a high level of confidence she could simply talk her way out of responsibility for her behaviour. She appeared bereft of insight and understanding.
- [61] Taking the most generous view, I must also consider whether the Tribunal can allow Ms Khetarpal to continue in practice under supervision. I do not consider that is appropriate for two reasons:
- [61.1] The evidence before me provides a compelling picture of gross deficiency in Ms Khetarpal's competence. That is evident from the two complaints, and her response to them. In my view Ms Khetarpal must complete the diploma course, the entry level qualification for licensed immigration advisers before providing any immigration services;
- [61.2] Second, practising under supervision requires a sound relationship with a supervisor. Effective supervision would be dependent on Ms Khetarpal having the insight to refer problems and seek guidance. The way Ms Khetarpal has responded to these complaints does not give any confidence she could be trusted to manage in a supervised environment. I have considered her inconsistent explanations to the Registrar, her inability to comprehend the deficiencies in her conduct, and her apparent personal, but misplaced confidence that she is highly competent. My evaluation is Ms Khetarpal will not engage with a supervisor effectively at least until she has completed the diploma course, and gained an understanding of what she needs to understand and apply as a licensed immigration adviser.
- [62] Accordingly, I do not consider Ms Khetarpal should be entitled to apply for any licence under the Act until she has completed the diploma course.
- [63] Ms Khetarpal's licence will be cancelled, and a prohibition placed on her applying for any licence until she completes the diploma course, and she can only apply for a full licence after completing two years of supervision while holding a provisional licence.

- [64] Ms Khetarpal can have no confidence she will ever be entitled to a licence under the Act, the Registrar would have to be satisfied of various matters after considering Ms Khetarpal's disciplinary history. They are issues for the Registrar, not the Tribunal so I express no view on her position.

Ms Khetarpal's financial position

- [65] The Tribunal has set out the principles relating to how a person's financial circumstances affect orders made under section 51 of the Act in a number of cases, such as *BN and MN v Hakaoro* [2013] NZIACDT 64 (www.justice.govt.nz). The first point is that the principles that apply to a person's means when considering criminal sanctions are different from orders the Tribunal makes. 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:

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

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

- [66] In contrast, 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, and discharged with the bankruptcy.

- [67] It follows that of the financial orders the Tribunal could make in the present case:

[67.1] Ms Khetarpal's financial circumstances will, as a matter of discretion, potentially be relevant to any financial penalty, but

[67.2] Potential orders in favour of the complainants or others, for the refund of fees or compensation are on the merits, without regard to Ms Khetarpal's means.

[67.3] Orders for costs are discretionary; however, a party's means in a civil process are not usually a relevant factor.

The orders in the two matters

- [68] I will make the order identified regarding Ms Khetarpal's licence in both complaints, but note in the *Khan* complaint that if it stood alone, the order would be that Ms Khetarpal would be required to enrol in and complete the diploma course over a two year period, without cancellation or suspension of her licence.

- [69] Given Ms Khetarpal's financial circumstances, the inevitable consequences of the loss of her licence, and that it is proper to give priority to the victims of Ms Khetarpal's professional offending, I will reduce the financial penalty:

[69.1] If the *Khan* matter stood alone, and there was no loss of licence, alone the penalty would be \$3,500. The penalty will be \$1,000.

[69.2] In the present matter, given the loss of licence, the penalty would be \$5,000; it is reduced to \$2,500.

- [70] In the *Khan* complaint, the complainant has sought no compensation or other orders; there will accordingly be no orders. No party has sought costs, so there will be no costs orders.

- [71] In the present complaint in relation to additional orders:

[71.1] The Tribunal has discretion in relation to awarding compensation, but generally applies standard civil recovery principles to determine whether to make an order. In the present case the complainant seeks an award in the nature of general damages for the disruption, and distress caused by Ms Khetarpal's failure to provide the services she promised, and her other breaches of standards. 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.

[71.2] I am satisfied the particular circumstances of this complaint went beyond the usual. In particular, the complainant was in a vulnerable position. He sought the advice of a professional person after a period of his non-compliance with New Zealand's immigration regime. Ms Khetarpal exploited him, rather than provide the professional services he sought, and was entitled to have. His position is precarious, and he will need to deal effectively with the issue he raised with Ms Khetarpal in April 2012. She only made his situation worse by reporting to Immigration New Zealand he was in New Zealand unlawfully. I am satisfied an award of \$2,500 is appropriate under section 51(1)(i) to recognise the distress caused by Ms Khetarpal's conduct, and the inevitable delay in addressing his immigration situation.

[71.3] In the present complaint, Mr Anthony Malcolm repaid the fees of \$3,450 when Ms Khetarpal failed to do so. There will be an order that Ms Khetarpal repay Mr Malcolm (section 51(1)(h) of the Act). Mr Malcolm also paid the complainant's costs. Counsel for the complainant indicated that a contribution to costs of \$1,000 would have been sought if that were not the case. The order for costs can be in Mr Malcolm's favour, and it is appropriate to make the order (section 51(1)(g)). The amount sought is a very substantial discount on the order that might be anticipated; given the hearing was a defended oral hearing over two days. The Registrar has not sought costs, so there is no order in favour of the Registrar.

[71.4] Accordingly, the additional orders on the present complaint will be for:

[71.4.1] \$2,500 to the complainant as compensation; and

[71.4.2] \$4,450 to Mr Malcolm for fees he refunded, and costs.

[72] I note that Ms Khetarpal did not own the practice, so did not personally have the benefit of the fees, other than the indirect benefit of her remuneration from the practice. However, she was the sole licensee, and personally liable for all issues relating to fees. I have taken this into account when discounting the financial penalties.

[73] Censure is an inevitable part of the sanctions.

[74] Ms Khetarpal has raised the issue of meeting the financial orders over time. Ms Khetarpal may negotiate with the parties in whose favour the orders are made; those parties will however have recourse to enforcement processes. The Tribunal does not have a statement of assets and liabilities, or sufficient information regarding Ms Khetarpal's circumstances to determine whether any specific orders regarding times for enforcement are appropriate.

Determination and Orders

[75] In this complaint, Ms Khetarpal is:

[75.1] Censured,

[75.2] Ordered to pay a penalty of \$2,500,

[75.3] Ordered to pay the complainant the sum of \$2,500 as compensation.

[75.4] Ordered to refund \$3,450 in fees, and pay costs of the hearing of \$1,000, to Anthony Malcolm, of Tutakaka, business owner, and

[75.5] Any licence Ms Khetarpal presently holds under the Act is cancelled at 5:00pm on the 15th working day after this decision is delivered. Further, Ms Khetarpal is then prevented from applying for any category of licence until she has complied with all orders made by this Tribunal; and

[75.5.1] Prevented from applying for any licence until she has enrolled in and completed the requirements for the issue of the Graduate Diploma in New

Zealand Immigration Advice (Level 7), and has a supervision regime approved by the Registrar; and

[75.5.2] Prevented from applying for a full licence until she has over a two year period (after this decision), practised under a provisional licence in full compliance with a supervision regime approved by the Registrar.

- [76] The Tribunal cautions Ms Khetarpal that during the period she continues to hold a licence, the Code of Conduct applies to her. She will be accountable for ensuring she conducts herself in a professional manner, including providing refunds of fees to the extent they are payable, as required by the Code.
- [77] The orders to make payments all take immediate effect.
- [78] The Tribunal reserves leave for the Registrar or Ms Khetarpal to apply to vary the orders relating to the Graduate Diploma in New Zealand Immigration Advice (Level 7), in the event the qualification changes, or there are alternative qualifications available; and to provide directions regarding supervision if the Registrar and Ms Khetarpal disagree regarding any aspect of supervision.

Order prohibiting publication of the complainant's name or identity

- [79] The complainant is in New Zealand unlawfully, and it is important that the complaint process is not undermined by a complaint increasing the risk of enforcement action. Accordingly, this decision is not to be published with information, identifying the complainant. The identity of the complainant's prospective employer could potentially identify the complainant; accordingly, information identifying him is not to be published.
- [80] The Tribunal reserves leave for the complainant or the Registrar to apply to vary this order. The order does not prevent:
- [80.1] The complainant disclosing the decision to his professional advisers, or any authority he considers should have a copy of the decision, or
- [80.2] 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 22nd day of January 2016

G D Pearson
Chair