

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

Decision No: [2017] NZIACDT 11

Reference No: IACDT 017/15

**IN THE MATTER** of a referral under s 48 of the  
Immigration Advisers Licensing Act  
2007

**BY** **The Registrar of Immigration  
Advisers**

Registrar

**BETWEEN** **Shivi Gupta**

Complainant

**AND** **Sanjay Dhar**

Adviser

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**DECISION  
SANCTIONS**

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**REPRESENTATION:**

**Registrar:** Ms A Skadiang, lawyer, MBIE, Auckland.

**Complainant:** In person.

**Adviser:** In person.

Date Issued: 4 August 2017

## DECISION

### Introduction

- [1] The Tribunal upheld this complaint in a decision dated 4 October 2016: *Gupta v Dhar* [2016] NZIACDT 65. The Tribunal found the adviser breached his professional obligations.
- [2] The grounds on which the complaint was upheld were:
  - [2.1] The adviser did not have a written agreement in accordance with the requirements of the Licensed Immigration Adviser's Code of Conduct 2014 (the 2014 Code).
  - [2.2] The adviser also breached the 2014 Code of Conduct due to lack of diligence and care as he failed to ensure that the complainant's residence application disclosed that she had two failed applications for work visas.
  - [2.3] The adviser further breached the 2014 Code as he failed to keep a copy of a work visa application.
- [3] The substantive decision sets out the background fully. In that decision, the Tribunal identified particular concerns. One of those concerns was that the adviser had claimed he did not have a client relationship with the complainant, which potentially demonstrated a grave lack of understanding of his responsibilities. There is a similar apparent deficit in relation to his claim that he could write a cover letter for a residence application containing incorrect information, and then claim it was his client's responsibility. A third concern was the apparent lack of commitment to professional standards by claiming that it was his client who was obliged to keep records rather than himself.
- [4] The Tribunal identified that the information before it was sufficiently concerning that potentially the public was at risk from the adviser providing professional services.

### The Registrar's position

- [5] The Registrar's counsel did not address the concerns the Tribunal had raised regarding the adviser. She did not contend that any restrictions should be placed on the adviser, such as supervision.
- [6] The Registrar's view was that the adviser should be required to enrol in the Graduate Diploma in Immigration Advice (Level 7), complete that qualification and, in addition, have a penalty of \$3,000 imposed.

### **The Complainant's position**

- [7] Essentially, the complainant indicated that in her view the adviser was incompetent in the way he dealt with her immigration affairs. She wanted the adviser to pay \$2,860 as compensation for the steps she was required to take to rectify the failed applications.

### **The Adviser's position**

- [8] The adviser's extensive submissions were largely irrelevant to the imposition of sanctions. He appeared to regard the opportunity to provide submissions as an occasion to engage in confusing and irrelevant analysis of the grounds on which the Tribunal upheld the complaint. To the extent that those submissions could be relevant in terms of mitigation of deficiencies, they fail to engage with the reasons the Tribunal gave for upholding the complaint.
- [9] The adviser appears to contend that he should not have to pay compensation because the complainant was successful with her immigration applications.
- [10] The adviser appears to resist the imposition of a monetary penalty on the basis that further examination of his practice would disclose that he did not engage in high-risk behaviour.
- [11] Overall, the adviser's submissions were largely incomprehensible; they completely failed to address the issues in the Tribunal's decision and appear to demonstrate an inability to present a coherent argument regarding his professional obligations; his breach of them and what the consequences ought to be.

### **Discussion**

#### *Background to regulating this profession*

- [12] 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.

- [13] 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.

*Preliminary*

- [14] This Tribunal must necessarily place considerable weight on the Registrar's view as to whether a practitioner is practising safely, or ought to be supervised, excluded from the profession or have other steps taken against them. The Registrar regularly goes through a process of examining the work of licensed immigration advisers when considering renewal of licences. She has powers to investigate a licensed immigration adviser's practice. In contrast, this Tribunal must rely on the circumstances arising in the complaint before it. An isolated complaint may completely fail to give an accurate picture of a practitioner's normal standards. The single complaint may be the "tip of the iceberg", or represent a particularly unfortunate and completely isolated instance of a lapse from usual high standards.
- [15] However, this Tribunal must give weight to the response that a licensed immigration adviser makes to a complaint before it. There are occasions when the nature of the response is such that it is evident the adviser lacks the competence to understand professional standards, or for attitudinal reasons declines to ensure they meet those standards. This case is an example where the Tribunal simply cannot disregard the adviser's response to the complaint, and the Tribunal's decision.
- [16] When the Tribunal issued directions on 22 June 2015 it referred the adviser to the High Court's decision in *ZW v Immigration Adviser's Authority* [2012] NZHC 1069 and the observations regarding the wisdom of seeking legal advice. The adviser, as he is entitled to, continued to represent himself. It is understandable that in doing so he may have failed to apprehend the nature of the process properly, or failed to understand the expectations this Tribunal has regarding his professional obligations. Regardless, the adviser is required to know what his professional obligations are. The Tribunal set out in some detail what its findings were and then specifically drew the adviser's attention to what it identified as "serious concerns regarding the professional standards maintained by [the adviser]". The specific concerns were:
- [16.1] The adviser claimed he did not have a client relationship with the complainant. He could only do so through a grave lack of understanding of his responsibilities as a licensed immigration adviser, or as a self-serving and false explanation.
- [16.2] He claimed he could write a cover letter for a residence application, which contained false and misleading information and then assert that it was his client's responsibility. The Tribunal noted that the adviser must have understood the risks

of lodging it with incorrect information, as the document was replete with warnings.

- [16.3] The adviser claimed that his client was obliged to keep records despite it being obvious that this was his personal responsibility under the 2014 Code.
- [17] The Tribunal clearly expressed in its decision that unless there was some acceptable explanation or steps taken to protect the public, the Tribunal may consider that the adviser should not hold the status of a licensed immigration adviser offering professional services to the public.
- [18] Counsel for the Registrar did not explain why she failed to address those concerns raised by the Tribunal, in terms of the adviser's current work.
- [19] The submissions presented by the adviser strongly reinforce the concerns expressed by the Tribunal. After examining the submissions, I have no doubt that the adviser lacks even a basic understanding of his professional responsibilities. If he does have that understanding, then his response is simply a disingenuous attempt to ignore the Tribunal's findings.
- [20] In these circumstances, notwithstanding the Registrar's counsel not to addressing these concerns and failure to discuss potential restrictions on the adviser's practice, I am satisfied that the Tribunal must consider what steps should be taken for the protection of the public.

*Principles for suspension or cancellation of licence*

- [21] 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].
- [22] In *Patel v Complaints Assessment Committee*, the Court stressed, when imposing sanctions in the disciplinary process applicable to that case, that it was necessary to consider the "alternatives available to it short of removal and to explain why lesser options have not been adopted in the circumstances of the case".<sup>1</sup>

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<sup>1</sup> *Patel v Complaints Assessment Committee* [2007] BCL 923; HC Auckland CIV-2007-404-1818, 13 August 2007 at [30]-[31], citing *Patel v The Dentists Disciplinary Tribunal* HC Auckland AP 77/02, 8 October 2002.

- [23] The purpose of professional disciplinary proceedings was affirmed by the Supreme Court in *Z v Dental Complaints Assessment Committee*:<sup>2</sup>

[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.

- [24] The statutory purpose is achieved by considering at least four factors which materially bear upon maintaining appropriate standards of conduct:

[24.1] 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 ...”

[24.2] 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.

[24.3] Punishment: the authorities emphasise that punishment is not the purpose of disciplinary sanctions: *Z v Dental Complaints Assessment Committee* at [1], [65], [70] and [149]-[153]. 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].

[24.4] Rehabilitation: it is an important object to have the practitioner continue as a member of the profession practising well, when practicable: *B v B* [1993] BCL 1093; HC Auckland HC4/92, 6 April 1993.

#### *Alternatives short of cancellation of licence*

- [25] 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.

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

[26.1] cancellation and a direction that the person may not apply for a licence for up to two years (s 51(d) & (e)); or

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<sup>2</sup> *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1; [2008] NZSC 55 at [97].

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

[27] 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)).

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

[28.1] suspension, or cancellation of the adviser's licence and a prohibition on reapplying for a licence for a period of up to two years;

[28.2] imposing requirements on the adviser; and

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

[29] 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]. Furthermore, it would potentially signify to the adviser the nature of the considerable professional obligations immigration advisers are subject to.

[30] In making this decision, the Tribunal is required to weigh the public interest against the adviser's interests: *A v Professional Conduct Committee* at [82].

## **Sanctions**

### *The Tribunal's evaluation*

[31] The response from the adviser indicates the underlying issue is probably competence, rather than intentional failure to engage responsibly. The material that the adviser has provided is misplaced, it appears only capable of explanation in terms of lack of skill or experience. The core skills of a licensed immigration adviser include advocacy for clients. The adviser's misguided response to the complaint has a significance that would not apply if his core professional skills did not lie in understanding legislation, analysing clients on their circumstances and opportunities, advising them of appropriate responses, and advocating for them.

[32] When the adviser has been unable to marshal an appropriate and directed response to the complaint, it is difficult to see that he has the skills required to provide professional services to clients to the minimum standards.

*Cancellation of full licence and opportunity to apply for a provisional licence*

- [33] The Tribunal has no power to impose the requirement that the adviser practise under conditions, other than undertaking specified training or remedying a deficiency. Lack of supervision is potentially a deficiency, if so; an order may be made on that basis. Otherwise, there are two potential approaches:
- [33.1] The Tribunal can suspend the adviser's licence until he meets specified conditions (section 51(1)(c)); or
- [33.2] Cancel his licence and order he meets specified conditions before reapplying (section 51(1)(d) and (e)).
- [34] The Tribunal can only suspend or cancel the adviser's licence if that is a justified and proportionate disciplinary response. As noted, the Tribunal must consider lesser alternatives.
- [35] For the reasons discussed, the primary concern is that the adviser appears to lack the ability to respond to this complaint and the findings against him. The subject matter is the very skills he needs to exercise in every client relationship. I do not consider the Tribunal should use suspension in this case. In my view the adviser is not simply refusing to comply, he has displayed a manifest lack of understanding of his professional duties.
- [36] Accordingly, the more satisfactory response is to give the adviser the opportunity to practice in a controlled environment. The mechanism to do so is to cancel the adviser's licence and that will allow the Registrar to grant a provisional licence under section 19(5) of the Act, subject to direct supervision. The Tribunal will allow the adviser to apply for a provisional licence immediately after cancellation, but only apply for a full licence when he has completed appropriate training and mentoring.
- [37] This approach will engage the Registrar's decision-making powers in relation to any fitness issues, and the statutory regime relating to supervision in the Immigration Advisers Competency Standards 2016. These are matters for the Registrar, not the Tribunal. For the reasons discussed, the Registrar is in a much better position than the Tribunal to make such evaluations given the wider information she can obtain.
- [38] The Tribunal requests that the Registrar engage with the adviser to put in place an arrangement that will allow him to prepare an application and mentoring arrangement and have the Registrar review it. The Registrar can then decide whether to issue a provisional licence as soon as practicable after cancellation of the adviser's current licence. The

Tribunal will reserve leave to alter the date of cancellation to avoid unnecessary disruption to the adviser's practice. However, the adviser must pay the financial penalty, compensation and refund fees before making any application for a provisional licence.

*Compensation and the refund of fees*

- [39] In relation to compensation, it is necessary to establish both a causal nexus between a professional breach and a loss.
  
- [40] The Tribunal has always been particularly cautious to ensure that compensation does not become a penalty; it must be restricted to being an efficient means of providing a civil remedy for a loss arising from professional disciplinary issues. In some cases, the Tribunal does allow modest awards in the nature of general damages, recognising that clients have inevitably suffered significant detriment, even if not quantified in a precise way. There is also jurisdiction to direct the refund of fees.
  
- [41] In this case, the material services were:
  - [41.1] The adviser lodged the complainant's expression of interest, and assisted her to apply for a work visa on two occasions, both of which failed.
  
  - [41.2] The adviser assisted the complainant to apply for a residence visa, which also failed.
  
- [42] The material grounds for upholding the complaint were that:
  - [42.1] the adviser lacked a written agreement for the provision of professional services; and
  
  - [42.2] the residence application failed as the adviser did not disclose the two failed work visa applications.
  
- [43] The complainant is seeking to recover the total lodgement fees of \$2,860 for the two declined visa applications, the expression of interest, and the residence application.
  
- [44] The grounds of complaint the Tribunal upheld as far as this issue is concerned relate only to the residence application. Accordingly, the fees for the work visas cannot be recovered in this proceeding.
  
- [45] The complainant said "... if my visa got declined so as per the procedure [the adviser] had to update my EOI in INZ but that never

happened and the cost of EOI was \$510, finally the residence application that was for \$1,810”.

- [46] In short, the complainant sought those two fees because the failed residence visa application negated the value of the EOI and the residence application. The adviser did not challenge the complainant's claims, but instead said that the EOI and the residence application gave strategic advantages. He said that both the EOI and the residence application gave the opportunity for a work visa.
- [47] The adviser's position lacks merit. He claims, it seems, using the EOI and residence application tactically gave the complainant the opportunity to get promotion at work and improve her position. However, the EOI and residence application were to be based on fact and the complainant's circumstances at the time. The applications were not holding measures pursued in the hope that an applicant's circumstances would change. The residence application failed because the adviser failed to disclose the failed applications. It is elementary in immigration practice that disclosure of such information is critical, and the Tribunal found the adviser failed to check the information.
- [48] Accordingly, I am satisfied that the complainant is entitled to recover the \$510 lodgement fee for the EOI, and the further \$1,810 for the residence visa application. Given the complainant has been put to expense, inconvenience and concern because of the adviser's professional failings, I am satisfied that a further award of \$1,500 in the nature of general damages is justified. Accordingly, the total compensation will be \$3,820.
- [49] Given the absence of a written agreement, which would have been an opportunity for the complainant to make an informed decision regarding services, and the serious failures in the delivery of services, I am satisfied that there should be an order for the refund of all of the fees paid to the adviser.

#### *Monetary penalty*

- [50] I accept the Registrar's view that an appropriate monetary penalty is \$3,000. However, I will discount that penalty. I do so first because of the orders affecting the adviser's licence. They effect deterrence, and the requirement for training and supervision will themselves incur costs. Furthermore, some priority should be given to compensation for the complainant.
- [51] The adviser's response aggravates the issues, particularly because he has consistently attempted to blame his client for his own failings. That

element of his response deserves condemnation; the Tribunal intends to bring home to him that as a licensed professional, he had duties to his client and he manifestly failed to fulfil those duties. It reflects badly for any professional person to blame a client for their own and obvious failings.

- [52] Regardless, I am satisfied that the aggravating elements are adequately addressed by the orders affecting the adviser's licence. Taking account of all the circumstances, a penalty of \$1,500 is sufficient.

### *Censure*

- [53] Censure is an inevitable part of the penalties.

### **Decision**

- [54] Any licence the adviser holds under the Act is cancelled at 5:00 pm on the 20th working day after this decision is delivered.

- [55] The adviser is prevented from:

[55.1] applying for any category of licence under the Act until he has discharged the monetary orders including the monetary penalty made in this decision; and

[55.2] prevented from applying for any licence under the Act, except for a provisional licence, until he has completed the requirements for the issue of the Graduate Diploma in New Zealand Immigration Advice (Level 7) and 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.

- [56] The adviser is:

[56.1] censured;

[56.2] ordered to pay \$3,820 compensation;

[56.3] ordered to pay a monetary penalty of \$1,500; and

[56.4] ordered to refund all fees he received from the complainant relating to the instructions in issue in the complaint (including in relation to all matters that should have been the subject of a written agreement).

- [57] The orders to make payments take immediate effect.

[58] The Tribunal reserves leave for any party to apply to:

[58.1] quantify the fees to be refunded;

[58.2] vary the orders relating to the cancellation of the adviser's licence, and his entitlement to apply for a licence.

[59] This decision does not imply the adviser meets or will meet the requirements to be issued with a licence if he applies for a further licence. That is not a decision for the Tribunal.

**DATED** at Wellington, 4 August 2017.

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**G D Pearson**  
Chair