

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

Decision No: [2017] NZIACDT 15

Reference No: IACDT 015/15

IN THE MATTER

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

BY

**The Registrar of
Immigration Advisers**

Registrar

BETWEEN

Marino P Kho

Complainant

AND

**Rosemarie
Navarette-Scholes**

Adviser

DECISION
(IMPOSING SANCTIONS)

REPRESENTATION:

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

Complainant: In person.

Adviser: In person.

Date Issued: 20 September 2017

DECISION

BACKGROUND

- [1] This is one of two complaints the Tribunal upheld against Ms Navarette-Scholes and are currently the subject of decisions on penalty. The respective grounds for the complaints the Tribunal upheld were:
- [1.1] In this complaint; *Kho v Navarette-Scholes* [2016] NZIACDT 60 (IACDT 030/14), the Tribunal upheld the complaint on the basis that Ms Navarette-Scholes:
- [1.1.1] offered immigration services but did not provide them; and
- [1.1.2] dishonestly misrepresented to the Registrar what happened.
- [1.2] In *Casas v Navarette-Scholes* [2016] NZIACDT 33 (IACDT 015/15) the Tribunal upheld the complaint on the basis Ms Navarette-Scholes:
- [1.2.1] engaged in dishonest and misleading behaviour, in relation to a false date on an agreement; and
- [1.2.2] breached the Code of Conduct, as she did not have a written agreement, did not set fees that were fair and reasonable, and failed to provide her services to the standard of proper care, diligence, respect and professionalism.
- [2] The circumstances are set out fully in the respective decisions (www.justice.govt.nz).
- [3] I will discuss both the positions taken by the respective complainants, Ms Navarette-Scholes, and the Registrar for each complaint. I will also apply the totality principle¹. Ms Navarette-Scholes's personal circumstances require consideration of the overall position. I need to also consider previous sanctions, in the context of Ms Navarette-Scholes's current circumstances.
- [4] Accordingly, I set out the reasoning and effect of the sanctions decisions in the two matters, but will issue separate decisions with the respective orders in each complaint.

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

- [5] The Registrar took the view that in all the circumstances, the order should be that Ms Navarette-Scholes cannot apply for another licence unless she completes the full qualifications for a licence, and has paid all outstanding monetary orders imposed by the Tribunal under section 51 of the Act. She took the view that priority should be given to orders for repayment of fees rather than a financial penalty.
- [6] Counsel for the complainant sought orders for the repayment of \$13,384 in fees, and legal expenses of \$3,000.

¹ See *R v Strickland* [1989] 3 NZLR 47 at p 49-51 for a discussion of the principle, it applies by way on analogy in the professional disciplinary context.

Ms Navarette-Scholes's response to the Casas complaint

- [7] Ms Navarette-Scholes said she accepts the findings against her, but submits that she should not be penalised for failing to adequately advise her client of the effects of her visa.
- [8] She is suffering from medical conditions, has limited financial means, and accepts that if she ever sought to practise again, retraining would be necessary. She accepted a further period of disqualification and censure would serve the interests of justice.

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

- [9] The Registrar took a similar approach to the Casas complaint, but suggested potentially requiring a statement of means, and imposing a financial sanction (referring to this complaint also).
- [10] The complainant did not provide any submissions.

Ms Navarette-Scholes's response to this complaint

- [11] Ms Navarette-Scholes reiterated her circumstances as outlined in paragraph [8].

Discussion

Important considerations

- [12] Ms Navarette-Scholes is to be commended for meeting the obligations the Tribunal imposed in the past. She has not embarked on further training, but has no reason to do so unless she intends to apply for a licence in the future.
- [13] Ms Navarette-Scholes' health requires a compassionate response.
- [14] It is inevitable that the Tribunal must denounce what occurred. The Tribunal has already made an order relating to further training which, in my view, would be essential for Ms Navarette-Scholes to practise safely. In making that observation, I am equally mindful of Ms Navarette-Scholes's safety, and her clients'.
- [15] Ms Navarette-Scholes' medical condition is a chronic illness, and she faces difficult financial circumstances following a business failure.
- [16] Unless there is some significant change in circumstances, Ms Navarette-Scholes is no longer a member of the profession, and not likely to return. Her disciplinary history will likely be a permanent barrier. However, that is a matter for the Registrar, not this Tribunal. In my view, the main focus for monetary orders should be in respect of compensating the complainants.
- [17] It is not necessary to get additional information regarding Ms Navarette-Scholes's financial position, as the complainant's entitlements do not turn on her means. The essential credibility of Ms Navarette-Scholes's claim that she is not in a good financial position appears sound, and if doubtful, that ought to have been revealed by now, given the lengthy history of Ms Navarette-Scholes's dealings with the Authority.

The starting point

- [18] The two complaints are at the higher end as they involve dishonesty in relation to representations made to clients, the starting point would be:

- [18.1] Censure,
- [18.2] A compulsory retraining requirement;
- [18.3] A financial penalty of \$7,500;
- [18.4] Compensation for any consequent loss; and
- [18.5] Costs.

Ms Navarette-Scholes' s licence

The principle

- [19] 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.

A response addressing Ms Navarette-Scholes's circumstances

- [20] The two cases of misleading clients inevitably mean that Ms Navarette-Scholes should be removed from the profession. That process has two dimensions; the Authority can remove a person by prohibiting them from applying for a licence for two years. However, re-entry to the profession regardless of how far in the future requires the Registrar to find they meet the statutory requirements including their fitness to hold a licence, after considering their disciplinary history. As things sit at this point, it is realistic to consider that Ms Navarette-Scholes will attempt to return to the profession.
- [21] It is appropriate to consider the issue across all of the complaints. The denunciation of Ms Navarette-Scholes's conduct is achieved through her removal from the profession. I will make orders:
 - [21.1] prohibiting any application for a licence for a period of two years; and
 - [21.2] making any future application for a licence dependent on Ms Navarette-Scholes undertaking full training, and fully complying with all orders made against her in disciplinary proceedings in this Tribunal.

Compensation and costs

- [22] In this complaint; the *Kho* complaint, Ms Navarette-Scholes has partly refunded the fees, and there are no other compensation or cost claims. The unrefunded fees amount to approximately \$400.
- [23] In the *Casas* matter the complainant seeks the refund of fees of \$13,484, and costs of \$3,000.
- [24] The only response Ms Navarette-Scholes has made regarding those claims related to her financial circumstances. In other cases the Tribunal has set out the principles relating to how a person's financial circumstances affect orders made under section 51 of the Act. *BN and MN v Hakaoro* [2013] NZIACDT 64 (www.justice.govt.nz) is an example. 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:

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

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

[25] 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.

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

[26.1] Ms Navarette-Scholes's financial circumstances will, as a matter of discretion, potentially be relevant to any financial penalty; but

[26.2] potential orders in favour of the complainants for the refund of fees or compensation are on the merits, without regard to Ms Navarette-Scholes's means.

[27] Orders for costs are discretionary. However, a party's means in a civil process are not usually a relevant factor, though the parties' views may have a significant bearing as costs usually have to be claimed before they are awarded.

[28] Accordingly, it is appropriate to order the payment of \$13,484 as a refund of fees, and \$3,000 in costs.

[29] Neither the Registrar nor the Complainant in the *Kho* matter sought costs, so there is no order.

Financial penalty

[30] I take account of the refund of fees, and award of costs in the *Casas* complaint, Ms Navarette-Scholes's financial circumstances, and the effect of her removal from the profession. There will be no financial penalty. There are elements of the totality principle, but more significant is Ms Navarette-Scholes means are limited.

Censure

[31] In accordance with the usual practice of disciplinary tribunals, censure will be an express sanction.

Orders in this complaint

[32] Ms Navarette-Scholes is censured.

[33] She is to pay the complainant \$400 being a refund of the balance of fees.

[34] The Tribunal orders that Ms Navarette-Scholes is prevented from applying for any licence under the Immigration Advisers Licensing Act 2007, until:

[34.1] a period of two years from the date of this decision has expired, and

[34.2] she has enrolled in and successfully completed the requirements for the Graduate Diploma in New Zealand Immigration Advice (Level 7), and

[34.3] she has satisfied all orders made against her under section 51 of the Immigration Advisers Licensing Act 2007.

[35] The Tribunal reserves leave to apply to vary the orders relating to the Graduate Diploma, if that qualification changes, or other qualifications become available.

DATED at WELLINGTON this 20th day of September 2017.

G D Pearson
Chairperson