

**IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL**

Decision No: [2019] NZIACDT 40

Reference No: IACDT 023/17

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

**BY** **THE REGISTRAR OF  
IMMIGRATION ADVISERS**  
Registrar

**BETWEEN** **JACOBUS VAN ZYL**  
Complainant

**AND** **NETTA TEMAMAEROA  
MARIA McNEIL**  
Adviser

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**DECISION  
(Sanctions)  
Dated 18 June 2019**

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**REPRESENTATION:**

Registrar: J Perrott, counsel  
Complainant: No appearance  
Adviser: No appearance

## INTRODUCTION

[1] The Tribunal upheld this complaint against Ms McNeil, the adviser, in a decision issued on 8 May 2019 in *van Zyl v McNeil*.<sup>1</sup> It found that Ms McNeil had failed to make a refund to her client, in breach of the Licensed Immigration Advisers Code of Conduct 2014 (the Code).

## BACKGROUND

[2] The narrative leading to the complaint is set out in the decision of the Tribunal upholding the complaint.

[3] Ms McNeil was a licensed immigration adviser. Her licence expired on 21 September 2016.

[4] On 19 April 2016, Ms McNeil, through her company, entered into a written agreement with the complainant, Mr van Zyl and his wife. She was instructed to prepare and lodge with Immigration New Zealand an essential skills work visa for Mr van Zyl. She worked on the application through April and May 2016. Mr van Zyl paid her a total of \$2,000 for the work. The application was lodged by Ms McNeil with Immigration New Zealand on 20 May 2016.

[5] Communication between Ms McNeil and the applicant's wife became difficult in June 2016. On 13 June at 5.51am, Ms McNeil advised the wife that her (Ms McNeil's) grandfather had passed away and she would be on bereavement leave for the rest of the week. It would appear that Ms McNeil then telephoned the complainant or his wife that evening and agreed to refund \$1,800.

[6] On 24 June and 12 July 2016, the complainant's wife sent further emails to Ms McNeil seeking a refund. According to the emails, Ms McNeil had told them she would keep \$200 and give the rest back. It was noted that Ms McNeil had not sent them a letter from Immigration New Zealand on 8 June 2016 identifying a number of issues with the application and nor had she communicated at all with them.

[7] A complaint was made by Mr van Zyl to the Immigration Advisers Authority (the Authority) on 9 January 2017. Ms McNeil failed to respond to the Authority when it advised her of the complaint and invited her explanation on 15 June 2017. Ms McNeil also failed to provide any response to the Tribunal when invited to do so after the complaint had been referred to the Tribunal.

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<sup>1</sup> *van Zyl v McNeil* [2019] NZIACDT 27.

[8] As noted above, the Tribunal issued a decision on 8 May 2019. The evidence from Mr van Zyl and his wife, which is not denied by Ms McNeil, is that she promised a refund of \$1,800. As she had failed to promptly provide that refund, she was in breach of cl 24(b) and (c) of the Code, as well as in breach of her written agreement to provide them with a fair and reasonable refund within 20 working days.

## **SUBMISSIONS**

[9] Counsel for the Registrar of Immigration Advisers (the Registrar), Mr Perrott, in his submissions (28 May 2019) contends that Ms McNeil should be:

- (a) censured; and
- (b) ordered to refund \$1,800 to Mr van Zyl.

[10] There were no submissions from the complainant or the adviser.

## **JURISDICTION**

[11] The Tribunal's jurisdiction to impose sanctions is set out in the Immigration Advisers Licensing Act 2007 (the Act). Having heard a complaint, the Tribunal may take the following action:<sup>2</sup>

### **50 Determination of complaint by Tribunal**

After hearing a complaint, the Tribunal may—

- (a) determine to dismiss the complaint;
- (b) uphold the complaint but determine to take no further action;
- (c) uphold the complaint and impose on the licensed immigration adviser or former licensed immigration adviser any 1 or more of the sanctions set out in section 51.

[12] The sanctions that may be imposed are set out at s 51(1) of the Act:

### **51 Disciplinary sanctions**

- (1) The sanctions that the Tribunal may impose are—
  - (a) caution or censure;
  - (b) a requirement to undertake specified training or otherwise remedy any deficiency within a specified period:

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<sup>2</sup> Immigration Advisers Licensing Act 2007.

- (c) suspension of licence for the unexpired period of the licence, or until the person meets specified conditions:
- (d) cancellation of licence:
- (e) an order preventing the person from reapplying for a licence for a period not exceeding 2 years, or until the person meets specified conditions:
- (f) an order for the payment of a penalty not exceeding \$10,000:
- (g) an order for the payment of all or any of the costs or expenses of the investigation, inquiry, or hearing, or any related prosecution:
- (h) an order directing the licensed immigration adviser or former licensed immigration adviser to refund all or any part of fees or expenses paid by the complainant or another person to the licensed immigration adviser or former licensed immigration adviser:
- (i) an order directing the licensed immigration adviser or former licensed immigration adviser to pay reasonable compensation to the complainant or other person.

[13] In determining the appropriate sanction, it is relevant to note the purpose of the Act:

### **3 Purpose and scheme of Act**

The purpose of this Act is to promote and protect the interests of consumers receiving immigration advice, and to enhance the reputation of New Zealand as a migration destination, by providing for the regulation of persons who give immigration advice.

[14] The focus of professional disciplinary proceedings is not punishment, but the protection of the public:<sup>3</sup>

...It is well established that professional disciplinary proceedings are civil and not criminal in nature. That is because 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.

...

The purpose of disciplinary proceedings is materially different to that of a criminal trial. It is to ascertain whether a practitioner has met appropriate standards of conduct in the occupation concerned and what may be required to ensure that, in the public interest, such standards are met in the future. The protection of the public is the central focus.

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<sup>3</sup> *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151] (citations omitted).

Lord Diplock pointed out in *Ziderman v General Dental Council* that the purpose of disciplinary proceedings is to protect the public who may come to a practitioner and to maintain the high standards and good reputation of an honourable profession.

[15] Professional conduct schemes, with their attached compliance regimes, exist to maintain high standards of propriety and professional conduct not just for the public good, but also to protect the profession itself.<sup>4</sup>

[16] While protection of the public and the profession is the focus, the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty.<sup>5</sup>

[17] The most appropriate penalty is that which:<sup>6</sup>

- (a) most appropriately protects the public and deters others;
- (b) facilitates the Tribunal's important role in setting professional standards;
- (c) punishes the practitioner;
- (d) allows for the rehabilitation of the practitioner;
- (e) promotes consistency with penalties in similar cases;
- (f) reflects the seriousness of the misconduct;
- (g) is the least restrictive penalty appropriate in the circumstances; and
- (h) looked at overall, is the penalty which is fair, reasonable and proportionate in the circumstances.

## DISCUSSION

[18] The only complaint upheld was a failure to promptly refund money, which the evidence shows Ms McNeil had promised. Despite her refusal to engage with either the Authority or the Tribunal, the complaint upheld could not be described as serious. So far as is known by the Tribunal, this was an isolated incident of wrongdoing and appears to

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<sup>4</sup> *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724–725 & 727; *Z v Dental Complaints Assessment Committee*, above n3, at [151].

<sup>5</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at [28].

<sup>6</sup> *Liston v Director of Proceedings* [2018] NZHC 2981 at [34], citing *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354 at [44]–[51] and *Katamat v Professional Conduct Committee* [2012] NZHC 1633, [2013] NZAR 320 at [49].

have occurred at a time of the death of her grandfather. It is also to be borne in mind that Ms McNeil is not practicing and has not done so now for more than two years.

[19] Ms McNeil will be cautioned rather than censured.

[20] I have given consideration to a financial penalty, but in the circumstances have decided not to impose one in order to encourage Ms McNeil to refund the fee to the extent promised. I note in this regard that the Registrar has not sought the imposition of a financial penalty.

[21] Ms McNeil will be ordered to make the refund promised. While the visa application made to Immigration New Zealand was ultimately unsuccessful, the evidence does not establish that was Ms McNeil's fault. It may have failed anyway. As Ms McNeil did perform some work, I accept that it was reasonable for her to retain part of the fee. Accordingly, Ms McNeil will be ordered to refund \$1,800.

## **OUTCOME**

[22] Ms McNeil is:

- (1) cautioned; and
- (2) ordered to immediately refund to Mr van Zyl \$1,800.

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D J Plunkett  
Chair