

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2019] NZIACDT 52

Reference No: IACDT 030/17

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **IMMIGRATION NEW ZEALAND
(DARREN CALDER)**
Complainant

AND **MARIA CHARINA (CHARIE)
SHEARER**
Adviser

SUBJECT TO SUPPRESSION ORDER

**DECISION
(Sanctions)
Dated 25 July 2019**

REPRESENTATION:

Registrar: T Thompson, counsel
Complainant: Self-represented
Adviser: Self-represented

INTRODUCTION

[1] The Tribunal upheld this complaint against Ms Shearer, the adviser, in a decision issued on 19 June 2019 in *Immigration New Zealand (Calder) v Shearer*.¹ It found that Ms Shearer had been negligent and incompetent in the system established to manage the visa applications of 22 offshore clients. She had failed to personally engage with her clients and had delegated responsibility for doing so to the unlicensed staff of companies operating in a different country. She had therefore breached the Immigration Advisers Licensing Act 2007 (the Act) and 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 and will only be briefly summarised here.

[3] Ms Maria Charina (Charie) Shearer was at the relevant time a licensed immigration adviser based in Auckland. She was the sole shareholder and director of a New Zealand company, Immigration Assist Ltd (Immigration Assist). As the Immigration Advisers Authority (the Authority) refused her a licence on 25 August 2017, Ms Shearer is no longer a licensed adviser.

[4] In mid-2015, Ms Shearer met Ms C, a national of the Philippines, and agreed to help her to establish a recruiting business. It was to operate under the legal entity of Ms Shearer's company, Immigration Assist. The trading name of the new business was IAL Employment Services (IAL Employment). It specialised in the recruitment of migrant workers from the Philippines.

[5] A "Recruitment Agreement" was entered into on 23 November 2015 between IAL Employment and a New Zealand employer (the employer) who was looking for truck drivers. The employer undertook to use IAL Employment for the purpose of recruiting overseas workers.

[6] Both Immigration Assist and IAL Employment operated in conjunction with a training centre set up in the Philippines to provide training and other services to those who wished to migrate to New Zealand.

¹ *Immigration New Zealand (Calder) v Shearer* [2019] NZIACDT 41.

[7] It was Ms Shearer's understanding at the time IAL Employment was operating that it was her sole client, which she considered to be a trading entity in its own right. She believed that her company, Immigration Assist, was contracted by IAL Employment to provide immigration services. She did not believe that, as a licensed adviser, she had a direct client relationship with the visa applicants (the drivers or the clients).

Visa applications lodged

[8] Between December 2015 and February 2016, Immigration New Zealand in Manila received the 22 applications for work visas lodged under Ms Shearer's licence which are the subject of this complaint. Each client had been recruited by IAL Employment and had undergone driver training at the training centre. They had all been offered employment as truck drivers by the employer.

[9] Immigration Assist and IAL Employment used the training centre's office and its staff in the Philippines to receive documents and liaise with the clients. The staff obtained from the clients the documents required by Immigration New Zealand in accordance with a work visa checklist supplied by Ms Shearer. The documents were collated by the staff and then sent to Ms Shearer to assess eligibility. She would draft covering letters for each client to be sent to Immigration New Zealand. The applications were lodged with Immigration New Zealand by the staff in Manila.

[10] As Ms Shearer was not present in the Philippines, she authorised Mr B to sign the covering letters and visa application forms on her behalf. Once the applications were lodged with Immigration New Zealand by IAL Employment, Ms Shearer became the point of contact for official communication.

[11] Immigration New Zealand became concerned about the applications. In February 2016, it sent similar letters to Ms Shearer regarding each of the 22 clients. A typical letter relating to one client noted that the visa application had stated Ms Shearer was the licensed immigration adviser, yet she had not signed the relevant section of the form. Furthermore, the covering letter had been signed by Mr B, on her behalf. Immigration New Zealand had also noted that Ms C and Mr S had been corresponding with it regarding the application, but these people had not been declared on the form as persons to whom it could communicate. Additionally, the client had said at the interview that he was unaware of the identity of the immigration adviser. He had given the names of staff as the people with whom he had been in direct contact.

[12] On 5 February 2016, Ms Shearer wrote a letter to Immigration New Zealand responding to its concerns regarding 14 drivers. She explained that IAL Employment was owned by Mr S. She said her own company, Immigration Assist, had been contracted by IAL Employment to provide immigration advice to ensure that the employer and IAL Employment met the requirements of the work visa applications. Immigration Assist was also responsible for lodging the applications and making sure that the required documentation was complete.

[13] According to Ms Shearer, IAL Employment advertised the jobs and directed applicants to an agency accredited by the Philippines government. Mr S met the selected candidates to explain the process and to ensure they satisfied the criteria provided by the employer and Immigration Assist. Mr B worked alongside both Mr S and a trainer from New Zealand.

[14] Once the clients were trained, the documentation from the drivers was passed to Ms Shearer to check and to prepare for the lodgement of their applications. She utilised the administrative staff of the training centre to help with this as she was based in New Zealand. As she had to go back to New Zealand, she had authorised Mr B to sign on her behalf, including the covering letter.

Visa applications declined

[15] Immigration New Zealand declined all of the applications in about February 2016, on the ground there was a risk to the integrity of New Zealand's immigration system and international reputation, due to the involvement of IAL Employment, Ms C and the training centre.

Complaint

[16] The complaint against Ms Shearer concerning the 22 clients was lodged with the Authority by Immigration New Zealand (Mr Calder) on 13 April 2016.

[17] On 7 August 2017, Mr Laurent, counsel for Ms Shearer, replied on her behalf to the Authority's letter of 7 June 2017 formally notifying her of the complaint. In summary, he advised that Ms Shearer admitted many, but not all, of the breaches alleged in the complaint. Many of her problems stemmed from a misunderstanding of the requirement to establish a personal professional relationship with the drivers themselves. Instead, she saw her sole client as IAL Employment. Ms Shearer further admitted that she had insufficient control to ensure that the drivers were being properly advised and that

unlicensed activity was not taking place. However, it was not accepted that she had been dishonest or misleading.

[18] The Registrar of Immigration Advisers (the Registrar), the head of the Authority, referred the complaint to the Tribunal.

Decision of the Tribunal

[19] In its decision of 19 June 2019, the Tribunal found that while Ms Shearer had assessed eligibility, drafted covering letters and taken responsibility for all communications with Immigration New Zealand, she had not engaged directly with the client or controlled the process of compiling the application throughout its entire duration. This had been done by the unlicensed staff of IAL Employment and/or the training centre. Their work was unlawful. It had all been done in Ms Shearer's name as the only licensed person. She had therefore facilitated the unlawful conduct of the unlicensed staff.

[20] It was found that Ms Shearer had been negligent at a high level, but not dishonest or misleading. It concluded she was naïve and out of her depth in taking on such a large volume of work from offshore clients in what was a relatively complex web of relationships, all under a sense of urgency.

[21] Ms Shearer's violation of the professional standards was found to have largely arisen from one fundamental mistake, which was failing to recognise that her professional obligations were owed to each of the clients individually and not to IAL Employment and/or the employer.

[22] Specifically, Ms Shearer had:

- (1) failed to personally obtain the clients' instructions, in breach of cl 2(e) of the Code;
- (2) maintained a business practice relying on unlicensed staff to provide immigration advice and services contrary to the Act, in breach of cl 3(c);
- (3) failed to confirm to the clients in writing when the applications were lodged and to make ongoing and timely updates, in breach of cl 26(b);
- (4) established and handled arrangements with all the parties amounting to both negligence and incompetence, being statutory grounds of complaint;
- (5) failed to ensure that there were written agreements with each client, in breach of cl 18(a);

- (6) been grossly unprofessional to pre-sign blank forms and leave it to others to complete and lodge the forms in her name, in breach of cl 1; and
- (7) not retained the clients' files and handed them over on request to the Authority, in breach of cl 26(e).

SUBMISSIONS

[23] Counsel for the Registrar, Ms Thompson, in her submissions of 9 July 2019, contends that Ms Shearer should be:

- (1) cautioned or censured;
- (2) ordered to pay a penalty not exceeding \$10,000; and
- (3) ordered to pay nominal costs of \$3,000 as a contribution towards the costs and expenses of the investigation.

[24] There are no submissions from the complainant.

[25] In her submissions of July 2019 (no date is given), Ms Shearer says she accepts the findings of the Tribunal, acknowledges that she was naïve and out of her depth and that the decisions she made at the time were careless, irresponsible and often breached the Code. In setting sanctions, she asks the Tribunal to take into account her current circumstances.

[26] As to her financial situation, Ms Shearer notes that she did not receive any payment for her work with Ms C. She accepts that that is only right, but points out that most of the expenses were funded through the personal savings of herself and her then husband. She still owed money to the landlord for the office that was set up for herself and Ms C. There were also several trips to the Philippines at her own cost, as well as numerous trips to another city in New Zealand to meet the employer. In addition, Ms Shearer says she had paid over \$10,000 in legal costs for the Authority's investigation. However, as she could no longer afford a lawyer, she was making her own submissions to the Tribunal.

[27] Ms Shearer estimates that the total financial cost of her negligence and incompetence was around \$30,000, not counting lost potential revenue which would likely be tens of thousands of dollars. These expenses had required personal loans and she was currently being supported by Work and Income. A letter from Work and Income, dated 22 July 2019, was produced in support.

[28] As for her professional circumstances, Ms Shearer points out that the Authority had refused her a licence, so she ceased operating. A move into job placement services had not been successful. She was trying to start again from the bottom, but with no real prospects ahead of her.

[29] Moreover, according to Ms Shearer, the personal cost of the last three years had been the greatest of all. She had lost her reputation within the Filipino community. All of these matters, including the financial pressures, had recently led to the collapse of her marriage of 17 years and she was now working on arrangements for the shared custody of their young daughter. She was attempting to restart her life while undergoing counselling.

[30] Ms Shearer also invites the Tribunal to take into account that when she had started practicing as an immigration adviser in 2007, she had done it for free to help her community. It was never about the money. She had been a frequent speaker at a migrant trust and had helped disadvantaged people from the Filipino community. Ms Shearer notes that she had also been a volunteer at the local community centre and a volunteer lifeline counsellor.

[31] In conclusion, Ms Shearer accepts the Tribunal's description of her conduct. The consequences had been profound, financial, professional and personal. Her life had completely changed as a result. The last three years of waiting for the outcome of the case was a punishment by itself, as she has been waiting to restart her life.

JURISDICTION

[32] The Tribunal's jurisdiction to impose sanctions is set out in the Act. Having heard a complaint, the Tribunal may take the following action:²

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.

² Immigration Advisers Licensing Act 2007.

[33] 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:
 - (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.

[34] 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.

[35] The focus of professional disciplinary proceedings is not punishment, but the protection of the public:³

...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.

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

...

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.

...

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.

[36] 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.⁴

[37] 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.⁵

[38] The most appropriate penalty is that which:⁶

- (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.

⁴ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724–725 & 727; *Z v Dental Complaints Assessment Committee*, above n 3, at [151].

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

⁶ *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].

DISCUSSION

[39] As recorded in the earlier decision, I acknowledge that most of the violations of Ms Shearer's professional obligations arose from one fundamental mistake, the failure to recognise that the drivers were her true clients. There will be no double counting of violations for the purpose of determining the sanctions.

[40] I will consider the appropriate sanctions in the order in which they are set out in s 51.

Caution or censure

[41] The conduct of Ms Shearer in delegating work exclusively reserved under the Act to immigration advisers is serious. Both Ms Shearer and the unlicensed staff may have committed statutory offences. It is not my role to assess whether the conduct is criminal, but the possibility shows the seriousness of the professional violations. Additionally, while not dishonest or intended to mislead, the pre-signing of visa application forms by Ms Shearer was grossly unprofessional. There was an obvious risk of fraud or of the forms being used for applicants unknown to her.

[42] Furthermore, this is the second time the Tribunal has upheld a complaint against Ms Shearer. I will say more about this shortly.

[43] It is therefore appropriate to censure Ms Shearer. A caution would not reflect the seriousness of her conduct.

Prohibition against licence reapplication

[44] Ms Shearer is no longer a licensed adviser and has not indicated any intention to return to the profession. However, the circumstances of her misconduct are sufficiently serious to warrant considering prohibiting her from reapplying for any licence.

[45] The cancellation of a licence and/or an order prohibiting an adviser from reapplying for a licence are measures of last resort as they can deprive an adviser of his or her income.

[46] As noted above, the conduct here is serious. It is aggravated by the large number of clients involved, being 22. There is also the grossly unprofessional signing of blank forms for others to complete and lodge with Immigration New Zealand.

[47] While I have not found her conduct to be dishonest or misleading, Ms Shearer has previously been found by the Tribunal to have misled her client and his employer. The details of the earlier complaint upheld are set out below.

[48] I appreciate that Ms Shearer has already been deprived of a licence for almost two years, but I find it to be in the public interest to prohibit Ms Shearer from applying for any licence for the maximum period of two years.

Penalty

[49] I reiterate that the breaches of cls 2(e) and 3(c) of the Code are serious. Ms Shearer unlawfully delegated to the unlicensed staff of other companies in a different country client engagement and therefore much of the immigration work exclusively reserved under the Act to her.

[50] More recent decisions concerning the unlawful delegation of immigration work include *Immigration New Zealand (Carley) v De'Ath* [2019] NZIACDT 1, where Mr De'Ath was ordered to pay a penalty of \$8,500 in respect of 11 clients. In *Immigration New Zealand (Foley) v Niland* [2019] NZIACDT 16, there was a penalty of \$4,000 against Ms Niland in respect of four clients. In *Immigration New Zealand (Calder) v Ahmed* [2019] NZIACDT 35, there was a penalty of \$4,000 in respect of four clients. Then in *Immigration New Zealand (Calder) v Cleland* [2019] NZIACDT 38, the financial penalty was \$7,500 in respect of 12 clients. Finally, in *Suresh v Elizabeth* [2019] NZIACDT 45, the penalty was \$3,500 in respect of one client.

[51] I recognise that other factors were also relevant to the level of penalty in those decisions. The conduct and the personal circumstances of each of those advisers were not identical to those of Ms Shearer.

[52] An aggravating feature of this complaint is that it concerns 22 clients. Furthermore, the rubber stamping here is at the upper end. Ms Shearer had no contact at all with the clients prior to the decline of their applications. The very unprofessional pre-signing of blank forms by her also has to be condemned. It is appropriate there be a punitive element to the sanctions and that I deter other advisers from such conduct.

[53] As already noted this is not the first time Ms Shearer has appeared before the Tribunal. A previous complaint was upheld on 18 March 2016 in *Chand v Shearer*.⁷ It was found that Ms Shearer had not filed a request for a visa on behalf of her client for about three months after being instructed to do so. She then misled her client and his

⁷ *Chand v Shearer* [2016] NZIADCT 12, [2016] NZIACDT 57 (Sanctions).

employer, pretending she had filed the request when that was not true. The Tribunal determined that Ms Shearer had been dishonest and misleading. In mitigation, she had accepted responsibility for her conduct and the sudden death of a family member provided some explanation.

[54] The Tribunal (Mr Pearson) cautioned Ms Shearer, ordered her to pay to the complainant compensation of \$10,081 and to refund to him fees of \$1,006.25. Furthermore, it decided that if she did not pay the complainant, her licence would be suspended three months after the date of the decision until she had paid him in full. I assume she paid him, as she has no record of any suspension.

[55] The Tribunal made the point that, were it not for the Registrar's view that compensation should be the focus of the sanctions, there would have been a substantial monetary penalty to denounce her deception.

[56] On the other hand, in this case, I acknowledge Ms Shearer's financial, professional and personal circumstances. Her conduct and the ensuing complaint have come at a heavy cost to her, which is worse punishment than any sanction to be imposed by the Tribunal. I also accept that the prolonged complaint process, of more than three years in her case, is stressful. Her circumstances are an important mitigating factor.

[57] I take into account that Ms Shearer was well intentioned in setting out to practice as an immigration adviser and in wanting to help 22 Filipino truck drivers go to a provincial area in New Zealand where there is a shortage of drivers for a growing export commodity. Ms Shearer has a history of helping her community. The facts also show that Ms Shearer was misused by Ms C and the others associated with IAL Employment.

[58] It is acknowledged that Ms Shearer has accepted that her conduct was wrong and that her remorse is genuine. Furthermore, she has been deprived of her ability to practice for almost two years already and will be prevented from doing so for a further two years.

[59] Balancing as best I can the serious wrong-doing which falls short of dishonesty, with the circumstances of Ms Shearer, the financial penalty will be \$6,500.

Costs of inquiry

[60] Ms Thompson seeks a nominal award of \$3,000 for the Authority's costs of the inquiry. It is unusual for the Tribunal to award costs, but it will do so where the investigation is particularly voluminous or complex, or the adviser's conduct in the face of the investigation unreasonably increases its cost. I accept that this is a complaint

where it would be appropriate to award costs as the investigation concerned 22 clients and numerous breaches of the Code, but I am not going to do so given Ms Shearer's financial and personal circumstances.

OUTCOME

[61] Ms Shearer is:

- (1) censured;
- (2) prevented from reapplying for any licence for two years from the date of this decision; and
- (3) ordered to immediately pay to the Registrar a penalty of \$6,500.

ORDER FOR SUPPRESSION

[62] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.⁸

[63] There is no public interest in knowing the names of Ms Shearer's clients or the individuals associated with IAL Employment.

[64] The Tribunal orders that no information identifying the clients or those individuals is to be published other than to the parties.

D J Plunkett
Chair

⁸ Immigration Advisers Licensing Act 2007, s 50A.