

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2019] NZIACDT 60

Reference No: IACDT 034/17

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
(MARCELLE FOLEY)**
Complainant

AND **FILIPINAS (FIL) RODRIGUEZ**
Adviser

**DECISION
(Sanctions)
Dated 30 August 2019**

REPRESENTATION:

Registrar: S Pragji, counsel
Complainant: Self-represented
Adviser: V Farrow, D Hubbard, counsel

INTRODUCTION

[1] The Tribunal upheld the complaint against Ms Rodriguez, the adviser, in a decision issued on 23 July 2019 in *Immigration New Zealand (Foley) v Rodriguez*.¹ It found that Ms Rodriguez had failed to conduct herself with due care, as she had recommended to an employer for a welding position someone who had little experience of welding. She had then obtained a work visa for that person again based on the welding position. Her conduct was found to be a 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 and will only be briefly summarised here.

[3] Ms Rodriguez is a licensed immigration adviser. She is a director of Dunedin Business Management Solutions and South Immigration Matters Ltd.

[4] The prospective employer sent an email to Ms Rodriguez seeking to recruit a foreign welding operator with experience in aluminium fabrication. He was quite specific as to the type of welding experience he was looking for. Ms Rodriguez visited his premises to better understand the role. She then travelled to Manila to interview prospective candidates.

[5] In due course, Ms Rodriguez contacted one of her Filipino clients (the candidate) and there followed an exchange of messages between herself and the candidate. The candidate told her that he had some welding experience but that he was “really not a welder”.

[6] Ms Rodriguez recommended the candidate to the employer for the welding position. The employer queried whether he had welding experience but on the basis of Ms Rodriguez’s confirmation that he had such experience, the employer accepted him. A work visa was then successfully sought from Immigration New Zealand.

[7] The candidate arrived in New Zealand and presented himself to the employer but it became obvious on the first day that he did not have the required welding skills. His employment was terminated on that first day.

¹ *Immigration New Zealand (Foley) v Rodriguez* [2019] NZIACDT 51.

[8] On being informed of what had happened that same day, Ms Rodriguez immediately apologised to the employer and took full responsibility for the error. She refunded to the candidate the fees paid and offered to fly him back to the Philippines, but he wanted to go elsewhere in New Zealand where his brother lived. Ms Rodriguez paid his travel to that other New Zealand location. The candidate continues to lawfully live in New Zealand.

[9] When Ms Rodriguez was notified of the complaint lodged by Immigration New Zealand with the Immigration Advisers Authority (the Authority), she accepted making a mistake due to confusion about the distinction between a welder and a fabricator. She acknowledged her errors and was remorseful.

Decision of the Tribunal

[10] In its decision on 23 July 2019, the Tribunal accepted that Ms Rodriguez had been confused as to the difference between a welder and a fabricator. There was no dishonesty or deception by her. However, as a professional adviser lacking knowledge in the engineering industry, she should have better informed herself. She had failed to conduct herself with due care, in breach of cl 1 of the Code.

SUBMISSIONS

[11] Counsel for the Registrar of Immigration Advisers (the Registrar), Ms Pragji, in her submissions of 8 August 2019, submits that Ms Rodriguez should be cautioned and ordered to pay a penalty in the vicinity of \$1,000.

[12] Ms Rodriguez's counsel, Ms Hubbard, in her submission of 13 August 2019, contends that in the circumstances no sanction should be imposed by the Tribunal. It would be unduly harsh to do so and would outweigh the gravity of her 'offending'. In the alternative, Ms Rodriguez should be cautioned or ordered to pay a penalty of less than \$500.

[13] It is submitted by counsel that the gravity of the charges sit at the lower end of the spectrum. Ms Hubbard notes that while the Tribunal found that Ms Rodriguez had failed to exercise due care, there was no dishonesty or lack of integrity. There had been no cost to Immigration New Zealand (the complainant), or to the candidate himself. Ms Rodriguez had refunded the fees and paid the candidate's airfare to relocate within New Zealand, as he had requested. She did not receive a fee from the employer.

[14] Furthermore, Ms Rodriguez had subsequently tried to help both the candidate and the employer. She had endeavoured to find the candidate alternative employment without success, but he had since obtained a work visa. She had also sent other clients to the employer for the welding position.

[15] Ms Rodriguez had promptly expressed genuine remorse for her failure.

[16] Counsel contends that the whole experience has affected Ms Rodriguez's livelihood and arguably her physical health. She has also, in essence, been publicly reprimanded already, as the local newspaper published an article on the Tribunal's decision.

[17] It is noted by counsel that it has been more than two and a half years since the mistake. Since that time, Ms Rodriguez has taken steps to rehabilitate herself. She has reduced her workload in order to focus on providing accurate, quality services to her clients. Her gross revenue has fallen dramatically, as she reduces the number of immigration cases taken on.

[18] Counsel further notes that Ms Rodriguez has continued to upskill herself by undertaking regular webinars offered by both the Authority and the New Zealand Association for Migration and Investment. She has also joined a local group comprising three immigration advisers which meets formally every quarter to discuss issues relating to immigration criteria. Some years ago, she obtained the Graduate Certificate in New Zealand Immigration Advice.

[19] There is an affidavit from Ms Rodriguez sworn on 13 August 2019. She confirms the steps taken to rehabilitate herself and ensure that she approaches her duties with the utmost due care. This includes her regular attendance at a local study group for more than two years and at various other courses and seminars run by the Authority and the New Zealand Association for Migration and Investment. She has cut back her high workload which was not conducive to carrying out her duties to the best of her ability.

[20] Ms Rodriguez confirms that she paid the candidate's travel to relocate within New Zealand and that for about two to three months she had sought to find him alternative employment. She understands the candidate has found a new job in New Zealand. She continued to send other suitable clients to the employer for some months after the candidate was rejected.

[21] Ms Rodriguez found the article in the local media to be embarrassing. A number of people who had seen it had contacted her. She has recently been diagnosed with a medical condition and believes the stress of the matter may have contributed to her condition.

[22] In her affidavit, Ms Rodriguez exhibits considerable documentation to support her statements, including formal minutes of the study group.

JURISDICTION

[23] 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: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.

[24] 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:

² Immigration Advisers Licensing Act 2007.

- (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.

[25] 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.

[26] 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.

...

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.

[27] 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

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

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].

[28] 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

[29] 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.

DISCUSSION

[30] While two heads of complaint were upheld, they amount in reality to different ways of describing the same error. Ms Rodriguez failed to conduct herself with due care in putting forward to the employer for a welding position a candidate who had little welding experience. She should have better informed herself of the distinction between a welder and a fabricator (who might have some welding experience) and had she done so, it would have been readily apparent that the candidate was not suitable for the role offered. The employer had been very clear that he wanted a welder and had even specified the types of welding needed.

[31] I found that her lack of due care arose from confusion on her part and not to any dishonesty or deception. I agree with Ms Hubbard's submission that the gravity of the misconduct upheld is at the lower end of the spectrum.

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].

[32] I accept that Ms Rodriguez immediately acknowledged her mistake and apologised to the employer on the very day she was advised of the problem. When notified by the Authority of the complaint, she had again promptly admitted the mistake. It is also clear that Ms Rodriguez did what she could to redress the problem she had caused. She refunded her fee and paid the candidate's travel to the location of his choice. There is no evidence of any cost to the candidate. Nor is there any evidence of any cost to the employer.

[33] Counsel for the Registrar seeks a caution and the imposition of a financial penalty of \$1,000.

[34] Counsel for Ms Rodriguez contends that it would be appropriate not to impose any sanction, relying on s 50(b) of the Act.

[35] In the circumstances, I have decided not to impose a penalty. I do not see the need to punish, deter or to denounce Ms Rodriguez's conduct. This appears to be an isolated mistake by an otherwise experienced and competent adviser. The public do not need protecting from Ms Rodriguez. She responded promptly and appropriately when first advised of the problem by the employer and then when notified of the complaint. Ms Rodriguez has gone to considerable effort to upskill herself and I applaud her participation in the local study group. She does not need any retraining.

OUTCOME

[36] The Tribunal will take no further action against Ms Rodriguez.

D J Plunkett
Chair