

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2020] NZIACDT 26

Reference No: IACDT 006/19

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **UO**
Complainant

AND **ELENA NUKULASI**
Adviser

SUBJECT TO SUPPRESSION ORDER

**DECISION
(Sanctions)
Dated 23 June 2020**

REPRESENTATION:

Registrar: Self-represented
Complainant: No appearance
Adviser: S Laurent, counsel

INTRODUCTION

[1] UO, the complainant, was in New Zealand unlawfully. He and his wife instructed Ms Elena Nukulasi, the adviser, who advised him to apply for a discretionary visa. She did not make the application until more than one year after being instructed. Nor did she advise the complainant in writing that his application had little chance of success.

[2] The complaint was referred by the Registrar of Immigration Advisers (the Registrar), the head of the Immigration Advisers Authority (the Authority), to the Tribunal. It was upheld in a decision issued on 12 May 2020 in *UO v Nukulasi*.¹ Ms Nukulasi was found to have breached the Licensed Immigration Advisers Code of Conduct 2014 (the Code).

[3] It is now for the Tribunal to determine the appropriate sanctions.

BACKGROUND

[4] 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.

[5] Ms Nukulasi, a licensed immigration adviser, is a director of E & T Consulting Services Limited, based in Auckland.

[6] The complainant, along with his wife and daughter, were living in New Zealand unlawfully. On 26 September 2017, the complainant and his wife met Ms Nukulasi. She advised them that one of their options was to request discretionary visas under s 61 of the Immigration Act 2009. She told them that their case was not strong. At a further meeting on 29 September 2017, the complainant and his wife instructed Ms Nukulasi to make the discretionary visa request.

[7] It was not until 5 October 2018 that Ms Nukulasi sent the s 61 application to the Associate Minister of Immigration. It was returned on 10 October 2018 with the advice that the matter should be pursued with Immigration New Zealand or the Immigration and Protection Tribunal.

[8] A complaint against Ms Nukulasi was made by the complainant to the Authority on 2 November 2018, seeking a refund and requesting that Ms Nukulasi face penalties. The complainant said that her unlawful status had been extended by Ms Nukulasi.

¹ *UO v Nukulasi* [2020] NZIACDT 18.

Decision of the Tribunal

[9] The Tribunal found that Ms Nukulasi had no justifiable reason for the extraordinary delay of one year in sending the s 61 request to the Minister's office. Her conduct was neither professional, diligent nor timely, a breach of cl 1 of the Code.

[10] Furthermore, the request made to the Minister had little, if any, chance of success. While Ms Nukulasi advised the complainant orally more than once of the limited prospects of success, she was obliged to give that advice in writing and wait for written instructions to proceed. Ms Nukulasi had therefore breached cl 9(a) and (b) of the Code.

SUBMISSIONS*Submissions from the Registrar*

[11] The Registrar, in his submissions of 25 May 2020, seeks a caution, an order for Ms Nukulasi to refund the fee of \$1,000 to the complainant and an order for payment of a penalty in the vicinity of \$1,000. It was noted that this was Ms Nukulasi's first appearance in front of the Tribunal and that she had already admitted the breaches of the Code.

Submissions from the complainant

[12] There are no submissions from the complainant.

Submissions from Ms Nukulasi

[13] In his submissions of 4 June 2020, Mr Laurent, counsel for Ms Nukulasi, advises that she accepts the Tribunal's findings and indeed has always admitted that she had breached the Code. She understands her failings. In the last two years, Ms Nukulasi has exceeded the requirements of compulsory continuing practice development, including supervision of a provisional licence holder.

[14] It is noted by Mr Laurent that the Registrar proposes a modest penalty of \$1,000. He observes that delays were a feature in *Suresh v Elizabeth*² and *WQ v Emberson*.³ Counsel contends that Ms Nukulasi's wrongdoing is not as serious as that in *Elizabeth*, but it is acknowledged that the delay was longer than in *Emberson*.

² *Suresh v Elizabeth* [2019] NZIACDT 45.

³ *WQ v Emberson* [2019] NZIACDT 39.

[15] According to counsel, the financial resources of Ms Nukulasi are limited. She is currently in other fulltime employment, in order to support her family. However, this employment will terminate at the end of June 2020. Her husband has stopped work because of the COVID-19 lockdown and is waiting to be recalled to his job. She and her husband have three dependent children. In the circumstances, it is proposed that the Tribunal waive any financial penalty and merely require a refund of \$1,000.

JURISDICTION

[16] 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:⁴

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.

[17] 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:

⁴ Immigration Advisers Licensing Act 2007.

- (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.

[18] 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.

[19] The focus of professional disciplinary proceedings is not punishment, but the protection of the public:⁵

...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.

[20] 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.⁶

⁵ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151] (citations omitted).

⁶ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724–725 & 727; *Z v Dental Complaints Assessment Committee*, above n 5, at [151].

[21] 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.⁷

[22] The most appropriate penalty is that which:⁸

- (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

[23] There was an extraordinary and inexplicable delay of one year to filing the s 61 request with the Minister's office. Time was of the essence as the complainant was unlawfully in New Zealand. Ms Nukulasi accepts her conduct was unprofessional.

[24] I do not find the *Elizabeth* decision to be applicable, as there was more serious wrongdoing there. As for *Emberson*, the wrongdoing was less serious, not just because the delay in filing the application was less (only about four months), but also because that case concerned no other wrongdoing.

[25] I agree with the Registrar and Mr Laurent that a caution, not a censure, is appropriate. This is Ms Nukulasi's first appearance before the Tribunal in six years of practice as a licensed adviser. Furthermore, she has always admitted her wrongdoing.

⁷ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at [28].

⁸ *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].

[26] I further agree with the Registrar and Mr Laurent that it is appropriate to order Ms Nukulasi to refund her fee of \$1,000 to the complainant. Ms Nukulasi's services were of no value to the complainant.

[27] This brings me to whether any financial penalty should be imposed and, if so, the level of penalty.

[28] I note that there is no evidence from the complainant of actual prejudice to him by the delay or the failure to provide written advice of the limited prospects of success. His current whereabouts and immigration status are unknown, but it is unlikely the delay would have caused the application (if pursued by him) to fail, as it would have failed even if filed earlier. Ms Nukulasi's conduct did not bring about his unlawful status, as he was already unlawfully in the country at the time he approached her.

[29] While the complainant was not advised by Ms Nukulasi in writing of his limited prospects, she did tell him orally more than once of this.

[30] I agree with the Registrar that a penalty of \$1,000 would ordinarily be appropriate, but I am mindful of Ms Nukulasi's modest financial circumstances. Given that this is her first appearance and she has always acknowledged her wrongdoing, there will be no penalty.

OUTCOME

[31] Ms Nukulasi is:

- (1) cautioned; and
- (2) ordered to immediately pay to the complainant \$1,000.

ORDER FOR SUPPRESSION

[32] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.⁹

[33] There is no public interest in knowing the name of Ms Nukulasi's client, the complainant.

⁹ Immigration Advisers Licensing Act 2007, s 50A.

[34] The Tribunal orders that no information identifying the complainant is to be published other than to Immigration New Zealand.

D J Plunkett
Chair