

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2020] NZIACDT 30

Reference No: IACDT 004/19

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **DMX**
Complainant

AND **MARTIN ANTONIO GUICH**
Adviser

SUBJECT TO SUPPRESSION ORDER

**DECISION
(Sanctions)
Dated 20 July 2020**

REPRESENTATION:

Registrar: Self-represented

Complainant: Self-represented

Adviser: Self-represented

INTRODUCTION

[1] Mr Martin Antonio Guich, the adviser, represented Ms DMX, the complainant, on an unsuccessful residence application. He appealed on her behalf, but it was dismissed since he was too late as a result of miscalculating the appeal period.

[2] A complaint by the complainant was referred by the Registrar of Immigration Advisers (the Registrar), to the Tribunal. It was upheld in a decision issued on 12 May 2020 in *DMX v Guich*.¹ Mr Guich 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] Mr Guich is a licensed immigration adviser and director of Collective Consulting Limited.

[6] The complainant had lived in New Zealand since 2012 and decided she wanted to reside here permanently. She entered into an agreement with Mr Guich on 16 July 2017.

[7] Mr Guich lodged the complainant's Expression of Interest with Immigration New Zealand on 18 July 2017, leading the agency to issue the complainant with an invitation to apply for residence. The residence application was filed by Mr Guich on 17 November 2017.

[8] The application was declined by Immigration New Zealand on 23 February 2018. The decision letter, addressed to both the complainant and Mr Guich, advised that the complainant had 42 days (calculated in the way set out in the letter) to appeal to the Immigration and Protection Tribunal (IPT).

[9] Mr Guich sent an email to the complainant on 1 March 2018 informing her of Immigration New Zealand's decision and advising that she had "approximately 47 days" to lodge an appeal.

¹ *DMX v Guich* [2020] NZIACDT 19.

[10] The complainant asked an assistant in Mr Guich's office by email on 4 April 2018 to be informed of the last date for the appeal. The assistant replied that the deadline was 22 April 2018.

[11] Mr Guich did not file the appeal in the IPT until 18 April 2018. The IPT advised him the following day that it was out of time.

[12] The complainant and Mr Guich had a meeting on 29 May 2018. He apologised again for his mistake as to the deadline, attributing it to human error. Mr Guich offered a refund of the fee for the residence application, even though the error had concerned the appeal and not the application. He informed her of the procedure for complaints.

Decision of the Tribunal

[13] The Tribunal found that Mr Guich had calculated the appeal period by relying on an out-of-date hard copy IPT guide. He did not review Immigration New Zealand's letter setting out the correct appeal period, nor the IPT's website. These were obvious steps to take. This degree of carelessness or negligence could not be described as minor. A competent, reasonable, prudent and diligent practitioner would not have calculated the appeal period in the way done here.

[14] It was found that Mr Guich lacked diligence and due care in calculating the appeal period which led him to file the appeal out of time. He had breached cl 1 of the Code.

SUBMISSIONS

Submissions from the Registrar

[15] The Registrar notes that this is Mr Guich's first appearance before the Tribunal. He submits that Mr Guich should be:

- (1) cautioned; and
- (2) ordered to pay a penalty in the vicinity of \$1,000.

Submissions from the complainant

[16] There are no submissions from the complainant.

Submissions from Mr Guich

[17] Mr Guich states that his submissions are very brief as he did not have anywhere near the amount of time he would have liked to compile his response. The complaint had come at the worst possible time due to various personal factors and the global COVID-19 pandemic. The pandemic had required him to spend countless hours to keep his business afloat and save jobs. His business is highly regarded in the industry but is effectively on life support, receiving the government wage subsidy, the small business cashflow loan and having made redundancies and cuts to keep it afloat. Furthermore, unnecessary and unanticipated work from Immigration New Zealand for ongoing cases had caused additional work.

[18] At the moment, according to Mr Guich, he is under immense pressure in every aspect of his personal and professional life. He still had time though to volunteer at a local welfare hub to support economic recovery in the region, as well as to provide *pro bono* advice and assistance to migrants.

[19] In Mr Guich's view, there are more pressing matters due to the global pandemic than for an experienced adviser and community leader such as himself to spend time on the complaint. The purpose of the legislation is to stop rogue advisers who are incompetent or exploiting migrants, not to "nit-pick" at every single aspect of an adviser's work and to punish an adviser acting in good faith who is competent but had made a genuine mistake.

[20] Mr Guich states that he has dedicated his career as a licensed adviser to helping people and has created a sustainable business employing 13 New Zealanders. He has mentored countless immigration advisers in the industry, as well as represented well over five thousand clients. Mr Guich describes himself as highly educated and competent, having multiple university degrees and speaking four languages.

[21] According to Mr Guich, the complainant has fabricated many issues and blatantly lied about the primary basis of the complaint, yet he is the one who is being punished. He wants to know why the lies and fabrications have not been addressed. He also wonders why a client is allowed to make wild accusations that are not factual. A business competitor had instigated and advised the client to pursue the complaint. His crime or mistake was trying to help the complainant. He did not have the capacity to take on the appeal and was overworked.

[22] The complaint has taken two years and caused significant additional stress and work for himself. He has lost complete faith in the competence of the Immigration

Advisers Authority as a licensing body and this experience has made him question whether to continue in the industry.

[23] Mr Guich accepts the Registrar's suggestion of a caution but does not accept the proposed fine of \$1,000. He has suffered enough financial loss as a result of the Registrar's incompetence in failing to refer the complaint to his internal complaints procedure. It could have been easily resolved two years earlier with a more positive outcome for the parties. Instead it has consumed countless hours of his time in addressing the Authority and the Tribunal. It has led to depression and legal costs. He made a mistake from being overwhelmed, but apologised to the complainant and offered compensation. As the internal complaints procedure has not been accepted, he will not accept the fine and considers that it would be reasonable to waive it.

[24] It is Mr Guich's hope that the Tribunal will adopt a common sense and pragmatic approach and see that it was a one-off mistake from an extremely competent adviser who consistently provides high quality advice, undertakes significant *pro bono* advice and is one of the top in the industry. The fact that the Tribunal did not dismiss the complaint set a dangerous precedent allowing a client to bypass an internal complaints procedure and seek to crucify a competent, honest and genuine adviser for a one-off mistake. Mr Guich does not agree with the Tribunal's decision, but accepts both the decision and the caution. In addition to waiving the fine, the Authority should waive his upcoming licence application fee due to the unnecessary time, effort and stress that the process had caused him.

JURISDICTION

[25] 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.

² Immigration Advisers Licensing Act 2007.

[26] 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.

[27] 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.

[28] 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.

[29] 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

[30] 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

[31] 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

[32] Mr Guich has been found to have lacked diligence and due care in calculating an appeal period leading to an appeal being filed out of time. It had the effect of removing whatever chance the complainant had of succeeding in obtaining residence as a result of her application. She must have had a material chance of success as Mr Guich would not have advised her to proceed with the appeal unless the appeal had some merit.

[33] It is apparent from the complaint made to the Authority and the complainant's email on 19 September 2019 to the Tribunal that the failure to obtain residence had a significant effect on her. She states that it led to severe emotional and mental stress, as well as financial loss. No further details are given and nor do I know whether the effect is ongoing, as the complainant has not provided any submissions or supporting evidence to the Tribunal. It is not known what her current immigration status is in this country, if indeed she remains here.

[34] Mr Guich has always acknowledged that he made a mistake. However, despite the effect on the complainant of his failure to file the appeal on time, he has no remorse and appears to have learned nothing from the experience. Indeed, he attacks not only the complainant but also the Authority and the Tribunal. He seems to be of the view that it is everybody's fault, but his own, that he has faced disciplinary proceedings. As found in the Tribunal's earlier decision, Mr Guich's mistake, while isolated and made at a particularly busy time for him, was not merely an excusable human error. A diligent practitioner would not have calculated the appeal period in the way he did.

[35] Mr Guich criticises the Registrar's failure to refer the complaint to his own internal complaints procedure. He raised the same argument earlier and it was dealt with in the Tribunal's decision.⁷ Mr Guich's attitude towards the complainant shows no resolution would likely have resulted from any such process.

[36] It is accepted that Mr Guich makes a considerable effort to help migrants and business people in his community on a voluntary basis. He has done so for some years.

[37] I agree that a single error of this nature is not a cause for censure. Mr Guich will be cautioned. Should a lack of diligence in the future have adverse consequences for a client, the sanction may be graver.

[38] The Registrar seeks a financial penalty of \$1,000. I agree that a penalty is warranted. While the financial stress that Mr Guich says his business suffers from as a result of New Zealand's border lockdown in the face of the global pandemic, which I

⁷ Above n 1, at [61].

accept, might warrant waiving some or all of the penalty in the current circumstances, his attitude to the disciplinary process aggravates his misconduct. His lack of remorse and attack on the complainant shows that a financial penalty is warranted. Such a penalty carries with it an element of punishment for wrongdoing, appropriate in this case. As it was an isolated incident in an otherwise successful practice of a competent practitioner, the penalty should be low. I agree with the Registrar that \$1,000 would be appropriate.

[39] In his statement of reply to the Tribunal, Mr Guich offers the complainant a refund of her residence application fees of \$1,600.⁸ He had made such an offer to her as early as 29 May 2018 and refers to it again in his submissions to the Tribunal on sanctions. It is reasonable for him to show some contrition, so it will be directed.

OUTCOME

[40] Mr Guich is:

- (1) cautioned;
- (2) ordered to immediately pay to the Registrar \$1,000; and
- (3) ordered to immediately pay to the complainant \$1,600.

ORDER FOR SUPPRESSION

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

[42] There is no public interest in knowing the name of Mr Guich's client, the complainant.

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

⁸ Statement of reply (15 April 2019) at Part 3D, item 5.

⁹ Immigration Advisers Licensing Act 2007, s 50A.