

**IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL**

Decision No: [2021] NZIACDT 9

Reference No: IACDT 024/19

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

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

**BETWEEN** **SL**  
Complainant

**AND** **ANGELINA GABRIELLA  
MACKINTOSH**  
Adviser

**SUBJECT TO SUPPRESSION ORDER**

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**DECISION  
(Sanctions)  
Dated 5 May 2021**

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**REPRESENTATION:**

Registrar: Self-represented  
Complainant: Self-represented  
Adviser: P Moses, counsel

## INTRODUCTION

[1] Ms Angelina Gabriella Mackintosh, the adviser, acted for SL, the complainant, on a visa application. She concealed from the complainant the decline of the application. Ms Mackintosh also incorrectly advised the complainant she could work on an interim visitor visa.

[2] A complaint to the Immigration Advisers Authority (the Authority) was referred by the Registrar of Immigration Advisers (the Registrar) to the Tribunal. It was upheld in a decision issued on 4 March 2021 in *SL v Mackintosh*.<sup>1</sup> Ms Mackintosh was found to have been dishonest and negligent, both grounds for complaint under the Immigration Advisers Licensing Act 2007 (the Act).

[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 earlier decision of the Tribunal and will only be briefly summarised here.

[5] Ms Mackintosh, a licensed immigration adviser, is a director of Care Immigration Ltd, of Auckland.

[6] The complainant, a national of India, had a work visa due to expire on 6 March 2019. Ms Mackintosh was engaged on 19 July 2018 to seek a further work visa. An application was duly filed by Ms Mackintosh on 2 August 2018, but she did not respond to Immigration New Zealand's letter of 12 September 2018 seeking further information. Immigration New Zealand accordingly declined the work visa on 25 September 2018.

[7] Ms Mackintosh did not inform the complainant of the decline of the visa application. In answer to requests from the complainant for updates on the application, Ms Mackintosh would make excuses as to why there had been no decision. Some requests for updates went unanswered. When Ms Mackintosh finally told the complainant of the decline on 8 November 2018, she gave a false reason for the decline. Nor would she give the complainant a copy of the decision.

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<sup>1</sup> *SL v Mackintosh* [2021] NZIACDT 4.

[8] On 24 January 2019, Ms Mackintosh made a work visa application for the complainant but did not tell her. The complainant was led to believe that a reconsideration application she had instructed Ms Mackintosh to make had been made, but in fact Ms Mackintosh had not done so. Again, requests for updates were ignored or Ms Mackintosh would say she had followed it up and was waiting for a reply.

[9] Ms Mackintosh incorrectly advised the complainant on 11 February 2019 that she was able to continue working while holding an interim visitor visa, which had been granted pending the decision on her work visa application of 24 January 2019.

[10] That work visa application was declined on 16 April 2019. The complainant was duly advised about this by Ms Mackintosh. A request for reconsideration of the 16 April decision was made on 30 April 2019.

[11] The complainant's immigration status then became unlawful on 9 May 2019. A s 61 request was made by Ms Mackintosh on 14 May 2019, but it could not be considered as a reconsideration application had already been made.

[12] The complainant finally received the first decline letter (dated 25 September 2018) on 23 May 2019.

[13] On 31 May 2019, Immigration New Zealand advised the complainant that the reconsideration sought on 30 April 2019 was declined. One of the reasons given was she had been caught by the labour inspectorate working while on an interim visitor visa.

[14] On 10 June 2019, Ms Mackintosh made another s 61 application. This was successful and on 2 July 2019, Immigration New Zealand granted the complainant a visitor visa valid until 22 November 2019.

#### *Decision of the Tribunal*

[15] The Tribunal upheld the complaint of dishonest behaviour. Ms Mackintosh had dishonestly:

- (1) withheld notifying the first decline decision for the period from about 10 October (when Ms Mackintosh first became aware of the decline) until 8 November 2018;
- (2) given false information about the processing status of the first application;

- (3) told the complainant that the decline was due to problems at Immigration New Zealand, concealing from her the real reason (failing to answer Immigration New Zealand's letter) and hence also the agency's 12 and 25 September 2018 letters; and
- (4) inferred a reconsideration application had been made in relation to the 25 September decline.

[16] The Tribunal additionally found Ms Mackintosh to have been negligent in providing erroneous advice to the complainant that she could work while holding the interim visitor visa.

## **SUBMISSIONS**

### *Submissions from the Registrar*

[17] The Registrar, in his submissions of 23 March 2021, noted that this was Ms Mackintosh's first appearance before the Tribunal. It did not appear that she had undertaken any relevant training since 2009. Furthermore, the sanctions should reflect the serious nature of her conduct being not only negligent but, more significantly, dishonest, which was sustained for a period of approximately eight months from October 2018 to June 2019.

[18] It is acknowledged that Ms Mackintosh had accepted her wrongdoing and offered to remedy the mistakes, including repaying the fee of \$1,150. For that reason, despite the finding of dishonesty, it is submitted that suspension is not appropriate. However, it is appropriate to impose a penalty at the higher end of the scale in order to reflect her dishonesty.

[19] The Registrar submits that the appropriate sanctions would be:

- (1) censure;
- (2) an order that Ms Mackintosh completes the Post Graduate Professional Practice module (LAWS7015) offered by Toi-Ohomai Institute of Technology within 12 months of the date of this decision;
- (3) an order for payment of a penalty in the vicinity of \$6,000; and
- (4) an order for Ms Mackintosh to refund to the complainant \$1,370 (the fee of \$1,150 and Immigration New Zealand's reconsideration fee of \$220).

*Submissions from the complainant*

[20] In her submissions of 27 March 2021, the complainant requests a refund of the professional fee paid, but not the monies paid to Ms Mackintosh for Immigration New Zealand's reconsideration fee.

[21] The complainant points out that Ms Mackintosh repeatedly failed to comply with her professional obligations, on a matter which was the cornerstone of the complainant's career in New Zealand. As a result, she and her husband had been treated unfairly. They must be compensated \$10,000 for punitive damages, stress, pain and suffering. The complainant says that she had to stay at home for three months without work, which was stressful.

[22] According to the complainant, she is a very organised person who keeps in mind all risks. This was why she went to Ms Mackintosh in July 2018, nine months before the expiry of her visa. If she had known of Immigration New Zealand's decision in September 2018, she would have had six months before the visa expired to upskill and find a new job. But this opportunity was lost.

[23] While Ms Mackintosh had some technical problems, she did not bother to call and get an update on the complainant's application. A genuine effort was not made by her. Throughout the nine months, the complainant says, she was very patient. Her trust in Ms Mackintosh was shattered when she was given the first decline letter in May 2019.

[24] It is contended that Ms Mackintosh, as a professional, failed to protect the complainant's interest and must be held responsible for her conduct.

*Submissions from Ms Mackintosh*

[25] Mr Moses, counsel for Ms Mackintosh, produced submissions on 24 March 2021. He noted that Ms Mackintosh had already fully and frankly accepted her misconduct and had provided an explanation of the context in which it arose, but was not claiming the circumstances as a defence. She apologises to the complainant for the disruption and stress her conduct caused.

[26] In mitigation, counsel submits that the medical evidence suggests Ms Mackintosh may have been more unwell than she realised at the time. This did not excuse her conduct but was relevant to the assessment of sanctions.

[27] Counsel notes that Ms Mackintosh will already have to contend with the Tribunal's decisions being published unredacted. This is likely to adversely affect her practice and

potentially its profitability. Mr Moses acknowledges the Tribunal's jurisprudence to the effect that publication is not punitive in nature, but an aspect of consumer protection. Publicity is clearly a consequence intended by the Act for a breach of professional obligations, but it is a very significant sanction in its own right.

[28] In response to the Registrar's submissions on sanctions, Mr Moses acknowledges that censure is clearly a likely consequence in light of the finding of dishonesty. Ms Mackintosh also instructs that she accepts the Registrar's submission in relation to further training. It is noted that the cost of undertaking the relevant paper at Toi-Ohomai will be \$720 which might be taken into account in setting the level of the fine.

[29] As to the fine, there is no contest to the submission that a financial penalty is required. However, it is submitted that a penalty of the magnitude sought by the Registrar (\$6,000) is greater than required or appropriate. It should be noted that this is the first complaint against Ms Mackintosh.

[30] Counsel refers to the financial penalties imposed in a number of the Tribunal's earlier decisions. Some of the advisers in those decisions had not participated in the complaint process. But Ms Mackintosh displayed a mature attitude and cooperated in the investigation of the complaint and the proceeding before the Tribunal. This ought to weigh in her favour. It could give the Tribunal comfort that the key purposes of the legislation, being to maintain professional discipline and consumer protection, have already been achieved to a significant degree. It is further noted that participation in the process when instructing counsel imposes an additional financial burden.

[31] Counsel states that Ms Mackintosh's income for the financial year was below that of a person working fulltime on the minimum wage. It is acknowledged though that she took medical leave and had incurred additional expenses paying a contractor to undertake ongoing services to her clients. This was necessary to ensure the survival of her business. The financial situation of Ms Mackintosh's business is marginal.

[32] It is submitted that a starting point for the financial penalty commensurate with the earlier cases would be \$3,500. The various mitigating factors could then be deducted, including the difficult economic circumstances of Ms Mackintosh as a result of her health and the effect of the COVID-19 pandemic on immigration work generally. It is accepted that the victim should be put in a preferential position. A penalty of between \$2,000 and \$2,500 would therefore be appropriate, depending on the amount of any compensation sought by the complainant.

[33] There is no opposition to the Registrar's submission that the fee of \$1,150 be refunded. This had already been offered by Ms Mackintosh. As for the reconsideration fee of \$220, Ms Mackintosh did not use the funds for that purpose but did use it to pay Immigration New Zealand's s 61 fee of \$410. A refund of \$220 is not therefore appropriate.

[34] There is a support letter to the Tribunal from Mr Darrell Enright, a licensed immigration adviser, dated 23 March 2021. He has been providing contract services to Ms Mackintosh and her business, due to her medical leave. It ensures that her clients are properly represented at all times. He remains in that role. She is slowly recovering and intends to return to work fulltime as soon as possible. Ms Mackintosh is upset that she had acted unprofessionally and had let the client down.

[35] A medical report from Dr Garsing Wong, general practitioner, dated 22 March 2021, has been produced. He sets out the details of Ms Mackintosh's medical condition since she consulted him in May 2020. This included severe pain, starting in about 2018, that led to significant brain surgery in November 2020. She made very good progress but continues to suffer from certain effects. In his opinion, Ms Mackintosh would have been severely impacted by her condition since 2018 and this would have compromised her ability to work without her being aware of the impact on her abilities.

[36] Ms Mackintosh has also produced a brief report from her accountants (23 March 2021). It discloses what is currently a very modest income, due to a combination of her time off for health reasons and the COVID-19 pandemic. Her current financial performance is forecast to continue for the foreseeable future.

## **JURISDICTION**

[37] The Tribunal's jurisdiction to impose sanctions is set out in 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.

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

[38] 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.

[39] 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.

[40] 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.

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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).

...

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.

[41] 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>

[42] 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>

[43] 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.

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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 n 3, 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].

## DISCUSSION

[44] The starting point is the seriousness of Ms Mackintosh's deception of her client leading to upholding a complaint of dishonesty. Honest communications with clients and others are a fundamental mark of a professional person.

[45] This dishonesty was not an isolated incident. It went on over a period of about eight months from October 2018 (when Ms Mackintosh became aware of the first decline) until May 2019 (when the complainant was provided with a copy of the first decline letter). It involved numerous occasions when Ms Mackintosh falsely informed the complainant that the decision had not been made. Even when she disclosed the fact of the first decline (but not the letter itself), she falsely told the complainant that it was due to new staff making inconsistent decisions. This fabricated reason was later repeated.

[46] While the misconduct could not be described as a one-off incident, this is the first time Ms Mackintosh has appeared before the Tribunal.

[47] In addition to her dishonesty, Ms Mackintosh negligently informed the complainant that she could work on an interim visitor visa. This professional breach must also be taken into account in assessing sanctions.

[48] There was no finding that the misconduct of Ms Mackintosh was responsible for the failure of the complainant to obtain a work visa.<sup>7</sup>

[49] I accept that Ms Mackintosh has suffered from a serious medical condition. The evidence as to the extent to which she was affected at the relevant time in 2018 and 2019 has to be seen in the context of her not seeking medical assistance until about May 2020. It is also surprising that Ms Mackintosh did not earlier describe her condition to counsel as serious enough to be relevant to his previous submissions to the Tribunal (February 2020), if the effect was as debilitating as she seems to be saying now. Moreover, it is not apparent why the symptoms, notably the pain she says she suffered in 2018/2019, led her to lie to her client on numerous occasions.

[50] Nonetheless, I accept the evidence of Dr Wong as to Ms Mackintosh's current condition. It does not, however, excuse her conduct, as she acknowledges. I will take it into account in mitigation, not because it provides any relevant context to her actions at the time, but because it is highly relevant to her current circumstances, an important factor in assessing sanctions.

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<sup>7</sup> *SL v Mackintosh*, above n 1, at [103].

[51] I have already accepted that the initial problem lay with IT issues arising from working from home as well as personal pressures (settling into a new home). Ms Mackintosh's misconduct then escalated on realising the early mistake, as a result of being upset, ashamed and embarrassed. She candidly describes her behaviour as "stupid".

[52] Ms Mackintosh acknowledged making mistakes immediately on being notified of the formal complaint against her. She promptly offered a refund of the fee of \$1,150. When contacted by the Authority, Ms Mackintosh accepted her wrongdoing. She has been contrite since becoming aware of the complaint. I accept counsel's submission that Ms Mackintosh has learned her lesson and the Tribunal can take comfort from this. She has cooperated throughout the disciplinary process.

#### *Censure or caution*

[53] Ms Mackintosh acknowledges that she should be censured. A caution would not reflect the gravity of her misconduct. Ms Mackintosh is hereby censured.

#### *Training*

[54] Again, there is no dispute that it is appropriate for Ms Mackintosh to undertake Toi-Ohomai's professional practice paper. It will be directed.

#### *Financial penalty*

[55] The Registrar submits that \$6,000 would be an appropriate penalty, given the seriousness of Ms Mackintosh's breaches of the Act. Mr Moses relies on various decisions of the Tribunal and the current financial and health circumstances of Ms Mackintosh, contending that a penalty of between \$2,000 and \$2,500 would be appropriate.

[56] Mr Moses refers to *IK v Tian*, *KX v Ji*, *TBE v Proudman* and *IMH v Marica*.<sup>8</sup> The difficulty with relying on previous decisions of the Tribunal in assessing sanctions is that the details of the wrongdoing and the circumstances of both the adviser and the client are different in every case. Nonetheless, the Tribunal's earlier decisions do provide some guidance.

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<sup>8</sup> *IK v Tian* [2020] NZIACDT 47, *KX v Ji* [2020] NZIACDT 50, *TBE v Proudman* [2020] NZIACDT 52 & *IMH v Marica* [2021] NZIACDT 7.

[57] I do not regard the *Tian, Ji* or *Proudman* decisions (penalties \$3,000, \$4,000 and \$3,500 respectively) as comparable. The complaint upheld against Ms Tian did not involve dishonesty. Both Ms Tian and Mr Ji had two previous complaints upheld. Ms Proudman had failed to engage with the Tribunal. All three of them were either suspended or prevented from reapplying for a licence, reflecting their particular circumstances. Such a sanction can also lead to a lesser financial penalty, as the Tribunal will have regard to the totality of the sanctions in setting a penalty.

[58] The case most closely resembling the case against Ms Mackintosh is *Marica* (penalty \$1,500), but I note an earlier complaint had been upheld against that adviser. On the other hand, that adviser's conduct was of a lesser nature and the serious health condition she suffered had existed at the time of the wrongdoing and affected her work. In other words, while there is some similarity with the circumstances of Ms Mackintosh, they are not identical.

[59] It is right to take into account Ms Mackintosh's current financial circumstances, reflecting her health and the pandemic, the \$720 cost of the Toi-Ohomai paper and the monies directed to be paid to the complainant (see later). The financial penalty will be \$2,000.

#### *Refund and compensation*

[60] Ms Mackintosh has repeated her offer of a refund of her fee of \$1,150. It will be directed.

[61] The complainant has sought compensation of \$10,000. No specific expense or loss is identified. Rather it is a claim for general damages, both compensatory and punitive. The strict factors necessary to award the latter are not made out here.

[62] The compensatory general damages sought are for disruption and distress. I accept that the complainant would have suffered considerable stress waiting to be informed of a decision that in fact had already been made. She trusted Ms Mackintosh so waited patiently. The complainant was deceived by Ms Mackintosh over a prolonged period and perpetually lied to. It must be very upsetting to know you have been mistreated by a professional person in this way.

[63] However, it is the practice of the Tribunal to award only modest sums for stress and anguish. I must also take into account Ms Mackintosh's current circumstances. The compensation will be \$1,000.

## **OUTCOME**

[64] Ms Mackintosh is:

- (1) censured;
- (2) directed to enrol and complete Toi-Ohomai's LAWS 7015 paper at its next available intake in July 2021;
- (3) ordered to immediately pay to the Registrar the sum of \$2,000; and
- (4) directed to immediately pay to the complainant the sum of \$2,150.

## **ORDER FOR SUPPRESSION**

[65] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.<sup>9</sup>

[66] There is no public interest in knowing the name of Ms Mackintosh's client.

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

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D J Plunkett  
Chair

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<sup>9</sup> Immigration Advisers Licensing Act 2007, s 50A.