

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2022] NZIACDT 13

Reference No: IACDT 014/21

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **BU**
Complainant

AND **CHRISTOPHER MARK
McCARTHY**
Adviser

SUBJECT TO SUPPRESSION ORDER

**DECISION
(Sanctions)
Dated 20 June 2022**

REPRESENTATION:

Registrar: Self-represented
Complainant: Self-represented
Adviser: No appearance

INTRODUCTION

[1] The complainant, BU, engaged Christopher Mark McCarthy to assist her daughter-in-law, MT, who was in New Zealand unlawfully. Mr McCarthy took money to make a s 61 request for her and represented that such an application had been made, but in fact he did not do so.

[2] A complaint made 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 18 May 2022 in *BU v McCarthy*.¹ Mr McCarthy was found to have been misleading and 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 earlier decision of the Tribunal and will only be briefly summarised here.

[5] Mr McCarthy was a licensed immigration adviser and director of Corporate Migration NZ Ltd, of [Town]. His licence expired on 27 April 2022 and he is no longer licensed.

[6] The complainant and her son engaged Mr McCarthy in about December 2017 to assist the complainant's daughter-in-law, who was unlawfully in New Zealand, in making a s 61 request to Immigration New Zealand (Immigration NZ).² He and the son exchanged emails as the evidence supporting the request was compiled. Mr McCarthy wrote to the complainant on 18 April 2018 recording his instruction to seek a s 61 visa. He set out his fees and other matters of engagement. She paid his fee of \$4,025 in April 2018.

[7] Mr McCarthy and the complainant's son continued their exchange of emails. He advised the son on 6 May 2019 that he was reviewing the evidence and putting together the s 61 request.

[8] There followed emails from the complainant or her son from October 2019 seeking news of progress. Mr McCarthy did not always reply. On 16 October 2019, he advised the son that there had been no update but he would contact him again soon.

¹ *BU v McCarthy* [2022] NZIACDT 11.

² Immigration Act 2009, s 61 (discretionary visa for someone unlawfully in New Zealand).

Mr McCarthy appears to have stopped communicating with the family in November 2019. The family continued to ask him about the status of the request they thought had been made to Immigration NZ. This went on until 27 February 2021. There was no reply from him.

[9] Eventually, on 7 April 2021, the son contacted Immigration NZ and was told that his wife's visa had expired in March 2006 and no s 61 request had been made.

[10] The complainant made a complaint to the Authority in April 2021. In response, Mr McCarthy advised the Authority on 22 June 2021 that he had "largely failed to act" and no request had been made. He provided no explanation to the Authority or the Tribunal.

Decision of the Tribunal

[11] The Tribunal found that in failing to lodge a s 61 request, Mr McCarthy had been unprofessional and lacked diligence. This was a breach of cl 1 of the Code.

[12] Mr McCarthy was also found to have consciously allowed the family to believe that a request had been made. He pretended that an application had been made. His communication of 16 October 2019 was deliberately misleading and deceptive. The family thought a request had been made in mid-2019 and it was not until April 2021 that they came to realise something was wrong and contacted Immigration NZ directly. This satisfied the statutory ground of complaint of dishonest or misleading behaviour.

SUBMISSIONS

Submissions from the Registrar

[13] In his submissions of 2 June 2022, the Registrar, Mr Connor, notes that this is the first complaint against Mr McCarthy upheld by the Tribunal. He did not contest any of the allegations made and he chose not to explain his conduct. The Tribunal had found him to be misleading and to have breached cl 1.

[14] The Registrar observes that the consequences were significant for the complainant's daughter-in-law and son. She overstayed her visa for several more years while under the impression that steps were being taken to possibly regularise her status. The daughter-in-law and son therefore remained uncertain about their ability to continue living in New Zealand, while being given false hope that something was being done to secure their future together.

[15] It is submitted that Mr McCarthy has demonstrated a severe lack of professionalism and diligence and has misconducted himself in two ways:

- (1) Receiving payment but failing to follow through on lodging the request.
- (2) Actively engaging in dishonest or misleading behaviour by leading the client to believe that there was a request before Immigration NZ for consideration.

[16] Mr McCarthy no longer holds a licence. It is submitted that the appropriate sanctions would be:

- (1) Censure.
- (2) Prevented from applying for a licence for 12 months.
- (3) Ordered to pay a penalty in the vicinity of \$4,000.
- (4) Ordered to pay reasonable compensation to the complainant's son and daughter-in-law for their emotional and mental distress.

Submissions from the complainant

[17] In her email to the Tribunal on 30 May 2022, the complainant seeks a full refund of the sum of \$4,025 paid to Mr McCarthy. She notes that her daughter-in-law was in a very vulnerable position and rightly expected that her case would be presented to Immigration NZ in a timely and competent manner.

[18] The complainant said she had been greatly distressed by the lack of action considering she was the one who recommended Mr McCarthy. She supported the recommendation that no renewal of Mr McCarthy's licence be granted.

Submissions from Mr McCarthy

[19] There are no submissions from Mr McCarthy.

JURISDICTION

[20] 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:³

³ Immigration Advisers Licensing Act 2007.

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.

[21] 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.

[22] 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.

[23] The focus of professional disciplinary proceedings is not punishment, but the protection of the public:⁴

...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.

[24] 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 collective reputation and public confidence in the profession itself.⁵

[25] 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.⁶

[26] The most appropriate penalty is that which:⁷

- (a) most appropriately protects the public and deters others;
- (b) facilitates the Tribunal's important role in setting professional standards;
- (c) punishes the practitioner;

⁴ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151].

⁵ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724–725 & 727; *Bolton v Law Society* [1994] 2 All ER 486 (EWCA) at 492; *Z v Dental Complaints Assessment Committee*, above n 4, at [151].

⁶ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at [28].

⁷ *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].

- (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

[27] The misconduct found by the Tribunal is serious. Mr McCarthy deliberately deceived his client into believing that a request for a visa had been made to Immigration NZ, when in fact no such request had been made. This deception endured for about 18 months. The consequences for the complainant's daughter-in-law were serious, as she was already unlawfully in New Zealand at the time Mr McCarthy was engaged. He was not responsible for her unlawful status, but it was extended by about three years as a result of his lack of diligence and then his deception. The longer the daughter-in-law was in New Zealand unlawfully, the more difficult it became to regularise her situation.

[28] Mr McCarthy's professional misconduct is exacerbated by his contempt for the disciplinary process. He provided no explanation to the Authority and has not engaged at all with the Tribunal.

[29] The Tribunal will now consider the sanctions that might be relevant.

Caution or censure

[30] Mr McCarthy is censured. A caution would not reflect the Tribunal's disapproval of his conduct.

Preventing reapplication

[31] Mr McCarthy is no longer licensed, so the issue of cancelling his licence does not arise. The Registrar seeks an order preventing Mr McCarthy from applying for a licence for a period of 12 months.

[32] Mr McCarthy deceived the complainant and her family over an extended period. It is appropriate, given the gravity of his misconduct, that there be a period of prohibition.

It is not opposed by Mr McCarthy. He was expressly invited to make submissions on the issue of preventing his re-application, but he has chosen not to do so.

[33] In light of Mr McCarthy's attitude to the disciplinary process, the public need to be protected for as long as the statute permits. The Tribunal has no confidence Mr McCarthy has learned anything from this complaint. He will be prevented from reapplying for any licence for the maximum period of two years.

Financial penalty

[34] The Registrar submits that \$4,000 would be an appropriate penalty. There are no submissions from Mr McCarthy.

[35] The maximum penalty is \$10,000, but Mr McCarthy's misconduct is not the worst seen by the Tribunal. While there was pecuniary gain to him, the complaint lodged with the Tribunal did not allege that he fraudulently took the money knowing that he would not undertake any work. He made no fraudulent immigration applications. Accordingly, while there is deception, there is no fraud as such.

[36] Having regard to the daughter-in-law's situation which required urgent attention, the Tribunal agrees with the Registrar and will impose a penalty of \$4,000.

Refund or compensation

[37] The complainant seeks a refund of the fee of \$4,025 paid. She received no value whatsoever from his services. The refund is not opposed by Mr McCarthy. He will therefore be ordered to refund the full fee.

[38] While no specific compensation is sought by the complainant, the Registrar draws the Tribunal's attention to the ability to award compensation for emotional distress.⁸ It is not opposed by Mr McCarthy.

[39] The complainant says she was greatly distressed herself, as she was the person who had recommended Mr McCarthy to her daughter-in-law and son. It appears that Mr McCarthy regarded her as his client, as he sent the "agreement" to her for signing. She paid his fee. Plainly, there would have been considerable distress to the daughter-in-law herself. Her immigration status was unlawful (which was not Mr McCarthy's fault), but as a result of his deception, she thought he was attending to regularising her status.

⁸ See *Unnikrishnan v Goldsmith* [2017] NZIACDT 22 at [30]–[31], *ZT v Li* [2020] NZIACDT 38 at [61].

It must have been anxious and stressful to have learned he had done nothing over such a prolonged period.

[40] The Tribunal makes only modest awards of such compensation. An award of \$2,000 will be made.

OUTCOME

[41] Mr McCarthy is:

- (1) Censured.
- (2) Prevented from reapplying for any licence for two years from today's date.
- (3) Ordered to immediately pay to the Registrar \$4,000.
- (4) Ordered to immediately pay to the complainant \$6,025.

ORDER FOR SUPPRESSION

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

[43] There is no public interest in knowing the name of Mr McCarthy's client, the complainant or her daughter-in-law.

[44] The Tribunal orders that no information identifying the complainant or daughter-in-law is to be published other than to Immigration NZ.

D J Plunkett
Chair

⁹ Immigration Advisers Licensing Act 2007, s 50A.