

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2020] NZIACDT 7

Reference No: IACDT 016/18

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **NLT**
Complainant

AND **KELLY DEE COETZEE**
Adviser

SUBJECT TO SUPPRESSION ORDER

**DECISION
(Sanctions)
Dated 10 February 2020**

REPRESENTATION:

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

INTRODUCTION

[1] The complaint by NLT, the client and complainant, against Ms Kelly Dee Coetzee, the adviser, was upheld by the Tribunal in a decision issued on 10 December 2019 in *NLT v Coetzee*.¹

[2] The Tribunal found that Ms Coetzee had failed to enter into a written client services agreement with the complainant and had failed to exercise due care, since she had given him incorrect advice as to whether he could lawfully work in New Zealand as an independent contractor.

[3] Ms Coetzee admits breaching the Licensed Immigration Advisers Code of Conduct 2014 (the Code).

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

BACKGROUND

[5] 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.

[6] Ms Coetzee, a licensed immigration adviser, is a director of Immigration Central Ltd, based in Auckland. The complainant is an Indian national who instructed Ms Coetzee from India, but came to New Zealand while she was acting for him.

[7] In addition to immigration services, Ms Coetzee acted for the complainant in relation to employment consultation services. It was Ms Coetzee who found the complainant a job as a health professional at a health centre in a tourist location in New Zealand.

[8] On 4 December 2015, Ms Coetzee filed an application with Immigration New Zealand for a work visa for the complainant. The visa was approved on 12 January 2016, giving him permission to work for the named employer for 36 months.

[9] The complainant arrived in New Zealand on 26 January 2016 and met with Ms Coetzee the following day. At the meeting, she presented him with an addendum to the employment agreement which had been provided by the employer. It stated that the earlier contract was null and void and he would be employed as an independent contractor. She advised him it would be okay to work as a contractor, if he wanted to. The complainant signed the addendum at that meeting.

¹ *NLT v Coetzee* [2019] NZIACDT 81.

[10] The complainant duly took up the position offered. He commenced work as a contractor, but an issue arose as to the nature of his employment given concerns expressed by him and/or Ms Coetzee as to the effect of this on his immigration status. At some point, the employer started treating the complainant as an employee in order to assist him to obtain residence.

[11] On 3 August 2016, the complainant sent an email to Ms Coetzee expressing confusion as to whether he should be a permanent employee or a contractor. Ms Coetzee replied on the same day advising that he could get residence as a contractor and she would help him with the immigration side of things.

[12] The complainant and the employer entered into an independent contractor contract on about 21 September 2016.

[13] On 7 October 2016, Ms Coetzee telephoned Immigration New Zealand and was informed that the complainant could not be an independent contractor without holding an open work visa. On the following day, Ms Coetzee advised the employer that the complainant could not be a contractor until he obtained the correct visa.

[14] The complainant resigned from his role on 25 November 2016 and allegedly continued working as a self-employed contractor.

[15] The complainant made a complaint against Ms Coetzee to the Immigration Advisers Authority (the Authority) on about 15 March 2017.

[16] On 17 May 2017, the complainant was issued with a deportation liability notice by Immigration New Zealand. He subsequently departed New Zealand.

Decision of the Tribunal

[17] The Tribunal found that Ms Coetzee did not have a written client services agreement with the complainant. It was further found that this failure was not due to any flagrant disregard by Ms Coetzee of her professional obligation, but was a requirement that had simply been overlooked. This was a breach of cl 18(a) of the Code.

[18] It also found that Ms Coetzee's advice to the complainant that he could become an independent contractor without affecting his visa status was erroneous. This advice was given twice, being at their meeting on 27 January 2016 and again in her email of 3 August 2016. If there was any uncertainty in Ms Coetzee's mind as to whether the complainant was permitted to work as a contractor, she should have sought advice from Immigration New Zealand much earlier than she did on 7 October 2016.

[19] There was a failure by Ms Coetzee to exercise due care, a breach of cl 1 of the Code. It was accepted that she had not connived with the employer to deprive the complainant of his employment status as an employee by ambushing him with an addendum to the agreement on his arrival in this country. There was no evidence of dishonesty on her part.

[20] The wrong advice could not be described as trivial. It put the complainant at risk of cancellation of his visa since he was working for the employer as an independent contractor in breach of his visa conditions. There was a high level of carelessness.

SUBMISSIONS

Registrar's submissions

[21] Counsel for the Registrar, Mr Gray, in his submissions of 23 December 2019, notes that this is Ms Coetzee's first appearance before the Tribunal. He submits that she should be cautioned and ordered to pay a penalty in the vicinity of \$2,000.

The complainant's submissions

[22] In his submissions of 19 January 2020, the complainant emphasises that both Ms Coetzee and his employer wrongly told him he could work as an independent contractor, in breach of his visa conditions. He spent a lot of money to get his visa, including a huge fee to Ms Coetzee. As his wife's visa was dependent on his, she lost it when he lost his. They failed to sell their business in the period of 28 days they were given after the visas were cancelled. He paid a huge fee to a lawyer who sought the cancellation of deportation. He seeks reasonable compensation for his loss.

[23] The complainant says his entire dream of migrating to New Zealand has been broken. He has suffered a lot of emotional, mental, physical and financial stress.

Ms Coetzee's submissions

[24] Counsel for Ms Coetzee, Mr Moses, in his submissions of 10 January 2020, records that Ms Coetzee accepts the breaches of the Code found by the Tribunal. It is contended that Ms Coetzee's breaches are at the lower end of the spectrum, notwithstanding that they relate to matters of principle and fundamental importance. They were inadvertent. The Tribunal therefore ought to have a predominantly rehabilitative or restorative approach, rather than a punitive focus.

[25] Counsel advises that, as a result of the complaint and the Tribunal's decision, Ms Coetzee has gained a much greater understanding of the issues in this situation.

[26] Mr Moses notes the adverse publicity attendant on publication of the Tribunal's decisions is a very significant sanction in its own right. Furthermore, Ms Coetzee will have to bear the costs of legal representation in responding to the complaint, which are frequently greater than financial penalties at the lower end of the scale.

[27] It is observed by counsel that the events leading to the complaint occurred between 2014 and 2016 and since then Ms Coetzee has continued to practice without attracting any adverse attention. Her misconduct was an isolated incident and does not show that her practice suffers from any general or systemic flaws. She responded to the complaint in a mature and responsible manner.

[28] Counsel takes no issue with the Registrar's position concerning sanctions. It is agreed that a caution is appropriate as is a fine at the lower end of the spectrum. It is submitted that a fine of \$1,000 would be appropriate.

JURISDICTION

[29] 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.

[30] 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:

² Immigration Advisers Licensing Act 2007.

- (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.

[31] 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.

[32] 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.

...

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

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.

[33] 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

[34] 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

[35] 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

[36] The Tribunal has made the point many times, as Mr Moses accepts, that the requirement to have a written agreement which contains all the details required by the Code is not a mere technicality. It is a critical document which provides important

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].

information to a client about an adviser's services, fees, professional obligations and complaints process. Ms Coetzee herself accepts this.

[37] While there have been breaches of important professional obligations, I broadly accept Mr Moses' contention that Ms Coetzee's misconduct is at the lower end of the spectrum. I note, however, the high degree of carelessness in relation to the advice about being an independent contractor. This could have had serious consequences for the complainant. However, by the time he left the employer and decided to work unlawfully as an independent contractor, he would have known he was in breach of his visa. The deportation process was not Ms Coetzee's fault.

[38] It is also the first time Ms Coetzee has appeared before the Tribunal in about seven years of practice as a licensed adviser. There is no systemic problem with her professional practice.

[39] Ms Coetzee's approach to the disciplinary process has been mature and responsible, as Mr Moses points out. She has taken the opportunity to learn from the process and now has a much greater understanding of her professional obligations.

[40] I further take into account the inevitable sanction of adverse publicity resulting from the Tribunal's decisions as well as the burden of paying for legal representation. While acknowledging these factors, their effect on the sanctions to be imposed by the Tribunal is limited since they are the natural consequences of Ms Coetzee's conduct.

Caution or censure

[41] Turning then to the appropriate sanctions, I agree with both counsel that a caution, rather than censure, is appropriate.

Financial penalty

[42] As for the financial penalty, Mr Gray contends that \$2,000 would be appropriate. Mr Moses submits that the \$1,000 penalty imposed in *Gong*⁷ provides a relevant comparison. He also refers the Tribunal to *Parekh*⁸ where there was no penalty. These decisions are useful, but inevitably the totality of the wrongdoing, the circumstances of the adviser and the cumulative sanctions (which can affect the level of financial penalty) in those cases are different from those applicable here.

⁷ *NTT v Gong* [2019] NZIACDT 65.

⁸ *HES v Parekh* [2019] NZIACDT 47.

[43] The penalty will be \$1,500.

Refund of fees and compensation

[44] According to the complainant, he has incurred a huge loss as a result of Ms Coetzee's wrong advice that he was permitted to be an independent contractor. He claims all the expenses of travelling to New Zealand, his professional registration, IELTS (English examination) fees and the like. He seeks not just a refund of Ms Coetzee's fees, but also the fee paid for a lawyer to prevent deportation. In addition, there was the loss on the household items and car which were unsold when he and his wife had to leave New Zealand.

[45] The complainant also says that he and his wife failed to sell "our businesses" and a few people employed in his wife's clinic lost their job.

[46] I will deal with compensation first, before considering whether any of Ms Coetzee's fee should be refunded.

[47] The Tribunal can award compensation for loss attributable to an adviser's misconduct. The loss must be caused by or relate to or arise from the wrongdoing. In the case of Ms Coetzee, there were two heads of complaint upheld. The first was the lack of a client agreement. The second was incorrect advice given to the complainant that he could work as an independent contractor.

[48] It is plain that no loss to the complainant arose out of the failure of Ms Coetzee to enter into a written client contract with him.

[49] Turning then to the incorrect advice Ms Coetzee gave, the issue is whether the various expenses and losses claimed arose in some material way from Ms Coetzee's erroneous advice.

[50] The cost of travelling to New Zealand to work, including professional registration, could not be said to have been incurred or wasted because of the wrong advice. The complainant came to New Zealand because Ms Coetzee found him a job. It was a real job. It required him to be professionally registered and, self-evidently, to travel to New Zealand. They are expenses he had to incur irrespective of Ms Coetzee's later mistaken advice.

[51] The complainant duly took up that job. He appears to have been there for just under one year. While an issue arose as to whether he would be better off if he was an independent contractor rather than an employee and Ms Coetzee wrongly informed him

he could be a contractor, there is no evidence he left that job because of that advice or even because of that issue. The complainant appears to have fallen out with the employer, but I do not know why.

[52] Once the complainant left the employer, he worked as an independent contractor, but I do not know whether he had another “employer” or just set himself up in business. However, by the time he did this in about late 2016 or early 2017, he knew from Ms Coetzee that he could not lawfully work as a contractor given his visa. He was told this in October 2016.

[53] It follows that the deportation process, starting in May 2017, with its attendant costs and inability to sell his furniture and car, was not caused by Ms Coetzee’s much earlier wrong advice. The evidence points to the complainant choosing, once he had left the employer, to work as a contractor in breach of his visa conditions. This was because he perceived such a status to be more financially rewarding for him.

[54] The complainant says that he and his wife failed to sell “our businesses”. I do not know what this business was. His visa did not allow him to work in any business apart from the employer. I do not know what business his wife had, or whether she had a visa to work in any business owned by her or them. There is no evidence that she had immigration permission to own and operate her own business. It is clear that he, and possibly both of them, were working contrary to their visas. Ms Coetzee is not responsible for their claimed losses on any business.

[55] I therefore decline to award any compensation. The various expenses and losses claimed do not arise from Ms Coetzee’s misconduct.

[56] This brings me to the claim for a refund of the fees paid to her. Again, I do not find this to be justifiable. The complainant received from Ms Coetzee what he had contracted for. In respect of the immigration services she contracted to provide, she obtained a work visa for him. There is no evidence he had any problems with Immigration New Zealand while working for that employer, even though he was doing so for a period in breach of his visa as a result of Ms Coetzee’s wrong advice.

[57] I decline to order the refund of any part of the fees.

OUTCOME

[58] Ms Coetzee is:

- (1) cautioned; and

(2) ordered to immediately pay to the Registrar the sum of \$1,500.

ORDER FOR SUPPRESSION

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

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

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

D J Plunkett
Chair

⁹ Immigration Advisers Licensing Act 2007, s 50A.