IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2020] NZIACDT 11

Reference No: IACDT 021/18

IN THE MATTER	of a referral under s 48 of the Immigration Advisers Licensing Act 2007
BY	**THE REGISTRAR OF IMMIGRATION ADVISERS** Registrar
BETWEEN	**TI(G)M** Complainant
AND	**ANNE MARIE HANNING** Adviser

SUBJECT TO SUPPRESSION ORDER

DECISION
(Sanctions)
Dated 21 February 2020

REPRESENTATION:

Registrar:	Self-represented
Complainant:	Self-represented
Adviser:	Self-represented

INTRODUCTION

[1] Ms Anne Marie Hanning, the adviser, represented the complainant on an application for a work visa. She failed to enter into a client agreement with him and failed to recognise that his employment documents did not comply with Immigration New Zealand's visa instructions. The complaint was upheld in a decision issued on 9 January 2020 in *TI(G)M v Hanning*.[1]

[2] It is now for the Tribunal to determine the appropriate sanctions. The essential issue is the extent to which the Tribunal should award compensation to the complainant.

BACKGROUND

[3] 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.

[4] Ms Hanning is a licensed immigration adviser and director of Hanning Immigration Adviser & Management Services Ltd, of Invercargill.

[5] The complainant had been living in New Zealand for more than 10 years and worked as a supervisor of vineyard workers. Ms Hanning had represented him on immigration matters for some years.

[6] Ms Hanning filed an application with Immigration New Zealand on about 18 August 2017 for a work visa for the complainant under the South Island Contribution category. It was declined on 24 November 2017 on two grounds. First, he had not advised the agency in 2012 when he had ceased earlier employment. Second, the employment agreement filed in support of his application did not guarantee the minimum number of weekly hours required by immigration instructions.

[7] A complaint was made by the complainant to the Immigration Advisers Authority (the Authority). It was referred to the Tribunal by the Registrar of Immigration Advisers (the Registrar), the head of the Authority.

Decision of the Tribunal

[8] The Tribunal found that Ms Hanning did not enter into a new written agreement with the complainant when he instructed her in 2017 to proceed with the application under the South Island Contribution category. Her explanation was that she had entered into an agreement with him some years previously and was not aware it had to be

[1] *TI(G)M v Hanning* [2020] NZIACDT 1.

updated when a new visa category was instructed. Ms Hanning did not provide the old agreement to the Authority or the Tribunal. Even if there was such an agreement, it would not comply with the current Licensed Immigration Advisers Code of Conduct 2014 (the Code). In any event, an agreement had to be updated every time the client instructed a new application to be made.

[9] The Tribunal also found that Ms Hanning did not conduct herself with diligence or due care, since she failed to identify the missing provision from the employment contract (relating to guaranteed minimum hours). She had been aware that this had been a problem with the particular employer. Ms Hanning had relied on an assurance from the employer in relation to another client that the standard contract had been fixed, but that was something she should have checked herself. She had compounded that unprofessional performance by failing to respond to Immigration New Zealand's notification of the problem with the employment agreement on 14 November 2017. Ms Hanning additionally failed to exercise diligence and due care in failing to identify the problem with the complainant's lack of income in 2012 and 2013.

[10] Ms Hanning was found to be in breach of cls 1 and 18(a) of the Code.

SUBMISSIONS

Registrar's submissions

[11] The Registrar filed submissions on his own behalf on 29 January 2020. He submits that it would be appropriate for the Tribunal to caution Ms Hanning and to order the payment of a penalty in the vicinity of $2,000. It is noted that this is Ms Hanning's first appearance before the Tribunal. Nevertheless, the penalty should reflect her failure to fulfil the basic duties expected of an adviser, such as providing a written agreement.

The complainant's submissions

[12] In his submissions of 26 January 2020, the complainant seeks a refund of fees and reimbursement for the losses and expenses said to have been incurred as a result of the failure of Ms Hanning to "coordinate our immigration status in the manner she was contracted to do".

[13] The following is claimed:

Ms Hanning's fees	$	920.00
Immigration fees (South Island Contribution visa)	$	635.00
Lost income complainant Dec 2017 to Apr 2018	$	16,800.00

Lost income partner Dec 2017 to Apr 2018	$	14,800.00
New adviser's fee s 61 request	$	600.00
Visitor permit (2 people)	$	730.00
New adviser's "work visa and adviser fees"	$	1,491.00
New adviser's "Ministerial Review and adviser fees"	$	1,500.00
	$	**37,476.00**

[14] These figures are said by the complainant to be conservative. He has not included costs which he could not quantify.

[15] It is contended that it is not extravagant to ask Ms Hanning to refund this money as he and his partner have suffered loss. According to the complainant, Ms Hanning must have been earning $40,000 per month and as she was operating from a home in Invercargill, she would not have had high rent or business costs.

[16] In a further email to the Tribunal on 4 February 2020, the complainant advised developments on his immigration status since finding a new immigration adviser. By the time the new adviser had legalised his immigration status and that of his partner under s 61 of the Immigration Act 2009, he was too late to again seek a South Island Contribution visa. His new adviser therefore sought a special direction from the Minister of Immigration, who granted him a work to residence visa on 17 October 2019 as an exception to instructions.

[17] According to the complainant, what upsets him and his partner is that they are behind where they could have been. They cannot buy a house as they are still not residents. The financial consequences of Ms Hanning's failures had been extremely expensive and stressful.

Ms Hanning's submissions

[18] In her submissions of 3 February 2020, Ms Hanning starts by accepting that she failed to obtain a new agreement with the complainant. She had now rectified this and every client had "an application" (presumably an agreement) for every visa managed.

[19] Ms Hanning explains that at the time of Immigration New Zealand's adverse information letter of 14 November 2017, she was very busy and was ill with the flu which affected her ability to respond to the letter. She accepts that mistakes were made and that she should have checked the employment contract. Nonetheless, her actions were not intentional, incompetent, dishonest or misleading. It is accepted by her that she may

have been negligent in relation to her duty of care while she was ill. Ms Hanning said she had endeavoured to provide a service to her client but had made mistakes.

[20] According to Ms Hanning, she had never charged exorbitant fees for her services and had been told by other advisers and even clients that she should be charging more. She was aware of the income of many clients, so was reasonable in her fees. Ms Hanning said she had even discounted her low fees, including to the complainant. She did not charge him for his partner's application. In some "serious cases" (deportations), she had provided services free of charge. Her fees are not high and she does not earn the ridiculous income implied by the complainant.

[21] Ms Hanning says she will cover the costs incurred by the complainant for the initial work to residence visas for him and his partner.

[22] In conclusion, Ms Hanning points out that in 10 and a half years as a licensed immigration adviser, there have been no other complaints against her.

JURISDICTION

[23] 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**
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> After hearing a complaint, the Tribunal may—
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> (a) determine to dismiss the complaint:
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> (b) uphold the complaint but determine to take no further action:
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> (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.

[24] The sanctions that may be imposed are set out at s 51(1) of the Act:

> **51 Disciplinary sanctions**
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> (1) The sanctions that the Tribunal may impose are—
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> (a) caution or censure:
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> (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.

[25] In determining the appropriate sanction, it is relevant to note the purpose of the Act:

> **3 Purpose and scheme of Act**
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> 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.

[26] 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.
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> …
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> 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.
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> …

[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.

[27] 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]

[28] 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]

[29] 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

[30] The Tribunal has said on numerous occasions that the obligation to have a client agreement is important. It provides critical information for a client, particularly concerning the adviser's professional obligations and complaint processes. It also sets out clearly

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[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].

the services to be performed by the adviser and the fees. It protects both the client and the adviser.

[31] There was also a relatively high degree of carelessness or negligence in failing to identify the glaring omission as to guaranteed minimum hours. Ms Hanning was aware that it had been a problem with the standard agreement of this employer. She had also failed the complainant twice, once when the visa application was filed and then when she overlooked Immigration New Zealand expressly identifying the problem in the 14 November 2017 letter.

[32] I take into account that this is Ms Hanning's first appearance before the Tribunal in more than 10 years as a licensed adviser. Furthermore, she has, in substance, acknowledged her failings and corrected the systemic failure to enter into a client agreement for every new visa instructed.

[33] I dismiss the complainant's speculation as to Ms Hanning's income. It is extravagant.

[34] I will now consider the sanctions that might be appropriate.

Caution or censure

[35] As this is Ms Hanning's first appearance before the Tribunal, I agree with the Registrar that her failures warrant a caution only. Her illness at the time she replied to Immigration New Zealand's letter is no defence, but provides some mitigation.

Financial penalty

[36] There were two professional breaches by Ms Hanning. The first was she had no written agreement with the complainant.

[37] The second breach of the Code was a lack of diligence or due care. This itself had two aspects. First, on two occasions, Ms Hanning overlooked the important contract omission (minimum hours), even after Immigration New Zealand had raised it as a problem. This failing likely prejudiced the complainant, an issue to which I will shortly turn. Second, Ms Hanning did not identify the problem with the complainant's lack of income in 2012 and 2013.

[38] The Registrar submits $2,000 would be an appropriate penalty. I agree, but it is right to maximise the amount of money available to pay some compensation to the

complainant. In setting the penalty, I will take into account the total financial cost of the sanctions on Ms Hanning.

[39] The financial penalty will be $1,000.

Refund and compensation

[40] The complainant seeks $37,476. This is claimed to be the loss incurred by him and his partner as a result of what is said to be the failure of Ms Hanning to "coordinate our immigration status".

[41] I will start with considering whether any refund of Ms Hanning's fee should be made by her. She charged $920 for the visa applications of the complainant and his partner (incl GST). I do not know the nature of the partner's visa, but assume it was dependent on the grant of the complainant's visa. In any event, Ms Hanning raises no objection to a refund. The visa applications were unsuccessful. In light of the failure to identify the employment contract omission, Ms Hanning bears some responsibility for that outcome.

[42] I will direct that $920 be refunded to the complainant. In addition, the complainant claims Immigration New Zealand's fees of $635. Again, there is no objection by Ms Hanning to a refund, so it will also be directed.

[43] This brings me to the claim for compensation in the form of lost income and the fees paid to the new adviser and Immigration New Zealand for subsequent applications.

[44] The Tribunal can award compensation for loss attributable to an adviser's wrongdoing. The loss must relate to or arise from the wrongdoing.[7] The complainant seeks $37,476, a large sum. The greater the sum claimed, the more cogent must be the evidence of the link between the loss and the wrongdoing.

[45] Indeed, the Tribunal has doubted that Parliament intended it to assess significant claims for compensation in the context of a disciplinary process.[8] That is what the general courts are established to determine. The Tribunal can, however, award modest sums for losses linked to an adviser's wrongdoing. It can also award modest amounts for inconvenience and stress, somewhat akin to general damages.[9]

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[7] *Zhang & Cao v Chen* [2019] NZIACDT 11 at [67]–[68].
[8] Above n 7.
[9] *Unnikrishnan v Goldsmith* [2017] NZIACDT 22 at [30]–[31].

[46] Starting with the new adviser's fees, I do not intend to direct their reimbursement. Having directed the refund of the fees of Ms Hanning for the failed applications of the complainant and his partner, the complainant cannot expect Ms Hanning to also pay the fees of an adviser to obtain further visas for the two of them. They needed further visas when he instructed her in the first place. The complainant was always going to incur fees for visas, as their then visas were due to expire.

[47] It is difficult to assess whether the complainant paid more to the new adviser than he could have expected to pay Ms Hanning. His South Island Contribution work visa application may not have been successful even if Ms Hanning had performed properly. She was not responsible for the complainant's failure to report to Immigration New Zealand that he had ceased employment in 2012/2013. She had in fact adequately explained it in response to Immigration New Zealand's adverse information letter of 14 November 2017, yet the agency still declined the visa partially on this ground.

[48] It has not been shown that the work visa application would necessarily have been successful had it not been for Ms Hanning's lack of care. Hence, it is not appropriate to require Ms Hanning to pay the later fees incurred by the complainant.

[49] Finally, the complainant claims his lost income and that of his partner.

[50] The complainant seeks $16,800 for himself and $14,800 for his partner. This amounts to $31,600. It is a substantial sum, particularly when compared to Ms Hanning's fee of $920. In determining what would be "reasonable" compensation, it is appropriate to have regard to the modest level of her fee.

[51] I do not intend to award any compensation in respect of the partner's loss of income. I know little of her circumstances. Furthermore, it would result in an award which would be unreasonably high.

[52] As for the complainant's lost income of $16,800, it is reasonable to make some award, since he had a good chance of a South Island Contribution work visa if Ms Hanning had performed properly. On the other hand, it has not been shown that Ms Hanning is entirely responsible for the failed visa application, so it would not be reasonable to order payment of the full amount. Nor has the complainant shown that he would necessarily have had work in the period from December 2017 to April 2018 if he had received a work visa. There have been periods in the past when he could not obtain work.

[53] I direct that Ms Hanning pay $6,000 compensation to the complainant for lost income. This is the contribution towards his loss that I consider reasonable for her to pay.

[54] As it is not my role to assess whether the complainant could succeed in a breach of contract action against Ms Hanning for his lost income and that of his partner, he may consider pursuing the balance of the claim in the appropriate forum for such civil claims. Depending on the amount claimed, it could be the District Court or the Disputes Tribunal. He will have to prove a cause of action and direct loss in the usual way.

[55] The complainant has not sought compensation for general damages, but given the partial award for lost income, I would not in this case add anything further for inconvenience, anxiety or stress. The award already made is the maximum compensation I regard as reasonable.

OUTCOME

[56] Ms Hanning is:

(1) cautioned; and

(2) ordered to immediately pay to the Registrar the sum of $1,000.

(3) ordered to immediately pay to the complainant the sum of $7,555.

ORDER FOR SUPPRESSION

[57] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.[10]

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

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

D J Plunkett
Chair

[10] Immigration Advisers Licensing Act 2007, s 50A.