

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2020] NZIACDT 12

Reference No: IACDT 024/18

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **TSO**
Complainant

AND **OLGA ANATOLIEVNA
(OLIA) ESSINA**
Adviser

SUBJECT TO SUPPRESSION ORDER

**DECISION
(Sanctions)
Dated 27 February 2020**

REPRESENTATION:

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

INTRODUCTION

[1] Ms Essina, the adviser, represented the complainant on an unsuccessful work visa application. It was alleged in the complaint that Ms Essina concealed from Immigration New Zealand an assessment of the complainant's trade certificate by the New Zealand Qualifications Authority (NZQA), misrepresented to the complainant the reasons an earlier visitor visa had been declined and then offered him money if he withdrew the complaint. The complaint was upheld in a decision issued on 16 January 2020 in *TSO v Essina*.¹

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

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 Essina was at the relevant time a licensed immigration adviser based in Auckland. She was a director of Approved Immigration Ltd (Approved Immigration). Her licence expired on 21 October 2018 and has not been renewed.

[5] In addition to her immigration consultancy, Ms Essina operated another business which provided job search and recruiting services.

[6] The complainant, a national of India residing in Singapore, sought to migrate to New Zealand. He lodged a visitor visa application on 10 December 2015. It was supported by an invitation to him from Ms Essina in her capacity as a job search/recruiting consultant, to attend an interview with a client of her company. She issued similar invitations to other Indian nationals working in Singapore as welders. Immigration New Zealand declined the application on 22 December 2015 as it was not satisfied he was a genuine visitor.

[7] On 24 December 2015, the complainant entered into a service contract with Ms Essina's job search company. The company would assist him to find a job.

[8] An NZQA assessment, dated 14 August 2016, was obtained. It assessed the complainant's trade certificate at the lowest level 1. An administrator from Ms Essina's job search company requested certain information from the complainant on 25 August 2016, so NZQA could be asked to reconsider its assessment.

¹ *TSO v Essina* [2020] NZIACDT 2.

[9] Ms Essina duly obtained a job offer for the complainant from an Auckland welding company. She then sent him Approved Immigration's service agreement for immigration services, which was signed by both Ms Essina and the complainant on about 1 November 2016.

[10] On 23 November 2016, Ms Essina filed a work visa application on behalf of the complainant with Immigration New Zealand. It was based on the offer from the welding company. She advised the agency in her covering letter that he had not received an evaluation of his education from NZQA.

[11] It would seem some difficulty arose regarding the employer and on 13 March 2017, at the request of Ms Essina, Immigration New Zealand confirmed the withdrawal of the work visa application.

[12] On 14 March 2017, Ms Essina sent an email to the complainant explaining what had happened. In relation to the decline of his earlier visitor visa application, she stated that the application had been made when Immigration New Zealand was in the process of changing a few rules and regulations. She had done everything according to the "acting" regulations, but it had been evaluated by the new regulations.

[13] There followed some correspondence between the complainant and Ms Essina. She refunded \$1,000 to him on 24 April 2017.

[14] On 13 May 2017, a complaint was made by the complainant to the Immigration Advisers Authority (the Authority).

[15] Ms Essina sent a text message to the complainant on 19 October 2017, asking him how much the complaint was worth to him. As she was about to pay a lawyer to protect her, she could pay it to him if he withdrew the complaint.

Decision of the Tribunal

[16] The Tribunal found that Ms Essina had made a deliberate decision to withhold the NZQA assessment from Immigration New Zealand. It was no honest mistake or forgetfulness on her part. She had acted in a dishonest or misleading way. Furthermore, her explanation to the complainant that his visitor visa application had been unsuccessful because Immigration New Zealand had changed the rules and regulations was wrong. This was another illustration of deception on her part. Her advice to her client was dishonest.

[17] In addition, Ms Essina had breached cl 1 of the Licenced Immigration Advisers Code of Conduct 2014 in offering the complainant money for the withdrawal of the complaint. Her conduct was unprofessional.

SUBMISSIONS

Registrar's submissions

[18] The acting Registrar, in his submissions of 10 February 2020, contends that Ms Essina should be censured, prevented from reapplying for a licence for one year and ordered to pay a penalty in the vicinity of \$5,000.

[19] It is noted that, while it is Ms Essina's first appearance before the Tribunal, she had been found to be dishonest or misleading in two material respects. The financial penalty should reflect her deliberate intention to deceive Immigration New Zealand and the complainant.

Complainant's submissions

[20] In his email of 19 February 2020 to the Tribunal, the complainant says he was very disappointed and distressed by the withdrawal of his visa. He has been suffering continuously for three years and has lost money. He claims a refund and compensation as follows:

Visitor visa fees	\$ 3,000
Application fees	\$ 300
Job search fee	\$ 1,000
NZQA evaluation	\$ 1,250
Roofing company offer	\$ 1,000
Application fees	\$ 300
Medical certificate	\$ 300
Police certificate	\$ 200
	\$ 7,350

[21] The complainant acknowledges that \$1,000 was refunded by Ms Essina.

Ms Essina's submissions

[22] In her submissions sent to the Tribunal on 10 February 2020, Ms Essina disputes the Tribunal's decision, apart from acknowledging and apologising for her proposal to

settle the complaint. She agreed with the Tribunal's decision regarding the offer of money to withdraw the complaint.

[23] As for concealing the NZQA assessment from Immigration New Zealand, Ms Essina says she overlooked it because she was busy at the time and was not even in New Zealand when the NZQA certificate was received. Furthermore, she mistakenly used a template letter relevant to some of the other welders she was then representing. Ms Essina also queries what benefit could accrue to her by intentionally hiding the certificate. She contends that the Tribunal in its earlier decision has not seen the obvious, which is that people make mistakes. It was not intentional.

[24] In respect of the advice to the complainant as to why his visitor visa application had been unsuccessful, Ms Essina advances an explanation to the Tribunal but it is difficult to understand. She says she did not intentionally mislead him. The complainant had a good understanding of the English language and could read the visa decline letter himself. Ms Essina points out that she did not present the application and does not know why the job offers that she had for him, as his sponsor, were not provided with the visa application.

[25] Ms Essina produced further submissions on 21 February 2020, in reply to those of the Registrar.

[26] In respect of the NZQA assessment, Ms Essina apologised for the mistake and said she did not have any desire to mislead Immigration New Zealand.

[27] Ms Essina accepted censure and would do her best not to repeat similar mistakes. She also accepted not being able to apply for a licence for one year, even if it hurt her financial situation.

[28] However, the proposed penalty of \$5,000 was simply unfair for an unintentional mistake. It would be harsh and unreasonable. Ms Essina says she could not afford to pay it, since she had lost 70% of her income as a result of not being able to operate her immigration business since November 2018.

[29] Furthermore, it had been a stressful time waiting for the Tribunal's decision. According to Ms Essina, she had developed some medical issues which did not allow her to work productively. When the pain became unbearable, she took some days off work. She was the only breadwinner in the family as her husband was retired. Ms Essina requested the Tribunal to direct a lesser amount of reparation.

[30] Additionally, Ms Essina requested name suppression. Her business reputation was important. She was concerned she might lose her income completely if her full name was published.

[31] A medical certificate (19 February 2020) was produced. It states that Ms Essina was unfit for work from 19 to 20 February 2020.

JURISDICTION

[32] 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.

[33] 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:

² Immigration Advisers Licensing Act 2007.

- (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.

[34] 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.

[35] 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.

...

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.

[36] 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

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

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].

[37] 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

[38] 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

[39] Three heads of complaint were upheld against Ms Essina, including two of dishonest or misleading conduct. It was found she intended to deceive Immigration New Zealand by not disclosing a poor NZQA assessment. She had also intended to deceive the complainant as to why an earlier visitor visa application had been declined. While Ms Essina did not represent the complainant in her capacity as an immigration adviser on that visitor application, she was the sponsor which Immigration New Zealand found to be unusual.

[40] Ms Essina's explanation to the Tribunal for her statement to Immigration New Zealand (that there was no NZQA evaluation), is that she overlooked it for various reasons. She was outside New Zealand at the time of the assessment, her workload was intense and she mistakenly used a template letter meant for other clients.

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].

[41] This explanation is different from the one provided to the Authority. She told the Authority the assessment was irrelevant and mistaken, so she did not use it as it could have harmed her client. The explanation is also different from that given earlier to the Tribunal, which was that the assessment was overlooked because she is getting older and her attention to detail is not great. The mobility of her explanations, noted by the Tribunal in its earlier decision, reinforces the correctness of the upholding of the complaint.

[42] I do not accept her various explanations. The NZQA assessment was deliberately withheld from Immigration New Zealand. That is what she had said to the Authority.

[43] As for Ms Essina's deception of her client regarding the visitor visa application, I appreciate that she did not represent him on that application. It is not easy to understand her motive in misrepresenting the reason for its decline, but she was involved in the application as the sponsor and had been criticised, albeit mildly, by Immigration New Zealand. It is neither a defence nor mitigation that the complainant could read Immigration New Zealand's decline letter for himself and see the reasons.

[44] There is also the unprofessional offer of money for the withdrawal of the complaint. Ms Essina acknowledges this was wrong and apologises for it.

[45] I will now consider the potentially appropriate sanctions.

Caution or censure

[46] The only appropriate sanction for dishonesty is censure. Ms Essina's conduct is to be denounced. Ms Essina does not accept that she was dishonest, but does accept censure.

Prohibition

[47] I agree with the Registrar that the public need protecting from Ms Essina. Her conduct was dishonest in respect of two matters. There is still no acknowledgement by her of wrongdoing, except as to the unprofessional offer of money to withdraw the complaint. While she accepts making a mistake, at least as to withholding the NZQA assessment, she maintains that it was unintentional which I have rejected.

[48] Since Ms Essina's dishonesty was not of the worst kind, I agree with the Registrar that one year only is the appropriate period to prevent a renewal of her licence. Again, Ms Essina accepts this sanction. It is to her credit that she does so.

Financial penalty

[49] The Registrar submits that \$5,000 would be an appropriate penalty. Ms Essina says this would be harsh and unreasonable. Nor could she afford it, as she has lost 70% of her income. However, Ms Essina produces no information as to her income or financial situation. It is contended that medical issues do not allow her to work productively but the medical certificate supplied contains no useful information.

[50] Ms Essina deliberately deceived Immigration New Zealand and the complainant, though I have already observed that her deception was not of the most serious kind. Ultimately, neither was deceived. Her acknowledgement of the wrongdoing is limited. I take into account that Ms Essina does admit a mistake, at least as to the non-disclosure to Immigration New Zealand. In addition to the deception complaints, she unprofessionally offered the complainant money to withdraw the complaint. Ms Essina admits this aspect of her professional misconduct and apologises.

[51] It is relevant that this is Ms Essina's first appearance before the Tribunal.

[52] The penalty will be \$4,000.

Refund and compensation

[53] The Tribunal can direct the refund of fees and expenses, and can also award reasonable compensation for losses or expenses arising out of an adviser's wrongdoing. The complainant seeks \$7,350 in refunds and compensation, but has not produced any supporting invoices or receipts.

[54] However, there is an invoice dated 1 November 2016 from Ms Essina to the complainant in the supporting documents sent to the Tribunal by the Registrar. It is for a fee of \$1,298, which includes \$298 payable to Immigration New Zealand. There is also evidence the complainant paid about \$2,300, being \$1,000 initially and this \$1,298.⁷ Of this, \$1,000 has been refunded by Ms Essina already. I will direct payment of the balance. Ms Essina does not raise any objection to refunding the fees paid to her.

[55] While the complainant provides no supporting documents, I accept that he paid other costs associated with the visa application. I decline, however, to award any compensation beyond a refund of the fees paid to Ms Essina, as it has not been shown that the failure of his visa application arose out of the wrongdoing upheld by the Tribunal.

⁷ Registrar's supporting documents at 149 & 164.

His visa application was withdrawn for reasons which are unclear. The evidence does not show that it was Ms Essina's fault it was withdrawn.

OUTCOME

[56] Ms Essina is:

- (1) censured;
- (2) prevented from applying for a renewal of her licence for one year from today's date; and
- (3) ordered to immediately pay to the Registrar the sum of \$4,000.
- (4) ordered to immediately pay to the complainant the sum of \$1,298.

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.⁸

[58] It is rare for the Tribunal to suppress the name of an adviser against whom a complaint is upheld. It is in the public interest that complaints upheld are notified to the public, so informed decisions can be made about choosing a licensed adviser. The Tribunal will not suppress an adviser's name to protect his or her business reputation. The request for suppression by Ms Essina of her own name is declined.

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

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

D J Plunkett
Chair

⁸ Immigration Advisers Licensing Act 2007, s 50A.