IN THE DISTRICT COURT
AT CHRISTCHURCH

CIV-2013-085-001004

UNDER	the Immigration Advisors Licencing Act 2007
IN THE MATTER OF	An appeal by Anneline Joanna McHugh from a determination of the Immigration Advisors Complaints and Disciplinary Tribunal
BETWEEN	ANNELINE JOANNA MCHUGH of Christchurch Appellant
AND	PETER WIEZORECK First Respondent
AND	IMMIGRATION ADVISORS AUTHORITY a body established under the Immigration Advisors Licensing Act 2007 Second Respondent

Hearing: 17 December 2014

Appearances: K Dalziel and J Pullar for the Appellant
No appearance by or for the First Respondent
E F Tait and Ms England for the Second Respondent

Judgment: 28 January 2015

RESERVED JUDGMENT OF JUDGE G S MACASKILL

Preliminary

[1] The case on appeal was supported by a relatively voluminous volume of documents. Counsel explained that most were provided as "background" and accepted that I should hear the appeal on the basis that I would consider only those

documents expressly referred to by counsel in their submissions, so that the appeal might be heard and determined within the three hours allowed.

[2] The submissions made by counsel for the appellant and the second respondent were very thorough and well prepared, for which I am grateful.

The appeal

[3] The appellant appeals, by way of rehearing, against the decision of the Immigration Advisors Complaints and Disciplinary Tribunal ("the Tribunal") in *Wiezoreck v McHugh* [2013] NZIACDT 49, dated 9 August 2013.

[4] Counsel advised that the hearing of this appeal was delayed by the loss of the file by the Wellington District Court. The appellant has already been suspended for 17 months of the 24 month period during which she is prohibited from applying for a position as Licensed Immigration Advisor ("LIA").

[5] The appellant appeals against the following orders:

2.1 Order to pay a penalty of $3500 - para [65.2].

2.2 Order to cancel any licence held by the appellant under the Immigration Advisors Licensing Act 2007 - para [66].

2.3 Order to prohibit the appellant from reapplying for any category of licence as a licensed immigration advisor for a period of two years from date of cancellation of the licence - para [67].

[6] The appellant does not appeal the orders to refund the complainant the fees and to pay compensation or the order of censure.

[7] The appellant seeks the following relief:

6.1 The orders that the aspects of the decision appealed against be quashed or varied.

6.2 If they are varied, that the penalty be reduced or quashed and the

appellant's licence be:

(a) Fully reinstated

(b) Suspended instead of cancelled; or

(c) The period of cancellation of the appellant's licence be reduced and the appellant be permitted to apply for a provisional licence or the appellant be granted a limited or provisional licence.

The Tribunal's decisions

[8] The background to the complaint by the first respondent, Mr Wiezoreck, is set out in detail in the written submissions of the second respondent. The process and decisions of the Tribunal are also helpfully summarised. As to the Tribunal's Complaints decision and the Tribunal's Sanctions decision, I adopt the careful submissions of the second respondent from paragraph 19 to 28 inclusive:

> **Tribunal's complaints decision**
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> 19. The Tribunal's complaints decision was delivered on 4 June 2014. The Tribunal observed that the appellant had provided information to establish that the only aspect of the complaint that would potentially be upheld was the issue relating to fees. With regard to the issue of fees, the Tribunal upheld the complaint on the grounds that the appellant:
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> 19.1 engaged in misleading and dishonest behaviour (constituting a ground for complaint under s 44(2)(d)); and
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> 19.2 breached the Code of Conduct by setting fees that were not fair and reasonable (constituting a ground of complaint under s 44(2)(e)).
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> 20. The first determination, that the appellant engaged in misleading and dishonest behaviour, concerned the appellant's representation (in her letter to Mr Wiezoreck of 24 February 2010) that the "industry standard" hourly rate for a LIA was in the range of €400 to €545 per hour (approximately NZ$740 – NZ$1,000).
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> 21. The Tribunal determined that that representation was "misleading" for the following reasons:
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> 21.1 The representation is "obviously false to anyone familiar with hourly rates for professionals in New Zealand".
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> 21.2 Further, the statement was inconsistent with the schedule of current fees that the appellant provided the Tribunal, disclosing that the appellant charged clients in the range from $203 to $290 per hour: That pointed to Ms McHugh "having misrepresented that fees were in the order of some three times higher than she

herself regards as an appropriate fee" and she therefore had the information to know that "her representation was not defensible."

21.3 The appellant "chose to make the representation to her client". It was the appellant's responsibility to represent only what she knew was true. She was not free to make factual representations to clients without knowing that they were true, or at least taking care to ensure that they were true.

22. In determining that the appellant was dishonest in making the representation, the Tribunal reasoned as follows:

22.1 The Tribunal was "very conscious of the standard of proof in this regard; a dishonest representation of this kind is at the most serious level of misconduct". The Tribunal observed that it was "necessary that [it was] sure before making a finding of dishonesty".

22.2 The Tribunal found that:

> Ms McHugh made the representation dishonestly, knowing it was false, and doing so with the intention of inducing Mr Wiezoreck to agree to terms of engagement that he may not have accepted if he was aware of the true "industry standard" fees. Ms McHugh misled Mr Wiezoreck with the intention he would believe grossly inflated hourly rates were competitive, or to alternatively accept a "budget" service believing it was a heavily discounted service compared with industry standards.

22.3 In finding that the appellant was "fully aware that her representation was false, and grossly so", the Tribunal referred to two factors in particular:

22.3.1 First, the fact that the rate that the appellant represented as being "industry standard" was approximately three times her own fee rates itself pointed to dishonesty. The appellant was "well aware the hourly rates licensed immigration advisers could charge was far less than $740 to $1,000 per hour", but "chose to say otherwise".

22.3.2 Secondly, the "very large apparent discounting factor from those rates to approximately $315 for the 'budget' service "ensured Ms McHugh had to confront the issue".

22.4 The Tribunal considered Ms McHugh's submission that she was a contractor for Oceania and hence (implicitly) she did not benefit from the representation. The Tribunal observed, however, that Ms McHugh was the person who held the licence, and as such she was professionally responsible for the professional engagement. Further, while the financial arrangements between Ms McHugh and Oceania had not been disclosed, it was evident that it was in Ms McHugh's financial interest to ensure clients were engaged – a result that Ms McHugh furthered with her misrepresentations.

23. The second determination – that the appellant breached the Code of Conduct by setting fees that were not fair and reasonable – was based on the actual fees charged. These were €2,900 for 18 hours of service, which equated (based on the Reserve Bank exchange rate applying at the time) to NZ$5,659.65, or NZ$314.42 per hour.

24. The Tribunal referred to material produced by the appellant to show that the total fee charged was approximately the average charged for a LIA to provide professional services for similar applications. However, the Tribunal found that LIAs "do not usually provide services based on an arrangement that leaves clients to carry the responsibility for preparing and lodging applications." The Tribunal therefore concluded that:

> Ms McHugh charged at the level of a full professional fee; but provided limited service on a "take or pay" basis with a capped number of hours of assistance. Accordingly, the fees were higher than typical, and misrepresented as heavily discounted. I am satisfied that the fees were not set at a fair and reasonable level.

25. The parties were given an opportunity to provide submissions on the appropriate sanctions to be made against the appellant.

Tribunal's sanctions decision – the decision under appeal

26. On 9 August 2013, having received furthers submissions from Ms McHugh, the Tribunal delivered its decision on the imposition of disciplinary sanctions ("Tribunal's sanctions decision").

27. The Tribunal held that the critical decision was whether Ms McHugh's licence should be suspended or cancelled, and if so on what terms. The Tribunal identified the options open to it short of cancelling the licence, and weighed the alternatives. In so doing, it found the primary issue was whether it could reasonably be considered that Ms McHugh would in future discharge her professional duties in a manner that promoted and protected the interests of those receiving immigration advice. In determining to cancel Ms McHugh's licence, the Tribunal found, amongst other things that:

    27.1 A significant fact in this case is that it involves dishonesty.

    27.2 Ms McHugh's offending was serious, but she was uncomprehending of the gravity of the offence.

    27.3 Ms McHugh's submission that she should face no sanctions and that the Tribunal's conclusions are wrong is unimpressive and significant in terms of the potential for her to apprehend professional obligations.

    27.4 Ms McHugh was either aware of her professional obligations at the time she offended, or had and continued to have no understanding of the obligations of professionalism.

28. The Tribunal's sanctions are set out at paragraph [65] of the sanctions decision. They included orders that any licence then held under the Act by Ms McHugh was cancelled, and that Ms McHugh was prevented from reapplying for any category of licence as a licensed immigration

adviser for a period of two years from the date her licence was cancelled."

Grounds of Appeal

[9] The appellant appeals on a number of grounds set out in paragraph 8 of counsel's submissions and comprising paragraphs 8.1 to 8.6:

> 8. The appellant appeals on the following grounds:
>
> 8.1 The Tribunal failed to take properly into account or was plainly wrong in its considerations of the circumstances of this case:
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> a. The appellant was at all times abiding by the policies, pricing structures and charge out rates of her employer: the Oceania Development Group (EMEAR) Ltd (Oceania) and should not be responsible for the actions of others.
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> b. The appellant believed on reasonable grounds that Oceania had systems in place to ensure only qualified persons gave immigration advice;
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> c. The appellant was a licensed immigration advisor which meant the Immigration Advisors Authority had assessed and approved supplementary material of the appellant including information about continuing professional development activities the applicant has completed, information about applications they tendered to Immigration New Zealand while they were licensed, information about compliance with the Licensed Immigration Advisers Code of Conduct 2010, a completed client file (including fees), a completed client file summary including the client authorisation and declaration;
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> d. The Immigration Advisors Authority published a range of fees charged throughout the industry;
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> e. No adverse findings against the appellant in relation to the role of the immigration agent (Mr Gerritsen);
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> f. No adverse findings on breach of the Licensed Immigration Advisers Code and other professional obligations;
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> g. The changes made to the appellant's practice; and
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> h. Mr Wiezoreck's concerns were directed at Oceania, not the appellant.
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> 8.2 It appears the Tribunal has incorrectly assessed the appellant as part of a "small minority of unskilled and unscrupulous people" providing immigration services.

8.3 The Tribunal took into account an irrelevant consideration (para 51) in that Licensed Immigration Advisers are required, when entering the profession, to have committed to a course of academic study or mentoring. This requirement came into being after the appellant had entered the profession.

8.4 In the alternative to para 8.3 above, the Tribunal failed to take into account the appellant's working environment where there was evidence of supervision and the fact her work had been assessed by the Licensing Authority as part of being licensed.

8.5 The aspects of the Tribunal's penalty which are appealed against are manifestly excessive and/or plainly wrong. In particular:

a. The "statutory disciplinary process has brought Ms McHugh no meaningful insight" (at [50]);

b. It is "evident Ms McHugh fails to understand the difference between general commerce and the trust and respect for clients that is demanded of licensed professions." (at [52])

c. At "no point in the process before the Tribunal has Ms McHugh shown a willingness or, it seems, a capacity to accept the duties she has as a professional." (at [53])

d. The "public will only be adequately protected and the objectives of the Act achieved by cancelling her license." (at [54]).

e. It is "unrealistic to expect her to be willing to respect, accept and learn from a mentor" (at [55])

8.6 The Tribunal was plainly wrong in its consideration of the appellant's non-acceptance of the Authority's findings for the following reasons:

a. This is a forum where there is no ability to appeal findings in relation to conduct; and

b. This is a forum which has relied heavily on admissions of liability to assess rehabilitation without calling for a full psychological report which assesses a number of risk factors to rehabilitation and insight, and is not limited to admissions of liability. For example, the appellant has demonstrated empathy to the complainant in not opposing a refund of fees or compensation.

Submissions on Appeal

[10] The submissions on appeal do not consistently follow the stated grounds of appeal. For convenience and to avoid unnecessary repetition, this judgment will follow the submissions.

Oceania practices

[11] Ms Dalziel acknowledged that immigration advisor licences can only be issued to an individual and not to a company. She referred to the decision of the Tribunal in *Musese v Min* [2013] NZIACDT 60, 18 September 2013:

> [24] If a licensed immigration advisor chooses to practice as an employee of a company, they personally bear responsibility for both the professional engagement and potential orders under this Act in relation to compensation and fees.
>
> [25] The Act leaves no room for defending a complaint on the basis of a corporate employer rather than the individual holding the licence is responsible.

[12] Ms Dalziel submitted that these principles are relevant to liability rather than penalty. The appellant acknowledges that, as an individually licensed advisor, she is potentially liable for the shortcomings of her employer. However, the appellant submits that her status as an independent contractor/employee is relevant to penalty. Ms Dalziel submitted that the Tribunal's penalty decision does not appear to have taken into account, or did not place enough weight on, the factual circumstances that the appellant was an employee and, as such, was bound by the practices, policies, hourly charge out rates and fee structures of Oceania. She submits that the appellant could not unilaterally vary these elements. Ms Dalziel observed that the Tribunal's penalty decision recorded that the appellant's conduct both involved "dishonestly putting her financial interest before her client's interests, and abusing the trust she was accorded as a licensed professional". Ms Dalziel submitted that, as a contracted employee, the appellant had no financial interest in the hourly charge out rates, fee structures or income to Oceania from a file. The appellant was paid on a time basis.

[13] A licensed immigration advisor cannot avoid responsibility for her professional conduct by asserting that she was acting in accordance with the practices etc of the employer. That is so whether or not the advisor has the status of an independent contractor or employee. An advisor is not "bound by" the practices, policies, hourly charge out rates and fee structures of the employer where any of those elements are in conflict with the advisor's overarching obligation to act honestly. An advisor's responsibility is not to "unilaterally vary" these elements but

simply to refuse to comply with them where they are in conflict with the advisor's obligation to act honestly.

[14] In an appropriate case, the influence of these elements on the judgment and conduct of an advisor might be taken into account in determining penalty. However, my attention was not drawn to any evidence that the appellant at any time recognised that any of her employer's practices etc would or might give rise to dishonesty or that she raised any objection. There is no evidence that Oceania - recognising or not that what was being done by the appellant was dishonest, or that it was at least potentially implicated in dishonesty - placed her under any pressure to conform to those practices or would have insisted on conformity if the appellant had objected.

[15] While the appellant evidently did not share in the fees charged by Oceania, I am of the opinion that her dishonest conduct indirectly put her financial interests before her client's interests because she would tend to do better if Oceania prospered. Also, the appellant dishonestly put Oceania's financial interests before her client's interests.

[16] Ms Tait submitted that the mere fact of an employment relationship or a contractor–principal relationship cannot justify an imposition of a lesser penalty. She argued that the scheme of the Act – being one of individual responsibility – is clear. In this context, it is the responsibility of individual advisors to ensure that the contractual arrangements do not encumber their ability to meet their individual professional obligations. Ms Tait argued that, while the appellant has contended that the contractual relationship should be relevant to penalty, she has not articulated why that should be so. She submitted that Parliament cannot have intended that employer advisors should have less responsibility for their actions than those who choose to operate independently.

[17] I agree that the mere fact of an employment relationship or contractor-principal relationship cannot justify the imposition of a lesser penalty. However, whenever Courts or Tribunals consider sanctions against wrongdoers, they are entitled to take into account any relevant circumstances relating to the wrongdoer's culpability. In the case of professional advisors, the influence of employers may be

relevant. Its relevance and weight is a matter for the Court or Tribunal. In this case the appellant has not shown that the Tribunal erred in not giving weight to this relationship in determining penalty.

Industry Standard Rates

[18] The Tribunal found that the appellant could not have honestly believed that "industry standard" rates were in the range of $700 to $1000 as quoted. The Tribunal also found that Mr Wiezoreck had accepted a budget service of approximately $315 per hour. It then went on to criticise the use of the term "budget service".

[19] The appellant challenges the degree by which her behaviour was characterised as dishonest. Counsel advises that she accepts responsibility but says that her behaviour was not at the level of gross dishonesty described by the Tribunal. She genuinely thought that the process was robust through Oceania and through the review processes of the Authority's licensing assessors.

[20] I respectfully agree with the Tribunal that the appellant's conduct was grossly dishonest. She clearly knew that the "industry standard" rates quoted were wrong and that the rate quoted to Mr Wiezoreck was not a "budget service". The fact that Oceania was potentially implicated in the dishonesty in no way excuses her conduct. Similarly, the review processes of the Authority's licensing assessors have not been shown to have addressed the issues that resulted in the Tribunal's findings of dishonesty.

[21] It seems to me that the appellant still fails to grasp that professional responsibility is essentially a personal responsibility and that an advisor cannot shelter behind their employer's practices or general reviews by the assessors. It certainly has not been shown that the assessors were aware of and approved the misquoting of rates and the misdescription of the value of the service provided.

Good Character

[22] Ms Dalziel made a number of points under this heading in her written submissions and I shall deal with them in the order raised.

[23] Ms Dalziel submitted that the Tribunal said that the process had given the appellant no meaningful insight but that it was not clear on what basis this conclusion had been reached. I am of the opinion that the Tribunal was entitled to draw this inference from the evidence before it and the course of the proceedings. Even on this appeal, counsel's reliance on the supposed exculpatory or mitigating factors that, I find, the Tribunal properly rejected, shows that the appellant has not yet accepted full responsibility for her dishonest conduct and acquired the level of contrition that might give the Court confidence that she is ready to again assume the professional responsibilities of an advisor.

[24] At paragraph [51], the Tribunal observed that the appellant had "entered the profession without having committed to a course of academic study, or the mentoring required for persons now entering the profession. That process has a significant component directed to gaining an appreciation of what professionalism means." Ms Dalziel submitted that the Tribunal appears to have treated the previous law regarding relatively open entrance to the profession as an aggravating feature. That submission is unfair. The Tribunal was merely seeking to explain why the appellant had not grasped the essence of professionalism. This explanation was not, as counsel submits, an irrelevant consideration in relation to the sanctions to be imposed. The Tribunal did not treat it as an aggravating factor but rather as an explanation for her lack of professionalism and it was that lack of professionalism that was relevant to the sanctions.

[25] At paragraph [53], the Tribunal said that at "no point in the process before the Tribunal has Ms McHugh showed a willingness or, it seems, a capacity to accept the duty she has as a professional". I reject the submission that this observation was not open to the Tribunal. Counsel did not refer to evidence that demonstrated that the appellant had shown such a willingness or capacity.

[26] At paragraphs 38 and 39 of her written submissions, Ms Dalziel referred to an issue upon which, she suggested, the Tribunal had "possibly focussed". I am not persuaded that the issue identified affected the Tribunal's judgment.

[27] At paragraph 41 of the written submissions, Ms Dalziel mentioned 11 points relating to the appellant's good character which, she contended, the Tribunal had not given sufficient weight. It is not necessary that I lengthen this judgment by discussing the points in detail because the Tribunal clearly considered, with justification, that the appellant "has exhibited none of the qualities that could lead to an expectation that she would commit to meeting professional standards in the future". In the face of that conclusion, the evidence as to good character and the other points made concerning the appellant's responses to the proceedings can carry little weight. I make the following brief observations concerning the points made:

41.1 The lack of history of complaints must be measured against the fact that the statutory regime is recent.

41.2 The "Oceania process" which involved client sign off on the charges were not material when a client had been induced to agree to the charges on the basis of dishonest representations.

41.3 The information published by the IAA as to charging was simply information provided by advisors. It was unreliable and the appellant knew or ought to have known that it was unreliable.

41.4 The licensing assessors reviews did not condone the appellant's dishonest practices.

41.5 The dismissal of other complaints does not mitigate the complaints upheld.

41.6 I accept that full restitution was made to the complainant.

41.7 The Tribunal noted at paragraph [11] that the appellant had indicated that she had changed her practices as a result of the Tribunal's decision.

41.8 The complainant's view that the issue lay with Oceania and not the appellant is irrelevant to the question of the appellant's culpability.

41.10 Counsel says that the appellant courteously engaged with the complainant and dealt with the complaint sensitively.

41.11 Mr Ward's declaration as to the appellant's character must be considered against the fact of his interest in Oceania.

Conclusions

[28] It is clear, from the Tribunal's decision as to sanctions, that it took a dim view of the appellant's unprofessional and dishonest practices in respect of fees. In summary, the appellant prepared and sent to Mr Wiezoreck the evaluation letter and

rate card, which contained representations to the effect that an LIA's "industry standard" fee was in the range of €400 to €545 (approximately NZ$740 to NZ$1,000). As noted by the Tribunal, this representation was "obviously false to anyone familiar with hourly rates for professionals in New Zealand". Furthermore, the appellant was aware of and provided services to Mr Wiezoreck under the "budget service" fee arrangement, whereby Mr Wiezoreck paid €2,900 for 18 hours unlimited service, in the nature of checking and advice. Despite the representation that this was a "budget service", the fees charged were higher than typical and were misrepresented as heavily discounted. As noted by the Tribunal, that view was reinforced by the fact that the appellant charged a lower fee for the same service to clients located in New Zealand.

[29] In the face of such blatant dishonesty and the appellant's attempts to minimise her professional responsibility before the Tribunal, it is hardly surprising that the Tribunal did not give weight to the mitigating factors of the appellant's otherwise good character and her responses to the proceedings, such as they were. The appellant's attempts to minimise her professional responsibility were continued on this appeal. The Tribunal's description of the appellant as "part of a small minority of unschooled and unscrupulous people" was within the range of epithets available to the Tribunal to refer to the appellant's lack of education and training in professional ethics and her blatantly dishonest conduct.

[30] The Tribunal's assessment was not clearly wrong and I am not satisfied that the sanctions imposed were inappropriate. This Court may only interfere with the Tribunal's discretion in determining sanctions if the Tribunal acted on a wrong principle, failed to take into account some relevant matter, took into account an irrelevant matter or was plainly wrong, or if the sanctions imposed were clearly inappropriate or excessive. The Tribunal was in the best position to weigh the seriousness of the appellant's professional misconduct. The Tribunal is familiar with the whole gradation of the seriousness of the cases that comes before it and it is particularly well qualified to say at what point on that gradation particular sanctions are appropriate.

[31] For these reasons, the Tribunal's decision is confirmed and the appeal is dismissed.

G S MacAskill
District Court Judge