IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2014-409-000082
[2014] NZHC 1215

BETWEEN		IMMIGRATION ADVISERS AUTHORITY Appellant
AND		CHRISTINE LAI CHUN YAP Respondent

Hearing: 28 May 2014 (via teleconference)

Appearances: M J Andrews for the Appellant
H F McKenzie for the Respondent

Judgment: 30 May 2014

JUDGMENT OF PANCKHURST J
[RE CONSENT ORDERS]

Introduction

[1] The Immigration Advisers Authority (the Authority) has appealed against a decision of the District Court by which sanctions imposed in a disciplinary context were quashed. This second appeal, pursuant to the Immigration Advisers Licensing Act 2007 (the Act), is restricted to questions of law.

[2] Unusually, agreement has been reached concerning how the appeal should be resolved. To that end, a consent memorandum has been filed. It seeks the reinstatement of a censure against the respondent and a direction that an application to renew the respondent's licence be reconsidered by the Authority on an urgent basis. I am satisfied that the orders sought by consent are appropriate. That said, I am also of the view that brief reasons should be given explaining why it is appropriate to resolve the appeal on the basis of the consent orders sought by the parties.

The background

[3] The respondent was a licensed immigration adviser. At the relevant time she was employed by a company offering immigration services in Christchurch. A client made a complaint to the Authority about the respondent's conduct. Of relevance for present purposes was an allegation that an hourly rate was quoted for services to be provided, but in fact the client was charged at a significantly higher rate.

[4] The complaint was assessed and a decision taken by the Authority to refer the complaint to the Immigration Advisers Complaints and Disciplinary Tribunal (the Tribunal).

[5] The Tribunal heard the complaint on the papers and gave a decision on 12 April 2013 in which it upheld the complaint in relation to two matters. The first was a finding that the respondent had engaged in dishonest and misleading behaviour concerning the fees charged to the client and that the respondent was also in breach of the code of conduct in relation to a "sign on" fee. The sign on fee is no longer relevant. The Tribunal called for written submissions concerning the appropriate sanction and prescribed a timetable.

[6] In the meantime, on 1 May 2013 the respondent lodged an application to renew her licence with the Authority.

[7] On 15 July 2013 the Tribunal imposed sanctions. The respondent was censured, ordered to pay a penalty of $3500, and directed to pay the client $4640 in compensation and for the refund of fees. The Tribunal further directed that the respondent's licence was cancelled with effect from 24 hours after delivery of the decision and that the respondent may not reapply for a licence for a period of two years.

[8] In light of the Tribunal decision the Authority on 1 October 2013 declined to renew the respondent's license in response to the licensing application lodged at the beginning of May.

[9] The respondent appealed to the District Court against the sanctions imposed by the Tribunal. The appeal was heard on 20 January 2014. That same day an oral judgment was delivered in which the appeal was allowed and the sanctions imposed by the Tribunal were quashed. In essence, the Judge found that although the client had been charged more than the hourly rate originally quoted, and was indeed overcharged, that this had arisen as a result of actions within the accounts section of the company by which the respondent was employed. The Court held that the respondent had no actual knowledge of these actions, nor ought she have known of them.

[10] The Authority appealed to this Court pursuant to s 85 of the Act. This section provides a second right of appeal restricted to "a question of law only". The notice of appeal raised a number of grounds, including that licensed immigration advisers are personally responsible for all aspects of client engagement and that, accordingly, the District Court erred in holding that the respondent had no obligation to be aware of the actions which resulted in her client being overcharged.

The consent memorandum

[11] The appeal was scheduled to be heard on 30 May 2014. The consent memorandum dated 23 May sought orders by consent, namely that:

> (i) The censure against the respondent imposed by the Tribunal under s 51(1)(a) be reinstated.
>
> (ii) The Authority reconsider the application to renew the respondent's licence application lodged by the respondent on 1 May 2013, in light of this Court's orders, and on an urgent basis.
>
> (iii) Costs lie where they fall in this Court and costs in the District Court are settled.

[12] A direction made by the Tribunal that the respondent pay her client $4640 by way of compensation and refund of fees was not challenged in the District Court and, accordingly, this aspect of the sanction remains.

[13] Counsel's memorandum provided the reasons for the consent orders sought. In brief these were that:

(i) There was now insufficient evidence, taking into account additional evidence adduced in the District Court, to sustain the Tribunal's finding that the respondent engaged in dishonest and misleading behaviour in relation to the fees to charged to her client.

(ii) However, the evidence did establish that the respondent breached clause 1.1(a) of the Licensed Immigration Advisers Code of Conduct 2010, in that the fees charged were higher than those quoted, and therefore the respondent failed to provide services to her client with due care and diligence.

(iii) Such breach of the Code was implicit in the Tribunal's more serious finding that the respondent had engaged in dishonest and misleading behaviour.

(iv) The appropriate and proportionate penalty for the breach of the Code was the censure imposed by the Tribunal, and it should be re-imposed.

(v) The District Court's orders quashing the penalty of $3500, cancelling the respondent's licence and prohibiting reapplication for two years should stand, given the substitution of a lesser finding.

[14] The error of approach in the District Court's decision concerned the level of individual responsibility upon licensed immigration advisers when providing professional services. It is common ground that a level of individual responsibility is imposed under the Act, but counsel differ concerning its definition. Resolution of the difference would require argument. However, acceptance that a breach of the Code is established and that reinstatement of the censure is therefore appropriate, obviates the need for this.

The direction to reconsider

[15] For completeness I record the reasons and jurisdictional basis for making the direction to the Authority to reconsider the respondent's application to renew her licence originally declined on 1 October 2013. Such decision was made with regard to the Tribunal's sanctions decision. The respondent's licence was both cancelled, and to remain so for two years. The decision was final and at common law the Authority's power of decision-making was spent.[1] In short, the Authority was functus officio.

[16] This Court's powers on appeal are the same as those of the District Court sitting as the first appeal court, including a power to make such "other order that the court considers justice requires".[2] I am satisfied that the public law power to direct a decision-maker to reconsider and decide afresh is available, and its exercise appropriate, in the circumstances of this case. The 1 October 2013 decision reflected the then sanction imposed by the Tribunal. The sanction has now been quashed. To do justice reconsideration of the application is required.

Conclusion

[17] The appeal is allowed.

[18] For the reasons I have endeavoured to explain, I make orders as sought in the consent memorandum, and as set out in paragraph [11](i), (ii) and (iii) of the judgment.

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[1] *Goulding v Chief Executive Ministry of Fisheries* [2004] 3 NZLR 173 (CA) at [43].
[2] Immigration Advisers Licensing Act 2007, s 85(3); Criminal Procedure Act 2011, ss 307(2) and 300(1)(e).