IN THE DISTRICT COURT
AT AUCKLAND

CIV-2016-004-000157
CIV-2016-004-000158
CIV-2016-004-000749

[2017] NZDC 21262

UNDER	SECTION 81 OF THE IMMIGRATION ADVISERS LICENSING ACT 2007
IN THE MATTER OF	APPEALS AGAINST THREE DECISIONS UNDER SECTION 51 OF THE ACT
BETWEEN	**APURVA KHETARPAL** Appellant
AND	**IMMIGRATION ADVISERS AUTHORITY** Respondent

Hearing:	11 September 2017
Appearances:	Mr S Wimsett for the Appellant Mr A Dumbleton for the Respondent
Judgment:	27 September 2017

DECISION OF JUDGE G M HARRISON

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[1] Ms Khetarpal appeals against three decisions of the Immigration Advisers Complaints and Disciplinary Tribunal ("the Tribunal") cancelling her immigration advisers licence.

[2] Her appeals are brought pursuant to s 81(c) of the Immigration Advisers Licensing Act 2007 (the Act) which permits a person to appeal to this Court against decisions of the Tribunal to cancel a person's licence.

[3] The licences were cancelled by the Tribunal, as constituted by s 40 of the Act. As its name suggests, the Tribunal has a disciplinary function in respect of persons holding licences issued under the Act, one of the sanctions it may impose being cancellation of a licence.

[4] There is no right of general appeal to this Court. There can be no appeal against the Tribunal's decision as to whether or not a complaint is upheld. The right of appeal is confined to the five s 81(1) categories of decisions made by the registrar and the Tribunal. *ZW v Immigration Advisers Authority.*[1]

The complaints

The OJ complaint

[5] This complaint was lodged with the registrar of Immigration Advisers on 26 September 2014. It alleged essentially that in the course of her professional relationship with the complainant the applicant failed to carry out her instructions properly, that she was dishonest or engaged in misleading behaviour, and failed to deal properly with fees.

[6] In its decision of 5 November 2015 the Tribunal held:

> [44] Accordingly, I find Ms Khetarpal did dishonestly mislead her client, taking fees, causing him to understand his request was managed properly, while knowing she was not progressing it using her professional skills and in accordance with the 2010 code.

The Khancomplaint

[7] This complaint was to the effect that Ms Khetarpal accepted instructions to lodge an expression of interest application on behalf of the complainant when there was no proper basis for doing so and that she did not encourage the complainant not to lodge it, nor advise in writing that the application was unfounded. The Tribunal concluded:

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[1] *ZW v Immigration Advisers Authority* [2012] NZHC 1069 per Priestley J.

> [29] For the reasons discussed I am satisfied Ms Khetarpal should have identified the expression of interest was grossly unfounded and had no hope of success. She failed to do so. As she failed to do so, it followed she did not:
>
> [29.1] encourage her client not to lodge it; and
>
> [29.2] did not advise her client in writing it was grossly unfounded.
>
> [30] Accordingly I am satisfied Ms Khetarpal breached cl 2.2(a) and (b) of the 2010 code. However, the fault lies in her failure to identify the expression of interest had no hope of success. Accordingly it does not add in a material way to the finding Ms Khetarpal breached cl 1.1(a) of the 2010 code.

The Prajapati complaint

[8] This complaint was to the effect that Ms Khetarpal took $2,200 from the complainant. This was paid to Ms Khetarpal's practice and not to a separate client funds account.

[9] The Tribunal said:

> [23] Accordingly, the $2,200 the complainant paid to Ms Khetarpal's practice was paid in advance as fees and disbursements; it was in advance in the sense Ms Khetarpal had no contractual or other basis for treating the money as other than fees paid:
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> [23.1] In advance of services being provided, and
>
> [23.2] In advance of her practice being entitled to take the fees when she had provided the services.
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> [24] Accordingly, Ms Khetarpal failed to established a client funds account, took the complainant's money, did not deposit it in a client funds account, and used the money for a purpose other than the purpose it was paid to her, namely expending it on practice expenses.
>
> [25] I accordingly find Ms Khetarpal breached clauses 4(a) and (c) of the 2010 code.

The sanctions

[10] On 22 January 2016 the Tribunal imposed sanctions on the Khan matter as follows:

> (a) Censure;

(b) Cancellation of licence with effect from 16 February 2016;

(c) Restraint from reapplying for a full licence for two years from the date her licence was cancelled;

(d) Restraint from applying for any class of licence until she has enrolled in and completed a graduate diploma in New Zealand Advice, has submitted to a supervision regime approved by the registrar, and has complied with all the orders made by the Tribunal;

(e) Penalty of $1,000 payable to the Crown.

[11] In respect of OJ, by further decision issued the same day the Tribunal imposed the same sanctions as in Khan except that the penalty was $2,500, the complainant was awarded compensation of $2,500 and a third party was awarded $3,450 and $1,000 as costs.

[12] Ms Khetarpal does not challenge the sanctions except for the cancellation of her licence in each case.

[13] On 3 May 2016, on the Prajapati complaint, the Tribunal ordered:

(a) Censure;

(b) Immediate cancellation of licence if the appellant still held one;

(c) Restraint from applying for any category of licence until the appellant has enrolled for the graduate diploma in New Zealand Advice (Level 7) course and obtained that qualification, which at minimum will take 12 months;

(d) Further restraint from applying for a provisional licence until the registrar has approved a supervision regime;

(e) Further restraint from applying for a full licence for two years, until at least 2 May 2018 and until the appellant has practised under supervision for two years with a provisional licence;

(f) Penalty of $5,000 to be paid immediately;

(g) Compensation of $2,200 to be paid to a third party.

The application for review

[14] On 12 February 2016 Ms Khetarpal applied to the High Court for judicial review of the Tribunal's decision upholding the complaint in the OJ matter.

[15] The decision of Justice Collins on that application was issued on 2 November 2016. The application was dismissed.

[16] Notably, the Judge found that the Tribunal was entitled to conclude that Ms Khetarpal had acted dishonestly. He outlined five factors that the Tribunal was entitled to take into account in reaching that decision and confirmed as follows:

> [49] When all these factors are considered holistically, the Tribunal was entitled to draw the ultimate inference that Ms Khetarpal acted dishonestly in her dealings with Mr J and his employer.

In that hearing the complainant OJ was referred to as J.

The interim orders

[17] Section 82 of the Act empowers the Court to make interim orders. Subsection (1) provides:

> At any time before the final determination of an appeal, a District Court may make an interim order allowing the appellant to engage in providing immigration advice.

[18] The order may be subject to any conditions the Court thinks fit. This is a curious provision.

[19] It is curious because interim orders may be made permitting a person who appeals against a licence cancellation to be permitted to continue to provide immigration advice, albeit subject to such conditions as the Court may impose.

[20] On 22 March 2016 Judge Hinton made interim orders by consent allowing Ms Khetarpal to continue working until her then two appeals were determined.

[21] The interim order made by Judge Hinton was to allow Ms Khetarpal to engage in providing immigration advice subject to and in accordance with the following conditions:

> (a) All such immigration advice shall be provided to the standard required by and in accordance with the Act and the relevant Licensed Immigration Advisers Code of Conduct and all relevant requirements of the Immigration Advisers Authority as if the appellant were at all times a licensed adviser subject to the Act and the code.
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> (b) The appellant must first, on terms approved by the registrar, enter into and remain subject to a supervision agreement with an immigration adviser approved by the registrar who has a full licence under the Act.
>
> (c) Without limiting the discretion or rights of the registrar or the authority under para (1)(b) above, or the supervision agreement, the appellant must forthwith provide for inspection by the registrar any client file that may periodically be requested by the registrar.
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> (d) The appellant must not provide any immigration advice to any person unless the appellant has advised that person in writing, on terms approved by the registrar, that the appellant is providing immigration advice pursuant to an interim order of the Court pending disposition of appeals to the Court and subject to a supervision agreement with another immigration adviser.
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> (e) The appellant must pay the sum of $10,450, being the total amount the appellant was ordered by the Tribunal to pay in the two decisions appealed, into the trust account of Laurent Law by 29 April 2016. Those amounts will be held by Laurent Law on behalf of the intended recipients pending further order of the Court.
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> (f) The appellant must enrol in and meet the course and attendance requirements of the Bay of Plenty Polytechnic Graduate Certificate in Immigration Advice course.
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> (g) The appellant must pursue in good faith with all due diligence the judicial review proceedings in the High Court to facilitate early hearing in this Court of the appeals.

[22] The interim order was noted to be of no effect and would terminate immediately if the appellant was not, or ceased to be, subject to a supervision agreement, and if, after 22 March 2016, the registrar referred any complaint concerning Ms Khetarpal to the Tribunal.

[23] The condition regarding attending the Polytechnic course was later amended to coincide with the renamed course then on offer.

[24] On 3 May 2016 the Prajapati sanctions decision was issued in which immediate cancellation of licence was again ordered as for the first two sanctions decisions.

[25] This led to an application by the authority for the interim orders to be cancelled. That application was heard by Judge Cunningham and in her decision of 14 June 2016 she declined the application and directed that the interim orders would continue in force.

[26] She said:

> [34] I have stood back and considered whether the Prajapati sanctions decision means that the interim orders should be reviewed in light of the fact that there are now three sanctions decisions adverse to Ms Khetarpal. The Prajapati decision is the least serious of all three. I have decided that it is not of consequence to the extent that the issue should be revisited at this time.

[27] Ms Khetarpal has continued to provide immigration advice to the present time. At the hearing before me, Mr Wimsett produced a letter dated 10 September 2017 from Mr J Peter Hendrikx, the managing director of Terra Nova Consultancy Limited, confirming his continued supervision of Ms Khetarpal and of the success of that arrangement.

The appeals

[28] As previously noted, the appeals are brought only in respect of the cancellation of Ms Khetarpal's licence. It needs to be remembered that on each of the three established complaints the Tribunal was of the view that cancellation of her licence was justified.

[29] For the appeals to succeed therefore Ms Khetarpal must, in each of the three cases, establish that the Tribunal erred in cancelling her licence.

[30] The sanctions that the Tribunal may impose pursuant to s 51 are discretionary.

[31] In *Kacem v Bashir*[2] the Supreme Court stipulated the correct approach to an appeal from a discretion. It said:

> [32] In this context the general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case the criteria for a successful appeal are stricter:
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> (1) Error of law or principle;
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> (2) Taking account of irrelevant considerations;
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> (3) Failing to take account of a relevant consideration; or
>
> (4) The decision is plainly wrong. …

[32] It was submitted on Ms Khetarpal's behalf that while it was accepted that the breaches are serious in nature, the imposition of the sanction of cancellation of licence appeared harsh and manifestly excessive. It was submitted that the decisions did not take into account the applicant's personal situation. It was said that the Tribunal should have taken a rehabilitative approach with Ms Khetarpal. The plea was in the end mitigatory in the sense that the Tribunal failed to take into account properly the personal circumstances of Ms Khetarpal in deciding to cancel her licence.

[33] In response, the authority referred to the Supreme Court decision in *Z v Dental Complaints Assessment Committee*[3] where the Court said:

> 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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> However, in *Patel v Complaints Assessment Committee* (High Court Auckland, CIV-2007-404-1818, 13 August 2007 at [28]) the Court held that despite the primary purpose of disciplinary proceedings, "regardless there is an element of punishment that serves as a deterrent to discourage unacceptable conduct".

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2 *Kacem v Bashir* [2011] 2 NZLR 1.

3 *Z v Dental Complaints Assessment Committee* [2008] NZSC 55 at [97].

[34] Taking the OJ sanctions decision as the most serious of the three, the Tribunal considered firstly the applicable "principles for suspension or cancellation of licence" and followed this by consideration of the "background to regulating this profession". The Tribunal then went on to consider "alternatives short of cancellation of licence, the gravity of her offending, and then her financial position".

[35] None of the criteria specified in the *Kacem* case has been identified to justify any interference with the discretion exercised by the Tribunal in imposing the sanctions it did.

[36] As Mr Dumbleton for the authority said in his submissions:

> 51 Licence cancellation was not simply an arbitrary response of the Tribunal but was arrived at only after a careful weighing up of the appellant's conduct, including her attitude shown to the disciplinary proceedings being taken, and her personal circumstances. Another adjudicator may have been less severe with the disciplinary action to be taken, but that is not the test of whether the Tribunal was wrong to have imposed licence cancellation in this case. It is submitted licence cancellation may have been at the upper end but was nevertheless within a range of disciplinary responses open to the Tribunal to take.

[37] As previously stated, there were three justified complaints leading to licence cancellation. For the appeal to be successful each of the discretionary decisions must be demonstrated to have been erroneous and they have not been.

Conclusion

[38] That would normally lead to a dismissal of the three appeals. What makes me hesitate in doing so are the interim orders permitting Ms Khetarpal to continue to act as an immigration adviser. Some of the conditions imposed in the sanction decisions are clearly tailored to providing her with an opportunity to re-enter the profession, the interim conditions echoing that opportunity.

[39] It would be completely pointless for the interim orders to have been made, and then lapse on dismissal of the appeals.

[40] It seems from documentation on the three files that the diploma course may have been completed by Ms Khetarpal in July 2017. I am mindful that the sanctions imposed prevented any application for a licence for a period of two years commencing

with the Khan and OJ decisions in January 2016, resulting in an expiry date of January 2018.

[41] The Prajapati decision of May 2016 also imposed a two year limitation on any reapplication which would expire in May 2018.

[42] As against those periods, two years being the maximum that could be imposed pursuant to s 51(1)(e), it seems appropriate to me at this stage to allow Ms Khetarpal to apply to the registrar for a licence.

[43] Although the sanctions decisions were imposed independently on each of the proved complaints, it is logical that the two year limitation imposed on the Prajapati sanction should coincide with the period imposed on the two earlier matters in January 2016. That would mean to the present time Ms Khetarpal would have been restrained for approximately 20 months from seeking a new licence which, in my view, is an appropriate period of time.

[44] Insofar as it may be necessary to permit an application for a new licence to be made, the time periods restricting that application in all three appeals are amended to expire as at the date this decision is issued.

[45] I note that r 18.24 District Court Rules 2014 permits the Court after hearing an appeal to make any order the Court thinks just – (r 18.24(1)(c)).

[46] I therefore defer the making of a final decision on this appeal pending receipt of advice from the authority as to the outcome of any application for a licence. I direct any such application to be made by 31 October 2017.

[47] If the application is granted, there will be no need for a continuation of the interim orders and these appeals will be formally dismissed.

[48] If the application is declined, then leave to apply further is reserved.

[49] The question of costs is also reserved pending final determination of the appeals.

G M Harrison
District Court Judge