



DECISION RECORD

AGENT	Mr Ravinder Singh
COMPLAINT NUMBER/S	CMP-29183
DECISION	Cancellation
DATE OF DECISION	4 January 2018

Terms used for reference

1. The following abbreviations are used in this decision:

<i>ABN</i>	Australian Business Number
<i>MARN</i>	Migration Agent Registration Number
<i>Section 308 notice</i>	Notice issued by the Authority under section 308 of the Act
<i>Section 309 notice</i>	Notice issued by the Authority under section 309 of the Act
<i>The Act</i>	<i>The Migration Act 1958</i>
<i>The Regulations</i>	<i>The Migration Regulations 1994</i>
<i>The Agent</i>	Mr Ravinder Singh
<i>The Authority</i>	The Office of the Migration Agents Registration Authority
<i>The Code</i>	The Migration Agents Code of Conduct prescribed under Regulation 8 and Schedule 2 to the Regulations
<i>The Department</i>	The Department of Home Affairs
<i>The Register</i>	Register of migration agents kept under section 287 of the Act
<i>Agent Regulations</i>	<i>Migration Agents Regulations 1998</i>
<i>FWO</i>	Fair Work Ombudsman
<i>VEVO</i>	Visa Entitlement Verification Online
<i>Fair Work Act</i>	<i>The Fair Work Act 2009</i>
<i>NOITTA</i>	Notice of intention to take action
<i>The restaurant</i>	PTC
<i>NOICC</i>	Notice of intention to consider cancellation

STATEMENT OF REASONS

Background

2. The Agent was first registered as a migration agent on 1 December 2009 and was allocated the MARN 0962169. The Agent's registration had been renewed annually to date, with the most recent registration commencing on 1 December 2016. The Agent lodged his latest application for registration on 28 November 2017. A decision is yet to be made on this application pending the finalisation of the complaint, which is the subject of this decision.
3. The Register lists the Agent's business name as Immisolutions Consultancy with the ABN 95 916 187 321.

Prior Disciplinary action

4. The Agent does not have a history of prior disciplinary action.

Complaint/s

5. The Authority received a complaint about the Agent's conduct as a registered migration agent from Ms NP (CMP-29183) on 14 March 2017.

The complaint alleged that:

6. Mr TS, co-director of VO, was engaged by Ms NP to prepare a nomination and subclass 457 visa application for her to work as a Restaurant Manager for RS & JS Pty Ltd, at a business owned by the Agent and his wife, Ms MK, for a fee of \$10,000;
7. The nomination for Ms NP to work for the Agent was refused on 13 May 2015, however she worked for the Agent for a period of time prior to a decision on the nomination, during which you paid her no wages and sexually harassed her; and
8. The Agent, along with his associates, VO's directors Mr TS and Mr GS, exploited Ms NP and took advantage of her vulnerable position as a temporary visa holder in Australia.

Notice under section 308 of the Act ("the section 308 notice")

9. On 30 March 2017 the Authority published the complaint to the Agent, advising the Agent that it raised concerns regarding his compliance with clauses 2.1, 2.15 and 2.23 of the Code.
10. Pursuant to section 308 of the Act, the Authority requested the Agent to provide a statutory declaration with responses to specific questions asked by the Authority in relation to the matters raised in the complaint.

The Agent's response to the Authority's section 308 notice

11. On 10 June 2017 the Authority received the Agent's response to the complaint/s by way of a statutory declaration, however the document provided was of poor quality and had the wording down the right side of the document cut off. A request to provide a better quality statutory declaration was sent on 9 August 2017, which was resubmitted by the Agent on 16 August 2017. The Agent made the following submissions in relation to the information put to him in the section 308 notice:
 - That the Agent had engaged VO on a number of occasions to provide immigration assistance, however he does not have any other business dealings or relationship with VO.

- The Agent asserted that he had never employed a client of VO in any of his businesses, however confirmed that Ms NP worked in his restaurant, PTC (the restaurant), from January 2015 to April 2015. In response to Ms NP's allegations regarding her pay and treatment, the Agent asserted that Ms NP was paid during the period of her employment. He also stated that if she had any issues with his behaviour as her employer, or with her pay, these could have been brought to the attention of the relevant authorities at the time in question, rather than two years later.
- The Agent sold both the restaurant and the company (RS & JS Pty Ltd) in August 2015, and at the time transferred all relevant business information to the restaurant's new owner. As a result, he has not retained any records from the restaurant. The Agent asserted that he had contacted the person he sold the restaurant to, who informed him that it has subsequently been sold to a third owner. As a result, the Agent informed the Authority that he was unable to provide Ms NP's payslips, which the Authority had requested.

Information received from the Department

12. As the result of concerns raised in the complaint with regards to Ms NP's employment at the Agent's restaurant, a review of departmental records was undertaken. In summary, the review ascertained:

- RS & JS Pty Ltd was approved as a standard business sponsor under the subclass 457 visa programme on 5 February 2013, with three sponsored subclass 457 visa holders linked to the business, which did not include Ms NP.
- Departmental and Australian Securities and Investment Commission (ASIC) records listed the Agent as a company co-director from 21 March to 5 September 2012, and then as the company's sole director from 4 February 2015 onwards until the Agent claims to have sold the business in August 2015. The Department was never notified of the sale. As a result, departmental records still show the Agent as the authorised contact person for RS & JS Pty Ltd as late as May 2016. The Agent's wife, Ms MK, is listed as a company director from 5 September 2012 to 4 February 2015. Supporting documentation provided for RS & JS Pty Ltd's business nomination shows the Agent's name and that of his former business partner jointly listed on the Company's Deed of Transfer of Lease for the restaurant, and associated paperwork. Additional supporting documentation, including the use of the Agent's business email address to provide information to the Department in support of RS & JS Pty Ltd's Standard Business Sponsorship in January and February 2013, was also identified to have occurred during the period of time that ASIC records confirm the Agent's wife replaced him as the listed company director.
- On 24 February 2015 Ms NP was sent a first Notice of intention to consider cancellation (NOICC) of her subclass 457 visa, in relation to her cessation of employment with her previous approved business sponsor more than 90 days prior.
- Ms NP's second subclass 457 visa application and the associated business nomination for RS & JS Pty Ltd were lodged on 26 February 2015.
- On 20 March 2015, departmental officers conducted a site visit to the restaurant premises owned by the Agent and found Ms NP to be working in breach of her then current subclass 457 visa, which had a condition 8107 attached¹.
- During the site visit, a number of staff were interviewed by departmental officers, including Ms NP, and all advised that the Agent was the owner and/or manager of the

¹ Visa condition 8107 applies by operation of law to all Temporary Work (Skilled) visa (subclass 457) visas where the applicant satisfies the primary criteria. In order to comply with condition 8107, visa holders must work in a particular occupation listed in the most recently approved nomination, for a particular employer, unless certain exemptions apply, must commence work within 90 days of arrival in Australia/visa grant, not cease employment for more than 60 days, and maintain any mandatory licence or registration.

restaurant. Ms NP advised that she had commenced working at the restaurant in January 2015.

- An Illegal Worker Warning Notice was issued to the Agent by the Department on 16 April 2015, in relation to Ms NP working illegally for RS & JS Pty Ltd.
- The business nomination application for RS & JS Pty Ltd was refused on 6 July 2015, with Ms NP's related subclass 457 visa application subsequently refused on 21 October 2015.
- A subsequent NOICC was sent to Ms NP on 31 August 2015 in regards to her working for someone other than the approved sponsor or an associated entity of the sponsor, in breach of condition 8107.
- Ms NP's existing subclass 457 visa was cancelled on 22 October 2015 as a result of her breach of condition 8107: that she was working for the Agent.

13. Departmental records also indicate that:

- In response to the information obtained at the site visit, the Department sent the Agent a Commencement of Monitoring notice on 27 March 2015, requiring RS & JS Pty Ltd to provide information by 21 April 2015. The notice was resent on 22 April 2015 to the Agent's business email address with a new deadline of 7 May 2015. The Agent provided his response to the notice on the due date.
- On 30 July 2015 the Department sent the Agent, as RS & JS Pty Ltd's contact person, a Notice of intention to take action (NOITTA) under Regulation 2.96 of the *Migration Regulations 1994* (the Regulations) to cancel RS & JS Pty Ltd's sponsorship approval for the subclass 457 visa programme. The NOITTA related specifically to the Agent's failure to satisfy sponsor obligations under Regulations 2.82, 2.83 and 2.84 with regards to the three approved subclass 457 visa holders working at the restaurant. The Department received the Agent's response on 13 August 2015.
- On 4 May 2016, the Department made a decision to bar RS & JS Pty Ltd from making applications for approval as a standard business sponsor for a period of 36 months from the date of decision, due to its non-compliance with the Act and the Regulations.

Fair Work Ombudsman records

14. Department records for RS & JS Pty Ltd also contained a media release from the Fair Work Ombudsman (FWO) dated 19 May 2016 relating to an investigation and legal proceedings against RS & JS Pty Ltd in respect to the alleged underpayment of two staff members. Public records on the FWO's website state that:

- In October 2015 the FWO issued RS & JS Pty Ltd a Compliance Notice to rectify the underpayment of two staff members in the restaurant during the period of October 2014 – January 2015. The underpayment amount during these months was alleged to have totalled \$8082.
- On 19 May 2016, the FWO commenced legal proceedings against RS & JS Pty Ltd, and the subsequent owner of the restaurant, Mr HP for failure to respond to the Compliance Notice.
- On 4 July 2017, the FWO published that the Federal Circuit Court had ruled against RS & JS Pty Ltd and imposed a penalty on Mr HP, who purchased the restaurant from the Agent prior to the Compliance Notice being sent. As a result, Mr HP was required to rectify the underpayment of the two staff members, despite this underpayment occurring when the Agent and his wife owned and managed the restaurant.

15. Additional information received from the FWO in October 2017, which has previously been published to the Agent in 2015, indicated:

- That the FWO contacted the Agent on 5 March 2015 to notify him of their investigation into allegations of underpayment by two former staff members, and that the Agent

subsequently engaged with the FWO on several occasions prior to selling the company and restaurant in August 2015 to respond to the allegations; and

- When responding to the allegations, the Agent advised that he had been managing the restaurant prior to being formally reinstated as Director in ASIC records on 4 February 2015.²

Notice/s under section 309 of the Act (“the section 309 notice”)

16. Following receipt of the Agent’s section 308 submission, the Authority undertook a review of its record holdings for the Agent. A review was also undertaken of departmental records relating to Ms NP’s second subclass 457 visa application, and RS & JS Pty Ltd’s activities as an approved business sponsor. Departmental records for RS & JS Pty Ltd included a publicly available media release from the FWO with regards to their investigation into underpayment by the company. Upon request, the FWO provided the Authority with additional information and documentation already provided to the Agent, relating to his knowledge of, and involvement in, their investigation. The review identified serious concerns with respect to the Agent’s conduct stemming from Ms NP’s complaint, which were relevant to the Agent’s integrity, and fitness to practice. The Authority subsequently put this information to the Agent in a notice pursuant to section 309(2) of the Act, advising the Agent that it was considering cautioning, or suspending or cancelling the Agent’s registration under section 303(1) of the Act.
17. The Agent was notified that having regard to the information before the Authority, it was open to the delegate to be satisfied that the Agent was not a person of integrity or otherwise not a fit and proper person to provide immigration assistance.
18. Pursuant to section 309(2) of the Act, the Authority invited the Agent to provide written submissions on the matter on 2 November 2017, which were due by 30 November 2017.

The Agent’s response to the Authority’s section 309 notice

19. On 20 November 2017 the Authority received the Agent’s submissions by statutory declaration, which stated:
20. The Agent affirmed that he had employed Ms NP as the restaurant manager between January and April 2015, as he was unable to work at the restaurant due to *[removed for privacy reasons]*.
21. He also confirmed that he bought the restaurant in 2012 with a business partner, and had put effort, time, and money into running the restaurant, including sponsoring three subclass 457 visa holders in 2013 to work at the restaurant. The business partner left him to run the restaurant in 2014, and in spite of the workload, the Agent was able to renovate the restaurant and apply for “*various licences for the growth of the restaurant*”, which he stated demonstrated that he had run the restaurant smoothly with his sponsored employees. In addition, the Agent stated that “the required obligations for all three [original] subclass 457 visa holders” were met from 2013, when the Department granted the visas, until the time of the site visit.
22. Due to *[removed for privacy reasons]*, and the long hours spent at the restaurant, the Agent asserts that *[removed for privacy reasons]* and he could not concentrate on his work or the running of the restaurant, which he attended barely once a week. As a result, he advertised on various websites for a restaurant manager, and was contacted by Ms NP, who advised him that she could start working immediately. Due to *[removed for privacy reasons]*, the Agent did not check Ms NP’s visa conditions on VEVO and believed Ms NP when she told him she had work rights. The Agent asserts that he was not even aware that Ms NP was the holder of a subclass 457 visa until he received the Illegal Worker

² FWO Record of Interview – 5 August 2015

Notice from the Department on 16 April 2015, upon which he terminated Ms NP's employment until she obtained the appropriate work rights to work for RS & JS Pty Ltd.

23. The Agent conceded that, as a registered migration agent, he should have conducted a thorough interview with Ms NP and her migration agent, to determine whether she could work at the restaurant or not but was not *[removed for privacy reasons]*.
24. With regards to the cash payments made to Ms NP, the Agent asserted that he paid all the employees at the restaurant in cash as he was unable to visit the restaurant on a regular basis due to *[removed for privacy reasons]*, stress, and his family life. The Agent further asserts that these cash payments were at no point an attempt to conceal Ms NP's employment until the second subclass 457 visa application had been granted, as he did not know she did not have the appropriate work rights.
25. In relation to the FWO investigation into underpayment, the Agent asserted that the reason the two employees were paid incorrectly was due to him receiving wrong advice from both his accountant and the solicitor who represented RS & JS Pty Ltd during the FWO investigation who both advised him he could hire the workers as contractors, rather than as employees.
26. The Agent acknowledged that while he did distance himself from the restaurant by selling it along with the company, this was done *[removed for privacy reasons]* because he could not find another restaurant manager, and he was unable to run it with *[removed for privacy reasons]*. The company and restaurant were sold to Mr HP with the knowledge that there were ongoing investigations, and the new owner was fully informed about the investigations. As evidence, the Agent provided a page from the contract of sale for the company which contains the following, "*apart from a current investigation by Fairwork Australia [FWO], is not involved in any litigation or arbitration proceedings and as far as the Seller is aware, there are no facts likely to give rise to any such proceedings*". As part of the sale, the Agent asserted that the estimated back pay amount of approximately \$8000 was deducted from the total sale price to accommodate any findings by the FWO to pay the money back. Therefore he did not hide the investigations from the new owner about the business's situation at the time of purchase.
27. The Agent asserted that he instructed VO to notify the Department of the company and restaurant sale, and was only made aware in the section 309 notice received from the Authority that his agent, Mr TS, had not acted in accordance with his instructions, resulting in him being sent the sponsor barring decision in May 2016. With regards to notifying the FWO of the sale, the Agent has asserted that he did so through his solicitor, and as a result the FWO were in direct correspondence with the new owner for the remainder of the investigation. The new owner ignored both the Agent's and the FWO correspondence and requests to back pay the affected employees.
28. The Agent has conceded that he did not disclose either of the investigations to the Authority in his repeat registration applications submitted on 26 November 2015 and 29 November 2016, as he had already sold both the company and the restaurant, and therefore did not have allegations presently against him. He however asserted that had he known that he should declare any investigations he was no longer associated with, he would have disclosed this information, and therefore believes his actions are an honest mistake and misunderstanding on his part as to the requirement of the registration character declaration.
29. The Agent conceded he has made mistakes but these were done unknowingly and could be partially attributed to *[removed for privacy reasons]*. He has requested that he be given a second chance to demonstrate that he is fit, honest and has soundness of moral principle and character, and that he can learn from his mistakes. The Agent has advised that he has *[removed]* and the loss of his licence would bring financial hardship on his family. He is happy to undertake any professional development deemed necessary to improve his skills as a registered migration agent.

30. The Agent stated that, prior to the matters under consideration in this decision record, he has not committed any other wrongdoings since first registering as a migration agent in 2009, which should be reflected in the Authority's records.
31. In support of his section 309 submission, the Agent provided the Authority with a copy of one page of the contract of sale for RS & JS Pty Ltd, which mentions the ongoing FWO investigation, and a copy of a letter *[removed for privacy reasons]* from July 2014 to July 2015.

Jurisdiction

32. The Authority performs the functions prescribed under section 316 of the Act.
33. The functions and powers of the Authority under Part 3 of the Act and Regulations are the Minister for Home Affairs' functions and powers. The Minister has delegated his powers under Part 3 of the Act and the Regulations to officers of the Authority. I am delegated under the relevant Instrument to make this decision.

Relevant legislation

34. The functions of the Authority under the Act include:
 - to investigate complaints in relation to the provision of immigration assistance by registered migration agents (paragraph 316(1)(c)); and
 - to take appropriate disciplinary action against registered migration agents (paragraph 316(1)(d)).
35. The Authority may decide to cancel the registration of a registered migration agent by removing his or her name from the register, or suspend his or her registration, or caution him or her under subsection 303(1), if it is satisfied that:
 - the agent's application for registration was known by the agent to be false or misleading in a material particular (paragraph 303(1)(d); or
 - the agent becomes bankrupt (paragraph 303(1)(e); or
 - the agent is not a person of integrity, or is otherwise not a fit and proper person to give immigration assistance (paragraph 303(1)(f); or
 - an individual related by employment to the agent is not a person of integrity (paragraph 303(1)(g); or
 - the agent has not complied with the Code prescribed under subsection 314(1) of the Act (paragraph 303(1)(h)).
36. Subsection 314(2) of the Act provides that a registered migration agent must conduct himself or herself in accordance with the Code. Regulation 8 of the Migration Regulations made under the Act prescribes a Code.
37. Before making a decision under subsection 303(1) of the Act, the Authority must give the agent written notice under subsection 309(2) informing the agent of that fact and the reasons for it, and inviting the agent to make a submission on the matter.

The Code of Conduct, under section 314 of the Act

1.10 The aims of the Code are:

- (a) to establish a proper standard for conduct of a registered migration agent;***

- (b) *to set out the minimum attributes and abilities that a person must demonstrate to perform as a registered migration agent under the Code, including:*
 - (i) *being of good character;*
 - (ii) *knowing the provisions of the Migration Act and Migration Regulations, and other legislation relating to migration procedure, in sufficient depth to offer sound and comprehensive advice to a client, including advice on completing and lodging application forms;*
 - (iii) *completing continuing professional development as required by the Migration Agents Regulations 1998;*
 - (iv) *being able to perform diligently and honestly;*
 - (v) *being able and willing to deal fairly with clients;*
 - (vi) *having enough knowledge of business procedure to conduct business as a registered migration agent, including record keeping and file management;*
 - (vii) *properly managing and maintaining client records;*
- (c) *to set out the duties of a registered migration agent to a client, an employee of the agent, and the Commonwealth and its agencies;*
- (d) *to set out requirements for relations between registered migration agents;*
- (e) *to establish procedures for setting and charging fees by registered migration agents;*
- (f) *to establish a standard for a prudent system of office administration;*
- (g) *to require a registered migration agent to be accountable to the client;*
- (h) *to help resolve disputes between a registered migration agent and a client.*

1.11 *The Code does not list exhaustively the acts and omissions that may fall short of what is expected of a competent and responsible registered migration agent.*

1.12 *However, the Code imposes on a registered migration agent the overriding duty to act at all times in the lawful interests of the agent's client. Any conduct falling short of that requirement may make the agent liable to cancellation of registration.*

Migration Agents Regulations 1998, regulation 9

Complaints

For paragraphs 316 (c) and (e) of the Act, any person or body may make a complaint, including:

- (a) *a client of the registered migration agent or lawyer;*
- (b) *an official;*
- (c) *an employee or member of the Institute;*
- (d) *an employee of the Authority;*
- (e) *a parliamentarian;*
- (f) *a tribunal or court;*
- (g) *a community organisation;*
- (h) *the Department.*

Migration Regulations 1994 (Cth)

Schedule 8, Visa condition 8107 Not cease or change work

8107(3) If the visa is, or the last substantive visa held by the applicant was, a Subclass 457 (Temporary Work (Skilled)) visa that was granted on the basis that the holder met the requirements of subclause 457.223(2) or (4):

(a) the holder:

(i) must work only in the occupation listed in the most recently approved nomination for the holder; and

(ii) unless the circumstances in subclause (3A) apply:

(A) must work only for the party to a labour agreement or former party to a labour agreement who nominated the holder in the most recently approved nomination; or

(B) if the sponsor is, or was, a standard business sponsor who was lawfully operating a business in Australia at the time of the sponsor's approval as a standard business sponsor, or at the time of the last approval of a variation to the sponsor's term of approval as a standard business sponsor — must work only in a position in the business of the sponsor or an associated entity of the sponsor; or

(C) if the sponsor is or was a standard business sponsor who was not lawfully operating a business in Australia, and was lawfully operating a business outside Australia, at the time of the sponsor's approval as a standard business sponsor, or at the time of the last approval of a variation to the sponsor's term of approval as a standard business sponsor — must work only in a position in the business of the sponsor.

(aa) the holder must commence that work within 90 days after the holder's arrival in Australia; and

(b) if the holder ceases employment — the period during which the holder ceases employment must not exceed 90 consecutive days; and

(c) if the holder is required to hold a licence, registration or membership that is mandatory to perform the occupation nominated in relation to the holder, in the location where the holder's position is situated—the holder must:

(i) hold the licence, registration or membership; and

(ii) comply with each condition or requirement to which the licence, registration or membership is subject.

(3A) For subparagraph (3)(a)(ii), the circumstances are that:

(a) if the nomination was made before 1 July 2010 — the holder's occupation is specified in an instrument in writing for subparagraph 2.72(10)(d)(ii) or (iii); or

(aa) if the nomination is made on or after 1 July 2010 — the holder's occupation is specified in an instrument in writing for subparagraph 2.72(10)(e)(ii) or (iii); or

(b) the holder is continuing to work for the sponsor, or the associated entity of the sponsor, for the purpose of fulfilling a requirement under a law relating to industrial relations and relating to the giving of notice.

Evidence and other material

38. In reaching the following findings of fact the Authority considered the following evidence:

- Documents contained in the Authority's complaint file CMP-29183;
- Information and documents provided by the Agent in the section 308 and section 309 submissions;

- Information held by the Authority in relation to the Agent;
- Information held on the Department's databases in relation to the matters raised in the complaint, which are the subject of this decision; and
- Information and documents provided by the FWO with regards to the Agent's former company.

DECISION AND REASONS

Integrity, fitness and propriety

39. Pursuant to paragraph 303(1)(f) of the Act, the Authority may caution a registered migration agent, or suspend or cancel their registration, if the Authority becomes satisfied that the agent is not a person of integrity or otherwise not a fit and proper person to give immigration assistance.
40. There is a degree of overlap between 'fit and proper' and 'integrity' to the extent that fitness and propriety include consideration of the honesty of the actions of an individual.
41. 'Integrity' means 'soundness of moral principle and character, uprightness and honesty'.³
42. Whether a person is a 'fit and proper person to give immigration assistance' is an enquiry which looks broadly at three factors – honesty, knowledge and competency.
43. At common law, the basic test to determine whether a person is "fit and proper" is known as the "*Allinson* test". A person is not fit and proper person if his or her conduct "would be reasonably regarded as disgraceful or dishonourable by his professional colleagues of good repute and competency".⁴
44. In *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, Toohey and Gaudron JJ indicated several factors that could be taken into account in determining whether a person was 'fit and proper'. These included, but were not limited to, conduct, character and reputation. Their Honours stated (at 380):

[D]epending on the nature of the activities, the question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed that it will not occur, or whether the general community will have confidence that it will not occur. The list is not exhaustive but it does indicate that, in certain contexts, character (because it provides indication of likely future conduct) or reputation (because it provides indication of public perception as to likely future conduct) may be sufficient to ground a finding that a person is not fit and proper to undertake the activities in question.
45. The formula 'fit and proper' (and 'person of integrity') must be construed in light of the particular legislative context at the registration scheme underpinning the migration advice profession.⁵
46. The context in which the reference to 'fit and proper' person occurs in section 290 of the Act is the applicant's giving of immigration assistance. The context also includes:
 - (a) the Act which creates offences for misleading statements and advertising, practising when unregistered and misrepresenting a matter; and
 - (b) the Code contained within the Regulations which refers to the applicant being able to perform diligently and honestly, being able and willing to deal fairly with clients, having

³ See *Re Peng and Department of Immigration and Multicultural Affairs* [1998] AATA 12 at paragraph [26].

⁴ See *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750

⁵ See *Cunliffe v Commonwealth* (1994) 182 CLR 272

knowledge of business procedure and properly managing and maintaining client records and maintaining client confidentiality.

47. Key elements of the fitness test are:

- the honesty of the person; and
- the person's knowledge of the migration scheme and ability to fulfil the position of a migration agent.

48. The requirement in section 290 that the applicant also be a 'person of integrity' is not concerned with the person's knowledge of the migration scheme or ability as a migration agent, but is primarily concerned with a person's reputation, moral principle and character, including their honesty.

49. Having regard to the body of case law cited above, a consideration of whether the Agent is a fit and proper person or a person of integrity to provide immigration assistance can legitimately include the following:

- that the Agent's past conduct can be an indicator of the likelihood of the improper conduct occurring in the future;
- the Agent's honesty and competency towards clients, the Department and the Authority;
- a consideration of the context in which the agent works, i.e. the provision of immigration assistance to migration clients;
- the Agent's knowledge and competency in immigration law and practice;
- the reputation of the Agent as a result of their conduct and the public perception of that conduct; and
- the perception of the conduct by the Agent's "professional colleagues of good repute and competency"⁶.

Findings on material questions of fact

50. Having regard to the totality of the Agent's conduct in relation to the complaint, I am satisfied that the Agent is 'not a person of integrity or is otherwise not a fit and proper person to give immigration assistance'. The evidence and reasons are set out below.

That the Agent employed Ms NP in breach of her visa conditions

51. The Agent stated in both his section 308 and section 309 submissions that Ms NP worked at the restaurant from January to April 2015, which is consistent with Ms NP's responses during the Department's site visit interview in March 2015. I am therefore satisfied that the Agent employed Ms NP during the aforementioned period, which commenced prior to the lodgement of the business nomination for RS & JS Pty Ltd, and the corresponding subclass 457 visa application.

52. Departmental records show that the Agent's company RS & JS Pty Ltd had previously been approved to sponsor subclass 457 visa holders in 2013, who were subsequently employed in the restaurant. This was confirmed by the Agent in his section 309 submission to the Authority, where he stated "*I sponsored three Subclass 457 visa holders...I have been running the restaurant smoothly with my sponsored employees*". As the Agent was an approved business sponsor, and had already sponsored three other employees on subclass 457 visas, he should have been aware of his sponsor obligations under the Regulations.

53. The Agent affirmed Ms NP's responses provided during the site visit interview that he had been responsible for hiring her as the restaurant manager, though asserted that he was

⁶ *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750

unaware the Ms NP was the holder of a subclass 457 visa or that she had any visa conditions that prevented her from being employed by his company. He conceded that he failed to undertake any visa checks for Ms NP and accepted Ms NP's assertion that she was permitted to work for him. In doing so, the Agent failed in his sponsor obligations under Division 2.19 of the Regulations to ensure he was aware of, or had given due consideration to, Ms NP's visa and conditions at the time of employment. The Agent also appears to shift the blame for this failure onto Ms NP, by suggesting that she lied to him by stating she was permitted to work for his company. This, however, does not adequately account for why the Agent, who had been registered as a migration agent for more than five years, failed to undertake a VEVO check for Ms NP despite having the knowledge and capability to do so.

54. A registered migration agent should demonstrate proficient knowledge of Australia's visa programs, and where not experienced in a particular visa class/subclass, the ability to navigate and interpret migration legislation as necessary. From his section 309 response, the Agent appears to have been aware that it is a contravention of the Act to allow a non-citizen to work without a valid visa or in breach of a visa condition, which is why he asserts he terminated Ms NP's employment following receipt of the Illegal Worker Notice on 16 April 2015.
55. During the site visit interview Ms NP informed the departmental officer that her migration agent, Mr TS, had advised her that a new visa application was required to be made in order for her to work for a different sponsor. As Mr TS was also RS & JS Pty Ltd's migration agent for the purpose of the business nomination, it is reasonable to presume this requirement was also discussed with the Agent prior to, or when, preparing the nomination and visa applications. Further, as the Agent proceeded to apply to nominate Ms NP on 26 February 2015 for a subclass 457 visa, I find it difficult to accept that he would not have questioned why Ms NP required a new visa to work for him, or sought to confirm her then current visa and work conditions through the migration agent, Ms NP, or VEVO. Instead, the Agent continued to employ Ms NP for nearly two months after the nomination and visa application lodgement until he received the illegal worker notice from the Department.
56. As a registered migration agent with over five years experience at that time, it would be expected that the Agent would have had a sound working knowledge of the Act and the Regulations, and Australia's migration program. Such knowledge and understanding of different visas and conditions should have led the Agent to question what visa Ms NP may have held that enabled her to work for him prior to the lodgement of the nomination and subclass 457 visa application on 26 February 2015. While the Agent has asserted that he was *[removed for privacy reasons]* which impacted on his judgment when deciding to hire Ms NP, I do not accept this factor alone would have resulted in him disregarding or overlooking years of migration knowledge and experience as both a registered migration agent and approved business sponsor. If the Agent's *[removed for privacy reasons]* as to result in him not considering Ms NP's immigration status, as he asserts, this presents concerns as to whether the Agent was fit to practice as a migration agent during this period of time, given he has been continually registered since 2009. On the information before me, I am not satisfied that the Agent was unaware of Ms NP's existing visa and conditions until the Department notified him in April 2015, and find his response to be unconvincing in defence of his actions. Given such, I find that the Agent knowingly acted in contravention of migration legislation and his obligations as an approved business sponsor concerning the employment of Ms NP, which resulted in the cancellation of her then current visa.
57. As an aside, it was put to the Agent that Ms NP stated during the site visit interview that the Agent paid her in cash and had advised her she would be paid "on the books" once her subclass 457 visa application was granted. The Agent contested this allegation, and stated that he paid all his employees in cash as he did not regularly attend the restaurant due to *[removed for privacy reasons]*. While I am unable to make a finding as to whether the Agent made such a statement to Ms NP, which would indicate he was aware that her employment was in contravention of her visa conditions, his submission that he paid all

employees in cash presents concerns as to the integrity of his financial management practices.

That the Agent failed, as an approved sponsor and an employer, to act in accordance with his obligations under the Migration Regulations and the Fair Work Act, in regards to other employees

58. The Agent's company was the subject of investigations by both the Department and the FWO into concerns regarding compliance with sponsorship obligations, and underpayment of employees, respectively.
59. The Department made a decision to bar RS & JS Pty Ltd from being able to make applications for approval as a standard business sponsor for a period of 36 months due to its failures to satisfy sponsorship obligations in relation to the three existing subclass 457 visa holders working in the restaurant⁷. The Department found that the Agent had failed in his obligations to keep records, to provide records and information to the Minister, and to provide information to the Department when certain events occur⁸. The Department's decision record was not handed down until May 2016, after the Agent had sold both the company and the restaurant. However, the breaches identified in the record related to both the period of time that the Agent was a director of RS & JS Pty Ltd, and when he advised the FWO and the Authority that he was the restaurant manager and/or owner, or otherwise heavily involved in running the restaurant.
60. Further, information obtained from the Agent's employees during the Department's Site Inspection identify only the Agent as the restaurant owner. Departmental records confirm that the Agent received both the Commencement of Monitoring notice and NOITTA in regards to potential findings that RS & JS Pty Ltd had failed in its obligations as a subclass 457 sponsor, and been provided opportunities to respond to both, prior to selling the business. As such, I am satisfied that the Agent was aware of the Department's investigation, and possible intention to cancel or bar the Agent's company's business sponsorship for breaches that occurred while he was the company director, and managing the restaurant. As the Department decided to bar RS & JS Pty Ltd for a period of 36 months, I am also satisfied that the Agent failed act in accordance with his obligations under the Regulations as an approved business sponsor, which reflects adversely on his suitability to advise clients in his role as a registered migration agent. A person who disregards his obligations as an approved sponsor cannot be relied upon to advise other potential sponsors about their obligations under the Act and the Regulations. In addition, the Agent's failure to keep and provide records to both the Department during its investigation, and the Authority when responding to the complaint material in the section 308 notice, raises concerns of his broader recordkeeping practices in relation to his work as a registered migration agent.
61. In relation to the FWO's investigation, subsequent legal proceedings were commenced against RS & JS Pty Ltd relating to the underpayment of two employees between October 2014 and January 2015. Though these legal proceedings were undertaken after the sale of both RS & JS Pty Ltd and the restaurant, and the Compliance Notice was issued to the subsequent owner in October 2015, FWO records confirm that the Agent was involved in the investigation prior to the sale. This included him being given the opportunity to respond to the two employees' matters and comply with the Inspector's advice to resolve non-compliance. The Agent in his section 309 submission confirmed that he was aware that the company was subject to an investigation by the FWO into serious non-compliance in the underpayment of staff prior to the business being sold, and that he disclosed this to the new owner in the contract of sale. While the Agent asserted that he was incorrectly advised by his accountant and solicitor regarding hiring employees as contractors which resulted in the underpayments, this action appears to have been a means to reduce the overall pay and entitlements of the two employees to the benefit of the Agent. The non-compliance matters raised by the FWO also appear to have been exacerbated by the

⁷ The Department's findings did not relate to the Agent's employment of Ms NP

⁸ In breach of 2.82, 2.83, and 2.84 of Part 2A of the Regulations

Agent's poor financial management practices, which were also raised in the Department's investigation. Consequently, the conduct raised in the FWO's investigation raises significant concerns with regard to the Agent's business practices, fitness, moral principles and character.

62. The two investigations also raise questions about timing of the Agent's sale of RS & JS Pty Ltd and the restaurant, given they had been owned by the Agent and his wife since 2012. It appeared from information available to the Authority that both were sold to the new owner, Mr HP, shortly after the Illegal Worker Warning Notice and the NOITTA had been issued, and the Agent had been notified of, and given the opportunity to respond to, the FWO investigation. The Authority also raised concerns as to whether the Agent had been frank and candid with the new owner as to the business' situation at the time of purchase, being subject to the aforementioned investigations, which could result in a loss of approval to sponsor visa holders, and be required to pay staff members a significant amount of money which was owed to them. Given such, the Agent's actions could be perceived as an attempt to distance himself from future disciplinary action, which speaks to his lack of fitness, propriety and integrity.
63. The Agent in his section 309 submission agreed that he had attempted to distance himself from the company and restaurant by selling, but argued that this distance was *[removed for privacy reasons]*. In addition, the Agent produced a page from his contract of sale, which confirmed the FWO investigation, as evidence that he had informed Mr HP of both investigations. However, the contract page does not include the Department's investigation into RS & JS Pty Ltd and there was no other evidence provided by the Agent, which indicates this information was disclosed to the new owner at time of sale. It would be expected that the contract of sale would have also included a similar clause relating to the Department's investigation, given a sanction outcome against RS & JS Pty Ltd would impact on the ability to employ future visa holders, who had made up the majority of staff in the restaurant. Based on the information before me, I reject the Agent's statements and supporting document as evidence that he informed Mr HP of both investigations. Subsequently, while I accept that the Agent informed Mr HP of the FWO investigation, I am not satisfied that he was completely frank and candid with the new owner in relation to the company and restaurant's overall situation at the time of sale.

That the Agent failed to disclose information regarding the above inquiries/investigations to the Authority in his applications for reregistration approved in December 2015 and December 2016

64. Registered migration agents are required to notify the Authority of any character consideration which may impact on their fitness and propriety, or integrity, as part of new or repeat registrations. The Authority, in considering an applicant's character, must take into account *"any inquiry or investigation that the applicant is or has been the subject of and that the Authority considers relevant to the application; and any disciplinary action that is being taken, or has been taken, against the applicant that the Authority considers relevant to the application; and...any other matter relevant to the applicant's fitness to give immigration assistance."*⁹
65. Section 303(1)(d) of the Act states that the Authority may cancel or suspend the registration of a registered migration agent, or caution him or her if it becomes satisfied that "the agent's application for registration was known by the agent to be false or misleading in a material particular".
66. The Agent applied for repeat registration on 26 November 2015, which was approved on 2 December 2015, and subsequently again on 29 November 2016, which was approved on 25 January 2017. The Authority's records show that in the Character sections of both applications, the Agent did not advise that he was, or had been, the subject of an inquiry or investigation by a Department or Agency of the Commonwealth or a State or Territory of Australia, or a professional association, corporate regulatory agency, or consumer protection organisation. In the case of the application for repeat registration made in

⁹ Section 290(2)(e) – (h) of the Act

November 2016, the Agent also did not notify the Authority that he had been subject, as the director of RS & JS Pty Ltd, to disciplinary action by the Department, despite the Department's records showing he was notified, through his authorised recipient, of the decision on 4 May 2016.

67. In response to this adverse information in the section 309 notice, the Agent stated that he had not been aware that he was required to disclose these investigations, given he was no longer associated with the company and restaurant following their sale to a new owner. However, the wording in the character section of the registration application states "is or has been", which clearly encompasses both present and past investigations and inquiries. Given that the Agent has been registered since 2009 and had applied for repeat registration five times before his 2015 application, I do not accept his assertion that he misunderstood the question or was unaware that he should disclose all investigations or inquiries he had been the subject of. The Agent highlighted that *[removed for privacy reasons]* could also be attributed to completing the applications incorrectly, however he only provided evidence of that circumstance *[removed for privacy reasons]* between July 2014 and July 2015. I therefore reject the argument that *[removed for privacy reasons]* affected his ability to accurately complete his repeat registration applications in late November 2015 and 2016.
68. The Agent also implied that he had not received the Department's decision record to bar RS & JS Pty Ltd as an approved sponsor, as he had been unaware his migration agent had not notified the Department of the sale until receipt of the section 309 notice. I find it difficult to believe that the Agent's designated migration agent would not provide him with important departmental correspondence addressed to him, particularly where it related to a sanctioning decision record. While there is insufficient information to determine whether the Agent received the notification of the barring decision in May 2016, I am satisfied that he was aware of the Department's intention to sanction his company before its sale.
69. Given both investigations were serious in nature and demonstrated repeated failures to deal with employees fairly, and comply with business sponsor obligations within the Temporary Work visa program, such matters reflect on the Agent's moral character, and knowledge of, and fitness to provide, immigration assistance. Disclosure of this information at the time of re-registration would have affected the Agent's prospects of approval, and likely resulted in an investigation by the Authority into his fitness. Therefore, I am satisfied that the Agent knowingly failed to disclose this adverse information to the Authority in two consecutive repeat applications for registration as it was in his own personal interests to do so. Consequently, I also find that these two applications contained responses that were false or misleading in nature.

Consideration of Appropriate Disciplinary Action

70. In deciding to discipline the Agent under section 303 of the Act I have taken into account all of the circumstances of the case, including the following:
- (a) Whether the Agent's behaviour is of a minor or serious nature. The Authority has identified the following behaviour as extremely serious and therefore likely to result in discipline at the higher end of the scale:
 - i. criminal behaviour;
 - ii. fraudulent behaviour;
 - iii. behaviour that demonstrates fundamental lack of knowledge of the law; or
 - iv. involves a blatant disregard for or a significant degree of indifference to the law;
 - v. repeated occurrences of the conduct described in subsection 303(1) (d)-(h) and/or;
 - vi. agent behaviour that has resulted in significant harm or substantial loss to clients.

- (b) Any aggravating factors that increase the Agent's culpability including but not limited to previous conduct.
- (c) Any mitigating factors that decrease the Agent's culpability including but not limited to evidence that the Agent's health has contributed to the Agent's culpability or where the Agent has undertaken steps to remedy the situation.

Seriousness of behaviour

71. In deciding to discipline the Agent under section 303 of the Act, I have taken into account all of the circumstances of the case, including the severity of the Agent's behaviour and any mitigating or aggravating circumstances which may exist.
72. Having regard to the Complaint Classification Matrix, I have considered that the Agent's conduct falls within the Major classification for the following reasons:
- (a) The Agent repeatedly failed to disclose adverse information to the Authority as part of his applications for repeat registration;
 - (b) The Agent has demonstrated a blatant disregard for his obligations as an approved business sponsor,
 - (c) The Agent has demonstrated a blatant disregard for migration and employment laws;
 - (d) The investigations undertaken by the Department and the FWO into the Agent's conduct as an approved business sponsor and employer are likely to adversely impact on or undermine the reputation of the migration advice profession; and
 - (e) I have found that the Agent is not a person of integrity, nor a fit and proper person to provide immigration assistance.

Aggravating factors

73. The Agent's behavior and actions, which are addressed in this decision record, fall well short of the standard expected of a registered migration agent. I consider that while the findings of this decision do not relate to the provision of immigration assistance by the Agent, I am satisfied that his professional colleagues of good repute and competency would regard his actions as an employer and approved business sponsor, the subject of two separate investigations by the Department and the FWO, to be unprofessional and unacceptable. In relation to the Department's investigation, the Agent was found to have employed a visa holder in breach of her conditions, and to have acted in contravention of his obligations as an approved sponsor, under the Act and Regulations, in relation to a number of other visa holders employed by him. The Agent has also been found to have provided false and misleading information to the Authority in two consecutive repeat registration applications to deliberately conceal these investigations, as well as in his responses to the section 309 notice. As such, I am also not satisfied that he has been honest throughout the investigation, demonstrating a level of disregard for the Authority and the migration agent regulatory scheme.

Mitigating Factors

74. The Agent has submitted that *[removed for privacy reasons]* which affected his ability to perform his obligations as an approved business sponsor and employer, as well as his employment of Ms NP and his subsequent applications for repeat registration with the Authority. While I have taken the Agent's submission *[removed for privacy reasons]* into account, the Agent has repeatedly provided only vague statements about *[removed for privacy reasons]*, when responding to all adverse information put to him.
75. I have also taken into account that a disciplinary decision would affect the Agent's financial earning capacity and livelihood. The Agent has advised that he has *[removed]*, and should his registration be cancelled, his family would experience financial hardship. While he

acknowledges that he has previously owned other businesses, which have provided income, the Agent states that he has no intention of buying any other businesses in the future.

76. In weighing the effect of a suspension or cancellation decision on the Agent's financial earning capacity and livelihood, I consider that the serious nature of the conduct in question, which occurred over a number of years, is more than a singular lapse of judgement resulting from the Agent's health issues. Furthermore, while the Agent has conceded that he made mistakes by employing Ms NP in breach of her visa conditions, and when completing his repeat registration applications in November 2015 and 2016, he has also been dishonest in his responses to the Authority and has attempted to divert blame onto either the complainant, another migration agent, his accountant, or his solicitor. Given such, I am not satisfied that he has demonstrated a genuine understanding of the severity of his wrongdoing, and the impact on his suitability to provide immigration assistance.

Consumer Protection

77. Consumers of professional services of registered migration agents are often vulnerable and place a high degree of trust in their registered migration agent. Consumers are therefore entitled to a high level of professional service from their registered migration agent, who should demonstrate the highest standards of integrity, propriety and fitness.
78. The behaviour demonstrated by the Agent falls short of the reasonably expected standards of a registered migration agent. I consider that the Agent poses a serious risk to consumers, given the concerns raised by the two investigations into his former company and restaurant, and his treatment of his employees on visas. I am satisfied that if the Agent were to continue to practice as a registered migration agent, the Agent would not demonstrate the requisite behaviour expected of a registered migration agent. I consider that a disciplinary decision is warranted to address the Agent's conduct in this decision, which speaks to his fitness, propriety and integrity.

DECISION

79. In all of the circumstances, and in the interests of consumer protection, I consider that it is appropriate to cancel the Agent's registration.
80. Based on the facts and evidence before me, and my findings as discussed in the decision, I have decided to cancel the Agent's registration as a migration agent under subparagraph 303(1)(a) of the Act. I am satisfied for the purposes of subparagraphs 303(1)(f) and (h) that the Agent is not a person of integrity, or is otherwise not a fit and proper person to give immigration assistance; and
81. In accordance with section 292 of the Act, an agent who has had their registration cancelled must not be registered within 5 years of the cancellation.
82. Accordingly, this cancellation will be in effect for a period of 5 years from the date of this decision.

Professional Standards Officer
Professional Standards and Integrity Section
Office of the Migration Agents Registration Authority
Department of Immigration and Border Protection

Date of Decision: 4 January 2018