

**BEFORE THE IMMIGRATION ADVISERS
COMPLAINTS AND DISCIPLINARY TRIBUNAL**

Decision No: [2016] NZIACDT 65

Reference No: IACDT 017/15

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Shivi Gupta

Complainant

AND

Sanjay Dhar

Adviser

DECISION

REPRESENTATION:

Registrar: In person

Complainant: In person

Adviser: In person

Date Issued: 4 October 2016

DECISION

Introduction

- [1] The Registrar of the Immigration Advisers Authority referred this complaint to the Tribunal. The background to the complaint is:
- [1.1] Mr Dhar's client sought advice regarding a letter from Immigration New Zealand, the letter expressed concerns relating to a work visa application.
- [1.2] Mr Dhar filed an expression of interest (EOI), which was selected. However Immigration New Zealand declined the first work visa application; a second work visa application that Mr Dhar prepared.
- [1.3] Mr Dhar filed a residence application; Immigration New Zealand declined it as it contained false and misleading information.
- [2] The Registrar raised three potential grounds of complaint:
- [2.1] Mr Dhar did not have a written agreement for providing the professional services;
- [2.2] He did not prepare the work and residence visa applications with adequate care; and
- [2.3] He did not keep proper records.
- [3] Mr Dhar did not dispute the essential facts. However, he said the complainant was not a client so he did not need a written agreement, he did take care with the applications and some of the responsibility was his client's, not his; his records were complete and reflected the way he engaged with his client.
- [4] The Tribunal has to evaluate the nature of Mr Dhar's professional responsibilities and how he discharged them. The Tribunal has upheld the complaint, as he did have a client relationship and no written agreement, he failed to take proper care in respect of the residence application, and some of his records were not complete.

The complaint

- [5] In her statement of complaint (SOC), the Registrar set out the background narrative to the complaint. The key elements are:
- [5.1] On or around 9 January 2014, the complainant contacted Mr Dhar; a licensed immigration adviser. She engaged Mr Dhar to respond to a letter from Immigration New Zealand regarding a work visa application, and to assist her to apply for residence.
- [5.2] Mr Dhar lodged an EOI for the complainant, and she was invited to apply for residence.

- [5.3] Mr Dhar responded to Immigration New Zealand's queries regarding the complainant's work visa application. However, Immigration New Zealand declined the application as it did not consider her employer made genuine attempts to recruit New Zealanders for the role.
- [5.4] On 29 January 2014, the complainant submitted a further work visa application, which Mr Dhar had prepared for her; this also failed. Immigration New Zealand expressed concerns regarding the availability of New Zealanders for the work, and Mr Dhar's response did not satisfy Immigration New Zealand.
- [5.5] On 16 May 2014, the complainant lodged a residence application, which Mr Dhar had prepared for her.
- [5.6] On 8 June 2014, the complainant terminated Mr Dhar's engagement.
- [5.7] On 8 September 2014, Immigration New Zealand wrote to the complainant regarding her residence application. Immigration New Zealand said that the application stated she had never had a declined visa application, when in fact she was declined work visa applications twice. Immigration New Zealand ultimately declined the complainant's residence application as she provided false or misleading information.
- [6] The Registrar set out the grounds of complaint arising from Mr Dhar's engagement with the complainant. The first ground is:
- [6.1] An alleged breach of clause 18(a) of the Licensed Immigration Advisers Code of Conduct 2014 (the 2014 Code).
- [6.2] The provision relates to the obligation to provide a client with a written agreement.
- [6.3] The particulars identify that the complainant was a client, and Mr Dhar failed to provide a written agreement.
- [7] The second ground is an allegation that Mr Dhar failed to be honest, professional, diligent and respectful, and conduct himself with due care and in a timely manner, in breach of clause 1 of the 2014 Code:
- [7.1] The SOC raises those obligations in relation to two elements of Mr Dhar's work:
- [7.1.1] First, the application for a work visa Mr Dhar prepared for the complainant.
- [7.1.2] Second, the residence application Mr Dhar prepared for the complainant.
- [7.2] In respect of the work visa application, the allegation is that Mr Dhar failed to include evidence of attempts by the complainant's employer to recruit New Zealanders for the relevant position of employment.

[7.3] Mr Dhar provided copies of advertisements to Immigration New Zealand when they questioned this aspect of the application. They were for different positions, not the position relating to the complainant; it appears that Mr Dhar potentially provided them intending that Immigration New Zealand would believe they related to the correct position of employment.

[7.4] In respect of the residence application, the application said the complainant had never been refused a visa or permit. In fact, since lodging the EOI Immigration New Zealand twice declined work visa applications. Accordingly, the information in the application was wrong, and Mr Dhar knew or ought to have known that.

[7.5] Accordingly, Mr Dhar allegedly failed to meet his obligation under clause 1 of the 2014 Code to be diligent and conduct himself with due care by:

[7.5.1] submitting a work visa application without ensuring that the employer had made genuine attempts to recruit new Zealanders for the position offered; and

[7.5.2] not ensuring that the residence application reflected that Immigration New Zealand had twice declined the complainant's visa applications.

[8] The third ground is an allegation in relation to an alleged failure by Mr Dhar to keep professional records pursuant to clauses 26(a)(i) and (iii) of the 2014 Code:

[8.1] The SOC alleges the Registrar required Mr Dhar to provide a copy of his client file so she could evaluate this complaint.

[8.2] Mr Dhar provided a copy of a file which did not contain the complainant's work visa application (of 29 January 2014), or records of the conversations and meetings he had with the complainant.

[9] The grounds of complaint were wider; the complainant has not filed a statement of reply seeking to pursue the wider grounds of complaint. Accordingly, the Tribunal will only consider the grounds the Registrar considered to have potential support.

The responses

[10] Mr Dhar and the complainant both filed statements of reply. However, Mr Dhar's statement of reply was not a coherent response to the grounds of complaint. Mr Dhar complained that the Registrar's statement of complaint is defective, and he said the Registrar's investigation was also defective.

[11] The Tribunal indicated to Mr Dhar that it did not accept his submission. The Registrar's investigation had reduced the grounds of complaint to three simple issues. The Tribunal gave notice to Mr Dhar that his criticism of the Registrar's investigation was unimpressive. Furthermore, the statement of complaint was clear and unambiguous as to the three issues Mr Dhar was required to answer.

- [12] The Tribunal gave notice to Mr Dhar that, pursuant to section 49(4)(a) of the Immigration Advisers Licensing Act 2007 (the Act), the Tribunal requested that he file an affidavit responding to the statement of complaint. The Tribunal also drew his attention to his right to legal representation.
- [13] Mr Dhar's response is addressed in the following discussion in relation to the respective grounds of complaint.

Discussion

The standard of proof

- [14] The Tribunal determines facts on the balance of probabilities; however, the test must be applied with regard to the gravity of the finding: *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [55].

The facts

- [15] The Registrar provided a chronology and supporting documentation.
- [16] I am satisfied the facts set out in the statement of complaint are generally consistent with, and supported by the material filed with it. However, I will consider the material facts in relation to each of the grounds of complaint.

No written agreement

- [17] The allegation against Mr Dhar is uncomplicated. The Registrar alleges he did not have a written agreement for providing professional services to the complainant, and the 2014 Code required him to have an agreement. The Registrar required Mr Dhar to provide a copy of the agreement. He was unable to do so. The complainant says there was no agreement.
- [18] Initially, Mr Dhar said in his statement of reply that the complainant was not a client. That claim is incomprehensible, as the statement of complaint is accompanied by close to 400 pages of documents that on their face indicated that Mr Dhar was providing the complainant with immigration services.
- [19] When required to file an affidavit, Mr Dhar supplied a narrative that fails to engage in a sensible way with the issues. Clauses 18 and 19 of the 2014 Code are uncomplicated. They require that a licensed immigration adviser must ensure "when they and the client decide to proceed", that they have a written agreement; there is a prescriptive set of information to disclose, and an obligation to record a number of elements.
- [20] As noted, there is a set of documents that on their face show Mr Dhar had no agreement and provided a series of professional services.
- [21] Mr Dhar's affidavit says:

[21.1] He discussed fees with the complainant;

[21.2] The complainant did not want to sign a contract;

[21.3] The complainant could not afford the services; and

[21.4] He offered services of a “complimentary nature” and was providing services as a goodwill gesture.

[22] In short, Mr Dhar appears to contend that the complainant was not a client, and he lent a helping hand, while she completed her own immigration work.

[23] That claim is inconsistent with the material the Registrar filed with the statement of complaint.

[24] The first observation is that Mr Dhar had a role in assisting the complainant with her immigration matters. If he was not providing a full service, having an agreement that contains “a full description of the services to be provided by the adviser” (clause 19(e) of the 2014 Code) is even more important than usual. It is a high risk situation if a professional person leaves their client to attend to some of the work usually undertaken by the professional adviser; both parties need to clearly understand the position. Furthermore, a licensed immigration adviser is likely to find that they have a range of professional responsibilities under the 2014 Code which they cannot avoid.

[25] However, an examination of the material makes it clear that Mr Dhar’s explanation is simply untenable. He was acting as a licensed immigration adviser not providing services of a “complimentary nature”. Examples of his professional involvement include:

[25.1] On 14 January 2014, Mr Dhar prepared form INZ 1160. The form gives notice to Immigration New Zealand that Mr Dhar was the complainant’s licensed immigration adviser. This apparently anticipated him requiring this authority to engage with Immigration New Zealand, which he did.

[25.2] On 17 January 2014, Mr Dhar wrote to Immigration New Zealand responding to Immigration New Zealand’s letter regarding potentially prejudicial information.

[25.3] On 29 January 2014, Mr Dhar signed a declaration that was part of a work visa application form. Mr Dhar declared in this document, intended to be submitted to Immigration New Zealand, that:

I certify that [the complainant] has asked me to help them complete this form and any additional forms. I certify that the applicant agreed that the information provided was correct before signing the declaration.

...

I have assisted the applicant with recording information on the form.

...

I have provided immigration advice (as defined in the Immigration Advisers Licensing Act 2007) ...”

[25.4] On 3 March 2014, Mr Dhar wrote to Immigration New Zealand regarding Immigration New Zealand’s letter relating to potentially prejudicial information.

[25.5] On 16 May 2014, Mr Dhar wrote to Immigration New Zealand submitting a completed and signed application for residence visas.

[26] Against that record, Mr Dhar’s claim that the complainant was not a client is plainly false and the declarations he made for submission to Immigration New Zealand demonstrate he was well aware of that. Mr Dhar was required to have a written agreement; he did not have one. Accordingly, I find he breached his obligation in clause 18(a) of the 2014 Code.

Lack of diligence and care

[27] The second ground is an allegation that Mr Dhar failed to be diligent and conduct himself with due care (as required by clause 1 of the 2014 Code), in that he:

[27.1] submitted a work visa application without ensuring that the employer had made genuine attempts to recruit new Zealanders for the position offered; and

[27.2] failed to ensure that a residence application reflected that Immigration New Zealand had twice declined the complainant’s visa applications.

[28] The starting point in relation to the work visa is that Immigration New Zealand considered the application was deficient. Accordingly, the issues are whether the application was deficient, and if so, whether a failure to maintain professional standards by Mr Dhar was the cause of the deficiency.

[29] Mr Dhar’s response in his affidavit contends:

[29.1] The complainant failed to provide evidence of attempts to recruit New Zealanders.

[29.2] Accordingly, the information did not exist, so it could not be provided to Immigration New Zealand.

[29.3] Mr Dhar, therefore, applied for a work visa “solely on the fact that the complainant needs a work visa to legally stay and work in New Zealand”, pending her residence visa application.

[29.4] In short, Mr Dhar says there was no evidence of attempts to recruit New Zealanders, and he fully understood that.

[29.5] The March 2015 form of INZ 1113 (the Employer Supplementary Form), allows applications by persons who have been invited to apply for a residence visa without evidence that New Zealanders are not available. That supports Mr Dhar’s approach.

[29.6] The version of form INZ 1113 that was current when Mr Dhar lodged the work visa application did require proof of attempts to recruit New Zealanders. However, Mr Dhar says at the time it was already Immigration New Zealand's practice not to require proof that a New Zealander could not fulfil a position, if the applicant had been invited to apply for residence.

[30] The first difficulty Mr Dhar faces is that on 29 January 2014, when he made the declaration referred to above in paragraph [25.3], the complainant had not been invited to apply for a residence visa. That only occurred on 3 February 2014, when Immigration New Zealand sent an email notifying that development. However, that is not the end of the matter. It appears that the complainant's EOI had been selected from the pool, as Mr Dhar's covering letter attached a copy of a printout showing it had been selected. He also referred in that letter to the work visa being only "so that she can continue with her employment till a decision is made on her Residence Application."

[31] Accordingly, Mr Dhar is entitled to the benefit of the doubt that he did turn his mind to the issue and had made a judgement that Immigration New Zealand would accept that the application met the requirements, or would be treated as an exception. The merits of his view can be debated; however, the Registrar has not challenged the claim that at the time, in the complainant's circumstances, it was Immigration New Zealand's practice to accept applications without proof of attempts to recruit New Zealanders. Accordingly, I accept that Mr Dhar may have had a reasonable belief that this was the policy at the time he drafted the work visa application.

[32] Mr Dhar's correspondence is less than satisfactory as he ought to have clearly signalled to Immigration New Zealand that the evidence relating to seeking New Zealanders was deliberately absent, and referred to his understanding of the policy. That applied both when submitting the original application, and when responding to Immigration New Zealand's queries. However, that is not the ground of complaint the Registrar has raised, so I make no finding on it.

[33] Accordingly, the Tribunal will dismiss this ground of complaint in relation to the work visa application.

[34] The second limb of this ground of complaint is the failure to declare the failed work visa applications when lodging the residence visa application. In essence, Mr Dhar says that he was not in New Zealand, the relevant documents were in order when he last saw them, and it was for the complainant to check her declaration was correct. In particular, Mr Dhar said:

[34.1] The EOI was correct when it was lodged.

[34.2] At the time the residence visa application was lodged, the complainant had work visa refusals.

- [34.3] Mr Dhar was overseas, so the complainant had the responsibility for checking the documents. She was able to work under an interim visa with work conditions, so she did not understand the significance of the refusals.
- [34.4] The complainant started taking immigration advice from another licensed immigration adviser.
- [34.5] Mr Dhar was travelling and had limited internet access.
- [34.6] The complainant took version of the work visa application that was no longer current, and filed it without checking it.
- [35] Mr Dhar does accept that he wrote a covering letter dated 16 May 2014. That letter says Mr Dhar attached the residence application duly signed. The copy produced as part of the statement of complaint has on the first page a statement that:
- This application form contains the information which you provided in your Expression of Interest. It is important you confirm the information in this form is true and correct. If any of the information in the form has changed, or your circumstances have altered, which may affect any of your answers to the questions in this form, please provide the new or additional information by following the directions given in the section of this form titled "Amendments or New Information".
- [36] The form also has a section for completion by the adviser. That section says:
- I certify that the applicant asked me to help them complete this form and any additional forms. I certify that the applicant agreed that the information provided was correct before signing the declaration."
- [37] The copy produced by the Registrar is not signed by either the applicant or Mr Dhar, accordingly, I cannot speculate as to what the final form of the document submitted to Immigration New Zealand was. However, there can be no doubt given Mr Dhar's letter and the contents of the standard terms of the document referred to in his letter, Mr Dhar ought to have been well aware of the need to check the document for accuracy. If Mr Dhar was offshore and could not do that properly, he should not have written the letter. He was obliged to make proper arrangements for his client and ensure she understood the issues, and had his advice on the accuracy of the content of the form. Mr Dhar contends that his client would not have understood the significance of the declined applications; it was his responsibility to ensure she did understand.
- [38] This application was serious. The complainant and her family's future would potentially change as a result of the application. It was Mr Dhar's responsibility to protect his client. He did not do so, and Immigration New Zealand rejected her application as it contained false or misleading information, that had the potential to alter the family's future.
- [39] The Registrar's allegation is that Mr Dhar's service delivery lacked diligence and care as he failed to ensure the residence application contained correct information. I am satisfied that allegation is established. Mr Dhar was engaged in the process; he wrote the letter submitting the document to Immigration New Zealand. There is no evidence the

complainant accidentally lodged a different version of the document; this was the only version.

- [40] Mr Dhar was obliged to either personally check the document properly, or arrange for another qualified person to do so, and draw his client's attention to the issues. The document contained false information, and Mr Dhar's justification based on his absence does not absolve him. He was obliged to fulfil his professional duties, or tell his client he could not do so and make appropriate arrangements for her protection.
- [41] I accordingly find Mr Dhar breached clause 1 of the 2014 Code; due to lack of diligence and due care, he failed to ensure the complainant's residence application disclosed that she had two failed applications for work visas.

Failure to keep records

- [42] The final ground of complaint is that Mr Dhar failed to keep professional records pursuant to clauses 26(a)(i) and (iii) of the 2014 Code. He was required to keep a copy of his client's applications, and his written communications and file notes recording material oral communications. Mr Dhar's records did not contain the complainant's work visa application (of 29 January 2014), or records of the conversations and meetings he had with the Complainant.
- [43] Mr Dhar's explanation in his affidavit is that the complainant filed the work visa application, so it was her responsibility to keep a copy.
- [44] Mr Dhar said almost all of the discussions with the complainant regarding her immigration matters were by email. The emails are the whole record of his professional communications with his client.
- [45] Mr Dhar prepared the work visa application; he was obliged to attend to submitting it and keeping a copy for his file. He could not delegate that responsibility to his client. Potentially, his client might deliver the document to Immigration New Zealand, but that no more absolved him from his professional responsibilities than using a courier company to deliver the document.
- [46] I will take Mr Dhar at his word regarding an absence of meetings and discussions. It is an answer to the ground of complaint regarding not keeping records. It is also evidence of the gravity of the other grounds of complaint, and Mr Dhar's lack of understanding regarding his professional commitments. Mr Dhar was dealing with a very important application; it failed due to false and misleading information being contained in a critical document. Mr Dhar's lack of professional commitment caused that to happen. Accordingly, while I will not uphold the failure to keep records or meetings as a ground of complaint, his admitted lack of meetings adds to my concern that Mr Dhar does not understand the nature of his professional obligations; or chooses not to comply with them.

[47] Accordingly, I uphold the complaint that Mr Dhar failed to keep a copy of the work visa application as required by Clause 26(a)(i) of the 2014 Code, and dismiss the ground that he failed to keep records of meetings with the complainant pursuant to Clause 26(a)(iii) as he did not have meetings with his client.

Decision

[48] The Tribunal upholds the complaint pursuant to section 50 of the Act; Mr Dhar breached the 2014 Code in the respects identified and that is a ground for complaint pursuant to section 44(2)(e) of the Act.

[49] In other respects, the Tribunal dismisses the complaint.

Submissions on Sanctions

Request for the Registrar's views

[50] The Tribunal has upheld the complaint; pursuant to section 51 of the Act, it may impose sanctions.

[51] The grounds of complaint and Mr Dhar's response to them raise serious concerns regarding the professional standards maintained by Mr Dhar. He claims he did not have a client relationship with the complainant. That claim, if he made it genuinely, would demonstrate a grave lack of understanding of Mr Dhar's responsibilities as a licensed immigration adviser providing professional services to the public. However, I have found the claim was not genuine; it was inconsistent with Mr Dhar's own declaration regarding his role. It was a self-serving and false explanation.

[52] The same deficit is exhibited in Mr Dhar's claim he could write a cover letter for a residence application, which contained false and misleading information; and then claim it was his client's responsibility. Mr Dhar must have understood the document was replete with warnings of the risks of lodging it with incorrect information.

[53] Mr Dhar for a third time demonstrated the same lack of commitment to professional standards saying his client was obliged to keep records, when the 2014 Code required him to keep the records.

[54] Mr Dhar in relation to this complaint has not accepted his professional obligations, and places responsibility on his client for meeting professional standards. In the absence of some acceptable explanation, or steps to protect the public, the view may be open that he should not hold the status of a licensed immigration adviser offering professional services to the public.

[55] I also note that Mr Dhar said he did not have records of engaging with his client, in relation to instructions that went very badly wrong, because he did not have meetings with her regarding serious and complex issues. That gives further perspective to the Tribunal's concerns.

[56] As it appears that potentially the public are at risk from Mr Dhar providing professional services, the Registrar is requested to provide her view of what orders are appropriate to ensure that consumers of immigration advice will have the protection promised by the 2014 Code, and the Immigration Advisers Licensing Act 2007.

Submissions

[57] The Registrar and the complainant have the opportunity to provide submissions on the appropriate sanctions, including potential orders for costs and compensation. Whether they do so or not, Mr Dhar is entitled to make submissions and respond to any submissions from the other parties.

[58] If the complainant seeks orders for compensation, she should consider that:

[58.1] sanctions, including compensation, must relate to the Tribunal's findings.

[58.2] the Tribunal expects the complainant to identify any additional costs or losses she claims as compensation, and provide documentation to support them; Mr Dhar should identify whether or not he challenges any of the claims.

[59] Any application for an order for the payment of costs or expenses under section 51(1)(g) should be accompanied by a schedule particularising the amounts and basis for the claim.

Timetable

[60] The timetable for submissions will be as follows:

[60.1] The Authority and the complainant are to make any submissions within 10 working days of the issue of this decision.

[60.2] The adviser is to make any further submissions (whether or not the Authority or the complainant makes submissions) within 15 working days of the issue of this decision.

[60.3] The Authority and the complainant may reply to any submissions made by the adviser within 5 working days of him filing and serving those submissions.

DATED at Wellington on this 4th day of October 2016

G D Pearson
Chair