BEFORE THE IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2011] NZIACDT 15

Reference No: IACDT 011/10

IN THE MATTER	of a referral under s48 of the Immigration Advisers Licensing Act 2007
BY	**Immigration Advisers Authority** Authority
BETWEEN	**JM** Complainant
AND	**AHX** Adviser

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DECISION
APPLICATION FOR REHEARING

REPRESENTATION:

Adviser

In person

Date Issued: Monday 11 April 2011

Decision

[1] In a decision dated 21 January 2011, the Tribunal upheld the complaint in this matter, and in a decision dated 29 March 2011 disciplinary sanctions were imposed.

[2] By letter dated 30 March 2011, the Adviser asked the Tribunal to "reconsider and dismiss the complaint". In support of that request, the Adviser has provided various documents he says support an assertion he was not involved in the events to which the complaint relates.

[3] He has now supported that with an application for a rehearing following a minute issued by the Tribunal indicating that would be required. The application is in the form of a letter dated 6 April 2011.

[4] The record of the proceedings shows the Adviser has throughout been on notice of the evidence relating to his role in this matter. In response to a minute issued by the Tribunal dated 1 December 2010, he wrote to the Tribunal by letter dated 6 December 2010. In that letter, he made statements that included:

> "My role in [The Complainant's] case was assisting and overseeing ..."
>
> "I provided advice in terms of certain direction and approach for a character waiver in this case to assist my young colleague ..."
>
> "The above mentioned is my involvement in this particular case ..."

[5] The Adviser now contends he had "nothing to do with [the Complainant] and his partner's immigration matters and hence not subject to [his] complaint against me."

[6] When an Adviser has responded to the Tribunal's processes by indicating he recalls the circumstances relating to the complaint, and gives a reasoned explanation, it creates a significant threshold to overcome if he is to credibly assert he in fact had no involvement in the matter. Indeed, it raises serious concerns relating to how the original explanation came to be given.

[7] First, there is an issue as to the jurisdiction to grant a rehearing.

[8] A view is that unless there is some deficiency in the process which deprives the existing decision of legal effect, the Tribunal is *functus officio*, and there is no jurisdiction to grant a rehearing.

[9] In the present case, the application does not establish there is a deficiency in the process that affects the validity of the existing decision. The Adviser claims that after the decision on penalty issued, he had a different recollection of the events, and has supported that with material relating to what days he was working. That does not in any way impugn the process by which the decision was reached or its validity.

[10] Accordingly, though I have not had the benefit of submissions on the issue, I take the view there is no jurisdiction to grant a rehearing in this case. In doing so, I have regard to the distinction between the power of the Tribunal to regulate is procedure (section 49) in dealing with matters within its jurisdiction, and the Tribunal's inability to confer any jurisdiction on itself other than that created by statute. The principle is discussed in *Department of Social Welfare v Stewart* [1990] 1 NZLR 697.

[11] If I am wrong in relation to the jurisdictional issue, I am satisfied the application lacks merit.

[12] The grounds on which a rehearing will be granted are that there has been a miscarriage of justice. The usual circumstances triggering a miscarriage of justice are: Some procedural irregularity (such as not getting notice of a hearing); an unfair practice by a party to a

proceeding; material evidence that could not have been foreseen has been discovered; or a witness has been guilty of misconduct.

[13] The application is seeking to present information which was available prior to the decision. However, it is appropriate to have regard to the potential for a miscarriage of justice to result from an error or oversight in failing to produce evidence that could have been obtained (*Green v Broadcasting Corporation of New Zealand* [1988] 2 NZLR 490). In the *Green* case, Casey J observed:

> "However, this rule [relating to rehearing] is not designed simply to give an unsuccessful party an opportunity to repair his case; the public interest requires that there be an end to litigation."

[14] The material does not explain in any adequate way why the Adviser gave a wholly inconsistent account to the Tribunal earlier. Against that background, I find the material presented in support of the application for a rehearing both implausible, and also unsatisfactory as a factual foundation to conclude the Adviser was not involved in the matters that gave rise to the complaint.

[15] The application for a rehearing is dismissed.

DATED at WELLINGTON this 11th day of April 2011

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G D Pearson
Chair