BEFORE THE IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2011] NZIACDT 24

Reference No: IACDT 016/10

IN THE MATTER	of a referral under s48 of the Immigration Advisers Licensing Act 2007
BY	**Immigration Advisers Authority** Authority
BETWEEN	**Paramjit Singh** Complainant
AND	**Rajesh Kumar** Adviser

Hearing: 12 August 2011

Appearance: The Adviser (in person)

DECISION

Date Issued: 18 August 2011

Decision

Introduction

[1] The Registrar of the Immigration Advisers Authority referred this matter to the Tribunal pursuant to section 45 of the Immigration Advisers Licensing Act 2007 (the "Act"). It concerns a complaint the Adviser failed to deliver professional services competently, then reacted to the complaint improperly.

[2] The complaint was referred as a breach of the Code of Conduct and section 44(2) of the Act. The Code was developed pursuant to section 37 of the Act (published www.iaa.govt.nz).

[3] Section 44(2) of the Act provides a breach of the Code is grounds to uphold a complaint, as is negligence and incompetence.

[4] The Adviser is a licenced immigration adviser, who was engaged by the Complainant to vary a work permit in July 2009.

[5] Immigration New Zealand responded to the application for variation, saying the variation was not possible. That was because the Complainant was no longer working for the employer specified in his permit. Immigration New Zealand said in these circumstances a new permit, rather than a variation of the existing permit, was required.

[6] The Adviser did not apply for a new work permit, instead he advised the Complainant to lodge an appeal with the Removal Review Authority. That appeal was not successful.

[7] The key elements of the complaint are:

[7.1] The Adviser should have applied for a new work permit, as Immigration New Zealand suggested.

[7.2] The appeal to the Removal Review Authority was misconceived, and lodged without substantiating the grounds.

[7.3] The Adviser engaged in personal abuse of the Complainant and his counsel. He was deliberately obfuscatory, dishonest, and misleading in his response when counsel queried his handling of the Complainant's affairs.

Procedural Issues

Oral hearing directed

[8] This Tribunal is required to address complaints on the papers, as far as that is practicable and appropriate.

[9] In accordance with its usual process, the Tribunal issued a minute and informed the parties of the issues the papers appeared to raise, and potential conclusions. The parties were invited to respond.

[10] A response was received from the Complainant, but not from the Adviser. Accordingly a decision issued, based on the papers and the response from the Complainant.

[11] The Adviser informed the Tribunal he had presented a submission in response to the minute, before the decision was issued. He provided a receipt to show the submission had been delivered. The receipt indicates the submission was delivered to an unrelated party in the same building as the Tribunal's Secretariat. That would not have been apparent to the Adviser.

[12] The Tribunal set aside the decision. The Adviser had established he took appropriate steps to file the submissions, and reasonably believed the Tribunal had acknowledged receipt.

[13] The Adviser's submissions requested an oral hearing, and set out a response to the complaint. The Tribunal determined the Adviser should have the opportunity of presenting his case at an oral hearing.

[14] The parties were informed the procedure at the hearing would reflect the Tribunal's statutory processes. The Tribunal is required primarily to determine complaints on the papers. Complainants are not required to present a case to the Tribunal; the process is inquisitorial. The Tribunal gave all parties the opportunity to be heard, and explained any witnesses would potentially be examined by the Tribunal in accordance with the usual process at an inquisitorial hearing.

[15] As the oral hearing was supplementary to the material already before the Tribunal, parties were not expected or required to replace the material already before the Tribunal.

[16] Each party was free to participate at the oral hearing but not required to do so. In the event, only the Adviser participated in the hearing.

Request to summons witnesses

[17] The Adviser requested witness summonses be issued to two employees of Immigration New Zealand to require them to attend the hearing. The Tribunal's power to summons witnesses is a power of its own volition to issue a witness summons. The power is contained in clause 6 of the Schedule to the Immigration Advisers Licensing Act 2007.

[18] The Adviser faced a serious complaint, and was entitled to every opportunity to advance his case. Nonetheless, the Tribunal only has the power to issue witness summonses of its own volition; it will not simply accede to a request from a party without inquiry, and being satisfied the exercise of the power is appropriate.

[19] The Tribunal did not issue the witness summonses requested. The reasons were set out in a third minute issued by the Tribunal.

[20] The reasons for not summonsing the first immigration officer were:

[20.1] The first immigration officer the Adviser sought to summons was the officer who had written letters regarding a potential application for a new work permit. The Adviser said this was so "she could explain what she intended to do with the application".

[20.2] It was not evident the Tribunal would gain any assistance from an immigration officer speculating on what they would do with an application that was never made.

[20.3] The Tribunal notified the Adviser the material point in issue appeared to be whether the Adviser was at fault in not advising the Complainant to make that application. Further, that expert evidence on that issue may be material to the Adviser's case. An experienced licensed immigration adviser could give evidence on what they would regard as a proper course of action when advising a person in the Complainant's circumstances.

[20.4] The request to summons the second officer was contained in a letter dated 2 August 2011 the Adviser sent to the Tribunal, in response to the Tribunal declining to summons the first immigration officer. The letter, among other things said:

[20.4.1] He knew of no more experienced immigration adviser than himself. Another "Immigration Advisor will otherwise give his/her subjective opinion that may be different from the official interpretation of the Immigration policy/Instruction as interpreted by the Minister of Immigration and implemented by INZ."

[20.4.2] The Tribunal needed to "understand the official interpretation of the Immigration Policy, and how INZ will act in the circumstances of the case."

[20.4.3] Accordingly, he requested a particular technical adviser from the Henderson Branch of Immigration New Zealand be summonsed. He said the particular officer is "supposed to be an expert on Immigration Policy".

[20.5] The Tribunal noted the Adviser had been informed that if he wished to have a witness summonsed he should apply to the Tribunal with an outline of the evidence he believed the witness would give (preferably in the form of a brief of evidence signed by the witness).

[20.6] There was nothing in his letter to suggest he had approached the potential witnesses or Immigration New Zealand to seek direction on what officer may have appropriate expertise. It was a wholly unrealistic submission for the Adviser to claim he is the only available licensed immigration adviser who could speak objectively on the merits of his conduct in this matter.

[20.7] Accordingly, the Tribunal was not satisfied it should of its own volition summons an immigration officer to give evidence simply on the basis they held a senior position, and had expertise in relation to immigration policy. An expert witness would be expected to fully review all the material facts, reflect on the issues, and present a considered view.

[20.8] The Adviser was informed it was routine for a professional facing a disciplinary charge of the kind the Adviser faces to brief and call peers as witnesses. The Tribunal would consider an application to issue a summons to either an expert witness who had been briefed, or a witness of fact.

The Hearing

[21] The Adviser has practised law in India, and indicated he had sophisticated legal skills. However, when presenting his case he made no attempt to distinguish issues of fact and law. He had indicated he was not presenting evidence, however much of what he said was oral evidence of factual matters.

[22] When the Adviser completed his case, the Tribunal examined him on the material presented. He was examined under oath.

[23] The Adviser's case was not presented under oath. The Tribunal raised with him what status his oral unsworn statements should have. He accepted his case should form part of the Tribunal's record. While the fact some of the evidence was not on oath could have a bearing of the weight to be given, no finding in this decision turns on that.

[24] The oral presentation has been accepted as evidence of facts, opinion, and submissions as part of the record of the complaint, and the response.

The Complaint and Response

[25] The first ground of the complaint was that the Adviser failed to recognise Immigration New Zealand had provided an opportunity for the Complainant to lodge a new application for a work permit. He instead simply allowed the Complainant to be in the position where his work permit expired, and then lodged an unmeritorious application with the Removal Review Authority.

[26] When a person does not have a current permit to be in New Zealand they cannot lodge a conventional application for a further permit. At the time their options to get a further permit in that situation were limited to:

[26.1] applying for the exercise of ministerial discretion under section 35A of the then current Immigration Act 1987; or

[26.2] applying on humanitarian grounds to the Removal Review Authority.

Accordingly, allowing a client to move to the position of being in New Zealand unlawfully due to having no current permit is very significant.

[27] The complaint includes the allegation the Adviser failed to engage in a discussion with the Complainant regarding the importance of this change of status, and the options he had available.

[28] In addition, the Complainant alleged misconduct in the Adviser's response to the complaint.

[29] The Adviser's response to the complaint had the principal features that:

[29.1] Due to the terms of the relevant immigration policy, despite Immigration New Zealand inviting a new application, that application would have been without merit, and of no benefit to the Complainant.

[29.2] There was no prospect of successfully challenging the revocation of the Complainant's work permit.

[29.3] The appeal to the Removal Review Authority had a good prospect of success, and was the appropriate course to take.

[29.4] The Adviser discussed the options the Complainant had with him. The discussion was at a level appropriate to his ability to engage with the nuances of complex immigration issues.

[29.5] The Adviser responded to counsel for the Complainant in a manner that corresponded to the way he was treated by counsel for the Complainant.

Facts and professional judgements

Not filing an application for a new permit, and lodging an appeal

WD1 Policy

[30] The Complainant held a work permit under WD1 policy. That policy provides for a person who has completed a course of study in New Zealand, and has an offer of employment to receive a work permit. As an interim step under WD2 policy, a person who has completed a course of study may obtain a "graduate job search work visa".

[31] The Complainant engaged the Adviser to apply for a variation of the conditions of the work permit he held. The Adviser made that application on 23 July 2009; it was to allow him to work for a different employer.

[32] On 30 July 2009, the Complainant's work permit was revoked with effect from 28 August 2009 as he had ceased to work for the employer identified in his work permit.

[33] On 4 August 2009, Immigration New Zealand wrote to the Complainant, care of the Adviser. The letter said the work permit had been revoked, a variation was not possible, and so a new work permit should be applied for. It explained the process and said the fee for the variation could be applied to the new application. When a work permit is revoked it is usual to allow time before the revocation takes effect. Given that the letter invited a new application for a work permit, an informed reader of the letter would be aware the revocation had not yet taken effect.

[34] On 6 August 2009, the Adviser requested that the Complainant make an appointment to discuss the issues.

[35] A meeting took place and the Adviser provided advice that led to the Complainant engaging the Adviser to lodge an appeal with the Removal Review Authority, rather than responding to the invitation in the 4 August 2009 letter to lodge an application for a new work permit.

[36] On 20 August 2009, Immigration New Zealand again wrote to the Complainant, care of the Adviser, and said there had been no response to the 4 August 2009 letter. The letter also reiterated the need for a new application and, in addition, noted there were outstanding court proceedings so there was a character issue to address. This letter required a response by 27 August 2009. The Adviser has not claimed the court proceedings were a bar to a successful application for a work permit, or that this element had any impact on his advice.

[37] The Adviser failed to respond to the two letters from Immigration New Zealand and, accordingly, the variation application failed. The reason given was failure to respond to the requirements in the two letters.

[38] On 28 August 2009 the revocation of the work permit took effect.

[39] The Adviser lodged an appeal with the Removal Review Authority on 1 September 2009.

[40] The Adviser's evidence was that his decision not to apply for a new work permit was considered, and appropriate. His position is that the terms of the policy in WD1 included among the material requirements that:

> "d. To be granted a work visa under these instructions, applicants must:
>
> i. apply no later than 3 months after the end of their student visa for that course or qualification; or
>
> ii. hold a 'graduate job search work visa' (see WD2)."

[41] The Adviser said the effect of this policy, as it was interpreted by both him, and Immigration New Zealand, is that:

[41.1] If a person wished to change employer they could get a variation of their permit to name a new employer.

[41.2] However, if the employment had terminated, then it was impossible to get a new permit, unless they were within three months of their student visa ending.

[42] He claimed to have relevant experience, and knew the policy interpretation, though the only specific evidence he gave to support his understanding was that he had rung Immigration New Zealand's telephone assistance service.

[43] It is not necessary to make a definitive finding as to whether the Adviser's interpretation is right. For present purposes, it would be sufficient if this view was one the Adviser could reasonably regard as correct.

[44] However, the difficulty the Adviser faces is that if he reasonably regarded the policy as having the effect of precluding a new permit being issued, that does not make the course of action taken by the Adviser competent, reasonable or appropriate. That is for two reasons: First, the expression of policy in the operational manual is not absolute. There is always the option of ministerial discretion if there is a deficiency in policy in relation to a particular person or circumstance (section 35A of the Immigration Act 1987). Second, being unable to apply for a new work permit does not of itself make the appeal to the Removal Review Authority appropriate.

The Adviser's view of WD1 policy excludes an application for a new permit

[45] The Adviser gave evidence he held the view the three month requirement precluded an application for a new permit, as suggested by Immigration New Zealand. He also explained why he failed to respond to the letters of 4 and 20 August 2009. His views of Immigration New Zealand, New Zealand's immigration policy, and law were determinative of his response.

[46] The Adviser explained he interpreted the 4 August 2009 letter as being in effect a cynical invitation. His view was that had he acceded to the invitation, the result would have been that the application would be processed and declined, on the basis of:

[46.1] not meeting the three month requirement under WD1; and

[46.2] as the Complainant's occupational skills were in horticulture, the Complainant would have had no hope of meeting alternative criteria for the issue of a work permit.

[47] The Adviser knew from the terms of the 4 August 2009 letter that the Immigration Officer had reviewed the application for variation, so was aware the Complainant was not working for the specified employer, and worked in the horticultural section so could not be expected to qualify under alternative policy.

[48] When questioned, it became evident the Adviser held the view that immigration law, policy, and Immigration New Zealand were unfair and unreasonable. The invitation in the letter to apply for a new permit was not made with any genuine expectation that it would assist the Complainant.

[49] The Adviser was frank about his views of New Zealand immigration law and policy. He said:

> "New Zealand Immigration law and policy is unfair and unreasonable, and I have to tell clients that is how it works. I have to tell clients that every day."

[50] He went on to say immigration law made by the New Zealand Parliament was unfair, in a systematic way intentionally detrimental to migrants, to the advantage of the New Zealand State.

[51] He developed his views of the particular unfairness contained in the expression of WD1 policy. He said it created an opportunity for employers to victimise permit holders. It gave the power to an employer to dismiss an employee with no proper reason, knowing they could then not get another permit to gain alternative employment. This, according to the Adviser, had given employers the means to blackmail employees, and workers were being treated as slaves in New Zealand.

[52] In the course of evidence at the hearing, the Adviser expressed the view Immigration New Zealand is neither reasonable nor fair in the way it administered immigration law and policy, but later emphasised it was the policy in particular that was his concern.

[53] The Adviser's view of Immigration New Zealand was reflected in one of the grounds of the appeal to the Removal Review Authority. The Adviser included as a ground that the Complainant had been "victimised by both his employer and [Immigration New Zealand]". The Authority determined, "The complaints against [Immigration New Zealand] are rejected". There was no evidence provided to the Authority to support the claim.

[54] Given his opinion of Immigration New Zealand and the immigration system, the Adviser ignored the suggestions in the 4 and 20 August 2009 letters, did not go back to Immigration New Zealand with his concerns, his client's permit expired, and he then lodged the appeal.

Appeal to the Removal Review Authority

[55] The Adviser contended he had good grounds for the appeal to the Removal Review Authority.

[56] The grounds were summarised by the Authority in its decision. They were in essence:

[56.1] The Complainant's employment had been terminated, and he had been blackmailed with threats of deportation if he demanded his due wages.

[56.2] His work permit was revoked by Immigration New Zealand due to it taking a week to find alternative employment.

[56.3] The appellant was victimised by his employer and Immigration New Zealand: "It is common for employers to blackmail and exploit foreign workers who are under constant threat of immediate termination of their employment. Some are even treated as slaves. [Immigration New Zealand] policies favour employers against employees."

[56.4] The Complainant needed to stay in New Zealand to advance his employment claim, and sought a new work permit.

[57] The Removal Review Authority noted the only information submitted in support of these serious allegations against Immigration New Zealand and the Complainant's employer was a request for mediation assistance. The request for mediation assistance was provided to the Tribunal as part of the record. The substantive element of the documents contains the following information:

"**Brief outline of current situation/problem**:

Outstanding wages of $5,793.00 to be paid and unjustified action and unjustified dismissal

Length of employment approx 2.5 years

Not on Trial Period"

Subsequent events

[58] The Complainant has been represented by counsel since the Adviser ceased acting for him. He has represented him in relation to this complaint, and also sought to obtain a work permit.

[59] On 23 February 2011, the Complainant was granted a work permit under section 61 of the Immigration Act 2009. That section is the general ministerial discretion that corresponds with section 35A or the former Act.

[60] Counsel explained the focus of the grounds for the section 61 application was the Adviser's failure to respond to Immigration New Zealand's invitation to apply for a work permit in their letters of 4 and 20 August 2009.

Abusive correspondence in the response to the Complaint

[61] The Adviser responded to the complaint with correspondence. Examples of comments that appear abusive in that correspondence are:

[61.1] A letter to counsel for the Complainant dated 12 March 2010, saying the Complainant "is a convict and he is telling lies to you."

[61.2] A letter to counsel for the Complainant dated 19 March 2010:

[61.2.1] Saying counsel for the Complainant had "no idea what to do about" the case and he was trying to "find some excuse to make some money out of his [client's] desperate situation".

[61.2.2] The letter continued to assert counsel for the Complainant had raised issues due to ignorance, incompetence and lack of diligence.

[61.2.3] In short, accusations of serious professional misconduct were levelled at counsel for the Complainant.

[61.3] A letter to counsel for the Complainant dated 29 March 2010:

[61.3.1] Reiterated the sentiments conveyed in the 19 March 2010 letter, and the Adviser said would be making a complaint with the New Zealand Law Society. He said counsel for the Complainant had engaged in "unprofessional conduct".

[61.3.2] He also said the Complainant "has a short fuse", "never accepts responsibility for his own actions", "fights with everybody", did not "spare his own wife and was convicted of assaulting her".

[61.4] A letter to the Authority dated 12 May 2010:

[61.4.1] He referred to earlier correspondence, asserted his position on the relevant immigration policy and law was correct, and

[61.4.2] Continued to denigrate counsel for the Complainant saying he had "no understanding of immigration policy and its application" to the case and further had been misleading the Complainant.

[61.5] A letter to the Tribunal dated 16 July 2010:

[61.5.1] He reported he had lodged a complaint about counsel for the Complainant.

[61.5.2] His allegations were that counsel was not competent to practise immigration law and had irresponsibly lodged a complaint with the Authority.

[61.6] The Adviser did lodge a complaint with the New Zealand Law Society. The Committee dealing with the complaint "could not find any evidence to support any of [the Adviser's] allegations".

[61.7] During the hearing the Adviser also volunteered his views on the Immigration Advisers Authority. He said the Authority had:

> "made a joke of the regulation of [the Licensed Immigration Advisers'] profession, as a lawyer recently admitted was dealing with the renewal of his licence – she was a girl who passed her law degree three months before".

The comments were obviously a sexist, and a wholly unjustified attack on the Authority. The women and men who comprise the officers of the Authority exercise powers under the structures for supervision and oversight; and decisions are decisions of the Authority not individual officers. When warned his comments reflected on his professional standing, and would potentially be taken into account by the Tribunal, he sought to justify them and said it was "feedback" which should be welcomed.

[61.8] The Adviser accepted at the hearing he regretted some of the denigration of counsel for the Complainant and the Complainant.

Professional background

[62] The Adviser has legal qualifications but is not qualified to practise law in New Zealand. He said he had practised law in India.

[63] He expressed the view in a letter dated 19 March 2010 to counsel for the Complainant that he, the Adviser, was "more qualified in law than you. So you are in no position to teach me legislation". At various points in the proceedings, the same sentiments were expressed, not only in relation the Adviser's comparative skill and expertise in relation to counsel for the Complainant, but others also, including Immigration New Zealand, the Authority, and this Tribunal.

Decision

The failure to respond to correspondence and lodge an appeal to the Removal Review Authority

[64] The first issue is the Adviser's view the three month requirement expressed in WD1 para.d (refer para [40] above) excluded the possibility of a new work permit being granted.

[65] I accept the wording of the policy could be viewed as having the effect the Adviser contends.

[66] However, the requirement is that the person "apply no later than three months after the end date of their student visa". The provision does not say the application must relate to the specific permit. It would be consistent with the policy objective if it was sufficient that the person had applied for the first visa in that timeframe, and could apply subsequently apply for a further permit.

[67] The Adviser's evidence to support his claim Immigration New Zealand interpreted the policy in the way he contended was his report of a telephone call to Immigration New Zealand's telephone assistance service. Little weight can be given to that, in the absence of knowing how the question was put, the qualifications and experience of the respondent, and the lack of

opportunity to examine to claim. The Adviser produced no evidence of any written communication or specific previous experience with the policy.

[68] I am not satisfied either the terms of the policy did preclude a successful application for a new permit, or that was the way Immigration New Zealand would interpret the policy. Nonetheless, I do accept the Adviser's belief as to the interpretation of the policy could be held by a competent licensed immigration adviser. That is a reasonable interpretation of the wording, even if it does not accord with the policy objective.

[69] However, that is not the end of the matter. The Adviser should have been aware this interpretation was not necessarily the view of Immigration New Zealand; and if it was, the issue could still be addressed with Immigration New Zealand in a manner that would lead to it being successfully resolved.

[70] There are two facts which indicated Immigration New Zealand would in fact ensure that the policy under WD1 did not operate to the disadvantage of applicants in the manner claimed by the Adviser:

[70.1] The 4 August 2009 letter specifically invited a new application. The Immigration Officer apparently knew the Complainant worked in the horticulture sector, and would either be entitled to a WD1 work permit, or not be eligible for a permit at all. The Officer also knew the Complainant was not working for the original employer. Only by attributing lack of understanding or cynical motives could that letter not be regarded as an indication Immigration New Zealand would consider an application for a new permit on its merits.

[70.2] Second, the Complainant was later granted a work permit under the Ministerial discretion delegated to Immigration New Zealand. That is not consistent with Immigration New Zealand intending the policy should have the effect claimed by the Adviser.

[71] Immigration New Zealand in its Operational Manual states: "Underpinning all our activity is the desire to provide the best possible service and to demonstrate honesty, fairness, confidentiality and respect in all our dealings". It is the experience of this Tribunal that Immigration New Zealand does conscientiously and consistently seek to realise that aspiration; accepting of course that in some cases human frailty may result in less than that standard in some cases.

[72] I find the letters of 4 and 20 August 2009, and the issue of a work permit under section 61 of the 2009 Act evidence a constructive and fair approach taken by Immigration New Zealand in relation to the Complainant.

[73] I reject the Adviser's claim that the letters of 4 and 20 August 2009 were an attempt to draw him into lodging an application that would necessarily fail. I also reject his assertions that:

[73.1] "New Zealand Immigration law and policy is unfair and unreasonable".

[73.2] WD1 created an opportunity for employer's to victimise permit holders, with the effect that employers are deploying it to blackmail employees, and treat them as slaves.

[73.3] That the Complainant was victimised by Immigration New Zealand.

[74] I find the Adviser's views of both Immigration New Zealand, and New Zealand immigration law and policy misconceived. His incorrect views have affected his decisionmaking to the detriment of his client. He has shown no willingness or capacity to reconsider, or re-examine the correctness of his views. It is a recurring theme of the Adviser's response to the complaint that his own understanding of immigration matters is superior to that of others; and reconsideration of a position he has taken is an affront to his dignity.

[75] Accepting the Adviser reasonably held the view there was an issue with immigration policy which prevented a second new application being made, that does not justify him ignoring the correspondence from Immigration New Zealand and instead lodging an appeal with the Removal Review Authority.

[76] I find a competent licensed immigration adviser holding that view would have responded to the 4 and 20 August correspondence from Immigration New Zealand and discussed the concern. If the Immigration Officer shared the concern, as a last resort it would have been open to lodge an application under section 35A (after revocation of the Complainant's permit took effect). That application would have allowed Immigration New Zealand to address an unjust policy outcome. The Complainant was later granted a permit by Immigration New Zealand under the equivalent provision in the 2009 Act.

[77] I, accordingly, conclude the Adviser was incompetent in failing to respond to the letters of 4 and 20 August 2009, and seek an effective solution with Immigration New Zealand. That view is reinforced by my conclusion that the course the Adviser took, namely an appeal to the Removal Review Authority, was not viable.

[78] I find the Adviser was incompetent in relation to the appeal to the Removal Review Authority in two respects:

[78.1] First, grounds were advanced that amounted to allegations of serious misconduct, and the appeal was presented with no evidence to support the grounds.

[78.2] Second, the appeal had no realistic prospects of success on the other grounds.

[79] As noted, the Removal Review Authority found the grounds of appeal included allegations of victimisation by Immigration New Zealand and his employer; and the only information submitted in support was a request for mediation assistance (which provided no evidence supporting the allegations). Serious allegations require proof, and the Adviser provided nothing of substance. It was improper to make allegations of that kind without a basis to support them.

[80] The appeal had no prospect of success, as there was nothing to support the key allegations. Beyond that, the grounds of appeal essentially were a complaint regarding the ordinary incidence of immigration policy. As the Authority noted, it is not a review tribunal of decisions of Immigration New Zealand to revoke or decline temporary permits.

[81] I am satisfied the Adviser failed to pursue an open and appropriate approach to Immigration New Zealand, and instead pursued an appeal to the Removal Review Authority. It was inevitable his client would not benefit.

[82] Counsel for the Complainant pursued an appropriate approach to Immigration New Zealand, and successfully obtained a work permit for the Complainant. The reasons advanced by the Adviser for his approach are his highly critical and disparaging views of New Zealand immigration law, policy, and its administration by Immigration New Zealand.

[83] Immigration law and policy, and Immigration New Zealand may be criticised. No body of state or regulatory regime is above either criticism, or the law. It is open for a licensed immigration adviser to raise and boldly pursue criticism when required. Indeed, it is a duty to raise and responsibly pursue issues that operate unfairly in relation to their clients.

[84] The views expressed by the Adviser to the Tribunal were of a different character. His views led him to treat helpful suggestions in the 4 and 20 August 2009 letters as a cynical attempt to lead this client into an inappropriate path. He expressed disdain for New Zealand immigration law and policy, regarding it as cynically crafted to disadvantage migrants, rather than a fair and measured regime, with the inevitable failings contained within every complex regulatory regime.

[85] The Adviser's views precluded him from identifying the action required for his client to achieve his immigration objectives.

[86] I am satisfied the Adviser acted incompetently, both in the nature of the action he identified as appropriate; and also in relation to the failure to lodge an appeal to the Removal Review Authority which had material to support the grounds on which the appeal relied.

[87] An issue raised in the complaint was the extent to which the Adviser engaged in a discussion with the Complainant to obtain informed consent before determining on a course of action. There is conflicting accounts of what was communicated. However, I do not consider the issue

adds materially to the complaint. I have found the Adviser embarked on a course of action that was inappropriate, a product of incompetence. Given the Adviser failed to identify the options the Complainant had, failing to discuss the options with his client was inevitable.

[88] Section 44(2)(b) of the Act provides "incompetence" is a ground for upholding a complaint.

[89] This aspect of the complaint has established:

[89.1] The Adviser in fact advised a course of action that was wrong and to the disadvantage of the Complainant;

[89.2] The advice was the product of a distorted and wrong view of New Zealand's immigration regime; and

[89.3] The process that was invoked was pursued incompetently.

[90] I am, accordingly, satisfied the facts are far above the threshold where an error reaches the point of sufficient gravity to constitute a professional disciplinary offence.

[91] In addition, I find there was a breach of clause 1 of the Code. The Adviser was required by clause 1.1 of the Code to both carry out his services and take reasonable steps to ensure his client's interests were represented with professionalism. He failed to do so.

[92] I also find the Adviser breached clause 2.2 of the Code in lodging the appeal with the Removal Review Authority. The appeal had no hope of success (through lack of evidence and being misconceived). A competent licensed immigration adviser practising in the area at the time the appeal was lodged should have understood that position. Clause 2.2 prohibits lodging an appeal that is grossly unfounded; this appeal was.

[93] Section 44(2)(e) of the Act provides that breaching the code is a ground for complaint under the Act.

The response to the complaint

[94] The Adviser has endeavoured to explain his abusive response to counsel for the Complainant, and the Complainant. He says he was provoked by counsel for the Complainant.

[95] There was a letter dated 22 February 2010 from counsel for the Complainant following up the failure to hand over files. It was unexceptional in its terms. The Adviser responded by email the following day, and took exception to the letter, and told counsel for the Adviser "you need to set your office right before writing threatening letters to the professionals". Counsel for the Complainant said "I am not sure what 'profession' you refer to as you are not a member of the legal profession, despite your apparent assertions to the contrary". It suffices to say the Adviser's correspondence degenerated, and the open hostility to his former client and counsel for the Complainant ensued.

[96] It is apparent from the Adviser's correspondence the acceptance by others of his professional dignity and standing is a matter of some sensitivity for him. He has expressed regret for his use of language, but not apologised, or admitted he was wrong.

[97] The terms in which the Adviser unjustifiably denigrated his former client and his counsel has no place in professional correspondence. The allegations against counsel were of serious misconduct. They are outlined above. Comments such as he had "no idea what to do about" the case and was trying to "find some excuse to make some money out of his [client's] desperate situation"; allegations of ignorance, incompetence, and lack of diligence were all unjustified and wrong.

[98] His comments about his former client were personal, and calculated to cause distress and upset. There was no other apparent purpose in comments such as he "is a convict and he is telling lies to you", "has a short fuse", "never accepts responsibility for his own actions", "fights with everybody", did not "spare his own wife and was convicted of assaulting her".

[99] The complaint regarding the Adviser's response to the complaint is upheld. The conduct breached the code.

[100] Clause 1 of the Code requires a licensed immigration adviser to perform services "with ... respect and professionalism." The rude and abusive conduct lacked respect and professionalism, and thereby breached the requirements of Clause 1.

[101] The conduct was calculated to lower the estimation of the Adviser's profession in the eyes of the public. Clause 2.1 of the Code requires a licensed immigration adviser to:

> "f) uphold the integrity of New Zealand's immigration system and the Immigration Advisers Authority; and
>
> g) maintain respectful and professional relationships".

[102] The conduct breaches those requirements; dealing responsibly with complaints is a core requirement of a professional. All licensed immigration advisers are required to have procedures to deal with complaints (clause 9 of the Code).

[103] Section 44(2)(e) provides a breach of the code is a ground for upholding a complaint.

Contemptuous views of Parliament and the Authority

[104] In his oral evidence, the Adviser denigrated the New Zealand Parliament, immigration law and policy, and the Authority. The comments are identified earlier in this decision (para.[48] - [54] and [61.7]), they are wrong, unjustified, and unprofessional. It had none of the character of fair and responsible criticism, which professionals should contribute public debate and discourse.

[105] The Adviser said he conveys his contemptuous views of New Zealand immigration law and policy to his clients as a matter of routine.

[106] It is evident the Adviser either fails to understand the most elementary of professional standards, or chooses to disregard them.

[107] His admission to his profession required him to commit to uphold the integrity of New Zealand's immigration system (Code clause 2). The creation of his profession was to ensure migrants receive professional service (section 3 of the Act); and thereby interact effectively with New Zealand's immigration system. An objective being to "enhance the reputation of New Zealand as a migration destination" (section 3 of the Act).

[108] Section 6 of the Act provides, unless a person is licensed under the Act or exempt from the requirement to be licensed, they may not provide immigration advice. Section 63 provides it is an offence to breach that requirement. "Immigration Advice" is defined in section 7. There are exceptions which are not presently material; section 7(a) provides "Immigration Advice":

> "means using, or purporting to use, knowledge of or experience in immigration to advise, direct, assist, or represent another person in regard to an immigration matter relating to New Zealand, whether directly or indirectly and whether or not for gain or reward; ..."

[109] Holding a licence under the Act is a significant privilege, and the licensee carries corresponding obligations.

[110] The views the Adviser expressed to the Tribunal at the hearing are in themselves sufficient to amount to professional misconduct at the most serious end of the scale. The unjustified expression of such views impacts on whether the Adviser is a fit and proper person to be a licensed immigration adviser.

[111] A concerning aspect of the Adviser's comments was his attack on the Authority, saying it had "made a joke" of the regulation of his profession. It was not an isolated comment; it was part of a sustained and contemptuous attack on the bodies, laws, and systems which a licensed immigration adviser is required to deal with professionally on a daily basis. Respect for them is

necessary if a licensed immigration adviser is going to be in a position to fulfil their duty to uphold the integrity of New Zealand's immigration system.

[112] The Tribunal will not treat this conduct as a separate ground of complaint.

[113] However, the Adviser's attitude to his profession, the bodies which govern it, and the regime it engages with will be considered in relation to the appropriate disciplinary sanctions to be imposed.

[114] The Adviser is put on notice of this factor, to allow him to make submissions on this issue.

Submissions on disciplinary sanctions

[115] Given the findings, disciplinary sanctions under section 51 of the Act may be imposed by the Tribunal.'

[116] The sanctions which are potentially open are prescribed by section 51 which provides:

> " **Disciplinary sanctions**
>
> (1) The sanctions that the Tribunal may impose are —
>
> (a) caution or censure:
>
> (b) a requirement to undertake specified training or otherwise remedy any deficiency within a specified period:
>
> (c) suspension of licence for the unexpired period of the licence, or until the person meets specified conditions:
>
> (d) cancellation of licence:
>
> (e) an order preventing the person from reapplying for a licence for a period not exceeding 2 years, or until the person meets specified conditions:
>
> (f) an order for the payment of a penalty not exceeding $10,000:
>
> (g) an order for the payment of all or any of the costs or expenses of the investigation, inquiry, or hearing, or any related prosecution:
>
> (h) an order directing the licensed immigration adviser or former licensed immigration adviser to refund all or any part of fees or expenses paid by the complainant or another person to the licensed immigration adviser or former licensed immigration adviser:
>
> (i) an order directing the licensed immigration adviser or former licensed immigration adviser to pay reasonable compensation to the complainant or other person."

Submissions on disciplinary sanctions

[117] The Authority and the Complainant have the opportunity to provide submissions on the appropriate sanctions, including potential orders for costs, refund of fees, and compensation.

[118] 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.

[119] Any claim for compensation for loss of income, expenses, or other damages flowing from the breach of a professional duty should be particularised, and substantiated.

[120] The Adviser will have the opportunity to respond to any submissions from the Authority and the Complainant. Whether or not they make submissions, the Adviser may provide submissions on penalty.

[121] Should the Adviser have a submission regarding inability to pay a penalty that submission is to be supported by a statement of assets and liabilities and particulars of income and outgoings.

[122] The Tribunal notifies the Adviser the grounds on which the complaint has been upheld are at the serious end of the scale. A potential sanction at this level is for a licence to be cancelled and an order made that prevents an adviser from applying for another licence for up to two years (which may include a prohibition on applying for any or all of the categories of licence: Full, limited or provisional). The Tribunal has formed no view of the appropriate penalty in this case. It is nonetheless important the Adviser is aware any submissions he makes should be properly directed to the full range of potential penalties.

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

[123.1] The Authority and the Complainant are to make any submissions within 10 working days of the issue of this decision, and

[123.2] The Adviser is to make any further submissions (whether or not the Authority or the Complainant make submissions) within 15 working days of the issue of this decision.

[124] The parties are notified this decision will be published with the names of the parties after five working days unless any party applies for orders not to publish any aspect.

DATED at WELLINGTON this 18th day of August 2011

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G D Pearson
Chair