BEFORE THE IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2011] NZIACDT 04

Reference No: IACDT 001/10

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

FOR PUBLICATION COPY

DECISION

REPRESENTATION:

Adviser

In person

Date Issued: 14 February 2011

Decision

The Referral

[1] This matter was referred to the Tribunal pursuant to section 45 of the Immigration Advisers Licensing Act 2007 (the Act) by the Registrar of the Immigration Advisers Authority. It concerns a complaint the Adviser was negligent, and breached duties of care.

[2] The complaint alleges the Adviser:

[2.1] Was, along with her colleague, SI, responsible for providing professional immigration services for the Complainant;

[2.2] She accepted a engagement to prepare an Expression of Interest, which would not be successful (or at least not on the Complainant's circumstances as they were at the time);

[2.3] The allegation against her is that she should have identified, and fully disclosed the risk the Complainant would not succeed in getting the immigration status he sought.

[3] The Registrar has referred the complaint as a breach of:

[3.1] Section 44(2)(a), and

[3.2] Clause 1.1, of the Code of Conduct. The Code having been developed pursuant to section 37 of the Act (published www.iaa.govt.nz).

[4] Clauses 1.1 Code requires that a licensed immigration adviser act with care, respect, diligence and professionalism.

Factual Issues

[5] The Tribunal undertook a review of the whole of the papers presented, and issued a minute dated 10 December 2010. Among other procedural matters, the minute identified the factual matters in issue, and the potential conclusions that could be reached on the papers before the Tribunal. The parties were given an opportunity to respond.

[6] The foundation for the complaint was:

[6.1] The Adviser agreed to represent the Complainant in making an Expression of Interest to Immigration New Zealand.

[6.2] The Complainant disclosed all material he was asked for in relation to his expression of interest.

[6.3] The Complainant relied on the Adviser's professional skill and expertise to lodge the Expression of Interest, and advise on its merits.

[6.4] Immigration New Zealand selected the Expression of Interest from the pool, but found it did not meet the requirements to progress.

[7] The difficulty was a very specific one, and identified by Immigration New Zealand in an email dated 7 April 2009, concerning the term of the Complainant's employment.

[8] The Adviser and Immigration New Zealand had different positions on the interpretation of policy as it applied to the particular terms of employment.

[9] The difference was not resolved, and the Adviser sought to pursue the issue through a process which would lead to a residence application. There were no appeal rights in relation to an expression of interest which was the point in the process, so the Adviser sought to advance the process further so it could be tested on appeal. The Complainant in an email of

2 June 2009 advised he had decided not to proceed with that course, it appears largely due to the filing fees for lodging the application, and potentially an appeal.

[10] The Adviser, through her counsel, had provided a response to the complaint, and the material supporting it. Her position was said to be correct, for reasons that are discussed later in this decision.

[11] The parties were notified the Tribunal considered it was necessary to evaluate the merits of the position taken by the Adviser and Immigration New Zealand, and given an opportunity to respond further.

Legal issues

[12] In his submissions prior to the Tribunal's minute, counsel for the Adviser had advanced the view "common-law concepts of negligence" were relevant to "negligence" as contemplated by section 44. The minute gave the parties the opportunity to consider whether there were other views of the threshold for an adverse finding of negligence in this jurisdiction.

[13] In some other contexts, the approach to professional discipline is that there is a threshold before fault or error is worthy of an adverse disciplinary finding, which may be higher than negligence as a cause of action in tort, or at least different.

[14] Of course, the central legal question is whether the material presented requires that the complaint should be upheld and, if so, in what respects.

The positions of the parties

[15] The Adviser's counsel responded to the minute by a memorandum dated 27 January 2011.

[16] On the question of the threshold for establishing negligence in this context he contended:

[16.1] Section 44(2)(a) provides for negligence as a "stand alone" ground on which a complaint may be founded; and

[16.2] What should amount to negligence in this context is informed by authorities in the different statutory context of medical professional disciplinary jurisprudence. These authorities take an approach where:

[16.2.1] The practitioner must first have departed from acceptable professional standards based on an objective comparison with professional peers, although the standards the community is entitled to expect may set the standard higher if professional peers are commonly failing to meet proper standards; and

[16.2.2] The departure is to be significant enough to attract sanction for the purpose of protecting the public.

[16.3] The approach is illustrated by *McKenzie v MPDT* (HC Auckland, CIV 2002-404-153; 12/6/03), and *F v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 774.

[16.4] In relation to the Code, counsel for the Adviser submitted that a similar approach is required, namely a failing measured by the standards of the profession and community; and also sufficiently serious to justify disciplinary action.

[16.5] Applying that approach, the Adviser met the standards required, so it would not be necessary to move to the second level and evaluate the gravity of any transgression.

[17] Counsel for the Adviser also submitted that, under section 44, it is the responsibility of the Authority to formulate the complaint, and the Tribunal must determine the complaint on those grounds alone. This was said to flow from the natural justice requirements in section 47(2) allowing the parties an opportunity to comment before a complaint is referred to the Tribunal. In contrast, there is a lack of mandated provisions in the Act in relation to natural justice when

a complaint has been placed before the Tribunal although counsel acknowledge nothing turned on the point unless the Tribunal considered wider issues than were in its minute.

[18] The other parties did not make further submissions in response to the minute.

Decision

[19] The first issue to determine is the proper approach to the concept of "negligence" under section 44(2)(a). The Act does not define the term, which is not surprising as its application turns on the wider statutory context.

[20] One view is that negligence is established when there is a shortcoming using concepts derived from the civil standard of care, as in a tortuous claim for negligence. While the Tribunal may make an order for compensation, it is not constituted to adjudicate compensation claims.

[21] Compensation orders are part of the disciplinary sanctions under section 51. Section 50 allows section 51 orders only when a complaint has been upheld. The grounds on which a complaint can be founded under section 44 do not include contractual claims, and other compensatory issues that arise outside of a professional disciplinary regime.

[22] Negligence is used in the Act in the context of professional disciplinary issues. It must be interpreted and applied accordingly. It is not appropriate simply to adopt principles from the law relating to negligence in tort. It follows to establish a complaint of negligence, under section 44(2)(a), or the correlative duties of care, diligence and professionalism under section 1.1 of the Code, it is necessary to consider what the threshold must be to uphold a professional disciplinary complaint under the Act.

[23] I agree with counsel for the Adviser that the jurisprudence from the various authorities dealing with medical professionals is appropriately applied to understand the threshold, but being mindful it is necessary to consider the statutory context in the respective situations.

[24] In *Tolland,* Decision No.325/Mid10/146P at para [39], the HPDT observed:

> "Negligence, in the professional disciplinary context, does not require the prosecution to prove that there has been a breach of a duty of care and damage arising out of this as would be required in a civil claim. Rather it requires an analysis as to whether the conduct complained of amount to a breach of duty in a professional setting by the practitioner."

[25] The professional setting is varied, but duties of competence, honesty, disclosure and propriety are shared by a wide range of professionals. Immigration advisers have much in common with other professionals. Section 3 of the Act affirms it is intended to protect the interests of consumers receiving immigration advice, which corresponds to the duties other professionals have to the public engaging their services. The issue is properly understood under the Act as whether there has been a breach of duty in a professional setting.

[26] Counsel for the Adviser identified a two step approach evident in some of the medical disciplinary cases:

[26.1] An objective assessment of whether the practitioner has departed from acceptable professional standards. That may be determined by comparison with the practitioner's peers; but reserving the right for the Tribunal to set standards in the interest of the public; and

[26.2] The second step being to determine whether the lapse is sufficient to warrant a disciplinary sanction.

[27] In my view, the Act does not require a two step test, as it does not have an ascending hierarchy of disciplinary offences. The second step is a necessary consideration when a finding must be made as to the level of disciplinary offence that is established. Regardless, I do accept it is a necessary element of the test to determine whether any lapse is sufficiently serious to warrant the complaint being upheld.

[28] Section 50 contemplates a complaint being upheld without necessarily imposing a sanction. It follows it is not necessary to find a disciplinary sanction is required to uphold a complaint. However, it is important to recognise that not every lapse or manifestation of human frailty should result in an adverse professional disciplinary finding. It follows there will be occasions when advisers are responsible for a lapse from acceptable standards; but still not justify upholding a disciplinary complaint.

[29] It is a reality many errors and mistakes are too trivial to warrant an adverse disciplinary finding, and the Act recognises that. Section 45(1) provides the Authority may treat a complaint as trivial or inconsequential, and should not be pursued, or treat it as a matter that is best settled between the parties.

[30] Accordingly, it is necessary and appropriate for this Tribunal to be mindful there is a threshold before a complaint of negligence, or want of care and diligence is established. The Act does not attempt to further prescribe where the boundary lies, and any attempt by this Tribunal to do so is unlikely to be successful. It is necessary to consider the facts of each complaint.

[31] I now apply those principles to the present facts. The essence of the complaint is that the Adviser accepted instructions when she should have warned the Complainant there were at least potential difficulties with his employment situation.

[32] For an adviser to accept instructions without identifying difficulties, and warning the potential client of them, may well amount to a disciplinary offence. Taking fees to advance a hopeless application is typical of the type of conduct the Act was intended to protect consumers against.

[33] However, it is an area where some insight is necessary. Immigration policy is not capable of being applied as a mechanical formulation which provides a definitive answer for every case. Indeed, appreciation of the nuances and the ability to advocate for an interpretation of policy, are important reasons why immigration advisers are engaged.

[34] As with other professions, individual advisers and immigration officers will have different views on particular aspects of immigration policy, and the meaning of the wording used to prescribe it. This is no different from dealing with any type of legislated regime. Some cases are clear, but there are inevitably boundary issues where different views are open. It is the daily work of the Immigration and Protection Tribunal to deal with disputes over the application of immigration law and policy in particular cases.

[35] Furthermore, it is not an uncommon experience for practitioners dealing with matters of any complexity to identify difficulties only after being engaged; following further investigation of facts, law, and policy. It is not realistic to expect a professional adviser to be in a position to necessarily identify all potential issues in an initial interview.

[36] In immigration work, it is common to find applicants who do face difficulties as the process is advanced. An adviser will have to deal with those situations. That process may involve making submissions, pursuing an appeal, or advising a client of steps they need to take to succeed with an application.

[37] The question in this case is whether the difficulty identified by Immigration New Zealand in its email dated 7 April 2009 should have been identified, and the Complainant warned at the time of engagement, or some time before Immigration New Zealand raised the issue. The email from Immigration New Zealand identified the problem as:

> "SM7.15.b.i requires that your employment must be permanent, or indefinite, or for a stated term of 12 months with an option for further terms. The information you have provided indicates that your employment agreement is for a term of 2 years. However your employment agreement also states '...is on a fixed term basis and as such there is no expectation between parties of ongoing work.' As your employment agreement does not allow for further terms it does not appear that your employment can be considered ongoing as required under SM7.15.i of SMC policy."

[38] The terms of the employment agreement did identify there was a fixed term of two years, recording:

> "The parties have agreed that a fixed term is appropriate for this employment because sufficient enrolments to run the same course in 2009 cannot be confirmed at this stage and accordingly the course may not be taught in 2011."

[39] There was a letter of explanation dated 9 April 2009 from the prospective employer that said:

> "CO's employment is a two years' fixed term contract with an option to renew if mutually agreed between the employer and the employee. However, due to the specific nature of our business, we need to keep it to a fixed term contract and all decisions about renewal of agreements are made at the end of the current two year term."

[40] However Immigration New Zealand was not satisfied, as its view (expressed in a letter dated 30 April 2009) was:

> "Whilst [the 9 April 2009 letter] you supplied implies that you may be offered a further term of employment this does not equate to an employment contract that includes an option for further terms."

[41] The Adviser challenged this interpretation (in an email dated 14 May 2009), noting that:

> "An important issue is that INZ appear to have overlooked that the applicant is already employed for two years which is twice the length of the minimum fixed term contract specified in policy. Therefore, the applicant already meets the requirement of 12 months with the option to renew. In addition, to this, the employer has confirmed that after the two years employment, there is the option to renew the contract again."

[42] The Adviser sought to pursue the issue through a process which would lead to a residence application. It is not necessary to analyse the details; it suffices to say that there are no appeal rights in relation to an expression of interest, and the Adviser sought to advance the process so it could be tested on appeal. The Complainant in an email of 2 June 2009 advised he decided not to proceed with that course it appears largely due to the filing fees for lodging the application, and potentially an appeal.

[43] The Adviser, through her counsel, has provided a response to the complaint, and the material supporting it. The key feature in relation to technical correctness of the Adviser's argument on the employment contract being:

[43.1] The view expressed by Immigration New Zealand was not necessarily correct.

[43.2] Two bases for the view not to be correct are:

[43.2.1] The policy only required an offer of employment, and the letter referring to an option to renew could satisfy that test.

[43.2.2] A two year term was equivalent to: "12 months with an option for further terms".

[44] The Adviser, through her counsel, also advanced the view that the decline was from a literal interpretation of the policy, and it was part of a professional service to seek solutions to such issues. Furthermore, it was within the Adviser's professional judgment and experience that the Complainant's employment would be acceptable. Furthermore, that reflected the views of reasonable professional peers, and information as to those views was presented.

[45] I agree with the submission advanced by counsel for the Adviser. In my view, the position taken by Immigration New Zealand was debateable, and potentially wrong. It is not necessary or appropriate for me to determine that question. For present purposes, it is sufficient for me to determine whether this issue was one that should have been identified, and the Complainant warned at an earlier phase of the professional engagement.

[46] I am satisfied the terms of the employment were fairly regarded as within the policy, and the different view was not one a competent and careful adviser would have necessarily identified. Furthermore, that the view taken by Immigration New Zealand was one that could have been

tested, and was potentially wrong. The uncertainty in my view is an ordinary example of the nuances and complexity that Immigration Advisers and Immigration Officers have to deal with.

[47] Employment contracts are endlessly varied, and describing key qualities is inherently difficult and uncertain. I am satisfied it is a reasonable view that, the particular employment in this case could well have been regarded as "a stated term of 12 months with an option for further terms". The contract did have two 12 month periods within the term mandated, and there was an "option" to continue. There is a range of meanings that could be attributed to "option". In this case, the employer very responsibly and genuinely made it very clear it would be necessary to fully review the position at the end of the defined term of engagement. However, that will apply unless there is an option for one party to unilaterally extend the term. The wording of the relevant immigration policy is ambiguous when applied to this particular contractual arrangement, and setting.

[48] It follows I am satisfied the Adviser conducted herself in all material respects at a level that was in accordance with the standards of her professional peers, and also at a standard the public are entitled to expect. Had the Complainant elected to continue with the process, the Adviser may well have been able to mount a submission that would have overcome the initial view taken by Immigration New Zealand.

[49] Finally, while not necessary to resolve this case, I note the submission that under section 44 it is the responsibility of the Authority to formulate the complaint, and that the Tribunal must determine the complaint on those grounds formulated by the Authority. I do not accept this view. The Authority does not formulate and prosecute a charge before the Tribunal. The reference to the Tribunal is a "complaint", and the Tribunal is required to deal with the complaint. Should different issues emerge from those formulated by the Authority, the Tribunal is not limited by the manner in which the Authority has formulated the complaint initiated by the Complainant. The Tribunal is of course obliged to ensure all parties have an opportunity to be heard in relation to any matter which may adversely affect them. A potential change in the basis on which the complaint will be determined will likely be in that category. The Tribunal is required to regulate its own procedure, and must do so having regard to the principles of natural justice.

[50] The complaint is dismissed.

DATED at WELLINGTON this 14th day of February 2011

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G D Pearson
Chair