

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

Decision No: [2012] NZIACDT 31

Reference No: IACDT 001/11

**IN THE MATTER**

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

**BY**

**Immigration Advisers Authority**

Authority

**BETWEEN**

**BO**

Complainant

**AND**

**XTT**

Adviser

---

**DECISION**

---

**REPRESENTATION:**

**Adviser:** In person

**Complainant:** In person

Date Issued: 28 June 2012

## DECISION

### Introduction

- [1] Mr BO complained that Mr XTT failed to carry out his professional duties as a licensed immigration adviser.
- [2] The professional engagement arose when Mr BO needed a variation to his work permit, as he wanted to work for a new employer.
- [3] He says Mr XTT met with him briefly, and gave him a blank form to sign. Mr XTT failed to tell him that he could not take up work with a new employer until Immigration New Zealand processed the application. Mr XTT delayed filing the application, and did not keep in touch with him.
- [4] Mr BO took up his employment with a new employer. Immigration New Zealand then discovered Mr BO had breached his work permit by doing so. Immigration New Zealand then refused to vary the work permit, due to that breach.
- [5] Mr XTT says he acted professionally and diligently, and Mr BO knowingly breached the terms of his work permit.
- [6] The issues are primarily factual. I have found the written material created at the time supports Mr XTT's account, and his account is consistent with the surrounding circumstances. I have found Mr BO's account unreliable, and reject it.
- [7] The Tribunal's decision is to dismiss the complaint.

### Mr BO's Complaint

- [8] Mr BO says that on 31 August 2010 he engaged Mr XTT to assist him apply for a variation to his work permit. He wanted to work for a different employer (his former employer had sold his business).
- [9] He says he spent some five minutes with Mr XTT, and paid an application fee of \$120 and professional fees of \$200. They also signed a written agreement.
- [10] At this meeting Mr BO gave Mr XTT a letter offering him employment with a new employer, and Mr XTT gave Mr BO a "blank supplementary form" to sign, which Mr XTT said he would fill in later.
- [11] Mr BO says Mr XTT did not warn him he could not take up the new employment until the variation was processed.
- [12] Accordingly, Mr BO took up a new position of employment at the beginning of September 2010, as he thought he had a current work permit and could do so.
- [13] Mr XTT did not lodge the application for variation with Immigration New Zealand until 6 October 2010.
- [14] Mr BO also said that prior to the issue relating to the work permit, he had engaged Mr XTT to assist with a possible application for residence. He said that on 3 July 2010 he had paid \$200 to have an expression of interest lodged, to commence the process of seeking residence. He complained that Mr XTT had not lodged the expression of interest.
- [15] It appears Mr BO's grounds of complaint are that:
  - [15.1] Mr XTT failed to warn him he could not work for an employer other than the one identified in his work permit, which led him to commencing work unlawfully for a new employer.

- [15.2] Mr XTT failed to lodge, within a reasonable time, both:
- [15.2.1] the expression of interest, and
  - [15.2.2] the application for variation of his work permit.
- [15.3] Mr XTT would not use a mobile telephone to make contact with him, so he had to make telephone calls to Mr XTT to be informed of what progress was being made.
- [15.4] Mr BO engaged another consultant and Mr XTT inappropriately terminated the engagement without discussion or negotiation.
- [15.5] Mr XTT used funds paid for lodging the expression of interest for something else.
- [16] Mr BO also disclosed what occurred with Immigration New Zealand in relation to his application to vary his work permit. Immigration New Zealand wrote to Mr BO after Mr XTT lodged the application. The letter, dated 4 November 2010, said Mr BO had breached his permit conditions by working for an employer not named on his work permit. The permit named a specific employer as the only employer Mr BO could work for. The letter said this breach may preclude Mr BO be regarded as a *bona fide* applicant.
- [17] Immigration New Zealand wrote another letter dated 29 November 2010 declining the application to vary the work permit. This letter traversed issues that now arise in the complaint. Key points in the letter were:
- [17.1] The reason for declining the variation was that Mr BO had worked in breach of his work permit.
  - [17.2] Mr BO had told Immigration New Zealand he worked in breach of the terms of his permit because Mr XTT failed to warn him he could not do so. Further, Mr XTT had not made the application for variation promptly.
  - [17.3] Mr XTT, however, had told Immigration New Zealand he had in fact warned Mr BO he could not work without the variation to the permit. Further, the application could not be made until Mr BO provided a satisfactory employment agreement.
  - [17.4] The employment agreement relied on was signed on 4 October 2010, and the application had been made on 6 October 2010.
  - [17.5] Immigration New Zealand took the view that regardless of who was responsible for the delay in obtaining the employment agreement, Mr BO was responsible for working in breach of his permit. The reasoning was:
    - [17.5.1] Mr XTT claimed he had informed Mr BO of his obligations in relation to not working for an employer other than the employer named on the work permit.
    - [17.5.2] It was implausible Mr BO did not understand he needed to vary the work permit, because he had approached Mr XTT to do exactly that.
    - [17.5.3] It was also implausible that Mr XTT, as an experienced licensed immigration adviser, would have explicitly or implicitly supported a belief that Mr BO did not need the variation he had applied for.
  - [17.6] Given the rejection of Mr BO's justification for working in breach of his work permit, he could not be regarded as a *bona fide* applicant, and his work permit would not be varied.

### **Mr XTT's Reply to the Complaint**

- [18] Mr XTT responded to the complaint by letter dated 22 December 2010 addressed to the Authority. The letter raised the following issues:

- [18.1] The consultation on 31 August 2010 took some 55 minutes, not 5 minutes. In that consultation Mr XTT explained what was required to vary Mr BO's permit, in particular a new employment agreement, job description, and a completed Employer Supplementary Form from the new employer. Mr XTT gave the form to Mr BO to take to his new employer, and explained he needed to get the variation before commencing employment.
- [18.2] During the initial consultation Mr XTT completed other aspects of the documentation so he could proceed quickly when the documents were completed by the employer.
- [18.3] He noted the work that was completed was not consistent with a consultation taking some five minutes. Mr XTT produced documentation supporting his position.
- [18.4] Mr XTT noted the Employer Supplementary Form had to be completed by the employer, whereas Mr BO in his complaint said he and Mr XTT were to complete it. Mr XTT said it had been necessary for his office to contact Mr BO to remind him of the necessity of obtaining the employment agreement and the Employer Supplementary Form. He could not lodge the application for a variation in a valid form without those documents.
- [18.5] When Mr XTT had the necessary documentation, he lodged the application within 24 hours.
- [18.6] Mr XTT also said he had an initial consultation with Mr BO regarding the potential for Mr BO to pursue a residence application, but that did not progress beyond initial advice and an explanation of the additional material required to commence the process.
- [18.7] After Immigration New Zealand wrote on 4 November 2010 raising the question of Mr BO working in breach of his permit, Mr XTT met with him. Mr BO was abusive, and claimed he did not know he was unable to work for a new employer. Mr XTT advised Mr BO to complete a statutory declaration to explain the situation, and seek a "character waiver" from Immigration New Zealand.
- [18.8] Mr XTT was informed by another licensed immigration adviser that she was advising Mr BO, and accordingly Mr XTT informed Mr BO he would not act for him any longer. He notified him by email dated 13 November 2010, and followed that with a fax on 16 November 2010.
- [18.9] Mr XTT refunded Mr BO the \$200 fee.
- [18.10] Mr XTT communicated with Mr BO in writing, in accordance with his service agreement.
- [18.11] Mr XTT produced a copy of his file to support his explanation.

## **Issues**

- [19] The Tribunal issued a minute to the parties (21 May 2012), identifying the issues that appeared to arise on the papers then before the Tribunal, and the conclusions that could potentially be reached.
- [20] The minute identified the issues that arose on the materials then before the Tribunal as:
  - [20.1] Did Mr XTT communicate inadequately or inappropriately in relation to the terms of Mr BO's work permit?
  - [20.2] Did Mr XTT fail to lodge either an expression of interest, or the application to vary Mr BO's work permit in a timely manner?
  - [20.3] Was Mr XTT's means of communication inadequate or inappropriate?

- [20.4] Did Mr XTT terminate his engagement properly and appropriately?
- [20.5] Did Mr XTT deal with funds lodged in respect of a potential application for residence inappropriately?
- [21] The Tribunal indicated that on each issue the view was open on the material then before the Tribunal that the issues would be answered adversely to Mr BO. The parties were given the opportunity to respond.
- [22] Mr BO made a further submission, and confirmed the terms on which he had made his complaint. He particularly noted that the meeting on 31 August 2010 was brief as Mr XTT had gathered information in a meeting on 3 July 2010 primarily relating to a potential residence application.
- [23] He also said Mr XTT did lodge the application without all of the necessary documentation, which demonstrated Mr XTT was not delaying filing for that reason. He provided a copy of a letter from Immigration New Zealand dated 28 October 2010, which requested further information.
- [24] He reiterated Mr XTT should not have terminated the engagement simply as he had consulted another adviser.
- [25] He also said another person accompanied him to the 31 August 2010 meeting, but could not locate that person.
- [26] Mr XTT also replied to the minute, and Mr BO's submission. The key points Mr XTT made were:
- [26.1] He affirmed his initial response.
- [26.2] In relation to the claim that the meeting of 31 August 2010 only lasted five minutes, he referred to the notes of his initial meeting and pointed out that such information was not relevant to the variation of the work permit, and the circumstances would not have led to any such discussion. Accordingly, the record was consistent with the necessity of a full briefing, as he has maintained.
- [26.3] The record showed the reasons for delay in lodging, and they related to the need to obtain information from Mr BO.
- [26.4] Mr XTT accepts the application was lodged without the full information; however, the signed employment agreement was essential before he could file the application. This explanation needs to be understood against Immigration New Zealand's practice of not accepting an application for filing if fundamental material is missing, but accepting and requesting information for less significant supporting material.
- [26.5] Mr XTT reiterated his explanation for terminating the engagement, in particular Mr BO's lack of compliance with the steps required to lodge the application. He was not satisfied Mr BO had been honest with him.

## **Decision**

### *The initial advice*

- [27] The crux of the complaint is that Mr BO worked in breach of his work permit, and he attributes responsibility for that to Mr XTT.
- [28] Immigration New Zealand has identified reasons why Mr BO's complaint in this respect is implausible. The two key reasons are:
- [28.1] It is highly improbable Mr BO would be taking the trouble to seek to vary his work permit unless he knew he needed to do so for his new position of employment.

- [28.2] It is also highly improbable Mr XTT would provide incorrect advice in respect of such an elementary and obvious point of immigration law and practice.
- [29] Immigration New Zealand's reasoning is compelling. In addition, on the papers before the Tribunal, I am satisfied Mr XTT's explanation should be preferred for the following reasons:
- [29.1] Mr BO's claim Mr XTT spent some five minutes with him is not consistent with the written record. The documentation indicates there was a full consultation, not a rushed meeting that caused Mr BO to misunderstand his obligations (which he already knew). I accept Mr XTT's account of the meeting.
- [29.2] Mr BO was aware of the status of the application as Mr XTT's office was communicating about that issue, and I accept Mr XTT's claim he communicated that clearly when he met with Mr BO. Accordingly, I am satisfied Mr BO commenced work knowing that his application had not been lodged.
- [30] The evidence satisfies me Mr BO knew he needed to vary his work permit, had not done so, and commenced work for a new employer in breach of his work permit. Mr XTT did nothing that contributed to Mr BO's action.
- [31] I am satisfied Mr XTT's advice was appropriate, and there is no substance in Mr BO's claim that he was inappropriately advised.

*Delay in lodging the expression of interest and application to vary the work permit*

- [32] Mr XTT has responded to the complaint that he delayed filing an expression of interest. He has produced evidence that he had an initial consultation, and was paid for that.
- [33] Mr BO has not shown any evidence of him having any different expectation until making the complaint. Accordingly, the view is open that there was only an initial discussion, and Mr XTT was waiting for Mr BO to follow up.
- [34] Mr XTT has produced evidence that he filed the application to vary the work permit as soon as practicable after he received the material he required from Mr BO and his employer.
- [35] I am satisfied Mr XTT did not fail to progress either matter in a timely way.

*Termination of the engagement*

- [36] Mr XTT terminated the engagement after Mr BO had taken advice from another adviser, and it appears after some tension had developed over the advice he had provided.
- [37] I accept it was appropriate for Mr XTT to terminate the engagement. His client's interests were protected, and he was reasonably satisfied Mr BO had arrangements in place for substituted representation.

*Dealing with funds*

- [38] The complaint was less than clear as to the grounds on which Mr BO was not satisfied in relation to fees.
- [39] Mr XTT has produced a record that appears to show appropriate treatment of all fees, both those to be paid to Immigration New Zealand and his own professional fees. I am satisfied there is no foundation for any criticism of Mr XTT in relation to fees.

*Summary*

- [40] These findings lead to the conclusion the complaint is not made out. The material satisfies the Tribunal that Mr XTT has dealt with Mr BO's affairs in an appropriate and professional manner.
- [41] The complaint is dismissed pursuant to section 50 of the Act.

- [42] In accordance with usual practice where the Tribunal dismisses a complaint, the names and identifying details of the parties are not to be published, and the Tribunal orders accordingly.

**DATED** at WELLINGTON this 28<sup>th</sup> day of June 2012

---

**G D Pearson**  
Chair