

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

Decision No: [2012] NZIACDT 63

Reference No: IACDT 011/11

IN THE MATTER

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

BY

Immigration Advisers Authority

Authority

BETWEEN

BC and SO

Complainants

AND

SH

Adviser

DECISION

REPRESENTATION:

Complainants: In person

Adviser: In person

Date Issued: 28 September 2012

DECISION

Introduction

- [1] Ms BC and Mr SO engaged the company Ms SH works with to provide immigration services.
- [2] There was some confusion, and initially others in the company and later Ms SH thought Mr SO had different qualifications to those he in fact had. The need to convert German qualifications to their New Zealand equivalent created some confusion.
- [3] Ms BC and Mr SO complain that Ms SH failed to advise them adequately on this issue.
- [4] The question for the Tribunal is whether Ms SH was sufficiently careful and gave proper advice.

The Complaint and the Response

The complaint

- [5] Ms BC and Mr SO are life partners; they are German nationals, and live there. They wished to migrate to New Zealand and engaged EOA Ltd (the company) to assist.
- [6] Ms SH is employed by the company and was responsible for part of the service provided.
- [7] The service agreed was one where the company would provide a number of hours of professional assistance, though Ms BC and Mr SO would themselves lodge applications with Immigration New Zealand.
- [8] The complaint focuses on a specific element of the service provided.
- [9] Ms BC and Mr SO wished to obtain a residence visa, and they proposed to do so under the Skilled Migrant category. A number of factors are assessed to determine eligibility under this category, one of them being occupational qualifications and experience.
- [10] On review of the circumstances, the company indicated both Ms BC and Mr SO had occupational skills and experience, and this would be weighed with other factors to determine their eligibility for a residence visa.
- [11] Their complaint is that the advice they received concerning Mr SO's occupational qualifications and experience was wrong, by:
 - [11.1] Proceeding on the assumption that Mr SO's qualification was at Level 5, not Level 3 as it was in fact.
 - [11.2] Advising it was necessary to have a New Zealand Qualifications Authority (NZQA) assessment of Mr SO's qualifications, whereas in fact it automatically qualified for 50 points.
 - [11.3] Failing to advise that Mr SO needed to be registered with a professional body before arriving in New Zealand.
- [12] Ms BC and Mr SO identify the difficulty arising from the initial inquiries, where they provided a description of Mr SO's occupation. They accept that description was not accurate, but say Ms SH failed to inform them of the importance of the accuracy of the description, and they subsequently produced accurate translations of qualifications.
- [13] They eventually made their own inquiries with Immigration New Zealand and discovered the advice they received from Ms SH was not accurate.

- [14] They sought a refund of fees to the extent fees have not been used and compensation for the expense of the unnecessary NZQA assessment of \$1,540.

The response

- [15] Ms SH responded to the complaint by letter dated 29 April 2011 sent to the Authority.
- [16] Ms SH referred to a letter dated 5 May 2010 in which the company provided advice to Ms BC and Mr SO. This letter was quite lengthy, and written by Ms NH, a solicitor with the company.
- [17] This letter provided a good deal of general immigration advice, and it was personalised to Ms BC's and Mr SO's circumstances.
- [18] This letter discussed Mr SO's qualification and stated it would be necessary to view the relevant certificate to make a further assessment, noting that it was not possible with the information to hand to reach any concluded view. The tentative views were based on a CV Mr SO had supplied; it described Mr SO as having worked as an "electrical engineering technician", and that he was currently self-employed: "Electrical engineering".
- [19] The next step involved a telephone call in which Ms DZ from the company, using a checklist, discussed the engagement with Ms BC and Mr SO. Ms SH has produced the checklist. There are some references to qualifications, and Ms SH says:

"DZ confirmed during this conversation that Mr SO was the main applicant. Christine also confirmed Mr SO's occupation and was advised 'Electrical Engineering Technician'. She advised that Mr SO's designated occupation of 'Electrical Engineering Technician' was confirmed as a Level 7, and of the need to claim bonus points in order to lodge without an offer of employment."

- [20] Ms DZ assigned Ms SH to the file, and provided instructions, saying:

"Mr SO will be the main applicant. His English is not very good, may need to do English course. His occupation is that of Electrical Engineering Technician. Please review qualifications – NZQA will be required to claim qualification and bonus points."

- [21] Following this, Ms SH sent a letter dated 3 June 2010 to Ms BC and Mr SO. It was a lengthy letter covering a range of issues.
- [22] In this letter Ms SH addressed the issues relating to qualifications and work experience.
- [23] The foundation for her assessment of Mr SO's qualification was:

"We note that you have an advanced technical certificate, Electrical Engineering Technician & Professional Education/Apprenticeship with Electro Vordgen, Borrowmausstrabc 1984 – 1988.

A full New Zealand Qualifications Assessment (NZQA) report would need to be obtained in order to claim qualification points."

- [24] She went on to discuss how that would relate to skilled employment in New Zealand, which was another aspect of the total "points" available. Ms SH noted:

"Based on the information available to us, you may be in a position to nominate the occupation of an Electrical Engineering Technician. This occupation is listed as being at Skill Level 2 on the ANSCO.

A Level 5 qualification, or 3 or more years of work experience is required to nominate this occupation."

- [25] Ms SH followed that with an extract from the ANZSCO description of the Engineering Draftspersons and Technician's category, and detailed instructions on the type of employment Mr SO could seek in New Zealand to gain points, and how to pursue that.

- [26] This letter of 3 June 2010 was sent to Ms BC and Mr SO by post, and the following day Ms SH sent an email saying the letter had been sent. In this letter she noted she needed “to know about your apprenticeship”. She also asked for the identity of the awarding body.
- [27] Ms BC replied by email on 6 June 2010. It appears it would have been prior to the time she received the 3 June 2010 letter which had been sent by post. In this letter, Ms BC identified the body that had awarded Mr SO’s qualification using its German name, and gave what she understood to be a translation. She said his apprenticeship diploma was being translated, and that would be sent to Ms SH when it was available.
- [28] Ms SH said in her response to the complaint she understood the body identified was the body for awarding the qualifications for electrical engineering technicians, as she had not heard of any alternative description of the qualification.
- [29] In the following weeks there was correspondence between Ms BC and Ms SH, and she supplied various documents relating to Mr SO’s qualifications and experience. They were translated from German to English. Ms SH concluded from the material that Mr SO’s occupation was in the electrical engineering field. She thought he was an electrical engineering technician, though he had qualified as an electrician.
- [30] On 23 July 2010, Ms SH wrote a letter to Ms BC and Mr SO. She had reviewed Mr SO’s documentation (including translations), and indicated it was ready to forward to NZQA for assessment.
- [31] NZQA undertook an assessment, and on 8 September 2010 concluded Mr SO held a qualification comparable to the New Zealand qualification of a National Certificate in Electrical Engineering Level 3.
- [32] This had a marked effect on the points available and accordingly, on 2 November 2010, Ms SH reviewed the position. Broadly, the effect was that Ms BC or Mr SO would need an offer of employment (and preferably both of them) for them to succeed.

Further Material

- [33] The Tribunal issued a Minute dated 31 July 2012, which identified the grounds of complaint, response, and the issues arising; and indicated conclusions that may be reached on the basis of the information held at that point by the Tribunal.
- [34] The parties responded.
- [35] Ms BC and Mr SO produced a number of items of correspondence. They said that the company had paid all the money back, and that it was “a guilty plea”. They also said that due to wrong information provided by Ms SH they had given up everything in Germany, selling a business, home and other property in expectation of migrating to New Zealand. That had been very costly.
- [36] Ms SH said refunds had been made of the amounts Ms BC and Mr SO sought.

The Issues

- [37] Ms SH was not engaged in the initial evaluation and gathering of information. It appears Ms NH and Ms DZ who did that work, left Mr SO’s qualifications and experience as an open question for further investigation.
- [38] The regime in the Immigration Advisers Licensing Act 2007 is one where individuals are licensed as immigration advisers and it is not possible for a corporate entity or a practice to be licensed. It follows that it is individual licensed immigration advisers who are the subject of complaints, and personally face disciplinary sanctions and orders for compensation. Accordingly, this complaint is determined on the basis of Ms SH’s conduct; although the environment where she works could be relevant to how she discharged her professional duties.

- [39] The focus in resolving the complaint is on whether Ms SH adequately and appropriately made inquiries and gave advice when she took responsibility for advising Ms BC and Mr SO. The starting point is her letter dated 3 June 2010.
- [40] The issues to resolve appear to be:
- [40.1] What responsibilities did Ms SH have for determining the standing of Mr SO's qualifications?
 - [40.2] Did Ms SH adequately inquire and identify issues for Ms BC and Mr SO in her letter dated 3 June 2010?
 - [40.3] Should Ms SH have been alerted by the information received prior to the request for the NZQA assessment that her initial view was, or was potentially, in error?
 - [40.4] At some point, should Ms SH have altered her advice regarding Mr SO's qualifications, and indicated a NZQA assessment was not required?

Decision

Preliminary

- [41] In addressing this complaint, it is necessary to give appropriate weight to the communication barriers resulting from Ms BC and Mr SO having German as their first language and Ms SH communicating with them in English. The equivalence of qualifications is technical, and a difficult area for communication.
- [42] Further, qualifications and occupational categories in Germany do not necessarily precisely equate with New Zealand equivalents. Identifying the level of qualifications is a professional evaluation undertaken by NZQA. A licensed immigration adviser needs to be aware of, and understand the assessment process. However, they are not required to have the information or professional skill to undertake an assessment in cases which are not clear.
- [43] I am satisfied Ms SH ought to have been aware Mr SO did qualify as an electrician.
- [44] However, that was not inconsistent with him having also qualified and worked as an electrical engineering technician. In New Zealand, qualifying as an electrician would commonly be an initial qualification for a person who gained further qualifications and experience as an electrical engineering technician.
- [45] The trigger for Ms BC and Mr SO's complaint appears to be Immigration New Zealand telling them Mr SO's qualifications as an electrician, if he registered in New Zealand and had an offer of employment, would have made him eligible for points and would not require a NZQA assessment.
- [46] In contrast, Ms SH took the view that there was a reasonable possibility that Mr SO would qualify in the electrical engineering technician category, and if so, Ms BC and Mr SO would have been in a significantly more favourable position.
- [47] The complaint essentially turns on that decision, both as it was initially made, and also as it was reviewed as information came to hand.
- [48] Ms BC and Mr SO's complaint, that the advice they received was given in a form that encouraged them to sell property in anticipation of migrating, is significant. It is critical that immigration prospects are not overstated, as it can lead to the very type of reliance claimed.
- [49] The Tribunal is required to be satisfied the complaint is established on the material before it, determining the complaint 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). In the present case the issues largely turn the professional judgement Ms SH exercised, measured against proper standards.

Allegation of overstating immigration prospects

- [50] Ms SH first addressed the issue of qualifications with Ms BC and Mr SO in her letter of 3 June 2010. She noted the necessity of getting a NZQA report, and qualified her advice using phrases such as “based on information available to us”.
- [51] I cannot regard that letter as an overstatement; it contained sufficient reservations not to be regarded as encouragement to consider that immigration was assured. She also discussed the sorts of technical issues that were material to the NZQA assessment, implying it was not a certain process.
- [52] This letter was followed by a process where information continued to be requested and supplied. I have not identified any statement or impression that Ms SH conveyed that could have been taken as the kind of assurance that would encourage the sale of property on the footing that migration was assured. Ms BC and Mr SO have not identified any specific communication that conveyed that to them.
- [53] I am not satisfied there was any professional failure where Ms SH gave unqualified assurances of the kind implied by this aspect of the complaint.

Professional judgment in relation to Mr SO's qualifications

- [54] I am satisfied it was reasonable for Ms SH to consider the possibility of Mr SO being an electrical engineering technician, at least until the translations of his qualifications and related material was available.
- [55] There was considerable room for uncertainty, and I am satisfied Ms SH addressed that adequately.
- [56] However, the Tribunal has not identified any material that appears to indicate Mr SO did have a qualification beyond completing his apprenticeship and qualifying as an electrician; with the exception of short-term seminars that do not appear, in themselves, to amount to a further level of qualification.
- [57] Ms SH had this material on 23 July 2010, when she reported to Ms BC and Mr SO regarding whether the NZQA assessment was ready to be lodged.
- [58] At that point, when Ms SH reviewed the material on 23 July 2010, she:
 - [58.1] should have viewed the material as excluding the possibility Mr SO had qualifications as an electrical engineering technician; or
 - [58.2] made further or different inquiries.
- [59] I am satisfied that Ms SH's evaluation of the situation fell short of ideal practice. However, that does not necessarily mean the complaint should be upheld.
- [60] It is necessary to determine the proper approach to the concept of “negligence” under section 44(2)(a) of the Act, and the not dissimilar requirement for “due care” under clause 1.1 of the Licensed Immigration Advisers Code of Conduct.
- [61] The Act does not define “negligence” or “care”, which is not surprising as their application turns on the wider statutory context.
- [62] One view is that negligence is established when there is a shortcoming using concepts derived from the civil standard of care, as in a tortious claim for negligence. While the Tribunal may make an order for compensation, it is not constituted to adjudicate compensation claims.
- [63] 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 or other compensatory issues that arise outside of a professional disciplinary regime.

- [64] 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 that to establish a complaint of negligence under section 44(2)(a), or the correlative duties of care, diligence and professionalism under clause 1.1 of the Code, it is necessary to consider the threshold required to uphold a professional disciplinary complaint under the Act.
- [65] The jurisprudence from various authorities dealing with other professional disciplinary contexts is appropriately applied to understand the threshold, while being mindful that it is necessary to consider the statutory context in the respective situations. They can be quite different.
- [66] In a decision of the Health Practitioners Disciplinary Tribunal (HPDT), *Re Tolland* (Decision No 325/Mid10/146P, 9 September 2010) 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. The test is whether or not the acts or omissions complained of fall short of the conduct to be expected of a [practitioner] in the same circumstances[.] This is a question of analysis of an objective standard measured against the standards of the responsible body of a practitioner’s peers.”
- [67] The professional setting is varied, but duties of competence, application of skill, 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.
- [68] I find it is a necessary element of the test to determine whether any lapse is sufficiently serious to warrant the complaint being upheld as a professional disciplinary matter.
- [69] Section 50 contemplates a complaint being upheld without necessarily imposing a sanction. It follows that it is not necessary to find a disciplinary sanction should be imposed 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 that still does not justify upholding a disciplinary complaint.
- [70] It is a reality that many errors and mistakes are too trivial to warrant an adverse disciplinary finding, and the Act recognises that. Section 45(1) of the Act provides that 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.
- [71] It is necessary and appropriate for this Tribunal to be mindful that there is a threshold before a complaint of negligence or want of care and diligence is established. Though the statutory context is quite different, there is a discussion of the underlying policy issues in *Orlov v New Zealand Law Society* [2012] NZHC 2154.
- [72] 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.
- [73] I now apply those principles to the present facts.
- [74] The extent of the failure on Ms SH’s part was to fail to consider adequately the material she had in her possession immediately prior to submitting it to the NZQA. That was a point of importance in the instruction, as fees were incurred, and of course a client should have accurate information as soon as practicable.

- [75] However, this was not a point in time when Ms SH was giving critical advice, such as assuring a client about their migration prospects.
- [76] It is entirely appropriate that Ms SH has refunded fees and the cost of the NZQA application. Doing so is not an admission of guilt; it is a proper recognition of professional responsibility and does not assist the Tribunal in determining the gravity of the error.
- [77] I am satisfied the error does not reach the professional disciplinary threshold.
- [78] I am influenced in that view by the fact that:
- [78.1] The assessment is a matter for NZQA, and not central to Ms SH's professional expertise. The highest the matter could be put is that with more attention to the information, she should have anticipated a potential adverse decision by NZQA.
- [78.2] I am prepared to accept Ms SH may have regarded the material on the relevant qualifications as an issue she was not likely to have the expertise to resolve. It does require close attention to the translated material to appreciate the true position. Her failure to give the material that attention is understandable, but nonetheless not justifiable.
- [78.3] There was no critical immigration advice being given at that point, and accordingly the wasted application fee was the adverse consequence risked; Ms SH has accepted responsibility for that. It would be a quite different matter if more critical advice was being given.
- [79] The complaint is dismissed.

Concluding comment

- [80] Ms SH chose to work in a manner where she offered a fixed amount of time, with her clients carrying out some of the work themselves.
- [81] It is appropriate for clients to assist with work they can competently perform and, indeed in virtually every instruction, clients have to gather critical information.
- [82] However, when a licensed immigration adviser works in this way they are fully accountable for their professional duties, and a professional relationship is quite different from a commercial relationship. A professional person is required to actively consider their client's needs and actively inform and advise on options, risks, and opportunities; a professional person cannot simply carry out the tasks their client instructs them to perform and regard their obligations as discharged.
- [83] There are obvious hazards for a professional person providing partial input in a professional instruction. This complaint has been considered in the same way as it would have been had Ms SH been entirely responsible for the work.

DATED at WELLINGTON this 28th day of September 2012

G D Pearson
Chair