

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

Decision No: [2012] NZIACDT 9

Reference No: IACDT 014/10

IN THE MATTER

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

BY

Immigration Advisers Authority
Authority

BETWEEN

SR
Complainant

AND

ITH
Adviser

DECISION

REPRESENTATION:

Complainant

In person

Adviser

In person

Date Issued: 16 March 2012

DECISION

Preliminary

Outline of the complaint

- [1] The complaint has two elements. First, Ms SR claims Mr ITH gave her inappropriate advice. Second, there was an altercation at Mr ITH's office which involved the police being called; Ms SR says Mr ITH behaved unprofessionally in the course of the altercation.
- [2] Mr ITH became a licensed immigration adviser on 12 January 2009. The licensing regime was not compulsory until 4 May 2009.
- [3] This Tribunal has no jurisdiction over persons who are not licensed immigration advisers. Accordingly, the starting point where this Tribunal has jurisdiction was 12 January 2009. At that point Mr ITH had a client relationship with Ms SR, and was obliged to fulfil his professional obligations to her, and this Tribunal has jurisdiction over any failure to do so.
- [4] Prior to being licensed Mr ITH had advised Ms SR to apply for the exercise of a discretion under section 35A of the Immigration Act 1987. When that failed, his advice was to lodge a complaint with the Office of the Ombudsmen.
- [5] At about the time Mr ITH became licensed Ms SR told him she had changed her address and was now residing with a partner. She and her partner had met some three months earlier.
- [6] The question at that point was:
- [6.1] Should Ms SR make a new application under section 35A, due to her relationship, or
- [6.2] Should she continue with the review by the Ombudsmen?
- [7] Mr ITH said she should continue with the complaint to the Ombudsmen.
- [8] In October 2009, Ms SR engaged a different immigration adviser, who said the prospects of success with the Ombudsmen were slight, so a further application under section 35A was the best course.
- [9] Ms SR, her partner, and others came to Mr ITH's office to uplift Ms SR's file. There was an altercation at Mr ITH's office.
- [10] A person associated with Mr ITH's office then made contact with the mother of Ms SR's partner, and Ms SR says her privacy was breached.

The issues to decide

- [11] The first issue is whether Mr ITH gave Ms SR sound advice when she advised him of her new relationship. About a year after Ms SR commenced her new relationship, another adviser said Ms SR should apply under section 35A relying on the new relationship, and this application was apparently successful. Should Mr ITH have made that application at some point during that year?
- [12] An aspect of that issue is whether Mr ITH adequately communicated with Ms SR during that time.
- [13] Second, it is necessary to determine what responsibility Mr ITH had in relation to the altercation in his office and surrounding events, and whether he dealt with these satisfactorily.

The complaint and response

Ms SR's complaint

- [14] The key events and circumstances raised by Ms SR are:
- [14.1] In January 2009, the Ombudsmen were considering a complaint regarding Immigration New Zealand's decision to decline Ms SR's section 35A application.
 - [14.2] About this time Ms SR told Mr ITH she had changed her address. She said she met a man on 18 November 2008; he had become her partner and they started living together on 4 January 2009.
 - [14.3] Ms SR asked if it was possible to lodge another application for discretion with Immigration New Zealand. It would have been lodged under section 35A on the basis of her new partnership.
 - [14.4] Mr ITH advised against doing so, so no new application was lodged.
 - [14.5] Ms SR subsequently called Immigration New Zealand and was told another section 35A application was able to be lodged.
 - [14.6] In November 2009, Ms SR engaged a new adviser in order to lodge another section 35A application. The new adviser told Ms SR the chances of success from her Ombudsman complaint were slight. Mr ITH was informed of this new adviser when he contacted the Office of the Ombudsmen.
 - [14.7] Mr ITH rang Ms SR and rudely told her to come in and pick up her file.
 - [14.8] Ms SR and her partner made an unannounced visit to Mr ITH's offices to pick up the file. She was informed the file was not ready for release, and an altercation ensued and the police were called.
 - [14.9] Ms SR says the key events in relation to the altercation were:
 - [14.9.1] Mr ITH was not present initially when she and her partner went to Mr ITH's office.
 - [14.9.2] Ms SR and her partner expressed the view Mr ITH had failed to provide sound advice and service.
 - [14.9.3] There were unpleasant exchanges with various people. Mr FP, who worked part-time at Mr ITH's office, made disparaging remarks to Ms SR's partner.
 - [14.9.4] Ms SR called the police using the emergency number, and "mentioned that [her] partner was being verbally abused". The police said they should deal with the matter by way of a complaint later.
 - [14.9.5] Mr ITH returned, he was rude and "violent and was approaching [Ms SR's partner] as if he wanted to punch him," but was held back by his wife. His wife is a lawyer and her practice has the same reception as Mr ITH's practice.
 - [14.9.6] Eventually, Ms SR and her partner were given the file and left.
 - [14.9.7] Ms SR and her partner subsequently complained to the Race Relations Office, the Privacy Commissioner, and also the police about these events.

- [14.10] Someone from Mr ITH's practice contacted the mother of Ms SR's partner and disclosed personal information to her.
- [15] Ms SR is seeking a formal written apology from the Adviser and his colleagues, and a refund of fees paid.
- [16] Ms SR says:
- [16.1] Mr ITH was negligent, as he should have told her she had little prospect of success with the complaint to the Ombudsmen and was wrong not to make an application under section 35A on the basis of the new relationship.
- [16.2] He was also incompetent due to failing to change Ms SR's address and not communicating effectively.
- [16.3] He was unprofessional in relation to the altercation, and subsequent disclosure of information.
- [16.4] He was dishonest in not providing information relating to the process of getting a section 35A permit, dealing with the Ombudsmen, and misleading regarding the role of people present at the altercation.

Mr ITH's response

- [17] Mr ITH provided a substantial amount of material from his file. Accordingly, it is possible to evaluate the approach he took in relation to Ms SR's immigration affairs from that material.
- [18] Mr ITH said in explanation:
- [18.1] He considered there was an adequate basis to proceed with a complaint to the Ombudsmen after the section 35A application was declined. The time he became licensed was about the same time that Ms SR told him of her new circumstances.
- [18.2] He was satisfied the best course of action was to continue with that complaint. He did not consider Ms SR was likely to receive a favourable decision if she made a further section 35A application. Accordingly, he advised Ms SR she should not at that time apply again under section 35A.
- [18.3] Mr ITH's reasoning was that Ms SR's relationship was of brief duration, and for that reason not likely to be regarded as a basis for a favourable exercise of the discretion under that section.
- [18.4] He provided Ms SR with copies of correspondence, as well as having various consultations with her.
- [18.5] Ms SR was not removed from New Zealand while the complaint to the Ombudsmen was being processed. Mr ITH requested removal be deferred. Deferral was consistent with Immigration New Zealand accepting the complaint was reasonably pursued.
- [18.6] Mr ITH became aware another adviser had been instructed and he made an appointment for Ms SR to uplift her file. She failed to keep the appointment which was for 24 November 2009.
- [18.7] On 14 December 2009, Ms SR and her partner came to Mr ITH's office. He was not expecting this, so left no instructions regarding the file. In relation to that situation:
- [18.7.1] The usual process for the release of a file in Mr ITH's office is for a copy to be made, and the client will sign an acknowledgement on receiving the file. However, Ms SR would not sign anything.

- [18.7.2] At the altercation, Mr ITH remained courteous, as he did in all his dealings with both Ms SR and her partner.
- [18.7.3] Mr ITH's wife is a lawyer, and she has her practice in the same office as Mr ITH. The practices are nonetheless separate organisations.
- [18.7.4] Ms SR's partner was aggressive and rude when he and Ms SR attended Mr ITH's office on 14 December 2009. As a result of the behaviour, Mr ITH's wife called the police and they attended.
- [18.7.5] Mr ITH provided statements from the various people present at his office. They present a picture of Ms SR attending the office with three other people and an aggressive confrontation led by Ms SR's partner ensued. In essence, the picture presented is that Ms SR had a sense of grievance and was intending to force Mr ITH to refund fees.
- [18.7.6] The Honourable Mr FP is a retired community worker who now works part-time in Mr ITH's practice. He has a background of public service in politics and other fields in Fiji over a period of some 50 years. That included holding office as a member of parliament, senator, and other high offices. Ms SR's partner's family was known to him. He was so concerned about the behaviour exhibited by Ms SR's partner, that he contacted his mother. He reported the incident to her as a matter of concern without disclosing other information.
- [18.7.7] When Mr ITH returned to his office, he negotiated the delivery of the file. Ms SR and the people attending left at that point.
- [18.8] Mr ITH questions whether the successful grant of the section 35A application was an outcome negotiated by the Ombudsmen's office; if so, affirming the appropriateness of his advice to pursue the complaint.

Decision

- [19] I have decided this complaint on the papers. Prior to making the decision, a minute was issued identifying the factual background, issues, and potential findings. The parties were given the opportunity to make submissions, present further evidence, and apply for an oral hearing. The parties did not take further steps.

First issue – the immigration advice

- [20] The first issue is whether in January 2009 Mr ITH appropriately advised Ms SR to persist with her complaint to the Ombudsmen and not apply again under section 35A, notwithstanding her new relationship.
- [21] Having reviewed the papers, I am satisfied Mr ITH's advice was correct. It would have been unlikely a relationship of the then very short duration would have assisted Ms SR, particularly having regard to her unlawful status at the time. Accordingly, my view is Mr ITH's approach of challenging the earlier decision was appropriate.
- [22] It is to be noted that when the relationship had endured for approximately a year the prospects of making a successful section 35A application would have been much greater. Accordingly, the fact that a successful application was made later is not inconsistent with my view. Further, Mr ITH fairly raises the possibility the complaint to the Ombudsmen may have contributed to a favourable view of the section 35A application in late 2009.
- [23] Having made the decision to rely on the Ombudsmen's process, I am also satisfied it was reasonable not to take any further initiative until that was complete (given the still relatively short duration of the relationship).

- [24] Ms SR complained of a lack of communication regarding the course being taken. The papers before me do not provide evidence of a lack of communication. There was little to report while the Ombudsmen considered the issues.

Second issue – the altercation

- [25] There is direct conflict in the evidence contained in the papers relating to the altercation. The parties were put on notice of findings that might be made on the papers; the parties did not seek to bring oral evidence.
- [26] The proceedings must be heard on the papers pursuant to section 49(3), subject to a discretion under subsection (4), which allows appearances before the Tribunal.
- [27] I am satisfied I should deal with the matters on the papers. The papers, for reasons I set out below, do point to a clear conclusion and no party has sought to bring further evidence after being put on notice of the potential findings.
- [28] I am satisfied Mr ITH did not behave inappropriately either in the lead up to the altercation, during it, or after it.
- [29] Ms SR has not explained why she attended Mr ITH's office unannounced with three other people, at least one of whom took a leading role in the events. I am satisfied the group were intent on a confrontation. That is what the witnesses other than Ms SR and her partner report occurred.
- [30] Mr ITH's office was part of a set of professional offices and each of the witnesses who have provided a statement report highly inappropriate conduct by Ms SR's partner. His conduct is consistent with a belief Mr ITH was seriously delinquent. Ms SR's complaint indicates that was her belief.
- [31] For the reasons set out previously, my view is Ms SR was mistaken. She had received sound professional advice from Mr ITH; he was neither incompetent nor dishonest as she has alleged. It appears Ms SR has assumed that the fact another adviser obtained a different result at a different time demonstrates Mr ITH served her badly. For the reasons discussed, that does not follow.
- [32] Mr ITH's wife, who is a lawyer, felt it appropriate to call the police during the altercation. To call the police without proper cause is a criminal offence; there no evidence to suggest the call was made improperly. It appears the police regarded the callout as appropriate.
- [33] The contact with the mother of Ms SR's partner was made by a person connected with Mr ITH's practice. However, there is no evidence that person had any knowledge of Ms SR's immigration affairs or disclosed them. He reports he made contact following a family connection out of concern about the conduct exhibited by Ms SR's partner.
- [34] Mr ITH was absent from his office when matters escalated. There is no apparent trigger for people in a professional office to behave aggressively when someone attends and asks for their file. Ms SR infers Mr ITH was angry as she had engaged another adviser. That, however, is a common issue in professional life and not likely to result in a confrontation or a police callout. Regardless, Mr ITH was not present when matters escalated.
- [35] On the papers, it is implausible Ms SR and the three people accompanying her were the subject of an aggressive attack by members of a professional office.
- [36] Mr ITH investigated the incident. He has taken written statements of what happened. I am satisfied the contents of those statements reasonably satisfied him he did not need to be concerned there had been unprofessional conduct in his office.

Conclusion

- [37] I am not satisfied Mr ITH behaved improperly, or fell short of the standards required of a licensed immigration adviser in any respect.
- [38] Given these conclusions, the complaint is dismissed; there are no grounds on which it could be upheld.

DATED at WELLINGTON this 16th day of March 2012

G D Pearson
Chair