

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

Decision No: [2013] NZIACDT 20

Reference No: IACDT 028/11

IN THE MATTER

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

BY

Immigration Advisers Authority

Authority

BETWEEN

CV

Complainant

AND

TND

Adviser

DECISION

REPRESENTATION:

Complainant: In person

Adviser: In person

Date Issued: 28 March 2013

DECISION

Introduction

- [1] Mr TND has a practice in X, and Mr CV approached him for assistance with getting a residence visa for New Zealand.
- [2] Mr CV was dissatisfied, and complained that he received incorrect advice, the professional service delivery was not prompt, communication was not adequate, and the process for commencing and terminating the engagement was wrong.
- [3] Mr TND responded to the complaint. He explained that the instruction took a wrong direction as Mr CV had provided inaccurate information regarding his work experience. As it happened, that was a crucial factor in the immigration options available.
- [4] The Tribunal has been satisfied that this miscommunication regarding Mr CV's qualifications for a residence visa led to the bulk of Mr CV's concerns. There is not sufficient information to conclude that there was anything defective in Mr TND's taking of the initial instructions, or his responses when difficulties emerged.
- [5] There was a minor error in the client engagement process. It was not enough to reach the threshold for disciplinary action.
- [6] The Tribunal has dismissed the complaint.

The Complaint

- [7] Mr TND is a licensed immigration adviser who practises in X. On 22 January 2011 Mr CV engaged Mr TND to seek a residence visa for New Zealand.
- [8] Mr CV indicated he required a residence visa by 1 October 2011. The date was critical, as his United Kingdom visa, where he was located, expired on that date. Mr TND agreed to accept the instruction.
- [9] Mr TND advised Mr CV that there were two options available; namely a work visa or a residence visa. Mr CV elected to seek a residence visa.
- [10] Central to the decision was Mr TND not indicating that Mr CV required an offer of employment to pursue the visa for New Zealand. Mr CV said that if that were the case he would have engaged a recruitment firm, of which there were many, and the fee would have been some £600 to £700, not the £2,500 Mr TND would charge. Mr CV considered that not having the uncertainty of having to gain an offer of employment was a crucial factor.
- [11] Mr CV promptly sent Mr TND a number of files which gave Mr TND all the information he required. A series of correspondence followed, and various pieces of additional information were supplied by Mr CV. Another person from Mr TND's practice also engaged with Mr CV regarding employment recruitment.
- [12] Mr CV met with Mr TND on 9 April 2011, by which time Mr TND indicated that a job offer was necessary to gain a residence visa for New Zealand.
- [13] On 22 and 28 May 2011 the recruitment adviser and Mr TND respectively asked Mr CV for further information regarding his qualifications and experience. Mr CV responded to these requests. Mr TND replied by indicating that the information was not consistent with what he understood, and he was cancelling the agreement to provide services.
- [14] Mr CV had paid £2,330, and after some negotiation Mr TND agreed to refund £1,432 of that sum.
- [15] Mr CV has complained that in the course of the engagement Mr TND failed to meet his professional obligations as:

- [15.1] The advice provided regarding Mr CV's immigration opportunities was not accurate.
- [15.2] The professional service delivery was not as prompt as it should have been.
- [15.3] Mr CV was not properly informed of progress, and communication was inadequate.
- [15.4] Mr TND failed to provide a copy of his internal complaints procedure, as required by the Code of Conduct.
- [15.5] The agreement to provide professional services was improperly cancelled.
- [15.6] Mr TND should have repaid all the fees paid.

The Response

- [16] Mr TND responded to the complaint by a memorandum delivered to the Authority on 12 September 2011, which included an explanation and supporting material from his file.
- [17] The key points made by Mr TND were:
 - [17.1] At the commencement of the instruction Mr CV indicated he had relevant experience as a social worker. He produced notes of the initial interview recording that Mr CV had "3 years experience as a social worker".
 - [17.2] Mr TND advised Mr CV that based on his qualifications and work experience he could expect to be successful in gaining a residence visa for New Zealand, although the timing could not be determined with certainty, as the system operated on a selection process that precluded that.
 - [17.3] When he received Mr CV's documentation on 23 January 2011, the details of the experience as a social worker were missing, so Mr TND asked Mr CV to add that to the relevant form.
 - [17.4] It became evident that Mr CV did not have the experience as a social worker that Mr TND understood to be the case. That altered his immigration opportunities in New Zealand, and Mr TND met with Mr CV to discuss the issues in April 2011. He explained that Mr CV would require a job offer to qualify for a residence visa for New Zealand, but assured him that his skills were in demand in New Zealand.
 - [17.5] When Mr TND had the initial interview with Mr CV it was taking some 3 to 6 months for qualified applicants to go through the process to complete applications for residence. Before they lodged their applications, they had to be selected from the "pool". Despite the uncertainties of timing in being selected from the pool, Mr TND considered the time until Mr CV had to leave the United Kingdom was sufficient. Mr TND did not give Mr CV a definite date, and it was not possible to do so.
 - [17.6] Mr TND provided Mr CV with a copy of correspondence including his internal complaints procedure.
 - [17.7] Mr TND cancelled the agreement, as the information he received was not accurate and Mr CV failed to respond satisfactorily to deal with the issues that arose. He negotiated an adjustment to the fee to reflect the work carried out.

The Issues to be Determined

- [18] The Licensed Immigration Advisers Code of Conduct ("the Code") has been established pursuant to sections 37–39 of the Immigration Advisers Licensing Act 2007 ("the Act").
- [19] Clause 1 of the Code requires a licensed immigration adviser to act with due care, diligence, respect and professionalism. In doing so, they must ensure that the terms of professional engagements are fair and appropriate.

- [20] Clause 8 requires that fees are fair and reasonable in the circumstances.
- [21] Clause 9 of the Code requires that a copy of the adviser's internal complaints procedure is to be supplied prior to any agreement being entered into.
- [22] Section 44 of the Act provides breaches of the Code are grounds for complaint, as are negligence, incompetence and misleading behaviour.
- [23] The issue for the Tribunal to determine is whether it is satisfied Mr TND breached any of these professional standards. The questions will be primarily determined by factual findings.

Tribunal's Minute

- [24] On 4 February 2013 the Tribunal issued a Minute which outlined the complaint, response, issues for determination, and potential conclusions. The Minute gave the parties the opportunity to respond, however there was no response.

Discussion

Advice, communication and professional service delivery

- [25] I am satisfied Mr CV, possibly unwittingly, overstated his work experience. Mr TND recorded Mr CV's reported work experience in the note he took of initial instructions. There is nothing that suggests the note was inaccurate.
- [26] Mr CV's work experience was critical as to whether he needed a job offer before he was likely to be able to gain a residence visa for New Zealand.
- [27] Mr TND identified this issue and communicated regarding it professionally and realistically. I am satisfied the communications were professional, timely and accurate.

Supply of internal complaints procedure

- [28] It appears likely Mr TND supplied his internal complaints procedure after the agreement was entered into, which is not in conformity with the Code of Conduct. However, it appears this was a matter of oversight, not intentional wrongdoing. Further, when difficulties arose Mr TND did supply a copy of the procedure.
- [29] Not every lapse is sufficient to uphold a complaint in a professional disciplinary context. In previous decisions this Tribunal has taken the view that jurisprudence from various authorities dealing with other professional disciplinary contexts is appropriately applied to understand the threshold for upholding a disciplinary complaint. Of course, the Tribunal has been mindful that it is necessary to consider the statutory context in the respective situations. They can be quite different.
- [30] 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 amounts 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."

- [31] 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.

- [32] Accordingly, a necessary element of the test is to determine whether any lapse is sufficiently serious as to warrant the complaint being upheld as a professional disciplinary matter.
- [33] Section 50 contemplates a complaint being upheld without necessarily imposing a sanction. It follows that it is not necessary to find that a disciplinary sanction should be imposed to uphold a complaint. It is important to recognise that not every lapse or manifestation of human frailty should result in an adverse professional disciplinary finding. There will be occasions when advisers are responsible for a lapse from acceptable standards, but that still does not justify upholding a disciplinary complaint.
- [34] 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 need not be pursued, or treat it as a matter that is best settled between the parties.
- [35] Accordingly, 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 (No 8)* [2012] NZHC 2154.
- [36] The Act does not attempt to prescribe further 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.
- [37] In the present case I am satisfied the deferred supply of the complaints procedure was not of sufficient gravity to uphold the complaint. It was not intentional wrongdoing, and it was corrected when identified.

Termination of the agreement

- [38] The Tribunal's Minute identified two issues the parties were invited to address further:
- [38.1] Mr TND terminated the agreement, as it was founded on information that proved not to be accurate and he was unable to establish a satisfactory basis to complete the instructions. The Tribunal considered the possibility Mr TND had some responsibility for not taking inquiries further when he initially gathered information from Mr CV. However, the information then held did not establish that, and Mr CV was given the opportunity to provide further evidence.
- [38.2] The view was open that Mr TND negotiated fees for the partial work that were "fair and reasonable in the circumstances", as required by clause 8 of the Code of Conduct. However, there was limited information available to the Tribunal, so again Mr CV was allowed the opportunity to provide further material.
- [39] As the parties presented no further information, the Tribunal is not in a position to make any adverse finding regarding Mr TND actions in relation to those matters.

Complaint dismissed

- [40] Given these conclusions, the complaint will be dismissed.

Decision

[41] Pursuant to section 50 the complaint is dismissed.

DATED at WELLINGTON this 28th day of March 2013

G D Pearson
Chair