

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

Decision No: [2013] NZIACDT 45

Reference No: IACDT 023/13

**IN THE MATTER**

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

**BY**

**The Registrar of Immigration Advisers**

Registrar

**BETWEEN**

**Immigration New Zealand**

Complainant

**AND**

**BUH**

Adviser

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**DECISION**

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**REPRESENTATION:**

**Registrar:** In person.

**Complainant:** Immigration New Zealand, Henderson.

**Adviser:** Simon Laurent, Laurent Law Barristers and Solicitors, Auckland.

Date Issued: 1 August 2013

## **DECISION**

### **Introduction**

- [1] The Registrar has referred a complaint brought by Immigration New Zealand about the adviser, who is a licensed immigration adviser.
- [2] The Registrar has identified two grounds for referral, namely:
  - [2.1] Incompetence; and
  - [2.2] Failing to give proper advice to a client seeking to lodge an ill-founded application.
- [3] This arose out of two errors when making an application. First, the adviser claimed points for a complete qualification for a client when the qualification was incomplete. Second, she mistakenly claimed points for employment outside Auckland, when the client's prospective employment was in Auckland.
- [4] The adviser responded with an explanation that the errors arose as at the time she was under intense pressure, due to cumulative personal tragedies. She says, before and since, she has been an effective and reliable licensed immigration adviser. Neither the Registrar nor Immigration New Zealand challenged the adviser's response.
- [5] The Tribunal has dismissed the complaint, as the two apparently isolated errors were made on an occasion of personal distress and do not establish incompetence. Further, the circumstances were not those of a client seeking to lodge an ill founded application, rather it was a case of an adviser mistakenly lodging an application they did not recognise as flawed.

### **The Statement of Complaint**

- [6] The Registrar identified the following material facts as founding the complaint:
  - "1. On 17 October 2012 an Expression of Interest (EOI) the adviser had submitted under the Skilled Migrant Category was selected from the pool.
  - 2. The adviser had claimed 145 points, of which 10 points were claimed for a job offer outside Auckland and 40 points for two qualifications. One of these qualifications was a Licence Controller Qualification gained in New Zealand, and the other a Year 13 certificate from South Africa.
  - 3. On 18 October 2012 the EOI was declined, as [Immigration New Zealand] stated that Ponsonby was not outside of Auckland and the qualifications needed to be assessed by the New Zealand Qualifications Authority (NZQA).
  - 4. On 28 October 2012 the adviser submitted a document from NZQA which she stated confirmed that the New Zealand qualification was assessed at Level 4.
  - 5. A representative of [Immigration New Zealand] called the adviser and told her that this was not a complete qualification by itself and could only be credited towards a Level 4 qualification.
  - 6. The adviser replied stating that she was awaiting further information; however on 27 November 2012 she forwarded an email from NZQA confirming the advice from [Immigration New Zealand]."

### **Grounds on which the Registrar referred the complaint**

- [7] The Registrar referred the complaint pursuant to section 45(2) of the Immigration Advisers Licensing Act 2007 ("the Act"), and identified the grounds for referral as:

- [7.1] Whether the adviser was incompetent under section 44(2)(b) of the Act; and
- [7.2] Whether the adviser breached Clause 2.2 of the Licensed Immigration Advisers Code of Conduct 2010 (“the Code”), which is concerned with vexatious and unfounded applications.

### **The complainant’s arguments in support of the complaint**

- [8] Immigration New Zealand contended the adviser “demonstrated a concerning lack of understanding regarding the NZQA qualifications framework”, and that she should have known that Ponsonby was not outside of Auckland.
- [9] This argument was made before the adviser responded to the complaint.

### **The adviser’s response to the complaint**

- [10] The adviser accepted the material facts founding the complaint.
- [11] However, the adviser said she was not incompetent, rather she explained her circumstances when she lodged the Expression of Interest on 17 October 2012, and in the following period:
  - [11.1] She had practised for some 15 years without a client complaint;
  - [11.2] At the time her husband was suffering from a terminal illness;
  - [11.3] She was caring for her grandson who has a disability;
  - [11.4] Her brother was diagnosed with cancer on the day the Expression of Interest was lodged, it proved to be a terminal condition; and
  - [11.5] The day the Expression of interest was rejected her brother-in-law was diagnosed with cancer, which was also a terminal condition.
- [12] In short, the adviser was under such emotional pressure she now appreciates she should not have been working. The pressure affected how she lodged the expression of interest, and managed the process subsequently.

### **Information gathered by the Registrar**

- [13] The Registrar has investigative powers, and is permitted to gather information in relation to the complaint when thought fit (ss 47 and 57 of the Act).
- [14] The Registrar has not gathered any further information after receiving the adviser’s explanation.

### **Discussion**

#### *Incompetence*

- [15] Mr Laurent, counsel for the adviser, distinguished negligence from incompetence. He made such distinction when initially responding to the complaint, which was received by the Registrar before he exercised his power of referral under section 45 of the Act.
- [16] Mr Laurent submitted that “incompetence” is defined by the Shorter Oxford Dictionary as the lack of the “power, ability, capacity” to perform a task or function. Accordingly, when used alongside “negligence” in section 44(2) there is a distinction. Negligence can arise on a particular occasion, whereas incompetence is a condition that is enduring to a greater or lesser degree. Mr Laurent refers to decisions of this Tribunal, namely *Bhagat v Singh* [2012] NZIACDT 16, *Barry v Devi* [2011] NZIACDT 29, and *Balich v Standing* [2012] NZIACDT 42, as support for this view.

- [17] I accept Mr Laurent's submission. The use of the two words "negligence" and "incompetence" in the statute implies there is a difference, and the natural distinction in this context is the one Mr Laurent has identified.
- [18] The material facts identified two errors by the adviser as grounds for referral of the complaint:
- [18.1] Claiming points on the basis that the job offer was outside of Auckland, when Ponsonby is inside Auckland; and
- [18.2] An error in claiming a qualification that was in fact not a complete qualification.
- [19] The two matters can be characterised as clear and obvious errors, and ones made in relation to a single application. The clear and obvious nature of the errors is illustrated by the fact the adviser practises in New Zealand, and could be expected to know that Ponsonby is in Auckland, without research.
- [20] The adviser has identified personal circumstances that understandably overwhelmed her at the relevant point in time. Additionally, the adviser has expressed regret and the insight that she should have disengaged from her work until she came to terms with the personal tragedies in her life. She has since done so, and resumed practising competently as she had previously.
- [21] On the material facts on which the complaint was referred, and the unchallenged explanation of the adviser, there is no basis for finding the adviser is, or was, incompetent. The material facts simply show she made two mistakes in the circumstances identified, and that she understands the mistakes she made and why.
- [22] Immigration New Zealand has been the recipient of the applications the adviser has prepared as a licensed immigration adviser. The Registrar has reviewed the adviser's work originally to issue, and to later renew, her licence. Neither has identified any other occasion when the adviser has failed to meet professional standards or made mistakes; or indeed suggested that there is any grounds for thinking there are such concerns. Accordingly, the Tribunal cannot find the adviser to be incompetent.
- [23] The Registrar has exercised his powers of referral solely under section 44(2)(b) of the Act, not section 44(2)(a). The latter section addresses negligence. Counsel representing Immigration New Zealand has not taken issue with the grounds of complaint, so has not filed a Statement of Reply.
- [24] The adviser admits she could be regarded as negligent; however, to find that there was negligence that was sufficiently serious to find a professional disciplinary breach would involve examining such threshold in the context of the pressures she was under at the time. I do not consider it appropriate for this Tribunal to explore that possibility when the Registrar and Immigration New Zealand have not pursued it. It is entirely understandable that they have not done so, given they have not challenged the adviser's explanation about her personal circumstances at the time.
- [25] Accordingly, the complaint that the adviser is incompetent will be dismissed.

*Vexatious application*

- [26] The second ground on which the complaint has been referred by the Registrar is that the adviser breached clause 2.2 of the Code. That provision prescribes a mechanism for licensed immigration advisers to deal with clients seeking to lodge unfounded applications. It provides:
- "If a proposed application, appeal, request or claim is vexatious or grossly unfounded (for example, it has no hope of success) a licensed immigration adviser must:
- a) encourage the client not to lodge it; and
  - b) advise the client in writing that, in the adviser's opinion, it is vexatious or grossly unfounded; and

- c) if the client still wishes to lodge it, seek written acknowledgment from the client that he or she has been advised not to.”

- [27] It is difficult to see how this provision of the Code can arise on the material facts on which the Registrar referred the complaint.
- [28] The material facts identify errors that mean the adviser either lodged the application on grounds that were inapt, or failed to identify the fact her client was not in a position to lodge the application at all. That is an adviser error, addressed in the preceding section, not a case of a client seeking to lodge an inappropriate application.
- [29] Accordingly, this ground of the complaint is also dismissed.

### **Decision**

- [30] Pursuant to section 50 of the Act, the complaint is dismissed.

**DATED** at WELLINGTON this 1<sup>st</sup> day of August 2013

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**G D Pearson**  
Chairperson