

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

Decision No: [2013] NZIACDT 52

Reference No: IACDT 024/13

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

TSO

Complainant

AND

Mohammed Hassan

Adviser

THE COMPLAINANT'S NAME IS NOT TO BE PUBLISHED

DECISION

REPRESENTATION:

Registrar: In person.

Complainant: Mr S Sharma, Lawyer, Auckland.

Adviser: In person.

Date Issued: 12 September 2013

DECISION

INTRODUCTION

- [1] The Registrar has referred a complaint brought against Mr Hassan, who is a licensed immigration adviser.
- [2] The Registrar identified four grounds for referral, namely:
 - [2.1] Incompetence;
 - [2.2] Negligence;
 - [2.3] Dishonest or misleading behaviour; and
 - [2.4] Breaches of the Licensed Immigration Advisers Code of Conduct 2010 ("the Code of Conduct").
- [3] The complainant is somewhat distantly related to Mr Hassan. He accepts he did not comply with some of the formalities in the Code of Conduct thinking informality in a "family" context was acceptable.
- [4] However, the complainant says she paid substantial fees, which Mr Hassan denies. The complaint also alleges Mr Hassan did not process applications properly and that he dishonestly misled her in relation to the applications he was instructed to file.
- [5] Mr Hassan provided an explanation that he was not paid, acted informally, but fully and accurately informed the complainant of the circumstances. Ultimately, he says, the complainant could not provide him with necessary information, and that was the difficulty.
- [6] The Registrar has investigative powers; he has not challenged Mr Hassan's explanation. Neither has the complainant challenged Mr Hassan's explanation. Accordingly, the Tribunal has accepted the explanation provided.
- [7] The complaint has been upheld, but only in respect of failure to comply with the Code of Conduct's requirements for written agreements, disclosure, and records.

THE STATEMENT OF COMPLAINT

- [8] This complaint has been filed by the Registrar, in the form of a Statement of Complaint, the key elements being:

Material facts

- [9] In mid-2011, the complainant instructed Mr Hassan to lodge an application for residence.
- [10] On 12 September 2011, Mr Hassan submitted the application to Immigration New Zealand (INZ); however it was returned as the medical certificate had not been completed correctly.
- [11] 15 November 2011, Mr Hassan resubmitted the application; however it was returned on 21 November 2011, as it was incomplete.
- [12] On 4 January 2012, Mr Hassan lodged a work visa on behalf of the complainant. On 10 January 2012, this application was returned as no medical certificate had been included.
- [13] On 15 January 2012, the complainant's current visa expired and she was in New Zealand unlawfully as a result.
- [14] On 17 January 2012, Immigration New Zealand received the resubmitted the work visa application from Mr Hassan. This was treated as a request for a visa under section 61 of the Immigration Act.

- [15] On 21 January 2012, Mr Hassan wrote to Immigration New Zealand regarding this request stating, among other things, that the application had been submitted before the complainant's visa had expired, and that a medical certificate had been previously submitted for the complainant which would still be valid.
- [16] On 23 January 2012, Immigration New Zealand refused the request for a visa.
- [17] On 8 March 2012, Immigration New Zealand wrote to Mr Hassan stating that they only had on record a medical certificate submitted on 24 March 2009 for the complainant. The medical certificate recently submitted had been returned with the complainant's residence application.
- [18] On 20 March 2012, Mr Hassan replied to Immigration New Zealand, apologising for his error and making a further request under section 61 for the complainant. On 18 April 2012, Immigration New Zealand refused this request.
- [19] The complainant then sought new representation for her immigration matters.

Grounds on which the Registrar referred the complaint

- [20] 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 of the complaint as it disclosed there was a case that Mr Hassan:
 - [20.1] Had been negligent and/or incompetent (Section 44(2)(a) and/or (b) of the Act).
 - [20.2] Engaged in dishonest or misleading behaviour as alleged by the complainant (Section 44(2)(d) of the Act).
 - [20.3] Breached the Licensed Immigration Advisers Code of Conduct 2010 (the Code of Conduct), specifically clauses 1.5, 2.1, 3 and 8. (Section 44(2)(e) of the Act).

The complainant's arguments in support of the complaint

- [21] The Statement of Complaint identified the complainant's key arguments in support of the complaint as:
 - [21.1] She cannot recall whether she has signed an agreement with Mr Hassan.
 - [21.2] She paid Mr Hassan \$4000 in total; however he did not provide her with any receipts.
 - [21.3] Mr Hassan told her throughout the process that Immigration New Zealand had made errors and that he would "sort this out". Mr Hassan provided her a copy of his letter dated 21 January 2012 in which he was "wrongly critical of Immigration New Zealand."
 - [21.4] Mr Hassan did not provide her with a copy of his letter dated 20 March 2012 in which he admitted his mistakes; she only saw a copy of this letter when her solicitor showed her a copy of the file he had obtained from Immigration New Zealand.
 - [21.5] Because of Mr Hassan's incompetence and failure to tell her what was going on that she was in New Zealand without a valid visa

Mr Hassan's response to the complaint

- [22] The Statement of Complaint identified the key elements of Mr Hassan's response to the complaint in the following way.

Material facts

- [23] He does not dispute the material facts.

Mr Hassan's response to the grounds of complaint:

- [24] He disputes the grounds of complaint put forward by the complainant, so all issues are at large.

The written material provided by Mr Hassan

[25] Mr Hassan provided the following written material:

[25.1] A written response to the complaint.

[25.2] A letter from the complainant's brother-in-law in support of Mr Hassan.

[25.3] Further comments in response to the complaint.

Mr Hassan's legal and factual arguments:

[26] He agreed to help the complainant as she was related to him, and he did not believe he had to sign an agreement when helping family members.

[27] When he was contacted on behalf of the complainant, he said that he did not want to "go into official dealings" as he would have to follow the proper procedures and create a paper trail.

[28] There is no specific rule against dealing with family and friends; however, he has made submissions on the new code of conduct on how advisers should deal with family and friends.

[29] The complainant did not pay him any money. She only paid the application fee, and the cheque was dishonoured, so he paid this for her. He has yet to receive this money back from her.

[30] He kept the complainant informed of what was going on, as he called her on the telephone all the time, and the complainant is lying about the lack of communication.

[31] The reason for the medical certificate submitted with the residence application being returned was because the doctor completing the certificate had not filled in certain sections, and he had to ask the complainant to go back and get this completed.

[32] When the complainant came to him she was already unlawfully in New Zealand, and he got her a valid visa. He is not responsible for her actions.

[33] The complainant delayed in providing a police report from Australia for her husband because he did not wish to provide this as he had a criminal record. Mr Hassan had her application ready to send to Immigration New Zealand, however during this process her current visa expired.

[34] Mr Hassan believes the complainant has a "marriage of convenience", and that when he questioned her on this she refused to respond.

[35] This was a family deal gone sour "by the instigation of another person for gaining political mileage". He believes she is "lying to achieve residence because some solicitor told her to do it".

[36] He would like to face the complainant in a hearing as he believes she would then tell the truth.

Information gathered by the Registrar

[37] 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).

[38] The Registrar obtained notes from the Immigration New Zealand Application Management System dated 13 September 2011 to 1 May 2012. The notes, the Registrar says, support the material facts stated by him in the Statement of Complaint.

RESPONSES TO THE STATEMENT OF COMPLAINT

- [39] The complainant and Mr Hassan had the opportunity of responding to the Statement of Complaint with Statements of Reply, identifying any facts or analysis that they disagree with; and indicating whether they sought an oral hearing.
- [40] Neither filed a Statement of Reply.

DISCUSSION

Facts

- [41] There are factual differences between the complainant and Mr Hassan's view of events. Some of the matters are on record, others are not.
- [42] The Tribunal is required to determine facts 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). Elements of the complaint are at the most serious end of the spectrum, as the Registrar has included dishonest or misleading behaviour as one of the grounds he has determined the complaint discloses.
- [43] The Registrar has power to gather information, including the exercise of powers of inspection and information gathering (sections 47 and 57 of the Act).
- [44] Mr Hassan provided a response to the complaint; it included matters where there was a significant divergence from what the complainant said:
- [44.1] Mr Hassan said that he had been paid nothing for his work, and had personally paid the lodgement fees as he had made an error. The complainant says she paid \$4,000 in fees. Mr Hassan invited the complainant to provide evidence of the payment. It is usual to be able to provide evidence of bank withdrawals and the like when cash is paid.
- [44.2] Mr Hassan accepts he made an error over the currency of a medical certificate; however, he says the real difficulty was that the complainant did not provide information as she was applying on grounds that were not genuine.
- [44.3] He also says that he did keep the complainant informed of developments, though he accepts this was not done in writing. This was confirmed by a family member who was an intermediary as the complainant changed addresses and telephone numbers several times.
- [44.4] He accepts that he worked on an informal basis, thinking that he was entitled to do so as the complainant was a somewhat remote family member.
- [45] I am required to be satisfied of facts on the papers before me.
- [46] I am in the position where Mr Hassan has made a clear response and provided information that is consistent with his position. The Registrar who has investigative powers has not produced any evidence that is inconsistent with what Mr Hassan says. He has either accepted the explanation and determined investigation is unnecessary, or investigated and found nothing to the contrary.
- [47] The complainant has not provided anything that replies to and challenges Mr Hassan's explanation.
- [48] In these circumstances, Mr Hassan is entitled to have his explanation accepted. I will proceed on that basis.
- [49] Mr Hassan's explanation leaves two issues:
- [49.1] He submitted applications that were not complete; and

- [49.2] He failed to comply with the Code of Conduct, as he thought he could deal informally with a family member.

Filing incomplete applications

- [50] In relation to filing applications that were not complete. There are two mitigating factors identified. The defective medical certificate was defective only in part as the medical practitioner had not completed a particular section of it.
- [51] The second application was submitted incomplete as the complainant has not supplied necessary material, and there was time pressure as she was in New Zealand unlawfully. Mr Hassan mistakenly thought the earlier submission of the medical certificate was on record as a valid submission.
- [52] The details are less than clear as the papers do not include copies of the documents submitted to Immigration New Zealand. Given the explanations, and the absence of the documents I am not in a position to find Mr Hassan was negligent. There is sufficient material to satisfy me there was an element of lack of care. However, not every mistake or error of judgment is sufficient to found an adverse professional disciplinary finding.
- [53] 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 each respective situation as they can be quite different.
- [54] 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.”
- [55] 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.
- [56] 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.
- [57] 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. 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.
- [58] 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 treated as a matter that is best settled between the parties.
- [59] It is necessary and appropriate for this Tribunal to be mindful of this threshold before a complaint 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.
- [60] I am not satisfied the papers disclose professional conduct or omissions that reach the threshold for an adverse disciplinary finding.

Non-compliance with the Code

- [61] There is no doubt that the fact that the complainant was a remote family member did not exempt Mr Hassan from full compliance with the Code of Conduct. There is no basis on which it can be said any category of client allows a licensed immigration adviser to do anything other than comply fully with the Code. There are respects in which Mr Hassan was non-compliant. I will address them with reference to the issues the Registrar stated for determination, which are accepted by the other parties as appropriately identifying the issues.

Issues for determination

- [62] I now address the findings in terms of the issues identified in the Statement of Complaint:

- [62.1] **Issue 1:** Whether the adviser was dishonest or misled the complainant regarding the progress of her visa applications.

Conclusion: The papers do not establish Mr Hassan was dishonest or misled the complainant. Mr Hassan and the family member who was on occasions an intermediary both say the complainant was fully and accurately informed. That explanation has not been challenged, and I accept it.

- [62.2] **Issue 2:** Whether the adviser was negligent and/or incompetent in his preparation and submission of the complainant's visa applications.

Conclusion: Any errors in the preparation and submission of the visa applications did not reach the threshold for an adverse disciplinary finding.

- [62.3] **Issue 3:** Whether the adviser was required to adhere to the Code of Conduct even if representing friends or family.

Conclusion: The Adviser was required to comply with the Code of Conduct in relation to his instructions from the complainant.

- [62.4] **Issue 4:** If yes, whether the adviser met his professional obligations under the Code of Conduct:

- [62.4.1] relating to written agreements (clause 1.5); and obtaining written authority to act on her behalf (clause 2.1(h)); and

Conclusion: The Adviser did not comply.

- [62.4.2] to maintain professional business practices including –

- [62.4.2.1] confirming in writing when applications have been lodged, with on-going timely updates (clause 3(a)); and

Conclusion: The Adviser reported orally, not in writing, so did not comply to that extent.

- [62.4.2.2] confirming material discussions with clients in writing (clause 3(f));

Conclusion: The Adviser reported orally, not in writing, so did not comply to that extent.

- [62.4.2.3] to maintain respectful and professional relationships with Immigration New Zealand (clause 2.1 (g)); and

Conclusion: There is no evidence of more than a mistake of fact leading to correspondence on a wrong understanding of fact; there was no failure to comply.

- [62.4.2.4] to take all reasonable steps to submit applications in a timely manner to ensure clients maintain lawful immigration status (clause 2.1(i)); and

Conclusion: There is no evidence Mr Hassan could have filed completed applications as the complainant had not provided necessary supporting information. There was no non-compliance.

- [62.4.2.5] to set fees that are fair and reasonable (clause 8), to work in a manner that does not unnecessarily increase costs (clause 1.1(d)) and to provide any refunds upon ceasing a contract for services (clause 3(d)).

Conclusion: Mr Hassan charged no fees, and met expenses out of his own pocket on the evidence in the papers.

DECISION

- [63] Pursuant to section 50 of the Act, the complaint is upheld, as Mr Hassan failed to initiate the professional relationship in accordance with the Code of Conduct, then reported orally rather than in writing. This amounted to breaches of the Code of Conduct identified above, which are grounds for complaint pursuant to section 44(2)(e) of the Act.

SUBMISSIONS ON SANCTIONS

- [64] As the complaint has been upheld, section 51 allows the Tribunal to impose sanctions.
- [65] The Authority and the complainant have the opportunity to provide submissions on the appropriate sanctions, including potential orders for costs, refund of fees and compensation. Whether they do so or not, Mr Hassan is entitled to make submissions and respond to any submissions from the other parties.
- [66] Any application for an order for the payment of costs or expenses under section 51(1)(g) should be accompanied by a schedule particularising the amounts and basis for the claim.

TIMETABLE

- [67] The timetable for submissions will be as follows:
- [67.1] The Authority and the complainant are to make any submissions within 10 working days of the issue of this decision.
- [67.2] Mr Hassan is to make any further submissions (whether or not the Authority or the complainant make submissions) within 15 working days of the issue of this decision.
- [67.3] The Authority and the complainant may reply to any submissions made by Mr Hassan within 5 working days of him filing and serving those submissions.
- [68] The parties are notified this decision will be published with the names of the parties after five working days, unless any party applies for orders not to publish any aspect.

DATED at WELLINGTON this 16th day of August 2013

G D Pearson
Chairperson