

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

Decision No: [2013] NZIACDT 65

Reference No: IACDT 060/12

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

EHQ

Complainant

AND

NKN

Adviser

DECISION

REPRESENTATION:

Registrar: In person.

Complainant: In person.

Adviser: Mr A Bartley, Solicitor, Jolliffe & Co., United Kingdom.

Date Issued: 20 September 2013

Introduction

- [1] The Immigration Advisers Authority received a complaint from Mr EHQ regarding Mr NKN. It concerned Mr NKN's conduct as a licensed immigration adviser.
- [2] The Registrar of the Authority identified a range of the most serious grounds on which a complaint can be referred to this Tribunal. The grounds included that Mr NKN was incapable, and he had acted dishonestly.
- [3] It was not evident from the material the Registrar filed that there were facts supporting these grounds. The Tribunal therefore required the Registrar to identify the material facts he relied on to support those grounds, which he did. Neither Mr EHQ nor Mr NKN took issue with the facts presented by the Registrar.
- [4] However, Mr NKN said those facts did not show he did anything wrong at all, let alone show he was incapable or dishonest.
- [5] The Tribunal has found the grounds of complaint are wholly lacking any supporting facts. The Tribunal has dismissed the complaint.

The statutory basis for referral

- [6] The Registrar referred a complaint brought by Mr EHQ about Mr NKN, who is a licensed immigration adviser.
- [7] When lodging the complaint with the Tribunal the Registrar was exercising a statutory power of decision pursuant to section 45(2) of the Immigration Advisers Licensing Act 2007 (the Act).
- [8] The Registrar has identified the grounds for referral, being:
 - [8.1] Negligence (section 44(2)(a) of the Act).
 - [8.2] Being incapable (section 44(2)(c) of the Act).
 - [8.3] Engaging in dishonest or misleading behaviour (section 44(2)(d) of the Act).
 - [8.4] Breaching the Licensed Immigration Advisers Code of Conduct 2010 in:
 - [8.4.1] Failing to perform services with due care, diligence, respect and professionalism (Clause 1.1).
 - [8.4.2] Misrepresenting the complainant's immigration opportunities (Clause 5.1.c).
 - [8.4.3] Deceptively promoting his business (Clause 5.1.b).
 - [8.4.4] Failing to work within the scope of his knowledge and skills (Clause 1.6).
 - [8.4.5] Working in a manner that unnecessarily raised the complainant's costs (Clause 1.1.d).
- [9] The Tribunal directed the Registrar to identify the material facts that established the grounds for complaint. The Tribunal specifically noted the Registrar should ensure that the material facts relate to, and provide *prima facie* evidence of, the grounds of negligence, incapacity and dishonest or misleading behaviour. This direction was contained in a written Directions as to Procedure, issued on and dated 7 August 2013.
- [10] The Registrar has statutory powers to gather information, which extend to powers of entry to premises, questioning, and inspection, pursuant to section 57 of the Act.

[11] Following this direction, the Registrar identified the following material facts as the basis for referring the complaint to the Tribunal on the grounds identified in paragraph [8] above pursuant to section 45:

1. The adviser is an employee and director of a company called The Emigration Group Limited (the adviser's company), which is based in the United Kingdom.
2. There is also a company incorporated in New Zealand called The Emigration Group (NZ) Ltd (the New Zealand company). One of the directors of this company is Geoffrey Taylor, he is also a director of the adviser's company.
3. In September 2009 the complainant contacted the adviser's company regarding migrating to New Zealand.
4. On 22 February 2010 the complainant signed a written agreement for job search and settlement services with the New Zealand company.
5. The agreement specifies a fee of £1,695.75 for the job search services and a fee of £395 for the resettlement programme.
6. On 2 March 2010, 30 March 2010 and 27 April 2010 the complainant made three payments of £678, £665 and £776 respectively into a British bank account nominated by the New Zealand company.
7. In April 2011 the complainant began communicating with the adviser regarding engaging an adviser for assistance with work visa and residence applications.
8. The complainant states that the adviser told him that in order for them to assist him further he would have to sign another contract.
9. On 21 April 2011 the adviser sent the complainant a contract for assistance with his immigration matters for him to sign.
10. On 4 May 2011 the complainant signed the second contract for assistance with his immigration matters. The contract is with the New Zealand company. The contract was not signed by the adviser or any representative of either company at this time.
11. At clause 1.1 the contract states that it is regarding a "Residence/Work (delete as required) visa application". It also states that the category of visa applied for is "skilled" but does not specify whether this is a temporary or permanent visa.
12. Under the heading 'FEES GENERAL' the agreement refers to a residence application and states that the "visa preparation" fee does not include temporary visa preparation.
13. The contract states with respect to refunds that, unless authorised by a director, no refund will be provided should the client no longer wish to proceed, regardless of how much work has been done.
14. The complainant paid £2,190 of the total agreed fee of £3,385 for the immigration services.
15. In June 2011 the complainant arrived in New Zealand and discovered that the job search had not been started.
16. The complainant was provided with accommodation owned by Mr Taylor's ex-wife.
17. The complainant was not successful in finding his own employment and left New Zealand in August 2011.
18. On 18 August 2011 the complainant emailed the adviser's company and the New Zealand company, stating that he was taking the first step described in

the complaints procedure, and expressing his dissatisfaction with their services.

19. On 22 August 2011, the adviser signed the second written agreement on behalf of the company and on 26 August 2011 returned it to the complainant by email.
20. On 6 November 2011, after further communication, the complainant emailed the adviser and requested full details of the complaints procedure referred to in the second agreement.
21. On 8 November 2011 the adviser responded to the complainant's email, attaching a copy of the complaints procedure and stating that he would deal with any concerns that the complainant had regarding the visa work and endeavour to respond to these within 14 working days.
22. The adviser told the complainant that as the two companies were separate, the complainant would need to direct any issues regarding the job search service to the New Zealand company.
23. On 25 November 2011 the adviser emailed the complainant, stating that the fees paid for the visa assistance would be refunded less an "administration fee".
24. As at 12 January 2012 the complainant had been refunded £1,568 by the adviser.

[12] The Registrar stated he could only reject a complaint if satisfied it did not disclose any of the grounds in section 44(2) of the Act, and "he was not satisfied that the complaint failed to disclose any grounds". The Registrar did not relate any of the material facts to a ground on which he referred the complaint.

[13] The Tribunal sets out this background for two reasons. First, Mr NKN has responded admitting the facts, and saying they do not support any of the grounds on which the Registrar referred the complaint. Second, unsurprisingly given the gravity of the grounds on which the Registrar has exercised his statutory power, the Australian licensing authority refused Mr NKN's continuing professional licensing in Australia while this complaint was pending. As a result, Mr NKN is entitled to have the background to the Registrar's referral recorded in full.

The adviser's position

[14] Mr NKN's position is set out in his Statement of Reply to the Registrar's Statement of Complaint.

[15] He admits in full, the material facts the Registrar has identified as supporting the complaint.

[16] He then states first that the Registrar was non-compliant in relation to the direction to relate material facts to the grounds on which the Registrar has referred the complaint, and second that there is no *prima facie* evidence that supports negligence, incapacity, dishonest or misleading behaviour, or breaches of the Code of Conduct.

[17] The submission continues that the Registrar has "failed to consider and/or analyse the complaint properly or at all."

[18] The submission then deals with the section of the Registrar's Statement of Complaint that identifies the arguments in support of the complaint. Though he indicated there was some difficulty in doing so given the material facts identified, and lack of precision in the arguments.

[19] One of the issues addressed was a potentially relevant Disputes Tribunal decision. Mr NKN pointed out he was not a party to those proceedings, and not controlling the company that was a party before the Disputes Tribunal. Regardless, he says there is nothing adverse regarding him in that decision.

- [20] In respect of each of Mr EHQ's arguments appearing in the Statement of Complaint, Mr NKN disputed Mr EHQ's assertions. He identified them as not material, and pointed out that the Registrar has not identified *prima facie* evidence that provided support for the arguments.
- [21] Mr NKN stated he has acted entirely properly in all respects, and there is no probative or *prima facie* evidence to support any of the grounds of complaint.

The complainant's position

- [22] Mr EHQ accepted the Registrar's Statement of Complaint, and did not file a Statement of Reply taking issue with it.
- [23] However, he did file a Reply to Mr NKN's Statement of Reply.
- [24] In the Reply, he provided records relating to the two companies referred to in the statement of material facts. The record relating to the New Zealand company indicates Mr NKN was not a shareholder or director of that company. The company styled as "the adviser's company" has Mr Taylor as a director and shareholder. He said there was no distinction between the two companies. He did not discuss further that they were incorporated in different jurisdictions, with different officers and shareholders.
- [25] He said all the evidence presented supported his complaint, and he supported the decision of the Registrar.
- [26] The Reply does not identify any wrongdoing on Mr NKN's part, or refer to evidence establishing or bearing upon that.

The Registrar's position

- [27] The Registrar indicated he did not wish to reply to Mr NKN's Statement of Reply.

Discussion

- [28] I am satisfied the material facts the Registrar relied on for referring the complaint do not support any of the grounds on which he referred the complaint.
- [29] In the Tribunal's Directions as to Procedure it was evident that there were questions regarding the factual basis of the referral, and accordingly the Directions stated:
- "The Registrar should ensure that the material facts relate to, and provide *prima facie* evidence of the grounds of negligence, incapacity, and dishonest and misleading behaviour (or identify the Registrar has not identified facts that support any or all of those grounds when exercising his statutory power under section 45(1)(b)."
- [30] Through his solicitor, Mr NKN responded to the Registrar's Statement of Complaint with the submission:
- "The Registrar has failed to comply [with the direction quoted in the preceding paragraph] as there is no or no *prima facie* evidence of [the grounds of complaint].
- ... the Registrar has failed to consider and/or analyse the complaint properly or at all."
- [31] The Registrar did not answer that submission.

- [32] In his Statement of Complaint, the Registrar stated he “was not satisfied that the complaint failed to disclose any grounds”. He provided no explanation that supports his view. In his Statement of Complaint, specifically the section where he identifies the grounds for referral of the complaint, he only provides the following:

The infringements the Registrar identified as grounds for referral of the complaint

The complainant alleges that the adviser has been negligent. This is a ground for complaint under section 44(2)(a) of the Act.

The complainant alleges that the adviser was incapable. This is a ground for complaint under section 44(2)(c) of the Act.

The complainant alleges that the adviser engaged in dishonest or misleading behaviour. This is a ground for complaint under section 44(2)(d) of the Act.

The complainant alleges that the adviser breached the code of conduct. This is a ground for complaint under section 44(2)(e) of the Act. In particular, the complainant alleges that the adviser:

- Did not perform services with due care, diligence, respect and professionalism, as required by clause 1.1 of the Code
- Misrepresented the complainant’s immigration opportunities in breach of clause 5.1.c of the Code
- Deceptively promoted his business, in breach of clause 5.1.b. of the code
- Did not work within the scope of his knowledge and skills, as required by clause 1.6 of the Code
- Worked in a manner that unnecessarily raised the complainant’s costs, in breach of clause 1.1.d. of the Code.

The Registrar may only reject a complaint if satisfied it does not disclose any of the grounds listed in section 44(2). The Registrar was not satisfied that the complaint failed to disclose any grounds and therefore the complaint must be referred to the Tribunal in accordance with section 45(2).

- [33] Among the papers lodged with the Tribunal is a standard complaint form. It has “tick boxes” where the complainant identifies a question: “What is your complaint about?” The options are Breach of Code of Conduct, Negligence, Incompetence, Incapacity, and Dishonest or Misleading behaviour.

- [34] Mr EHQ ticked each box except “Incompetence”.

- [35] It appears the Registrar’s approach is that he may, or should, exercise his statutory power of decision under section 45(2) by adopting the complainant’s grounds of complaint identified in the “tick boxes”. While the complaint and the Registrar’s determination may be the same, there is a determination the Registrar must make using his own judgement.

- [36] Section 45(1) of the Act sets out the procedure the Registrar must undertake on receiving a complaint regarding a licensed immigration adviser. That procedure is that on receipt of a complaint the Registrar may do any of the following:

- [36.1] **Determine** that the complaint does not meet the criteria set out in section 44(3), and reject it accordingly:
- [36.2] **Determine** that the complaint does not disclose any of the grounds of complaint listed in section 44(2), and reject it accordingly:
- [36.3] **Determine** that the complaint discloses only a trivial or inconsequential matter, and for this reason need not be pursued:

[36.4] **Request** the complainant to consider whether or not the matter could be best settled by the complainant using the immigration adviser's own complaints procedure.

(Emphasis added).

- [37] Section 45(2) goes on to say that if the Registrar **determines** that the complaint should not be dealt with under subsection (1) outlined above, the Registrar must then refer the complaint to the Tribunal for determination.
- [38] Leaving aside section 45(1)(d) where the Registrar may make a request to the complainant, section 45(1) clearly states that the Registrar must **determine** whether the complaint meets the specific criteria or discloses any of the relevant grounds of complaint or any trivial or inconsequential matters.
- [39] While the Act does not define the term "determine", the Oxford English Dictionary sets out that the term is a verb meaning "to bring oneself to a decision; to come to the resolve (to do something)". In applying that definition to the present case, the Tribunal finds that the Registrar is required pursuant to section 45(1) to review the complaint and its material facts, to consider the relevant grounds of the complaint under section 44(2), and to conclude whether the complaint discloses any of the grounds listed.
- [40] To reinforce that point, the Registrar also has powers of inspection regarding the facts (section 57). The wide powers of inspection allow the Registrar to gather any additional information considered necessary before filing the complaint with the Tribunal under section 48. The effective use of these powers is particularly important when the Act directs that the Tribunal must hear the complaint "on the papers", subject to particular exceptions.
- [41] When the Registrar refers a complaint, he is exercising a power where he has been required to evaluate the complaint, and he provides the Tribunal with the information and analysis that justified the exercise of his statutory power.
- [42] The Registrar's decision to reject or not pursue a complaint is subject to appeal to this Tribunal pursuant to section 54 of the Act.
- [43] The Registrar's role in referring a complaint to this Tribunal is outlined in paragraphs [36] to [42] above. He is not simply exercising administrative duties at the direction of complainants, or respondents for that matter. It is a statutory decision-making power subject to appeal.
- [44] The Registrar in the present case has not shown any facts or reasoning that could result in the Tribunal finding any of the grounds of complaint could be upheld.
- [45] Both Mr EHQ and Mr NKN have accepted that the material facts the Registrar identified are the material facts relating to the complaint. It follows I must find there is no foundation for any of the grounds on which the complaint was referred.
- [46] The issue is straightforward. Mr NKN is accused of a range of serious professional misconduct, including dishonesty. This Tribunal must decide that complaint based on evidence, and reach reasoned conclusions (section 51(2)).
- [47] The Registrar has presented the material facts; parties do not dispute the material facts, and there is nothing in them that establishes Mr NKN did anything wrong.
- [48] Mr NKN must engage with at least one other licensing authority; he is entitled to have this Tribunal record that not only has it concluded that the complaint cannot be upheld; there is no evidence at all supporting any of the grounds on which the Registrar referred the complaint to the Tribunal.

Order

[49] The complaint is dismissed.

DATED at WELLINGTON this 20th day of September 2013

G D Pearson
Chair