

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

Decision No: [2013] NZIACDT 69

Reference No: IACDT 025/13

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

NG

Complainant

AND

THZ

Adviser

THE NAMES OF THE COMPLAINANT AND THE ADVISER ARE NOT TO BE PUBLISHED

DECISION

REPRESENTATION:

Registrar: In person.

Complainant: In person.

Adviser: In person.

Date Issued: 22 October 2013

DECISION

INTRODUCTION

- [1] The complainant first approached the adviser's husband and discussed the possibility of obtaining work in New Zealand with a view to migrating from South Africa. The events occurred in South Africa, where the adviser practises.
- [2] The complainant says he indicated he could not travel to New Zealand for employment interviews, and the adviser's husband responded saying he could provide a referral to a New Zealand recruitment agency. The complainant did not take up that offer.
- [3] After that, the complainant engaged the adviser, and indicated to her that he could gain employment in New Zealand, but needed a visa to do so.
- [4] The adviser undertook work to the value of the fee the complainant had paid when the engagement commenced, which was half of the full fee. At that point, the complainant realised that gaining an offer of employment without travelling to New Zealand was problematic and he decided not to migrate to New Zealand.
- [5] He sought a refund of all the fees he paid; the adviser offered a partial refund, which he refused.
- [6] The complainant lodged a complaint with the Registrar that the adviser was incompetent, had acted dishonestly or behaved in a misleading manner, and breached the Code of Conduct in an unspecified way.
- [7] The Registrar referred the complaint to the Tribunal based on the grounds identified by the complainant. However the Registrar did so in the form of a Statement of Complaint, which did not identify material facts that could justify any of those grounds.
- [8] The Tribunal has determined there is no foundation for any of the grounds of complaint, or for a finding of wrongdoing on the part of the adviser. Accordingly, the Tribunal has dismissed the complaint.

THE STATEMENT OF COMPLAINT

- [9] The complaint has been filed by the Registrar, in the form of a Statement of Complaint. It contains the following information.

Material facts

- [10] The Registrar identified the material facts that founded the complaint in his Statement of Complaint in the following terms:

"The complainant states that on 13 April 2012 he made contact with the adviser's company by phone. He spoke to someone who identified himself as [the adviser's husband].

The complainant states that he enquired whether the company assisted people with finding employment and mentioned to the adviser's husband that he would not be able to travel for job interviews.

The complainant states that he asked whether it was possible for him to get an offer of employment through telephone interviews. He states that the adviser's husband told him he could, and that they could make contact with an Auckland-based recruitment company at an extra cost of NZ\$1,500.

The complainant states that on 16 April 2012 he, his sister and her husband visited the company's offices and met with the adviser's husband. The complainant states that the adviser's husband made an assessment of his qualifications and work experience.

The complainant states that he told the adviser's husband about his difficulties in finding employment in New Zealand. He states that he told the adviser's husband that he had had a phone interview with an Auckland-based company but could not get the job as he did not have a visa.

The complainant states that the adviser joined the meeting while they were discussing the reasons he could not travel. He states that he told her that he could not travel as his South African residence permit was pending and that he also did not have the means to pay for a trip.

He states that he asked again if there was any way of getting a job without travelling, and he was reassured they would do their best.

The complainant states that the adviser stated she would contact the Auckland-based company and explain she was working on his behalf. He states that they guaranteed the success of his visa based on their assessment and on the condition that they find the right job.

On 25 April 2012 the complainant signed a written agreement with the company for assistance with permanent residence and a work visa application.

The agreement states at clause 10 that the adviser's company guarantees that "the application will not fail for any reason which could reasonably be considered to be within the control of The Company". This clause further states that the guarantee is limited to "the full refund of the Service fee paid to The Company minus any disbursements and costs incurred".

The agreement also states at clause 14 that in the event of termination of the agreement by the client all fees payable by the client "including costs incurred and all services fees" would immediately become due.

At clause 19 the agreement further states that fifty per cent of the professional fee is payable as a non-refundable deposit due from the date of signing the agreement.

The complainant paid the adviser 17,500 Rand as part of the agreed professional fee of R35,000.

On 23 May 2012 the adviser emailed the complainant, telling him it appeared it would be difficult to get a job from South Africa and that he should consider coming to New Zealand.

On 27 September 2012 the complainant emailed the adviser saying that he no longer wished to go ahead with the application. He reminded the adviser of their conversation at their first meeting regarding his wish not to travel. He requested a refund of the deposit, minus any disbursements incurred on his behalf.

On 29 September 2012 the adviser's husband responded to the email, stating that all clients who require a job offer to qualify for migration are told in their first meeting that they will likely need to travel to New Zealand to secure a position. The adviser's husband stated that it was only later when he met with him again that the complainant told him that he was not prepared to travel to New Zealand.

On 18 October 2012 the adviser responded to further emails from the complainant's brother, saying that the issue of the complainant travelling had not been discussed at the initial meeting. The adviser offered a R2,500 refund, although she also stated that he was not entitled to this as the deposit was not refundable.

On 30 October 2012 the adviser verbally offered the complainant a R5,000 refund, however he did not accept this as he did not feel the work done by the adviser justified her retaining the remaining R12,500.

The complainant states that the adviser told him that she could only afford to refund him R5,000 as she needed to pay salaries to her staff among other expenses."

- [11] In short, the complainant says he sought to secure an offer of employment in New Zealand without travelling there. Initially he dealt with the adviser's husband who is not a licensed immigration adviser, later with the adviser who is a licensed immigration adviser. At that point, there was an agreement for the provision of immigration services.
- [12] The key terms of the agreement were the full fee was R35,000. Of that, R17,500 was paid as a non-refundable deposit.
- [13] Later the complainant determined that he would, or could, not proceed with his plan to migrate to New Zealand and sought a refund of the fees he had paid, less disbursements paid.
- [14] The adviser took the position the fees paid were non-refundable, but she would offer a refund of R5,000.

Grounds on which the Registrar referred the complaint

- [15] 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 the adviser:
- [15.1] Was incompetent (section 44(2)(b) of the Act).
- [15.2] Engaged in dishonest or misleading behaviour (section 44(2)(d) of the Act).
- [15.3] Breached unspecified clauses of the Licensed Immigration Advisers Code of Conduct 2010 ("the Code of Conduct") (section 44(2)(e) of the Act).

The complainant's arguments in support of the complaint

- [16] The Statement of Complaint identified the complainant's key arguments in support of the complaint as:
- [16.1] He needed a job offer to migrate to New Zealand, and could not travel to seek the job offer. He should have been advised this was a serious impediment.
- [16.2] The refusal to refund the money was based on an unjustifiable excuse the adviser needed the money to meet her own expenses.
- [16.3] The fees the adviser refuses to pay are being withheld unfairly.

The adviser's response to the complaint

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

The adviser's response to the material facts

- [18] The complainant did not initially identify the difficulty with travelling to New Zealand to seek work.
- [19] Work was found, but to secure it the complainant had to travel to New Zealand, and he considered that option.
- [20] It was only on 20 September 2012 that the complainant disclosed in an email that he did not have the funds to travel to New Zealand.

The adviser's response to the grounds of complaint:

- [21] The adviser denied providing any misleading information.

The adviser's legal and factual arguments:

- [22] The agreement identified the limited role relating to employment search services, and the complainant did not insist on a different provision in the contract.

- [23] The services covered by the initial fee had been provided, excluding an assessment application to the New Zealand Qualifications Authority.
- [24] The complainant was not entitled to any refund of fees, but offers of initially R2,500 and then R5,000 were made, and he would not accept them.
- [25] His claims regarding employment services are wrong, and the adviser provided more services than had been required.
- [26] The complainant has engaged in an internet campaign disparaging the adviser with untrue and unfounded claims.

Information gathered by the Registrar

- [27] The Registrar has not gathered any additional information.

RESPONSES TO THE STATEMENT OF COMPLAINT

- [28] The complainant and the adviser had the opportunity of responding to the Statement of Complaint, and identifying any facts or analysis that they disagree with and indicating whether they sought an oral hearing.

The complainant's response

- [29] The complainant did not lodge a statement of reply. It was not necessary to do so if he accepted the Statement of Complaint set out his position in relation to the various matters contained in the Statement of Complaint.

The adviser's response

- [30] The adviser did file a statement of reply, as she took issue with some of the contents of the Statement of Complaint. Her position was as follows.

The facts

- [31] The adviser took issue with the following aspects of the material facts the Registrar identified in the Statement of Complaint:
 - [31.1] The adviser did not accept the complainant raised the issue of seeking employment in New Zealand without being willing to travel for interviews until late in the process. On the contrary, initially he said he had an employment opportunity, and the adviser was surprised that was possible without him travelling to New Zealand for an interview.
 - [31.2] The adviser did not offer to provide employment search services, and that is consistent with the contract.
 - [31.3] The complainant was qualified to migrate to New Zealand on the basis of the information the adviser had, though he needed to obtain work. The adviser did all she was required to do.
 - [31.4] On 23 May 2012, the adviser emailed the complainant and said it would be difficult to get work in New Zealand without travelling for an interview. His response was recorded in an email that day that he "will consider it".
 - [31.5] When the contract was terminated by the complainant, no further fees were sought and refunds of R2,500 and later R5,000 were offered.
 - [31.6] There had been a large amount of work undertaken for the complainant with input from five different staff members.
 - [31.7] The adviser did not say she could not afford a refund; she explained the reality that costs has been incurred due to work undertaken.

The grounds for referring the complaint

[31.8] The adviser says she was not incompetent, did not engage in dishonest or misleading behaviour, or breach the Code of Conduct.

The complainant's reply to the adviser's statement of reply

[31.9] The complainant indicated he was willing to rely on the Registrar's Statement of Complaint, claiming the adviser's statements were "inconsistent, false and made with deliberate intent to detract from the facts."

DISCUSSION

The facts before the Tribunal

- [32] None of the parties have sought an oral hearing. The Tribunal has not identified reasons to convene an oral hearing of its own motion. The hearing will be on the papers as required pursuant to section 49(3).
- [33] Accordingly, the Tribunal will determine the complaint on the basis of the material facts the Registrar has identified.
- [34] The material facts the Registrar has identified, which the complainant has accepted, do not support the grounds on which the complaint has been referred. The material facts do not:
- [34.1] Contain any element that could be a basis for finding the adviser was incompetent.
- [34.2] Identify anything that amounts to false information provided by the adviser, nor anything that is dishonest.
- [34.3] Identify any element of the Code of Conduct that has been breached, or facts that appear to amount to a breach of the Code.
- [35] The Registrar is charged with a statutory duty to maintain standards of competency and conduct for immigration advisers. That is identified as a function of the Authority in section 35(1)(c). His mandate in that regard to his duties generally has been the subject of comment by the High Court in *ZW v Immigration Advisers Authority* [2012] NZHC 1069 at [41].
- [36] The powers and duties conferred upon the Authority are consistent with that function. They include the power to enter premises, question certain people, and require the production of documents. Those powers are contained in section 57 of the Act. Section 56 makes it clear that the powers are available at all stages of the complaints procedure, and generally. Section 47 makes it clear the power applies to the preparing of complaints for lodging before the Tribunal.
- [37] Whether the Registrar considers matters put forward by the complainant, the adviser, or others require investigation is a matter for the Registrar's determination.
- [38] In the present case the Registrar has set out the facts he considers should be put before the Tribunal. They do not include facts that support the complainant's assertions of dishonesty, and the other serious allegations.

The engagement process and expectations given to the complainant

- [39] The facts the Registrar set out indicate the complainant was aware of the necessity of gaining employment if he was to migrate successfully to New Zealand. There is no suggestion the adviser misrepresented to the complainant what was required to gain employment. The Registrar set out that:
- [39.1] The complainant (in his arguments in support of the complaint) had acknowledged prior to engaging the adviser he had consulted with other immigration advisers and had been advised he would require a job offer to migrate to New Zealand.

- [39.2] The complainant “stated” to the adviser’s husband he could not travel for job interviews. The adviser’s husband said it was “possible” for him to get an offer of employment through telephone interviews. He was offered a referral to a recruitment company in New Zealand.
- [39.3] The complainant did not do that but “had a phone interview with an Auckland-based company. He could not get the job as he did not have a visa.” It was at that point the adviser was engaged to deal with gaining a visa. The agreement for the provision of professional services from the adviser related to immigration, not recruitment.
- [39.4] The adviser evaluated the complainant’s work experience and skills. There is no suggestion the evaluation was inaccurate or wanting.
- [39.5] At some unspecified time later, the complainant said he could not travel to New Zealand for an employment interview for immigration and financial reasons. It appears he had determined that was now necessary, despite previously identifying the primary impediment as not being in a position to apply for a visa.
- [39.6] He asked the adviser to assist, and was told she would do her best.
- [40] There is no suggestion the adviser misled the complainant; on the contrary, the material facts indicate the adviser professionally addressed the issue of employment. This is the position taken by the Registrar and the complainant as to the material facts. They do not say the adviser made false or misleading representations regarding either the complainant’s work skills and experience, or what the process for gaining employment was.
- [41] The facts indicate that in relation to the complainant’s claim he raised the issue of not being able to attend interviews:
- [41.1] He raised it with the adviser’s husband in the context of employment issues, not with the adviser who was addressing immigration issues.
- [41.2] The adviser’s husband offered the complainant a referral to a New Zealand agency where he could pursue the issue.
- [41.3] He says he later discussed the issue with the adviser, but in the context of him having had a telephone interview with a prospective employer and finding the impediment was getting a visa not attending a personal interview.
- [42] In her statement of reply, the adviser said she did not accept the complainant raised the issue of not travelling for a personal interview until later. She said the first time travelling to New Zealand was raised as an issue was when it was addressed in an email on 23 May 2012. She points to the response, and says that the complainant’s position was not consistent with him having been misled.
- [43] There is no other element of the facts that could be taken as raising a concern that the adviser engaged in misleading behaviour.

Refund of costs

- [44] The central element of the complainant’s complaint is that the adviser would not refund him all the money he paid.
- [45] The adviser has maintained that she accepted a professional engagement from the complainant, who had a realistic prospect of gaining employment, and on that basis, could expect to be eligible to migrate to New Zealand. She has said that in fulfilment of the agreed terms she undertook work to the value of the fee she had been paid. It followed, that under the agreed terms and on the basis of the value of work performed, the complainant could not expect a refund as he decided not to pursue migrating to New Zealand.
- [46] The Registrar has not suggested there is any reason to question the adviser’s position in relation to having been entitled to the fees, and having performed work to that value. If there was reason to require further information, or it appeared the claim should be questioned the Registrar could have investigated the claim.

- [47] The complainant in his reply to the adviser's statement of reply indicated he was "fully satisfied with my complaint as presented and prepared by the [Authority's] officer." He provided no basis to question the adviser's position.
- [48] It necessarily follows that the Tribunal must accept the adviser was entitled to the fees, the complainant was not entitled to any refund, and the adviser's offer of a refund was not required of her.

The issues for determination

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

- [49.1] **Issue 1:** Whether the adviser was incompetent in her dealings with the complainant.

Conclusion: The Statement of Complaint contains no basis for any adverse finding regarding the adviser's competence.

- [49.2] **Issue 2:** Whether the adviser acted dishonestly or behaved in a misleading manner.

Conclusion: The Statement of Complaint contains no basis for any finding that the adviser acted dishonestly or behaved in a misleading manner.

- [49.3] **Issue 3:** Whether the adviser breached the Code of Conduct:

Conclusion: Neither the Registrar nor the complainant identified any provision in the Code of Conduct the adviser breached. Furthermore, the Statement of Complaint did not state any factual circumstances that could be a basis for finding there was a breach of the Code of Conduct.

Conclusion

- [50] The Registrar referred the complaint to the Tribunal based on allegations of a range of serious professional misconduct, including dishonesty. This Tribunal must decide the complaint based on evidence, and reach reasoned conclusions (sections 41 and 51(2)).
- [51] The Registrar has presented the material facts. The complainant does not dispute the material facts, and there is nothing in them that establishes the adviser did anything wrong.
- [52] There are situations where a professional person is required to disclose their history of professional disciplinary complaints, and the mere fact that a complaint has been made may be seen as significant. The adviser 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.

ORDERS

- [53] The complaint is dismissed.
- [54] The names of the complainant and the adviser are not to be published.

DATED at WELLINGTON this 22nd day of October 2013

G D Pearson
Chairperson