

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

Decision No: [2013] NZIACDT 70

Reference No: IACDT 020/13

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

ZQI

Complainant

AND

DI

Adviser

THE COMPLAINANT'S AND THE ADVISER'S NAMES ARE NOT TO BE PUBLISHED

DECISION

REPRESENTATION:

Registrar: Ms K England, Counsel, Ministry of Business, Innovation and Employment, Auckland.

Complainant: In person.

Adviser: In person.

Date Issued: 24 October 2013

DECISION

Background

- [1] The Registrar filed this complaint with the Tribunal. He provided a limited explanation as to the grounds for the exercise of his statutory powers and a set of documents. The documents appeared to comprise a copy of his file.
- [2] The Tribunal later directed the Registrar to file a Statement of Complaint, so the Tribunal and the parties could engage with the facts, and the allegations against the adviser. The grounds of complaint were very serious, alleging dishonesty.
- [3] The Registrar set out the material facts in the Statement of Complaint. Those facts could not support an adverse finding against the adviser on any of the statutory grounds on which the Registrar referred the complaint.
- [4] At this point, the complainant sought to withdraw his complaint, and the adviser said the Tribunal should dismiss the complaint.
- [5] Then the Tribunal directed the Registrar to explain the grounds for referring the complaint to the Tribunal, given the absence of material facts that explained the referral.
- [6] The Registrar provided submissions that indicated he exercised his statutory powers relying solely on what the complainant alleged. That was as to both the material facts, and the allegations of dishonesty, notwithstanding the absence of factual material pointing to any dishonesty. The Registrar submitted it was not necessary or appropriate for him to have looked into the substance of the complaint.
- [7] This decision finds the Registrar is required to evaluate and investigate complaints before referring them to the Tribunal. The Registrar has a statutory decision-making power. He does not operate at the direction of a complainant by simply presenting their allegations to the Tribunal, whether or not after investigation the complaint discloses adequate grounds.
- [8] The Tribunal has dismissed the complaint, as the Registrar has at no point provided facts or evidence that supports the grounds on which he submitted the complaint to the Tribunal, and both the complainant and the adviser agree the complaint should be dismissed.

The facts the Registrar referred to the Tribunal for determination

The Registrar's basis for referring the complaint

- [9] On 7 May 2013, the Registrar, under section 48 of the Immigration Advisers Licensing Act 2007 (the Act), filed this complaint. He did so by lodging what could be described as a "raw file". This material appeared to be all the documents provided by the complainant and the adviser and a covering letter from the Registrar. There was no analysis that identified the material facts and related them to the statutory grounds for complaint under section 44(2) of the Act.
- [10] Accordingly, on 21 May 2013, the Tribunal issued a Direction which required the Registrar to provide particulars of the statutory process he followed under sections 45, 47 and 48 of the Act.
- [11] The information required by the Tribunal was to be presented as a Statement of Complaint that included:
 - [11.1] A record of the material facts the Registrar identified as establishing the grounds for complaint;
 - [11.2] The infringements the Registrar identified as grounds for referral of the complaint; and
 - [11.3] The issues the Registrar considered the Tribunal needed to determine.

- [12] The Registrar filed a Statement of Complaint dated 13 June 2013.
- [13] The Registrar identified that the material facts on which he exercised his statutory duty to refer the complaint were as follows:
- “1. On 22 February 2012 the complainant met and signed an agreement with the adviser for assistance with a “residence application under [the] entrepreneur category.” The written agreement is in Chinese.
 2. This agreement appears to quote a total fee of \$5000, however the complainant has not provided information regarding how much, if any, of this fee he had paid to the adviser.
 3. On 6 March 2012 the adviser submitted a change of business plan application (COP) for the Long Term Business Visa (LTBV) which the complainant currently held.
 4. The complainant’s original business plan dealt mainly with the exporting of healthcare products from New Zealand. The COP proposed to change this to an import/export business.
 5. On 26 March 2012 the COP was withdrawn by the adviser.
 6. On 28 March 2012 the adviser emailed the complainant to confirm that Immigration New Zealand had “cleared” that he must invest NZ\$260,000, employ three full time employees and could do “shipping, importing/exporting as we said in our plan”.
 7. On 7 June 2012 the adviser lodged an application for the balance of the complainant’s LTBV.
 8. On 31 July 2012 Immigration New Zealand wrote to the adviser, expressing concerns that the original business plan was not being followed.
 9. On 16 August 2012 the adviser was notified that the application had been declined.
 10. In August 2012 the complainant met with the adviser to discuss applying for reconsideration. An application for reconsideration of the decline was submitted on 22 August 2012.
 11. In October 2012 the adviser told the complainant that Immigration New Zealand had refused to reconsider the LTBV.
 12. On 17 October 2012 the complainant contacted Immigration New Zealand and discovered that the COP had been withdrawn by the adviser in March 2012.”
- [14] The material facts contained references to documents created by the various events.
- [15] Those material facts disclose no basis for an adverse finding against the adviser. They are a simple narrative of a professional engagement; there are no material facts that could found a determination of dishonesty, misleading behaviour, failure to maintain standards of care and competence, or breaches of the Code as required by section 44(2).
- [16] However, the Registrar went on to state he had referred the complaint due to:
- [16.1] dishonest or misleading behaviour, and
 - [16.2] a breach of the Code.

[17] He also identified issues he considered the Tribunal had to determine. In relation to the first ground the Registrar said:

“Issue 1: Whether the adviser’s behaviour was dishonest or misleading. This may require the Tribunal to assess:

- a) Whether the adviser provided the correct information to the complainant about his conversation with the Immigration officer of 21 March 2012; and
- b) Whether the adviser sought instructions from the complainant before the COP was withdrawn; and
- c) Whether the adviser informed the complainant that the COP had been withdrawn.”

[18] Other issues concerning breaches of the Code were identified. However, it is sufficient to refer to the first issue to identify the difficulty with the material before the Tribunal.

[19] The material facts the Registrar has identified in the Statement of Complaint, after exercising his statutory duties and powers in sections 45 and 48 of the Act, disclose no material facts that provide any apparent basis for adverse findings in relation to the “Issue 1” grounds. For instance:

[19.1] The material facts provided by the Registrar neither make reference to a conversation of 21 March 2012, nor say what the “correct information” was.

[19.2] They make no reference to the circumstances of the withdrawal of the COP, only saying that it was withdrawn by the adviser. That fact contains no implication of dishonest or misleading behaviour.

[19.3] There is an implication the adviser failed to inform his client. However, that does not automatically identify or imply dishonest or misleading behaviour. For example, a person may not be informed simply because of innocent communication failures.

[20] The Registrar did not identify any material facts, it appears, that support the dishonesty, misleading behaviour, and breaches of the Code he identified as the grounds for referral of the complaint.

[21] The material facts do not support the other issues the Registrar identified either.

[22] The grounds on which the Registrar has referred this complaint are serious. A finding of dishonest conduct against a practitioner is a grave matter, and the integrity of the licensing regime demands that such allegations are addressed. An adviser is also entitled to have such allegations resolved, and if they are not upheld, that should be a clear outcome of the complaint process.

The complainant wishes to withdraw the complaint

[23] After the Registrar filed the Statement of Complaint, the complainant indicated he wished to withdraw the complaint.

[24] However, that is not the end of the matter. A complaint which has been lodged with the Tribunal under the Registrar’s statutory powers is not solely an *inter partes* matter. The complaint is lodged under a statutory process intended to have regard to public interest issues, it is not simply a dispute resolution function confined to matters in contention between the complainant and adviser.

[25] The Tribunal will always be concerned to understand why a complainant has changed their position. In this case, the complainant says he was mistaken.

[26] The grounds the complainant has given for intending to withdraw the complaint, do not coincide with the grounds on which the Registrar has referred the complaint. Rather than

dishonest or misleading behaviour, he says that he has now recalled that the adviser on 25 March 2012 discussed withdrawal of the Change of Business Plan Application, and that was the extent of his concern.

- [27] Regardless, even if there was a failure to communicate about the withdrawal of the Change of Business Plan Application, that in itself does not establish dishonest or misleading behaviour.

The Tribunal issues a Second Direction to the Registrar

- [28] As matters stood at this point in the proceeding:

[28.1] The Registrar had not identified material facts that would found any adverse finding against the adviser.

[28.2] The complainant said he has no grounds for complaint.

[28.3] The adviser expected the complaint to be dismissed.

- [29] Given the public interest concerns arising from the Registrar's referral of a complaint of dishonesty, the Tribunal expected the Registrar to explain why he had exercised his statutory power to refer the complaint to the Tribunal. Accordingly, on 19 June 2013, the Tribunal issued a Direction that the Registrar should provide submissions that:

[29.1] Identify the basis on which he concluded, when exercising his statutory power, that the material facts he notified as founding the complaint provided grounds for finding:

[29.1.1] The adviser engaged in dishonest or misleading behaviour; and

[29.1.2] That the adviser breached the Code.

[29.2] Provide any response he wishes to make to the complainant seeking to withdraw the complaint.

- [30] The other parties were given the opportunity of replying.

The Registrar's submissions on his process

Preliminary

- [31] The Registrar, through his counsel, provided submissions on 13 September 2013 the other parties did not reply.

[32] The Registrar provided submissions that indicated he exercised his statutory powers when filing the complaint, relying solely on what the complainant alleged. That was as to both the material facts and the allegations of dishonesty, notwithstanding the absence of factual material pointing to any dishonesty. The Registrar submitted it was not necessary or appropriate for him to look into the substance of the complaint.

[33] The submission contends the Registrar is entitled or required to take this approach, and operate effectively at the direction of the complainant. The submission contends it is the function of this Tribunal rather than the Registrar to investigate facts.

[34] These are issues of considerable significance both in relation to this complaint, and more generally.

[35] The Tribunal has established procedural processes; they depend on the Registrar performing a significant statutory role in the investigation and presentation of complaints.

[36] The submissions presented by the Registrar challenge the Tribunal's processes, particularly its reliance on what it considers the Registrar's statutory functions to be.

- [37] It is necessary to consider the Registrar's submissions with care. The way the Registrar has processed this complaint appears to affect how it, and likely others, will be determined.
- [38] The Registrar's submissions address how he complied with the Tribunal's directions in this case. How he responded to the Tribunal's directions has a direct bearing on determining the outcome of this complaint. It is necessary to review the Registrar's submissions in that context.

Complaints must be referred regardless of substance

- [39] The first point made by the Registrar in his submissions is that he is required to refer complaints to the Tribunal; it is he says a "default" position.
- [40] The Registrar acknowledges section 45(1) of the Immigration Advisers Licensing Act 2007 imposes a statutory duty in the following terms:

"45 Procedure on receipt of complaint by Registrar

- (1) On receiving a complaint concerning a licensed immigration adviser or former licensed immigration adviser, the Registrar may –
- (a) determine that the complaint does not meet the criteria set out in section 44(3), and reject it accordingly;
 - (b) determine that the complaint does not disclose any of the grounds of complaint listed in section 44(2), and reject it accordingly;
 - (c) determine that the complaint discloses only a trivial or inconsequential matter, and for this reason need not be pursued;
 - (d) 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.
- (2) If the Registrar determines that the complaint should not be dealt with under subsection (1), the Registrar must refer the complaint to the Tribunal for determination."

- [41] The submission contends the Registrar:
- [41.1] May deal with the complaint in one of the ways identified in section 45(1) "but is not required to".
 - [41.2] He "does not determine whether a complaint merits referral", if not rejected it must be referred.
 - [41.3] He refers complaints legitimately "without needing to positively determine that grounds have been established".
 - [41.4] The determination in section 45(1) is "based solely on the information alleged in the complaint."
 - [41.5] Only after deciding to refer a complaint "does the Authority have the ability to gather information and exercise the power of inspection" pursuant to section 47 of the Act.
 - [41.6] Section 48 of the Act "does not provide the Registrar with the ability to review all the material to determine whether to file the complaint with the Tribunal."
- [42] Accordingly, the Registrar's position is that he must exercise his statutory power to reject or refer a complaint relying solely on allegations made by a complainant, without making any evaluation or investigation of the facts himself.
- [43] He accepts he has power to gather information himself after deciding to refer the complaint. However, the submissions go on to suggest that the Registrar "must remain neutral in complaints". He explains his view of neutrality, and says he should go no further than "provide a neutral reflection of the complainant's concerns and the adviser's response".

- [44] The Registrar goes on to say the Tribunal “is not restricted by the Authority’s presentation of a complaint and should review all material in order to independently determine the complaint”.

Discussion

- [45] The Tribunal required the Registrar to set out the material facts supporting this complaint. In essence, the Registrar submits it is not his function to do so. Instead, he only collates the complainant’s and adviser’s material, and the Tribunal should make its own inquiries into the facts.

The Tribunal is an adjudicative body not an investigative body

- [46] The Registrar’s position is not correct. Shorn of the detailed statutory analysis, the Registrar’s position is that he should not inquire into the facts and substance disclosed by a complaint. He may do no more than file the complaint he received with the Tribunal, and the Tribunal should inquire into the facts. This, he says, is a “neutral” role. More accurately, the role he describes is a clerical role, where he simply relays material from the complainant and the adviser.
- [47] I will return to the details of the statutory scheme; however the Registrar’s position is not consistent with the elementary statutory functions of his office, and this Tribunal.
- [48] This Tribunal is not an investigative body. Its functions are adjudicative. Section 41 of the Act provides:

“41 Functions of Tribunal

- (1) The functions of the Tribunal are—
- (a) to make decisions on matters about immigration advisers that are referred to the Tribunal by the Registrar under section 48:
 - (b) to make decisions as to whether an immigration adviser’s licence should be suspended under section 53 pending a final decision in regard to a matter involving a licensee:
 - (c) to hear appeals against—
 - (i) a decision of the Registrar to cancel the licence of an immigration adviser under section 27; or
 - (ii) a determination by the Registrar to reject a complaint under section 45(1)(b) or (c) as not disclosing a ground of complaint, or as being trivial or inconsequential.”

- [49] The Tribunal’s reliance on parties presenting facts is emphasised by a requirement to hear matters “on the papers”, with a discretionary power to request information or appearances (section 49). There is a power to issue witness summonses (clause 6 of the Schedule to the Act). None of this takes the Tribunal out of a decision-making role into an investigative one; its powers are typical of those conferred on an adjudicative body in New Zealand.
- [50] The legislation constitutes the Tribunal as a statutory tribunal administered by the Ministry of Justice. It is required to exercise its jurisdiction judicially, and issue written decisions. The Tribunal has no investigative mandate.

The Registrar has a statutory power and obligation to investigate complaints

- [51] The Registrar is in a different position. He has a statutory duty to maintain standards of competency and conduct for immigration advisers. Section 35(1) identifies this as a function of the Authority, and the Registrar is responsible to the Chief Executive for carrying out the functions of the Authority (section 35(2)).
- [52] The powers and duties conferred on the Authority are consistent with that function.

- [53] The Registrar contends in relation to complaints that he “must remain neutral”, and he should only “provide a neutral reflection of the complainant’s concerns and the adviser’s response”.
- [54] The Registrar should not act for or act on the instructions of complainants or advisers. As an independent statutory officer, he must be neutral in the sense of not acting on the instructions of others. However, that does not imply he is neutral in the sense he is constrained if he has reason to inquire into whether a licensed immigration adviser is not maintaining professional standards. His duty is to enforce standards and use his statutory powers to achieve that end. That includes initiating and submitting complaints on his own motion.
- [55] When the Registrar refers a complaint to the Tribunal, he is required to put the material evidence before the Tribunal. He should not do so in a selective or partisan way. He is a statutory officer whose duty lies in putting all **material** evidence before the Tribunal for determination, so the Tribunal can carry out its decision-making function.
- [56] One of the ways the Registrar maintains standards of competency is by investigating complaints before referring them to this Tribunal, and ensuring the Tribunal has the facts it requires to make decisions. The Act sets out the various powers and duties the Registrar has for this purpose.
- [57] The Registrar is not required to wait passively for a complainant to make a complaint. Section 46 of the Act provides that the Registrar may, of his own motion, make a complaint, and prepare it for referral to the Tribunal. The Registrar is a statutory officer whose obligation is to enforce the Act. In *ZW v Immigration Advisers Authority* [2012] NZHC 1069 at [41] the High Court observed:

“In passing the Act, Parliament has clearly intended to provide a system of competency, standards, and a Code of Conduct to clean up an industry which hitherto had been subject to much justified criticism. The Registrar and Tribunal have a Parliamentary mandate to enforce standards.”

- [58] The Registrar has the power to enter premises, question certain people, and require the production of documents. For convenience, I have referred to those powers as investigative powers in this decision. 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 56(1) states:

“56 Purposes of inspection

The powers in section 57 may be used for 1 or more of the following purposes:

- (a) administering the licensing regime:
- (b) obtaining information in relation to complaints in respect of persons who are or have formerly been licensed to provide immigration advice:
- (c) obtaining information in respect of persons who have applied to be licensed:
- (d) investigating offences under this Act.”

- [59] Administering the licensing regime will include making investigations into potential breaches of professional obligations, whether they are matters raised by the Registrar or another person, and whether or not that person makes a formal complaint. The powers are specifically made available in relation to complaints, whether of the Registrar’s own motion or otherwise.
- [60] The Registrar has statutory powers that authorise him to ascertain facts when he has received a complaint, or is dealing with a complaint of his own motion. One of the important issues is interim suspension while a complaint is being processed.
- [61] Section 53 provides that the Registrar, while preparing a complaint on his own motion under section 46(2), or that of another party under section 45(3), may refer the complaint to the Tribunal to suspend the licence of the Adviser pending the outcome of the complaint.

- [62] Determining whether to initiate interim suspension does not contemplate that the Registrar “provide a neutral reflection of the complainant’s concerns and the adviser’s response”. It requires a meaningful evaluation of the substance of the complaint, and its implications for protection of the public, then a determination as to whether the Registrar should initiate a process that will potentially lead to a person being suspended from their profession.

The Registrar is required to evaluate complaints and determine they disclose statutory grounds before referral to this Tribunal

- [63] The Registrar has focused on the structure of section 45(1) and (2) as a justification for not engaging with the facts, and saying he is under an obligation to refer complaints simply based on the allegations contained in a complaint, without looking into the substance.
- [64] That would be a surprising conclusion given the Registrar’s duty to maintain standards of competency and conduct, his obligations relating to interim suspension and the investigative powers he holds.
- [65] When the Registrar receives a complaint, he is required to address it under section 45. There are two alternatives, there is a determination under section 45(1); and if not, he will refer the complaint to the Tribunal under section 45(2).
- [66] For present purposes paragraphs (a), (c) and (d) of section 45(1) can be put to one side. They respectively provide for complaints not made in the correct form (for example, not in writing), ones that are trivial, or those that the adviser and complainant should address.
- [67] That leaves paragraph (b) which the Registrar considers requires only a review of the allegations, without looking into the facts and evidence supporting the complaint. It provides the Registrar may:
- “(b) determine that the complaint does not disclose any of the grounds of complaint listed in section 44(2), and reject it accordingly”
- [68] The Registrar says this decision must be made “solely on the information **alleged** in the complaint” (emphasis added).
- [69] The Registrar’s submission places him in the position where he puts himself at the direction of any complainant who chooses to make unfounded allegations. That cannot be the effect of section 45(1)(b), as he would not be making a determination. He would be uncritically accepting allegations for filing with the Tribunal.
- [70] The Registrar’s statutory function under paragraph (b) is to “determine”. 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)”. It is not consistent with the Registrar’s submissions that:
- [70.1] He may deal with the complaint in one of the ways identified in section 45(1) “but is not required to”.
- [70.2] He “does not determine whether a complaint merits referral”.
- [70.3] He refers complaints legitimately “without needing to positively determine that grounds have been established”.
- [71] The Registrar has an important statutory function.
- [72] His claim he should rely “solely on the information **alleged**”, is not consistent with the wording of section 45(1)(b) that he is required to determine what is **disclosed**. That is different from accepting what is **alleged**. Disclosure contemplates more than empty allegations.
- [73] The Registrar’s submission is not consistent with him having investigative powers, where he can gather information, from the relevant parties, and truly determine what is disclosed from the complaint.

[74] However, he says he is restricted to what the complainant has provided, saying he cannot investigate complaints until after making the determination under section 45(1). The submission said:

“Only once a referral determination has been made, does the Authority have the ability to gather further information and exercise the power of inspection (section 47).”

[75] However, that is wrong. It cannot be reconciled with section 56 (refer to paragraph [58] above).

[76] Section 47 expressly confers the power to investigate while preparing a complaint. It is likely it does so to avoid doubt and preclude an argument investigative powers cease after the Registrar determines he will refer a complaint, rather than deal with it under section 45(1). Section 47(1) is a permissive provision, not one restricting section 56.

[77] Whether the Registrar should mechanically process a complaint, uncritically accepting allegations made by a complainant, or whether he should investigate and make a determination as to the substance of what the complaint discloses is not simply theoretical.

[78] If the Registrar had to rely solely on what was **disclosed** in the information provided by complainants, many complaints would be dismissed under section 45(1)(b), as some (often the most vulnerable) complainants lack the skills to assemble the evidential material.

[79] Referring a complaint relying on unfounded allegations is not fair to advisers either. The complaint has significant implications for the adviser, particularly when the unsupported allegation is serious.

[80] It has been the experience of this Tribunal that at least one licensed immigration adviser has been in a position where his professional registration could not be renewed in another country because a complaint of dishonesty had been referred to the Tribunal with no factual support at all.

[81] It is also costly and distressing for advisers to have to respond to such complaints. Furthermore, advancing complaints without evidence may well divert complainants from providing the probative evidence they do not appreciate is necessary to support their complaint.

[82] The Registrar is required to investigate and evaluate the complaints he receives (as he sees fit in his discretion), and make the statutory determination under section 45 as to how he should deal with it. The determination is required to be based on his evaluation of the facts, measured against the standards of competency and conduct he is required to enforce, and the statutory grounds for complaint.

[83] If the Registrar determines there are not sufficient facts to establish an adequate case, then he may well determine that the complaint does not disclose grounds listed in section 44(2) and reject it accordingly pursuant to section 45(1)(b).

The Registrar's obligations on referring a complaint to this Tribunal

[84] This Tribunal can only make decisions that will achieve the purposes of the Act if it has the material facts before it, or the evidence from which contested facts can be determined.

[85] Complainants are not always aware of what the standards of professional conduct are. Frequently English is a second language for complainants. A purpose of the legislation is to protect vulnerable consumers. It does that, in part, through the complaints procedure. It is a significant impediment to the complaints procedure if the Registrar does not investigate and gather evidence.

- [86] If this Tribunal is to decide complaints only on what complainants provide, after considering the response of the adviser, it is inevitable decisions will be made without the full facts. It is unsatisfactory for two reasons.
- [86.1] First it is not fair to advisers to expect them to respond to allegations of serious professional misconduct if there is no foundation.
- [86.2] Second, meritorious and potentially serious complaints will be dismissed for want of evidence to support them.
- [87] The Act contains a regime that allows the proper investigation of facts by the Registrar, and a hearing before this Tribunal on the papers, or orally where that is appropriate.
- [88] The regime is not unprecedented; disciplinary tribunals are well established, and they share much common jurisprudence. This Tribunal is required to regulate its procedures as it thinks fit, and has done so in accordance with that jurisprudence. The model of an investigative body receiving complaints, evaluating them and referring them to a judicial tribunal for determination is an ordinary model.
- [89] The Tribunal has instituted a standard practice for the filing of complaints, set out in the Practice Note. Essentially the process mandated in the Practice Note was directed to be observed in this case.
- [90] The Practice Note requires the Registrar to identify:
- [90.1] The material facts the Registrar determined were grounds for referring the complaint;
- [90.2] The statutory grounds for complaint which the Registrar has determined arise from the material facts;
- [90.3] The complainant's arguments in support of the complaint;
- [90.4] The adviser's response;
- [90.5] Any further evidence the Registrar has gathered; and
- [90.6] The issues to be determined.
- [91] The parties then respond, and are required to identify whether they accept the Registrar's presentation of that material, and can comment on their position and that of the other party.
- [92] The most fundamental difficulty is the Registrar has not identified material facts that provide a basis for the referral. He has submitted he set out "the material facts alleged by the complainant". It is not evident the complainant has the understanding to provide information that can be used as a foundation for dealing with the complaint. There is no reason he should; he is a consumer the Act is intended to protect.
- [93] The Registrar has not investigated the complaint, or even, it appears, evaluated it. He has nonetheless lodged it as a complaint of dishonesty, which if it had substance would raise questions as to whether the adviser should continue to hold a licence.
- [94] The complainant for reasons that are not fully explained does not wish to pursue his complaint, and has provided an explanation that conflicts with the grounds of complaint.
- [95] The adviser and the complainant have both accepted the Registrar's formulation of the material facts. The Registrar in his submission suggests that now the Tribunal "should review all material in order to independently determine the complaint".
- [96] The Tribunal is required to give parties the opportunity to be heard. The Statement of Complaint is the document the parties have responded to.

- [97] If the Tribunal were to review the material as the Registrar suggests, that would in effect involve preparing a replacement statement of complaint, and then require further statements of reply. That is neither appropriate, nor consistent with the statutory scheme.
- [98] The Tribunal does not have the investigative powers required to prepare properly a statement of complaint.

The complaint will be dismissed

- [99] This decision has set out the statutory scheme, which includes the Registrar's duties to maintain competency and conduct standards, his powers of investigation, and the public interest in a complaint that extends beyond *inter partes* considerations.
- [100] It is evident the complaint before the Tribunal has not been subject to the proper statutory process. As matters stand, the complaint is a very serious complaint of dishonesty, but wholly unsupported by facts.
- [101] It is evident this situation may have arisen as the Registrar has mistaken his statutory obligations; it maybe that the complaint should not have been referred, or there may be facts the Tribunal is not aware of that justify the complaint.
- [102] Nonetheless, the Registrar was expressly put on notice of these concerns, and he has provided no material facts to support the grounds on which he submitted the complaint.
- [103] The adviser seeks a determination that the complaint should be dismissed, and the complainant supports that application. The adviser is entitled to have his application granted, and the Tribunal will do so.

Disposition

- [104] The complaint is dismissed.
- [105] The names and other information that identifies the complainant or the adviser are not to be published.

DATED at WELLINGTON this 24th day of October 2013

G D Pearson
Chairperson