

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

Decision No: [2013] NZIACDT 8

Reference No: IACDT 037/11

**IN THE MATTER**

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

**BY**

**Immigration Advisers Authority**

Authority

**Between**

**MC**

Complainant

**AND**

**BL**

Adviser

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**DECISION**

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**REPRESENTATION:**

**Complainant:** In person.

**Adviser:** In person.

Date Issued: 28 February 2013

## DECISION

### Introduction

- [1] Mr MC engaged Ms BL to assist him to apply for a work permit. He claims Ms BL failed in her responsibilities in a number of respects.
- [2] He says Ms BL:
  - [2.1] Delayed lodging his application, then said it had been lodged, when that was not true.
  - [2.2] Lodged an application that could not succeed as it relied on an offer of employment that was not satisfactory.
  - [2.3] Gave him incorrect advice when he ultimately withdrew his application.
  - [2.4] Wrongly indicated to him he could not lodge a complaint with the Authority.
  - [2.5] Failed to return documents.
- [3] After Mr MC and Ms BL produced their explanations and the relevant documentation, I have been satisfied the facts do not support Mr MC's complaint. There are two exceptions:
  - [3.1] The application for a work permit was not supported by a proper offer of employment, and the documentation did reveal that.
  - [3.2] There was a statement that could have caused Mr MC to believe he could not lodge this complaint.
- [4] I have been satisfied the two errors do not reach the threshold for an adverse disciplinary finding.
- [5] Mr MC presented his offer of employment as regular. The circumstances became somewhat rushed, and Ms BL has frankly acknowledged she should have been more thorough and accordingly fully refunded fees to Mr MC. The lapse does not reach the threshold for an adverse disciplinary finding.
- [6] The indication Mr MC could not lodge a complaint was in the context of a settlement. The issue was no more than unfortunate wording in the context of a genuine endeavour to reach a satisfactory resolution of a dispute. In the particular circumstances, this failing was also below the threshold for an adverse disciplinary finding.
- [7] The complaint has been dismissed.

### The Complaint

#### *Background*

- [8] Mr MC's complaint is supported by various documents; it presented the following allegations and factual propositions.
- [9] Ms BL is a licensed immigration adviser. Mr MC was in New Zealand, and held a visitor's visa which was to expire on 24 March 2011. He engaged Ms BL to assist with an application for a work visa, under the Essential Skills category. The terms were contained in an agreement dated 3 February 2011.
- [10] Mr MC paid Ms BL a total of \$3,680 in two instalments; the first when he signed the agreement, and the second on 24 March 2011. Mr MC had supplied all his supporting documentation to Ms BL by 3 March 2011.

- [11] On 20 March 2011 (or thereabouts), Mr MC became concerned as his visa was to expire soon. He consulted with Ms BL who told him she had lodged an application for a work permit on 15 March 2011. That was not correct, as the application was in fact lodged on 23 March 2011.
- [12] On 29 March 2011 Ms BL received a letter from Immigration New Zealand stating that Mr MC had been issued with an interim visa, valid from the expiry of his visitor's visa. The interim visa gave Mr MC only the entitlements of a visitor's visa.
- [13] On 27 April 2011 Immigration New Zealand, by email, queried whether Mr MC's offer of employment was for a full-time position.
- [14] The same day Mr MC sent an email to Ms BL and Immigration New Zealand and said he had always been clear that the position was one where he was not employed for fixed hours, rather paid for work produced. This, Mr MC said, was conventional in his industry.
- [15] On 28 April Immigration New Zealand replied to Ms BL and Mr MC by email. This email explained:
- [15.1] The application had originally been lodged on 17 November 2010 (apparently prior to Ms BL's involvement), but rejected as the application failed lodgement.
- [15.2] A second application was lodged on 23 March 2011.
- [15.3] As the second application was being processed, it became apparent Mr MC's application was not supported by an offer of full-time employment, and at least in the form it was lodged, this was required. The reasons were explained.
- [16] Mr MC had told Ms BL from the outset his offer of employment was not equivalent to full time work, and he was to be paid on a commission basis.
- [17] Ms BL advised Mr MC he was entitled to rely on his interim visa which was valid until 24 September 2011, and he could withdraw his application. The application could be re-lodged later when he had a complying offer of employment, and he would not need to repeat the preliminary processes. In reliance on that advice Mr MC, in an email of 3 June 2011, withdrew the second application.
- [18] Mr MC has since ascertained that contrary to Ms BL's advice, when he withdrew his application, his visa ceased to be valid, and he was in New Zealand unlawfully.
- [19] Mr MC was concerned that Immigration New Zealand would take the view he had not acted responsibly; whereas in fact he had provided accurate information, relied on Ms BL's advice, and instructed her in good time to ensure that his immigration affairs were in order.
- [20] On 6 May 2011 Ms BL agreed Mr MC should be refunded the \$3,450 in fees he had paid to her. This letter contained the term:
- "You will not at any time make any complaint to any third party (including but not limited to the Immigration Advisers Authority)".
- [21] Mr MC then sought to put his immigration affairs in order, and consulted a lawyer. He expended \$2,070 in legal expenses. Mr MC requested his documents from Ms BL to brief his lawyer. Ms BL was slow to return the documents; however, they were all returned by 9 August 2011.
- [22] Mr MC seeks to have his legal expenses refunded.

### **The Response**

- [23] Ms BL engaged in a series of correspondence with the Authority regarding a response to the complaint. The correspondence concluded with Ms BL undertaking to provide submissions in

response to the complaint by 7 November 2011. The Authority indicated Ms BL could expect the complaint to be filed with the Tribunal on 8 November 2011.

- [24] Ms BL did not provide any submissions within time. It is now apparent she provided submissions late and the case had by then been referred to the Tribunal. The Authority informed Ms BL she should send her submission direct to the Tribunal. She did not do so at that time.

### **The Tribunal's Minute**

- [25] On 4 November 2012 the Tribunal issued a Minute. The Minute explained it followed a review of the material then before the Tribunal, and identified apparent issues, potential factual findings, and emphasised that the parties would have the opportunity to respond, and the Tribunal had reached no conclusions at that point.
- [26] The key elements of the complaint, and the response identified in the Minute were as outlined above.
- [27] The Tribunal is an expert inquisitorial body, which receives complaints, and determines whether the proof before it is adequate to uphold the complaint, and if so, in what respects.
- [28] The Authority and the complainant do not lay charges and prove them.
- [29] Accordingly, the Minute identifies issues and potential conclusions on the material presented to give the parties the opportunity to consider their positions, and provide submissions and further proof if they wish.

### *The issues identified in the Tribunal's Minute*

- [30] Clause 1 of the Licensed Immigration Advisers Code of Conduct requires:
- [30.1] A licensed immigration adviser to act with professionalism.
- [30.2] They must carry out the lawful informed instructions of clients.
- [30.3] Passports and personal documents are to be returned to clients on request, and without delay.
- [30.4] That a licensed immigration adviser must discharge professional engagements with due care, diligence and respect. That requires them to ensure their professional service delivery meets proper standards.
- [31] Clause 2.1(f) requires licensed immigration advisers to uphold the integrity of New Zealand's immigration system and the Immigration Advisers Authority.
- [32] Section 44 of the Act provides breaches of the Code, negligence, incompetence, and misleading behaviour are all grounds for complaint.
- [33] The issue the Minute identified was for the Tribunal to determine is whether it is satisfied Ms BL breached any of these professional standards. The parties have not taken issue with this identification of the issues arising.

### *Potential conclusions identified in the Minute*

- [34] The Tribunal's Minute went on to identify potential findings on the basis of material then before the Tribunal, and indicated quite different conclusions may follow if further information was presented, or submissions made as to the effect of the material presently held. The potential conclusions identified were as follows.

### *Delay and misrepresentation in relation to lodging application*

- [35] It appeared Mr MC approached Ms BL, engaged her services, and had supplied all the material she required by 7 March 2011. Ms BL was on notice that the matter was urgent, and failed to lodge the application until immediately prior to Mr MC's visa expiring on 24 March 2011.
- [36] Mr MC alleges Ms BL misrepresented to him that the application had been lodged on 15 March 2011, when that was not true and known to Ms BL not to be true.
- [37] The view was potentially open that the delay fell short of the standards expected, but was not necessarily of sufficient gravity to justify an adverse disciplinary finding.
- [38] However, the allegation of misleading a client is inherently a serious allegation. It had not been answered and, on the information presently before the Tribunal, would potentially be upheld.

*Lodging application without appropriate offer of employment*

- [39] It is evident that the application was deficient, as Immigration New Zealand found the offer of employment did not meet the relevant requirements.
- [40] The view appeared to be open that the application was lodged without due care, as on the material presently before the Tribunal Mr MC provided Ms BL with the appropriate information, and it was Ms BL's responsibility to check the application.

*Incorrect advice as to effect of withdrawing application*

- [41] Ms BL's advice that an interim visa would remain valid after withdrawal of the application to which it related appeared to be wrong, with the consequence that Mr MC would be in New Zealand unlawfully.
- [42] Accordingly, the view appeared open that Ms BL failed to provide this advice with due care and attention.

*Attempting to preclude complaint being made to the Authority*

- [43] Ms BL appeared to have written a letter which was intended to cause Mr MC to believe he was not entitled to lodge a complaint with the Authority.
- [44] The Code and the Act are intended to ensure that consumers of immigration services are aware of, and have access to the Authority to deal with complaints.
- [45] The view was potentially open that Ms BL's actions were not professional, and intended to undermine the protections the Code afforded to Mr MC.

*Failure to return documents in a timely manner*

- [46] On the information then held, the view was potentially open that Ms BL failed to return documents and provide her file promptly to Mr MC so his new adviser could deal with the difficulties he faced.

**Response to the Minute**

- [47] After the Minute was issued, Ms BL's submissions that she sent to the Authority after the complaint was filed in the Tribunal were sent to the Tribunal.

*Ms BL's submission*

- [48] Ms BL said in her submission that her engagement commenced on 3 February 2011. The same day she sent Mr MC a checklist so he could compile the necessary documents.

- [49] She was told at the outset by Mr MC he had a fulltime job offer as a graphic/web designer. This was supported by:
- [49.1] A file note of the discussion.
- [49.2] What appears to be a job offer for such a position of employment.
- [50] Ms BL submitted a work visa application to Immigration New Zealand believing that Mr MC had an offer of fulltime employment as a graphic/web designer. After the application was submitted, Immigration New Zealand identified that in fact the offer was for piece work, not fulltime employment.
- [51] At that point Ms BL examined the employment agreement more closely, and realised that Immigration New Zealand was correct. Ms BL accepted responsibility for not having identified the issue earlier, and fully refunded the fees paid. On 6 May 2011 Mr MC signed an agreement accepting this as full settlement.
- [52] From 6 May 2011 Mr MC dealt direct with Immigration New Zealand, and understood that Ms BL was no longer representing him.
- [53] Immigration New Zealand wrote to Ms BL regarding Mr MC withdrawing his application. Ms BL:
- [53.1] Took instructions from Mr MC and gave him accurate advice,
- [53.2] Wrote to Immigration New Zealand saying the application should be withdrawn, and
- [53.3] Returned Mr MC's passport after Immigration New Zealand returned it; it was the only document returned by Immigration New Zealand.
- [54] Immigration New Zealand retained some documents, as is usual practice on the withdrawal of an application, as then a further application can be lodged without replacing supporting documents. Ms BL explained the process, and the necessity for a new application.
- [55] Mr MC asked for material from Ms BL's file, and that was supplied promptly.
- [56] Ms BL ensured that Mr MC was aware of his obligations in relation to keeping within the terms of his visa.

*Further submission from Ms BL*

- [57] In a letter dated 11 November 2011 addressed to the Authority and in further submissions dated 12 December 2012, Ms BL elaborated on some of the issues:
- [57.1] Ms BL was in regular email contact with Mr MC, and he fully understood he had to pay the full fee before his application would be lodged. He made that payment on 3 March 2011.
- [57.2] The employment documentation was completed on 7 March 2011.
- [57.3] There was a delay in Mr MC locating his passport. Ms BL was most concerned and had followed the issue up. Eventually she lodged the application with a promise to send the passport in the following day.
- [57.4] Ms BL moved as quickly with Mr MC's application as possible, given the need to get material from him.
- [57.5] Mr MC was accurately informed of the date the application was submitted, and never told it was submitted on 15 March 2011. Rather, Ms BL was emphasising to Mr MC he needed to get his passport so it could be lodged (on 17 March 2011).

[57.6] Ms BL did take steps to ensure that the job offer was in order. She asked questions in a questionnaire, she made a note of Mr MC's oral assurance, and an "Employer Supplementary Form" indicated appropriate employment. Ms BL in fact questioned Mr MC closely regarding the issue.

[57.7] Ms BL has accepted responsibility for not reading the terms of the employment agreement itself, where the difficulties arose.

[58] Ms BL reiterated and elaborated on the other points raised in her first submission.

[59] In relation to the settlement agreement excluding a complaint, Ms BL said she did not intend to deprive Mr MC of his right to complain. She had understood the term in the context of the Authority expecting advisers to resolve complaints; and she believed that she had done that in a manner that satisfied Mr MC.

#### *Mr MC's response*

[60] In an email of 13 December 2012 Mr MC sent various documents, and said that it was always clear the his job offer involved piece work.

[61] In an email of 17 December 2012 Mr MC provided a copy of a settlement relating to designs he produced. The information was not relevant to any contentious issue in the complaint.

[62] An email of 19 December 2012 reviewed some of the issues. The key points were:

[62.1] Mr MC had originally supplied his passport, taken it back, and accordingly when Ms BL was seeking it, she was trying to get it back for a second time.

[62.2] The application should have been made on 3 March 2011 as Ms BL had all the material then. Except that Mr MC had to get an employment agreement.

[62.3] Ms BL did not adequately convey the requirements for a complying offer of employment.

[62.4] The nature of the employment was clear, and evident from the documentation.

[62.5] The offer of employment was as a designer for a restaurant, and Mr MC said "pretending to be a full time designer being employed form a Restaurant could only be [a pretence]".

## **Discussion**

### *Delay and misrepresentation in lodging the application*

[63] I am satisfied Ms BL lodged the application as soon as reasonably practicable. The requirement to have the fee paid first was reasonable, and it was not paid until 3 March 2011. The application could not be lodged at that point as the documentation was not complete until 7 March 2011, and on 17 March 2011 Ms BL was actively seeking Mr MC's passport to lodge the application. Ultimately she lodged the application with an indication the passport would follow.

[64] The evidence does not support Ms BL misleading Mr MC regarding the time when the application was lodged. The allegation is not consistent with the steps being taken at the time; Ms BL was seeking a passport to lodge the application. There is no documentary evidence supporting the claim. There was room for confusion on Mr MC's part, as it is evident that his understanding of the process was limited. That is evident from the correspondence.

[65] I am satisfied that Ms BL conducted herself responsibly and professionally in these respects, and those grounds of the complaint cannot be upheld.

*Lodging the application without an appropriate offer of employment*

- [66] Ms BL accepts she should have examined the employment agreement more closely; but does claim that Mr MC explained his situation in a manner that caused her to believe there was a complying job offer. She also says she expressed concern regarding the job offer.
- [67] Ms BL's explanation is consistent with the record. It appears Mr MC had some expectation Ms BL would create documentation around a complying job offer; and she explained that was not her role.
- [68] I am not satisfied that it would be appropriate to uphold the complaint on the basis of the failure to correctly identify the issue in the employment agreement. I give some credit to the rather rushed circumstances, and other documentation that would encourage the belief that it was a regular offer of employment.
- [69] I agree Ms BL has responsibly refunded the fee in total, as it was a lapse. However, whether it was a lapse justifying an adverse disciplinary finding is another matter.
- [70] 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; they can be quite different.
- [71] 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.”
- [72] 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.
- [73] 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.
- [74] 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. It is important to recognise that 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.
- [75] It is a reality that 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.
- [76] It is necessary and appropriate for this Tribunal to be mindful that there is a threshold before a complaint of negligence or want of care and diligence 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.



[77] The Act does not attempt to further prescribe where the boundary lies, and any attempt by this Tribunal to do so is unlikely to be successful. It is necessary to consider the facts of each complaint.

[78] I am satisfied that the lapse is properly characterised as a relatively minor error, where there were factors that led to a less than comprehensive review of the documentation. It is significant Ms BL recognised the failure, and fully refunded the fees. It was a mistake that was promptly put right. In all these circumstances I am satisfied the disciplinary threshold was not reached, and this element of the complaint is dismissed.

*Incorrect advice as to effect of withdrawing application*

[79] Ms BL has provided an explanation and some correspondence relating to what she told Mr MC regarding the withdrawal of the application. Mr MC appears to accept he has a very limited understanding of it.

[80] I dismiss this ground of the complaint, as I am not satisfied there was any inaccurate information conveyed, or inappropriate conduct.

*Attempting to preclude complaint being made to the Authority*

[81] Ms BL has explained her understanding of including a provision in the settlement agreement that there would be no complaint lodged with the Authority. I accept it reflected her understanding of the approach to resolving complaints. She correctly identifies the Authority encouraging the resolution of disputes; it is an objective of the Act and the Code.

[82] It was an error to positively state there could be no complaint, as that is a statutory right and it is not appropriate to purport to exclude it. However, I accept this was a minor misunderstanding that does not reach the threshold for adverse disciplinary findings.

[83] This element of the complaint is not upheld.

*Failure to return documents in a timely manner*

[84] I accept Ms BL's evidence she returned all documents she had when requested and promptly. Mr MC has not challenged her account, or the records that support it.

[85] This element of the complaint is not upheld.

**Decision**

[86] The Tribunal dismisses the complaint pursuant to section 50 of the Act.

**DATED** at WELLINGTON this 28<sup>th</sup> day of February 2013

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**G D Pearson**  
Chair