

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

Decision No: [2014] NZIACDT 26

Reference No: IACDT 034/12

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Mark Justin Thoman

Complainant

AND

Artika Archina Devi

Adviser

DECISION

REPRESENTATION:

Registrar: In person.

Complainant: In person.

Adviser: S Singh, Singhs Barristers & Solicitors, Auckland.

Date Issued: 17 March 2014

DECISION

Introduction

- [1] The Registrar filed a Statement of Complaint; the central issue is an allegation that the adviser dishonestly made a claim the complainant was a diesel mechanic in an application for residence.
- [2] The complainant says the adviser presented this information to Immigration New Zealand without his knowledge.
- [3] The issue is a very serious allegation as it involves the adviser's alleged failure to address issues with her client and a claim she made a dishonest representation to Immigration New Zealand.
- [4] The adviser has answered the complaint saying that the complainant claimed to be a diesel mechanic, he provided information to support that claim, and he had employment as a diesel mechanic. Accordingly, she acted appropriately on the information she held.
- [5] Here there is a fundamental question of credibility on a serious issue.
- [6] The parties have sought to have the complaint decided on the papers. The Tribunal has accepted it should do that. The Tribunal has upheld the complaint based on negligence and incompetence but has dismissed the complaint to the extent that it is based on dishonest or misleading conduct.

The complaint

- [7] The Registrar filed a Statement of Complaint.
- [8] The foundation of the complaint is an allegation by the complainant that the adviser:
 - [8.1] Filed an application for residence, relying on the complainant being a diesel mechanic.
 - [8.2] He says he did not tell the adviser he was a diesel mechanic, as he was a truck driver and undertook some workshop duties associated with that.
 - [8.3] The application failed as it was ill-founded and the adviser failed to refund the fees she received for an application that should have been identified would fail.
 - [8.4] Furthermore, this Tribunal with effect from 19 September 2011 cancelled the adviser's licence. She then failed to inform the complainant this occurred, despite the unresolved application.
- [9] The Registrar identified the facts could potentially result in adverse findings that:
 - [9.1] The adviser breached the Code of Conduct in that:
 - [9.1.1] She did not exercise due care, diligence, respect and professionalism (Clause 1.1 of the Code).
 - [9.1.2] In a false, fraudulent or deceptive manner, misrepresented or promoted the Complainant's immigration opportunities (Clause 5.1(c) of the Code), and knowingly provided false or misleading documentation to Immigration New Zealand (Clause 5.2 of the Code).
 - [9.2] The adviser was negligent (section 44(2)(a) of the Act).
 - [9.3] She was incompetent (section 44(2)(b) of the Act).
 - [9.4] She was incapable (section 44(2)(c) of the Act).

- [9.5] She engaged in dishonest or misleading behaviour (section 44(2)(d) of the Act), in that:
- [9.5.1] She misled the complainant resulting in financial loss,
 - [9.5.2] Was dishonest with the complainant and told Immigration New Zealand he was a diesel mechanic without his knowledge, and
 - [9.5.3] Did not tell the complainant her licence had been cancelled.

The adviser's response

- [10] The adviser responded to the Statement of Complaint through written submissions from her counsel. They added to the adviser's initial reply (through her agent) to the complaint directed to the Registrar (a letter of 8 July 2012). The adviser said:

"When the client initially saw us, he informed us that he had work experience as a diesel mechanic from Fiji. He showed us a reference which vouched for this fact and clearly stated that he had several years experience working as a diesel mechanic"

- [11] She attached the reference, the relevant passage said:

"While employed he was assigned duties such as arranging deliveries of import/export cargoes for our customers. He was also employed as a heavy truck driver and 75% of Diesel Mechanic on casual basis."

- [12] The adviser also said:

"At the time the client consulted us, he also had a job offer for a diesel mechanic from an NZ based company."

- [13] This employment agreement was attached, it said:

"Position: Heavy Transport Driver."

- [14] The employment agreement did not refer to "diesel mechanic".

- [15] The adviser went on to say:

"Therefore in regards to the employment to be nominated on the client's residence application, the client had two choices open to him. He could either apply as a truck driver and almost certainly not qualify for residence (of which he was lucidly advised of) or he could apply as a diesel mechanic and have a greater chance of success."

- [16] She then said:

"When the client's residence visa was being processed, Immigration New Zealand paid a visit to the employer who provided the client with the diesel mechanic job offer. Upon investigation by the Immigration New Zealand officers, it was revealed that the client's nominated employer had no knowledge of the diesel mechanic job offer arrangement. The employer confirmed that the client was offered a job merely as a truck driver. It appears that the client did not seek the consultation of his employer regarding the diesel mechanic job offer before proceeding with applying for his residence based on the job offer."

Notification of potential finding by the Tribunal

- [17] The Tribunal considered the complaint on the papers, as it is required to do unless exercising a discretion to conduct an oral hearing (section 49). While doing so, the Tribunal identified that a central issue in the complaint involved credibility and issued directions giving the adviser the opportunity of applying for an oral hearing, and providing further material.

- [18] The Tribunal's direction gave notice the complainant had consistently said he told the adviser he was a truck driver, not a diesel mechanic. Whereas the adviser had asserted the complainant said he was a diesel mechanic. The difference in terms of immigration prospects was fundamental, as the adviser herself recognised.
- [19] Significantly (refer para [10] to [16] above), the adviser claimed the complainant had produced written evidence he had a job offer as a diesel mechanic, and the documents she produced did not show that at all. They showed what the complainant claimed, namely that he was a truck driver employed as a truck driver, with some practical experience doing mechanical work on heavy vehicles.
- [20] The directions put the adviser on notice the view was open on the papers that:
- [20.1] She had produced some evidence the complainant had a degree of practical experience working as a diesel mechanic. However, that material did not in itself show the complainant met the requirements to be qualified as a diesel mechanic for immigration purposes in New Zealand.
- [20.2] The Tribunal would expect:
- [20.2.1] The adviser to produce evidence she made inquiries into the qualification and had discussions with the complainant. Further, that she confirmed the discussions in writing in accordance with Clause 3(f) of the Code of Conduct.
- [20.2.2] Unless the adviser did provide appropriate advice and make necessary inquiries, she was at risk of the Tribunal finding she failed to meet the requirements of due care, diligence and professionalism in Clause 1 of the Code of Conduct and potentially negligence under section 44(2)(a) of the Act.

Reply to notification of potential findings

- [21] Through her counsel, the adviser indicated she preferred the decision to be on the papers and would not apply for an oral hearing.
- [22] In relation to claiming the complainant was a diesel mechanic, she said:
- [22.1] Three years of practical experience as a diesel mechanic without a qualification would be sufficient, and she was satisfied the complainant had that.
- [22.2] The complainant told her "he had an offer letter for a diesel mechanic from NZ based company including a work reference".
- [22.3] The complainant gave an oral assurance he was a diesel mechanic.
- [22.4] She "provided the complainant with the copy of duties of a diesel mechanic from Australian and New Zealand Standard Classification of Occupations to confirm and he agreed with the job description".
- [22.5] It was not in the adviser's interests to make a false or dishonest misrepresentation.
- [23] She claimed she addressed the issue with care, diligence, and professionalism as:
- [23.1] All "the relevant inquiries were made and proper advice was given to the complainant based on the work references and offer letter by a New Zealand based company that were provided".
- [23.2] The adviser and the complainant lodged the application with full knowledge and understanding of the issues.
- [24] While it appears counsel drafted the response, there was a section in what appeared to be the adviser's words, which referenced her wish to highlight certain points.

[25] An important point the adviser highlighted was a letter dated 26 May 2011 from the potential employer. This letter was among the original documents filed. This letter written by the company's "Assistant Accountant" said:

"[The complainant] has been an employee of [the Company] since 08/12/2008, working as a Diesel Motor Mechanic/Heavy Transport Driver."

[26] However, the employment agreement dated 8 December 2008 was also part of the original documentation, and it does not refer to the complainant being a diesel mechanic; it refers to him being a driver only.

[27] The adviser suggested that the complainant and another person had attempted to provide misleading information to Immigration New Zealand. The same company employed both of them, the adviser acted for both of them and there is a complaint before the Tribunal in connection with both matters.

[28] The adviser says Immigration New Zealand discovered the attempted deception, and all the parties were trying to blame her.

[29] The adviser suggested she was entitled to rely on what her clients told her.

[30] Counsel suggested the two complaints were an attempt to recover fees and defame the adviser.

Discussion

Background

[31] The central issue is whether there was any professional shortcoming on the part of the adviser in relation to the complainant's application which was based on him being a diesel mechanic.

[32] Immigration New Zealand found the complainant was not a diesel mechanic, and none of the parties dispute the correctness of that position.

[33] There are essentially two explanations. The complainant says he told the adviser he was a truck driver, but did present papers suggesting he had some level of experience as a diesel mechanic. He says, regardless, the adviser prepared the application on the basis he was a diesel mechanic.

[34] The adviser, in contrast, says the complainant dishonestly misrepresented he was a diesel mechanic and that she was entitled to take him at his word.

[35] Whether the issue is resolved in an oral hearing or on the papers, the contemporaneous documents are a significant element of the evaluation.

[36] There is no doubt there are documents that refer to the complainant at least having experience as a diesel mechanic:

[36.1] A former employer's reference from Fiji referring to the complainant's experience: "as a heavy truck driver and 75% of Diesel Mechanic on casual basis." (refer para [11] above)

[36.2] A letter from the employer's assistant accountant saying he was "a Diesel Motor Mechanic/Heavy Transport Driver". (refer para [25] above)

[37] However, the documents are vague. Immigration New Zealand has very clear requirements for work qualifications and experience, and requires specific evidence of the qualifications and experience. Immigration New Zealand was not satisfied with the material presented in this case and quickly rejected the claim after making obvious inquiries.

[38] Furthermore, there was material to put the adviser on notice of the real possibility the complainant was a driver who did some mechanical work in downtime, not a person with the specialist skills of a diesel mechanic.

- [39] The employment agreement of 22 October 2008 indicated the complainant's employment was not as a diesel mechanic. That at least indicated investigation of the letter from the employer's assistant accountant (refer para [25] above), and the other material was necessary. Indeed, no document unequivocally suggests the complainant was a "diesel mechanic"; each of them points to him being a driver who does more, or less, maintenance work.
- [40] The adviser admits she understood the importance of the difference between the being a driver and meeting Immigration New Zealand's requirements as a diesel mechanic (refer para [15] above).
- [41] In such circumstances, a licensed immigration adviser has a duty to ensure they have accurate information regarding a client's immigration opportunities. That is for two primary reasons. Their client needs to understand their immigration opportunities; otherwise, they cannot give informed instructions. Second, information supplied to Immigration New Zealand must be accurate as far as practicable. It is not acceptable to make a claim a person has a particular qualification or type of experience, and leave Immigration New Zealand to question whether that is correct or not; Immigration New Zealand requires applications to be lodged and supported with evidence.
- [42] The adviser herself has pointed to the declaration in the application which emphasises the accuracy of information. It specifically refers to any "false or misleading information" and points out the consequences. The form continues with the adviser's declaration that refers to the adviser assisting the applicant to complete the application, providing immigration advice and explaining the form. The adviser had a duty to ensure that the complainant understood what was required to claim he was a diesel mechanic and ensure he had evidence to support the claim.
- [43] The adviser claims she provided this information. However, the reality is there is no contemporaneous record of that process. Clause 3(f) of the Code of Conduct required the adviser to confirm the details of material discussions in writing. However, more important is the simple reality Immigration New Zealand reviewed the information provided and:
- [43.1] Was concerned it did not establish the complainant was a diesel mechanic; and then
- [43.2] Made simple inquiries with the complainant and his employer, and ascertained he was a driver not a diesel mechanic.
- [44] The material the adviser held at the time was sufficient to put the adviser on inquiry that the complainant may not have met the requirements to be a "diesel mechanic".
- [45] I am satisfied the adviser held scant and ambiguous evidence the complainant was a diesel mechanic, identified that it was to the complainant's advantage to claim he was a diesel mechanic, and failed to make even elementary inquiries to ascertain whether he did qualify as a diesel mechanic for Immigration New Zealand's purposes.
- [46] The next issue is in what respects, if any, there has been a professional failing. It is important to have regard to the standard of proof. The Tribunal is required to determine facts on the balance of probabilities; however the test must be applied with regard to the gravity of the finding (*Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1).

Dishonest or misleading behaviour

- [47] The most serious allegation is the adviser engaged in dishonest or misleading behaviour. To find that established would be a finding at the highest level of professional offending. The allegation presents in this complaint in a form that makes it necessary to find an element of wilfulness in the deception of Immigration New Zealand and/or the complainant. I would need to be sure the evidence (on the principles in *Z v Dental Complaints Assessment Committee*) justified the finding before making it.
- [48] To find against the adviser on this point, I would need to be satisfied I should accept the complainant's account and wholly reject the adviser's account. The written material does not definitively favour either account. Neither is demonstrably implausible. Neither account has been subject to cross-examination.

- [49] There was some information consistent with the complainant being a diesel mechanic and there is no evidence of information being hidden, or falsified.
- [50] Accordingly, I cannot find the adviser engaged in intentional deception of the complainant or Immigration New Zealand.
- [51] What the material before me establishes is the adviser failed to inquire into and review whether the complainant was a diesel mechanic. The material, clearly and obviously, required examination. Accordingly, dishonest or misleading behaviour are not proper grounds for upholding the complaint. The other grounds of complaint, however, remain open.

Negligence and breach of Clause 1 of the Code of Conduct

- [52] I am satisfied the adviser was negligent. She had documentation before her that informed her of the need to make proper inquiries as to the employment qualifications and experience of the complainant. It was a necessary and important element of his immigration application. She failed to undertake any meaningful or effective inquiries.
- [53] The same conduct amounted to a breach of Clause 1 of the Code of Conduct. The adviser failed to perform her services with due care, diligence, and professionalism.

Incompetence

- [54] I am also satisfied the adviser was incompetent. At no point in dealing with the complainant has the adviser shown any recognition of her responsibilities.
- [55] She was a licensed professional, consulted for her expertise. However, she did, and apparently still, takes the position her client had the responsibility to ascertain his employment classification. Whether he was a diesel mechanic under Immigration New Zealand's requirements is a technical issue.
- [56] The complainant was entitled to and needed advice on whether he should apply as a driver or as a diesel mechanic. Accordingly, he needed to know what was required to qualify as a diesel mechanic and what evidence he needed to satisfy Immigration New Zealand he had that qualification. Providing assistance of this kind is an elementary skill the adviser was required to have, and I am satisfied she lacked that skill. It is the only sensible explanation short of intentional wrongdoing. The adviser filed the application on a demonstrably wrong basis, as Immigration New Zealand readily ascertained.

Incapability

- [57] Incapability suggests the adviser was not only incompetent, but also unable to perform her professional duties. I am not satisfied that has been made out on the material before me. The adviser failed to perform her duties, but there nothing that suggests she was incapable of doing so.

Breaches of the Code of Conduct

- [58] As discussed, for the reasons the adviser was negligent and incompetent, she breached the Code of Conduct, as she did not exercise due care, diligence, and professionalism (Clause 1 of the Code).
- [59] The remaining allegations are:
- [59.1] The adviser in a false, fraudulent or deceptive manner, misrepresented or promoted the complainant's immigration opportunities (Clause 5.1(c) of the Code), and
- [59.2] Knowingly provided false or misleading documentation to Immigration New Zealand (Clause 5.2 of the Code),
- [60] I am not satisfied they are made out for the same reasons the dishonest or misleading conduct allegation has not been upheld.

Miscellaneous

- [61] The complaint the adviser failed to notify the complainant this Tribunal had cancelled her licence is best categorised as a failure to comply with the Code of Conduct. The Statement of Complaint does not include that as a ground; accordingly, there is no finding on that point. The issue does not materially add to the substance of the complaint.
- [62] Similarly, any issue relating to the refund of fee relates to the Code of Conduct. The issue arises in relation to sanctions, which could potentially include a refund of fees, but is not otherwise a finding in this decision.

Decision

- [63] The Tribunal upholds the complaint pursuant to section 50 of the Act.
- [64] The adviser was negligent, incompetent, and breached Clause 1 of the Code of Conduct. They are grounds for complaint pursuant to section 44(2) of the Act.
- [65] In other respects, the complaint is dismissed.

Suppression of name

- [66] The adviser sought an order to keep her identity confidential. The grounds were she:
- [66.1] Is no longer a licensed immigration adviser.
- [66.2] Acted in a professional manner, and denies wrongdoing on her part.
- [66.3] Has another career, where she is in "a special relationship of mutual confidence and trust".
- [66.4] Did not gain financially.
- [66.5] Due to her culture, there will be repercussions for her and her family.
- [67] The submissions have an element of unreality. The Tribunal has upheld a number of complaints against the adviser, and cancelled her full licence. The decisions are public information, and involve conduct as serious as that in the present complaint. The incremental effect of publishing another disciplinary finding, which is the issue in the case, is not consistent with the grounds advanced.
- [68] There is no sensible reason not to publish the present complaint in these circumstances. I appreciate counsel could of course advance reasons for suppression that were not advanced previously, and if a case were made out the Tribunal would make an appropriate order. However, the situation is one where publication is a routine consequence of the disciplinary process.
- [69] There are no special circumstances. If the adviser is in a position of mutual confidence and trust in her current work, that is not a justification for suppressing her professional disciplinary background.
- [70] Unfortunately, her disciplinary history is not an isolated lapse; rather she has engaged in a sustained course of conduct resulting in multiple complaints the Tribunal has upheld. That is not information the Tribunal should deny to the public, particularly when the adviser is seeking confidence and trust in a professional capacity. The Tribunal has found on repeated occasions she had abused trust and confidence given to her as a licensed immigration adviser.
- [71] Accordingly, the Tribunal will not make an order restricting publication of this decision.

Submissions on sanctions

- [72] The Tribunal has upheld the complaint in the respects outlined above; pursuant to section 51 of the Act, it may impose sanctions.
- [73] The Authority and the complainant have the opportunity to provide submissions on the appropriate sanctions, including potential orders for costs, refund of fees and compensation. Whether they do so or not, the adviser is entitled to make submissions and respond to any submissions from the other parties.
- [74] Any application for an order for the payment of costs or expenses under section 51(1)(g) should be accompanied by a schedule particularising the amounts and basis for the claim.

Timetable

- [75] The timetable for submissions will be as follows:
- [75.1] The Authority and the complainant are to make any submissions within 10 working days of the issue of this decision.
- [75.2] The adviser is to make any further submissions (whether or not the Authority or the complainant make submissions) within 15 working days of the issue of this decision.
- [75.3] The Authority and the complainant may reply to any submissions made by the adviser within 5 working days of her filing and serving those submissions.

DATED at WELLINGTON this 17th day of March 2014

G D Pearson
Chair