

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

Decision No: [2014] NZIACDT 38

Reference No: IACDT 051/12

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

IJ

Complainant

AND

BLV

Adviser

DECISION

REPRESENTATION:

Registrar: In person

Complainant: In person

Adviser: In person

Date Issued: 25 March 2014

DECISION

Introduction

- [1] The complainant undertook a course at a training establishment in her home country. The adviser is a senior official at the establishment and provides immigration services. He is a licensed immigration adviser.
- [2] The complainant completed a course she expected would lead to the establishment where she trained providing her with a job placement at a hotel outside her home country.
- [3] She came to New Zealand for a job offer at a motel. The situation deteriorated quickly; she was not satisfied with the motel as a placement or how the employer treated her.
- [4] The Registrar investigated the complaint, including getting translations and transcripts of the evidence. He lodged material with the Tribunal which left open the view that:
- [4.1] Regardless of the complaint regarding the placement at a motel, and
- [4.2] How the complainant was treated at the motel,
- The placement and treatment at the motel may not be matters that arose in respect of providing immigration services, so fall outside the Tribunal's jurisdiction.
- [5] He also provided information relating to the immigration services provided.
- [6] The Tribunal has to determine the extent to which the complaint relates to immigration matters, and, to the extent that it does, whether the adviser acted properly.
- [7] The Tribunal has found the placement at a motel and the employment issues are not matters it can deal with, as they do not concern immigration. The Tribunal has found the adviser acted properly in relation to his duties as a licensed immigration adviser.

Procedural history

- [8] On 3 February 2014, the Registrar filed a Statement of Complaint; it explained the Registrar had undertaken further investigation and is not able to present information that establishes the complaint.
- [9] The adviser filed a Statement of Reply on 18 February 2014 supporting the Registrar's position and providing some additional submissions.
- [10] The complainant filed a Statement of Reply on 21 February 2014 contending the Tribunal should uphold the complaint.

The complaint

The Statement of Complaint

- [11] The Registrar, after initially filing the complaint, undertook further investigation. One of the difficulties was material relating to the complaint was not all in English and some was in the form of a voice recording. The Registrar made the information accessible and used it to review the complaint.
- [12] The Statement of Complaint sets out a summary of the allegations in the complaint:
- [12.1] The adviser is the area director of a hotel management school (the school), in an Asian country.
- [12.2] The complainant studied at the school, which offered job placement on completion of studies.

[12.3] The complainant completed her studies and travelled to New Zealand. The material circumstances were that:

[12.3.1] She travelled on a student visa, which the adviser helped her to get.

[12.3.2] The school obtained a job offer in New Zealand.

[12.3.3] The adviser assisted with an application for a work visa.

[12.3.4] The employer dismissed the complainant and did not pay any wages.

[13] The Statement of Complaint identified seven elements in the complaint and referred to the material in support and the adviser's response.

[14] The essence of the position in the Statement of Complaint in relation to the elements of the complaint is:

Lack of assistance

[14.1] The complainant contended there was a lack of assistance provided in relation to seeking a work visa.

[14.2] The adviser responded with a letter indicating he understood the prospective employer and the complainant would complete the application. He had completed the required sections in the application form for the work visa. In short, he completed the work required and left it to the employer and complainant to lodge the application along with the documentary evidence which they were to provide in support (which they did).

Knowing the complainant was working in New Zealand without a work visa

[14.3] The complainant says the adviser sent her to a motel to work, knowing she did not have a work visa; she started work there and then completed a work visa application saying she was not working.

[14.4] Various materials disclosed the understanding of the parties. They include:

[14.4.1] A record of a conversation in which the employer and the complainant (and a third person) were involved;

[14.4.2] Another conversation between Immigration New Zealand and the adviser; and

[14.4.3] A letter from the adviser to the employer.

[14.5] The material indicates the adviser thought the complainant and the employer would apply for a work visa (using the material he prepared), and the employer may have thought the complainant had a visa at the outset. The complainant's main concern was that she would be paid.

[14.6] The employment agreement supporting a work visa application provided for employment had a trial period starting on 21 February 2012 running until 21 March 2012 (possibly intended to be 21 May 2012 as a 90-day trial period).

[14.7] The relationship between the employer and the complainant broke down, on 29 March 2012, the employer called the adviser. He tried to mediate but that was unsuccessful.

[14.8] The adviser concluded the complainant had been working and paid before the relationship with the employer broke down.

Employment issues

[14.9] The complainant contended the adviser guaranteed the complainant employment at a hotel, but got work at a motel instead. When the employment broke down, he did not assist her.

[14.10] This appeared not to relate to immigration advice.

Timely provision of documents

[14.11] The complainant contended the adviser did not provide documents in his possession that were required for the work visa promptly, and had to ask three times.

[14.12] The record indicates:

[14.12.1] The complainant's job offer dated 17 February 2012 was essential before the process of applying for a work visa could commence.

[14.12.2] The prospective employer contacted the adviser on 21 February 2012, the same day the adviser emailed the employer setting out the documents required, and he prepared the work visa application and sent it to the employer who submitted it to Immigration New Zealand (received on 9 March 2012).

Poor communication

[14.13] The complainant contended the adviser did not keep in contact regarding the visa process and job offers. In particular, she went on holiday on 20 December 2011 and received no update regarding a potential job offer.

[14.14] The adviser said he indicated at the time he would email the complainant only if there was an update. The potential employer did not proceed and the adviser told the complainant promptly.

Failure to provide a refund

[14.15] The complainant paid for the work visa application which she withdrew after her employment difficulties. She would have to pay for another application and wanted a refund.

[14.16] The adviser explained that the employer withdrew support, so the application could not proceed. He did not understand a refund was necessary in the circumstances.

Medical certificate

[14.17] The complainant considered the adviser told her to get a medical certificate too soon; it was at risk of expiring and the adviser did not progress matters urgently enough in the circumstances.

[14.18] The adviser said the medical certificate was valid when the complainant lodged her work visa application.

[15] The Registrar set out the complainant's grounds of complaint and the results of his investigation. It explains why he reached the position that he was not in a position to determine that the complaint did disclose grounds of complaint in accordance with the Act.

[16] In essence, the Registrar's investigations had disclosed that the real issue was the breakdown of an employment relationship. The adviser's role in that relationship was both indirect and related in part only to providing immigration advice. Furthermore, the adviser had provided evidence of meeting his professional obligations in respect of the elements of the complaint.

The adviser's response to the Statement of Complaint

- [17] The adviser reinforced the position reached by the Registrar.
- [18] The key points were:
- [18.1] In relation to the complaint of lack of assistance, he pointed to the work he had done and said he could not intervene in the employment dispute beyond talking to the employer.
 - [18.2] In relation to knowledge of the complainant working without a visa, he said the school did not place students in employment. It only provided opportunities for students to apply for positions. The complainant chose to apply for the position in issue. He took the appropriate steps to secure a visa.
 - [18.3] In relation to employment issues, the adviser said it was not part of his role as an immigration adviser.
 - [18.4] In relation to the timely provision of documents, the adviser reiterated he had done all that was necessary and said there was nothing wrong with the application the complainant lodged.
 - [18.5] In relation to poor communication, he reiterated he had communicated effectively and appropriately.
 - [18.6] In relation to refunding fees, he said he had investigated his obligations and understood the difficulties were of the complainant's making and he should not refund fees.
 - [18.7] He said he had given appropriate advice in relation to the timing of getting medical certificates.

The complainant's response to the Statement of Complaint

- [19] The complainant's Statement of Reply set out her position.
- [20] In some respects, the complainant confirmed the position disclosed by the Registrar's investigation and the contentions of the adviser. Central to her concern were difficulties with her employment. It is unnecessary to review the issues that gave rise to the employment dispute.
- [21] The complainant addressed each of the issues identified in the Statement of Complaint.

Lack of assistance

- [22] The complainant claimed:
- [22.1] The school was obliged to get her a job in a hotel not a motel.
 - [22.2] The prospective employer lodged her visa application not the adviser, as the adviser did not do what he should have done.
 - [22.3] The adviser did not deal with the complainant's employment issues.
 - [22.4] The adviser knew the complainant was working in New Zealand without a work visa
 - [22.5] The complainant was concerned about her employment situation, including the employer having her work and using the lack of a visa as an excuse for non-payment.

Employment issues

- [23] She did not dispute employment is not in itself an immigration issue.

Timely provision of documents

[24] She did not dispute the adviser's response regarding the provision of documents.

Poor communication

[25] She did not take issue with the Registrar's investigation, but raised a different issue relating to an email from the adviser's wife. The email appeared to be a "holding reply" in the adviser's absence.

Failure to provide a refund

[26] She discussed the complaint process, not the reasons the adviser considered he was not obliged to refund fees.

Medical certificate

[27] She discussed her concern regarding the lack of a good employment opportunity offered by the school.

Discussion

[28] 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).

[29] The Registrar has investigated the complaint, including getting transcripts and translations to ensure he understood the complaint correctly.

[30] In essence, the Registrar has reached the view that:

[30.1] The complainant may or may not have valid complaints that the school failed to deliver a placement in an employment position; and

[30.2] The employer in New Zealand may or may not have breached New Zealand employment law.

However, the first of those issues would concern the law of another country, as that is where the school operated and the second issue would concern New Zealand employment law. Neither the Registrar nor this Tribunal can or should deal with those issues.

[31] Of course, employment issues, or promises made regarding job placement could lead to professional obligations for a licensed immigration adviser. However, there has to be a nexus with professional practice and obligations. There is no evidence in this case there is a nexus.

[32] The Registrar has considered the areas where there were professional obligations, investigated and concluded there was no breach of professional obligations. I have reached the same view. I address the reasons under each of the heads the parties have addressed:

Lack of assistance

[33] The written material provides evidence the adviser correctly claimed he had drafted an application and forwarded it to the complainant and prospective employer to lodge.

[34] The complainant says the adviser should have lodged it independently, but provides no evidence of circumstances that make the adviser's approach inappropriate in the circumstances.

[35] I am satisfied the material before me establishes the adviser complied with his professional obligations in this regard.

Knowing the complainant was working in New Zealand without a work visa

- [36] Under this head of the complaint, the complainant has raised the general circumstances of her employment at the motel in New Zealand.
- [37] I will assume the complainant was working without a visa, the employer should have paid her, he failed to pay her in breach of New Zealand employment law, and the Adviser ascertained these facts. That is not a finding of this Tribunal, simply the most favourable potential view of the evidence.
- [38] However, there is no evidence the adviser was a party to the employer's alleged conduct, nor evidence he had reason to suspect matters would develop in the way the complainant alleges. In particular, there is no reason to conclude he knew the complainant would work without a visa.
- [39] The material before me satisfies me the adviser knew the complainant had an offer of employment, he performed his professional duties to gain a work visa, and then the complainant raised her concerns.
- [40] In her Statement of Reply, it appears that the complainant alleges the adviser failed to advise her about her inability to work without a work visa. There is a lack of specific evidence. At the highest, it appears the adviser may have thought the complainant was doing job training and had sufficient cause to believe this.
- [41] The adviser is not an expert on New Zealand employment law and is not expected be able to advise on an employment disputes in New Zealand.
- [42] Accordingly, I am not satisfied the adviser failed to meet his professional obligations as a licensed immigration adviser in this regard.

Employment issues

- [43] The complainant contended the adviser guaranteed the complainant employment at a hotel, and placed her at a motel instead. There are two difficulties; first the adviser says the school did not guarantee placement, and second this is relates only peripherally to the adviser's work as a licensed immigration adviser.
- [44] The first difficulty is determinative. Whether the school had an obligation to place the complainant at a hotel is an issue for the law of the country where the school is located. If the school misrepresented what it offered, that is not an issue for a New Zealand tribunal, except to the extent the adviser might have used his status as a licensed immigration adviser to promote the misrepresentation.
- [45] There is no persuasive evidence the adviser personally used his standing as a licensed immigration adviser in connection with promises of placement following study.
- [46] As noted, the adviser did not have a professional obligation to deal with employment issues in New Zealand when the employment relationship broke down.
- [47] Accordingly, I am satisfied there was no breach of the adviser's professional duties under this aspect of the complaint.

Timely provision of documents

- [48] I am satisfied the adviser has demonstrated he dealt with the work visa in a timely and effective manner. I am satisfied there is no evidence of professional failing in this regard.

Poor communication

- [49] I am satisfied the adviser has demonstrated he dealt with the work visa in a timely and effective manner. The email the complainant referred to in her statement of reply was unexceptional. I am satisfied there is no evidence of professional failing in this regard.

Failure to provide a refund

- [50] The complainant paid for the work visa application, which she withdrew when her employment broke down. She would have to pay for another application for another position of employment, and wanted a refund.
- [51] The adviser explained the employer withdrew support, so the application could not proceed. He did not understand he should refund fees in the circumstances. I am satisfied that is correct. Unless the adviser was responsible for the employment difficulties, or failed to prepare a proper application, he was not responsible for the complainant's application not proceeding.
- [52] I am satisfied the adviser did not have an obligation to refund fees.

Medical certificate

- [53] The complainant considered the adviser told her to get a medical certificate too soon; it was at risk of expiring and the adviser did not progress matters urgently enough in the circumstances.
- [54] The medical certificate was current when she lodged her visa application. I am satisfied the adviser carried out his professional duties properly and there are no grounds for complaint in this regard.

Conclusion

- [55] The Registrar set out the complainant's grounds of complaint, and the result of his investigations in the Statement of Complaint. It explains why he reached the position that he was no longer in a position to present information that supported the position that the complaint disclosed grounds for complaint under the Act.
- [56] In essence, the Registrar's investigations had disclosed that the real issue was the breakdown of an employment relationship and the adviser's role in that was both indirect, and related in part only to providing immigration advice. Furthermore, the adviser had provided evidence of meeting his professional obligations in respect of those elements of the complaint, which did concern his professional duties as a licensed immigration adviser.
- [57] I am satisfied that the information before the Tribunal establishes that there was no professional obligation or duty which the adviser failed to meet arising from the complaint.

Decision

- [58] The Tribunal is satisfied the material before it discloses no ground for complaint in accordance with section 44(2) of the Act and dismisses the complaint pursuant to section 50(a).

DATED at WELLINGTON this 25th day of March 2014

G D Pearson
Chair