

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

Decision No: [2014] NZIACDT 60

Reference No: IACDT 002/13

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

QR

Complainant

AND

UC

Adviser

DECISION

REPRESENTATION:

Registrar: In person

Complainant: In person

Adviser: In person

Date Issued: 30 April 2014

DECISION

Preliminary

- [1] The complainant engaged the adviser to assist with an application for a residence class visa.
- [2] The adviser submitted an application; it relied on the complainant having a level 5 qualification and work experience. It became evident the complainant did not have the qualification or work experience relating to the qualification.
- [3] The pleadings put the complaint before the Tribunal only on the ground of incompetence.
- [4] The adviser responded to the complaint with an explanation that the institution where the complainant trained had provided information he understood as showing the complainant had a qualification at New Zealand Qualifications Authority (NZQA) level 5. If correct, he says, that was sufficient for the visa application, when combined with previous work experience. He says it was only later that it became apparent the institution was using the words *level 5* not with reference to NZQA levels, but to its own internal levels.
- [5] It is necessary for the Tribunal to consider the meaning of *incompetence*; and then evaluate whether the adviser was incompetent in relation to the work that led to this complaint.
- [6] The Tribunal has dismissed the complaint as the material before the Tribunal does not establish incompetence.

The Statement of Complaint

- [7] The Registrar filed a statement of complaint. It says the complainant lodged the complaint on wider grounds, but the Registrar identified material that supports the following ground of complaint: *The adviser was incompetent, which is a ground for complaint under section 44(2)(b) of the Act.*
- [8] In summary, the background was:
 - [8.1] The adviser and the complainant entered into a professional relationship on or about 22 August 2011. The adviser was to assist the complainant with an application for a residence visa under the Skilled Migrant category.
 - [8.2] The adviser filed the application with Immigration New Zealand on 28 November 2011, and claimed the complainant had a recognised qualification and relevant work experience.
 - [8.3] The qualification claimed was a diploma in nursing. In fact, the complainant was a student who was part way through a Bachelor of Nursing degree.
 - [8.4] Immigration New Zealand declined the application for a visa as it found the complainant did not have either:
 - [8.4.1] a recognised qualification; or
 - [8.4.2] three years' work experience.
- [9] The statement of complaint provides particulars of the potential infringement of professional obligations.

Incompetence
- [10] For the application to succeed on the basis it was filed with Immigration New Zealand, the complainant was required to hold a recognised qualification or at least three years of work experience.
- [11] The complainant had neither the qualification nor the work experience.

- [12] The adviser pursued the application over a period of some 10 months.
- [13] A competent adviser should have made proper inquiries into the complainant's qualification and work experience, but did not do so.
- [14] The adviser has admitted he made a mistake when he responded to the complaint.

Reply to the Statement of Complaint

The complainant

- [15] The complainant did not file a statement of reply, and was not required to do so unless challenging the statement of complaint. As there was no challenge, it is only appropriate to determine the aspects of the complaint in respect of which the statement of complaint identifies supporting grounds.

The adviser

- [16] The adviser did not file a statement of reply and, like the complainant, was only required to do so if challenging it.

Discussion

- [17] The adviser has admitted he made an error.
- [18] The statement of complaint has put the adviser on notice that there is material supporting a potential finding of incompetence, but not other potential grounds. The complainant has not taken issue with that.
- [19] The statement of complaint has not put the adviser on notice of a foundation for a finding based on lack of care or diligence under the Code, or negligence under the Act. The Tribunal will accordingly confine its consideration to incompetence as particularised in the statement of complaint.
- [20] Incompetence is not synonymous with lack of care or negligence. As noted in *Auckland District Law Society v Neutze* [2006] 2 NZLR 551 at [38]:
- "Negligence", that is careless behaviour, is not the same as incompetence and may not reach such a level.
- [21] The essential Oxford Dictionaries definition of *incompetence* is:
- Inability to do something successfully; ineptitude.
- (Oxford Dictionary (29 April 2014) <www.oxforddictionaries.com>)
- [22] It is similarly defined in *Black's Law Dictionary*:
- The state or fact of being unable or unqualified to do something.
- [23] Accordingly, I take the approach that to establish the incompetence, it is necessary to find the adviser lacked the skill or ability to perform his professional duty. I accept in the present context that is not necessarily a permanent or enduring circumstance, and it is not necessary to find that the adviser was generally incompetent. However, I consider it is necessary to establish that in some material respect he provided his professional services without the knowledge or skill required to meet minimum professional standards.
- [24] If, for example, a practitioner took instructions in an unfamiliar field of work, lack of experience and research could put them in a situation where they were incompetent in relation to those instructions.

- [25] In this case, the adviser filed an application under the Skilled Migrant category when the applicant had neither an essential qualification, nor necessary work experience. That points to a very significant irregularity. However, in itself that says little of what responsibility the adviser had. The adviser has responded to the complaint with an explanation.
- [26] He explained he had become confused with information indicating the complainant had achieved level 5, and understood that to be level 5 under the NZQA framework. In fact, the complainant had passed level 5 of a degree course, and the level referred only to the institution's own grading. The adviser's mistaken assessment flowed from that error.
- [27] Immigration New Zealand addressed the issue in their letter giving reasons for declining the application. The letter acknowledged Immigration New Zealand had erroneously issued a visa, potentially due to the same mistake the adviser made. Immigration New Zealand's letter said:
- "Although you were issued a graduate job search work visa by INZ on the basis of completing a level 5 diploma in nursing, this looks to have been issued in error and INZ are in the process of rectifying the situation by cancelling this visa and allowing you to apply for a more suitable visa.
- As evidence of your qualification you have supplied a letter dated 19 June 2012 from Unitec stating you have completed level 5 of the bachelor of nursing programme. You have been unable to supply a qualification certificated from Unitec or NZQA."
- [28] The letter went on to say the complainant's prior work experience as a community worker could not qualify. However, it was not because of the absence of work experience, but because it did not count without a recognised qualification.
- [29] Accordingly, it is possible Immigration New Zealand and the adviser both misunderstood Unitec's label for the level at which the complainant was studying. While the letter from Unitec of 19 June 2012 postdates the residence application, and addresses Immigration New Zealand's queries after the application raised concerns, it is relevant. The letter is the best evidence of what the complainant and the adviser understood when preparing the application. It is evident the level 5 language was used by Unitec, and it is plausible the adviser mistakenly believed it referred to the NZQA level.
- [30] I am not satisfied the material before me establishes the adviser was incompetent. When he received the complaint and reviewed it, the adviser accurately identified the error. The error followed from potentially ambiguous information. The circumstances do not give grounds for me to be satisfied the adviser lacked the ability to perform the instructions he accepted. At most, there is evidence of a failure to inquire further in the face of potentially inadequate information.
- [31] The pleadings make it unnecessary and inappropriate for me to consider whether the error was the result of lack of care or diligence, or negligence; it is sufficient that I am satisfied it has not been established it was the result of incompetence.

Decision

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

DATED at WELLINGTON this 30th day of April 2014.

G D Pearson
Chair