BEFORE THE IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2014] NZIACDT 65

Reference No: IACDT 011/13

IN THE MATTER	of a referral under s 48 of the Immigration Advisers Licensing Act 2007
BY	**The Registrar of Immigration Advisers** Registrar
Between	**Wong Choong Heng** Complainant
AND	**Lip Funn (James) Yap** Adviser

DECISION

REPRESENTATION:

Registrar: In person

Complainant: In person

Adviser: In person

Date Issued: 28 May 2014

DECISION

Preliminary

[1] The Registrar received a complaint relating to the adviser.

[2] The Registrar identified the basis of the complaint as being that the adviser was:

[2.1] negligent;

[2.2] incompetent; and

[2.3] he allowed unlicensed staff to provide immigration advice.

[3] In essence, the complaint is founded on the grounds that:

[3.1] The adviser accepted instructions to start the process of applying for residence in New Zealand for the complainant and his wife, without giving adequate advice. In reality, their circumstances at that point made it unlikely they could qualify for residence.

[3.2] The adviser allowed unlicensed staff to deliver professional services despite the requirement for a licensed immigration adviser to provide immigration advice personally.

[4] The adviser has largely accepted the core facts. However, he says the process of providing accurate advice involved stages and the initial advice, although not accurate, was preliminary and reasonable in the circumstances.

[5] The adviser says his staff acted under instructions, and that was proper.

[6] The Tribunal is required to determine whether the material before it establishes the allegations against the adviser.

[7] To determine the first aspect of the complaint the Tribunal must identify the process of providing advice to the complainant regarding his immigration prospects, and evaluate the advice.

[8] The second issue primarily involves determining whether the adviser could comply with his professional duties by having his staff engage with clients under his instructions.

[9] The Tribunal has determined the adviser was negligent and incompetent as he did not properly evaluate the complainant's immigration prospects, and his delivery of services through unlicensed staff breached his professional duties.

The Statement of Complaint

[10] 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 grounds of complaint:

[10.1] The adviser was negligent and/or incompetent (section 44(2) of the Immigration Advisers Licensing Act 2007 (the Act)). In particular, he failed to give proper advice before accepting instructions and then failed to deal properly with the consequences.

[10.2] The adviser breached clauses 1.1(a) and 2.1(b) of the Licensed Immigration Advisers Code of Conduct 2010 (the Code). In particular, he allowed unlicensed employees to provide immigration advice.

[11] The Registrar identified the material facts supporting the allegations in his statement of complaint. In essence, these were as follows:

[11.1] The adviser has his practice in Malaysia; he is the only licensed immigration adviser in the practice.

[11.2] The practice also employs unlicensed employees.

[11.3] The complainant wished to migrate to New Zealand. He approached the adviser's practice and met an unlicensed employee in the practice. She told him he could claim 135 points and had a great chance of selection under the Skilled Migrant category if he lodged an Expression of Interest (EOI) with Immigration New Zealand. Accordingly, he was likely to be successful if he pursued migrating to New Zealand.

[11.1] On 19 April 2012, the complainant signed an agreement with the adviser's practice. The agreement provided for the supply of immigration services and identified the adviser as the licensed immigration adviser. At that time, the employee said the correct points able to be claimed were 120, but the complainant still had a "great chance" of success.

[11.2] Over the course of several months, the complainant exchanged emails with unlicensed employees who discussed his points and chances of success. They eventually assessed him as eligible for 110 points, and led him to understand that Immigration New Zealand randomly selected people from the EOI pool if they were in the range between 100 and 140 points.

[11.3] The complainant was also advised by an employee that he and his wife should have their qualifications assessed to try and raise the points claimed to 120, as with 100 or 110 points the prospect of success was low.

[11.4] Employees continued to deal with the complainant's affairs and submitted an EOI to Immigration New Zealand in August 2012. The complainant ascertained he had little chance of selection from the EOI pool due to the points he could claim. He approached the adviser who confirmed the complainant was correct.

[11.5] The complainant requested a full refund from the adviser, as he had not received accurate advice at the outset.

[12] The Statement of Complaint provided particulars of the grounds of complaint:

[12.1] The matters potentially founding negligence or incompetence are:

[12.1.1] The complainant, before giving informed instructions, needed accurate advice as to his prospects of success in the EOI pool. Whether he could reasonably expect to migrate to New Zealand or not would turn on that information.

[12.1.2] The advice he received was wrong and, as a result, he engaged the adviser without sufficient information or advice and could not provide informed instructions.

[12.1.3] Having failed to provide accurate advice at the outset, the uninformed instructions were pursued over several months. Ultimately the complainant identified that he had little prospect of successfully migrating to New Zealand.

[12.1.4] At that point, the adviser failed to accept he was obliged to refund fees.

[12.2] The matters potentially founding a determination that the adviser breached the Code by allowing unlicensed employees to provide immigration advice are:

[12.2.1] The adviser was the only person in his practice who could provide immigration advice lawfully, as he was the only person holding a licence.

[12.2.2] The adviser had limited contact with the complainant, and unlicensed employees gave the initial advice, prepared the EOI application, and assessed the points the complainant could claim.

The Adviser's Response

[13] The adviser responded to the statement of complaint with a statement of reply.

[14] In essence, the adviser's response to the complaint is:

[14.1] The initial advice regarding points was preliminary. The complainant had a one or two week period under Malaysian consumer law to cancel the engagement.

[14.2] The initial advice to the complainant was that he had: "a good chance of being selected, however this was subject to further analysis of [his] work experience and qualifications amidst other details". This was standard correspondence to clients.

[14.3] The employees of the practice at all times engaged with the complainant only on the adviser's instructions.

[14.4] During the assessment process, the adviser ensured regular communication. The issue of assessing points involved ambiguity and uncertainty. The adviser managed the process, and did so with as much precision as the circumstances allowed.

[14.5] The complainant received advice that his EOI was not strong, so he was informed properly before the adviser proceeded with preparing and lodging the application.

[14.6] The adviser offered a refund of the whole fee; however, the complainant wanted disbursements reimbursed also. The Malaysian Consumer Claims Tribunal dealt with the matter, and ordered a refund of RM5,000, which the adviser paid. The adviser supplied a copy of the decision, but it does not contain reasons, so may be the sealed order following an oral or written decision. The Tribunal's reasons are not in the record before this Tribunal.

The Complainant's Response

[15] The complainant filed a reply to the adviser's Statement of Reply. The key points were:

[15.1] An employee gave the initial advice to the complainant. At that time, the adviser did not engage personally with the complainant, although the adviser was in the office at the time. His only personal contact was two or three telephone calls, when the employees could not answer questions.

[15.2] While advice may have been qualified, it gave a clear impression the complainant could rely on the assessment made of the points he could claim.

[15.3] It took more than a year to progress to the point of obtaining realistic advice that the complainant was not likely to be able to migrate to New Zealand. While there were regular communications, the information provided was not accurate.

[15.4] The complainant does not know if the adviser was aware of the advice his staff provided and the actions they took. However, the employees dealt with the complainant, not so the adviser, until late in the instructions.

Discussion

The standard of proof

[16] 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 at [55].

[17] It is necessary to address the allegations against the adviser and consider the factual basis for each of them.

Negligence and incompetence

[18] The allegations of negligence and incompetence both proceed from the same factual basis, namely a failure to provide adequate advice regarding the complainant's migration options prior to engagement, and then in carrying out the instructions.

[19] The adviser has not disputed the essential facts, taking the position that:

[19.1] The complainant did have little prospect of successfully migrating to New Zealand with the points he and he wife could claim at that time.

[19.2] However, the original advice was preliminary; it was difficult to be precise due to the nature of the assessment.

[19.3] There was a realistic evaluation before the complainant gave instructions to lodge the EOI.

[20] The first difficulty for the adviser is that he was obliged to obtain informed instructions before accepting an engagement to carry out immigration work (clause 1.1(b) of the Code). He could have properly accepted a limited engagement to assess the complainant's immigration opportunities and later taken informed instructions to proceed with a particular immigration pathway.

[21] What happened, on his own admission, is that his practice provided preliminary advice, accepted instructions to proceed with a particular immigration path, and then ascertained information that materially affected the proposed path.

[22] The complainant was entitled to have all the relevant information regarding his immigration options, an opportunity to assess them against his circumstances and then decide on the course he wished to pursue. Instead, he had incorrect information and the adviser's employee led him to understand he had sufficient information to decide to proceed with the relevant immigration path.

[23] I have reviewed the written record. It shows the adviser's employee initially overstated the complainant's prospects. Then, reasonably promptly (in April 2012), the second employee to deal with the complainant determined the prospects had been overstated. The complainant (in an email of 26 April 2012) said he did not consider his prospects were "that great now". However, the employee dealing with the situation gave the clear impression (in an email of 2 May 2012), that even with minimal points the complainant was well-placed. He said:

[23.1] for those with 145 points or over, selection was automatic;

[23.2] second choice were persons with a job offer in New Zealand; and

[23.3] third were persons with points between 100 and 140 where selection is random.

[24] This information was wrong, and egregiously so, as it gave the clear impression that it made no difference whether the complainant claimed 100 points (likely the least he would have), or the maximum suggested at the outset (135 points). In reality, the level of points and employment-based points, which the complainant did not have, were critical. That information was available on the Immigration New Zealand website, and it was an elementary competence for the adviser to know that, and inform his client of his true prospects.

[25] On 3 May 2012, the employee sent another email. Contrary to the earlier email, he now said the complainant's chances at the 100-point level were low. After further communications, the employee appeared to revert to the former position and sent an email on 10 May 2012 referring to the "third category", stating that with between 100 and 135 points there was still the chance of selection. It appears to affirm the concept of random selection.

[26] The complainant replied with an email saying: "I take it ... even if my points are 100, you still advise me to proceed?"

[27] The employee dealing with the matter went ahead on that basis.

[28] The record provides evidence that at the point when the complainant committed to lodging an EOI, the adviser's employee led the complainant to believe if he could claim 100 points, that was a reasonable basis to proceed with the EOI, and that he could reasonably expect to claim 100 points.

[29] However, further investigations followed and the New Zealand Qualifications Authority (NZQA) assessed the complainant's wife's qualifications. On 13 June 2012, the adviser's employee dealing with the matter said that after consulting with *management* (apparently referring to the adviser); he recommended the complainant should have his qualifications assessed.

[30] Consistent with the earlier advice regarding random selection of an EOI which had over 100 points, the complainant asked for confirmation that:

[30.1] If he got his qualification assessed successfully, he could claim 110 points; and

[30.2] He would then submit his EOI and be guaranteed success, although it would take a longer time.

[31] The response appears to confirm that if he submitted an EOI with over 100 points, he could rely on random selection.

[32] After a process of assessment of the complainant's qualifications, and preparation of an EOI, the employee who was dealing with the EOI informed the complainant she had lodged it with 110 points claimed.

[33] Later, the complainant made his own inquiries regarding the likely fate of his EOI, using Immigration New Zealand's website. He discovered that on 19 September 2012 Immigration New Zealand's selection did not include any EOIs with less than 140 points, unless they included points for skilled employment in New Zealand or work experience in an area of absolute skill shortage.

[34] As a result, the adviser admitted the complainant did not have a realistic prospect of success with his EOI.

Finding of negligence and incompetence

[35] I am satisfied the adviser was negligent as he was obliged to ensure his client had accurate information before giving instructions to proceed on a particular immigration pathway. The adviser failed to provide essential information, and gave a clearly wrong impression of the complainant's immigration prospects.

[36] A licensed immigration adviser acting with care would ensure his client had accurate information. The ability to provide accurate information is a core competence for any licensed immigration adviser acting in such a matter, and accurate information was available.

[37] The adviser's employees provided clearly wrong information regarding the operation of the EOI regime. They told him, in effect, if he filed a qualifying EOI, at worst he had entered a random process where, given time, he could expect success.

[38] In reality, the system operated not on a random basis, but rather it selected for desired attributes. The EOI selection criteria at the time depended on either:

[38.1] high absolute points; or

[38.2] substantial points boosted by employment factors.

[39] The complainant had no prospect of success with the EOI he lodged. The original preliminary evaluation was that the complainant could potentially claim 135 points. However, even those points would not have been sufficient for selection on 19 September 2012, as employment factors would also have been necessary.

[40] I am satisfied the material before me establishes:

[40.1] Neither the adviser nor his employees ever accurately informed the complainant how the EOI system worked, the number of points needed to succeed, or the importance of employment factors. The complainant only discovered that when he made his own inquiries.

[40.2] The number of points the complainant was eligible to claim remained uncertain, until external evaluation of the qualifications of the complainant and his wife. However, at no point did the adviser or his employees determine or expect sufficient points could be claimed to have confidence employment factors would not also be necessary.

[41] When undertaking work involving the Skilled Migrant category, an understanding of the EOI selection process is an elementary level of skill any practitioner must have to accept instructions. Determining the points for qualifications is dependent on external evaluation in many cases, and a licensed immigration adviser's essential skills lie in gathering information, having an informed appreciation of qualifications, and understanding the process for evaluation.

[42] I am satisfied the initial evaluation process was far below an acceptable standard. The record shows the complainant was dealing with unqualified staff who did not understand the EOI system. The record shows the adviser engaged with the complainant's instructions from time-to-time, and knew of and was party to his staff providing incorrect information.

[43] At the outset the complainant was entitled to:

[43.1] An explanation of his potential points; accepting that may have left uncertainty in relation to qualifications and work experience.

[43.2] A clear explanation of the EOI system, his prospects in relation to his likely or potential points claimed, and the significance of employment factors.

[44] It would have been reasonable for the adviser to accept limited instructions to investigate and advise on those issues. Instead, the complainant initially received hopelessly optimistic advice. He committed to proceeding and agreed to pay fees based on that misinformation. An investigative process followed, but the adviser and his employees encouraged the complainant to proceed by telling him that at worst he could expect to submit an EOI and enjoy the prospect of random selection.

[45] The complainant himself researched the issue and ascertained that the foundation for his decision-making was wrong, because the information provided by the adviser and his employees was clearly wrong, in a material way.

[46] I am satisfied the adviser was negligent. He did not understand the EOI system, which was an essential prerequisite to accepting instructions in this area. He failed to give the complainant essential information.

[47] In relation to incompetence, I am satisfied that allegation is also made out.

[48] The adviser had every opportunity to reflect on what had occurred after his client identified he received incorrect advice and asked for a refund. With the benefit of hindsight, and his client pointing out information he should have known, the adviser ought to have understood:

[48.1] His client gave him instructions without sufficient information.

[48.2] He acted without informed instructions.

[48.3] His client expended fees and disbursements based on patently incorrect advice given by the adviser and his employees.

[48.4] His instructions were defective.

[49] Despite that, the adviser took the position that his client was entitled to a limited refund, and did not recognise the whole instruction was established on wrong advice.

[50] Accordingly, the deficiencies in the advice given were elementary, identified by the adviser's client and still not fully understood by the adviser when identified.

[51] I am satisfied the allegation that the adviser was incompetent is made out. This is far from a simple error that the adviser identified and addressed.

A party to an unlicensed person providing immigration advice

[52] In many areas of professional and licensed practice, extensive use is made of people who do not hold the professional qualifications required of the person primarily responsible for providing the service. In some cases, those persons hold different and complementary qualifications, such as lawyers and legal executives; surgeons, nurses, and anaesthetists; pilots and first officers. Often people without formal qualifications provide essential services in these settings too, under delegation from the qualified person who is responsible for the work.

[53] If there was no legislative direction, a licensed immigration adviser could conduct their practice making extensive use of unqualified people and the practitioner would not act unreasonably or irresponsibly in doing so. Any complaint would likely require a demonstration of failure to delegate appropriately or supervise properly, if that were the law.

[54] However, the Act was (among other things) intended to put an end to a history of a small minority of advisers who exploited vulnerable migrants. The background to the Act is discussed in *ZW v Immigration Advisers Authority* [2012] NZHC 1069 and reflected in section 3 of the Act.

[55] It is evident the legislative scheme has been constructed in a manner designed to exclude unlicensed people from being engaged in the delivery of professional services to a degree that is exceptional in the regulation of professional service delivery.

[56] It was foreseeable that some people who had formerly provided immigration services, and failed to gain a licence, would seek to have a licensed person "rubber stamp" their continuing activity in the industry. Unfortunately, this Tribunal's work demonstrates that was a well-founded apprehension and an area where enforcement action has been necessary.

[57] Against that background, the policy behind the stringent restrictions in the Act on unlicensed persons providing immigration services is evident.

[58] Section 63 of the Act provides that a person commits an offence if they provide "immigration advice" without being either licensed or exempt from the requirement to be licensed.

[59] It is an offence under section 63, whether or not any part of it occurred within New Zealand (section 73).

[60] Section 7 defines the scope of "immigration advice" very broadly. It includes:

> using, or purporting to use, knowledge of or experience in immigration to advise, direct, assist, or represent another person in regard to an immigration matter relating to New Zealand ...

[61] There are exceptions. Section 7 provides that the definition does not include "clerical work, translation or interpreting services". Accordingly, the question arises as to whether the work in issue came within that exception.

[62] The scope of *clerical work* is important, as otherwise, the very wide definition of immigration advice would likely preclude any unlicensed person working in an immigration practice in any capacity.

[63] *Clerical work* is defined in section 5 of the Act in the following manner:

> **clerical work** means the provision of services in relation to an immigration matter, or to matters concerning sponsors, employers, and education providers, in which the main tasks involve all or any combination of the following:
>
> (a) the recording, organising, storing, or retrieving of information:
>
> (b) computing or data entry:
>
> (c) recording information on any form, application, request, or claim on behalf and under the direction of another person

[64] The definition refers to administrative tasks, such as keeping records, maintaining financial accounts and the like.

[65] The definition deals specifically with the role an unlicensed person may have in the process of preparing applications for visas. They may record information "on any form, application, request, or claim on behalf and under the direction of another person".

[66] The natural meaning of those words is that the unlicensed person relying on the "clerical work" exception may type or write out what another person directs.

[67] That other person may properly be the person who is making the application, a licensed immigration adviser, or a person who is exempt from licensing. The person typing or writing out the form in those circumstances is not giving immigration advice.

[68] The definition does not give any authority for the unlicensed person to make inquiries and determine what to record on the form. Under "clerical work" a person must do nothing more than "record" information as directed.

[69] The other exception in section 7 is that immigration advice does not include "providing information that is publicly available, or that is prepared or made available by the Department". This also excludes the possibility of an unlicensed person engaging with the specific factual situation of the person making an application, as they may only provide information, not advice. This exception does not arise on the facts of this case.

The facts in this case

[70] The record leaves me in no doubt the complainant principally dealt with the adviser's employees. The adviser appears to admit this, and says they did so "at all times on the instructions of the Adviser". However, the correspondence makes it clear the employees would say from time-to-time, they needed to consult with *management*, and the adviser accepts this is a reference to him.

[71] The record, and what the complainant and adviser both say, leaves no room for concluding the employees were performing clerical functions. They were engaging with the complainant and referring to the adviser as and when they thought it necessary.

[72] What occurred in this case is a foreseeable consequence of unqualified staff, dealing with matters, they could not lawfully engage with, and which were beyond their expertise and experience. It appears the adviser, even now, does not appreciate he could not conduct his practice through his employees engaging with clients on his instructions.

[73] The adviser is required to understand the stringent limits the Act places on a licensed immigration adviser. I am satisfied the adviser allowed unlicensed staff to unlawfully provide immigration advice as defined in the Act.

[74] It follows the adviser's conduct was unprofessional and he breached clauses 1.1(a) and 2.1(b) of the Code.

Conclusion

[75] I am satisfied the adviser:

[75.1] Was negligent and incompetent, which are grounds for upholding the complaint under section 44(2)(a) and (b) of the Act.

[75.2] Acted unprofessionally and in breach of the Act. He did so by allowing unlicensed employees to provide immigration advice, and breached clauses 1.1(a), and 2.1(b) of the Code, which are grounds for complaint pursuant to section 44(2)(e) of the Act.

[76] The Tribunal upholds the complaint in those respects.

Decision

[77] The Tribunal upholds the complaint pursuant to section 50 of the Act.

[78] The adviser:

[78.1] was negligent and incompetent, which are grounds for complaint pursuant to section 44(2)(a) and (b) of the Act; and

[78.2] breached the Code of Conduct in the respects identified, which are grounds for complaint pursuant to section 44(2)(e) of the Act.

[79] In other respects, the Tribunal dismisses the complaint.

Submissions on Sanctions

[80] As the Tribunal has upheld the complaint, pursuant to section 51 of the Act it may impose sanctions.

[81] 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.

[82] 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

[83] The timetable for submissions will be as follows:

[83.1] The Authority and the complainant are to make any submissions within 10 working days of the issue of this decision.

[83.2] The adviser is to make any further submissions (whether or not the Authority or the complainant makes submissions) within 15 working days of the issue of this decision.

[83.3] The Authority and the complainant may reply to any submissions made by the adviser within 5 working days of him filing and serving those submissions.

DATED at WELLINGTON this 28th day of May 2014.

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G D Pearson
Chair