

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

Direction No: [2014] NZIACDT 67

Reference No: IACDT 002/12

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Tai Lesa Samuelu

Complainant

AND

Theresa (Terry) Aasa

Adviser

DECISION

REPRESENTATION:

Registrar: In person

Complainant: Robyn Ngchok, Mangere Community Law Centre, Mangere

Adviser: In person

Date Issued: 30 May 2014

DECISION

Introduction

- [1] The essential background is the complainant sought to migrate to New Zealand under the Samoan Quota.
- [2] The complainant says:
- [2.1] He paid a substantial fee, and understood the adviser attended to all the necessary requirements.
- [2.2] One of the requirements was that the complainant would have an offer of employment in New Zealand. The adviser agreed to ensure that the complainant had an appropriate offer of employment and agreed to assist in getting one.
- [2.3] The adviser lodged an application for the complainant and his family to migrate to New Zealand.
- [2.4] Immigration New Zealand found the job offer, an essential part of the application, unsatisfactory after making inquiries.
- [2.5] Immigration New Zealand informed the adviser of the difficulty with the job offer and she failed to respond in a satisfactory manner. She provided no substantive response to Immigration New Zealand's requests.
- [2.6] She failed to inform the complainant of what had happened, he had to make his own inquiries with Immigration New Zealand.
- [3] The essence of the complaint is the adviser took fees, lodged an application that was not satisfactory, failed to communicate regarding the application, including both the difficulties identified by Immigration New Zealand and their consequent decision to decline the application. This the complainant says was a dishonest process where the adviser made, and intended to make, no real effort to lodge a successful application.
- [4] Furthermore, the complainant says he left the issue of gaining a job offer in the hands of the adviser, he took assurance from the fact the adviser considered the job offer was sufficient to lodge the application.
- [5] The adviser appears to dispute the complaint, but has not responded in a manner that addresses the complaint she faces, aside from general responses of maintaining professional standards.
- [6] The Tribunal issued an interim decision identifying why the material before it was potentially sufficient to uphold the complaint. The adviser has not responded. This decision is a final decision upholding the grounds of complaint on the grounds indicated in the interim decision.

The Complaint

- [7] This decision follows the interim decision the Tribunal issued on the complaint, dated 11 March 2014.
- [8] The interim decision put the adviser on notice she was at risk of findings that:
- [8.1] She negligently failed to ensure the job offer supporting the complainant's application to Immigration New Zealand met Immigration New Zealand's requirements. Further, she failed to address concerns Immigration New Zealand had regarding the job offer.
- [8.2] She was incompetent on the same grounds she was negligent and, in addition, failed to communicate with the complainant regarding the application to Immigration New Zealand.

- [8.3] The adviser engaged in dishonest or misleading behaviour, as she induced the complainant to believe she was providing a professional service and did not intend to do so in an effective and diligent manner. After securing the payment of fees, she failed to pursue her instructions and had that intention from the outset.
- [8.4] She breached the Licensed Immigration Advisers Code of Conduct 2010 (the Code), as she:
- [8.4.1] Failed to prepare, lodge and pursue the complainant's application with due care, diligence and professionalism (clause 1 of the Code of Conduct).
 - [8.4.2] She failed to communicate with her client as required by clause 3 of the Code of Conduct.
 - [8.4.3] Provided no services of value so was required to refund fees in full and failed to do so (clauses 8 and 3 of the Code of Conduct).

The Adviser's Opportunity to Respond

- [9] The adviser acknowledged receipt of the interim decision, and was allowed additional time to respond. She has not responded with any substantive evidence or submissions.

Discussion

The standard of proof

- [10] 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].
- [11] It is necessary to address the allegations against the adviser and consider the factual basis for each of them.

Background

- [12] The Adviser was required to maintain full written records of her engagement (refer clause 3 of the Code).
- [13] She faces allegations of negligence, incompetence, dishonest or misleading behaviour, and breaches of the Code.
- [14] She received a statement of complaint lodged by the Registrar and the Tribunal put her on notice she was required to file a statement of reply if she disputed the contents of the statement of complaint. The Tribunal pointed out the potential findings open to it on the evidence in the interim decision.
- [15] The adviser has provided no meaningful response to the allegations against her.
- [16] If the adviser complied with the Code of Conduct, she should be in a position to provide a fully documented contemporaneous record that answers the allegations against her.
- [17] Given the adviser's failure to respond to the complaint, I proceed on the basis the adviser has not answered the allegations against her. Accordingly, I must give the allegations weight and recognise the adviser has not challenged them.
- [18] The central issue in the complaint is that the complainant had the opportunity to migrate to New Zealand with his family from Samoa. The complainant applied under the *Samoan Quota*, and Immigration New Zealand selected him. The complainant had to have a job offer for the family to migrate. Without a job offer, the migration opportunity would lapse.
- [19] The opportunity was plainly an important one for the complainant and all his family.
- [20] The adviser accepts she took responsibility for assisting the complainant to get a job offer; and of course, it was an essential part of her professional duties to ensure that the job offer

accompanying the family's residence application met Immigration New Zealand's requirements.

- [21] The adviser submitted a job offer accompanied with a letter from the prospective employer. The letter itself raises concerns. The letter purports to be written by a person named Jacky Chan as the director of a company named CK Industries Ltd. The letter has no address other than a post office box number, and there is no telephone number shown either.
- [22] Immigration New Zealand investigated whether the job offer was genuine. Immigration New Zealand wrote to Jacky Chan using the post office box address making routine inquiries. There was no response. Immigration New Zealand's final verification report recorded:
- [22.1] There was no response to inquiries.
- [22.2] The company had no telephone directory listing.
- [22.3] It had no website.
- [23] The adviser has been on notice she faces potential findings of serious professional offending, and reminded of the fact she had to keep full business records (Code clause 3). However, she has not provided any documentation to show she made proper inquiries and or established grounds for thinking the employment offer was genuine.
- [24] The inquiries Immigration New Zealand wanted to make included things such as:
- [24.1] Confirming the job offer was still open and real.
- [24.2] Finding out how the complainant obtained the job offer.
- [24.3] Having the employer supply a copy of its bank records, tax position, financial statements, and other information to verify financial stability.
- [24.4] Getting a record of the current employees and details of the employer's business history.
- [25] Immigration New Zealand's inquiries were foreseeable. When obtaining the job offer, the adviser plainly needed to communicate with the prospective employer to ensure a satisfactory response would be forthcoming.
- [26] The adviser says she was dealing with a Mr David Tan, and he communicated with Jacky Chan. She has provided no written record to support that claim. The adviser says she was contacting Mr Tan every day, and making additional enquiries with other companies. She has provided no written record to support that claim. Indeed, she says her "entire office and entire team worked tirelessly to try and salvage the application with another job offer"; but produced no written record to support that either.

Negligence

- [27] The first aspect of the complaint is that the adviser negligently failed to ensure the job offer, supporting the complainant's application to Immigration New Zealand, met Immigration New Zealand's requirements and that she further negligently failed to address concerns that Immigration New Zealand had regarding the job offer.
- [28] It appears beyond dispute the job offer was not satisfactory, the complainant's position is the adviser was responsible for addressing this aspect of the application. The adviser accepts that is correct.
- [29] The adviser has not provided an explanation that establishes she made any or adequate investigations as to the suitability of the job offer. The adviser has not explained the circumstances leading to the job offer and documentation.
- [30] It is clear the letter containing the offer looks potentially bogus, it is also clear the writer of the letter did not respond to routine inquiries from Immigration New Zealand. In these circumstances, I am satisfied it is probable the adviser failed to take proper steps to procure a

genuine job offer. That she submitted the complainant's application relying on an unsatisfactory job offer. The job offer was an essential foundation for the application. Accordingly, I am satisfied the adviser was negligent as she failed to deal professionally with an elementary and essential aspect of the application adequately.

Incompetence

[31] The second aspect of the complaint is the adviser was incompetent on the same grounds she was negligent and, in addition, failed to communicate with the complainant regarding the application to Immigration New Zealand.

[32] To find incompetence it is necessary to find the adviser did more than lapse below acceptable standards. 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.

[33] The essential Oxford Dictionaries definition of *incompetence* is:

Inability to do something successfully; ineptitude.

(Oxford Dictionary (29 April 2014) <www.oxforddictionaries.com>)

[34] It is similarly defined in *Black's Law Dictionary*:

The state or fact of being unable or unqualified to do something.

[35] Accordingly, I take the approach that to establish incompetence, it is necessary to find the adviser lacked the skill or ability to perform her professional duty. 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 she provided her professional services without the knowledge or skill required to meet minimum professional standards.

[36] I am satisfied the material before me does establish incompetence. First, the aspect of the application the adviser failed to address adequately was elementary. Immigration New Zealand has clear requirements and there is no evidence the adviser either considered, or applied them. Second, the adviser has not identified her error and addressed it. There is an apparent lack of comprehension regarding what her professional duties were and what she should have done to discharge them.

[37] The adviser has provided an explanation regarding communication; in essence, she suggested he did not have a contact address. The explanation is unsatisfactory, as she needed to establish a means of effective communication. However, the point does not add materially to the finding.

Dishonest or misleading behaviour

[38] The complaint is the adviser engaged in dishonest or misleading behaviour, as she induced the complainant to believe she was providing a professional service when she did not intend to do so in an effective and diligent manner. After securing the payment of fees, she failed to pursue her instructions and had that intention from the outset.

[39] Unfortunately, this is a familiar ground of complaint. Many decisions of the Tribunal deal with advisers who are incompetent, lack the skills to perform at the requisite professional standard, or choose not to meet those standards. They solicit fees, fail to provide the promised services and then fail to account for the fees despite having failed to deliver the promised services.

[40] I am satisfied this ground of complaint has been established. The fees charged were substantial and the services a far from the minimum standard; when difficulties arose, the adviser took no adequate steps to rectify the situation and then failed to take financial responsibility for the failure to deliver the services promised.

- [41] A key element in the present circumstances is the job offer, which was potentially bogus in the sense the prospective employer did not intend to follow through with the offer of employment. That is certainly consistent with the failure to respond to Immigration New Zealand's inquiries. It is to say the least concerning that the prospective employer did not even respond to inquiries. Further, that normal means of communication and a physical address were absent from the employer's letter.
- [42] Having regard to the sliding scale of proof, mentioned above at paragraph[10], the issue is whether I am satisfied that the material before me establishes the adviser solicited fees without intending to deliver the professional services she promised and that she induced the payment of fees by dishonestly misleading the complainant to think she would perform the services.
- [43] In evaluating the material before me, the first factor is the job offer on its face appears potentially bogus. I can speculate the adviser could have procured a job offer that was not satisfactory or genuine through, incompetence, naivety, carelessness, being duped or a range of other circumstances that do not involve her dishonesty. However, she has not provided an explanation that raises or establishes any of those explanations.
- [44] I am satisfied that the following elements, evident on the material before the Tribunal, make it probable the adviser was aware the job offer would inevitably lead to a failed application:
- [44.1] The face of the letter relating to the job offer raises concerns.
- [44.2] The adviser was personally responsible for arranging the job offer, she needed to go through a process of introducing the employee and employer, and explaining the information the employer would have to provide to Immigration New Zealand. The adviser provided no evidence that occurred.
- [44.3] The adviser's explanation suggests she never communicated direct with Jacky Chan, the purported director of the prospective employer, and author of the letter.
- [44.4] The adviser was dealing with a family whose application had important implications for them. She carried a serious burden of professional responsibility to assist the family to achieve their objectives. However, she has no records that establish she made any reasonable effort to ensure the job offer would meet the necessary standards.
- [45] I am very conscious finding the adviser solicited fees without intending to provide services is at the most serious end of the scale. However, I am sure the material before me makes it probable the adviser solicited fees, and then simply "went through the motions", realising the result would be a failed application.
- [46] The adviser's strategy appears to incorporate the excuse she offered in her explanation to the Authority:
- "As part of our [terms of service] we state that we would assist with a job offer as part of our services which indeed we did honour, however it is also clearly stated that the ultimate and final decision lies with Immigration New Zealand and that in no way do we guarantee the success of an application ..."
- [47] The adviser failed to refund fees, despite Immigration New Zealand pointing out clearly the application failed not due to some unforeseen nuance of immigration policy; but the job offer the adviser presented could never result in a successful application. The adviser has wholly failed to explain how she could have ever thought otherwise; despite the interim decision putting her on notice the Tribunal may reach this conclusion. She has produced no evidence of making a genuine search for a job offer.

Breaches of the Code

- [48] The adviser is alleged to have breached the Code, as she:
- [48.1] Failed to prepare, lodge and pursue the complainant's application with due care, diligence and professionalism (clause 1 of the Code).
- [48.2] Failed to communicate with her client as required by clause 3 of the Code.

- [48.3] Provided no services of value (clause 8 required her to charge fair and reasonable fees). Accordingly, she was required to refund fees in full (clause 3 d) at the end of the instruction.
- [49] I am satisfied these grounds of complaint are established.
- [50] For the reasons discussed in relation to incompetence and negligence, the application was defective and that resulted from a lack of care.
- [51] I am also satisfied the adviser failed to act with diligence and professionalism. An adviser acting with diligence and professionalism could not have submitted the application with the defective job offer. The adviser would have ensured the prospective employer fully understood the inquiries, and commitment that would follow. Further, when Immigration New Zealand identified the problem, a diligent and professional adviser would have provided an explanation; including an explanation for the first failed job offer and some sensible strategy to find an alternative job offer or withdraw the application. Instead, the adviser allowed Immigration New Zealand's final time limit to expire and the application to fail.
- [52] The adviser claims she could not communicate with her client. She was obliged to put a communications strategy in place. Without being able to contact the complainant, she could not have accepted the instructions. She had to arrange a telephone interview with prospective employers and the like if she was to perform her instructions. I am satisfied that ground is established.
- [53] I am satisfied the adviser provided no services of value (and was obliged to charge fair and reasonable fees pursuant to Clause 8), was obliged to refund fees in full (clause 3 d)) and failed to do so.

Decision

- [54] The Tribunal upholds the complaint pursuant to section 50 of the Act.
- [55] The following grounds for upholding the complaint have been established:
- [55.1] Negligence (section 44(2)(a)),
- [55.2] Incompetence (section 44(2)(b)),
- [55.3] Dishonest and misleading behaviour (section 44(2)(d)), and
- [55.4] Breach of the Code of Conduct in the respects identified, which are grounds for complaint pursuant to section 44(2)(e) of the Act.

Submissions on Sanctions

- [56] As the Tribunal has upheld the complaint, pursuant to section 51 of the Act it may impose sanctions.
- [57] 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.
- [58] 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

- [59] The timetable for submissions will be as follows:
- [59.1] The Authority and the complainant are to make any submissions within 10 working days of the issue of this decision.

- [59.2] 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.
- [59.3] The Authority and the complainant may reply to any submissions made by the adviser within 5 working days of the adviser filing and serving those submissions.

DATED at WELLINGTON this 30th day of May 2014.

G D Pearson
Chair