

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

Decision No: [2014] NZIACDT 69

Reference No: IACDT 066/12

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Maina Elisara

Complainant

AND

Theresa (Terry) Aasa

Adviser

DECISION

REPRESENTATION:

Registrar: In person

Complainant: In person

Adviser: In person

Date Issued: 19 June 2014

DECISION

Introduction

- [1] The essential background is that the complainant sought to migrate to New Zealand and apply for a residence class visa under the Samoan Quota scheme. Whilst still in Samoa, she engaged the adviser who lodged an application for her; the application included a job offer, a necessary part of the application, which the adviser had arranged.
- [2] The complainant says:
- [2.1] She did not know about the particular job offer at the time the adviser lodged it with her application.
- [2.2] The adviser failed to make any adequate response when Immigration New Zealand raised its concerns regarding the job offer and the complainant does not think the offer was genuine.
- [2.3] The adviser took nearly a month to tell the complainant that her application had failed.
- [3] The grounds of complaint are that the adviser was negligent, incompetent, and proceeded without getting the complainant's instructions. She then failed to tell the complainant her application had failed.
- [4] The central issues first involve identifying what the adviser was required to do when obtaining the job offer. Then considering whether she responded properly, when Immigration New Zealand raised concerns, and when Immigration New Zealand rejected the residence application.
- [5] This decision upholds the grounds of complaint.

The Statement of Complaint

- [6] 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 against the adviser:
- [6.1] She negligently failed to respond to Immigration New Zealand's concerns regarding the complainant's application and did not seek further time to respond until the deadline expired. She then failed to provide a substantive response.
- [6.2] She was incompetent for the same reasons she was negligent.
- [6.3] She breached the Licensed Immigration Advisers Code of Conduct 2010 (the Code), as she:
- [6.3.1] Failed to carry out the lawful informed instructions of the complainant; with due care, diligence, respect and professionalism (Clause 1 of the Code of Conduct). In particular, the adviser procured an unsatisfactory job offer without communication with the complainant.
- [6.3.2] She failed to provide timely updates to her client as required by Clause 3(a) of the Code of Conduct. In particular, she did not report that the complainant's application had failed for approximately a month.
- [7] The initial complaint, lodged by the complainant with the Immigration Advisers Authority, also alleged the adviser engaged in dishonest or misleading behaviour. In particular, the job offer the adviser purported to procure appeared to be "fake". The complainant pointed to the documentation which lacked certain particulars which she said made it appear "phoney", and the offer appeared without her being part of a candidate selection process. The Registrar did

not identify dishonest or misleading behaviour as a ground of complaint supported on the material filed with the Tribunal.

- [8] The Registrar identified the material facts supporting the allegations set out in the Statement of Complaint. In essence, the alleged facts were as follows:
- [8.1] The adviser assisted the complainant with her residence application under the Samoan Quota scheme.
 - [8.2] To qualify for a visa the complainant had to have an acceptable offer of employment.
 - [8.3] The adviser lodged the visa application with an offer of employment on 11 February 2011 or thereabouts.
 - [8.4] Immigration New Zealand requested further information from the prospective employer and, having received no response, on 8 April 2011 requested further information from the adviser regarding the offer of employment.
 - [8.5] On 23 April 2011, Immigration New Zealand wrote to the adviser identifying concerns regarding the employment offer, allowing until 16 May 2011 for a response.
 - [8.6] The adviser requested an extension of time on 18 May 2011, which Immigration New Zealand allowed, extending the time to 1 June 2011.
 - [8.7] The adviser failed to respond and the visa application failed.
- [9] The Statement of Complaint provided particulars of the grounds of complaint:
- [9.1] The adviser was potentially negligent (section 44(2)(a) of the Act) as:
 - [9.1.1] She failed to respond to Immigration New Zealand's request for information, and sought an extension of time after the deadline expired.
 - [9.1.2] She then failed to provide a substantive response when given further time.
- [10] The adviser was potentially incompetent (section 44(2)(b) of the Act) as she failed to address Immigration New Zealand's concerns regarding the job offer.
- [11] The adviser potentially breached her duties of care, diligence and professionalism (clause 1.1(b) of the Code) as:
- [11.1] The adviser submitted documents relating to a job offer without informing the complainant of what the adviser submitted to Immigration New Zealand.
 - [11.2] The complainant had to be aware of the details relating to the job offer to provide informed instructions.
- [12] The adviser also potentially breached her obligation to provide timely updates (clause 3(a) of the Code); as she notified the complainant her application failed on 1 July 2011, approximately one month after Immigration New Zealand declined the application.
- [13] Additionally, the Statement of Complaint put the adviser on notice that the complainant's alternative ground of complaint, namely dishonest or misleading behaviour, was also open for consideration by the Tribunal. The complainant had advanced that element of the complaint on the basis the adviser had knowingly procured a bogus job offer and used that to lodge the application, without informing her.

The Adviser's Response

- [14] The adviser responded to the Statement of Complaint with a Statement of Reply.
- [15] In essence, the adviser's response to the complaint is:
- [15.1] She was engaged to assist with the complainant's residence application late, after the complainant had tried to obtain a job offer with her family's assistance.
 - [15.2] The adviser procured a job offer with a company.
 - [15.3] The adviser was accommodating in relation to the payment of fees.
 - [15.4] The complainant failed to pay fees.
 - [15.5] The complainant's allegations are false.
 - [15.6] The job offer was one of eight extended to the adviser's clients by the same company. The company withdrew the job offers. The adviser approached other prospective employers and found six positions, but could not find one for the complainant. The adviser did not provide any evidence corroborating this claim.
 - [15.7] She described the allegation the job offer was bogus as absurd.

The Complainant's Reply

- [16] The complainant responded to the adviser's Statement of Reply. The key points were:
- [16.1] The complainant outlined the dealings she had with the adviser and her practice.
 - [16.2] She complied with her obligations.
 - [16.3] She noted the adviser provided no evidence of seeking alternative job offers.
 - [16.4] The job offer provided by the adviser was not on letterhead and appeared not to be genuine. The complainant had tried to follow up the prospective employer using contact details provided by the adviser, but persons answering the telephone denied knowledge of the company.

Discussion

The standard of proof

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

The material before the Tribunal

- [19] The Adviser was required to maintain full records of her engagement (refer clause 3 of the Code).
- [20] She faces allegations of negligence, incompetence, dishonest or misleading behaviour, and breaches of the Code.
- [21] She received a Statement of Complaint lodged by the Registrar and a copy of the initial complaint in which the complainant has claimed the job offer was not genuine.
- [22] While the adviser has provided a written response to the critical elements of the complaint, she has not provided any evidence corroborating her account. Critically there is no evidence of

correspondence with the prospective employer or her alleged attempts to secure another offer of employment for the complainant after Immigration New Zealand raised issues about the first offer.

- [23] 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. In the absence of such evidence the Tribunal is entitled to prefer the complainant's account.

Negligence

- [24] The first aspect of the complaint is that the adviser negligently failed to respond to Immigration New Zealand's concerns regarding the job offer, applied for an extension after the deadline expired, and then failed to provide a satisfactory response.

- [25] The context, however, requires consideration of the circumstances in which the adviser procured the job offer and presented it to Immigration New Zealand.

- [26] When lodging the residence application the adviser was required to provide evidence of a job offer that met Immigration New Zealand's requirements.

- [27] The job offer was not satisfactory. The adviser says it was genuine but later withdrawn by the employer; she has provided no documentation to corroborate this. The complainant's position is the adviser was responsible for addressing this aspect of the application. The adviser accepts that is correct, though says the situation was difficult as the complainant attempted to find a job offer herself first. Regardless, the adviser's professional responsibility was to present a job offer that met the requirements when she filed the application or explain to her client she was not in a position to lodge the residence application as no suitable job offer was available.

- [28] 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 its associated documentation. The complainant says she knew nothing of the job offer until after the adviser filed it; and was suspicious when she did see the documentation, as it lacked significant particulars.

- [29] The letter containing the offer looks potentially "fake", as the complainant alleges. It lacks a physical address and telephone number. The job offer was an essential foundation for the application. The adviser has provided no evidence of making any inquiries regarding the job offer, arranging a telephone interview, providing a CV to the prospective employer or the like.

- [30] I am satisfied the adviser was in a position where she could not respond to Immigration New Zealand satisfactorily as there was no satisfactory explanation. There is no evidence the job offer ever met Immigration New Zealand's stringent requirements. The adviser claims she sought an alternative position, but has provided no evidence of that.

- [31] Accordingly, I am satisfied the adviser was negligent as she wholly failed to respond to Immigration New Zealand's inevitable inquiries regarding the job offer.

- [32] The adviser had an obligation to support the job offer, or explain why she could not do so. At very least she was required to address the situation by consulting with her client and then dealing with Immigration New Zealand on the basis of whatever lawful, informed instructions she received. She failed to ensure the job offer met the requirements before lodging the residence application and then negligently failed respond to the concerns raised by Immigration New Zealand.

Incompetence

- [33] 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.

[34] 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.

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

Inability to do something successfully; ineptitude.

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

[36] It is similarly defined in *Black’s Law Dictionary*:

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

(*Black’s Law Dictionary* (9th ed, 2009, online ed) at incompetence definition),

[37] 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.

[38] 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 the adviser has provided no evidence she either considered, or addressed them. Second, the adviser has not provided evidence that she 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.

[39] I am accordingly satisfied the circumstances that establish negligence, also establish incompetence, in this instance.

Breaches of the Code

[40] The adviser is alleged to have breached the Licensed Immigration Advisers Code of Conduct 2010 (the Code), as she:

[41] Failed to carry out the lawful informed instructions of the complainant in that she failed to prepare, lodge and pursue the Complainant’s application with due care, diligence and professionalism (clause 1.1 (b) of the Code of Conduct).

[42] Failed to report to her client as required by clause 3(a) of the Code of Conduct.

[43] I am satisfied these grounds of complaint are established.

[44] For the reasons discussed in relation to incompetence and negligence, the application was defective, and that proceeded from a lack of care. The application should not have been lodged without the adviser satisfying herself the job offer she procured and presented could be supported.

[45] I am also satisfied the adviser failed to act with due diligence and professionalism. The defective application, and the lack of response when Immigration New Zealand was not satisfied with the application, is evidence of both. The adviser has provided nothing to suggest an alternative explanation.

[46] Further, the adviser failed to take instructions from her client. When the complainant eventually received the documentation relating to the job offer, she justifiably expressed concern that the job offer appeared “fake”. Before lodging the application, the adviser had an obligation to engage with her client, inform her of the job offer and take her instructions. She failed to do that, the same applies to her failure to engage with her client and take instructions when Immigration New Zealand queried the job offer.

[47] The adviser failed to report the failed application for approximately a month and has not explained or justified that. I am satisfied she failed to report as required in clause 3(a) of the Code.

Dishonest or misleading behaviour

[48] The complainant's allegation of dishonest or misleading behaviour relies on the allegation that the job offer was bogus and the adviser filed it with that knowledge.

[49] The Statement of Complaint did not present evidence to support a finding of dishonest or misleading behaviour.

[50] It appears beyond dispute the job offer was not satisfactory.

[51] I am satisfied the adviser failed to make proper investigations and get instructions concerning the job offer; and failed to provide sufficient information to respond appropriately to Immigration New Zealand's inquiries. However, the complaint is before the Tribunal on the grounds those findings establish only negligence or incompetence.

[52] There is no allegation the adviser dishonestly used a bogus job offer to induce the complainant to pay fees and go through a *pro forma* process of lodging a hopeless application.

[53] There are certainly grounds for suspicion the job offer was bogus. The documentation does not have a physical address on it, the name of the director is the same as a well-known actor and the complainant could not locate the director when making inquiries. None of that proves the job offer was bogus, however there can be no surprise Immigration New Zealand expected authentication and it was not forthcoming.

[54] Immigration New Zealand was not satisfied the job offer was satisfactory; however, the material in support of the complaint does not provide details of the reasons for Immigration New Zealand reaching that view. Nor does it contain any evidence of Immigration New Zealand making inquiries that established the job offer was bogus.

[55] To uphold this aspect of the complaint I would, at the least, need to be satisfied both that the job offer was bogus and that the adviser used it to mislead the complainant and/or Immigration New Zealand. The adviser is entitled to the benefit of the doubt on the material presented in support of this complaint. The evidence supporting this complaint only goes to the point of establishing the adviser was negligent, incompetent and failed to meet professional duties in relation to the job offer.

[56] The Tribunal notes that this allegation of dishonest and misleading behaviour currently before the Tribunal is significantly different from a separate complaint recently upheld against the adviser. In that instance the allegation was made on the basis the adviser 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.

[57] Despite the similarity of facts in the two cases, the allegation of dishonest and misleading behaviour in each complaint is different. Because of this, the requirements of natural justice, and some evidential differences, the Tribunal has determined the allegation of dishonest and misleading behaviour differently in the two complaints.

Decision

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

[59] The following grounds for upholding the complaint have been established:

[59.1] Negligence (section 44(2)(a)),

[59.2] Incompetence (section 44(2)(b)),

[59.3] 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

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

[61] 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.

[62] 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

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

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

[63.2] 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.

[63.3] 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 19th day of June 2014.

G D Pearson
Chair