

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

Decision No: [2014] NZIACDT 9

Reference No: IACDT 017/12

**IN THE MATTER**

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

**BY**

**The Registrar of Immigration Advisers**

Registrar

**BETWEEN**

**BL and UL**

Complainants

**AND**

**AX**

Adviser

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**DECISION**

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**REPRESENTATION:**

**Registrar:** In person.

**Complainants:** Mr H Hakaoro, Auckland.

**Adviser:** In person.

Date Issued: 5 February 2014

## DECISION

### Preliminary

- [1] The Registrar received a complaint relating to the adviser.
- [2] The basis of the complaint was the adviser failed to exercise proper and adequate supervision in the course of supervising another licensed immigration adviser. The person subject to the supervision (the provisional licence holder) only held a provisional licence, so supervision was mandatory under the Act.
- [3] The issue arose as the complainants say they gave instructions to the provisional licence holder to lodge an appeal against Immigration New Zealand's decision to decline a residence visa, and paid her for that work. However, she did not lodge the appeal.
- [4] The adviser does not dispute that the complainants may have grounds for complaint, but says he did supervise the provisional licence holder properly. He says the problem was that the provisional licence holder failed to disclose to him anything of the matter. This, he says, was despite him taking all reasonable actions to ensure he knew of all the work the provisional licence holder was engaged with.
- [5] The Tribunal has determined it must dismiss the complaint as it relates to the adviser. The adviser's claim as to his level of supervision is unchallenged, and the Tribunal is satisfied it was adequate in relation to the circumstances arising in the complaint.

### Discussion

#### *The complaint*

- [6] On the basis of papers before the Tribunal, the material facts on which the complaint is based are:

#### *The background*

- [6.1] A material restriction on a provisional licence is the requirement that the holder must work under the "direct supervision of a fully licensed immigration adviser for 12 months" (section 19 of the Act).
- [6.2] The adviser was providing the provisional licence holder's direct supervision. He had that role from 23 September 2010 when the provisional licence was issued, until 23 September 2011 when it lapsed.
- [6.3] The complaint relates to instructions received in April 2011.
- [6.4] The complainants had unsuccessfully sought residence visas in New Zealand and wanted to appeal to the Immigration and Protection Tribunal against that decision.
- [6.5] The instructions for the appeal commenced in Tonga, where the provisional licence holder had an office at the time. The office in Tonga was not where she usually did immigration work, which was in Auckland.

#### *The basis of the complaint*

- [6.6] The complainants say they provided all necessary information to the provisional licence holder's office and paid the fees. They say they only dealt with the provisional licence holder once, and later dealings, it appears, were with other persons at the office in Tonga.
- [6.7] Persons, other than the provisional licence holder, told the complainants the appeal was "in process", which was untrue as it had not been filed.

[6.8] On 22 February 2012, the complainants' new adviser approached the adviser and notified him of their concern that an appeal had not been filed, despite full instructions having been given.

[6.9] The adviser responded saying he knew nothing of the matter, but had raised the concern with the provisional licence holder and had been told that her only role had been a brief communication before leaving Tonga.

*The preliminary issue*

[7] The focus of the complaint is on the failure to lodge an appeal when holding complete instructions to do so. There is a secondary issue relating to whether payments were client funds and not accounted for.

[8] However, in relation to the adviser, the preliminary issue is the extent of his responsibility as a supervisor of a provisional licence holder. If he properly discharged his duties as a supervisor and had no contact with the complainants, then the Tribunal must dismiss the complaint against him. In that instance, the complaint would lie solely with the provisional licence holder.

[9] Only if there was a failure in supervision or the adviser was personally engaged by the complainants, would the Tribunal need to examine the failure to deal properly with the instructions.

*The adviser's Statement of Reply*

[10] The adviser's Statement of Reply makes two material responses to the complaint in relation to his responsibility:

[10.1] That the provisional licence holder has claimed she only had a preliminary discussion and the potential clients did not engage her at that time. She claimed persons in her Tonga office had potentially acted dishonestly.

[10.2] Regardless, the adviser properly discharged his supervision duties and neither knew of, nor could have reasonably found out about, the complainant's instructions.

[11] The adviser produced a substantial volume of information regarding his supervision of the provisional licence holder. For present purposes it suffices to say it involved:

[11.1] A formal contract;

[11.2] Instruction in professional responsibilities;

[11.3] Monitoring of all formal documentation and correspondence;

[11.4] Meetings twice weekly, and later once weekly reviewing instructions and the work carried out;

[11.5] Joint meetings with clients where appropriate; and

[11.6] Dealing with instances where the provisional licence holder acted without informing the adviser. Where that had occurred, he produced evidence of him taking remedial action.

[12] He says that after the complaint he began to be concerned the provisional licence holder had not honoured the agreement to provide the adviser with the information he required to supervise her. The complainants' case was, he says, a matter of which he had no knowledge, but potentially would have, if the provisional licence holder had honoured her obligations.

*Other responses*

[13] The complainants did not lodge a Statement of Reply and were not required to do so if they accepted the terms of the Registrar's Statement of Complaint. Neither the Registrar nor the complainants have replied to the adviser's Statement of Reply.

*Facts – conclusions*

- [14] The adviser has put forward his position regarding his supervision, the provisional licence holder's failure to comply with the contract for supervision, and that he only became aware of the extent of her non-compliance after the complaint. This he says, led to him not knowing of the matters giving rise to the complaint, despite having taken reasonable steps to prevent an issue like this occurring.
- [15] The papers before the Tribunal are consistent with the adviser's claim. Furthermore, neither the Registrar nor the complainants have taken issue with the adviser's Statement of Reply.
- [16] Accordingly, I accept the adviser's account regarding his role in the matter, which is noted above under the heading "*The adviser's Statement of Reply*".
- [17] In light of the conclusions reached below, it is not necessary to deal with the issue regarding what the provisional licence holder knew of the instructions and what occurred in her office in Tonga. There is a complaint before the Tribunal relating to that matter and the present complaint can be determined without making findings on the issue.

*The relevant issue*

- [18] The issue is whether the supervision exercised by the adviser was sufficient to comply with the requirement for "direct supervision" contained in section 19(5) of the Act.
- [19] The adviser says he did implement and apply an effective regime of direct supervision through contractual obligations, instruction and guidance, comprehensive monitoring of documents and correspondence, reviews, engaging with clients, and responding when there was any irregularity.
- [20] It is necessary to determine whether the adviser is correct.

*Was the supervision adequate?*

- [21] There is no doubt supervision is an important professional obligation, the supervisor owes duties to both their colleague holding a provisional licence and the consumers, who should expect to receive professional service delivery that fully complies with the Code of Conduct and the Act.
- [22] In principle, the steps the adviser has described must amount to direct supervision, unless the phrase is to mean that the provisional licence holder can be little more than an observer. In regimes where persons gain professional skills and experience in a professional practice, it is usual for the person learning to engage personally in the professional task.
- [23] The most problematic issue in this instance is that the adviser and the provisional licence holder were not continually in the same office. The adviser says they were in the same office for part of each week. However, the view is potentially open that direct supervision requires a supervisor and the person supervised to work at the same site.
- [24] Some professional codes require this, as otherwise, a person could effectively be acting as an unsupervised principal, with a licence holder delegating the day-to-day control of a branch office to a person who is not qualified.
- [25] However, it is also necessary to be mindful that changes in communications and technology have altered the extent to which persons can work together at a geographic distance. The Act contemplates provisional licence holders may be practising throughout the world, and a qualified supervisor may not be available in the same country. Supervision at the same site may be impossible. Accordingly, I would be reluctant to take a narrow view of the arrangements that may comply, without full argument.
- [26] However, this complaint is not a case where it is necessary to decide the full scope of "direct supervision", other than to note it is a strict test and that, while there may be a range of means of compliance, the supervision must be effective.

- [27] This complaint arose out of a situation where the provisional licence holder was attending a remote office. She did not usually work there.
- [28] It is not entirely clear what occurred at that office. However, it seems that the provisional licence holder had a business at this office and that business was separate from immigration matters, as she had conducted this business before holding a provisional licence.
- [29] In the circumstances, the adviser is entitled to the benefit of the doubt. I can be satisfied of no more than that it appeared to the adviser that the provisional licence holder from time to time visited her office offshore, and would receive referrals when she was there. I am satisfied that does not in itself step outside of the scope of direct supervision.
- [30] Furthermore, the adviser had a regime in place that, if the provisional licence holder complied with the adviser's clearly stated requirements, she would have told the adviser of any instructions received in that office promptly. She did not do so in relation to the matters arising in the complaint; she claims she did not get instructions.
- [31] On the material before me, I cannot find either that the circumstances relating to this matter fell outside of the scope of direct supervision or that there was any fault on the part of the adviser in relation to the supervision.
- [32] I have considered the question as to whether the adviser should have appreciated that the provisional licence holder was not disclosing all instructions, and taken preventative action. However, the materials before me do not establish that the adviser had seen more than occasional irregularities. It would be wrong to magnify the importance of relatively minor irregularities using the perspective of hindsight.
- [33] Accordingly, I find the material before me does not establish the adviser fell short of his duty to provide direct supervision or any other any material professional standard in the Code of Conduct or the Act.

### **Decision**

- [34] The Tribunal dismisses the complaint, as far as it relates to the adviser, pursuant to section 50 of the Immigration Advisers Licensing Act 2007.

**DATED** at WELLINGTON this 5<sup>th</sup> day of February 2014

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**G D Pearson**  
Chair