

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

Decision No: [2015] NZIACDT 10

Reference No: IACDT 037/14

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Lenice Mandy February

Complainant

AND

Gregory Francisco Smith

Adviser

DECISION

REPRESENTATION:

Registrar: In person

Complainant: In person

Adviser: In person

Date Issued: 20 February 2015

DECISION

Introduction

- [1] The Registrar of the Immigration Advisers Authority referred this complaint to the Tribunal. The grounds are uncomplicated. The Statement of Complaint identifies the grounds of complaint being that Mr Smith as a licensed immigration adviser accepted instructions to apply for a visa. He failed to progress the application, and failed to communicate. The complainant lodged a complaint; the Registrar issued a statutory notice requiring Mr Smith to produce his file, he failed to do so.
- [2] Mr Smith has not responded to the complaint with an explanation or justification addressing grounds of complaint.
- [3] The Tribunal has concluded it must uphold the complaint, as the material before it establishes Mr Smith failed to provide the services he agreed to provide, failed to communicate with his client, was unavailable to her when she tried to contact him; and he failed to comply with his statutory duties when the Registrar investigated the complaint.

The Complaint

- [4] The Registrar filed a statement of complaint, she put forward the following background as the basis for the complaint:
 - [4.1] The complainant engaged Mr Smith to assist with a request for a visa for her, and her partner. She paid him an initial fee of \$184. On 18 June 2013 the complainant and her partner signed an agreement in which Mr Smith agreed to provide immigration services, in particular applying for visas under section 61 of the Immigration Act 2009 by 24 June 2013. They paid Mr Smith \$900 for these services.
 - [4.2] Between 24 June and 16 August 2013 the complainant made repeated attempts to contact Mr Smith, he had not lodged the section 61 requests, did not make contact with his clients, and was not available to them when they attempted to make contact.
 - [4.3] On 18 August 2013, Mr Smith wrote to the complainant seeking her address so he could return documents, and pay a refund.
 - [4.4] On 30 June 2014, the Registrar issued a statutory demand under section 57 of the Immigration Advisers Licensing Act 2007 (the Act), Mr Smith did not supply his file.
- [5] The Registrar identified potential infringements of professional standards. They were:
 - [5.1] That Mr Smith negligently failed to deliver the services he agreed, and failed to communicate with his clients appropriately. Negligence is a ground for complaint under section 44(2) of the Immigration Advisers Licensing Act 2007 (the Act). Furthermore, the same conduct was a breach of clause 1.1(a) of the Licensed Immigration Advisers Code of Conduct 2010 (the 2010 Code) which required Mr Smith to perform his services with professionalism.
 - [5.2] He did not provide a copy of his client file when the Registrar required him to do so by issuing a statutory demand under section 57 of the Act, and accordingly breached clause 3(c) of the Licensed Immigration Advisers Code of Conduct 2014 (the 2014 Code). That provision in the 2014 Code required Mr Smith to comply with the Act.

The Responses

- [6] Mr Smith sought and was granted a series of adjournments to give him time to respond to the Statement of Complaint. The adjournments were granted on the basis the other parties did not object. After the fourth application, the Tribunal required Mr Smith to lodge an application and provide proof of the grounds he relied on by 17 February 2015. Mr Smith took no steps.

- [7] The complainant did not respond to the Statement of Complaint. They were not required to do so if they accepted the Registrar's Statement of Complaint set out the facts and matters in dispute appropriately.

Discussion

The standard of proof

- [8] The Tribunal determines 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].

The material before the Tribunal

- [9] The Registrar provided a chronology, and supporting documentation. The parties have not disputed this record or added to it.
- [10] I am satisfied this material supports the grounds of complaint alleged.
- [11] Mr Smith has had repeated opportunities to provide an explanation, and has wholly failed to answer the complaint. Furthermore, he has failed to comply with a statutory demand requiring him to provide information relating to the complaint.

Negligence and unprofessional conduct

- [12] The information before me establishes Mr Smith accepted instructions, and payment for them. He failed to carry out his instructions, failed to communicate with his clients, and failed to make himself available to his clients when they tried to contact him. He was negligent in failing to carry out his instructions in a timely manner, and that is a ground for complaint under section 44(2)(a) of the Act. He was unprofessional in failing to carry out his instructions in a timely manner, and in failing to communicate with, and be available to his clients. In those respects, he breached clause 1.1 of the 2010 Code.

Breach of the Act

- [13] The Registrar issued a statutory demand under section 57 of the Act requiring Mr Smith to produce his file. Clause 26(e) of the 2014 Code required that he keep a file, and clause 3(c) required that he comply with the statutory requirement to produce it. He has provided neither justification nor excuse for not producing his file.
- [14] It is a core requirement of professional practice that a licensed immigration adviser comply with the Act. I am satisfied Mr Smith breached clause 3(c) of the 2014 Code as he failed to comply with the demand, or failed to keep a file in breach of clause 26(e) of the 2014 Code.

Decision

- [15] The Tribunal upholds the complaint pursuant to section 50 of the Act.
- [16] The adviser breached the Codes of Conduct, and was negligent in the respects identified; they are grounds for complaint pursuant to section 44(2) of the Act.

Submissions on Sanctions

- [17] The Tribunal has upheld the complaint; pursuant to section 51 of the Act, it may impose sanctions.
- [18] 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, Mr Smith is entitled to make submissions and respond to any submissions from the other parties.
- [19] 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.

- [20] Mr Smith is at risk of a substantial financial penalty, loss of licence, and an order for compensation. In giving Mr Smith notice of the gravity of this matter, I am not indicating the Tribunal has reached any concluded view, or that the Registrar and the complainant may not successfully advance a case for imposing other sanctions. The purpose of putting Mr Smith on notice is that he has consistently failed to respond to the Registrar and the Tribunal, and it is important that he do so. This complaint is not a trivial matter.
- [21] It is of particular concern to the Tribunal that Mr Smith failed to respond to the Registrar's statutory demand that he produce his file. Such conduct is wholly unacceptable, it is not only a breach of the obligation to comply with the Act; the conduct impedes the investigation of a complaint. Mr Smith must, it appears, have known that not producing his file would impede the investigation. Failing to produce his file, is accordingly potentially consistent with cancellation of his licence. The Tribunal requests that Mr Smith address these issues in his submissions on sanctions.

Timetable

- [22] The timetable for submissions will be as follows:
- [22.1] The Authority and the complainant are to make any submissions within 10 working days of the issue of this decision.
- [22.2] 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.
- [22.3] The Authority and the complainant may reply to any submissions made by the adviser within 5 working days of her filing and serving those submissions.

DATED at Wellington this 20th day of February 2015

G D Pearson
Chair