

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

Decision No: [2015] NZIACDT 16

Reference No: IACDT 029/14

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Manit Ly

Complainant

AND

Rosemarie Navarette-Scholes

Adviser

DECISION ON APPLICATION TO DISMISS COMPLAINT

REPRESENTATION:

Registrar: Mr M Denyer, lawyer, Ministry of Business Innovation and Employment, Auckland.

Complainant: In person.

Adviser: Mr S Laurent, Laurent Law, Auckland.

Date Issued: 6 March 2015

DECISION

The issue

- [1] The Registrar filed a statement of complaint dated 24 November 2014. Through her counsel Ms Navarette-Scholes responded with an application to dismiss the complaint on the grounds:
 - [1.1] The Statement of Complaint does not comply with the Tribunal's practice note.
 - [1.2] The Registrar in the conduct of her statutory functions exhibited bias against Ms Navarette-Scholes.
 - [1.3] The Statement of Complaint discloses no grounds for complaint.
- [2] She said she refused to file a statement of reply, for those reasons.
- [3] This decision determines the application to dismiss the complaint.

Background

- [4] The Registrar has changed her approach to evaluating and processing complaints. The result has been the Registrar now investigates and evaluates complaints, and then lodges a statement of complaint. The statement of complaint now identifies potential grounds where the Registrar is in a position to lodge information supporting the grounds, and identifies any wider grounds the complainant advanced for which the Registrar did not find support. Formerly the Registrar gave the Tribunal notice of the complaint as presented by the complainant.
- [5] The result is that the statement of complaint now puts:
 - [5.1] The adviser on notice of potential grounds of complaint and of the evidence that the Registrar considers potentially supports those grounds.
 - [5.2] The complainant on notice the Registrar does not consider there is evidence to support any wider grounds, if they advanced such grounds.
- [6] The next step in the process allows both the complainant and the adviser to respond. Typically, complainants accept the narrower grounds the Registrar identifies and the adviser is of course in a position to admit or dispute all or some of the complaint.
- [7] The Registrar has modified the form of the statement of complaint to reflect her current processes. It is not necessary for her to set out details of information that has become apparently irrelevant after the investigative and evaluation process.

This case

- [8] The present case is a typical example of the new process adopted by the Registrar. The complainant lodged a complaint with the Registrar that Ms Navarette-Scholes had been negligent, incompetent, engaged in dishonest or misleading behaviour, and breached the Code of Conduct. In short, a comprehensive allegation that she breached all of the potential grounds for complaint under the Act.
- [9] The Registrar, having investigated the complaint, lodged a statement of complaint that said "the complaint may disclose" a breach of clause 3 of the Licensed Immigration Advisers Code of Conduct 2010 (the Code of Conduct). Clause 3 of the Code of Conduct relates to business management in a licensed immigration adviser's practice.
- [10] The Statement of Complaint identifies the Registrar considered there was potential support for the Tribunal to conclude:
 - [10.1] Ms Navarette-Scholes met with the complainant and her niece a number of times in respect of immigration issues. She knew they wanted her to submit a visa application for her niece's fiancé (the applicant).

- [10.2] She also knew of financial arrangements to sponsor the applicant and engage Ms Navarette-Scholes.
- [10.3] For a period, Ms Navarette-Scholes held the applicant's personal documents.
- [10.4] Ms Navarette-Scholes's conduct caused the complainant to believe she was acting professionally in respect of the applicant's immigration matters.
- [10.5] When the Registrar investigated the complaint, Ms Navarette-Scholes said she had no records and denied she entered into any business relationship with the complainant.
- [10.6] The Registrar identified Ms Navarette-Scholes's claim she had no professional engagement and did not breach professional obligations. However, the Registrar considered that may not answer the complaint, as there was a professional relationship and:
- [10.6.1] She retained personal documents for some two and a half months;
- [10.6.2] She attended meetings to discuss immigration matters and failed to record or document those interactions in writing;
- [10.6.3] She failed to record material discussions; and
- [10.6.4] Failed to take charge of the financial arrangements that related to her professional services.

Discussion

Form of the statement of complaint

- [11] For Ms Navarette-Scholes, her counsel sets out in some detail the respects in which the Statement of Complaint departs from the practice note. However, he fails to identify any respect in which it is unfair or inadequate in achieving the purpose of giving Ms Navarette-Scholes notice of the complaint, and the respects in which it appears to have potential support.
- [12] The departure from the prescribed form is on the contrary very much in Ms Navarette-Scholes's interest, as it does not unnecessarily traverse the grounds of negligence, incompetence, dishonest or misleading behaviour and wider breaches of the Code of Conduct. The complainant may or may not pursue those grounds. If she does, then Ms Navarette-Scholes will have a right of reply.
- [13] I am satisfied Ms Navarette-Scholes's complaint of departures from the prescribed form is in reality founded on alterations that are in her own interests.
- [14] The submission includes a claim that the Registrar in preparing the Statement of Complaint failed to take adequate account of Ms Navarette-Scholes's response to the complaint. I discuss that issue in the following section.

Allegation of actual bias against the Registrar

- [15] Ms Navarette-Scholes contends through her counsel that the Registrar has:
- [15.1] Selectively used Ms Navarette-Scholes's response to the complaint,
- [15.2] Presented allegations made by the complainant as fact, and treated Ms Navarette-Scholes's statements differently.
- [15.3] Made assumptions without factual support.
- [16] This he says establishes "an inappropriate bias against [Ms Navarette-Scholes] in breach of [the Registrar's] statutory duties". Accordingly, the allegation is one of actual bias by a statutory officer in the execution of her statutory functions.

- [17] This allegation of actual bias by a statutory officer who rejected the more serious allegations brought by a complainant does not begin from a position of strength. None-the-less, Mr Laurent submitted the Statement of Complaint and the material supporting it contains evidence of the Registrar's bias against Ms Navarette-Scholes when conducting her statutory functions.
- [18] Clearly, it would be incompatible with her office if the Registrar were to exhibit bias against a licensed immigration adviser; and make decisions motivated by her bias rather than the statutory grounds. She has an important statutory role in determining whether to refer a complaint to the Tribunal pursuant to section 44 of the Act. Both complainants and licensed immigration advisers are entitled to have that power exercised free of personal bias. However, it is entirely legitimate for the Registrar to refer a complaint to the Tribunal on grounds the Tribunal may or may not uphold. It is the Tribunal's function to determine complaints, and the Registrar's duty to lodge complaints and the material supporting them with the Tribunal.
- [19] The Registrar's primary function when drafting the statement of complaint is to identify the grounds she considers have potential support, and the material supporting those grounds. In doing so she identifies the case the licensed immigration adviser faces. As in a criminal charge, or statement of claim in a civil proceeding, the initiating process should put the recipient on notice of what they must answer. In this way both the complainant and the licensed immigration adviser are on notice of the issues the Tribunal will address; and they can each respond.
- [20] It is less important that the Registrar set out the adviser's response to the grounds of complaint as the Tribunal will assess this information. The adviser has the opportunity of lodging a statement of reply and ensuring the response effectively targets the grounds the Registrar included in the Statement of Complaint. The tone and content of the Statement of Complaint in this matter are measured and provide no support whatsoever for a claim the Registrar was biased against Ms Navarette-Scholes.
- [21] The underpinning for the submission of bias is:
- [21.1] A contention that Ms Navarette-Scholes had no client relationship,
- [21.2] The Registrar did not accept that submission on its face,
- [21.3] Accordingly, she failed to carry out her duties fairly and reasonably, as she should have accepted it.
- [22] That reasoning is flawed.
- [23] Mr Laurent presented, as a complete answer to the complaint, that clause 3 of the Code of Conduct relates to clients and in the present case the complainant, her niece and the applicant were not clients. It does not appear there was a process of client engagement in accordance with the Code of Conduct. However, if they were in fact clients, non-compliance with the Code's mandatory disclosure and documentation processes does not exempt the licensed immigration adviser from responsibility. The non-compliance is a ground for complaint, not exoneration.
- [24] The Statement of Complaint identifies a range of circumstances that may have triggered a client/adviser relationship, in particular:
- [24.1] A number of meetings to discuss immigration issues.
- [24.2] The meetings included communication regarding lodging a visitor visa application.
- [24.3] Communication regarding arrangements for the payment of Ms Navarette-Scholes's fees.

- [24.4] Ms Navarette-Scholes receiving and holding personal documents related to immigration processes.
- [25] The Tribunal, given Ms Navarette-Scholes's refusal to lodge a statement of reply, is not in a position to take a view of the merits of this issue. However, it is an elementary proposition that where a professional person engages to that level with a matter in their area of professional expertise, they may create professional obligations and potentially a client relationship. It is certainly not evident that failing to apply the Code of Conduct's mandatory processes for initiating the client relationship will defer triggering those responsibilities or a client relationship.
- [26] This is a straightforward complaint with grounds that Ms Navarette-Scholes may answer by filing a statement of reply. Ms Navarette-Scholes may adapt the form of her Statement of Reply as necessary to respond to the form of the Statement of Complaint.
- [27] If Ms Navarette-Scholes continues to refuse to file a statement of reply, the Tribunal will determine the complaint on the papers now before it. In that event, the Tribunal will take into account that Ms Navarette-Scholes has had the opportunity of providing a reply to the Statement of Complaint, and has elected not to do so. In any event, the Tribunal will consider all the material before it, including what Ms Navarette-Scholes has said to this point.
- [28] I am satisfied the allegation of bias against the Registrar is wholly lacking any justifiable foundation.

Further matters

- [29] The effect of the changes in the Authority's processes, and their relationship to the material filed with the Tribunal is under consideration. The Tribunal will consult with interested parties and update its practice note.
- [30] It is not clear whether the Tribunal has the power to dismiss the complaint on an interlocutory basis. It is not necessary to decide the issue given the decision the application is without merit.

Timetable

- [31] The complainant and Ms Navarette-Scholes may file statements of reply within 10 working days of the date of this decision. Each may file a reply to the other party's Statement of Reply within 5 working days of receiving the reply.
- [32] Neither party is required to file a statement of reply if they accept the Statement of Complaint adequately sets out issues, reasoning and factual material they wish the Tribunal to consider.

DATED at WELLINGTON this 6th day of March 2015

G D Pearson
Chair