

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

Decision No: [2015] NZIACDT 45

Reference No: IACDT 033/14

**IN THE MATTER**

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

**BY**

**The Registrar of Immigration Advisers**

Registrar

**BETWEEN**

**Moureen Minaaz Khan**

Complainant

**AND**

**Apurva Khetarpal**

Adviser

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**DECISION**

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**REPRESENTATION:**

**Registrar:** In person.

**Complainant:** In person.

**Adviser:** In person.

Date Issued: 24 April 2015

## Introduction

- [1] The Registrar of the Immigration Advisers Authority referred this complaint to the Tribunal.
- [2] The complaint is that Ms Khetarpal accepted instructions to lodge an expression of interest, and did so in a form that could not lead to a successful outcome. It claimed points that were not available for the relevant position of employment. The allegations are that she:
- [2.1] Lodged the defective application because she did not prepare it with due care, and professionalism.
- [2.2] She failed to provide advice to her client in the form required when lodging a process that had no hope of success.
- [3] Ms Khetarpal responded to the complaint with different explanations, ultimately saying she knew the expression of interest would not qualify when she lodged it, but her client insisted she file it.
- [4] The Tribunal is required to evaluate whether to accept Ms Khetarpal's explanation, and regardless then consider whether she breached her professional duties.
- [5] If rejecting her explanation she knew the expression of interest was defective when filing it; then to decide whether the defect was due to a lack of care and professionalism, and that error resulted in not giving her client the advice he was entitled to have.
- [6] If the Tribunal accepts her explanation that she knew the application was defective; then the Tribunal must consider whether Ms Khetarpal acted unprofessionally in lodging an expression of interest when she knew it claimed points her client was not entitled to claim.
- [7] The Tribunal rejected Ms Khetarpal's explanation, and concluded she did not exercise due care and professionalism and filed a defective expression of interest for that reason. It accordingly upheld the complaint.

## The complaint

- [8] The Registrar filed a statement of complaint, she put forward the following background as the basis for the complaint:
- [8.1] The complainant and her husband (the husband) met with Ms Khetarpal on 8 July 2011 to discuss applying for residence under the skilled migrant category. She recorded the husband's occupation as "Heavy Plant and Equipment Operator/Construction Site supervisor", and assessed him against the Construction Trades Workers category of the Australian and New Zealand Standard Classification of Occupations (ANZSCO).
- [8.2] On 27 July 2011, the husband entered into a written agreement with Ms Khetarpal to provide immigration services. On 21 February 2012, she submitted an expression of interest on behalf of the husband and his family, and Immigration New Zealand selected it for further consideration on 22 February 2012. The expression of interest relied on the husband's employment meeting the skilled category.
- [8.3] On 15 March 2012, Immigration New Zealand declined the expression of interest, as the occupation nominated for the husband's employment did not meet the relevant immigration instructions for skilled employment.
- [8.4] Ms Khetarpal has provided contradictory statements regarding the outcome of her assessment whether the husband's current employment was "skilled", for immigration purposes:
- [8.4.1] On one occasion Ms Khetarpal said "It was my opinion that as a Heavy Plant and Equipment Operator & Construction Site Supervisor, [the husband] ... was eligible for Residence under the Skilled Migrant Policy". (An email to the Immigration Advisers Authority dated 28 May 2014).

- [8.4.2] On another occasion that “It was explained very clearly to [the husband] (by me) that his employment in New Zealand/his role was such that he did not meet the Immigration New Zealand Skilled Employment definition”. (A letter dated 2 November 2014 addressed to the Immigration Advisers Authority).
- [8.5] Ms Khetarpal and the husband both provided statements saying Ms Khetarpal advised him he did not qualify as a skilled migrant, and he insisted on lodging the expression of interest regardless.
- [9] The Registrar identified potential infringement of professional standards during the course of Ms Khetarpal’s engagement, the allegations were:
- [9.1] Ms Khetarpal breached clause 1.1(a) of the Licensed Immigration Advisers Code of Conduct 2010 (the 2010 Code). It required her to perform her services with due care, diligence, respect and professionalism. The circumstances were:
- [9.1.1] Ms Khetarpal assessed the husband’s employment against a category of occupations, not an individual occupation within a category.
- [9.1.2] The occupation Ms Khetarpal nominated in the expression of interest sits within a different category to the one against which she assessed the husband’s employment. The occupation nominated on the expression of interest did not meet the definition of skilled employment.
- [9.1.3] The expression of interest required detailed reasons why the applicant’s occupation was skilled, and Ms Khetarpal wrote that it met ANZSCO requirements.
- [9.1.4] The Registrar alleged that this potentially breached clause 1.1(a) of the 2010 Code, as Ms Khetarpal:
- [9.1.4] Failed to assess the husband’s employment properly;
- [9.1.4] Nominated an occupation on the expression of interest that was not skilled employment; and
- [9.1.4] Failed to provide detailed reasons why the employment was skilled.
- [9.2] Ms Khetarpal breached clause 2.2(a) of the Licensed Immigration Advisers Code of Conduct 2010 (the 2010 Code). It required her to deal with a vexatious or grossly unfounded claim, by encouraging a client not to lodge it, and seek written acknowledgement if the client wishes to proceed. The circumstances were:
- [9.2.1] Ms Khetarpal and the husband both claim Ms Khetarpal advised the husband his employment did not qualify, and he regardless instructed her to lodge the expression of interest.
- [9.2.2] The information available suggests that claim is untrue.
- [9.2.3] If Ms Khetarpal did inform the husband his employment was not skilled, then it appears she may have breached clause 2.2 of the 2010 Code, as:
- [9.2.3] She did not encourage the husband not to lodge the expression of interest (clause 2.2(a));
- [9.2.3] She failed to confirm her advice in writing that the expression of interest had no hope of success (clause 2.2(b)); and
- [9.2.3] She failed to seek written acknowledgement from the husband that she had advised him not to lodge the expression of interest (clause 2.2(c)).

## The responses

- [10] Ms Khetarpal did not file a statement of reply; she was not required to do so if she accepted the contents of the Statement of Complaint.
- [11] The complainant did not file a statement of reply. The due date was Thursday 11 December 2014; she was given extensions of time through to 30 January 2015. She claimed on 17 April 2015 she had not responded due to “pressing personal commitments”, despite the Tribunal allowing the time she requested earlier; and she sought an extension to 27 April 2015.
- [12] The Tribunal declines the complainant’s request:
- [12.1] She has repeatedly failed to comply with deadlines.
- [12.2] She no longer supports the complaint, and accordingly it is not appropriate in these circumstances to allow her to pursue any grounds beyond those identified by the Registrar (her original complaint was on wider grounds); if that is her intention.
- [12.3] If she intends to support Ms Khetarpal, then Ms Khetarpal has had the opportunity to file a statement of reply, and has not done so. It is not appropriate to allow further time for the complainant to advance Ms Khetarpal’s case.
- [12.4] The Registrar has investigated, and lodged the information supporting the complaint, to the extent she is satisfied it has merit without support from the complainant. The complaint is ready to be heard.
- [13] In these circumstances, I am satisfied the complainant should have no further indulgence, she has no essential role in the process, and has elected not to participate when she had the opportunity. It is the public interest to proceed now, and Ms Khetarpal who has not filed a statement of reply is entitled to a decision.

## The complainant does not support the complaint

- [14] The complainant sought to withdraw the complaint, the Registrar proceeded with it. The purported withdrawal was inconsistent with earlier positions. It is not necessary to explore the motivation for the change in the complainant’s position.
- [15] The Registrar and the Tribunal deal with complaints under a statutory process. A complaint is not solely an *inter partes* matter. Public interest issues arise in many professional disciplinary cases, and that is so in the present case.
- [16] While the Tribunal will take account of a request to withdraw a complaint, it is not the complainant’s right to withdraw a complaint. This Tribunal, as is commonly the case for professional disciplinary tribunals, has an inquisitorial function. The Act provides for complaints to be put before the Tribunal, and requires the Tribunal to hear the complaint; usually on the papers, and where necessary, by exercising powers to seek further information (section 49, Immigration Advisers Licensing Act 2007).
- [17] In this case before withdrawing the complaint the Tribunal would first be concerned to explore fully the circumstances that caused the complainant and her husband to change their position. However, in my view this is a complaint that should proceed. The merits of the complaint before the Tribunal are patently obvious on the papers. Ms Khetarpal failed to perform her duties with care to meet the minimum professional standards; or she committed a more serious professional offence of filing an application she knew claimed points that were not available.
- [18] Ms Khetarpal’s inconsistent response to the complaint make it necessary, in the public interest, to resolve this complaint on its merits; this is not a case where a licensed immigration adviser has simply made an error, acknowledged it, and taken appropriate steps to address that error. In such cases, the wishes of a complainant carry considerable weight.

## Discussion

### *The standard of proof*

- [19] 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 facts*

- [20] The Registrar provided a chronology, and supporting documentation.
- [21] The essential facts are uncomplicated, and evidenced by the documentary record:
- [21.1] It is clear Ms Khetarpal filed an expression of interest with an employment category that ensured the expression of interest would fail, as the husband simply could not qualify for residence on that basis.
- [21.2] As a justification, Ms Khetarpal says she knew of the difficulty, and told her client who insisted she proceed to lodge the application. However, there is no evidence that Ms Khetarpal either did so, or complied with the 2010 Code's prescription for addressing that situation.

### *Lack of due care and professionalism*

- [22] There is no doubt on the papers before me that Ms Khetarpal specified an occupational category that on its face ensured the expression of interest on that did not qualify, and would necessarily fail. The Statement of Complaint has accurately set out the reasons.
- [23] Immigration New Zealand mandates the categories clearly, and the expression of interest did not qualify, for reasons that were readily ascertainable. There was no sensible reason to lodge an application with that patent defect.
- [24] Ms Khetarpal claims, she was aware of the issue and warned her client against lodging the expression of interest. If true, Ms Khetarpal is in the position where she clearly had to ensure her client fully understood the position. She also had to consider whether she was acting professionally if a client insisted that she file an application that to her knowledge falsely claimed points.
- [25] Her duties engaged a number of the provisions in the 2010 Code:
- [25.1] When she gave her client advice regarding filing an application that was hopeless, clause 3(f) required that she confirm material discussions in writing, clause 2.2(a) required that she encourage her client not to file it, clause 2.2(b) required her to advise her client in writing it was unfounded; and clause 2.2(c) required that if he insisted she file it, then she should seek written instructions;
- [25.2] To the extent the application was false or misleading in claiming points that she knew were not available; then clause 5.1(c) prohibited her from misrepresenting or promoting her clients immigration opportunities in a false or deceptive manner, clause 5.2 prohibited her from providing false or misleading documentation with any application, and clause 1.1(a) required her to perform her services with professionalism.
- [26] If what Ms Khetarpal now says is true namely she lodged an expression of interest claiming 115 points, knowing that her client could not claim that many points under the instruction; then her conduct was unprofessional. She dishonestly and deceptively attempted to gain a residence visa knowing her client did not qualify; and she presented a document effecting the pretence he did qualify and accordingly breached clause 1.1(a) of the 2010 Code.
- [27] However, I do not consider that is probably what occurred. For the reasons discussed in paragraph [25] above, if Ms Khetarpal recognised the expression of interest was defective she had a number of duties to consider. The record does not suggest that was the case, it shows none of the documents she was required to prepare. There is no explanation from the husband to explain why he would proceed with an application if he truly understood it was hopeless.

Furthermore, Ms Khetarpal's initial response was not to say she advised her client he could not qualify; rather she said "It was my opinion [the husband] was eligible for Residence under the Skilled Migrant policy".

- [28] I am satisfied what probably occurred was that when she filed it Ms Khetarpal believed the expression of interest did qualify, and filed it for that reason. Plainly, it did not and she should have taken sufficient care to ascertain the correct position, which was unambiguous. The correctness of the expression of interest was important to her client. Accordingly, I am satisfied Ms Khetarpal failed to perform her services with due care and professionalism, and breached clause 1.1(a) of the 2010 Code for that reason.

*Failure to comply with clause 2.2 of the 2010 Code*

- [29] For the reasons discussed I am satisfied Ms Khetarpal should have identified the expression of interest was grossly unfounded and had no hope of success. She failed to do so. As she failed to do so, it followed she did not:

[29.1] Encourage her client not to lodge it; and

[29.2] Did not advise her client in writing it was grossly unfounded.

- [30] Accordingly I am satisfied Ms Khetarpal breached clause 2.2(a) and (b) of the 2010 Code. However, the fault lies in her failure to identify the expression of interest had no hope of success. Accordingly, it does not add in a material way to the finding Ms Khetarpal breached clause 1.1(a) of the 2010 Code.

**Decision**

- [31] The Tribunal upholds the complaint pursuant to section 50 of the Act; Ms Khetarpal's negligence and the identified breaches of the 2010 Code are grounds for complaint pursuant to section 44(2) of the Act.

**Submissions on Sanctions**

- [32] The Tribunal has upheld the complaint; pursuant to section 51 of the Act, it may impose sanctions.
- [33] The Registrar 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, Ms Khetarpal is entitled to make submissions and respond to any submissions from the other parties.
- [34] 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.

**Warning**

- [35] For the reasons discussed, I have rejected Ms Khetarpal's claim that she told her client the expression of interest could not succeed. Had I not made that finding, I would have made the far more serious finding that Ms Khetarpal filed an expression of interest claiming points she knew were not available.
- [36] However, that finding necessarily implies Ms Khetarpal attempted to mislead the Registrar in her letter dated 2 November 2014. The sanctions that may be imposed on a licensed immigration adviser are affected not only by the gravity of their professional transgression; but also by how they address that transgression. A misleading response to a client, the Registrar or this Tribunal may well lead to orders affecting the adviser's licence, and financial penalties at the high end of the scale; when lesser orders would have resulted if there were mitigating circumstances.
- [37] Ms Khetarpal should prepare her submissions on penalty with regard to those factors.

[38] The Tribunal will consider an application to conduct an oral sanctions hearing if Ms Khetarpal applies, providing grounds, any affidavit evidence, and submissions.

*Timetable*

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

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

[39.2] The adviser is to make any further submissions (whether or not the Registrar or the complainant makes submissions) within 15 working days of the issue of this decision.

[39.3] The Registrar and the complainants may reply to any submissions made by the adviser within 5 working days of her filing and serving those submissions.

**DATED** at Wellington this 24<sup>th</sup> day of April 2015

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**G D Pearson**  
Chair