

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

Decision No: [2015] NZIACDT 67

Reference No: IACDT 009/14

IN THE MATTER

of an appeal under s 54 of the
Immigration Advisers Licensing Act 2007

AGAINST

**A decision of The Registrar of
Immigration Advisers**

By

Chamath Ekanayake

Appellant

DECISION

REPRESENTATION:

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

Appellant: In person.

Date Issued: 28 May 2015

DECISION

Introduction

- [1] This is an appeal against the Registrar's decision that a complaint lacked merit and she should not refer it to the Tribunal.
- [2] The complaint related to professional services delivered by a licensed immigration adviser (the adviser) for advancing a skilled migrant application. The adviser also provided job search services as Mr Ekanayake would have to secure employment to qualify as a skilled migrant. The Registrar considered that the services relating to seeking a position of employment were not proper grounds for complaint, and found the other elements of the complaint were not well founded.
- [3] Mr Ekanayake had the opportunity of providing evidence to support his complaint.
- [4] The Tribunal has to decide whether the material now before it is sufficient to conclude the complaint should be referred to the Tribunal.
- [5] The Tribunal does not agree with the Registrar's approach in not considering the elements of the complaint that related to job search services.
- [6] However, the Tribunal has rejected the appeal, as the whole of the complaint has the appearance of exaggeration, and the material before the Tribunal is consistent with the adviser meeting professional standards. The complaint does not justify further investigation, or determination.

The grounds of appeal

- [7] This is an appeal under section 54 of the Immigration Advisers Licensing Act 2007 (the Act), against a decision of the Registrar not to refer a complaint.
- [8] The Registrar decided Mr Ekanayake's complaint did not disclose any of the statutory grounds of complaint. She applied section 45(1)(b) of the Act.
- [9] Mr Ekanayake appeals from that decision and claims that his complaint discloses:
 - [9.1] Dishonest or misleading behaviour, based on the adviser promising employment recruitment services, failing to deliver the services, and not refunding payments. The material's Mr Ekanayake lodged do not identify any particularity of evidence to support the allegations.
 - [9.2] Negligence, based on lack of availability and follow up.
 - [9.3] Incompetence, based on the style of CV drafted for Mr Ekanayake, and the eligibility of the positions of employment sought to qualify as a skilled migrant.
 - [9.4] Promotion of the adviser's practice in a false and deceptive manner; there are no particulars.

The decision appealed against

- [10] The Registrar issued a letter dated 25 September 2014, explaining why she did not refer the complaint to the Tribunal and submissions further explaining her decision.
- [11] The Registrar provided two distinct bases for not referring the complaint to the Tribunal.
- [12] One ground was that some of the grounds of complaint were unrelated to the provision of immigration advice.
- [13] The second was that grounds of complaint, which did relate to the provision of immigration advice, did not disclose any of the statutory grounds of complaint.

The nature of the Registrar's decision

- [14] When she makes a decision under section 45, the Registrar is deciding whether she should commence the process of referring the complaint to the Tribunal. Should she decide to refer the complaint to the Tribunal, then the Act contemplates the potential for further investigation (section 47 and 48).
- [15] Statutory investigators in roles of this kind are required to exercise their judgement as to whether they pursue a particular matter. This type of role is discussed in *Brierley Investments Ltd v Bouzaid* [1993] 3 NZLR 655 by the Court of Appeal. That case concerned the Commissioner of Inland Revenue, but makes the relevant observation an official in this position must take account of resources and selectively make decisions on what matters to pursue.
- [16] The Registrar was not required to undertake an exhaustive examination of any potential evidence. This appeal provided Mr Ekanayake with the opportunity to provide evidence, which the Tribunal will consider.

Discussion

The issue

- [17] I have to consider the two elements of the Registrar's decision:
- [17.1] Whether she was correct not to have regard to professional conduct outside of "immigration advice" as defined in the Act, and if so whether those elements of the complaint have merit; and
- [17.2] Whether she was correct to determine the complaint, as it related to "immigration advice", did not disclose any statutory grounds for complaint.
- [18] Section 54 requires the Tribunal to reject the appeal, determine it should hear the appeal, or set in place a process to determine the matter under the adviser's complaints procedure.
- [19] The Tribunal will evaluate the decision in the same manner as the Registrar, but with the advantage of any material supporting the appeal, and will consider the merits on a *de novo* basis.

Whether the Registrar was correct to exclude conduct beyond "immigration advice"

- [20] The definition of "immigration advice" is the mechanism to determine the areas of practice reserved to licensed immigration advisers and exempt persons (lawyers and some other categories). Generally, professional regulatory schemes reserve some areas of professional services to the profession, but members of the profession will commonly undertake other work.
- [21] A common example of ancillary work in respect of licensed immigration advisers is providing assistance with seeking a position of employment. If a person who has no immigration objective receives the service, then it would fall outside of the scope of "immigration advice". However, if a person was to engage a licensed immigration adviser to provide such services in furtherance of their immigration objectives, it may well be because they are a licensed immigration adviser that their job search services are also sought. If the licensed immigration adviser were, for example to act deceptively in relation to providing non-restricted services it would be a serious gap in the integrity of the professional disciplinary regime if they could do so with impunity.
- [22] Accordingly, professional disciplinary regimes generally address conduct within a professional practice setting, and other matters that potentially affect a person's fitness to practise as a member of their profession.
- [23] It appears the Registrar took the view section 44(1) of the Act confines complaints to the act of providing *immigration advice*. That phrase is defined in section 7 of the Act, which materially includes:

... using, or purporting to use, knowledge of or experience in immigration to advise, direct, assist, or represent another person in regard to an immigration matter relating to New Zealand, whether directly or indirectly and whether or not for gain or reward ...

- [24] It appears the Registrar's interpretation of section 44(1) is that a complaint must relate to the process of delivering immigration advice, or it falls outside the scope of the disciplinary regime. That is of course a possibility; however, the consequences would be unusual in the context of professional disciplinary regime. The usual scope extends to include conduct that is sufficiently egregious to raise concerns regarding their fitness or general conduct in exercising the privileges of a licence holder.
- [25] The Registrar's view would, for example, lead to the position that a licensed immigration adviser could be charged or convicted of violent or sexual offending and the Registrar would not be able to file an own motion complaint or apply for the suspension of their licence under section 53. The convicted person could continue to display the Authority's registered trademark and hold himself or herself out as a professional adviser given a preferred status by the New Zealand Government. It is clear that sections 15 and 16 do not terminate registration due to such offending and while section 24 would allow the Registrar to address a conviction on an application for renewal of a licence, that does nothing to assist in dealing with circumstances before then. Section 27 provides powers of cancellation, but they would not cover some conduct that is incompatible with holding a licence.
- [26] If section 44(1) extends to a matter going to the fitness of a person to provide immigration advice, not simply deficit in respect of a specific example of immigration advice, then interim suspension and sanctions are available. Section 44(2) provides that grounds of complaint extend to dishonest or misleading behaviour, and a breach of the Code of Conduct. The opening provision of the Licensed Immigration Advisers Code of Conduct 2014 provides that:
- A licensed immigration adviser must be honest, professional, diligent, and respectful and conduct themselves with due care and in a timely manner.
- [27] The view is at least potentially open that complaints regarding a licensed immigration adviser acting dishonestly or unprofessionally, outside of delivering *immigration advice*, do concern the provision of immigration advice in relation to their clients generally. The same would apply to professional practice issues in relation to matters beyond the provision of immigration advice.
- [28] However, even if that is not correct and section 44(1) does limit the professional disciplinary regime to the process of delivering immigration advice, I am satisfied this complaint relates to that process. The elements the Registrar disregarded did involve the "use, knowledge of or experience in immigration to ... assist, ... another person in regard to an immigration matter ... whether directly or indirectly".
- [29] The Registrar identified that the professional services in question related to "a skilled migrant application and job search assistance". She said in her letter declining to refer the complaint to the Tribunal that "the job search assistance service [is] outside the scope" of immigration advice as defined by the Act.
- [30] I do not agree. The adviser accepted a professional engagement to advance a skilled migrant application, and to do so Mr Ekanayake had to secure employment that met the particular categories that would qualify. Identifying and securing a suitable position of employment required an understanding of the relevant categories of employment for immigration purposes; and securing the position was a composite set of professional services. The adviser required knowledge of immigration matters to deliver the services; and the services directly or indirectly related to an immigration matter.
- [31] It would be artificial to separate out elements, and for example apply the Licensed Immigration Advisers Code of Conduct 2014 to fees for a the application, and treat fees for employment services as unregulated. Some advisers facing serious allegations of dishonesty argued they have no liability under the Act for fees they received for composite services. They have claimed misappropriated fees related to employment services. The Tribunal has required advisers to account for their fees and conduct in such circumstances.
- [32] Accordingly, I am satisfied the Registrar should have considered all the grounds of complaint.

[33] However, that is insufficient to establish that I should allow the appeal. The Tribunal may determine the decision of the Registrar was incorrect, but reject the complaint on another ground under section 54(3)(b).

My view of the complaint

[34] The complaint has an appearance of gross exaggeration. It alleges dishonesty and a range of lesser wrongdoing, but the particulars, especially for dishonesty, do not correspond to the allegations.

[35] Mr Ekanayake has provided documentary material in support of his complaint; however, it does not establish the allegations. What does appear from the material is that there were professional instructions to advance a skilled migrant application, a job search and to secure an appropriate employment position for the applicant, as this was necessary for a successful outcome. The adviser undertook substantial work, but the outcome was not successful. The complaint is not that the adviser failed to take instructions properly or to give proper advice on the prospects of success; rather that the failure was because the adviser dishonestly promised services that would not be delivered, then negligently and incompetently delivered such services as were provided.

[36] The material before me neither proves those allegations, nor gives any expectation that investigation would produce evidence that would support them; or such other lesser matters that might properly be referred to the Tribunal. On the contrary, the material is consistent with the honest, diligent and competent delivery of professional services.

[37] I consider the Registrar reached the correct view on the elements of the complaint she considered, she correctly determined the complaint does not disclose any statutory grounds for complaint.

[38] I have reached the same view of the elements of the complaint, in relation to the job search services, which the Registrar did not consider; the complaint, as a whole does not disclose any statutory grounds for complaint.

[39] In my view, the complaint is without foundation, and it should not be referred to the Tribunal.

[40] I am satisfied I must reject the appeal.

Decision

[41] The Tribunal rejects the appeal.

DATED at Wellington this 28th day of May 2015

G D Pearson
Chair