

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

Decision No: [2015] NZIACDT 70

Reference No: IACDT 050/14

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

Between

Mohit Juneja

Complainant

AND

Mayank Kumar

Adviser

DECISION

REPRESENTATION:

Registrar: In person.

Complainant: In person.

Adviser: In person.

Date Issued: 29 May 2015

DECISION

Introduction

- [1] The Registrar of the Immigration Advisers Authority referred this complaint to the Tribunal. The facts on which the complaint is based are:
- [1.1] The complainant went to Mr Kumar's practice to get advice on applying for a work visa.
- [1.2] An unlicensed person generally provided the services.
- [1.3] Mr Kumar provided advice as to the requirements for a job offer that would meet the criteria for applying for a work visa. He provided incorrect advice, and then lodged the application with non-complying documentation, and information showing the complainant had worked outside of the conditions of his permit (without providing an explanation).
- [2] Mr Kumar did not file a response to the allegations. Accordingly, the Tribunal has evaluated the facts against Mr Kumar's professional duties and upheld his client's complaint as Mr Kumar failed to meet his professional obligations.

The complaint

- [3] The Registrar's statement of complaint put forward the following background as the basis for the complaint:
- [3.1] The complainant engaged Mr Kumar to assist with a work visa application, in October 2013. The complainant dealt mainly with an unlicensed person in Mr Kumar's practice (the unlicensed person). His only contact with Mr Kumar was a brief conversation where Mr Kumar said he could apply for a work visa with a part-time offer of employment if paid more than \$15/hr.
- [3.2] On 7 November 2013, Immigration New Zealand received a work visa on behalf of the complainant submitted by Mr Kumar's practice. Immigration New Zealand wrote to the complainant on 29 November 2013 noting concerns that:
- [3.2.1] The prospective employer had not completed the process for establishing New Zealand residents and citizens were not available, so his job offer did not qualify.
- [3.2.2] Further, the employment did not qualify as it was for less than 30 hours per week.
- [3.2.3] The complainant had worked in breach of his student visa, as evidenced in the material Mr Kumar submitted with the visa.
- [3.3] On 4 December 2013, the complainant withdrew the application following the unlicensed person's advice.
- [4] The Registrar identified potential infringement of professional standards during the course of Mr Kumar's engagement; the allegations were that potentially:
- [4.1] Mr Kumar breached clauses 2.1(b) and 3 of the Licensed Immigration Advisers Code of Conduct 2010 (the 2010 Code). The provisions required him to act in accordance with immigration legislation, and maintain professional business practices. The circumstances were:
- [4.1.1] Only licensed immigration advisers, or persons who are exempt, can provide immigration advice without breaching the Immigration Advisers Licensing Act 2007 (the Act).
- [4.1.2] The complainant came to Mr Kumar's practice, and the unlicensed person who does not hold a licence provided immigration advice. That occurred on

one occasion when Mr Kumar was out of New Zealand, and Mr Kumar provided little of the services. The unlicensed person provided critical advice, including that the complainant should withdraw his application.

- [4.1.3] Mr Kumar breached his duties to comply with the Act, and maintain professional business practices.
- [4.2] Mr Kumar was incompetent and negligent (a ground for complaint under section 44(2) of the Act. The circumstances were:
 - [4.2.1] Mr Kumar told the complainant he could base an application for a work visa on a position of employment of less than 30 hours per week, if he was paid \$15/hr or more.
 - [4.2.2] The correct requirement was that the job offer had to be fulltime, which required 30 hours per week, under the relevant immigration instructions.
 - [4.2.3] The application for a work visa did not show that the job offer was for fulltime work.
 - [4.2.4] Mr Kumar was either incompetent as he did not know what the requirement was, or negligent as the application did not show an offer of fulltime employment.
 - [4.2.5] The application was drafted and submitted negligently as aside from not being supported with a fulltime job offer:
 - [4.2.5.1] It did not have evidence to show a proper process to establish no New Zealanders were available;
 - [4.2.5.2] Did have pay slips showing a breach of the complainant's visa through working outside of the conditions in it, but without an explanation.
- [5] The grounds of complaint were wider; the complainant has not filed a statement of reply seeking to pursue the wider grounds of complaint. Accordingly, the Tribunal will only consider the grounds the Registrar considered to have potential support.

The responses

- [6] The complainant filed a statement of reply, and agreed with the contents of the statement of complaint.
- [7] Mr Kumar did not file a statement of reply, and he was not required to do so if he accepted the statement of complaint accurately set out the material information.

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 facts

- [9] The Registrar provided a chronology and supporting documentation; and Mr Kumar has not filed a statement of reply and challenged the fact set out in the statement of complaint.

Allowing unlicensed personnel to provide immigration services

- [10] In many areas of professional and licensed practice, extensive use is made of people who do not hold the professional qualifications required of the person primarily responsible for

providing the service. In some cases those persons hold different and complementary qualifications, such as lawyers and legal executives; surgeons, nurses, and anaesthetists; pilots, and first officers. Often people without formal qualifications provide essential services in these settings too, under delegation from the qualified person who is responsible for the work.

- [11] If there was no legislative direction, a licensed immigration adviser could conduct their practice using unqualified people, and the case would not be easily made out they acted unreasonably or irresponsibly in doing so. Any complaint would likely require a demonstration of failure to delegate appropriately, or supervise properly if that were the law. Unqualified people successfully provide very important skills in many areas of professional service delivery.
- [12] However, the Act was, among other things, intended to put an end to a history of a small minority of advisers who exploited vulnerable migrants. The background to the Act is discussed in *ZW v Immigration Advisers Authority* [2012] NZHC 1069, and reflected in section 3 of the Act.
- [13] It is evident the legislative scheme has been constructed in a manner designed to exclude unlicensed people from being engaged in the delivery of professional services to a degree that is far from universal in the regulation of professional service delivery.
- [14] It was foreseeable that some people who had formerly provided immigration services, and failed to gain a licence, would seek to have a licensed person “rubber stamp” their continuing activity in the industry. Unfortunately, this Tribunal’s work demonstrates that was a well-founded apprehension and an area where enforcement action has been necessary.
- [15] Against that background, the policy behind the stringent restrictions in the Act on unlicensed persons providing immigration services is evident.
- [16] Section 63 of the Act provides that a person commits an offence if they provide “immigration advice” without being either licensed, or exempt from the requirement to be licensed.
- [17] Section 73 provides that a person may be charged with an offence under section 63, whether or not any part of it occurred outside New Zealand.
- [18] The scope of “immigration advice” is defined in section 7 very broadly. It 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 ...
- [19] There are exceptions to consider. Section 7 provides that the definition does not include “clerical work, translation or interpreting services”. Accordingly, the question arises as to whether the work in issue came within that exception.
- [20] The scope of *clerical work* is important, as otherwise, the very wide definition of immigration advice would likely preclude any non-licence holder working in an immigration practice in any capacity.
- [21] *Clerical work* is defined in section 5 of the Act in the following manner:
- clerical work** means the provision of services in relation to an immigration matter, or to matters concerning sponsors, employers, and education providers, in which the main tasks involve all or any combination of the following:
- (a) the recording, organising, storing, or retrieving of information:
- (b) computing or data entry:
- (c) recording information on any form, application, request, or claim on behalf and under the direction of another person
- [22] The definition is directed to administrative tasks, such as keeping records, maintaining financial records and the like.

- [23] The definition deals specifically with the role an unlicensed person may have in the process of preparing applications for visas. They may record information “on any form, application, request, or claim on behalf and under the direction of another person”.
- [24] The natural meaning of those words is that the unlicensed person relying on the “clerical work” exception may type or write out what another person directs.
- [25] That other person may properly be the person who is making the application, a licensed immigration adviser, or a person who is exempt from being licensed. The person typing or writing out the form in those circumstances is not giving immigration advice.
- [26] The definition does not give any authority for the unlicensed person to make inquiries, and determine what is to be recorded on the form. Under “clerical work” they must do nothing more than “record” information as directed.
- [27] The other exception in section 7 is that immigration advice does not include “providing information that is publicly available, or that is prepared or made available by the Department”. This also excludes the possibility of an unlicensed person engaging with the specific factual situation of the person making an application as they may only provide information, not advice. This exception is not at issue for the Tribunal on the facts in this complaint.
- [28] Mr Kumar has not provided a response to the statement of complaint, which states the unlicensed person provided immigration services, including when he was out of New Zealand, and his input was slight.
- [29] Accordingly:
- [29.1] I am satisfied Mr Kumar breached clause 2.1(b) of the 2010 Code. He had to act in accordance with the Act, and allowing or requiring unlicensed persons to provide immigration services to his client made him a party to the breach of the Act.
- [29.2] Clause 3 required him to maintain professional business practices in relation to staff management. He failed to take steps to ensure his staff acted lawfully, and accordingly breached clause 3 of the Code.

Negligence and incompetence

- [30] Mr Kumar provided incorrect advice on the requirements for the complainant to obtain a work visa, it appears probable he did not know what they were; he then completed the application with information that wholly failed to meet Immigration New Zealand’s documented requirements, and included information that showed the complainant had been working outside of his visa (without an explanation).
- [31] The errors were elementary and amounted to a sustained series of wrong advice and defective documentation. There is no sensible explanation; I am satisfied Mr Kumar’s conduct was the result of incompetence, and he was negligent as he either attempted to deliver services he did not have the skills to deliver, or failed to apply himself and achieve minimum standards.
- [32] I am satisfied that Mr Kumar was both negligent and incompetent, which are grounds for complaint pursuant to section 44 of the Act.

Decision

- [33] The Tribunal upholds the complaint pursuant to section 50 of the Act; Mr Kumar breached the 2010 Code in the respects identified and that is a ground for complaint pursuant to section 44(2)(e) of the Act, and negligence and incompetence are grounds for complaint pursuant to section 44(2)(a) and (b) of the Act.
- [34] In other respects, the Tribunal dismisses the complaint.

Submissions on Sanctions

- [35] The Tribunal has upheld the complaint; pursuant to section 51 of the Act, it may impose sanctions.
- [36] The authority and the complainant have the opportunity to provide submissions on the appropriate sanctions, including potential orders for costs and compensation. Whether they do so or not, Mr Kumar is entitled to make submissions and respond to any submissions from the other parties.
- [37] 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.

Timetable

- [38] The timetable for submissions will be as follows:
- [38.1] The Authority and the complainant are to make any submissions within 10 working days of the issue of this decision.
- [38.2] 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.
- [38.3] The Authority and the complainant may reply to any submissions made by the adviser within 5 working days of him filing and serving those submissions.

DATED at Wellington, Friday, 29 May 2015

G D Pearson
Chair