

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

Decision No: [2015] NZIACDT 72

Reference No: IACDT 001/15

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Raminderpal Singh

Complainant

AND

Mayank Kumar

Adviser

DECISION

REPRESENTATION:

Registrar: In person.

Complainant: In person.

Adviser: In person.

Date Issued: 4 June 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] Mr Kumar's client went to his practice to get advice on applying for a Graduate Work Experience Visa. However, his client could not get an Employer Supplementary Form, which is an essential prerequisite to apply for that class of visa.
- [1.2] Mr Kumar advised his client he could none-the-less apply, and proceeded to make the application. Immigration New Zealand responded explaining the application could not succeed.
- [1.3] Mr Kumar then advised his client to respond to Immigration New Zealand, essentially relying on the same information that Immigration New Zealand had pointed out must result in the application failing.
- [2] Mr Kumar faces a complaint that he failed to provide proper advice to his client, lodged an application that would necessarily fail, gave his client poor advice when Immigration New Zealand pointed out the difficulties, persisted with his deficient application; and failed to record the advice he did give.
- [3] 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

- [4] The Registrar's Statement of Complaint put forward the following background as the basis for the complaint:
- [4.1] The complainant engaged Mr Kumar to assist with seeking a Graduate Work Experience Visa, which occurred on 23 January 2013. They signed a written agreement, providing for fees of \$1,500. Mr Kumar received an initial payment of \$1,000 and issued a receipt. At the initial meeting, the complainant told Mr Kumar of potential difficulties obtaining an Employer Supplementary Form from his employer.
- [4.2] Mr Kumar submitted the visa application, and said in a covering letter "please note [the complainant's employer] only issues the letter instead of the Employer Supplementary form as it is their company policy and they have provided the same in the past to INZ".
- [4.3] Immigration New Zealand responded on 1 February 2013 with a letter raising concerns, including the fact the application did not have an Employer Supplementary Form supporting it. Mr Kumar replied in a letter on 15 February 2013, discussing the complainant's employment and reiterating it was his employer's policy not to issue an Employer Supplementary Form; Immigration New Zealand declined the visa request, and the complainant was in New Zealand unlawfully without a current visa.
- [5] The Registrar identified potential infringements of professional standards during the course of Mr Kumar's engagement, the allegations were that potentially:
- [5.1] Mr Kumar breached clauses 2.2 and 3(f) of the Licensed Immigration Advisers Code of Conduct 2010 (the 2010 Code). The provisions required him to take steps to warn his client in respect of a grossly unfounded application, and confirm in writing the details of material discussions. The circumstances were:
- [5.1.1] The complainant told Mr Kumar from the outset he did not have an Employer Supplementary Form, and was not likely to get one. An Employer Supplementary Form is a mandatory lodgement requirement for a Graduate Work Experience Visa under Immigration New Zealand instruction WD1(e)(iv).

- [5.1.2] Mr Kumar told the complainant an Employer Supplementary Form was not necessarily important, and he could get the visa without one.
- [5.1.3] Mr Kumar did not:
- [5.1.3.1] Make the complainant aware of the importance of an Employer Supplementary Form.
 - [5.1.3.2] Confirm in writing details of his discussions with the complainant regarding the Employer Supplementary Form.
 - [5.1.3.3] Encourage the complainant not to lodge the visa application without an Employer Supplementary Form, provide written advice to suggest the application was grossly unfounded, or seek written confirmation if the complainant wished to proceed.
- [5.2] Mr Kumar breached clauses 1.1(a), 1.1(b) and 3(f) of the Licensed Immigration Advisers Code of Conduct 2010 (the 2010 Code). The provisions required him to perform services and carry out instructions with due care, diligence, and professionalism, and confirm in writing the details of material discussions. The circumstances were:
- [5.2.1] When Mr Kumar received the letter of 1 February 2013 from Immigration New Zealand, expressing concerns about the application, he forwarded it to the complainant. He told the complainant to request: "head office to write details about your employment on their letterhead."
 - [5.2.2] Mr Kumar discussed Immigration New Zealand's letter with the complainant and the complainant asked Mr Kumar to proceed with his application. However, the confirmation of Mr Kumar's advice was limited to recording "as per our discussion this afternoon, you have advised us to let Immigration make a decision on the information that is with them."
 - [5.2.3] Mr Kumar's response to Immigration New Zealand's 1 February 2013 letter failed to address most of Immigration New Zealand's concerns, and he failed to supply supporting documentation:
 - [5.2.3.1] The only new documentation supplied was an irrelevant payroll analysis report;
 - [5.2.3.2] Mr Kumar stated the Employer Supplementary Form was not supplied due to HR personnel being on leave (without evidence this was true);
 - [5.2.3.3] Referring to a letter from the complainant's employer saying he had been promoted, when it was a standard confirmation of service that did not refer to a promotion;
 - [5.2.3.4] Claiming payslips were evidence of promotion, when they did not evidence a promotion directly or from an increase in pay; and
 - [5.2.3.5] Stating the employer's policy was not to provide Employer Supplementary Forms, when Mr Kumar had not established that was true.
 - [5.2.4] Mr Kumar did not:
 - [5.2.4.1] Take adequate steps to explain Immigration New Zealand's concerns to the complainant, discuss options for addressing them, or advise him of the consequences of not addressing them.

- [5.2.4.2] Respond adequately to Immigration New Zealand's concerns. Including that unless the complainant presented an Employer Supplementary Form his application would fail.
- [5.2.4.3] Confirm the details of his discussions in writing for the complainant.

- [6] 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

- [7] Neither the complainant, nor Mr Kumar filed statements of reply, and they were not required to do so if they 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 or challenged the facts set out in the statement of complaint. The information establishes the factual foundation the Registrar presented for the complaint.

Pursuing a hopeless application

- [10] From the outset, Mr Kumar should have identified that without an Employer Supplementary Form the complainant could not apply for the visa he sought. The issue is clear from Immigration New Zealand's instructions; his client raised the issue at the first meeting. Mr Kumar's duty was to understand the significance of the issue, and tell his client what the position was and what, if anything, he could do to meet the requirements for the visa.
- [11] Instead, Mr Kumar gave incorrect advice and proceeded to apply to the visa. Any licensed immigration adviser in Mr Kumar's situation had an obligation to understand the relevant immigration instruction, and in the present case, Mr Kumar's client drew attention to the critical issue. He then placed his client in the position of applying for a visa when he could not be eligible without the necessary documentation.
- [12] This aspect of the complaint raises two issues; first, that Mr Kumar pursued a hopeless application. I am satisfied that occurred, as the requirement for the Employer Supplementary Form is an essential prerequisite to lodging an application. It inevitably followed that Mr Kumar failed to go through the process for dealing with a proposal to lodge a grossly unfounded application. Second, Mr Kumar was obliged to document his advice regarding the merits of the application; and, if his client wished to proceed, to document his concerns regarding that.
- [13] These circumstances inevitably establish Mr Kumar:
- [13.1] Breached clause 2.2 of the 2010 Code, as he did not encourage his client not to lodge the application, advise his client in writing that it was grossly unfounded, and did not seek written acknowledgement regarding that advice; and
- [13.2] He breached clause 3(f), as he was required to confirm in writing the details of material discussions with clients, and he has not confirmed in writing what advice he gave about this grossly unfounded application.
- [14] Accordingly, the Tribunal must uphold these elements of the grounds of complaint.

Failing to respond professionally when Immigration New Zealand pointed out the difficulties

- [15] Mr Kumar provided incorrect advice on the requirements for the complainant to obtain a visa, it appears probable he did not know what was required; he then completed the application with information that wholly failed to meet Immigration New Zealand's documented requirements.
- [16] However, Mr Kumar had a second opportunity to address the issues. Immigration New Zealand wrote to him, and pointed out the deficiencies. Despite Immigration New Zealand making the position clear beyond doubt, Mr Kumar persisted with the grossly unfounded application. His client was entitled to know what the true position was, whether he could do something to change it, and if not that he had to prepare to leave New Zealand as he could not obtain a new visa and his visa was due to expire. Instead, Mr Kumar prepared a response for Immigration New Zealand that ensured his client's application must fail, as he did not address the critical issues Immigration New Zealand raised. Mr Kumar failed to record his advice in writing.
- [17] Accordingly, Mr Kumar:
- [17.1] Breached clause 1.1(a) and (b) of the 2010 Code, he did not have lawful informed instructions as he did not give his client the advice needed to give informed instructions; and he did not perform his services with due care, diligence or professionalism. The actions he took to respond to Immigration New Zealand ensured his client's application would fail, and there was no other strategy in place.
- [17.2] Breached clause 3(f) of the 2010 Code, as he did not record his advice to his client in writing, when he provided advice on the response to Immigration New Zealand's request.

Decision

- [18] 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.
- [19] In other respects, the Tribunal dismisses the complaint.

Submissions on Sanctions

- [20] The Tribunal has upheld the complaint; pursuant to section 51 of the Act, it may impose sanctions.
- [21] 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.
- [22] 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

- [23] The timetable for submissions will be as follows:
- [23.1] The Authority and the complainant are to make any submissions within 10 working days of the issue of this decision.
- [23.2] 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.
- [23.3] 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 Thursday 4th day of June 2015

G D Pearson
Chair