

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

Decision No: [2015] NZIACDT 8

Reference No: IACDT 013/14

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Shiv Prashant Choudhary

Complainant

AND

Gregory Francisco Smith

Adviser

DECISION

REPRESENTATION:

Registrar: In person

Complainant: In person

Adviser: In person

Date Issued: 18 February 2015

DECISION

Introduction

- [1] The Registrar of the Immigration Advisers Authority referred this complaint to the Tribunal. The grounds alleged in the Statement of Complaint are that the adviser breached elements of the Licensed Immigration Advisers Code of Conduct 2010 (the 2010 Code) and the Licensed Immigration Advisers Code of Conduct 2014 (the 2014 Code), and was negligent and engaged in dishonest and misleading behaviour (grounds for complaint under section 44(2) of the Immigration Advisers Licensing Act 2007 (the Act)).
- [2] The grounds put forward in the Statement of Complaint are that in the course of his professional relationship with the complainant:
- [2.1] Mr Smith's written agreement failed to include details of the services he would provide;
- [2.2] He failed to do the work he agreed to do;
- [2.3] He dishonestly told the complainant he had lodged an application with Immigration New Zealand, that they were considering it and held his passport; knowing he had not lodged the application and he had the passport;
- [2.4] He failed to return the passport when requested;
- [2.5] He failed to comply with the Authority's statutory request for his file.
- [3] Mr Smith has not responded to the Tribunal with an explanation or justification for any of these matters.
- [4] The Tribunal has concluded it must uphold the complaint, as the material before it supports the grounds of complaint.

The complaint

- [5] The Registrar filed a statement of complaint, she put forward the following background as the basis for the complaint:
- [5.1] On 9 November 2012, the complainant received a letter from Immigration New Zealand requesting comment on issues concerning an application he made for a work visa.
- [5.2] He engaged Mr Smith to respond to the letter, and to submit a student visa application. On 15 November 2012, he entered a written agreement with Mr Smith relating to these services.
- [5.3] Mr Smith contacted Immigration New Zealand, and obtained an extended time to reply to their query.
- [5.4] On 22 November 2012, the complainant paid Mr Smith \$1,200.
- [5.5] On 3 December 2012, Immigration New Zealand declined the complainant's application for a work visa, due to the lack of response from Mr Smith. It followed that the complainant's interim visa expired, and he was in New Zealand unlawfully. Immigration New Zealand returned the complainant's documents, including his passport.
- [5.6] On 18 April 2013, the complainant contacted Immigration New Zealand; they told him he had no current application. He went to Mr Smith, and he told the complainant his file was still with Immigration New Zealand. In May 2013, the complainant asked Mr Smith for his passport. Mr Smith told him Immigration New Zealand had his passport.
- [5.7] Mr Smith took no steps with Immigration New Zealand on the complainant's behalf, apart from securing an extension of time.

- [6] The Registrar identified potential infringements of professional standards. They were:
- [6.1] Mr Smith breached clause 1.5(b) of the 2010 Code as he failed to provide a full description of the services he agreed to provide.
 - [6.2] He negligently failed to submit an application for a student visa and respond to Immigration New Zealand's queries, having agreed to do so. Negligence is a ground for complaint under section 44(2) of the Act.
 - [6.3] He dishonestly told the complainant Immigration New Zealand was dealing with his dealing with his application, knowing Immigration New Zealand declined the application some 4 months earlier. He also dishonestly said to the complainant that Immigration New Zealand had his passport, when it was in his possession. Dishonest or misleading behaviour is a ground for complaint under section 44(2)(d) of the Act.
 - [6.4] He failed to return the complainant's passport when he requested it, in breach of clause 1.3(b) of the 2010.
 - [6.5] He did not provide a copy of his client file when the Registrar required him to do so, and accordingly breached clause 3(c) of the 2014 Code. The Registrar required the file to deal with this complaint.

The Responses

- [7] Mr Smith sought and was granted a series of adjournments to give him time to respond to the Statement of Complaint. The adjournments were granted on the basis the other parties did not object. After the fourth application, the Tribunal required Mr Smith to provide grounds and evidence in support of the grounds for an adjournment. He had to do so by 17 February 2015. He took no steps, and he has not filed a reply to the Statement of Complaint.
- [8] The complainant filed a statement of reply. He accepted the Registrar's Statement of Complaint set out the facts and matters in dispute appropriately.

Discussion

The standard of proof

- [9] 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].

Evaluation of the material before the Tribunal

- [10] The Registrar provided a chronology, and supporting documentation. The parties have not disputed this record or added to it.
- [11] I am satisfied this material supports the grounds of complaint alleged.
- [12] The complainant has provided a coherent complaint that he instructed Mr Smith, he failed to act on the instructions, then he lied to him regarding the work performed, he also lied about the whereabouts of his passport, and then did not return the passport. Mr Smith then failed to provide the Registrar with his file in breach of his legal obligations.
- [13] Mr Smith has answered none of these very serious allegations.
- [14] I am satisfied that the material before the Tribunal establishes Mr Smith breached his duties in the respects set out in the Statement of Complaint.
- [15] In particular my findings on the material before the Tribunal are:

- [15.1] The written agreement does not contain a full description of the services that Mr Smith would provide, as required by clause 1.5(b) of the 2010 Code. That is manifest on the face of the document, and there is nothing put forward in justification or excuse.
- [15.2] The complainant came to Mr Smith when he was under time pressure to respond to Immigration New Zealand. On Mr Smith's request, they granted an extension of time, Mr Smith failed to respond in the time allowed. That was negligent. He also agreed to apply for a student visa; it was imperative that the complainant had a visa when in New Zealand. When the work visa application failed due to Mr Smith not replying to Immigration New Zealand, the lack of a student visa put the complainant in a position of being unlawfully in New Zealand. Mr Smith was negligent in failing to respond to Immigration New Zealand, and in failing to apply for a student visa. His negligence led to the complainant being in New Zealand unlawfully. Accordingly, this ground of complaint is upheld under section 44(2)(a) of the Act.
- [15.3] The complainant sought an explanation from Mr Smith regarding him not having a current application with Immigration New Zealand. Mr Smith lied to him, knowing the application was declined due to his own failure to provide an explanation, and furthermore that the complainant was in New Zealand unlawfully. He also knew he held the complainant's passport and lied to him about that too. The deceptions were of the utmost seriousness as they concerned the complainant's lawful status in New Zealand, which has potentially permanent adverse effects, and the deception regarding the passport made it difficult for the complainant to comply with New Zealand law even when he found out his true immigration status. The only apparent explanation for the repeated deception by Mr Smith is to hide his own unprofessional conduct. I am satisfied Mr Smith's conduct was dishonest and misleading, and accordingly this ground of complaint is upheld under section 44(2)(d) of the Act.
- [15.4] Mr Smith failed to return the complainant's passport pursuant to clause 1.3(b) of the 2010 Code. He lied to evade the responsibility.
- [15.5] Mr Smith also failed to provide his file to the Registrar; he did so when the Registrar made a statutory request pursuant to section 57 of the Act. He accordingly breached clause 3(c) of the 2014 Code, which required that he comply with the Act.

Decision

- [16] The Tribunal upholds the complaint pursuant to section 50 of the Act.
- [17] The adviser breached the 2010 and 2014 Codes in the respects identified, and the grounds of negligence and dishonest and misleading behaviour are made out.

Submissions on Sanctions

- [18] The Tribunal has upheld the complaint; pursuant to section 51 of the Act, it may impose sanctions.
- [19] The Authority 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, Mr Smith is entitled to make submissions and respond to any submissions from the other parties.
- [20] If the complainant seeks compensation for the loss of the ability to work, he should provide information relating to whether his application for a work visa would have been successful if Mr Smith acted on his instructions. In addition, he should provide details of any lost income. If he has had costs in addressing his immigration status, he should provide particulars.
- [21] 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.
- [22] Mr Smith is at risk of a substantial financial penalty, loss of licence, and an order for compensation. In giving Mr Smith notice of the gravity of this matter, I am not indicating the Tribunal has reached any concluded view, or that the Registrar and the Complainant may not

successfully advance a case for imposing other sanctions. The purpose of putting Mr Smith on notice is that he has consistently failed to respond to the Registrar and the Tribunal, despite the Tribunal already giving Mr Smith express notice of the importance of doing so, in its minute of 10 November 2014. Mr Smith should understand he is now in the position where the Tribunal has upheld a complaint at the most serious end of professional offending, and the Tribunal may well regard his failure to respond to the Registrar's request for his file as a matter aggravating the complaint.

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 him filing and serving those submissions.

DATED at Wellington this 18th day of February 2015

G D Pearson
Chair