

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

Decision No: [2015] NZIACDT 81

Reference No: IACDT 038/14

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

T L

Complainant

AND

S O

Adviser

DECISION

REPRESENTATION:

Registrar: Ms S Blick, Lawyer, Ministry of Business, Immigration and Employment, Auckland.

Complainant: In person

Adviser: Mr S Laurent, lawyer, Laurent Law, Auckland.

Date Issued: 14 August 2015

DECISION

Introduction

- [1] The Registrar of the Immigration Advisers Authority referred this complaint to the Tribunal. The factual allegations on which the complaint is based are:
- [1.1] The adviser allegedly conducted herself in a dishonest and misleading manner as she misrepresented the date of her first contact with the complainant, put a false remuneration rate into the complainant's employment contract, and offered a job to the complainant that was not genuine or sustainable.
- [1.2] She allegedly failed to pay a refund.
- [2] The Tribunal held an oral hearing where the adviser gave sworn evidence and was subject to cross-examination. The complainant did not attend and gave no sworn evidence. The adviser said there was a minor inaccuracy regarding what she told Immigration New Zealand about her first meeting with the complainant, but claimed it was no more than a minor clerical matter. The remuneration in the job offer was accurate, the only discrepancy was that after tax the complainant would (appropriately) receive an after tax income. While the business offering the complainant work did fail later, at the time the offer was for a position to replace an employee who decided to leave. Only with hindsight did she realise the position was not enduring. She also said she had offered a refund, but the complainant had refused it.
- [3] There was a wider issue relating to the complaint. The complainant said she paid an intermediary \$15,000 to procure a job offer from the adviser. If correct, and the adviser was a party to that, then plainly she was involved in a dishonest practice. The adviser's evidence was that she knew nothing of the intermediary being paid \$15,000 until after the material events and he had absconded.
- [4] The Tribunal invited the Registrar to provide any evidence in reply; she provided no evidence. However, through her counsel she did cross-examine the adviser. Accordingly, the complaint simply turns on whether the Tribunal should accept the adviser's evidence.
- [5] The Tribunal has accepted the adviser's evidence; there was no proper basis to do otherwise. It was the only sworn evidence; it was plausible and consistent with the contemporaneous written record. It follows that the Tribunal must reject this complaint.

The complaint

- [6] The Registrar's Statement of Complaint put forward the following background as the basis for the complaint. It was based on the complainant's statements:
- [6.1] On 31 May 2013, a person known as Mr Mahesh introduced the complainant to the adviser. The adviser had a company called X Agency Ltd (the company). It provided immigration and other services. The purpose of the introduction related to a potential position of employment as the Customer Services Manager in the company.
- [6.2] The complainant paid Mr Mahesh \$15,000 in cash to secure the offer of employment from the adviser. The adviser asked the complainant whether Mr Mahesh told her about the money. The complainant accordingly inferred that the adviser was to receive some of the \$15,000.
- [6.3] The same day the adviser completed an initial assessment, and personal profile for the complainant and the complainant completed a job application for the position.
- [6.4] On 11 June 2013, the adviser advertised the position in the *New Zealand Herald* newspaper. She told the complainant to apply for the role again, in response to the advertisement so as to make it look genuine. The complainant did so.
- [6.5] On 21 June 2013, the adviser offered the complainant the position, subject to her getting a work visa, and signed an employment agreement. It indicated the

complainant would be paid \$18.75 per hour (\$39,000 per annum). The adviser said she would in fact be paid \$15/hr.

- [6.6] The adviser gave the complainant a letter saying she could choose whether to use her services to apply for a work visa, but told her that in fact the job offer was conditional on her doing so.
- [6.7] The complainant signed an agreement for the adviser to apply for a work visa; the fees were \$810, comprising Immigration New Zealand fees of \$270 and the balance of \$540 in the adviser's professional fees.
- [6.8] The adviser submitted a work visa application. On 31 July 2013, Immigration New Zealand sent a verification questionnaire to the adviser. On 16 August 2013 she completed it, stating that her first contact with the complainant was by email on 14 June 2013.
- [6.9] On 18 September 2013, Immigration New Zealand emailed the adviser saying the offer of employment did not appear to be genuine or sustainable. She provided a response.
- [6.10] Immigration New Zealand declined the complainant's application, as it was not satisfied that:
 - [6.10.1] The offer of employment was sustainable; and
 - [6.10.2] The qualifications the complainant held were not the key factor in offering employment to the complainant.
- [6.11] Immigration New Zealand said the financial information did not make it likely the complainant's remuneration could be sustained over the following financial year.
- [6.12] The complainant's lawyer requested that the adviser refund the payment of \$15,000 for securing the job. The adviser denied she received \$15,000.
- [7] The Registrar identified potential infringement of professional standards during the course of the adviser's engagement, the allegations were that:
 - [7.1] The adviser engaged in dishonest and misleading behaviour, which is a ground for complaint under section 44(2)(d) of the Immigration Advisers Licensing Act 2007 (the Act) and clause 5.2 of the Licensed Immigration Advisers Code of Conduct 2010 (the 2010 Code), which provides a licensed immigration adviser must not provide false or misleading information, or conceal relevant information in respect of immigration processes. The circumstances were:
 - [7.1.1] That the adviser "may have been dishonest and misleading when she represented to Immigration New Zealand that her first contact with the complainant was in an email on 14 June 2014, knowing that this was false and misleading. It appears this representation was made in order to make the job offer look genuine."
 - [7.1.2] The employment offer "stated [the adviser] intended to pay the complainant \$18.75 per hour, when in fact she intended to pay the complainant \$15 per hour."
 - [7.1.3] "[The adviser] may have been dishonest and misleading when she offered a job to the complainant for the purposes of obtaining a work visa, and was subsequently engaged to assist in obtaining that work visa, when in fact that job offer was not genuine or sustainable."
 - [7.2] The adviser breached clause 3(d) of the Licensed Immigration Advisers Code of Conduct 2010 (the 2010 Code). The provision required the adviser to provide any refunds payable on completing or ceasing a contract for services. The circumstances were:

[7.2.1] The agreement for providing services relating to the work visa application allowed for a refund of 50% of the fee if the application was unsuccessful.

[7.2.2] The application failed, and the adviser did not pay the refund.

[8] The Registrar did not include as a ground of complaint the allegation that the job offer was conditional on using the adviser's services.

The responses

The complainant

[9] The complainant did not file a statement of reply, and was not required to do so if she agreed with the contents of the Statement of Complaint.

The adviser

[10] The adviser filed a statement of reply and an affidavit. The Tribunal issued a direction. It noted that the adviser's response was undisputed, and provided the Registrar with an opportunity to file any evidence in reply, and apply for an oral hearing to cross-examine the adviser. The Registrar indicated she had no evidence in reply, but wished to cross-examine the adviser.

[11] The adviser travelled from China to attend the hearing.

Discussion

The standard of proof

[12] 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 grounds for alleging dishonesty

[13] The Statement of Complaint says the complainant claimed the adviser was a party to soliciting a payment of \$15,000 from the complainant for a position of employment. The employment did not eventuate, and the money was not repaid. That allegation is at the most grave end of the scale of professional offending by a licensed immigration adviser. Not only is securing payment for employment dishonesty of a kind that is wholly incompatible with the professional obligations of a licensed immigration adviser, it will almost certainly involve serious criminal offending.

[14] Notwithstanding the gravity of the complainant's allegations, the Statement of Complaint did not allege dishonesty in respect of being a party to defrauding the complainant of \$15,000. The allegations in the Statement of Complaint were limited to allegations that the adviser said the first contact was by email and not an earlier face-to-face meeting, the employment contract stated the wrong remuneration, and the job offered was not in fact sustainable.

The facts and circumstances

[15] The Registrar provided a chronology and supporting documentation; that record is not in dispute.

[16] The adviser addressed the critical factual issues. Her explanation is uncomplicated. The critical parts of her evidence were that:

[16.1] She had some contact with Mr Mahesh, after a colleague introduced him. He had introduced some clients and she paid him as an agent for client introductions.

[16.2] Mr Mahesh introduced the complainant, but not as a client. The person who worked for the company as its Customer Services Manager was leaving, and the adviser was looking for a replacement. Mr Mahesh introduced the complainant as a potential employee.

- [16.3] The adviser knew nothing of any money paid to Mr Mahesh, as neither he nor the complainant said anything about that.
- [16.4] The adviser considered the complainant would be a suitable applicant for the position. After an initial evaluation, she said she had to advertise the position otherwise the complainant could not get a work visa relying on the position. She said this was usual; a business would contemplate employing a migrant and then have to go through the process of establishing a New Zealand resident or citizen was not available.
- [16.5] She said that her business had faced difficulties, in part through adverse publicity. The business ultimately failed. However, at the time, the position of employment offered was simply a replacement of an existing employee and she believed it was sustainable, as it had been in the past.
- [16.6] She said the employment contract correctly stated the remuneration was \$18.75/hr; she said to the complainant that the net after tax rate was about \$15/hr. She demonstrated that that figure approximated the after tax payment.
- [16.7] The adviser said she told the complainant she could make her own application for the work visa, or get her to do it for a fee of \$540 which was a standard fee. The complainant asked her to do the work.
- [16.8] She said Mr Mahesh disappeared; she does not know where he went. At that point, the complainant for the first time disclosed the payment of \$15,000. The adviser was concerned, but did not know where Mr Mahesh had gone or how she could contact him. She was not involved with the money he solicited from the complainant, so there was nothing she could do.
- [16.9] The adviser said she accepted Immigration New Zealand decided the position was not sustainable, but at the time, she believed it was. Although the business ultimately failed, she did not foresee that outcome at the time.
- [16.10] The adviser accepted she owed a refund of \$270, being half of the fee she received, but said she had tried to repay the money and the complainant refused to accept it.
- [17] There is nothing in the record that is inconsistent with the adviser's evidence. Notwithstanding the Tribunal making it clear it would accept the adviser's evidence as uncontested, subject to cross-examination. There is no sworn evidence that provides any alternative to what the adviser deposed. Accordingly, the Tribunal is in a position where extremely serious allegations have been set out in the Statement of Complaint, but there is no sworn evidence to support them. The adviser has fully answered them. Her evidence is plausible and consistent with the record. She is entitled to have the Tribunal find her evidence is correct and the allegation that she was a party to defrauding the complainant is without foundation.
- [18] I will consider each of the specific grounds of complaint.

Conclusions regarding providing false information as to the first contact with the complainant

- [19] The Statement of Complaint alleges the adviser was dishonest and misleading regarding the first contact with the complainant. She accepted she erroneously told Immigration New Zealand her first contact was through an email on 14 June 2013, but has since realised that was not accurate as she had the first meeting in late May 2013. The statement was made when Immigration New Zealand investigated the employment offered to the complainant.
- [20] She also said she had not seen the issue as being very important, as there was no reason to hide her contact with the complainant before she advertised the position; it was a routine situation. There is no evidence to the contrary, and it is unsurprising evidence. Furthermore, the person who compiled the information the adviser used was the then Customer Services Manager. It appeared he identified the first contact by searching the records, and the adviser relied on that information to reply to Immigration New Zealand.
- [21] Accordingly, I accept there is no more significance in this matter than a minor administrative error; I find this ground of complaint is not established.

Conclusions regarding a false remuneration in the employment agreement

- [22] The adviser's explanation that the correct remuneration figure is in the employment agreement and she was merely explaining the after tax figure was about \$3/hr less is entirely plausible and unchallenged. I accept the explanation. Accordingly, I do not find this ground of complaint established.

Conclusions regarding offering employment that was not genuine or sustainable

- [23] The adviser's evidence that the employment offered was an existing position that was sustainable for a period of years in the past is the starting point to evaluate her understanding of the circumstances. I accept that in fact the business later failed; however, the evidence does not establish when the business first became insolvent. Regardless, the allegation I must determine is whether the adviser was "dishonest and misleading". She says at the point in time she made the job offer, she believed she could overcome the difficulties faced by the business. That is far from unusual even when a business is in a hopeless financial situation; regardless, the adviser's evidence of her state of mind is the only evidence before me. I do not have evidence that the business was in such a parlous state she could not have held the belief. There is nothing in the record to show the adviser believed the business was unsustainable at that point. Accordingly, I accept the adviser's evidence and find she offered the employment, and believed that, as the offer was to replace the departing staff member, it was a genuine and sustainable position.

- [24] Accordingly, I do not find this ground of complaint established.

Refund

- [25] The adviser should have refunded half the complainant's fee. She says she offered the money in cash, but the complainant refused to accept the money. When the complainant's lawyer wrote asking for \$15,000 there was no mention of the \$270, which was half the fee for immigration services. Accordingly, having made the offer and having been refused, there was no follow up.
- [26] I accept the adviser's uncontested evidence. She made the offer of a refund, and there is no evidence she had another opportunity to pay the refund. The adviser said she remains willing to make the repayment if the complainant will accept the money. It follows I do not find this ground of complaint established.

Decision

- [27] The Tribunal dismisses the complaint pursuant to section 50 of the Act; none of the grounds of complaint is made out on the material before the Tribunal.

DATED at Wellington this 14th day of August 2015

G D Pearson
Chair