

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

Decision No: [2016] NZIACDT 13

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: Ms F Mohammed and Ms A Skadiang, lawyers, MBIE, Auckland.

Complainant: No appearance.

Adviser: Mr Moses, Barrister, Auckland.

Date Issued: 18 March 2016

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 gave evidence to the Tribunal that the allegation that an unlicensed person provided advice in his practice was not factual. He said there was no person fitting the description in the complaint at his practice, and that he personally provided the advice. He said his advice was sound, with the exception of a minor error of judgement regarding the evidence to support the work visa application. Neither the Registrar nor the complainant challenged Mr Kumar's evidence at the oral hearing it held to allow them to produce any evidence in reply and cross-examine Mr Kumar.
- [3] Mr Kumar did admit, of his own volition, he could have provided better advice regarding the work visa application and that he should have recorded the advice he did give more adequately. He accepted that in those respects, he breached the 2010 Code of Conduct.
- [4] Accordingly, the Tribunal has accepted Mr Kumar's unchallenged evidence, rejected the grounds of complaint, but upheld the complaint to the extent of Mr Kumar's admissions. Through her counsel, the Registrar accepted that was the appropriate outcome on the evidence before the Tribunal.

Rehearing

- [5] The Tribunal issued a decision upholding this complaint on the grounds presented by the Registrar in her Statement of Complaint. Mr Kumar applied for a rehearing. He supported the application on the grounds:
- [5.1] He posted a statement of reply to the Tribunal, using a correct postal address and in a timely manner.
- [5.2] Without the statement of reply, the Tribunal could not justly determine the complaint.
- [5.3] The Tribunal did not receive Mr Kumar's documentation despite him taking the proper steps.
- [6] If Mr Kumar took the proper steps to present his defence to the complaint, and the Tribunal did not have that material to consider; then, plainly, the Tribunal's decision should not stand. In previous decisions¹ the Tribunal has applied the principle that if parties take all proper steps and the Tribunal does not consider material that may affect the outcome of the complaint the decision is likely a nullity. Further, that the Tribunal's power to regulate its own procedure², if the Tribunal is not *functus officio*, allows the Tribunal to rehear the matter. Those principles have not been contentious in previous cases, and rehearing applications have turned on the merits of the application rather than jurisdictional issues.

¹ Such as *L v Conquer* [2015] NZIACDT 49.

² Section 49(1) of the Immigration Advisers Licensing Act 2007.

[7] This complaint was one of three complaints, where Mr Kumar said he had posted material to the Tribunal, and said the postal service failed to deliver it. Mr Kumar's initial evidence in support of his application for a rehearing was slight; accordingly, the Tribunal put the parties on notice of the factual issues that were not obviously resolved on the material then before it. The Tribunal hears matters on the papers, unless in the interests of justice further information is required, or personal appearances are necessary to deal properly with an issue. To allow the parties to address the grounds in Mr Kumar's application for rehearing, the Tribunal noted in its directions that:

"It would appear likely that if Mr Kumar created the [Statement of Reply] electronically, there will be evidence as to when he created it. In the absence of such evidence, the Tribunal may well give weight to the information Mr Kumar has already supplied [in support of his application for rehearing]:

- He admitted that using postal delivery was not his usual method of communicating with the Tribunal, but does not provide a reason for this departure from his usual practice.
- When a person posts documents, they usually reach their destination.
- Mr Kumar says three posted documents did not reach their destination, but he provided no reason why that should occur.
- The three documents were not due to be posted at the same time, and apparently, Mr Kumar must have posted each on a separate occasion. The first statement of reply was due before the Registrar filed the third statement of complaint.
- When he received the three decisions disclosing the Tribunal did not receive statements of reply from him, Mr Kumar did not immediately deliver the documents he said he had earlier prepared and posted."

[8] Mr Kumar responded with a report from an expert that said he examined Mr Kumar's computer for evidence relating to the three Statements of Reply, which Mr Kumar said he created on 19, 22 and 30 January 2015. The report said that copies on the computer had dates of 9 June 2015, but said the information was such that "we recommend computer forensic investigation in detail." There was no evidence of further investigation presented to the Tribunal. Mr Kumar did give evidence he posted the Statements of Reply in January 2015, and said he could not explain why the postal service failed to deliver it.

[9] The Tribunal gave directions that an oral hearing would take place, that the Registrar and the complainant could provide any evidence in reply, and cross-examine Mr Kumar.

[10] At the hearing, the complainant did not appear. The Registrar indicated, she did not oppose Mr Kumar's application for a rehearing; and she did not cross-examine Mr Kumar.

[11] 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].

[12] The only sworn evidence relating to whether Mr Kumar posted the three Statements of Complaint is from Mr Kumar. His evidence is that he personally posted the documents, using a correct address in January 2015. The Registrar and the complainant have not challenged this evidence by cross-examination; and in addition, the Registrar does not oppose the application for a rehearing.

[13] Accordingly, the Tribunal must accept Mr Kumar's unchallenged sworn evidence. It follows the Tribunal must find Mr Kumar prepared a statement of reply in January 2015, and posted it to the Tribunal. The postal service failed to deliver the document, and the Tribunal's decision failed to take account of Mr Kumar's defence to the complaint. For the reasons discussed below that defence is material to the Tribunal's findings regarding the grounds of the complaint. The Tribunal has accordingly reheard the complaint.

The complaint

- [14] The Registrar's Statement of Complaint put forward the following background as the basis for the complaint:
- [14.1] 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.
- [14.2] 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:
- [14.2.1] 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.
- [14.2.2] Further, the employment did not qualify as it was for less than 30 hours per week.
- [14.2.3] The complainant had worked in breach of his student visa, as evidenced in the material Mr Kumar submitted with the visa.
- [14.3] On 4 December 2013, the complainant withdrew the application following the unlicensed person's advice.
- [15] The Registrar identified potential infringement of professional standards during the course of Mr Kumar's engagement, the allegations were that potentially:
- [15.1] 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:
- [15.1.1] Only licensed immigration advisers, or persons who are exempt can provide immigration advice without breaching the Immigration Advisers Licensing Act 2007 (the Act).
- [15.1.2] The complainant came to Mr Kumar's practice, and an unlicensed person 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.
- [15.1.3] Mr Kumar breached his duties to comply with the Act, and maintain professional business practices.
- [15.2] Mr Kumar was incompetent and negligent (a ground for complaint under section 44(2) of the Act). The circumstances were:
- [15.2.1] 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.
- [15.2.2] The correct requirement was that the job offer had to be fulltime, which required 30 hours per week, under the relevant immigration instructions.
- [15.2.3] The application for a work visa did not show that the job offer was for fulltime work.

[15.2.4] 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.

[15.2.5] The application was drafted and submitted negligently as, aside from not being supported with a fulltime job offer:

[15.2.5.1] It did not have evidence to show a proper process to establish no New Zealanders were available;

[15.2.5.2] Did have pay slips showing a breach of the complainant's visa through working outside of the conditions of his visa, but did not have an explanation.

[16] 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

[17] The complainant filed a statement of reply, and agreed with the contents of the Statement of Complaint.

[18] Mr Kumar filed an affidavit answering the complaint.

[18.1] Mr Kumar said the complaint was invention, as there was no person in his practice that fitted the description of the unlicensed person who the complainant alleged provided services unlawfully.

[18.2] Mr Kumar said he provided professional advice and services in accordance with the standards required, except he admitted:

[18.2.1] He did lodge an application for a work visa with insufficient support. However, it was only an error of judgement.

[18.2.2] At the time, Mr Kumar did have concerns, and had in fact advised the complainant to take a different approach. None the less, he accepted he made an error in his evaluation of what Immigration New Zealand might accept as sufficient evidence using their discretion.

[18.3] Accordingly, Mr Kumar accepted he breached the Licensed Immigration Advisers Code of Conduct 2010 (the 2010 Code), in that:

[18.3.1] He failed to provide adequate advice on the lack of evidence supporting the work visa application (clause 1.1(a) of the 2010 Code); and

[18.3.2] He failed to record the advice he did provide (clause 3(f) of the 2010 Code).

Discussion

The standard of proof

[19] As noted, the Tribunal determines facts on the balance of probabilities; that applies equally to interlocutory and substantive issues.

The facts

[20] The complaint turns on the facts.

[21] As noted the Tribunal required Mr Kumar to attend an oral hearing where the complainant and the Registrar had the opportunity to call evidence in reply, and/or cross-examine Mr Kumar.

- [22] The complainant did not attend the hearing. The Registrar did not cross-examine Mr Kumar, and did not oppose his contention that the extent of any professional failing was a minor error of judgement and a failure to record advice. Her counsel accepted that was the appropriate outcome on the evidence before the Tribunal.
- [23] Mr Kumar's answer to the complaint essentially required the Tribunal to reject entirely the foundation for the complaint and its genuineness. For Mr Kumar, Mr Moses submitted the Tribunal ought not to speculate, and accept there may be motivations for false complaints.
- [24] Plainly, Mr Kumar was in a position to have direct knowledge of the matters to which he deposed, his is the only sworn evidence, and the Registrar has not challenged the evidence. Accordingly, the Tribunal must accept Mr Kumar's evidence.

Allowing unlicensed personnel to provide immigration services

- [25] The Tribunal must find there was no person fitting the complainant's description in Mr Kumar's practice who could have given immigration advice. Only Mr Kumar could have given immigration advice and did give the immigration advice, and he is licensed. Accordingly, the Tribunal must dismiss the complaint that an unlicensed person provided immigration advice in Mr Kumar's practice.

Negligence and incompetence

- [26] Mr Kumar's unchallenged evidence is that the only deficiency in his professional service delivery was a minor error of judgement falling short of negligence. Mr Kumar's evidence is surprising, given Immigration New Zealand's reaction to the application. However, neither the complainant nor the Registrar challenged this evidence. Significantly, they did not challenge Mr Kumar's evidence that the complainant constructed the complaint about an unlicensed adviser. Who was responsible for a failed application can have a great deal to do with the adviser/client interaction, and the information provided to the adviser. I am mindful of two things:
- [26.1] First Mr Moses' submission the Tribunal should not speculate regarding complaints as there can be wrongful motives for false complaints.
- [26.2] Second, the Tribunal has exercised its inquisitorial functions under section 49 of the Immigration Advisers Licensing Act 2007, by requiring Mr Kumar to appear, and address any opposing evidence and cross-examination from the Registrar and the complainant. The Registrar has responsibility for protecting the public interest in the complaints process, investigating complaints, and ensuring the Tribunal has such information as it should have to make decisions.
- [27] The Tribunal has unchallenged evidence given on oath, it is obliged to accept that evidence, it cannot simply reject it as unbelievable. The Registrar neither laid a foundation for such a submission through cross-examination, nor made such a submission. Through her counsel she accepted Mr Kumar's explanation, and his evidence that the concessions he made were the extent of his professional offending.
- [28] Mr Moses correctly submitted that the Tribunal must not speculate and go beyond the evidence before it. The parties may be aware of matters they do not, and should not, disclose to the Tribunal. The Registrar protects the public interest in that regard.
- [29] Accordingly, the Tribunal accepts Mr Kumar's evidence that in the circumstances in which he provided his professional services he did so with competence and care, except for a minor error of judgement. I accordingly, dismiss negligence and incompetence as grounds of complaint.

Breaches of the 2010 Code

- [30] Mr Kumar has admitted an error of judgement passing the threshold for disciplinary action as he failed to evaluate adequately the evidence to support a work visa application. Accordingly, I find he failed to perform his services with due care in breach of clause 1.1(a) of the 2010 Code.

[31] Further, he admitted failing to adequately record his advice regarding the merits of the application for a work visa. Accordingly, I find he failed to confirm in writing the details of material discussions, and breached clause 3(f) of the 2010 Code.

Decision

[32] The Tribunal upholds the complaint pursuant to section 50 of the Act; Mr Kumar breached the 2010 Code in the respects identified.

[33] In other respects, the Tribunal dismisses the complaint.

Submissions on Sanctions

[34] The Tribunal has upheld the complaint; pursuant to section 51 of the Act, it may impose sanctions, or take no further action.

[35] 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.

[36] 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

[37] The timetable for submissions will be as follows:

[37.1] The Authority and the complainant are to make any submissions within 15 working days of the issue of this decision.

[37.2] The adviser is to make any further submissions (whether or not the Authority or the complainant makes submissions) within 25 working days of the issue of this decision.

[37.3] 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 March 2016

G D Pearson
Chair