

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

Decision No: [2016] NZIACDT 14

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

Complainant: No appearance.

Adviser: Mr Moses, Barrister, Auckland.

Date Issued: 23 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] 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] Accordingly, 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 gave evidence to the Tribunal that he did give proper advice regarding the application. He admitted only a failure to record that advice in writing, and accepted in that respect, he breached the 2010 Code of Conduct. He conceded some lack of clarity in his communications, which was evident only with hindsight. His evidence was that his interactions with his client were fundamentally different from the grounds of complaint presented by the Registrar.
- [4] Neither the Registrar nor the complainant challenged Mr Kumar's evidence at the oral hearing, which the Tribunal held to allow them to produce any evidence in reply and cross-examine Mr Kumar.
- [5] Accordingly, the Tribunal has accepted Mr Kumar's unchallenged evidence, rejected the grounds of complaint, except to the extent of Mr Kumar's admission. Through her counsel, the Registrar accepted that was the appropriate outcome on the evidence before the Tribunal.

Rehearing

- [6] 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:
- [6.1] He posted a statement of reply to the Tribunal, using a correct postal address and in a timely manner.
- [6.2] Without the statement of reply, the Tribunal could not justly determine the complaint.
- [6.3] The Tribunal did not receive Mr Kumar's documentation despite him taking the proper steps.
- [7] 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

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

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

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.

- [8] 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."

- [9] 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.
- [10] 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.
- [11] 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.
- [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].
- [13] The only sworn evidence relating to whether Mr Kumar posted the three Statements of Reply 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.
- [14] 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

- [15] The Registrar's Statement of Complaint put forward the following background as the basis for the complaint:
- [15.1] The complainant engaged Mr Kumar to assist with seeking a Graduate Work Experience Visa. That 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.
- [15.2] 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".
- [15.3] 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.
- [16] The Registrar identified potential infringements of professional standards during the course of Mr Kumar's engagement, the allegations were that potentially:
- [16.1] 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:
- [16.1.1] 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).
- [16.1.2] Mr Kumar told the complainant an Employer Supplementary Form was not necessarily important, and he could get the visa without one.
- [16.1.3] Mr Kumar did not:
- [16.1.3.1] Make the complainant aware of the importance of an Employer Supplementary Form.
- [16.1.3.2] Confirm in writing details of his discussions with the complainant regarding the Employer Supplementary Form.
- [16.1.3.3] 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.
- [16.2] 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:
- [16.2.1] 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."

- [16.2.2] 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."
- [16.2.3] 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:
- [16.2.3.1] The only new documentation supplied was an irrelevant payroll analysis report;
 - [16.2.3.2] Mr Kumar stated the Employer Supplementary Form was not supplied due to HR personnel being on leave (without evidence this was true);
 - [16.2.3.3] 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;
 - [16.2.3.4] Claiming payslips were evidence of promotion, when they did not evidence a promotion directly or from an increase in pay; and
 - [16.2.3.5] Stating the employer's policy was not to provide Employer Supplementary Forms, when Mr Kumar had not established that was true.
- [16.2.4] Mr Kumar did not:
- [16.2.4.1] 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.
 - [16.2.4.2] Respond adequately to Immigration New Zealand's concerns. Including that unless the complainant presented an Employer Supplementary Form his application would fail.
 - [16.2.4.3] Confirm the details of his discussions in writing for the complainant.

- [17] 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

- [18] The complainant did not file a statement of reply, but was not required to do so if he agreed with the contents of the Statement of Complaint.
- [19] Mr Kumar filed an affidavit answering the complaint.
- [19.1] Mr Kumar said the Statement of Complaint did not set out what the complainant told him. He said he discussed the complainant's ability to obtain an Employer Supplementary Form, and that the complainant assured him he would pursue the process. Following that, he engaged with the complainant and explained the importance of obtaining the appropriate documentation. He specifically warned the complainant about the risk Immigration New Zealand would return his application "failed lodgement", and the complainant instructed him to proceed.

- [19.2] Mr Kumar said he did not record his advice as required by clause 3(f) of the 2010 Code. He accepted he breached the Code in that respect.
- [19.3] He said with the benefit of hindsight his correspondence with Immigration New Zealand was “not as clear as desirable”, but did not admit to breaching the Code or the Act in that respect.
- [19.4] Accordingly, Mr Kumar accepted he breached the 2010 Code of Conduct, in that he failed to record the advice he did provide (clause 3(f) of the 2010 Code).

Discussion

The standard of proof

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

The facts

- [21] The complaint turns on the facts.
- [22] 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.
- [23] 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 failure to record advice. Her counsel accepted that was the appropriate outcome on the evidence before the Tribunal.
- [24] Mr Kumar’s answer to the complaint essentially required the Tribunal to reject the complainant’s account of Mr Kumar’s conduct, and view his correspondence in the light of a different interaction with his client. For Mr Kumar, Mr Moses submitted the Tribunal ought not to speculate, and accept there may be motivations for false complaints.
- [25] 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 through her counsel expressly said she did not challenge the evidence, or the outcome Mr Kumar sought. Accordingly, the Tribunal must accept Mr Kumar’s evidence.

Unfounded application and failure to provide advice

- [26] The Tribunal must find Mr Kumar did provide appropriate advice to his client regarding the lodgement requirements. Mr Kumar said he provided the advice, and his unchallenged sworn evidence is that his client failed to obtain the Employer Supplementary Form, despite his clear advice. Accordingly, I must dismiss the ground of complaint that Mr Kumar failed to warn his client.
- [27] However, Mr Kumar admits he failed to record his advice in writing, and accordingly, I uphold the ground of complaint that he breached clause 3(f) in failing to confirm the details of his discussions in that regard.

Lack of care, diligence and professionalism

- [28] Mr Kumar’s unchallenged evidence is that the only deficiency in his professional service delivery was a minor error in failing to be as “clear as is desirable” in his correspondence. Mr Kumar’s evidence is surprising, given the Registrar’s allegations in the Statement of Complaint, which the documents she provided plainly support. However, neither the complainant nor the Registrar challenged this evidence. Significantly, they did not challenge Mr Kumar’s evidence that the complainant misrepresented the advice Mr Kumar provided regarding difficulties with the application. When a licensed immigration adviser provides information and makes written representations to Immigration New Zealand, the foundation for the process is the adviser/client interaction, and the information provided to the adviser. I am mindful of two things:

- [28.1] First, Mr Moses' submission the Tribunal should not speculate regarding complaints as there can be wrongful motives for false complaints.
- [28.2] 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.
- [29] The Tribunal has unchallenged evidence given on oath, it is obliged to accept that evidence; it cannot simply reject it as unbelievable without justification. 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.
- [30] 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.
- [31] Accordingly, the Tribunal accepts Mr Kumar's evidence that in the circumstances in which he provided his professional services he did so with care, diligence and professionalism, except for a lack of clarity that became evident with hindsight. I accordingly dismiss that ground of complaint and find no breach of clause 1.1 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 respect 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 23rd day of March 2016

G D Pearson
Chair