

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

Decision No: [2016] NZIACDT 15

Reference No: IACDT 005/15

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

J I

Complainant

AND

L J

Adviser

DECISION

REPRESENTATION:

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

Complainant: No appearance.

Adviser: Mr Moses, Barrister, Auckland.

Date Issued: 24 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 that Mr J:
- [1.1] Created a false agreement where the fees are only \$100, required his client to pay \$4,500, and provided a falsified invoice for \$100.
 - [1.2] He dishonestly attempted to take \$4,400 from his client, by pretending he had only paid \$100, and not the \$4,500 in fact paid; he also falsified an acknowledgement the fee was in fact \$100.
 - [1.3] Mr J dishonestly attempted to mislead the Registrar by providing only part of his file when she made inquiries regarding this complaint.
 - [1.4] Mr J then repaid the \$4,400 and lied to the Registrar about doing so.
- [2] Aside from the dishonesty, the complaint includes that Mr J was unprofessional, failed to provide a refund and did not document his fees properly.
- [3] Mr J gave evidence to the Tribunal that the complainant fabricated the complaint, and used the threat of the complaint to make Mr J pay him money. He said that the documentation he created and supplied to the Registrar was accurate and proper in all respects.
- [4] Neither the Registrar nor the complainant challenged Mr J's evidence at the oral hearing, which the Tribunal held to allow them to produce any evidence in reply and cross-examine Mr J.
- [5] Accordingly, the Tribunal has accepted Mr J's unchallenged evidence and dismissed the complaint. 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 J 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 J's documentation despite him taking the proper steps.
- [7] If Mr J 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.
- [8] This complaint was one of three complaints, where Mr J said he had posted material to the Tribunal, and said the postal service failed to deliver it. Mr J's initial evidence in support of his

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

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

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 J's application for rehearing, the Tribunal noted in its directions that:

"It would appear likely that if Mr J 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 J 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 J 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 J 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 J did not immediately deliver the documents he said he had earlier prepared and posted."

- [9] Mr J responded with a report from an expert that said he examined Mr J's computer for evidence relating to the three Statements of Reply, which Mr J 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 J 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 them.
- [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 J.
- [11] At the hearing, the complainant did not appear. The Registrar indicated she did not oppose Mr J's application for a rehearing, and she did not cross-examine Mr J.
- [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 J posted the three Statements of Reply is from Mr J. 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 J's unchallenged sworn evidence. It follows the Tribunal must find Mr J 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 J'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] On 29 July 2013, the complainant engaged Mr J to assist him with an application for a residence visa. The agreement provided for a fee of \$100 + GST, and for the complainant to pay Immigration New Zealand's fees. An invoice issued for the \$115 fee. However, the complainant said he paid \$4,500 in cash for the services, and did not receive a receipt for that amount.
- [15.2] On 31 July 2013, the complainant terminated Mr J's engagement, and sought a refund. Mr J forced him to sign an acknowledgement the fee was \$100, swore at him, pushed him, and refused to pay the refund of the true amount of the fees (he paid \$100).
- [15.3] On 15 May 2014, the Registrar required Mr J to provide a full copy of his file; the Registrar required the information to investigate this complaint. Mr J provided documents he claimed were his file, and was no reference to the \$4,500 or other material correspondence relating to the true fee.
- [15.4] On 27 June 2014 the Registrar queried apparent discrepancies in the file Mr J provided to her; he forwarded further information that did include references to the true fee and the cash payment. Mr J subsequently refunded a further \$4,400 to the complainant, but later denied doing so.
- [16] The Registrar identified potential infringement of professional standards during the course of Mr J's engagement, the allegations were that potentially:
- [16.1] Mr J engaged in dishonest or misleading behaviour, which is a ground for complaint under section 44(2) of the Immigration Advisers Licensing Act 2007 (the Act). The circumstances were:
- [16.1.1] The written agreement dishonestly said the fee was \$100, when it was in fact \$4,500 (subject to GST and disbursements).
- [16.1.2] Mr J withheld documents from the Registrar in an attempt to mislead her regarding the true fee, and his failure to refund the true amount.
- [16.2] Mr J breached clauses 1.5(e) and 3(c) of the Licensed Immigration Advisers Code of Conduct 2010 (the 2010 Code). The provisions required him to record and agree in writing changes to the terms of an agreement, and any increase in fees. The circumstances were:
- [16.2.1] The written agreement provided for fees of \$100, and Mr J then demanded a fee of \$4,500.
- [16.2.2] Mr J did not obtain agreement in writing for the increase.
- [16.2.3] He accordingly breached his obligations in clauses 1.5(e) and 3(c) of the 2010 Code.
- [16.3] Mr J breached clause 1.1(a) of the 2010 Code. The provisions required him to perform his services with respect and professionalism. The circumstances were:
- [16.3.1] When the complainant came to retrieve his documents and discuss a refund, Mr J swore at him, pushed him, and refused to provide a refund.
- [16.3.2] His conduct was unprofessional, in breach of clause 1.1(a) of the 2010 Code.
- [16.4] Mr J breached clauses 3(d) of the 2010 Code. The provision required him to provide any refunds payable on ceasing a contract for services. The circumstances were:
- [16.4.1] Mr J refunded \$100, not the full amount of fees he should have refunded. He later refunded the balance, but denied doing so.
- [16.4.2] Mr J breached his duty to refund fees, when he initially refunded only \$100 of the \$4,500 due.

The responses

- [17] 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.
- [18] Mr J filed an affidavit answering the complaint. Mr J's position was uncomplicated, he claimed the whole foundation for the complaint was fabrication, and the complaint had through threats and false allegations caused Mr J to pay him money. The essential elements of Mr J's evidence were:
- [18.1] To develop his practice he agreed to provide the complainant with professional services for a nominal fee of \$100 plus GST. He correctly documented the transaction, and received the payment as agreed. However, the complainant changed his mind, Mr J returned the money, and his documents and thought that was the end of the matter.
- [18.2] Then the complainant began to make false threats against Mr J, saying he owed him money. In late 2013 and early 2014, Mr J was dealing with a family member who had terminal illness, and later bereavement following their death.
- [18.3] After the complainant had filed this complaint, he demanded \$10,000 from Mr J and threatened to make a complaint if he did not pay. At that time Mr J did not know the complainant had already lodged the complaint. Mr J was vulnerable due to his family circumstances. Mr J said the Registrar received this complaint on 12 August 2013, but Mr J only received notice on 15 May 2014. Only then did Mr J realise the complainant said to the Registrar he paid \$4,500.
- [18.4] After making the complaint, the complainant continued to demand \$10,000. In August 2014 due to his fragile emotional state following the family bereavement, Mr J paid the complainant \$8,000 to try to put an end to the harassment. Mr J used money he inherited to meet the complainant's demands.
- [18.5] In short, Mr J's evidence is that the complainant fabricated the complaint and used threats to exploit Mr J's vulnerability.

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 J to attend an oral hearing where the complainant and the Registrar had the opportunity to call evidence in reply, and/or cross-examine Mr J.
- [22] The complainant did not attend the hearing. The Registrar did not cross-examine Mr J, and did not oppose his contention that the complainant fabricated the complaint. Her counsel accepted the appropriate outcome on the evidence before the Tribunal was for the Tribunal to dismiss the complaint.
- [23] Mr J's answer to the complaint requires the Tribunal to reject the complainant's account as a fabrication. For Mr J, Mr Moses submitted the Tribunal ought not to speculate, and accept there may be motivations for false complaints.
- [24] Plainly, Mr J 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 J sought. Accordingly, the Tribunal must accept Mr J's evidence.

Dishonest or misleading behaviour

- [25] Mr J's unchallenged evidence is that he completed the agreement for his services correctly and honestly, and he provided the Registrar with the correct documentation when asked.
- [26] Accordingly, there is no foundation at all for this ground of complaint. I find that Mr J honestly and accurately completed the agreement for the provision of his services, and provided the correct documentation to the Registrar when asked. I accordingly dismiss the ground of complaint that Mr J engaged in dishonest or misleading behaviour.

Failure to record changes in writing and an increase in fees

- [27] Mr J's unchallenged evidence is that there was no change to the terms of the agreement. The complainant cancelled the agreement, and Mr J refunded the fees paid. I accordingly dismiss the ground of complaint that Mr J failed to deal properly with changes to his agreement and fees.

Failure to perform services with respect and professionalism

- [28] Mr J's unchallenged evidence is that he did not swear at the complainant, push him and refuse to provide a refund; the evidence is that he was the victim of the complainant seeking to extort money through making false allegations. He did not humiliate the complainant, and instead paid him \$8,000 due to his personal vulnerability at the time. Accordingly, I must reject the allegations against Mr J as unfounded, and dismiss the ground of complaint that he failed to provide his services with respect and professionalism.

Failure to provide refunds

- [29] Mr J's unchallenged evidence is that he paid the only refund due, namely \$115. Accordingly, I dismiss the ground of complaint that he failed to provide a refund.

Observation

- [30] Mr J's evidence is in some respects surprising. Neither the complainant nor the Registrar challenged the evidence. I am mindful of two things:
- [30.1] First Mr Moses' submission the Tribunal should not speculate regarding complaints as there can be wrongful motives for false complaints.
- [30.2] Second, the Tribunal has exercised its inquisitorial functions under section 49 of the Immigration Advisers Licensing Act 2007, by requiring Mr J 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.
- [31] The Tribunal has unchallenged evidence given on oath; it is obliged to accept that evidence, it cannot reject it as unbelievable without justification and reasons. The Registrar neither laid a foundation for such a submission through cross-examination, nor made such a submission. Through her counsel, she accepted Mr J's explanation, and his evidence.
- [32] 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.
- [33] Accordingly, the Tribunal accepts Mr J's evidence after weighing those considerations.

Decision

- [34] The Tribunal dismisses the complaint pursuant to section 50 of the Act.

DATED at Wellington this 24th day of March 2016

G D Pearson
Chair