

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

Decision No: [2016] NZIACDT 17

Reference No: IACDT 032/14

**IN THE MATTER**

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

**BY**

**The Registrar of Immigration Advisers**

Registrar

**BETWEEN**

**J O**

Complainant

**AND**

**L J**

Adviser

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**DECISION**

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**REPRESENTATION:**

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

**Complainant:** No appearance.

**Adviser:** Mr Moses, Barrister, Auckland.

Date Issued: 30 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 engaged Mr J to provide him with immigration services. They agreed on a fee of \$18,000, and Mr J received \$12,000 of the fee.
  - [1.2] However, Mr J failed to complete client engagement processes.
  - [1.3] The fee was not fair and reasonable, and Mr J did not document it and issue invoices.
  - [1.4] Mr J threatened and assaulted his client, and generally behaved in an abusive and unprofessional manner.
  - [1.5] Mr J failed to refund the fees he received when his instructions did not progress.
  - [1.6] Then Mr J lied to the Registrar regarding his instructions, and failed to provide his records to her.
- [2] Mr J gave evidence to the Tribunal that the complainant fabricated the complaint, falsified a transcript using an altered audio recording; the truth was the complainant was never his client, never paid any money to him, and he had accurately informed the Registrar of the facts.
- [3] The Tribunal convened a hearing. The complainant neither provided evidence nor attended the hearing. The Registrar did not challenge Mr J's response, and accepted it was an answer to the complaint.
- [4] Accordingly, the Tribunal has dismissed the complaint.

### The complaint

- [5] The Registrar's Statement of Complaint put forward the following background as the basis for the complaint:
- [5.1] On 22 May 2013, the complainant met with Mr J and discussed making an application for a work visa. Mr J quoted a fee of \$18,000 for arranging employment, and applying for a work visa; the complainant agreed.
  - [5.2] An intermediary paid \$12,000 to Mr J.
  - [5.3] Mr J arranged employment that was not suitable, and on 10 July 2013, an associate of the complainant asked Mr J for a refund of the fee.
  - [5.4] On 15 July 2013 the complainant met with J, and during this meeting Mr J:
    - [5.4.1] Used offensive language;
    - [5.4.2] Threatened the complainant with sexual violence;
    - [5.4.3] Threatened to hit the complainant,
    - [5.4.4] Threatened to call the police, stating the result would be cancellation of the complainant's visa.
  - [5.5] Mr J refunded \$3,000 to the complainant on 22 July 2013. On 16 October 2013, the Disputes Tribunal ordered Mr J to refund the balance of \$9,000.
  - [5.6] Mr J told the Registrar that the complainant was never his client, and he provided no immigration advice to him.

- [6] The Registrar identified potential infringement of professional standards during the course of Mr J's engagement, the allegations were that potentially:
- [6.1] Mr J breached clauses 1.5(a), (b) and (d) of the Licensed Immigration Advisers Code of Conduct 2010 (the 2010 Code). The provisions required him to enter agreements for the delivery of professional services, ensure the agreements have a full description of the services, and have clients confirm the agreement they enter. The circumstances were:
- [6.1.1] The complainant was Mr J's client, and he agreed to provide immigration services.
- [6.1.2] Mr J wholly failed to comply with the client engagement provisions in the 2010 Code.
- [6.2] Mr J breached clauses 3, 8(a) and (e) of the 2010 Code. The provisions required him to maintain proper professional business practices, set fees that are fair and reasonable, and provide clients with invoices. The circumstances were:
- [6.2.1] Mr J's fee was \$18,000; it was potentially not fair and reasonable.
- [6.2.2] Mr J did not act professionally in accepting payment of his fee via an intermediary (the complainant's flatmate).
- [6.2.3] Mr J failed to issue invoices.
- [6.3] Mr J breached clause 1.1(a) of the 2010 Code. The provisions required him to perform his services with due care, diligence, respect and professionalism. The circumstances were:
- [6.3.1] At the meeting on 15 July 2013, the complainant used his mobile telephone to record the meeting.
- [6.3.2] During the meeting Mr J:
- [6.3.2.1] Repeatedly used offensive language,
- [6.3.2.2] Made threats of sexual violence,
- [6.3.2.3] Threatened to hit the complainant, and
- [6.3.2.4] Threatened to call the police, and use that as a device to put the complainant's visa in jeopardy.
- [6.3.2.5] Used force to take the mobile phone, and initially refused to return it.
- [6.4] Mr J breached clause 3(d) 2010 Code, and 24(c) of the Licensed Immigration Advisers Code of Conduct 2014 (the 2014 Code). The provisions required him to provide any refunds on completing or ceasing a contract for the provision of services. The circumstances were:
- [6.4.1] The complainant terminated Mr J's services in July 2013, and he refunded \$3,000 of the \$12,000 he received. On 16 October 2013, the Disputes Tribunal ordered Mr J to refund the remaining \$9,000.
- [6.4.2] Mr J did not refund the remaining \$9,000 until July 2014 and only after the complainant agreed to withdraw his complaint.
- [6.4.3] The delay in refunding the fees amounted to a breach of the provisions in the respective iterations of the Code.

- [6.5] Mr J engaged in dishonest or misleading behaviour, which is a ground of complaint pursuant to section 44 of the Immigration Advisers Licensing Act 2007 (the Act). The circumstances were:
- [6.5.1] The Registrar required Mr J to provide his file, using the statutory process under section 57 of the Act.
  - [6.5.2] Mr J's response to the request was to say the complainant was never his client, and accordingly he had no records, and had not given any immigration advice.
  - [6.5.3] However, Mr J had in fact accepted an engagement to provide professional services to the complainant, received payment of \$12,000, and had ongoing dealings because of the Disputes Tribunal.
- [6.6] Mr J breached clause 3 of the 2010 Code, or clauses 3(c) and 26(e) of the 2014 Code. The provisions required him to maintain professional business practices, act in accordance with the Act, maintain files and keep them for 7 years, and supply them to the Registrar on request. The circumstances were:
- [6.6.1] Mr J was required to produce his client file under section 57 of the Act.
  - [6.6.2] He either failed to keep a client file; or
  - [6.6.3] He failed to comply with the statutory requirement to produce his file, if he kept a client file.
- [7] 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**

- [8] The complainant filed a statement of reply, and generally agreed with the contents of the Statement of Complaint. He emphasised the gravity of the complaint.
- [9] Mr J filed an affidavit answering the complaint. The key point Mr J made is that he contends the complainant fabricated the complaint, and used deception to procure a decision of the Disputes Tribunal. Mr J said:
- [9.1] The complainant was never his client, and he did no immigration work for him. Furthermore, he received no money from him.
  - [9.2] He said he did meet with the complainant on several occasions in 2013, as he accompanied his flatmate who was Mr J's client. Any discussion of immigration issues concerning the complainant was only polite casual conversation in response to the complainant asking about his situation while his flatmate discussed issues with Mr J in a client/adviser context.
  - [9.3] The complainant did telephone Mr J at times, and he recorded those conversations, and the meeting of 15 July 2013. Mr J referred to recordings, which has been transcribed and said:
 

"These records, however, are heavily edited, and they do not represent the full conversations we had. They create a misleading impression."
  - [9.4] Mr J also said a:
 

"... conversation between the Complainant and me appears to have been recorded and disclosed to the Immigration Advisers Authority, but in a heavily edited version."
  - [9.5] In respect of the Disputes Tribunal Mr J said as he had no professional relationship with the complainant, and had taken no money. Accordingly, he had not been

concerned about the claim. He said he was “shocked when the Tribunal found against me.”

- [9.6] Mr J said he did not undertake the client engagement processes, as the complainant was never a client.
- [10] In short, Mr J’s evidence in his affidavit was that the complaint was fabrication, and the central evidence to support it was a recording that the complainant edited to create a misleading impression. Through his counsel, Mr J applied to have the purported transcript excluded from evidence as it was not genuine.

### **Procedure**

- [11] The Tribunal’s default position is to hear complaints on the papers<sup>1</sup>. However, in cases such as this where credibility is in issue the Tribunal will conduct an oral hearing exercising its inquisitorial powers under section 49(4) and; where necessary, the powers in the Schedule of the Act to require the attendance of witnesses and take evidence on oath.
- [12] This complaint against Mr J is one of the most serious the Tribunal has addressed. It involved an allegation Mr J used physical violence against a client, threatened sexual violence; and that he dishonestly hid what had occurred by telling lies to the Registrar when she exercised statutory powers to gather information.
- [13] Mr J’s response was also an extraordinary one; he alleged the complainant had falsified a transcript to create a misleading impression. He alleged the complainant used that document to mislead the Disputes Tribunal.
- [14] Depending on the credibility of the polarised accounts, the outcome would be the Tribunal would accept Mr J’s claim he was the victim of a false complaint, or make very grave findings against Mr J. That decision turned entirely on the evidence of the parties. Accordingly, the Tribunal indicated to the parties it would hold an oral hearing, and set a timetable for the complainant, the Registrar and Mr J to file briefs of evidence.
- [15] The complainant did not provide a brief of evidence, and he did not attend the hearing.
- [16] Mr J provided his affidavit, which was his evidence in chief. He attended the hearing and he was available for cross-examination.

### **Discussion**

#### *The standard of proof*

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

#### *The facts*

- [18] The complaint turns on the facts.
- [19] The Registrar attended the hearing through her counsel. She cross-examined Mr J. The main point of the cross-examination was to assist Mr J’s claim that the complainant procured the decision of the Dispute’s Tribunal by deception. She asked Mr J to confirm the transcript of the meeting was central to the Disputes Tribunal’s decision. She did not in any respect challenge Mr J’s evidence that the transcript was “edited” and misleading. Accordingly, she established that Mr J’s evidence of deception by the complainant did have an effect on the Dispute Tribunal’s process.
- [20] The only other aspect of cross-examination was to have Mr J explain he applied for a rehearing, so he delayed payment until after the rehearing.

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<sup>1</sup> Section 49 of the Act

- [21] This jurisdiction is separate from the Disputes Tribunal, and the evidence before this Tribunal is different to the evidence before the Disputes Tribunal. Accordingly, the Disputes Tribunal's decision can have no bearing on my decision on the evidence before me.
- [22] The Registrar, through her counsel, accepted the evidence before this Tribunal justifies dismissing the complaint.
- [23] Accordingly, I am in the position where I must determine this complaint on Mr J's unchallenged evidence. His evidence is that the complaint is false, and evidence to support it created to mislead. For Mr J, Mr Moses submitted the Tribunal ought not to speculate, and accept there may be motivations for false complaints.
- [24] Mr J was in a position to have direct knowledge of the matters to which he deposed, his is the only sworn evidence, and neither the complainant nor the Registrar has challenged the evidence. Accordingly, the Tribunal must accept Mr J's evidence.

*Failure to comply with the 2010 Code's client engagement process*

- [25] Mr J's unchallenged evidence is that the complainant was never a client, he had only the occasional social discussion regarding his immigration issues, and the complainant paid no money to him direct or otherwise.
- [26] Accordingly, Mr J had no reason or obligation to apply clauses 1.5(a), (b) and (d) of the 2010 Code to his dealings with the complainant. I dismiss the complaint in that regard.

*Fees and invoicing*

- [27] Mr J's unchallenged evidence is that he neither charged a fee, nor received any money from the complainant. Accordingly, I dismiss the complaint Mr J breached clauses 3, 8(a) and (e) of the 2010 Code.

*Threatening and unprofessional behaviour*

- [28] The Tribunal has a transcript, which, if true, would prove Mr J used offensive language, threatened sexual and non-sexual violence, threatened the complainant with a false report to police, and that he used violence to take a telephone from the complainant.
- [29] Mr J says the Tribunal should take no account of the transcript, and exclude it as material evidence. If that were to occur, the Tribunal would expect to hear evidence from persons present during the material events, and possibly persons involved in the transcription process. If the Tribunal was not satisfied the transcript more or less accurately recorded events, it might well reject any reliance on the transcript. However, that is not what occurred.
- [30] The Tribunal has one witness who gave evidence on oath regarding the events. That is Mr J, and he said the transcript is misleading, and I should not rely on it at all for that reason. Counsel for the Registrar did not cross-examine Mr J to the effect that parts of the transcript may be accurate and accordingly a foundation for adverse conclusions. Mr J denied the allegations in his statement of reply, and affirmed his denial in his evidence; that is the extent of the evidence before me.
- [31] Accordingly, the only evidence I have that I can rely on is the unchallenged evidence that the transcript is misleading, and the events it purports to evidence did not occur. It is neither necessary nor appropriate to exclude the transcript, but it is not probative as a record of what it purports to record.
- [32] Accordingly, there is no evidence to support the assertions Mr J used threats and otherwise engaged in misconduct at the meeting on 15 July 2013. I accordingly dismiss the complaint that Mr J breached clause 1.1(a) of the 2010 Code in that respect.

*Failure to provide refunds*

- [33] Mr J's unchallenged evidence is that no refund was due, as he received no money from the complainant. Accordingly, I dismiss the complaint that Mr J breached clause 3(d) 2010 Code, and 24(c) of the 2014 Code.

*Dishonest and misleading behaviour*

[34] Mr J's unchallenged evidence is that he had no client relationship with the complainant, received no money from him, and accordingly had no client file; he said he correctly reported those facts to the Registrar when she made inquiries and sought his client file. Accordingly, I dismiss the complaint that Mr J engaged in dishonest or misleading behaviour.

*Failure to maintain records*

[35] Mr J's unchallenged evidence is that he had no client relationship with the complainant, and properly kept no client file. Accordingly, I dismiss the complaint that Mr J breached clause 3 of the 2010 Code, or clauses 3(c) and 26(e) of the 2014 Code. He had no file and no reason to create or keep a file.

*Observation*

[36] Mr J's evidence is in some respects surprising. Neither the complainant nor the Registrar challenged the evidence. I am mindful of two things:

[36.1] First, Mr Moses' submission the Tribunal should not speculate regarding complaints as there can be wrongful motives for false complaints.

[36.2] 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.

[37] 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. On the contrary, through her counsel, she accepted Mr J's explanation, and his evidence.

[38] 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.

[39] Accordingly, the Tribunal accepts Mr J's evidence after weighing those considerations.

**Decision**

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

**DATED** at Wellington this 30<sup>th</sup> day of March 2016

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**G D Pearson**  
Chair