

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

Decision No: [2016] NZIACDT 18

Reference No: IACDT 039/14

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Ikmeet Singh

Complainant

AND

Mayank Kumar

Adviser

DECISION

REPRESENTATION:

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

Complainant: No appearance.

Adviser: Mr Moses, Barrister, Auckland.

Date Issued: 4 April 2016

DECISION

Introduction

- [1] The Registrar of the Immigration Advisers Authority referred this complaint to the Tribunal. The key elements of the complaint are:
- [1.1] Mr Kumar provided immigration services using an unlicensed person in his practice;
- [1.2] The services were provided negligently. The complainant had a conviction and Mr Kumar failed to disclose it in an application to Immigration New Zealand. That occurred notwithstanding Mr Kumar having had to address that conviction on an earlier occasion.
- [1.3] Mr Kumar provided incorrect details regarding his dealings with the complainant when the Registrar requested information in relation to this complaint.
- [2] Mr Kumar gave evidence to the Tribunal that the complainant's assertion that an unlicensed person provided immigration advice was false, as he provided the services. He accepted he overlooked the previous conviction, but that was due to the urgent circumstances, created because the complainant sought assistance on the day his visa was due to expire. He did accept his narrative provided to the Registrar had an error, and given the importance of the issue, he should have taken more care, so fell short of the high standards of professionalism required of him.
- [3] The Tribunal convened a hearing. The complainant neither provided evidence nor attended the hearing. The Registrar did not challenge Mr Kumar's response, and accepted it answers the complaint; aside from Mr Kumar's admission regarding the information he supplied in response to the complaint.
- [4] Accordingly, the Tribunal upheld the complaint that Mr Kumar failed to provide information to the Registrar with adequate care and professionalism, and otherwise 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 30 August 2013, the complainant engaged Mr Kumar to respond to a letter from Immigration New Zealand, which said he provided false or misleading information. It concerned a conviction.
- [5.2] Mr Kumar replied, and Immigration New Zealand granted the complainant's visa but required him to declare information relating to the conviction if he made any future application.
- [5.3] On 18 March 2014, the complainant went to Mr Kumar's office and there met with a person who was not a licensed immigration adviser. That person advised him to apply for a visitor's visa. The complainant entered a written agreement, and signed an application, which the unlicensed person partly prepared. Mr Kumar submitted the application; it declared the complainant had no convictions.
- [5.4] On 9 April 2014, Immigration New Zealand raised its concern the complainant again failed to declare a conviction. On 16 May 2014, the complainant met with the unlicensed person, who prepared a declaration saying the complainant forgot to confirm the conviction. On 26 May 2014, Immigration New Zealand declined the application.
- [6] The Registrar identified potential infringement of professional standards during the course of Mr Kumar's engagement, the allegations were that potentially:
- [6.1] Mr Kumar breached clauses 2(e) and 3(c) of the Licensed Immigration Advisers Code of Conduct 2014 (the 2014 Code). The provisions required him to obtain informed

instructions, and act in accordance with immigration legislation. The circumstances were:

- [6.1.1] On 18 March 2014, the complainant went to Mr Kumar's office.
 - [6.1.2] An unlicensed person provided immigration services.
 - [6.1.3] It is unlawful for persons who are not licensed or exempt to provide immigration services, which the Immigration Advisers Licensing Act 2007 (the Act) defines as "immigration advice", it is an offence under section 63 of the Act.
- [6.2] Mr Kumar was negligent, which is a ground for complaint under section 44 of the Act. The circumstances were:
- [6.2.1] Mr Kumar knew of the complainant's conviction from his previous dealings, including Immigration New Zealand's explicit warning that the complainant must declare it in the future.
 - [6.2.2] Mr Kumar submitted a visitor's visa application for the complainant without declaring the conviction.
 - [6.2.3] Failure to check the application and identify the failure to declare the conviction was negligent.
- [6.3] Mr Kumar breached clause 1 of the 2014 Code, which required him to be honest, professional, diligent, respectful and conduct himself with due care and in a timely manner. The circumstances were:
- [6.3.1] Mr Kumar was required to provide a copy of his client file to the Registrar.
 - [6.3.2] He provided records that stated:
 - [6.3.2] He met the complainant on 18 March 2014, when he was not at the meeting.
 - [6.3.2] That he then met with the complainant on 19 March 2014, and that the complainant signed a declaration. Whereas the complainant signed the declaration on 16 May 2014 and there was no meeting on 19 March 2014.
 - [6.3.3] The records were inaccurate and misleading, in breach of the obligations under clause 1 of the 2014 Code.

The responses

- [7] The complainant filed a statement of reply, and generally agreed with the contents of the Statement of Complaint. He raised a concern regarding the security of documents, however it did not appear to add to the grounds of complaint or have foundation for any additional ground of complaint.
- [8] Mr Kumar filed an affidavit answering the complaint. Mr Kumar accepted he had made some errors, but said key factual elements of the complaint were to his knowledge untrue. While he accepted minor deficiencies in his professional service delivery, he rejected the key elements on the complaint. Mr Kumar said:
 - [8.1] He rejected the complainant's assertion that he engaged with an unlicensed person in Mr Kumar's practice. Mr Kumar agreed there was an employee in his practice fitting the description the complainant gave; however, she did not give immigration advice, her role was marketing and administration.

- [8.2] Mr Kumar said he knew the unlicensed employee did not provide immigration services to the complainant, as he did so personally. He said that he personally advised the complainant his only option in March 2014 was to apply for a visitor's visa.
- [8.3] He said the claim the unlicensed employee prepared the application form was false, as he personally saw the form and engaged with the complainant; it was the complainant himself who had completed the form. Mr Kumar finalised the form with him. He said he fully engaged with the complainant regarding the application form, and the complainant signed it after taking advice from Mr Kumar.
- [8.4] Mr Kumar accepted he did previously act for the complainant regarding the prior conviction, and at the time emphasised he must declare the conviction in the future (as did Immigration New Zealand). When completing the application in March 2014 Mr Kumar did not recall the previous incident; that was because the complainant came to his office on the last day for filing the application, and the urgency of the situation did not allow time for a review of the file. Mr Kumar noted the complainant has strong competence in the English language, and it was reasonable for him to place some reliance on him understanding his immigration circumstances, given the urgent nature of the instructions.
- [8.5] Mr Kumar did accept he was in error regarding the information he supplied to the Registrar in response to this complaint. On 16 May 2014, the complainant presented his declaration to Mr Kumar. It was for presentation to Immigration New Zealand, it had a typed date of 19 March 2014; but below the complainant's signature, it had the date of signature as 16 May 2014. Mr Kumar accepts he should have corrected the first date. As a result of not aligning the two dates, he mistakenly said the complainant presented the declaration on 19 March 2014; but overall his file correctly records the date as the document is correctly dated. Accordingly, Mr Kumar accepted he made a clerical error in preparing his file for the Registrar and narrating the events, but there was no element of dishonesty and transparent on looking at the document. Mr Kumar accepted none-the-less this was a professional shortcoming.
- [9] In short, Mr Kumar's evidence in his affidavit was that the complaint was substantially false; that he made an inadvertent error due to time pressure, but did fail to prepare his file and narrate the events for the Registrar. He accepts this was a professional failing on his part.

Procedure

- [10] The Tribunal's default position is to hear complaints on the papers¹. 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.
- [11] This complaint against Mr Kumar was very serious. It involved an allegation Mr Kumar was a party to an unlicensed person providing immigration services, which is a criminal offence, and that he provided inaccurate and misleading information to the Registrar.
- [12] Mr Kumar's response was a direct challenge to the complainant's credibility. He alleged the complainant constructed a false account of his professional service delivery.
- [13] Depending on the credibility of the polarised accounts, the outcome would be the Tribunal would accept Mr Kumar's claim he was the victim of a false complaint, or make very grave findings against Mr Kumar, including that he provided inaccurate and misleading information to the Registrar. 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 Kumar to file briefs of evidence.
- [14] The complainant did not provide a brief of evidence, and he did not attend the hearing.
- [15] Mr Kumar provided his affidavit, which was his evidence in chief. He attended the hearing and he was available for cross-examination.

¹

Discussion

The standard of proof

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

The facts

[17] The complaint turns on the facts.

[18] The Registrar attended the hearing through her counsel. She cross-examined Mr Kumar; however, the objective appeared to be to emphasise Mr Kumar's evidence in chief answered the complaint in the respects he sought to do so. In particular that:

[18.1] The complainant himself completed documentation, not the unlicensed employee as the complainant asserted,

[18.2] That Mr Kumar personally reviewed the documentation, and that the work was performed in circumstances of urgency.

[19] The cross-examination did not in any respect suggest:

[19.1] The complainant's account was true rather than Mr Kumar's evidence,

[19.2] That Mr Kumar either actually knew of the prior conviction or that in the circumstances he should have made more adequate inquiries before filing the application, or

[19.3] That Mr Kumar was more than careless in his presentation of his file to the Registrar.

[20] The Registrar, through her counsel, accepted the evidence before this Tribunal justifies finding the complaint established only to the extent admitted by Mr Kumar.

[21] Accordingly, I am in the position where I must determine this complaint on Mr Kumar's unchallenged evidence. His evidence is that the complaint relies on false allegations. For Mr Kumar, Mr Moses submitted the Tribunal ought not to speculate, and accept there may be motivations for false complaints.

[22] Mr Kumar 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 Kumar's evidence.

Unlicensed person providing immigration advice

[23] Mr Kumar's unchallenged evidence is that he personally provided all of the immigration services to the complainant. Accordingly, there is no factual basis to uphold the complaint that Mr Kumar breached clauses 2(e) and 3(c) of the 2014 Code in failing to obtain informed instructions and act in accordance with immigration legislation, as this aspect of the complaint relies on an unlicensed person providing immigration services. The evidence is that did not occur.

[24] I dismiss the complaint in that regard.

Negligence

[25] Mr Kumar's unchallenged evidence is that in circumstances of urgency he overlooked an aspect of his dealings with his client, which occurred some time ago. He relied on his client's understanding of his circumstances, given the urgency.

[26] The highest the matter can be put on the evidence before me is that Mr Kumar's memory failed him in circumstances of urgency. I must accept the significance of the looming deadline. If it passed his client would have been in New Zealand lawfully, and unable to file the application at all. It was reasonable for Mr Kumar to give absolute priority to the late instruction, and regard filing a valid application as essential. The Registrar did not challenge

Mr Kumar's evidence inevitable human frailty that caused his memory lapse, and he did not have the time to make the inquiries he would usually make. Accordingly, I cannot find Mr Kumar's conduct fell short of the professional standards required; he was not negligent.

[27] I dismiss the complaint in that regard.

Inaccurate and misleading information

[28] Mr Kumar accepted he made an error in cataloguing his file, and narrating events. There was an inadvertent error in a written statement that the complainant prepared. It had the date 19 March 2014 (the day after he lodged his application) typed in, but the date he signed it below his signature (16 May 2014). Mr Kumar accepted that when he provided his file to the Registrar in response to this complaint he should have identified the latter date of the document as the date the complainant signed it; and correctly narrated the events to show that. He admits he incorrectly used the earlier date. He accepts the strict obligations on a licensed immigration adviser providing material to the Registrar, which required him to take more care.

[29] He said he accurately described the meeting of 18 March 2014, as he was present at that meeting.

[30] I accept Mr Kumar's unchallenged explanation, and find he breached his duty of professionalism in that he failed to apply adequate attention and care to his task of preparing his file and narrating his instructions. However, the failure is at the lower end, given the document does contain the correct date on its face.

[31] I accordingly uphold the complaint that Mr Kumar breached clause 1 of the 2014 Code in the respect identified.

Observation

[32] It is surprising to deal with a complaint turning on credibility where there is no challenge to the evidence of the adviser and, no explanation. I am mindful of two things:

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

[32.2] 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 any material information to make decisions.

[33] 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 Kumar's explanation, and his evidence.

[34] 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.

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

Decision

[36] The Tribunal upholds the complaint pursuant to section 50 of the Act; Mr Kumar breached the 2014 Code in the respect identified.

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

Submissions on Sanctions

- [38] The Tribunal has upheld the complaint; pursuant to section 51 of the Act, it may impose sanctions. Alternatively, it may uphold the complaint, as it has, and take no further action under section 50(b) of the Act.
- [39] 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.
- [40] 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

- [41] The timetable for submissions will be as follows:
- [41.1] The Authority and the complainant are to make any submissions within 15 working days of the issue of this decision.
- [41.2] 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.
- [41.3] 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 4th day of April 2016

G D Pearson
Chair