

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

Decision No: [2016] NZIACDT 25

Reference No: IACDT 047/14

IN THE MATTER

of an appeal under s 54 of the
Immigration Advisers Licensing Act 2007

AGAINST

A decision of **The Registrar of
Immigration Advisers**

By

Santokh Singh

Appellant

DECISION

REPRESENTATION:

Registrar: Mr M Denyer, Ministry of Business, Innovation and Employment, Auckland.

Appellant: Mr Shaam Bhardwaj, Bridge Law, Hamilton.

Date Issued: 17 May 2016

DECISION

Introduction

- [1] This is an appeal against the Registrar's decision not to refer a complaint to the Tribunal, because she considered it disclosed only trivial or inconsequential matters.
- [2] The appellant provided his grounds of appeal, the Registrar replied with an affidavit from her senior investigator, and Mr Singh replied with his affidavit.
- [3] The Tribunal has to decide whether the material now before it is sufficient to conclude it should hear the complaint.
- [4] The Tribunal has allowed the appeal, as the complainant has provided sufficient foundation for his complaint to justify further investigation, and determination. The Tribunal makes no findings on the merits of the complaint, beyond concluding there is sufficient evidence to hear it.

The grounds of appeal

- [5] This is an appeal under section 54 of the Immigration Advisers Licensing Act 2007, against a decision of the Registrar not to pursue a complaint.
- [6] The Registrar decided Mr Singh's complaint disclosed only a trivial and inconsequential matter, which she should not pursue. She applied section 45(1)(c).
- [7] Mr Singh's notice of appeal identified the following grounds for his appeal:
 - [7.1] The Registrar gave no reasons for finding the adviser was justified in charging a fee of \$5,000 (after a refund of \$5,000 of the total of \$10,000), it was not justifiable and should have been refunded;
 - [7.2] The Registrar unfairly did not allow Mr Singh to be heard on the issue of whether the fee he paid to the adviser was justified;
 - [7.3] The agreement for the provision of professional services was invalid and the terms defective as they did not have a basis for fees identified in the agreement.
 - [7.4] The Registrar did not properly assess the gravity of the complaint.
- [8] In subsequent submissions, Mr Singh's counsel elaborated on the grounds. He placed particular emphasis on:
 - [8.1] The amount of the fee was high enough to need justification, and appeared unreasonable from Mr Singh's point of view, given his knowledge of the work delivered for the fee.
 - [8.2] The circumstances in which Mr Singh signed the written agreement involved a lack of disclosure, and pressure. It was inconsistent with the professional service delivery standards in the Licensed Immigration Advisers Act 2007.
 - [8.3] Mr Singh's application for residence was hopeless, as he did not have sufficient funds, and the adviser failed to give advice on the proper requirements.
 - [8.4] The terms of the agreement to provide services were draconian, and failed to provide a basis for the fees charged.

The decision appealed against

- [9] The Registrar provided an affidavit and submissions setting out the process she used to evaluate the complaint, and identify the information she considered. She considered and evaluated the following potential grounds for complaint:

- [9.1] The first issue was a potential failure to act with due care and diligence and obtain informed instructions. The Registrar concluded the adviser took adequate steps to evaluate Mr Singh's options, and explain them to him. She said she reached this conclusion from the material in the adviser's file, and his explanation. However, she did not produce evidence of the advice Mr Singh received, and compare that with the reasons for Mr Singh not being able to make a successful application.
- [9.2] The second issue was a failure to issue an invoice for disbursements; she found there was insufficient evidence to establish grounds for complaint.
- [9.3] The third issue was whether the fees were fair and reasonable; the Registrar said Mr Singh should use the adviser's internal complaints procedure. She took account of, an offer of a partial refund, there had been no previous complaints against the adviser and he held a full licence since 2009 and there was evidence the adviser assessed options and he provided checklists. She said the fees were at the higher end of the scale, but not necessarily excessive. Further, that the adviser recognised there were deficiencies in the adviser's records, but he was committed to rectifying them. The total fee was \$10,000 and the Registrar considered a refund of \$5,000 was reasonable.
- [9.4] The fourth issue was whether the adviser maintained a client file to the proper standard. The Registrar concluded he clearly failed to do so, but this ground was trivial or inconsequential. She took account of the complainant not raising the issue, and the adviser taking steps to rectify the position. She also said there was no harm to Mr Singh.
- [9.5] The Registrar noted the adviser made unsubstantiated references to misleading behaviour on the part of Mr Singh, and wrote an unprofessional letter to him. She issued a general warning letter to the adviser regarding that conduct.
- [10] The Registrar accordingly concluded that each ground of complaint was not established, trivial or inconsequential, and did not consider she should refer the complaint to the Tribunal.

Mr Singh's response

- [11] Mr Singh provided an affidavit in reply. The key points in Mr Singh's affidavit are:
- [11.1] Mr Singh disputes the adviser's claim he used a proper disclosure process, and provided sufficient advice to gain informed instructions. Mr Singh said the adviser did not tell him of the financial requirements for successfully applying for residence. He produced a document he says the adviser had, which the adviser should have realised demonstrated Mr Singh could not have made a successful application. Accordingly, he says the adviser took instructions for an application he should have identified as hopeless.
- [11.2] He produced an email attachment, which is materially different from an email attachment the adviser apparently sent to the Registrar. Mr Singh says the adviser provided a falsified copy to the Registrar.
- [11.3] He is not satisfied he has seen evidence of work justifying the fee of \$5,000. Furthermore, he does not consider the adviser had prepared the application to the point where it was ready to lodge, as the adviser claims.
- [11.4] He does not consider the Registrar had full information.
- [11.5] The adviser continued with allegations of misleading behaviour on the part of Mr Singh, notwithstanding the Registrar's warning.

Discussion

The issue

- [12] Mr Singh's complaint failed, as the Registrar does not consider there is substance in the complaint, she says the grounds that could be established are trivial or inconsequential. She considers she has taken the matter far enough to make that determination.

- [13] Mr Singh has had the opportunity to provide facts and reasoning to show the Registrar is wrong in her view.
- [14] Section 54 requires the Tribunal to reject the appeal, determine it should hear the complaint, or set in place a process to determine the matter under the adviser's complaints procedure.
- [15] The Tribunal will evaluate the decision in the same manner as the Registrar, but with the advantage of any material supporting the appeal, and on a *de novo* basis. The apparent policy reason for having the right of appeal under section 54 is to provide a transparent process for evaluating the complaint; and have the Tribunal decide whether it should hear the complaint.
- [16] It is important to recognise, this is not a decision on whether the Tribunal is likely to uphold the complaint, as that decision, if the Tribunal allows this appeal, will turn on different evidence and after hearing the adviser. This appeal only concerns a threshold issue; with some similarity to a strike out application or seeking consent for a private prosecution.
- [17] Accordingly, two relevant principles emerge:
- [17.1] This decision concerns the Registrar's decision on the threshold for lodging the complaint with the Tribunal, or taking a different step (section 45 of the Act); and
- [17.2] The Tribunal must evaluate that question on the material before it, and make its own decision on that material. The Registrar and Mr Singh have both put forward the material they consider relevant to their respective positions.

My view of the complaint

- [18] In my view Mr Singh's appeal has identified six potential grounds for complaint:
- [18.1] The adviser did not, initially, properly evaluate Mr Singh's circumstances, and provide advice on his immigration prospects. Had he done so, he would have advised Mr Singh the proposed application had no realistic prospect of success.
- [18.2] The adviser charged an excessive amount, having regard to the work performed; and the lack of value of the work, given it was not likely to lead to a successful outcome.
- [18.3] The agreement for the provision of professional services was defective, in relation to its terms and the circumstances in which Mr Singh agreed to it.
- [18.4] The adviser did not keep his files in accordance with the correct professional standards; including the obligation to communicate in writing with Mr Singh.
- [18.5] The adviser attempted to mislead the Authority by providing a document altered from the original.
- [18.6] The adviser engaged in unprofessional communications with the complainant.
- [19] I have sworn evidence before me as described in paragraph [11] above. It is sufficient to note that is enough to establish a foundation for grounds of complaint under that Act, which require examination. These are serious allegations, which may or may not have substance. However, what Mr Singh has provided on its face, cannot be dismissed as unfounded. If that were the only information, then the Tribunal would hear the matter.
- [20] Consumers of professional services often lack the knowledge, skills and information to know whether a professional person acted properly. The merits usually only become evident on examining the professional's explanation, and measuring it against their records. In the case of licensed immigration advisers, the Licensed Immigration Advisers Code of Conduct 2014 (the 2014 Code) provides a licensed immigration adviser must maintain proper file management practices (clause 26); that includes confirming "in writing to the client the details of all material discussions with the client" (clause 26(c)).
- [21] I have before me a letter from the adviser responding to the complaint. However, I do not have all of the documents referred to in the letter. Given that this appeal is a transparent process where I will decide it on what is before me, I will evaluate the material I do have.

- [22] I do not have a record of the kind the 2014 Code contemplates. It may or may not exist, however I note that the Registrar filed an affidavit saying “the adviser had clearly failed to maintain comprehensive records of his dealings with the Appellant”. She regarded this as “trivial or inconsequential”, as the adviser acknowledged the deficiency, was taking remedial steps, and Mr Singh did not suffer any detriment.
- [23] Mr Singh complains the adviser recommended an application for residence, but did not advise him properly of the merits of the application. Mr Singh says he paid \$10,000 to have the adviser prepare the recommended application. The application could not proceed, and Mr Singh points to evidence that the adviser held information making that evident from the outset. The adviser has retained \$5,000 of the \$10,000 fee. In my view, it is not a trivial or inconsequential matter if the adviser cannot produce the records of his advice; and it was potentially to Mr Singh’s detriment if he did not provide that advice in writing or provide a written confirmation of oral advice. The Registrar has not produced evidence of such records.
- [24] The Tribunal should hear the complaint, as the complaint of not receiving adequate advice on the merits of the proposed application has an adequate foundation and the material currently before the Tribunal does not provide a satisfactory answer.
- [25] It is not necessary or appropriate to examine the merits of each potential ground of complaint. I must allow the appeal if I am satisfied the Tribunal should hear the complaint; any deeper examination of the issues should occur after the adviser has the opportunity to reply when the complaint is before the Tribunal.
- [26] As I am satisfied the Tribunal should hear the complaint, the Tribunal will direct the Registrar to prepare the complaint for filing pursuant to section 54(3)(c).

Process

- [27] Mr Singh advanced this appeal, and the Registrar has taken the position that the complaint does not have merit. The standard process for complaints lodged with the Tribunal is for the Registrar to prepare a statement of complaint, which identifies grounds of complaint the Registrar considers the evidence may support. After the Registrar files a complaint, the complainant may advance the complaint on the Registrar’s grounds, or wider grounds. Given the Registrar’s position, I do not expect the Registrar to identify the potential grounds in this case, unless she wishes to do so.
- [28] I do expect the Registrar to prepare and lodge a statement of complaint with the following information in the usual format with a chronology and pagination, and include:
- [28.1] A full copy of the adviser’s records;
- [28.2] A full copy of correspondence relating to the complaint;
- [28.3] The documents filed in this appeal;
- [28.4] A description of the complainant’s grounds of complaint, in the form of a brief outline of Mr Singh’s allegations of fact, and particulars of his allegations of non-compliance with the Act, or the 2014 Code.
- [29] After the Registrar files the statement of complaint, the Tribunal will then issue directions that ensure the adviser is clearly on notice of the grounds of complaint, with particulars of the relevant provisions of the 2014 Code, and the Act.

Decision

- [30] The Tribunal determines that it should hear Mr Singh’s complaint; and directs the Registrar to prepare the complaint for filing with the Tribunal.

Service

- [31] The adviser is not a party to this appeal, and it is important that the adviser should understand the Tribunal has made no decision regarding the merits of the appeal beyond deciding it

should hear the complaint. The Tribunal is very conscious that it has not heard the adviser's case, and will ensure he has a proper opportunity to present his response to the Tribunal.

- [32] The Tribunal requests that the Registrar provide a copy of this decision, and the documents filed in this appeal to the adviser so he has access to all the material the Tribunal has seen. That material will also be included in the statement of complaint to ensure the Tribunal's record is complete and transparent.

DATED at Wellington dated this 17th day of May 2016.

G D Pearson
Chair