

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

Decision No: [2016] NZIACDT 38

Reference No: IACDT 049/15.

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Li Wang

Complainant

AND

Yingda (Lawrence) Fu

Adviser

DECISION

REPRESENTATION:

Registrar: Ms M Ulrich, Ministry of Business, Innovation and Employment, Auckland.

Complainant: Mr AcClymont, McClymont and Associates, lawyers, Auckland.

Adviser: In person.

Date Issued: 8 August 2016

DECISION

Introduction

- [1] The Registrar of the Immigration Advisers Authority referred this complaint to the Tribunal. The facts alleged in support of the complaint are, in outline:
- [1.1] Mr Fu is a licensed immigration adviser. He assisted the complainant to apply for a work visa. The application failed.
 - [1.2] Mr Fu agreed to apply for a reconsideration of the decision to decline the application.
 - [1.3] He failed to apply in time, and withdrew an application for visitor visas dishonestly; telling Immigration New Zealand that he had instructions to do so.
 - [1.4] He dishonestly told the Authority when responding to the complaint that he had lodged the request for reconsideration in time, and had instructions to withdraw the visitor visa applications. The Registrar's statement of complaint alleges neither claim was true.
 - [1.5] Mr Fu took lodgement fees for the reconsideration and later requests for discretionary relief; he failed to either pay the money to Immigration New Zealand, or refund the money.
- [2] Mr Fu disputes the factual allegations and contends he complied with his professional obligations. The Tribunal gave Mr Fu the opportunity of presenting his case at an oral hearing. The complainant filed an affidavit supporting her evidence, in anticipation of giving evidence at an oral hearing. However, the Tribunal abandoned the oral hearing, as Mr Fu did not comply with the timetable for the hearing. The key issue is whether the Tribunal finds that the evidence on the papers supports the complaint.
- [3] The Tribunal has upheld the complaint.

The complaint

- [4] The Registrar's statement of complaint put forward the following background:
- [4.1] On 21 October 2011, the complainant engaged Mr Fu to assist with applications for work and residence visas for her and her family. On 20 November 2014, Immigration New Zealand received an application for a work visa under that arrangement.
 - [4.2] On 17 December 2014, Immigration New Zealand wrote to Mr Fu saying they had declined the work visa application. The letter from Immigration New Zealand gave 14 days to seek to have Immigration New Zealand reconsider their decision.
 - [4.3] On 5 January 2015, Mr Fu sent an application for visitor visas for the complainant and her family to Immigration New Zealand and said they did so while waiting for Immigration New Zealand to reconsider the declined work visa application. On 16 January 2015, Mr Fu wrote to Immigration New Zealand saying he would send a request to reconsider the declined work visa application the following week.
 - [4.4] Mr Fu sent the request to reconsider the work visa application on 22 January 2015, but Immigration New Zealand returned it as it was out of time. On 26 January 2015, Mr Fu wrote to Immigration New Zealand and withdrew the request for visitor visa. The complainant did not authorise Mr Fu to do so.
 - [4.5] Mr Fu lodged two requests for visas under section 61 of the Immigration Act 2009; Immigration New Zealand refused them.

[4.6] On 16 December 2015, Mr Fu wrote to the Authority in response to this complaint and said that:

[4.6.1] he submitted the request for Immigration New Zealand to reconsider their decision to decline the work visa on 10 January 2015; and

[4.6.2] on 25 January 2015, he obtained instructions from the complainant and her husband to withdraw the visitor visa applications.

[5] The Registrar identified potential breaches of professional standards. The allegations were that potentially:

Negligence, dishonest and misleading behaviour

[5.1] Mr Fu was negligent and engaged in dishonest and misleading behaviour, which are grounds for complaint under section 44(2)(a), and (d) of the Immigration Advisers Licensing Act 2007 (the Act).

[5.2] Mr Fu breached his professional obligations in those respects as:

[5.2.1] He negligently failed to seek a reconsideration of Immigration New Zealand's decision to decline the work visa application in time.

[5.2.2] He was dishonest and misleading in saying to the Authority that:

[5.2.2.1] he submitted the request for reconsideration on 10 January 2015, when in fact he did not do so until at least 16 January 2015; Immigration New Zealand received the request on 22 January 2015; and

[5.2.2.2] he had his client's instructions to withdraw the visitor visa applications, when in fact he did not consult her regarding that matter and she did not instruct him to do so.

[5.2.3] He was also dishonest and misleading in telling Immigration New Zealand he had instructions to withdraw his client's visitor visa applications.

Refund of disbursements

[5.3] Mr Fu breached clause 24(c) of the Code of Conduct 2014 (the 2014 Code). The clause requires that a licensed immigration adviser must:

[5.3.1] ensure that refunds are fair and reasonable in the circumstances;

[5.3.2] ensure they can meet obligations; and

[5.3.3] promptly provide any refunds payable on completing or ceasing a contract for service.

[5.4] Mr Fu failed to comply for the following reasons:

[5.4.1] The complainant paid to Mr Fu what he said was an application fee of \$370 for the reconsideration of the work visa applications, and \$700 for requests for visas under section 61.

[5.4.2] He did not pay those fees to Immigration New Zealand.

[5.4.3] He did not refund the fees.

[6] 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

- [7] While the Tribunal usually hears complaints on the papers, where necessary it may convene an oral hearing to address any elements of the complaint. As Mr Fu disputed the facts, the Tribunal proposed to hear his response to the complaint in an oral hearing. Ultimately, Mr Fu failed to comply with the steps timetabled for the hearing, and accordingly, the Tribunal heard the matter on the papers. A hearing on the papers is the standard form of hearing, the proposed oral hearing was made available under the Tribunal's discretion under section 49(3) of the Immigration Advisers Licensing Act 2007 (the Act). The oral hearing to allow Mr Fu to present his case was a discretionary exercise of the Tribunal's power under section 49(4) of the Act. When Mr Fu failed to lodge a brief of evidence, the Tribunal conducted the hearing on the papers. Mr Fu was not required to present evidence; the choice as to whether he would do so was his.
- [8] The material for the hearing is all the papers before the Tribunal and particularly:
- [8.1] The statement of complaint with the documents attached to it.
- [8.2] Mr Fu's statement of reply, which disputed the statement of complaint in these respects:
- [8.2.1] Mr Fu disputed the factual basis of the statement of complaint but did not include an evidential base to support the denial;
- [8.2.2] He said the complaint was a result of the complainant being dissatisfied with the outcome of the applications for visas; and
- [8.2.3] He claimed the complaint is groundless.
- [8.3] The complainant's response, which pointed out:
- [8.3.1] Mr Fu's response addressed irrelevant matters;
- [8.3.2] He failed to provide evidence of the disputed factual matters; and
- [8.3.3] The complainant maintained she was correct in the respects where the complaint relied on her account (particularly not giving instructions to withdraw the visitor visa applications, and pay amounts for application fees). In other respects, the documentary record supported the complaint.
- [8.4] Mr Fu provided a further response; it contained unsupported claims and asked questions. It did not address the complaint in a sensible manner.
- [9] The Tribunal issued Directions on 5 May 2016. They pointed out to Mr Fu:
- [9.1] He was facing a serious professional disciplinary complaint, which included dishonesty. It was in a category where his licence is in issue if the Tribunal upheld the complaint.
- [9.2] The complainant's response, which pointed out the inadequacy of Mr Fu's response, potentially had merit.
- [9.3] The Tribunal would schedule an oral hearing where Mr Fu could provide a full response.
- [9.4] The Tribunal notified Mr Fu he was entitled to legal representation.
- [10] On 31 May 2016, the Tribunal issued further directions pointing out Mr Fu's unsatisfactory response to preparation for the oral hearing. It put him on notice that the Tribunal would hear the matters on the papers unless he complied with the timetable.
- [11] In compliance with the timetable, the complainant filed an affidavit affirming the statement of complaint. Mr Fu did not comply with the timetable. The Tribunal gave notice that the hearing

would not proceed when it became too late to make further changes to the timetable and still proceed with the hearing.

- [12] After the Tribunal cancelled the oral hearing, Mr Fu provided an unsworn letter. He reiterated his assertion the complainant is dishonest, and he is honest. He criticised the scope of the evidence supporting the complaint; but failed to engage with the grounds of complaint that are set out very clearly in the statement of complaint. He also provided copies of some communications, which do not deal with the essential issues, and attached a testimonial from a client, who appeared to have no knowledge of this complaint.

Discussion

The standard of proof

- [13] 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].

The facts

- [14] The Registrar provided a chronology and supporting documentation. Mr Fu challenged the facts, but only in a general way.
- [15] The narrative provided by the Registrar in the statement of complaint is a starting point for consideration. I will address the contentious facts in relation to each of the grounds of complaint.

Negligence, dishonest and misleading behaviour

- [16] The first ground is that Mr Fu was negligent and engaged in dishonest and misleading behaviour, which are grounds for complaint under section 44(2)(a) and (d) of the Act.
- [17] The first element is that he negligently failed to meet the time limit for seeking a reconsideration of Immigration New Zealand's decision to decline the work visa application. He has provided no sensible or adequate explanation, and Immigration New Zealand's records establish he failed to lodge the application on time.
- [18] The second element is that Mr Fu allegedly dishonestly attempted to mislead the Authority by providing written statements that:
- [18.1] he submitted the request for reconsideration on 10 January 2015, when in fact he did not do so until at least 16 January 2015; Immigration New Zealand received the request on 22 January 2015; and
- [18.2] he had his client's instructions to withdraw the visitor visa applications, when in fact he did not consult her regarding that matter, and she did not instruct him to do so.
- [19] That he was late filing the request is evident in the written record; Mr Fu has not explained it. On the face of it, he dishonestly misrepresented the situation to the Authority to evade liability in relation to the complaint. The complainant has provided sworn testimony that she gave no instructions to withdraw the visitor visa applications. Mr Fu has provided no record of such instructions and if there were oral instructions, he was required under clause 26(c) of the 2014 Code to confirm in writing to his client the details of all material discussions. He provided no such record.
- [20] The third element is that Mr Fu dishonestly misled Immigration New Zealand by saying that he had instructions to withdraw his client's visitor visa applications. He has not provided any reason to doubt he said that to Immigration New Zealand, and for the reasons discussed, the evidence establishes he had no such instructions.
- [21] While I am satisfied that the evidence establishes Mr Fu was negligent, dishonest, and misleading, I note there has never been a right to silence on the part of professional persons

facing a disciplinary process.¹ If it were otherwise, it would be virtually impossible for many professional services to be subject to effective scrutiny. This Tribunal has power to request information, appearances, and to summons persons to give evidence.² The Tribunal gave Mr Fu the opportunity to attend an oral hearing to present his case, and made it plain why he ought to do so. The Tribunal also told him of the likely outcome if he did not do so successfully.

- [22] The Tribunal is mindful of the observations of the Medical Practitioners Disciplinary Tribunal³, which applied this observation in *Bowen-James v Walten & Ors* [1991] NSWCA 29:

In our opinion, there is no right to silence or any privilege against self-incrimination upon which a medical practitioner, answering a complaint before the Tribunal, is entitled to rely. Indeed, we would endorse the observations made by Hope AJA in *Ibrahim*. There is a public interest in the proper discharge by medical practitioners of the privileges which the community accords to them, and in the due accounting for the exercise of the influence which the nature of the occupation permits them, and indeed requires them, to exert over their patients. we are of the opinion that if a medical practitioner fails to answer by giving his or her account of the matters charged, there can be no complaint if the Tribunal draws the unfavourable evidentiary inference which absence from the witness box commonly attracts.

- [23] In *Ithaca (Custodians) Ltd v Perry Corporation* [2004] 1 NZLR 731 (CA), the Court of Appeal considered what inferences may be drawn from the absence of witnesses. The Court observed at [153]-[154] that:

The absence of evidence, including the failure of a party to call a witness, in some circumstances may allow an inference that the missing evidence would not have helped a party's case. In the case of a missing witness such an inference may arise only when:

- (a) the party would be expected to call the witness (and this can be so only when it is within the power of that party to produce the witness);
- (b) the evidence of that witness would explain or elucidate a particular matter that is required to be explained or elucidated (including where a defendant has a tactical burden to produce evidence to counter that adduced by the other party); and
- (c) the absence of the witness is unexplained.

Where an explanation or elucidation is required to be given, an inference that the evidence would not have helped a party's case is inevitably an inference that the evidence would have harmed it. The result of such an inference, however, is not to prove the opposite party's case but to strengthen the weight of evidence of the opposite party or reduce the weight of evidence of the party who failed to call the witness.

- [24] The principles are applicable to this complaint. Given the findings of dishonesty, I treat the sliding scale for the balance of probabilities as at the high end of that scale. In this case, the evidence available is compelling, but Mr Fu's decision not to take the opportunity of presenting evidence and having it subject to cross-examination leaves me in a position where I am sure the finding is wholly justified.

- [25] Accordingly, I find Mr Fu was negligent, dishonest, and attempted to mislead the Authority and Immigration New Zealand. They are grounds for upholding the complaint under section 44(2) of the Act. The conduct inevitably also involves systematic breaches of the 2014 Code.

¹ *Bowen-James v Walton* (New South Wales Court of Appeal, unreported, 5/8/91), *Belhumeur v. Barreau du Québec (Comité de discipline)* (1988), 54 D.L.R. (4th) 105 (Que. C.A.) at 117; *Re White Cartwright*, PJ, Chair: Medical Practitioners Disciplinary Tribunal (MPDT), 87-98-36C, Aug 20, 1999.

² Section 49(1), (4), and the schedule to the Act.

³ *Re White Cartwright*, PJ, Chair: Medical Practitioners Disciplinary Tribunal (MPDT), 87-98-36C, Aug 20, 1999 or *White* [1999] NZMPDT 87 (20 August 1999)

However, it is not appropriate to make findings regarding those matters as the findings of negligence and dishonesty properly reflect the gravity of the conduct.

Refund of disbursements

- [26] The second allegation is that Mr Fu breached clause 24(c) of the 2014 Code as he received money for disbursements and failed to refund it. He claims he did not receive the money. The complainant has provided an affidavit confirming payment and evidence included in the Registrar's statement of complaint supports this.
- [27] If Mr Fu received the payments and did not apply them to the visa application fees that they were allocated for, which the evidence suggests, then it appears Mr Fu has no other justification for not refunding the payments when his instructions terminated.
- [28] Analysing the evidence is much the same as for the other disputed evidence. The complainant has provided sworn evidence. Mr Fu simply asserts he did not receive the payment. He has not taken the opportunity to provide his evidence and have it tested under cross-examination.
- [29] Accordingly, I prefer the evidence of the complainant and uphold this ground of complaint. I accordingly find Mr Fu breached clause 24(c) of the 2014 Code.

Observation

- [30] 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.

Decision

- [31] The Tribunal upholds the complaint pursuant to section 50 of the Act; Mr Fu was negligent, engaged in dishonest and misleading behaviour, and breached the 2014 Code in the respect identified. They are grounds for complaint pursuant to section 44(2) of the Act.
- [32] In other respects, the Tribunal dismisses the complaint.

Submissions on Sanctions

- [33] The Tribunal has upheld the complaint and pursuant to section 51 of the Act, it may impose sanctions.
- [34] The Authority and the complainant have the opportunity to provide submissions on appropriate sanctions.
- [35] They potentially include costs; refund of fees, and compensation for any losses flowing from Mr Fu's conduct that the Tribunal found breached his professional obligations.
- [36] Whether they do provide submissions and evidence of claims or not, Mr Fu is entitled to make submissions and respond to any material from the other parties. As indicated, given the gravity of the finding that Mr Fu engaged in dishonest behaviour in relation to the Authority and Immigration New Zealand, the orders will likely result in the cancellation of Mr Fu's licence. He should consider that when providing submissions.

Timetable

- [37] The timetable for submissions is:
- [37.1] The Authority and the complainant may make any submissions within 10 working days of the issue of this decision.
- [37.2] Mr Fu may provide submissions (whether or not the Authority or the complainant provides submissions) within 15 working days of the issue of this decision.

[37.3] The Authority and the complainant may reply to any submissions made by Mr Fu within 5 working days of him filing and serving his submissions.

DATED at WELLINGTON this 8th day of August 2016.

G D Pearson
Chair