

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

Decision No: [2016] NZIACDT 61

Reference No: IACDT 053/14

IN THE MATTER

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

BY

**The Registrar of Immigration
Advisers**

Registrar

BETWEEN

Arminder Saini

Complainant

AND

Vikrant Dua

Adviser

DECISION

REPRESENTATION:

Registrar: Mr A Dumbleton, lawyer, MBIE, Auckland.

Complainant: Ms T Botha, lawyer, Community Law Waikato, Hamilton.

Adviser: Mr P Moses, lawyer, Auckland.

Date Issued: 26 September 2016

DECISION

Introduction

- [1] The Tribunal issued a decision upholding this complaint on 29 May 2015, based on Mr Dua not filing a statement of reply. The complainant's counsel notified the Tribunal that she had received a statement of reply, and after making inquiries, the Tribunal ascertained that through an administrative error, Mr Dua's statement of reply was not on the file considered by the Tribunal. Accordingly, on 29 July 2015, the Tribunal indicated that its decision of 29 May 2015 was a nullity and without legal effect.
- [2] For various reasons it took some time to resolve the issues. It is sufficient to note that with the assistance of counsel, Mr Dua filed an amended statement of reply and supporting evidence. The Tribunal gave notice to all parties that the Registrar or the complainant may seek an oral hearing, which would give the opportunity to test the evidence supporting Mr Dua's response. If not, then the Tribunal would hear the complaint on the papers, and the likely result of a hearing on the papers would be to uphold the complaint in the respects Mr Dua admitted. This decision follows a hearing on the papers, and does uphold the complaint to that extent.
- [3] The facts on which the complaint is based are:
- [3.1] Mr Dua's client instructed him to apply for a partnership work visa; his current visa was due to expire after a relatively short number of weeks later. Unless Mr Dua lodged the application, his client's visa would expire and he would be in New Zealand unlawfully. Mr Dua failed to lodge the application; his client was then in New Zealand unlawfully.
- [3.2] Mr Dua then lodged a request for Immigration New Zealand to apply a discretionary power to issue a visa, which Immigration New Zealand declined. Mr Dua then advised his client to lodge a further request on essentially the same grounds. Mr Dua also charged additional fees without obtaining an agreement in writing.
- [3.3] Mr Dua's client was arrested and faced deportation as he was in New Zealand unlawfully. His client's lawyer requested Mr Dua's file, which would have potentially disclosed that Mr Dua was responsible in whole or in part for his client's unlawful status in New Zealand. He failed to provide the file, and his client was deported.
- [4] Mr Dua accepted he failed to properly document and make the necessary disclosures relating to the second stage of his instructions, and deliver his file to the lawyer who took over the complainant's instructions. However, he said this occurred through oversight, not through deliberate non-compliance.
- [5] Mr Dua does not accept that:
- [5.1] he was at fault for not giving the complainant adequate notice of the issues relating to the impending expiry of his visa; or

- [5.2] his instructions relating to a second request for a visa were unfounded and he failed to provide sufficient warning of the difficulties to the complainant.
- [6] The Tribunal must evaluate Mr Dua's professional responsibilities relating to the pending visa expiry, and merits of the second request after the visa expired. The Tribunal has found that Mr Dua's responses to those matters did not involve any matters justifying an adverse disciplinary finding.
- [7] Accordingly, the Tribunal has upheld the complaint only on the grounds Mr Dua admitted, that is documenting his changed instructions and handing over his file.

The complaint

- [8] The Registrar's statement of complaint put forward the following background as the basis for the complaint:
- [8.1] The complainant engaged Mr Dua to assist with a partnership work visa application, on 18 June 2012. A written agreement signed by both parties agreed on a fee of \$1,997 for that service.
- [8.2] The complainant paid \$695 as the first instalment, and a further \$972 was payable when unspecified documents were submitted to Mr Dua's office.
- [8.3] On 6 August 2012, the complainant's student visa expired; he had made no further payments. On 18 August 2012, Mr Dua said he would need to file a request under section 61 of the Immigration Act 2009, a discretionary provision that applies when a person is in New Zealand without a current visa and cannot otherwise apply for a visa.
- [8.4] On 19 December 2012, Mr Dua lodged a section 61 request for a partnership work visa; Immigration New Zealand refused the request on 31 January 2013. The following day, Mr Dua told the complainant because his visa had expired and he had no rights of appeal, he should leave New Zealand. On 11 and 15 February 2013, the complainant paid Mr Dua an additional \$750 for a further section 61 request; a written agreement for those services had been sent to the complainant.
- [8.5] The complainant was arrested due to being in New Zealand unlawfully on 18 February 2013, and deported on 16 March 2013; before the section 61 request could be made.
- [9] The Registrar identified potential infringement of professional standards during the course of Mr Dua's engagement, the allegations were that potentially:
- [9.1] Mr Dua breached clauses 2.1(i) and 3(b) of the Licensed Immigration Advisers Code of Conduct 2010 (the 2010 Code). The provisions required him to take all reasonable steps to submit applications in a timely manner, to ensure clients maintain lawful immigration status; and confirm in writing when work ceases part way through an immigration process. The circumstances were:

- [9.1.1] Mr Dua received part payment, and was not intending to provide further services. He did not take steps to inform his client that he would not progress the application.
- [9.1.2] Mr Dua should have informed his client if he was not going to provide the agreed services due to clauses 2.1(i) and 3(b) of the 2010 Code.
- [9.2] Mr Dua breached clauses 1.5(a), (b) and (d) or clause 1.5(e) of the 2010 Code. The provisions required him to complete disclosure, and have a written agreement, and have changes agreed and recorded in writing:
- [9.2.1] The original agreement provided for work relating to a work visa on partnership grounds.
- [9.2.2] The section 61 requests that became necessary after the complainant's visa expired required a new agreement, or variation of the existing agreement with the related disclosure; but Mr Dua did not attend to that.
- [9.3] Mr Dua breached clause 3(c) of the 2010 Code. The provision required him to obtain agreement to any material increase in costs. The circumstances were:
- [9.3.1] The written agreement provided for fees of \$1,997 including disbursement payable to Immigration New Zealand, for the visa application.
- [9.3.2] The complainant paid fees of \$2,262, excluding an additional fee of \$495 for the section 61 request. There was no agreement for the \$265 increase in costs.
- [9.4] Mr Dua breached clause 2.2 of the 2010 Code. The provision required him to deal with a proposed grossly unfounded request by encouraging his client not to file it, provide advice in writing, and seek written acknowledgement if the client still wished to lodge it. The circumstances were:
- [9.4.1] The first section 61 request failed.
- [9.4.2] Mr Dua accepted instructions to file a second request; there was no significant change in the circumstances to support the request. A second request, on the same grounds as a request Immigration New Zealand refused, would fail; Mr Dua failed to take the steps required in clause 2.2 of the Code. The complainant was arrested before Mr Dua filed the further request.
- [9.5] Mr Dua breached clause 3 of the 2010 Code. The provision required him to maintain professional practices in relation to finances, records, and documents. The circumstances were:

[9.5.1] The complainant's lawyer emailed Mr Dua seeking a copy of his file urgently; this was at a point after the complainant had been arrested and before he was deported.

[9.5.2] Mr Dua failed to comply with the request despite his client's circumstances.

[10] 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. Accordingly, it is not necessary to discuss negligence or incompetence, only potential breaches of the 2010 Code.

The responses

[11] The complainant did not file a statement of reply, and was not required to do so if he agreed with the contents of the statement of complaint.

[12] Mr Dua's statement of reply¹, took the position that:

[12.1] The total fees were \$1,967 (not \$1,997 mentioned in the statement of complaint).

[12.2] The narrative of events in the statement of complaint is accurate. However, he added some further details that have some significance for understanding Mr Dua's professional service delivery:

[12.2.1] Mr Dua reminded the complainant by telephone prior to 6 August 2012, that his visa was expiring on that date.

[12.2.2] At the time the complainant's visa expired, the complainant had not given Mr Dua any of the documents required to apply for another work visa.

[12.2.3] When the complainant gave Mr Dua the documents required to apply for a work visa, he issued an invoice for \$800 (as per the contract). That happened on 10 August 2012, and the complainant paid the same day.

[12.2.4] The fees of \$750 paid on 11 and 15 February 2013 were \$400 for professional fees, and \$350 for the anticipated Immigration New Zealand fee.

[12.3] In respect of the grounds of complaint, Mr Dua's position is:

[12.3.1] *Adequacy of steps to maintain client's lawful status*: He did not cause the complainant's unlawful status, he took appropriate steps. He did fail to record the change in the scope of services.

[12.3.2] *Recording change in work*: He, through oversight, failed to document the changed instructions to make a request under section 61.

¹ It is only necessary to refer to the statement of reply dated 11 March 2016, which Mr Dua filed with the assistance of counsel, which the Tribunal has treated as a replacement for his original statement of reply.

[12.3.3] *Breach in relation to fees:* He had an oral agreement relating to fees for the section 61 requests, but failed to deal with the requirements relating to writing.

[12.3.4] *Unfounded application:* Mr Dua did not accept a second section 61 would be unfounded. He provided further information and evidence regarding the issue.

[12.3.5] *Delivering client file to new adviser:* Mr Dua accepts he failed to deliver a copy of his file due to an oversight.

[13] In addition, Mr Dua agreed to refund fees after taking legal advice, he does so without qualification. However, he did request that the Tribunal consider that he was not responsible for the unfortunate consequences for the complainant's immigration situation; and recognise that the refund was not required.

Discussion

The standard of proof

[14] The Tribunal determines facts on the balance of probabilities; 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

[15] The Registrar provided a chronology and supporting documentation, and Mr Dua provided a response which neither the complainant nor the Registrar challenge.

Mr Dua admits elements of the complaint

[16] As there is no opposition to the basis on which Mr Dua admitted elements of the complaint, it is sufficient to set out the elements admitted, his unchallenged description of the circumstances; and record the Tribunal's finding.

[17] The grounds in this category are:

[17.1] *Recording change in work:* Mr Dua accepts that, through oversight and not deliberately, he failed to document the changed instructions to make a request under section 61. Accordingly, he breached clauses 1.5(a), (b) and (d) or clause 1.5(e) of the 2010 Code.

[17.2] *Breach in relation to fees:* Mr Dua had an oral agreement relating to fees for the section 61 requests, but failed to deal with the requirements relating to writing; he breached clause 3(c) of the 2010 Code.

[17.3] *Delivering client file to new adviser:* Mr Dua accepts he failed to deliver a copy of his file due to an oversight, accordingly, he breached clause 3 of the 2010 Code.

Adequacy of steps to maintain lawful status

- [18] One of the critical considerations when a client gives instructions to apply for a visa when they are located in New Zealand is the currency of their visa. Unless they hold a visa, they cannot apply for another visa without leaving New Zealand. Accordingly, the licensed immigration adviser needs to know for how long their visa is valid. If it reaches the point where their client is in New Zealand without a visa, or it expires, then they cannot apply for a visa without leaving New Zealand; they are in New Zealand unlawfully and at risk of compliance processes that may lead to deportation.
- [19] In this case, the complainant's visa was going to expire within weeks. Mr Dua's unchallenged evidence is that he did communicate with the complainant, but the complainant failed to provide the documents needed to lodge an application. Mr Dua accepts he should have used written communication more effectively.
- [20] The significance of passing the expiry date for a visa is high. However, oral communications relating to the documents an adviser needs to lodge a visa application will often be effective. There are elements of judgement as to when matters move from the simple and administrative to professional advice or a warning, and then written communication is necessary. I accept that the complainant understood what was required, as he produced the material, but was late. He was also required to understand the terms of his own visa. Mr Dua says, without challenge, that the complainant did understand his situation.
- [21] In all the circumstances, I am satisfied that there was an error on Mr Dua's part. He should have included written communications regarding the significance of the visa expiry date, as the date approached. However, given the oral communication, and because the complainant understood and indicated he was gathering the necessary information, the lapse from the ideal is at a low level. It was not a situation where lack of communication led to the complainant overstaying a visa through lack of understanding.
- [22] Accordingly, I must consider whether this ground of complaint meets the threshold for an adverse disciplinary finding. Not every lapse is sufficient to uphold a complaint in a professional disciplinary context. In a decision of the Health Practitioners Disciplinary Tribunal: *Re Tolland* No 325/Mid10/146P, 9 September 2010 at para [39], the HPDT observed:
- Negligence, in the professional disciplinary context, does not require the prosecution to prove that there has been a breach of a duty of care and damage arising out of this as would be required in a civil claim. Rather, it requires an analysis as to whether the conduct complained of amounts to a breach of duty in a professional setting by the practitioner. The test is whether or not the acts or omissions complained of fall short of the conduct to be expected of a [practitioner] in the same circumstances... This is a question of analysis of an objective standard measured against the standards of the responsible body of a practitioner's peers.
- [23] While directed to negligence, the analysis is of wider application. Typically, a professional disciplinary issue will involve finding whether there has been a breach of duty in a professional setting, by measuring the breach against real world standards where perfection is not attainable. A responsible body of a practitioner's peers gives weight to the realities of day-to-day professional practice, and human error. Accordingly, a necessary element of the test is to determine whether any lapse is sufficiently serious to warrant upholding the complaint as a

professional disciplinary matter. Though the statutory context is quite different, a relevant discussion of the underlying policy issues to be weighed can be found in *Orlov v New Zealand Law Society (No 8)* [2012] NZHC 2154.

- [24] Section 50 contemplates the Tribunal upholding a complaint without necessarily imposing a sanction. However, section 45(1) of the Act provides that the Authority may treat a complaint as trivial or inconsequential and not pursue it, or treat an issue as best settled between the parties. I am satisfied that the proper course is to apply the usual principles to complaints in this jurisdiction and require a level of gravity before making an adverse disciplinary finding.
- [25] The Act does not attempt to prescribe where the boundary is, and any attempt by this Tribunal to do so is unlikely to be successful. It is necessary to consider the facts of each complaint.
- [26] In this case, I have unchallenged evidence of effective oral communication of the deadline and its significance, and an assurance from the complainant that he was responding as best he could. I consider that the absence of written communication, while a fault, fell below the disciplinary threshold.
- [27] I accordingly do not uphold this ground of complaint.

Unfounded application

- [28] When a person is in New Zealand without a current visa, they may make a request for a visa under section 61 of the Immigration Act 2009. However, the matter is entirely discretionary and Immigration New Zealand is not required to provide reasons for the decision to grant or decline the request.
- [29] The statement of complaint is concerned with the point in February 2013 when Mr Dua accepted instructions to lodge a second section 61 request, despite no apparent change in circumstances and after Immigration New Zealand declined the first request. The request was not in fact lodged as the complainant was arrested before that was possible. Mr Moses emphasises that the overall circumstances were not obviously hopeless, given that the complainant was the father of a New Zealand citizen, and living in a family relationship with the child and her mother. Issues relating to the Convention on the Rights of the Child were relevant. Furthermore, it is of significance that the lawyer who later acted for the complainant took the view that there were circumstances that justified seeking the Minister's intervention.
- [30] Furthermore two experienced immigration lawyers, Mr Richard Small of Pacific Legal, and Mr Simon Laurent of Laurent Law provided evidence regarding lodging a second section 61 request. They both make the point that a second section 61 request is not necessarily inappropriate; it may be a justified and effective intervention.
- [31] Accordingly the unchallenged evidence is that:
- [31.1] Mr Dua had not finalised his request, so may have issued further advice before doing so;

- [31.2] The lawyer who later took over the instructions thought the matter had sufficient merit to make a request to the Minister, which is similar in principle to a section 61 request made to the Minister's delegate;
- [31.3] Two experienced lawyers have given expert opinions that a failed section 61 request is not itself evidence that a further request is inappropriate; indeed they are successful sometimes.
- [32] I am not satisfied that the complainant's circumstances after the failed section 61 request were such that a further request would have been "vexatious, or grossly unfounded". In this case, there was no particular form of application that could be within those categories, as the complainant was arrested before the work progressed to that point. It would be necessary to find that the overall circumstances made a meritorious application impossible. The evidence is to the contrary, the lawyer who took over lodged a well reasoned request with the Minister.
- [33] Accordingly, I do not uphold this ground of complaint.

Decision

- [34] The Tribunal upholds the complaint pursuant to section 50 of the Act; Mr Dua breached the 2010 Code in the respects identified and that is a ground for complaint pursuant to section 44(2)(e) of the Act.
- [35] In other respects, the Tribunal does not uphold the complaint.

Submissions on Sanctions

- [36] The Tribunal has upheld the complaint; pursuant to section 51 of the Act, it may impose sanctions, or take no further action pursuant to section 50(b) of the Act.
- [37] In this case, Mr Dua has repaid all of the fees he received; that is significantly beyond any refund of fees or compensation that the Tribunal would award as a result of the grounds of complaint upheld. The Tribunal is also conscious that its processes resulted in a decision issuing without considering Mr Dua's statement of reply. The subsequent intervention of counsel and a replacement statement of reply supported by evidence made a considerable difference to the outcome for Mr Dua. Nonetheless, the initial decision likely increased Mr Dua's costs. The grounds upheld are at a low level.
- [38] Accordingly, the Tribunal will consider taking no further action unless that course is opposed by the Registrar or the complainant.
- [39] The Authority and the complainant are requested to indicate whether they oppose the Tribunal taking no further action, and if not, the Tribunal will take no further action.

Timetable

[40] The timetable for submissions on sanctions will be as follows:

[40.1] The Authority and the complainant may indicate that they oppose the Tribunal taking no further action, and if so, make any submissions regarding sanctions within 10 working days of the issue of this decision.

[40.2] The adviser is to make any submissions in reply within 15 working days of the issue of this decision if a party opposes the Tribunal taking no further action.

[40.3] 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 26th day of September 2016.

G D Pearson
Chair