

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

Decision No: [2018] NZIACDT 46

Reference No: IACDT 002/16

IN THE MATTER of a referral under s 48 of the
Immigration Advisers Licensing Act
2007 (the Act)

BY **The Registrar of Immigration
Advisers**

Registrar

BETWEEN **Nilesh Govind**

Complainant

AND **Ashwini Chandra**

Adviser

DECISION

REPRESENTATION:

Registrar: Ms C Pendleton, lawyer, MBIE, Auckland

Complainant: In person

Adviser: In person

Date Issued: 15 November 2018

DECISION

Preliminary

- [1] This is a complaint against Ms Chandra, it has two elements. The first is that she did not have a written agreement for her professional engagement with Mr Govind, she accepts that, so the complaint will be upheld in that respect.
- [2] The second element of the complaint is that Ms Chandra sought a character waiver from Immigration New Zealand for Mr Govind. The difficulty was that a character waiver could only be obtained in respect of a specific application, and there was no live application. There is no dispute that Ms Chandra made an error in her approach, the question is whether the error was serious enough to justify a disciplinary response.
- [3] I have reached the view that the request for a character waiver does not justify an adverse disciplinary finding.
- [4] Unfortunately, this matter was heard, and the record of the proceeding being incomplete was misplaced. I apologise to the parties for the delay.

The Complaint

The background facts

- [5] The Registrar filed a statement of complaint, which set out a factual narrative and identified the two potential grounds for complaint. The main elements of the factual background in the statement of complaint were as follows:
- [5.1] Mr Govind sponsored his former wife for a work visa application.
- [5.2] Mr Govind's former wife made false allegations to the police regarding him. He wanted to marry again. He was not at the point of having a prospective wife, or having an application for a partner to get a visa. However, he did want to know whether sponsoring a prospective wife was an option for him.
- [5.3] Ms Chandra submitted a letter requesting a character waiver. Immigration New Zealand received the documents, but could not carry out a character waiver assessment in the absence of a visa application.

The grounds of complaint identified by the Registrar

Potential breach of clause 16(a) of the Licensed Immigration Advisers Code of Conduct 2014 (Code of Conduct 2014)

- [6] Ms Chandra charged a fee for the application, but did not have a written agreement. She was required to have a written agreement pursuant to clause 16(a) of the Code of Conduct 2014.

Futile immigration matters clause 9 of the Code of Conduct 2014

- [7] When immigration matters are futile, clause 9 of the Code of Conduct requires a process of gaining informed instructions. The request for a character waiver was futile as a waiver could only be made in respect of a specific application, and no steps were taken to notify Mr Govind of the situation.

Procedure

- [8] Ms Chandra and Mr Govind attended the hearing. However, the facts were not contentious. Ms Chandra admitted not having a written agreement. She accepted that she could not have obtained a character waiver, and accepted she had a mistaken understanding.

- [9] Mr Govind raised a number of matters, but none of them affected the issue to be determined, namely whether Ms Chandra's error was sufficient to trigger a disciplinary response.

Discussion

Breach of clause 16(a) of the Code of Conduct 2014

- [10] I find the absence of a written agreement was a ground for complaint. The Registrar related the complaint to the rule relating to instructions for an initial consultation. To some extent that lessens the gravity of the matter. Regardless, a written agreement is an elementary feature of all engagements under the Code of Conduct 2014, and it protects both advisers and clients. This case is an example, there is dispute as to whether the full fee was to be \$700 or \$1,500. However, it is not necessary to resolve that issue, as the services provided were not of value.

Breach of clause 9 of the Code of Conduct 2014

- [11] In a decision of the Health Practitioners Disciplinary Tribunal (HPDT), *Re Tolland*, the HPDT observed:¹

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 amount 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.

- [12] The professional setting is varied, but duties of competence, and the application of skill, honesty, disclosure and propriety are shared by a wide range of

¹ *Re Tolland* (Decision No 325/Mid10/146P, 9 September 2010) at [39].

professionals. Immigration advisers have much in common with other professionals. Section 3 of the Act affirms that it is intended to protect the interests of consumers receiving immigration advice, which corresponds with the duties other professionals have to the public engaging their services. The issue is properly understood under the Act as whether there has been a breach of duty in a professional setting.

- [13] Accordingly, a necessary element of the test is to determine whether any lapse is sufficiently serious as to warrant the complaint being upheld as a professional disciplinary matter.
- [14] Section 50 of the Act contemplates a complaint being upheld without necessarily imposing a sanction. It follows that it is not necessary to find that a disciplinary sanction should be imposed to uphold a complaint. It is important to recognise that not every lapse or manifestation of human frailty should result in an adverse professional disciplinary finding. There will be occasions when advisers are responsible for a lapse from acceptable standards, but that still does not justify upholding a disciplinary complaint.
- [15] It is a reality that many errors and mistakes are too trivial to warrant an adverse disciplinary finding, and the Act recognises that. Section 45(1) of the Act provides that the Registrar may treat a complaint as trivial or inconsequential which need not be pursued, or treat it as a matter that is best settled between the parties.
- [16] Accordingly, it is necessary and appropriate for this Tribunal to be mindful that there is a threshold before a complaint of negligence or want of care and diligence is established. Though the statutory context is quite different, there is a discussion of the underlying policy issues in *Orlov v New Zealand Law Society (No 8)*.²
- [17] The Act does not attempt to prescribe further where the boundary lies, and any attempt by this Tribunal to do so is unlikely to be successful. It is necessary to consider the facts of each complaint.
- [18] In the present case, I am satisfied a disciplinary response is not justified in relation to the application for a character waiver. There was a simple error, Ms Chandra thought she could apply for a character waiver in advance. That was what Mr Govind wanted, he did not want to find a prospective wife and then find he was barred from sponsoring her. There was nothing wrong with signalling to Immigration New Zealand that the issue might arise, and asking whether some response was possible, even though it could not be binding. Ms Chandra's mistake was a simple technical lapse. It was not an exceptionally obvious error,

² *Orlov v New Zealand Law Society (No 8)* [2012] NZHC 2154.

or indicative of a serious lack of care, and she did not persist with the error after Immigration New Zealand pointed it out to her.

- [19] I do accept that proceeding with the request did not advance Mr Govind's interests, however that is properly viewed as a contractual matter. In this case, there was no written agreement, and the work was of no value. Subject to submissions that may be presented, my view is the fee of \$500 Mr Govind paid must be refunded. That is a proportionate response to the error.
- [20] In my view, bringing the complaint under clause 9 of the Code of Conduct 2014 as a futile application was inappropriate. The issue was lack of care. Ms Chandra did not knowingly bring an application that could not succeed.

Decision

- [21] The Tribunal upholds the complaint pursuant to section 50 of the Act.
- [22] The adviser breached the Code of Conduct 2014 in the respects identified. These are grounds for complaint pursuant to s 44(2) of the Act.

Submissions on Sanctions

- [23] The Tribunal has upheld the complaint. Therefore, pursuant to section 51 of the Act, it may impose sanctions.
- [24] Unless there are contrary submissions, the Authority will order that Ms Chandra refund fees of \$500.
- [25] The may provide submissions on sanctions.
- [26] The following timetable will apply:
- [26.1] The Registrar and the complainant may provide submissions on sanctions, within 10 working days of this decision.
- [26.2] Ms Chandra may provide submissions within 15 working days of this decision.

DATED at WELLINGTON Wednesday, 06 March 2019

G D Pearson
Chair