IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2019] NZIACDT 28

Reference No: IACDT 011/17

IN THE MATTER	of a referral under s 48 of the Immigration Advisers Licensing Act 2007
BY	**THE REGISTRAR OF IMMIGRATION ADVISERS** Registrar
BETWEEN	**WQ** Complainant
AND	**LAVENIA EMBERSON** Adviser

DECISION
Dated 8 May 2019

REPRESENTATION:

Registrar:	Self-represented
Complainant:	Self-represented
Adviser:	Self-represented

PRELIMINARY

[1] Ms Emberson, the adviser, acted for Mr WQ, the complainant, who sought to migrate to New Zealand. There were considerable delays by her in compiling and lodging the complainant's application with Immigration New Zealand, by which time changes made to the immigration policy meant he was not eligible for automatic selection. Ms Emberson admits the delays.

[2] A further complaint against Ms Emberson by the regulatory body concerns her failure to make available the complainant's file for inspection. As to this, she says it was her employer's file and not hers and she had left the firm's employment by the time inspection was sought. The issue here for the Tribunal is whether an adviser could be in breach of the professional obligation to make files available for inspection if she no longer has possession or control of the file.

BACKGROUND

[3] Ms Lavenia Emberson is a licensed immigration adviser. At the relevant time she worked for a law firm in Dubai.

[4] On 19 May 2016, the complainant entered into a written retainer agreement with the law firm for the purpose of obtaining permanent residence in New Zealand.

[5] Throughout May and June 2016, the complainant sent Ms Emberson various required documents, as requested by her. He had numerous questions which Ms Emberson answered by email.

[6] On about 22 June 2016, Ms Emberson applied to the New Zealand Qualifications Authority (NZQA) for an assessment on behalf of the complainant.

[7] On 27 June 2016, the complainant sent an email to Ms Emberson asking about the salary in New Zealand for housemaids and whether there was any website showing labour laws for housemaids. After further emails from the complainant on 4 and 17 July 2016, Ms Emberson replied on 17 July identifying a website showing the minimum wage.

[8] On receipt of Ms Emberson's response of 17 July, the complainant emailed her on the same day with questions concerning both his wife's NZQA assessment process and Immigration New Zealand's English language criterion.

[9] Following a reminder email from the complainant on 4 August 2016, Ms Emberson replied in regard to the NZQA process on the same day. She said she would send the English language document requested shortly.

[10] Following a further reminder from the complainant on 7 August 2016, Ms Emberson sent him the requested English language document that day. She confirmed receipt of his NZQA assessment.

[11] On 23 August 2016, Ms Emberson advised the complainant that he would need to complete a specialist report (KA02) for the Institute of Professional Engineers of New Zealand. She copied to him an email from the institute.

[12] On 1 September 2016, the complainant sent an email saying he was still waiting for both the KA02 form and the expression of interest (EOI) application form. In reply on the same day, Ms Emberson sent him the KA02 form and advised that further information was required from him for the EOI.

[13] On 5 September 2016, Ms Emberson emailed the complainant telling him that she would complete the EOI by the end of the week.

[14] On 19 September 2016, Ms Emberson emailed the complainant asking him for information for the EOI. She informed him that she had completed most of the EOI and hoped he would make Immigration New Zealand's draw on 27 September 2016. The complainant provided the information the following day.

[15] On 28 or 29 September 2016, Ms Emberson emailed the complainant to apologise for the delay and explained that the draw that week had been missed, but he could enter the following week's draw.

[16] On 29 September 2016, the complainant sent an email to Ms Emberson complaining about her failure to communicate and the delays in lodging his EOI.

[17] In late September 2016, Ms Emberson stopped working at the law firm but assisted with the transition of her files to the replacement employee until about mid October 2016. She continued to communicate using the firm's email address.

[18] The complainant sent further emails on 3, 4, 5 and 9 October 2016 seeking additional information from her and/or another employee of the law firm.

[19] The complainant sent an email to Ms Emberson on 10 October 2016 seeking urgent feedback on three queries that had been unanswered. An employee of the law firm answered them on the same day. Ms Emberson also responded on 10 October 2016 apologising for the delay and stating that the work had all been done and he would catch that week's draw.

[20] The complainant's EOI application was completed and lodged on 10 or 11 October 2016.

[21] On 12 October 2016, Immigration New Zealand changed its policy, increasing the number of points required for automatic selection. This meant the complainant was no longer eligible.

[22] The complainant then sent Ms Emberson several emails asking how the policy change affected his EOI. She replied using the law firm's email address on 15 or 16 October 2016 advising that she was attending a webinar to learn more about the policy change and assuring him she would get back with some advice. This was the last time the complainant heard from Ms Emberson, despite his further emailed requests to be updated on the effect of the policy changes.

[23] An employee of the firm sent an email to the complainant on 27 October 2016 explaining the changes to immigration policy made on 12 October. He was advised to maintain his application as he could still be selected, though not automatically. He could also apply for Australia. The complainant replied on the same day that he was expecting to hear from Ms Emberson.

COMPLAINT

[24] On 13 November 2016, the complainant filed a complaint against Ms Emberson with the Immigration Advisers Authority (the Authority), headed by the Registrar of Immigration Advisers (the Registrar). He complained about the delays, in particular the delay to lodging his EOI. If the policy changes meant that he was disqualified, he wanted a full refund of all his expenses.

[25] There was an exchange of emails between the Authority and Ms Emberson in response to the former's request for the file concerning the complainant. Ms Emberson pointed out that s 57 of the Immigration Advisers Licencing Act 2007 (the Act) limited the Authority's powers of inspection to documents "in that person's possession or under that

person's control". The file was no longer in her possession or control. She had left all the clients and files with the firm, as she did not want to be accused of stealing them.

Ms Emberson's response to the complaint of 30 March 2017

[26] Ms Emberson sent an email to the Authority on 30 March 2017 expressing sympathy for the complainant who was badly affected by the changes to New Zealand's immigration policy which were made without notice. According to her, he continued to have options as he could still qualify for New Zealand if he obtained a job offer, or alternatively he could apply to go to Australia.

[27] The Authority was advised that she was initially receiving so many phone calls from the complainant that she asked him to communicate by email. She had three meetings with him, all of which were three to four hours.

[28] According to Ms Emberson, while the complainant was seeking a refund of his fee, he was well aware that his agreement was with the law firm. She believed that the complainant and the law firm were complicit in the complaint to the Authority. It was a malicious, frivolous, and vexatious complaint to undermine someone with a spotless career of 16 years in immigration.

[29] Ms Emberson set out how she came to work at the law firm. She had expected a written agreement with the firm and was given all sorts of excuses as to why the agreement and her Dubai visa, sponsored by the firm, were never sorted out. Unfortunately, the changes to Immigration New Zealand's policy occurred at the same time as she was transitioning out of the firm.

[30] Ms Emberson advised the Authority that her own situation at the firm was precarious and the working environment was not healthy. She worked very long hours, up to six days a week. There were unethical work practices and dodgy clients. She left the firm in September 2016.

[31] As for inspection of the physical file, Ms Emberson stated that it was not in her possession or under her control as she was no longer at the law firm. The information in the electronic file belonged to the firm and was stored on its system. The obligation to maintain client files and to provide them to the Authority could only apply if she was still employed. She could not steal their property when she left. The responsibility for obtaining the file was that of the Registrar.

Ms Emberson's response to the complaint of 23 May 2017

[32] A further response from Ms Emberson was sent by email to the Authority on 23 May 2017. She repeated her accusation that the complainant and the law firm were complicit in making the complaint to the Authority. However, she was not infallible, so she apologised for breaches of her obligations as a licensed adviser. She had now undertaken the Code of Conduct 2014 (the Code) refresher course and had taken the learning on board.

[33] Ms Emberson explained that she was now a sole trader and the Authority could be assured that the matter would never arise again. She advised that she had worked for the law firm for only four months, which was the worst time of her life. Her personal and professional life were then in a mess. There was conflict in her personal relationship with the head of the firm. She was a single mother of three children and had lived in the Middle East for the last 10 years.

[34] Ms Emberson agreed that she could have lodged the complainant's EOI on four occasions before the policy change on 12 October 2016, for which she apologised. However, even if the complainant had entered into any of the earlier draws, the policy change meant that he and his wife would not have been able to meet the new English language requirement. She was wrong not to lodge his EOI in time for automatic selection, but saved him from later disappointment and the EOI fees. Ms Emberson acknowledged this was no excuse for her failure to deal adequately with his application.

[35] Notwithstanding her delays, Ms Emberson did not accept that cl 1 of the Code had been breached by failing to provide services diligently and in a timely manner. She believed she had been very fair with the complainant in terms of the time spent with him in responding to his emails.

[36] Ms Emberson accepted that she did not answer the complainant's question about the salary for a housemaid. This was because she thought she had already answered him. Additionally, she admitted not answering his query about his wife's NZQA assessment, as she thought it was not important. As for the "EOI requirements", while he sent a reminder on 4 August, the next working day was 7 August which was when she sent the template.

[37] In respect of the period after 15 October 2016 when she failed to get back to the complainant, Ms Emberson said she had already exited the firm and had no access to the emails. She was told that a new adviser had taken over. Ms Emberson accepts she should have informed the complainant of her exit and the name of the new adviser. According to her, the complainant was not her client, but the client of the law firm. It was the firm which had the agreement with him and to whom he paid the fees. She saw herself only as a contractor. This was why she did not communicate her exit to him.

[38] In terms of the file management complaints, Ms Emberson repeated that the complainant was not her client, but the law firm's client. She recognised that there was a duty to retain a file for seven years and to make it available for inspection, but in this case the information did not belong to her. Had she taken any information from the law firm, she would have been sued for stealing clients and information, so she had to balance going to jail with losing her immigration licence. This was a one-off situation which would never happen again.

Complaint referred to Tribunal

[39] The Registrar referred the complaint to the Tribunal on 16 June 2017. The following breaches of the Code are alleged against Ms Emberson:

(1) Delays in lodging the EOI and in communicating with the complainant, in breach of the obligation in cl 1 to be professional, diligent and to conduct herself with due care and in a timely manner.

(2) Failing to maintain a copy of the client file and making it available for inspection on request, in breach of the obligation to do so in cl 26(e).

JURISDICTION AND PROCEDURE

[40] The grounds for a complaint to the Registrar made against an immigration adviser or former immigration adviser are set out in s 44(2) of the Act:

(a) negligence;

(b) incompetence;

(c) incapacity;

(d) dishonest or misleading behaviour; and

(e) a breach of the Code of Conduct.

[41] The Tribunal hears those complaints which the Registrar decides to refer to the Tribunal.[1]

[42] The Tribunal must hear complaints on the papers, but may in its discretion request further information or any person to appear before the Tribunal.[2] It has been established to deal relatively summarily with complaints referred to it.[3]

[43] After hearing a complaint, the Tribunal may dismiss it, uphold it but take no further action or uphold it and impose one or more sanctions.[4]

[44] The sanctions that may be imposed by the Tribunal are set out in the Act.[5] The focus of professional disciplinary proceedings is not punishment but the protection of the public.[6]

[45] It is the civil standard of proof, the balance of probabilities, that is applicable in professional disciplinary proceedings. However, the quality of the evidence required to meet that standard may differ in cogency, depending on the gravity of the charges.[7]

[46] There was a statement of complaint from the Registrar (16 June 2017), together with supporting documents. There was no statement of reply or submissions from either the complainant or Ms Emberson. Neither requested an oral hearing.

ASSESSMENT

[47] The Registrar relies on the following provisions of the Code:

> **General**
>
> 1. A licensed immigration adviser must be honest, professional, diligent and respectful and conduct themselves with due care and in a timely manner.
>
> **File management**
>
> 26 A licensed immigration adviser must:
>
> …

[1] Immigration Advisers Licensing Act 2007, s 45(2) & (3).
[2] Section 49(3) & (4).
[3] *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376 at [93].
[4] Section 50.
[5] Section 51(1).
[6] *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151] (citation omitted).
[7] *Z v Dental Complaints Assessment Committee* at [97], [101]–[102] & [112].

> e) maintain each client file for a period of no less than 7 years from closing the file, and make those records available for inspection on request by the Immigration Advisers Authority, and
>
> …

[48] Prior to dealing with the complaint, there is a preliminary point. Ms Emberson says the complainant was the law firm's client and not hers. While that is correct in terms of the law of contract, it is Ms Emberson who owes the professional obligations to the complainant under the Code, not the firm. For the purpose of the Code, the complainant is her client.

(1) Delays in lodging the EOI and in communicating with the complainant, in breach of the obligation in cl 1 to be professional, diligent and to conduct herself with due care and in a timely manner

[49] The complainant instructed the firm on 19 May 2016. Ms Emberson commenced work on the file shortly afterwards. She did not complete the EOI and lodge it until 10 or 11 October 2016, almost five months later.

[50] The EOI required considerable information and documentation, largely from the complainant but also from other bodies such as NZQA. However, Ms Emberson acknowledges it should have been lodged much earlier. She accepts that she missed four draws between 17 August and 28 September 2016.

[51] Ms Emberson's delays caused the complainant to miss automatic selection, due to a policy change on 12 October 2016. Ms Emberson also accepts this. However, according to her, even if the EOI had been filed earlier, the complainant would have been caught by another policy change concerning the English language criterion. While making the point, Ms Emberson does not advance it as an excuse for her conduct.

[52] Despite the delays and policy change, it has not been established that the application was necessarily doomed as a result of Ms Emberson's dilatory work. The Tribunal has not been informed of the ultimate fate of the EOI. The failure to meet the criterion for automatic selection does not mean the application necessarily fails. Nor do I know whether automatic selection before the 12 October policy change would have inexorably led to residence for the complainant and his family. I therefore decline to find that her delays resulted in the failure (if so) of what would have otherwise been a successful application (if so).

[53] As for Ms Emberson's email communications with the complainant, it is self-evident that there were lengthy delays in her replying to a number of his questions starting in late June 2016.

[54] Ms Emberson did not reply to the query made on 27 June 2016 concerning the housemaid until 17 July 2016. This was after reminders on 4 and 17 July.

[55] It therefore took Ms Emberson three weeks to respond to the complainant's housemaid query. It was a peripheral matter which did not involve the residence of the complainant and his family, but nonetheless a professional adviser should respond within a reasonable time. Three weeks was unreasonable, irrespective of Ms Emberson's personal situation within the firm.

[56] The complainant also raised queries regarding his wife's NZQA assessment and the English language criterion on 17 July 2016. They were not answered until 4 August (NZQA) and 7 August (English language). This was after reminders from the complainant on both 4 and 7 August. As for the 7 August response, I note Ms Emberson's explanation that 7 August was the next working day after 4 August.

[57] Again, Ms Emberson's responses were sent about three weeks later. These queries related directly to the prospective application. It is not a sufficient reason that Ms Emberson did not think the matters important. They were material to the complainant so should have been answered within a reasonable time. Three weeks or so was an unreasonable time.

[58] I uphold the first head of complaint. The delays in filing the EOI and replying to the complainant's questions are a breach of cl 1 of the Code to be professional and diligent, and to conduct herself with due care and in a timely manner.

(2) Failing to maintain a copy of the client file and making it available for inspection on request, in breach of the obligation to do so in cl 26(e)

[59] The Registrar contends that Ms Emberson is in breach of cl 26(e) of the Code, in that she has failed to keep the client's file for seven years and make it available for inspection by the Authority.

[60] Ms Emberson states that she could not retain the file or make it available, as it was the file of her former employer. She had left the firm by mid-October 2016, so she could not access it when requested by the Authority.

[61] The Code obligation to maintain a file and make it available for inspection could not be inconsistent with the Act. Section 57 sets out the Authority's powers of inspection:

> **57 Inspection powers**
>
> (1) Any person authorised by the Registrar may, for a purpose set out in section 56,—
>
> (a) at any reasonable time, enter any premises where the person has good cause to suspect that—
>
> (i) any licensed immigration adviser or former licensed immigration adviser works or has worked in the past 2 years; or
>
> (ii) any person who has applied to be licensed as an immigration adviser works; or
>
> (iii) a person provides immigration advice or contracts or employs a person to provide immigration advice:
>
> (b) question any licensed immigration adviser, former licensed immigration adviser, or other person at any premises of a kind described in paragraph (a):
>
> (c) require a person of a kind described in paragraph (a) to produce for inspection relevant documents in that person's possession or under that person's control:
>
> (d) inspect and take copies of documents referred to in paragraph (c):
>
> (e) retain documents referred to in paragraph (c), if there are grounds for believing that they are evidence of the commission of an offence.
>
> (2) If a requirement is made of a person under subsection (1)(c), the person must immediately comply with that requirement.
>
> (3) The provisions of subparts 1, 5, 6, 7, 9, and 10 of Part 4 of the Search and Surveillance Act 2012 apply.

[62] An adviser can only be required to produce for inspection documents "in that person's possession or under that person's control".[8]

[8] Immigration Advisers Licensing Act 2007, s 57(1)(c).

[63] The obligation in cl 26(e) of the Code must be interpreted so as to be consistent with s 57(1)(c) of the Act. As a former employee, Ms Emberson will have no possession or control over the complainant's file at the law firm. The file was that of the firm and not Ms Emberson.[9] By the time the Authority requested the file, Ms Emberson had left the firm.

[64] Nonetheless, an adviser must make reasonable efforts to assist the Authority to obtain the employer's file. No evidence has been provided as to what efforts, if any, Ms Emberson made in this regard. There is evidence that the Authority's requests for a copy of the file made directly to the law firm went unanswered. Such evidence as exists tends to show that the firm would not have made the file available to Ms Emberson to provide to the Authority, even if she had requested it.

[65] In any event, it is not apparent what was not provided to the Authority as much, perhaps all, of the file does appear to have been produced by someone. The Authority has copied to the Tribunal what appears to be a full file. While there are no internal file notes of any telephone discussions or meetings with the complainant, none may have been produced. The Registrar has not identified what, if anything, is missing from the file.

[66] The second head of complaint is dismissed.

OUTCOME

[67] I uphold the first head of complaint. Ms Emberson has breached cl 1 of the Code.

SUBMISSIONS ON SANCTIONS

[68] As the complaint has been upheld, the Tribunal may impose sanctions pursuant to s 51 of the Act.

[69] A timetable is set out below. Any requests for training should specify the particular course suggested. Any request for repayment of fees or the payment of costs or expenses or for compensation must be accompanied by a schedule particularising the amounts and basis of the claim.

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[9] *Jiang v Immigration Advisers Complaints and Disciplinary Tribunal* [2018] NZHC 3152 at [73].

Timetable

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

(1) The Authority, the complainant and Ms Emberson are to make submissions by **30 May 2019**.

(2) The Authority, the complainant and Ms Emberson may reply to any submissions by another party by **13 June 2019.**

D J Plunkett
Chair