IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2019] NZIACDT 37

Reference No: IACDT 026/18

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

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 6 June 2019

REPRESENTATION:

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

PRELIMINARY

[1] The primary allegations against [the adviser], are that she used unlicensed staff in her office to engage with the client which is work that only a licensed adviser is allowed to perform, and that her work was negligent.

[2] The essential issue to consider is whether there is sufficient evidence of those alleged professional violations.

BACKGROUND

[3] [the adviser] is a licensed immigration adviser. She is a director of [company].

[4] [The complainant], a national of India, approached [company] on 13 June 2017. He had come to New Zealand in 2014 and had lawfully studied and worked. However, his visa had expired on 2 May 2017. Immigration New Zealand then declined a graduate work experience visa on 8 June 2017. He was therefore unlawfully in New Zealand at the time of his approach.

[5] A written agreement was entered into between the complainant and [company] on 15 June 2017. [the adviser] signed on behalf of the company. The agreement identified three other licensed advisers who might handle the complainant's case. It recorded that he was unlawfully in New Zealand, but as he had an offer of employment he sought a "Post Study Work Visa Employer Assisted" under s 61 of the Immigration Act 2009 (a Ministerial discretion to grant a visa in a special case). A "stage one" fee of $1,552.50 was paid by the complainant to [company] on the same day.

[6] On 22 June 2017, [the adviser] lodged with Immigration New Zealand a s 61 request for work visa on behalf of the complainant. The agency was advised he had been offered new employment with a named employer as a telecommunication technician.

[7] Immigration New Zealand refused the request on 28 July 2017. No reasons were given and none were required to be given. The letter reminded the complainant that he was unlawfully in New Zealand and had to leave immediately.

[8] The agreement between the complainant and [company] was varied on 1 August 2017 to permit another s 61 application to be made. No additional stage one fee would be charged.

[9] On 6 September 2017, another licensed adviser employed by [company] lodged a fresh s 61 application with Immigration New Zealand.

[10] Immigration New Zealand advised its refusal to consider the further application on 2 October 2017. No reasons were given and none were required to be given. Again, the complainant was reminded that he was unlawfully in New Zealand and had to leave immediately.

[11] The complainant left New Zealand on 14 November 2017.

[12] On 7 December 2017, [the adviser] lodged with Immigration New Zealand an online Essential Skills Work Visa application on behalf of the complainant (covering letter dated 6 December 2017). It was based on an offer he had for work as a telecommunications technician. [the adviser] says she did not charge a fee for this application.

[13] On 11 December 2017, Immigration New Zealand wrote to the complainant identifying a number of issues with his application which could have a negative impact on the outcome. First, he did not appear to have any relevant work experience. Furthermore, while he had provided evidence indicating that the position was advertised on TradeMe, the nature and extent of the advertising did not meet the agency's criteria. Nor had the employer provided any evidence of the outcome of the attempt to recruit a New Zealand worker for the position offered. Immigration New Zealand had also been unable to ascertain if the employer had made an effort to train New Zealanders to fill the position. The complainant was invited to provide further information.

[14] [the adviser] comprehensively responded to Immigration New Zealand's concerns on 22 December 2017. She provided a letter from the complainant, a letter from the employer, CVs from candidates and a competencies document.

[15] In her covering letter, [the adviser] advised that the complainant had worked from May 2016 to April 2017 as a cabler and the employer had offered him a position as a telecommunications technician. She stated that the complainant had sufficient work experience. He was a genuine person and highly qualified, having both Level 5 and Level 7 qualifications. The whole purpose of the application was to give the complainant a chance to prove to the New Zealand employer that he would be an asset.

[16] According to [the adviser], the employer had made a genuine effort to recruit New Zealanders, but there were none available. The employer wanted him to start work as soon as possible, as a qualified, experienced person was needed. The employer had provided CVs showing it had tried to recruit New Zealanders. An explanation was given for rejecting each of the seven shortlisted candidates. She noted there was further explanation in the employer's letter.

[17] Immigration New Zealand declined the application on 2 February 2018. It noted that an advertisement for jobs should be placed for at least two weeks. This position had been advertised on TradeMe on 30 November 2017 and the application lodged on 7 December 2017. The prospective employer in New Zealand had therefore offered the job within a week of listing the advertisement, with the application then being lodged. It appeared unlikely that within a week the employer had advertised the role, reviewed all the CVs, attempted to contact the suitable candidates and decided to recruit him over them. In its letter, Immigration New Zealand then made an unintelligible comment about one candidate. As a result, it questioned the genuineness of the attempts made by the employer. It did not appear that the employer had made an attempt to recruit suitable New Zealand citizens or residents.

COMPLAINT

[18] A complaint against [the adviser] was lodged with the Immigration Advisers Authority (the Authority) by the complainant on 28 February 2018. He said that [the adviser] was either not well qualified or was negligent. She may have wanted to make money instead of provide services. She had lodged the Essential Work Visa application without the requirements being fulfilled. [the adviser] should have waited two weeks after the job was advertised, rather than made the application within a week. He wanted compensation totalling $1,850.50, comprising [the adviser]'s fees of $1,552.50 and Immigration New Zealand's fee of $298.

[19] The Authority formally notified [the adviser] of the complaint and set out the details on 10 July 2018.

Response to notification of complaint

[20] [the adviser] responded to the Authority's notification of the complaint on 24 July 2018.

[21] It was accepted by [the adviser] that an error was made in failing to note on the agreement that an essential skills visa was to be sought. She advised they did not charge him for this.

[22] [the adviser] further advised that the complainant had been in touch with her in person and had made numerous calls on her mobile, so it was hard to keep a record. She was one of the very rare advisers who gave her mobile number to her clients. Because the calls were on the mobile phone, there was no record. To avert this situation in the future, her company had spent $30,000 for a system to log the calls. They were

now able to record the phone calls made to clients or received from them. All incoming and outgoing emails were recorded.

[23] When the complainant presented with "his advertisement", he requested they file as soon as possible, as the employer had to know he had immediately applied. According to [the adviser], some applications had been approved with limited periods of advertising. There had been inconsistent decisions by Immigration New Zealand.

[24] Despite having eight staff members, under no circumstances did they provide "immigration advice". If any of them did, it would result in instant dismissal.

[25] The complainant had met them in person and they went through his entire case prior to the company being instructed. They had a reasonable belief in his success, given his qualifications and offer of employment.

[26] [the adviser] said she would have no objection to refunding to him the entire payment.

Complaint referred to Tribunal

[27] The Registrar of Immigration Advisers (the Registrar), the head of the Authority, filed a statement of complaint with the Tribunal on 31 July 2018. He has referred to the Tribunal the following possible statutory grounds of complaint and breaches of the Licensed Immigration Advisers Code of Conduct 2014 (the Code):

(1) Failing to ensure a written agreement was entered into relating to the Essential Skills Work Visa application, in breach of cl 18(a);

(2) Failing to take personal responsibility for maintaining the client relationship and instead relying on unlicensed staff to carry out key parts of the client engagement process, including providing ongoing timely advice to the complainant and obtaining his informed lawful instructions, thereby conducting herself negligently or in breach of cls 1, 2(e), 3(c), 26(b) and (c); and

(3) Failing to complete a proper assessment of the complainant's eligibility under the Essential Skills Work Visa instructions, thereby conducting herself negligently or in breach of cl 1.

JURISDICTION AND PROCEDURE

[28] 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 Immigration Advisers Licensing Act 2007 (the Act):

(a) negligence;

(b) incompetence;

(c) incapacity;

(d) dishonest or misleading behaviour; and

(e) a breach of the code of conduct.

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

[30] 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]

[31] 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]

[32] 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]

[33] 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]

[34] The Tribunal has received from the Registrar a statement of complaint (31 July 2018) and supporting documents.

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[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].

[35] The complainant has provided a statement of reply and letter, dated 16 August 2018, including supporting documents. He says [the adviser] should have assessed his case thoroughly on her own and not used unlicensed staff. She should have told him at the beginning he had no case, even under s 61. He could have found another professional to make a case under s 61.

[36] According to the complainant, given [the adviser]'s improper guidance, he had lost his job, left his assets (presumably in New Zealand) and had been unemployed since returning to India. The complainant says he did not insist on the early filing of the essential skills application. Her negligence had left his career in bad credit with Immigration New Zealand. He sets out $52,565.50 compensation which is sought, including $25,000 for ruining his career and his life, and $25,000 for mental pressure and depression.

[37] [the adviser] provided submissions in reply on 20 August 2018, with supporting documents. To the extent necessary, they are discussed later.

[38] Neither the complainant nor the adviser requests an oral hearing.

ASSESSMENT

[39] The Registrar relies on the following provisions in 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.
>
> **Client Care**
>
> 2. A licensed immigration adviser must:
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> …
>
> e. obtain and carry out the informed lawful instructions of the client, and
>
> …
>
> **Legislative requirements**
>
> 3. A licensed immigration adviser must:
>
> …
>
> c. whether in New Zealand or offshore, act in accordance with New Zealand immigration legislation, including the Immigration Act 2009, the Immigration Advisers Licensing Act 2007 and any applicable regulations.

Written agreements

18. A licensed immigration adviser must ensure that:

    a. when they and the client decide to proceed, they provide the client with a written agreement

File management

26. A licensed immigration adviser must:

    …

    b. confirm in writing to the client when applications have been lodged, and make on-going timely updates

    c. confirm in writing to the client the details of all material discussions with the client

    …

(1) Failing to ensure a written agreement was entered into relating to the Essential Skills Work Visa application, in breach of cl 18(a)

[40] There was a written agreement between [company] and the complainant entered into on 15 June 2017. It described the service being sought as a request for a "Post Study Work Visa Employer Assisted – s 61." It bears a handwritten amendment, dated 1 August 2017, recording that another "s 61" would be lodged. However, [the adviser] overlooked amending the agreement again when the complainant, by then offshore, instructed an Essential Skills Work Visa application.

[41] The Registrar alleges this amounts to a breach of cl 18(a) of the Code requiring a written agreement. It is not. It is a breach of cl 19(e), requiring that the agreement contains a full description of the services to be provided. However, this breach is not alleged by the Registrar.

[42] The first head of complaint is dismissed.

(2) Failing to take personal responsibility for maintaining the client relationship and instead relying on unlicensed staff to carry out key parts of the client engagement process, including providing ongoing timely advice to the complainant and obtaining his informed lawful instructions, thereby conducting herself negligently or in breach of cls 1, 2(e), 3(c), 26(b) and (c)

[43] The Registrar alleges that the majority of communications in [the adviser]'s client file were between the complainant and unlicensed staff. In particular, the staff had carried out the following duties:

(1) advised the complainant of updates on immigration matters, including notifying Immigration New Zealand's concerns;

(2) advised the complainant of the outcome of applications;

(3) requested an extension of time from Immigration New Zealand; and

(4) made enquiries of the complainant regarding previous visa declines.

General principles

[44] The Tribunal has adversely commented in previous decisions on the practice which developed in the immigration advisory industry of what is known as "rubber stamping".[8]

[45] Typically, this occurs where a licensed immigration adviser uses agents sometimes from another country or even the adviser's own staff to recruit the clients, prepare the immigration applications and send them to the licensed adviser to sign off and file with Immigration New Zealand. There is little, if any, direct contact between the licensed adviser and the client.

[46] The practice is illegal. A person commits an offence under the Act if he or she provides "immigration advice" without being licensed or exempt from licensing.[9] A person employing as an immigration adviser another person who is neither licensed nor exempt also commits an offence.[10] A person may be charged with such an offence even where part or all of the actions occurred outside New Zealand.[11]

[47] The statutory scope of "immigration advice" is very broad:[12]

> **7 What constitutes immigration advice**
>
> (1) In this Act, **immigration advice**—
>
> (a) means using, or purporting to use, knowledge of or experience in immigration to advise, direct, assist, or represent another person in regard to an immigration matter relating to New Zealand, whether directly or indirectly and whether or not for gain or reward; but
>
> (b) does not include—

[8] *Stanimirovic v Levarko* [2018] NZIACDT 3 at [4], [36]–[38]; *Immigration New Zealand (Calder) v Soni* [2018] NZIACDT 6 at [4], [50]–[61].
[9] Immigration Advisers Licensing Act 2007, s 63.
[10] Section 68(1).
[11] Sections 8 & 73.
[12] Section 7.

> (i) providing information that is publicly available, or that is prepared or made available by the Department; or
>
> (ii) directing a person to the Minister or the Department, or to an immigration officer or a refugee and protection officer (within the meaning of the Immigration Act 2009), or to a list of licensed immigration advisers; or
>
> (iii) carrying out clerical work, translation or interpreting services, or settlement services.
>
> (2) To avoid doubt, a person is not considered to be providing immigration advice within the meaning of this Act if the person provides the advice in the course of acting under or pursuant to—
>
> (a) the Ombudsmen Act 1975; or
>
> (b) any other enactment by which functions are conferred on Ombudsmen holding office under that Act.

[48] The exclusion from the scope of "immigration advice" relevant here is subs (1)(b)(iii) concerning clerical work, translation or interpretation services.

[49] "Clerical work" is narrowly defined in the Act:[13]

> **clerical work** means the provision of services in relation to an immigration matter, or to matters concerning sponsors, employers, and education providers, in which the main tasks involve all or any combination of the following:
>
> (a) the recording, organising, storing, or retrieving of information:
>
> (b) computing or data entry:
>
> (c) recording information on any form, application, request, or claim on behalf and under the direction of another person

[50] Persons who are not licensed (or exempt) are permitted to undertake clerical work. In essence, such a person can do no more than retrieve and then record or organise information, enter data on a computer database or hard copy schedule, or record information on a form or other like document under the direction of another person, who will be the licensed adviser or the client or a person exempt from licensing.

[51] Activities which do not meet the narrow definition of clerical work but which involve the use of immigration knowledge or experience to advise or assist another person on an immigration matter, "whether directly or indirectly", amount to providing immigration advice. That is the exclusive domain of the licensed adviser.

[52] In *Immigration New Zealand (Calder) v Ahmed* [2019] NZIACDT 18, the Tribunal set out the principles applicable to distinguishing clerical work from immigration advice.[14]

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[13] Section 5, "clerical work".
[14] *Immigration New Zealand (Calder) v Ahmed* [2019] NZIACDT 18 at [55]–[59], [65]–[70].

It also noted the principle that a violation of a professional rule had to reach a certain threshold as to gravity in order to attract a sanction.[15] The decision provides a non-exhaustive list of activities which are either not clerical work or would not cross the threshold justifying disciplinary action if undertaken on isolated occasions.

[53] The obligations in the Code, including cl 2(e) requiring the adviser to take or carry out the client's instructions, are personal to the adviser and cannot be delegated.[16]

Application of general principles to this complaint

[54] The first three items in the Registrar's list of duties performed by the staff are clerical work only. The staff member made no observations in passing onto the complainant the updates or outcomes from Immigration New Zealand. To the extent that the staff advised the complainant of the outcomes of his applications, which should be done by the adviser under cl 26(b), I would not regard that as crossing the threshold warranting disciplinary action in the circumstances here. Requesting an extension of time is purely an administrative task requiring no knowledge or experience in immigration.

[55] The fourth item is arguably "immigration advice", as defined, but merely requesting such information from a client does not warrant a disciplinary process.

[56] There is evidence from [the adviser]'s file that she did communicate with the complainant. For example, on 13 October 2017, [the adviser] sent him a document checklist. On 13 December 2017, when the complainant asked for assistance from the staff as to what information to provide in response to Immigration New Zealand's letter of 11 December expressing concerns with his application, the staff member asked him for his contact number so [the adviser] could contact him.[17]

[57] There is no example in the communications provided to the Tribunal of the unlicensed staff providing any substantive advice to the complainant. I cannot assume it was the staff who were predominantly working with the complainant to compile the documents and information required by Immigration New Zealand, given the evidence of some engagement of [the adviser] with him throughout the process.

[58] The second head of complaint is dismissed.

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[15] At [60].
[16] *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376 at [29], [32], [34] & [47].
[17] Emails to the complainant 13 December 2017 (Registrar's supporting documents at 299, 301).

(3) Failing to complete a proper assessment of the complainant's eligibility under the Essential Skills Work Visa instructions, thereby conducting herself negligently or in breach of cl 1

[59] The allegation here is that [the adviser] was negligent in advancing an application to Immigration New Zealand within one week of the employer advertising the position. As the agency stated in its decision on 2 February 2018, the position was posted on Trade Me on 30 November 2017, but the application was lodged on 7 December 2017. It pointed out the steps that had to be undertaken in that week. Immigration New Zealand therefore doubted the genuineness of the employer's attempts to recruit New Zealanders.

[60] I observe that Immigration New Zealand's formal criteria, attached to the letter of 2 February 2018, contain no such 'two weeks' rule.[18] What the criteria require is evidence of a genuine attempt at local recruitment. [the adviser] also notes that there is no such stipulation in Immigration New Zealand's policy, thought she says it is in the agency's guidelines (the latter unseen by the Tribunal).

[61] According to [the adviser], the complainant was "panicking" and when he provided the advertisement, he wanted the application filed as soon as possible. In this case, the employer had provided evidence of a genuine attempt. He had been able to conduct the entire process within one week, because he required someone urgently.

[62] Furthermore, in [the adviser]'s many years of experience, there can be positive outcomes from such applications.

[63] I accept [the adviser]'s contention that Immigration New Zealand's criteria do not contain a 'two weeks' stipulation for the advertising period, only a best practice guideline. I also accept that a genuine attempt at recruitment can be satisfied by a process conducted over one week, if all the steps are properly carried out by the employer. She provided evidence of those steps being undertaken. [the adviser] was also entitled to have regard to the urgency which she says was claimed by the complainant and the employer. I appreciate he denies it, but her contention is plausible.

[64] It follows that I do not regard the filing of the application within one week of advertising as, of itself, sufficient to establish negligence.

[65] The Registrar notes that the file does not contain any evidence of an eligibility assessment taking place or of advice to the complainant regarding eligibility. I suspect [the adviser] regarded this as a straightforward application. She no doubt assessed

[18] Registrar's supporting documents at 119–124.

eligibility when she saw all the documents and there is no requirement that she then record that assessment on her file or advise the complainant of her opinion on eligibility. Had she formed the view that the prospects of success were low, she would be required to inform the client and obtain instructions. But there is no such obligation for a positive assessment, unless the client requested it.

[66] There is insufficient evidence of negligence or a breach of the obligation in cl 1 to be professional and to take due care.

[67] The complainant blames [the adviser] for his predicament, but the evidence does not establish she is responsible for the failure of his application. The real problem was that he was already unlawfully in New Zealand when he approached her. Nor do I regard [the adviser] as responsible for the failure of the essential skills application. Immigration New Zealand, rightly or wrongly, took a view that the employer had not met the criteria for showing that no local could fill the position.

[68] The third head of complaint is dismissed.

OUTCOME

[69] The complaint against [the adviser] is dismissed.

ORDER FOR SUPPRESSION

[70] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.[19]

[71] There is no public interest in knowing the name of either the complainant or the adviser against whom the complaint was dismissed.

[72] The Tribunal orders that no information identifying the complainant or adviser is to be published other than to Immigration New Zealand and the parties.

D J Plunkett
Chair

[19] Immigration Advisers Licensing Act 2007, s 50A.