

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2020] NZIACDT 19

Reference No: IACDT 004/19

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **DMX**
Complainant

AND **MARTIN ANTONIO GUICH**
Adviser

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 11 May 2020

REPRESENTATION:

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

PRELIMINARY

[1] Mr Martin Antonio Guich, the adviser, represented DMX, the complainant, on an unsuccessful residence application. He appealed on her behalf, but it was dismissed as he was too late as a result of miscalculating the appeal period.

[2] A complaint by the complainant against Mr Guich to the Immigration Advisers Authority (Authority) was referred to the Tribunal by the Registrar of Immigration Advisers (Registrar), the head of the Authority. It alleges Mr Guich's conduct amounts to negligence, a ground of complaint under the Immigration Advisers Licensing Act 2007 (Act) and also breaches the Licensed Immigration Advisers Code of Conduct 2014 (Code).

[3] Mr Guich acknowledges he made a mistake in his calculation, but contends that a one-off human error of that nature cannot amount to negligence or a breach of professional standards. The essential issue to consider is whether Mr Guich's error is one which a prudent, diligent adviser could have made.

BACKGROUND

[4] Mr Guich, a licensed immigration adviser, is a director of Collective Consulting Limited and is currently based in Wellington.

[5] The complainant, a national of the United Kingdom, had lived in New Zealand since 2012. She had a work visa and was employed as the day manager of the food and beverage department of a hotel. She had a consultation with Mr Guich on 6 July 2017 concerning obtaining residence under the skilled migrant category. According to his notes of the meeting, the complainant wanted to go ahead with the application despite the risk it might not succeed.

[6] On 16 July 2017, the complainant and Mr Guich signed the latter's client agreement. Mr Guich agreed to assist the complainant to file an expression of interest (EOI) and residence application. The fee was \$2,400 (incl. GST).

[7] The complainant's EOI was lodged with Immigration New Zealand by Mr Guich on 18 July 2017.

[8] On 26 July 2017, Immigration New Zealand issued an invitation to the complainant to apply for residence.

[9] The residence application was filed by Mr Guich on 17 November 2017.

[10] Immigration New Zealand wrote to the complainant on 31 January 2018 advising that her employment did not substantially match the relevant description for a hotel service manager, an acceptable skilled occupation. Her points were therefore insufficient and the application could be declined. Her comments were invited.

[11] Following a meeting with the complainant on 5 February 2018, Mr Guich responded to Immigration New Zealand by undated letter sent by email on 12 February 2018. It was argued that the complainant's position substantially matched that of a hotel service manager for the reasons set out. Support documents were attached to the response.

[12] Immigration New Zealand declined the residence application by letter on 23 February 2018 addressed to both the complainant and Mr Guich.¹ Her employment did not match the description of hotel service manager. They were advised that she had 42 days (calculated in the way set out in the letter) to appeal to the Immigration and Protection Tribunal (IPT).

[13] Mr Guich sent an email to the complainant on 1 March 2018 informing her of the final decision made to decline the application. He did not consider the decision to be entirely correct. He advised that she had "approximately 47 days" to lodge an appeal. They met to discuss the options on about 5 or 7 March 2018.

[14] On 4 April 2018, the complainant asked an assistant in Mr Guich's office by email to be informed of the last date for the appeal. The assistant replied on the same day referring to Mr Guich's file note that the deadline for the appeal was 22 April 2018. The complainant was asked to drop off any additional documents.

[15] On Monday 16 April 2018, the assistant sent an email to the complainant advising they needed to send the documents off that week as the final days to file were over the weekend. The complainant was asked to drop the documents off as soon as possible.

[16] On 17 April 2018, Mr Guich wrote to the complainant attaching a written client agreement covering an appeal to the IPT. The fee was \$800. It was signed by the complainant on 18 April 2018.

Appeal filed

[17] On 18 April 2018, Mr Guich filed the appeal in the IPT.

¹ A second copy of the same letter bearing the date 28 February 2018 has been produced to the Tribunal; see Registrar's supporting documents at 78.

[18] The IPT wrote to Mr Guich on 19 April 2018 stating that the appeal had to be filed within 42 days of 1 March 2018. Information as to how the appeal period was calculated was set out, which the IPT said was the same as that set out in Immigration New Zealand's letter of decline. While the IPT's letter does not expressly say so, it meant the appeal was out of time.

[19] Mr Guich's office notified the complainant by email on 23 April 2018 that the IPT had returned the appeal.

[20] Mr Guich sent an email to the IPT on 6 May 2018, noting that the appeal period had been calculated by him in accordance with an appeal guide from that tribunal.

[21] Mr Guich had a meeting with the complainant on 8 May 2018 and, according to his notes, apologised profusely.

[22] The IPT replied to Mr Guich's email on 14 May 2018 stating that the guide booklet referred to by him was an old one. The guide on the IPT's website, which had been there since mid-2015, was different. There was no jurisdiction to extend the timeframe.

[23] Mr Guich advised the complainant in an email on 18 May 2018 that the IPT had confirmed the appeal was out of time. He offered his sincerest apologies.

[24] The complainant and Mr Guich had a meeting on 29 May 2018. He apologised again for his mistake as to the deadline. He said it was human error. Mr Guich offered a refund of the fee for the residence application, even though the error had concerned the appeal and not the application. He informed her of the procedure for complaints. The complainant said that neither a refund nor a complaint were necessary.

[25] At the meeting, the complainant told Mr Guich that she had arranged a meeting of about 15 to 20 minutes with a free lawyer at a Citizens Advice Bureau. Mr Guich said he had a lot of information on his file, "hundreds, potentially thousands of pages", many of which would not be relevant to the lawyer. He would get together the important documents.

[26] Mr Guich cancelled the invoice charging the complainant for the appeal.

COMPLAINT

[27] On an unknown date, the complainant made a complaint to the Authority against Mr Guich. She contended that he had been negligent and this had resulted in the loss of a significant opportunity, as well as severe emotional and mental stress. It had also caused her financial loss.

[28] The complainant said she had been told in an email from Mr Guich on 1 March 2018 and again at a meeting with him on 5 March 2018 that she had 47 days to appeal the decline of residence. He told her he strongly disagreed with Immigration New Zealand's decision. She said Mr Guich had admitted the mistake. The complainant stated in the complaint that she had asked him for her file, as she was going to talk to an immigration lawyer at the Citizens Advice Bureau. He replied that he would gather together the part the lawyer would need, which she picked up from his office the next day. She wanted her money back and compensation for the significant stress she had experienced.

[29] The Authority informed Mr Guich of the details of the complaint on 8 February 2019 and invited him to provide an explanation.

Explanation from Mr Guich

[30] On 28 February 2019, a lawyer instructed by Mr Guich replied to the Authority on his behalf. Through the lawyer, Mr Guich acknowledged that the appeal was filed out of time (two days late) because of a mistake he made in calculating the appeal period. He had referred to an out of date guide of the IPT. This was totally out of character for him. Mr Guich had a solid history of successfully pursuing appeals. It was simply human error. Furthermore, the breach had come at a particularly busy time in his consultancy business.

[31] According to the lawyer, Mr Guich alerted the complainant to the error as soon as he became aware, sincerely apologised and offered a refund of the fee for the residence application. He was very remorseful for his breach and had now put in place a peer review process whereby another licensed adviser would cross-check appeal deadlines. He had also hired additional licensed advisers to reduce his workload.

[32] It was acknowledged by Mr Guich that the time limits for appeals were critical and at the forefront of matters to be dealt with. They had to be accurately calculated by an adviser.

[33] The lawyer accepted that a breach of cl 1 of the Code was not trivial, but noted that it was a one-off event caused by a mistake and was at the lower end of the spectrum.

[34] As for the alleged failure to return all documents to the complainant, it was Mr Guich's recollection that the complainant never requested a full copy of her file. The complainant had told him that she had a short, free meeting booked with a lawyer at the Citizens Advice Bureau. During their meeting, they agreed that, in order to make the best use of the short amount of time, she should only take with her key information. It

was Mr Guich's recollection that following their meeting on 29 April 2018, she did not contact him to seek the balance of the file.

[35] The lawyer advised this was the first complaint against Mr Guich since he had been licensed in 2013.

[36] On 7 March 2019, the Registrar referred the complaint to the Tribunal alleging that Mr Guich's conduct amounted to negligence, a ground of complaint under the Act, and breached the Code in the following respects:

- (1) filing an appeal out of time as a result of calculating an incorrect timeframe of 47 days, this being negligence or alternatively, a failure to exercise diligence and due care in breach of cl 1; and
- (2) failing to return all documents to the complainant upon request, in breach of cl 26(f).

JURISDICTION AND PROCEDURE

[37] 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.

[38] The Tribunal hears those complaints which the Registrar decides to refer to the Tribunal.²

[39] The Tribunal must hear complaints on the papers, but may in its discretion request further information or any person to appear before the Tribunal.³ It has been established to deal relatively summarily with complaints referred to it.⁴

² Immigration Advisers Licensing Act 2007, s 45(2) & (3).

³ Section 49(3) & (4).

⁴ *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376 at [93].

[40] 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.⁵

[41] The sanctions that may be imposed by the Tribunal are set out in the Act.⁶ The focus of professional disciplinary proceedings is not punishment but the protection of the public.⁷

[42] 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.⁸

[43] The Tribunal has received from the Registrar the statement of complaint (7 March 2019), together with a file of supporting documents.

[44] There are no submissions from the complainant. She did, however, send an email to the Tribunal on 19 September 2019 stating that what had happened to her was incredibly upsetting and scary. She asked to be updated as to the state of the complaint.

[45] There is a statement of reply (15 April 2019) with attached submissions from Mr Guich. He sent additional submissions to the Tribunal on 4 and 7 October 2019. The supporting documents include numerous glowing testimonials from satisfied clients and from others with whom he works. Three testimonials from licensed advisers who have been mentored by Mr Guich speak highly of his skills and competence.

[46] No party requests 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:

...

⁵ Section 50.

⁶ Section 51(1).

⁷ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151] (citation omitted).

⁸ *Z v Dental Complaints Assessment Committee*, above n 7, at [97], [101]–[102] & [112].

- f. when requested by the client or their new licensed or exempt immigration adviser, release a copy of all applications lodged on behalf of the client and all correspondence relating to the client.

(1) *Filing an appeal out of time as a result of calculating an incorrect timeframe of 47 days, this being negligence or alternatively, a failure to exercise diligence and due care in breach of cl 1*

[48] The Registrar alleges that Mr Guich's filing of the complainant's appeal out of time, as a result of miscalculating the appeal period, amounts to negligence or alternatively, a failure to exercise diligence and due care which is a breach of cl 1 of the Code.

[49] Mr Guich has always accepted that he made a mistake in calculating the appeal period which led to the appeal being out of time. He was two days late. In his submissions to the Tribunal, he denies that this amounts to negligence. Nor does he believe that he did not act with due care. According to him, it was a one-off mistake, a result of human error. Having apologised and expressed deep remorse, he believes that "everyone should be entitled to one mistake". It was the only mistake as to a deadline that he had made in 2,513 applications filed by him as an adviser in almost six years of practice. Mr Guich contends that it would be seriously unjust and extremely punitive to consider his mistake to be conduct falling short of professional standards and therefore to sanction him.

[50] Mr Guich does not concede a breach of any professional standard, but I note that his former lawyer describes his conduct as a breach of cl 1 in the explanation given to the Authority on 28 February 2019.

[51] While Mr Guich does not accept it, I regard his mistake as plainly a failure to exercise diligence and due care, for the reasons set out below. As I find him in breach of cl 1, there is no need to assess whether his misconduct also amounts to negligence.

[52] It is apparent that Mr Guich is an experienced and generally competent immigration adviser. I accept this was a one-off error. Mr Guich believes that a one-off error cannot amount to a professional breach or failing. He contends that perfection is not attainable.

[53] While I agree that perfection is not expected of a professional, there is no principle of law that an isolated act cannot amount to a breach of a professional standard or obligation. There is no entitlement to one mistake. A single mistake by a professional may, or may not, be a breach of a professional standard of conduct. That depends on whether it is a mistake which a competent, reasonable, prudent, diligent practitioner

could make. If the mistake can be described as one any such practitioner could make, then it might be seen as an excusable human error. However, an error, albeit isolated, which such a practitioner would not make, amounts to a professional breach.

[54] Mr Guich's miscalculation of the appeal period resulted from a degree of carelessness or negligence which could not be described as minor, though I would not describe it as gross. He concedes that calculating the correct appeal period is a critical function of an adviser. That must be true, given the consequences of getting it wrong, since the client may lose the chance of obtaining residence. That is what occurred here, as the complainant was ineligible for residence under the new criteria and could not simply make a fresh application to overcome the missed appeal. Despite what was therefore the significance of the calculation, Mr Guich relied on what must have been a hard copy IPT guide in his office. It was out of date, though I appreciate he did not know that.

[55] Is this what a competent, reasonable, prudent and diligent practitioner would have done in the circumstances? The answer, self-evidently, is 'no'.

[56] The appeal period was correctly set out in Immigration New Zealand's decision letter. That fact, of itself, establishes Mr Guich's lack of due care. It seems clear to me that he should have reviewed the letter when calculating the period. As it was conceivable that the agency's information in the letter could have been wrong, a prudent practitioner would also have consulted the IPT's website, which had the correct appeal period. These are rather obvious steps to take, even without consulting the primary source, the governing legislation.

[57] Mr Guich appears to have neither looked at the letter nor the website, instead relying on a hard copy guide in his office, which turned out to be several years out of date. That is always the risk with resource materials held in hard copy in an office. He was not entitled to determine the appeal period, a critical calculation as he accepts, in that way.

[58] Mr Guich relies on the Tribunal's decision in *E v S* where a complaint including a charge of delay was dismissed as being too slight to engage the Code.⁹ However, the delays in that case were described as minor and not critical. Unlike the adviser in that case, Mr Guich's conduct here falls markedly short of the standard of his peers.

[59] It is unfortunate that Mr Guich partially blames the complainant for the failure to lodge the appeal in time. He says he filed it on the same day the complainant returned the signed client agreement and supporting documents to him, which was on 18 April

⁹ *E v S* [2017] NZIACDT 2.

2018. However, it was his fault that she did so. He had only sent the agreement to her the day before, 17 April (already one day after the deadline of 16 April). Additionally, Mr Guich had told the complainant they had 47 days or until 22 April to file the appeal, so it was due to his advice as to the appeal period that she was late in sending him the necessary documents.

[60] It is not material that Mr Guich was particularly busy at the time or that his misstep was out of character. They are, however, factors to consider in determining later the appropriate sanction.

[61] Nor is it material that the Registrar decided not to refer the complaint back to Mr Guich to deal with pursuant to his internal complaints procedure, which Mr Guich says should have occurred.¹⁰ It is for the Registrar to assess whether this would be an appropriate response to the complaint. While Mr Guich has always acknowledged making a mistake, he has never accepted any breach of his professional obligations. It is not clear he would have reached agreement with the complainant had the matter been returned to him, but in any event, it is for the Registrar to decide whether the practitioner's conduct warrants a formal disciplinary process.

[62] I find that Mr Guich failed to exercise diligence and due care, in breach of cl 1 of the Code. The first head of complaint is upheld to that extent.

(2) *Failing to return all documents to the complainant upon request, in breach of cl 26(f)*

[63] It is alleged that Mr Guich failed to provide to the complainant, upon request, all of her documents. Mr Guich provided her with what he regarded as the key documents for a short meeting she was due to have with a lawyer at the Citizens Advice Bureau. He says she never asked for the full file, which he claims is voluminous.

[64] The visa application was relatively straight-forward so the file may not have been of the magnitude claimed by Mr Guich. While the complainant probably initially asked Mr Guich for "the file", it was reasonable for him to merely provide the key documents for what was to be a brief, free consultation at a Citizens Advice Bureau. I accept he probably said that to her at their meeting and she agreed. There is no evidence the complainant followed up receipt of the key documents with a further request for the full file.

[65] I dismiss the second head of complaint.

¹⁰ Immigration Advisers Licensing Act 2007, ss 44(3)(c), 45(1)(d).

OUTCOME

[66] I uphold the first head of complaint. Mr Guich lacked diligence and due care in calculating the appeal period and thereby filing the appeal out of time. He has breached cl 1 of the Code.

SUBMISSIONS ON SANCTIONS

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

[68] A timetable is set out below. Any requests that Mr Guich undertake training should specify the precise 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.

Timetable

[69] The timetable for submissions will be as follows:

- (1) The Registrar, the complainant and Mr Guich are to make submissions by **4 June 2020**.
- (2) The Registrar, the complainant and Mr Guich may reply to submissions of any other party by **18 June 2020**.

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.¹¹

[71] There is no public interest in knowing the name of Mr Guich's client.

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

D J Plunkett
Chair

¹¹ Immigration Advisers Licensing Act 2007, s 50A.