IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2020] NZIACDT 31

Reference No: IACDT 001/20

IN THE MATTER	of an appeal against a decision of the Registrar under s 54 of the Immigration Advisers Licensing Act 2007
BY	**TOD** Appellant
AND	**THE REGISTRAR OF IMMIGRATION ADVISERS** Registrar

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 20 July 2020

REPRESENTATION:

Appellant:	Self-represented
Registrar:	T Gray, counsel

INTRODUCTION

[1] This is an appeal against the decision of 8 January 2020 made by the Registrar of Immigration Advisers (the Registrar), the head of the Immigration Advisers Authority (the Authority). He rejected a complaint of negligence made by TOD (the appellant) against a licensed adviser, OJT (the adviser).

[2] The essential issue for the Tribunal is whether the adviser's error warrants a formal disciplinary process.

BACKGROUND

[3] The following narrative has been ascertained from the limited documentation produced to the Tribunal.

[4] The appellant was in New Zealand on a work visa, due to expire on 20 April 2018. He met the adviser on 17 April 2018 and signed a written agreement for the filing of a new work visa application.

[5] On 20 April 2018, the adviser lodged the appellant's work visa application. An interim visa valid for six months was issued by Immigration New Zealand.

[6] The agency requested further information from the adviser on 4 May 2018, which he produced on 11 May 2018. Immigration New Zealand then sought additional information on 14 May 2018, giving the adviser until 18 May to respond. The adviser sought the information from the appellant who provided it on 16 May. However, it was not conveyed to Immigration New Zealand.

[7] On 29 May 2018, Immigration New Zealand declined the appellant's work visa application since he did not meet the requirements set out in the immigration instructions. No response had been received by 18 May 2018 to the request for information. The appellant was informed that his interim visa had expired and he would be unlawfully in New Zealand as from 30 May 2018.

[8] The adviser wrote to the appellant on 30 May 2018 apologising and accepting full responsibility for the omission to file the further information, offering two options:

(1) A request to the Minister of Immigration to exercise his discretion to issue a further work visa pursuant to s 61 of the Immigration Act 2009, free of charge; or

(2) A full refund of the fees paid by the appellant.

[9] On 31 May 2018, the appellant agreed to a s 61 request and signed a written agreement for the adviser to do this. The adviser duly prepared the request. However, on 1 June 2018, the appellant instructed the adviser not to go ahead, but to return all of his documents and refund the fees. The adviser accordingly returned the documents and refunded the fees paid, including Immigration New Zealand's fee.

[10] On 21 October 2018, the appellant's further interim visa expired and he became unlawful in New Zealand.

[11] The current immigration status of the appellant is not known. He appears to be in New Zealand as he gives local contact details.

Complaint to the Authority

[12] A complaint was made by the appellant to the Authority (unseen by the Tribunal).

[13] On 3 December 2019, the Authority notified the adviser of the complaint and invited his explanation.

[14] The adviser, through his then lawyer, provided a response to the Authority on 23 December 2019. He accepted the Authority's chronology of events. He explained that there had been a clerical error by an unlicensed staff member who had failed to upload the material to Immigration New Zealand's online portal due to difficult personal circumstances. The adviser accepted responsibility for the mistake.

[15] The lawyer submitted that it was a simple clerical error, an oversight, though it was acknowledged that the consequences were significant. While the adviser's mistake could be described as negligence, his conduct did not cross the disciplinary threshold. The adviser's response had been highly professional and ethical, once the error had been discovered. He had offered two constructive and sensible solution options.

[16] The lawyer noted that the complaint had not been made to the Authority until 30 August 2019, 15 months after the visa had been declined. The appellant was trying to attribute his overstaying for more than a year to the adviser's oversight, when in fact it had arisen from decisions made by the appellant. The claimed prejudice to the appellant (becoming unlawful in New Zealand) may have been prevented had the adviser been permitted to urgently file a s 61 request. The claim for two years lost wages as compensation was fanciful, since the appellant could not prove causation between the adviser's error and the loss of income over that period.

[17] Following the events in question, the adviser had changed his practice and now had a daily reminder system triggering a progress review on any matter with a due date. The complaint had served as a learning experience for the adviser.

Registrar's letter dismissing complaint

[18] On 8 January 2020, the Registrar wrote to the appellant advising him that the complaint only disclosed a trivial or inconsequential matter and would not therefore be pursued.

[19] The Registrar concluded that the adviser's conduct, in failing to pass onto Immigration New Zealand the additional information, could be a potential breach of cl 1 of the Licensed Immigration Advisers Code of Conduct 2014 (the Code), being a failure to exercise due care. However, a number of matters diminished the potential breach:

(1) although the adviser took immediate full responsibility for the error, the mistake was a clerical one by an unlicensed person and not within the definition of immigration advice. The unlicensed staff member was not bound by the Code;

(2) the adviser had acted professionally and diligently upon discovering the error as he immediately apologised and offered two remedial options. The appellant accepted remedial action before choosing to terminate the adviser's services. The adviser subsequently refunded his fees and disbursements;

(3) it was not known if Immigration New Zealand's decision to decline the visa would have been any different had it received the additional information; and

(4) it was not possible to establish if the appellant's interaction with the adviser had contributed to the situation, given the appellant's decision not to continue with the adviser and that over a year had lapsed before the complaint was made.

JURISDICTION AND PROCEDURE

[20] The grounds for a complaint against a licensed adviser are listed 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.

[21] Section 45(1) provides that on receipt of a complaint, the Registrar may:

(a) determine that the complaint does not meet the criteria set out in section 44(3), and reject it accordingly;

(b) determine that the complaint does not disclose any of the grounds of complaint listed in section 44(2), and reject it accordingly;

(c) determine that the complaint discloses only a trivial or inconsequential matter, and for this reason need not be pursued; or

(d) request the complainant to consider whether or not the matter could be best settled by the complainant using the immigration adviser's own complaints procedure.

[22] In accordance with s 54 of the Act, a complainant may appeal to the Tribunal against a determination of the Registrar to reject or not pursue a complaint under s 45(1)(b) or (c).

[23] After considering the appeal, the Tribunal may:[1]

(a) reject the appeal; or

(b) determine that the decision of the Registrar was incorrect, but nevertheless reject the complaint upon another ground; or

(c) determine that it should hear the complaint, and direct the Registrar to prepare the complaint for filing with the Tribunal; or

(d) determine that the Registrar should make a request under section 45(1)(d).

[24] The adviser against whom the complaint is made is not a party to the appeal and has not been served. The appeal itself cannot result in the Tribunal upholding the complaint against the adviser.

[1] Immigration Advisers Licensing Act, s 54(3).

[25] In respect of the complaint here, the Registrar determined that it disclosed only a trivial or inconsequential matter so it did not need to be pursued, in accordance with s 45(1)(c) of the Act. The Tribunal therefore has jurisdiction to consider the appeal.

[26] The Tribunal issued directions on 10 March 2020 setting out a timetable for submissions and evidence.

ASSESSMENT

[27] The gravamen of the complaint against the adviser is that he was negligent in failing to produce the additional information requested by Immigration New Zealand in the prescribed period. He had received it from his client. This omission directly led to the failure of the work visa application, though it is not known whether the application would have succeeded if the information had been provided.

[28] The appellant says on appeal that he is not happy with the Registrar's decision because he was not asked about his background or about his company's background. Even though the adviser had taken all responsibility, the appellant had still not been successful with his complaint. He adds that because the adviser had made a mistake, the adviser would cover himself and try to escape from his mistake. The adviser should have to pay him for the two years of salary lost because he did not get a visa.

[29] I agree with the Registrar's assessment. There has been a breach of cl 1 of the Code but, given the adviser's professional response upon discovering the mistake, the complaint does not reach the threshold warranting disciplinary action.[2]

[30] The appellant says the Registrar should have taken into account his own background and that of his company, but he does not explain why that would have been relevant to the Registrar's decision. He does not set out in his appeal any relevant details concerning the background which might have been material to the Registrar's decision.

[31] The appellant has not established any entitlement to compensation as he has not shown that he would have had good prospects of obtaining a work visa if the additional information had been supplied to Immigration New Zealand. Nor has he shown that he took all reasonable steps to obtain a visa during the two years he says he did not have one. In particular, it is noted that he did not allow the adviser to attempt to regularise his situation immediately by applying for a s 61 visa.

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[2] *Immigration New Zealand (Calder) v Ahmed* [2019] NZIACDT 18 at [60], relying on *Orlov v New Zealand Law Society* [2012] NZHC 2154 at [79]–[80]; *Liston v The Director of Proceedings* [2018] NZHC 2981 at [42]–[45].

OUTCOME

[32] The appeal is rejected.

ORDER FOR SUPPRESSION

[33] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.[3]

[34] There is no public interest in knowing the name of the adviser against whom the complaint is made. Nor would that be fair given that the complaint was dismissed by the Authority and will not be restored by the Tribunal.

[35] Nor is there any public interest in knowing the identity of the appellant.

[36] The Tribunal orders that no information identifying the adviser or appellant is to be published other than to Immigration New Zealand.

D J Plunkett
Chair

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