

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2020] NZIACDT 6

Reference No: IACDT 033/18

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **NL**
Complainant

AND **ASHAR JOSEPH**
Adviser

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 31 January 2020

REPRESENTATION:

Registrar: Self-represented
Complainant: A McClymont, counsel
Adviser: No appearance

PRELIMINARY

[1] The complainant, NL, instructed Mr Ashar Joseph, the adviser, to seek a work visa based on a job offer from a business in which Mr Joseph had an interest. Mr Joseph told a staff member to sign the relevant employment documents in the name of the business owner, who was unaware of the job offer. The owner retrospectively gave approval for the offer, after Immigration New Zealand raised an issue as to the genuineness of the job.

[2] A complaint made by the complainant against Mr Joseph to the Immigration Advisers Authority (the Authority) has been referred to the Tribunal by the Registrar of Immigration Advisers (the Registrar), the head of the Authority.

[3] It is alleged that in lodging falsely signed documents with Immigration New Zealand, Mr Joseph was negligent, a statutory ground of complaint under the Immigration Advisers Licensing Act 2007 (the Act). It is also alleged that he breached the Licensed Immigration Advisers Code of Conduct 2014 (the Code), not just in respect of the false signature but also due to the absence of a client agreement and proper file documentation.

BACKGROUND

[4] The adviser is self-employed, trading under the name Ashar Joseph. He is a licensed immigration adviser.

[5] In July 2017, the complainant and her husband engaged Mr Joseph for assistance with their immigration matters. Both were nationals of India living in New Zealand. The complainant had held student and job search visas. Her husband was the holder of a work visa.

[6] Following discussions with the complainant about her work experience and qualifications, Mr Joseph offered her a job as assistant business manager for a transport company (the employer). He had an interest in the business. At the same time, he advised her to apply to Immigration New Zealand for a post-study – employer assisted work visa, based on the offer of employment he had made.

[7] The complainant was provided with an offer of employment letter (dated 24 July 2017) and an employment agreement. Both documents purportedly bore the signatures of the owner and director of the employer. The signatures of the owner and the complainant were dated 23 July and 24 July 2017 respectively.

[8] Mr Joseph then travelled to Malaysia on 25 July 2017.

[9] On 28 July 2017, while Mr Joseph was in Malaysia, he filed online with Immigration New Zealand a post-study – employer assisted work visa application on behalf of the complainant.

[10] An interim visa was granted by Immigration New Zealand on 1 August 2017 while consideration was being given to her work visa application.

[11] On the same day, 1 August 2017, Mr Joseph returned to New Zealand.

[12] On 9 August 2017, Immigration New Zealand contacted the owner by telephone to verify the offer of employment. He advised that he was not aware of a position being offered to the complainant. He said he had not signed the employment agreement.

[13] Immigration New Zealand immediately wrote to Mr Joseph, on 9 August 2017, outlining their concerns with the visa application. The agency concluded that the employment agreement was not genuine, so it was not satisfied the complainant was a *bona fide* applicant who genuinely intended a temporary stay in New Zealand for a lawful purpose. Furthermore, it was not satisfied that she met the good character requirements of the immigration instructions. The complainant's comments were invited.

[14] On 16 August 2017, Mr Joseph responded to Immigration New Zealand's concerns set out in the letter of 9 August. According to Mr Joseph, he was acting as an immigration adviser for the complainant and an authorised adviser and partner on behalf of the employer. The owner was the sole director but he and the owner worked together. He was authorised to act on behalf of the employer and make director-level decisions. He had done this before and sent evidence to the agency proving this.

[15] Mr Joseph further advised Immigration New Zealand that at the time the complainant was offered the position, he was on holiday in Malaysia and when he came back he had work commitments. He could not therefore communicate the offer to the owner. Once Immigration New Zealand had raised the issue, he told the owner who did not doubt his (Mr Joseph's) authority. The complainant had qualifications in business and marketing and he had been quite impressed by her.

[16] Mr Joseph provided to Immigration New Zealand a letter from the owner, also dated 16 August 2017, who explained that he and Mr Joseph were business partners and a new business was being set up. Mr Joseph had offered the complainant the sales and marketing position. He was authorised to make offers of employment. The offer was genuine and it remained open.

[17] Immigration New Zealand declined the post-study work visa on 17 August or 7 September 2017 (the file documents are inconsistent), as the employment agreement was not valid. The complainant was not therefore a *bona fide* applicant. A record of providing a false employment agreement would be kept by the agency. The complainant would be subject to a full character assessment in her future applications. Her interim visa had expired and she would be liable for deportation from 9 September 2017.

[18] Following the decline, the complainant's stay in New Zealand became unlawful.

[19] On about 4 October 2017, Mr Joseph filed a request for a visa under s 61 of the Immigration Act 2009 on behalf of the complainant (Minister's discretion to grant a visa to a person unlawfully in New Zealand). The explanation as to the genuineness of the employment agreement was repeated. Mr Joseph stated that the complainant was not aware that it was the director who was supposed to sign the agreement. She had good character and had never breached her visa conditions.

[20] Immigration New Zealand refused the request for a s 61 visa on 30 October 2017. This letter has not been seen by the Tribunal.

[21] A further s 61 request dated 3 December 2017 lodged by Mr Joseph was refused on 31 January 2018. No reasons were given.

[22] The complainant subsequently engaged Mr McClymont, counsel, to act on her behalf. She has since obtained a visa to remain in New Zealand.

[23] In a letter to the complainant's counsel on 26 February 2018, Mr Joseph advised that he was a business partner of the owner, but not a director or shareholder of the employer company because he had a bad credit history. He was permitted to make director level decisions. When he lodged the application, he was in Malaysia, so he told his office worker to sign and scan the documents, before sending them to him. He intended to inform the owner later, but could not do so before Immigration New Zealand rang. He confirmed that the documents were signed in the owner's name. He had acted like a director and made decisions before without asking the owner.

COMPLAINT

[24] The complainant made a complaint against Mr Joseph to the Authority on 3 April 2018. She alleged that he had led her to believe that he was the owner, or at least had managerial authority in the company. Either Mr Joseph or someone from his staff fraudulently signed employment documents in the name of the employer. The fraudulent signing of the documents and Mr Joseph's false representation to the complainant that

he was authorised to sign documents on behalf of the employer led directly to the complainant's work visa being declined and her unlawful immigration status. Mr Joseph's actions strongly suggest a potential criminal offence.

[25] The complainant's husband provided a brief statement of facts (dated 18 April 2018) to the Authority. He alleged that Mr Joseph threatened to advise Immigration New Zealand that the complainant knew about the fake job offer, unless she withdrew the complaint. It is noted by the Tribunal that this allegation has not been pursued by the Authority.

[26] The Authority wrote to Mr Joseph formally on 21 August 2018 setting out the details of the complaint and inviting his explanation.

Explanation from Mr Joseph

[27] Mr Joseph provided an explanation to the Authority on 30 September 2018. As for the allegation that he had dishonestly or negligently provided false or misleading documents to Immigration New Zealand, he advised that he made director level decisions on behalf of the employer. He had previously signed documents on behalf of the owner. He had a financial interest in the business. The owner had confirmed this. There was no reason for him to give the complainant false employment. The partners were starting a new business, which was already up and going. The only mistake he made was not to communicate with the owner in time. He believed that he had been honest, professional, diligent and respectful towards his client.

[28] As for the failure to sign the written client agreement, Mr Joseph stated that the complainant signed the application form confirming that he was representing her. As for the failure to have copies of communications with the client, the complainant had taken "most of the hard copies of the application" in his absence. He understood that he was supposed to have copies of the "applications" and apologised that he "could not prove them".

[29] Mr Joseph sent to the Authority a letter from the owner (dated 26 September 2018) confirming that he and Mr Joseph had been business partners since 2015 and Mr Joseph was authorised to act on behalf of the employer.

Complaint referred to Tribunal

[30] The complaint was referred to the Tribunal on 5 November 2018 by the Registrar. The following statutory ground of complaint and breaches of the Code by Mr Joseph are alleged:

- (1) instructing a staff member to sign various employment documents in the name of the owner and lodging those falsely signed documents with Immigration New Zealand, thereby being negligent; or
- (2) alternatively, instructing a staff member to sign various employment documents in the name of the owner and negligently lodging those falsely signed documents with Immigration New Zealand, in breach of cl 31(a); or
- (3) alternatively, instructing a staff member to sign various employment documents in the name of the owner and lodging those falsely signed documents with Immigration New Zealand, in breach of cl 1;
- (4) failing to provide a written agreement in respect of his services, in breach of cl 18(a); and
- (5) failing to maintain copies of all written communications between himself, the complainant and Immigration New Zealand or a full copy of the complainant's visa application, in breach of cl 26(a)(i) and (iii).

JURISDICTION AND PROCEDURE

[31] The grounds for a complaint 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.

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

[33] 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

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].

[34] 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

[35] 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

[36] 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

[37] The Tribunal has received from the Registrar a statement of complaint (5 November 2018) with supporting documents.

[38] Mr McClymont advised the Authority by letter on 21 November 2018 that the summary of facts was accepted, though commented on certain observations made by Mr Joseph in his response to the Authority.

[39] A statement of reply (undated) from Mr Joseph was received on 27 January 2020.

[40] Neither Mr Joseph nor any other party has requested an oral hearing.

ASSESSMENT

[41] 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.

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

...

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*, above n 6, at [97], [101]–[102] & [112].

File management

26. A licensed immigration adviser must:
- a. maintain a hard copy and/or electronic file for each client, which must include:
 - i. a full copy of the client's application or other immigration matter
 - ...
 - iii. copies of all written communications (including any file notes recording material oral communications and any electronic communications) between the adviser, the client and any other person or organisation
 - ...

Applications

31. A licensed immigration adviser must:
- a. not deliberately or negligently provide false or misleading documentation to, or deliberately or negligently conceal relevant information from, the decision maker in regard to any immigration matter they are representing, and
 - ...

- (1) *Instructing a staff member to sign various employment documents in the name of the owner and lodging those falsely signed documents with Immigration New Zealand, thereby being negligent; or*
- (2) *Alternatively, instructing a staff member to sign various employment documents in the name of the owner and negligently lodging those falsely signed documents with Immigration New Zealand, in breach of cl 31(a); or*
- (3) *Alternatively, instructing a staff member to sign various employment documents in the name of the owner and lodging those falsely signed documents with Immigration New Zealand, in breach of cl 1*

[42] The employment agreement lodged by Mr Joseph with Immigration New Zealand was on its face signed by “[the owner’s name]” as the employer. The offer letter was also signed in the name of the owner. Immigration New Zealand’s employer supplementary form was also signed by “[the owner’s name]”, as a “Director”. These documents were all lodged with Immigration New Zealand in support of the visa application.

[43] However, none of the documents had been signed by the owner. Mr Joseph accepts this. As he was in Malaysia at the time the application was filed, he instructed a staff member in New Zealand to sign the forms as the owner. Mr Joseph explains he had an interest in the business and had authority from the owner to make such decisions, though he neglected to inform the owner on this occasion.

[44] These three documents were false. They wrongly recorded that they had been signed personally by the owner. It is the signature which is false, not Mr Joseph's authority to bind the company nor the position offered to the complainant.

[45] Mr Joseph says in explanation that it was not his intention to provide false information to Immigration New Zealand. The job was genuine and he had nothing to gain from having it signed this way.

[46] Mr Joseph has misunderstood the nature of the falsity. The unprofessional behaviour was instructing the staff member to sign as the owner, not *on behalf of* the owner. The purported signature of the owner was a fabrication. Mr Joseph was, in effect, instructing the staff member to pretend to both the complainant and Immigration New Zealand that the owner had personally signed the document.

[47] Nor was Mr Joseph's misconduct, as he believes, merely overlooking to inform the owner. As to this though, his explanation for the omission is not convincing. He says he was on holiday and was too busy when he came back to New Zealand, but given modern forms of communication, such circumstances would have been no impediment to notifying the owner. If he can go online in Malaysia to file an application, he can send a text or email to the owner informing him of what he has done.

[48] I do not, however, regard Mr Joseph's conduct as negligent, as the Registrar alleges. It is not apt to describe his misconduct as amounting to a lack of reasonable care. In my view, Mr Joseph has, in terms of cl 31(a), "deliberately ... [provided] false or misleading documentation" to "the decision maker" (Immigration New Zealand). His conduct is arguably dishonest or at least misleading, rather than negligent. The first and second grounds of complaint are a misdescription of the misconduct.

[49] Turning then to the alternative third head of complaint, Mr Joseph's conduct was plainly unprofessional. A professional person will not present to others documents with false signatures, even if the signatory (in his or her own name) could properly have signed on behalf of another person. I uphold the third head of complaint. Mr Joseph has breached cl 1 of the Code.

[50] While not material, it is surprising that Mr Joseph did not sign the employment documents himself in his own name, if he was authorised to commit the company without reference to the owner. Of course, that would have required him to explain his dual capacity to Immigration New Zealand and to comply with the Code's conflict of interest obligations.⁸

(4) *Failing to provide a written agreement in respect of his services, in breach of cl 18(a)*

[51] Mr Joseph admits failing to enter into a client services agreement with the complainant. Essentially, he failed to do this on three occasions, since there must be a new written agreement or at least an update of an existing agreement for each visa application he was instructed to lodge (the work visa and two s 61 visas). He does not say why he did not do so. Mr Joseph accepts he made a mistake and has taken steps to ensure it does not happen again. He says that every client is now required to sign an agreement before he commences any work.

[52] This omission is not a mere technicality or file management issue. It is an important obligation of advisers to ensure that there is a written agreement containing the mandatory items specified in the Code. The agreement sets out such critical matters as the services to be performed and the fees. It also provides notification to the client of the professional Code and the complaints process. It protects not just the client, but the adviser as well.

[53] I uphold the fourth head of complaint. Mr Joseph is in breach of cl 18(a) of the Code.

(5) *Failing to maintain copies of all written communications between himself, the complainant and Immigration New Zealand or a full copy of the complainant's visa application, in breach of cl 26(a)(i) and (iii)*

[54] The Registrar alleges that Mr Joseph's client file did not contain a copy of the full work visa application or all written communications with the complainant or Immigration New Zealand.

[55] Mr Joseph admits this. In explanation, he states that the complainant and her husband took away the hard copy of the application he had on file. In any event, it is accepted it was his responsibility to retain a copy, so he now scans all the files into his computer.

⁸ Code of Conduct 2014, cls 5, 6, 7.

[56] Irrespective of what the complainant uplifted, Mr Joseph was obliged to place and then to retain on his file a complete copy of all the applications and his written and material oral communications with the complainant and Immigration New Zealand.⁹

[57] I uphold the fifth head of complaint. Mr Joseph is in breach of cl 26(a)(i) and (iii) of the Code.

OUTCOME

[58] The third, fourth and fifth heads of complaint are upheld. Mr Joseph has been found to have been unprofessional and to have failed to properly document his services. He has breached cls 1, 18(a) and 26(a)(i) and (iii) of the Code.

SUBMISSIONS ON SANCTIONS

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

[60] A timetable is set out below. As this is not the first time Mr Joseph has appeared before the Tribunal, the parties are specifically asked to address the sanctions of suspension, cancellation and prevention of licence renewal.

[61] Any requests that Mr Joseph undertake training should specify the precise course suggested. Mr Joseph is asked to produce evidence of his completion of a refresher course in 2019. Any request for repayment of fees or the payment of costs or expenses or for compensation must be accompanied by a schedule detailing the amounts and basis of the claim. Mr Joseph has offered to pay compensation, so the complainant is invited to advance a particularised claim for reasonable compensation.

Timetable

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

- (1) The Registrar, the complainant and Mr Joseph are to make submissions by **24 February 2020**.
- (2) The Registrar, the complainant and Mr Joseph may reply to submissions of any other party by **9 March 2020**.

⁹ Clause 26(a)(i), (iii) & (e).

ORDER FOR SUPPRESSION

[63] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.¹⁰

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

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

D J Plunkett
Chair

¹⁰ Immigration Advisers Licensing Act 2007, s 50A.