IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2020] NZIACDT 8

Reference No: IACDT 030/18

IN THE MATTER	of a referral under s 48 of the Immigration Advisers Licensing Act 2007
BY	**THE REGISTRAR OF IMMIGRATION ADVISERS** Registrar
BETWEEN	**GQ** Complainant
AND	**GENOVEVA EVELYN (GENNIE) RAMOS** Adviser

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 10 February 2020

REPRESENTATION:

Registrar:	Self-represented
Complainant:	Self-represented
Adviser:	P Moses, counsel

PRELIMINARY

[1] The complainant, GQ, instructed the adviser, Ms Genoveva Evelyn (Gennie) Ramos, to obtain a post-study (employer assisted) work visa, following study in New Zealand. The complainant had an offer to work as a caregiver. The visa application made was unsuccessful as Immigration New Zealand did not regard the job as related to the qualification obtained. The complainant alleges that Ms Ramos was incompetent.

[2] A complaint against Ms Ramos was made by the complainant to the Immigration Advisers Authority (the Authority), headed by the Registrar of Immigration Advisers (the Registrar). The Registrar referred the complaint to the Tribunal. It is alleged that Ms Ramos breached the Licensed Immigration Advisers Code of Conduct 2014 (the Code) by failing to provide sufficient immigration advice to enable the complainant to make an informed decision as to how to proceed. Furthermore, she failed to keep a record of oral advice given to the complainant or to confirm that advice in writing.

BACKGROUND

[3] Ms Ramos is self-employed and presumably a director of Immigration Service Limited in Auckland.

[4] The complainant, a national of the Philippines, qualified there as a nurse. She came to New Zealand to study, obtaining a Diploma in Management (Healthcare).

[5] On 26 February 2018, the complainant and Ms Ramos met to discuss the complainant's immigration situation. The complainant worked as a caregiver and had an offer to continue that work. According to Ms Ramos, she explained that Immigration New Zealand would be critical of the relevance of the complainant's qualification to work as a caregiver. A realistic alternative would have been an application under the essential skills work visa category. The complainant, however, instructed her to go ahead with the post-study application. Ms Ramos says that the complainant wanted to continue her employment as a caregiver in the hope a pathway to residence could be found later on. Her flatmate had obtained a work visa that way.

[6] The complainant and Ms Ramos signed the latter's consulting agreement. It provided for Ms Ramos to represent the complainant on an application for a work visa (post-study), for a fee of $1,468.

[7] On 5 March 2018, Ms Ramos lodged with Immigration New Zealand the post-study work visa application (form signed by the complainant on 22 February 2018). The complainant relied on a job offer as a caregiver.

[8] The complainant was granted an interim visitor visa on 6 April 2018, while the work visa application was being processed. On the same day, Ms Ramos sent an email to the complainant to inform her that the visa did not allow her to work.

[9] Immigration New Zealand wrote to Ms Ramos on 10 April 2018 to advise that it was not satisfied that the offer of employment was relevant to the complainant's qualification. An explanation was invited.

[10] Ms Ramos responded to Immigration New Zealand's letter on 12 April 2018. She stated that the job offer was that of caregiver and the job description was relevant to nursing and healthcare management. The employer had written to say that the complainant was working alongside the nurse manager and undertaking managerial work in a healthcare situation. The complainant was a registered nurse in the Philippines and this was why she had enrolled in a related healthcare course to enhance her nursing and healthcare experience, leading to registration in New Zealand as a nurse. The course provided her with hands-on experience relating to the health management of clients.

[11] According to Ms Ramos' letter to Immigration New Zealand, the request for the visa was an opportunity for the complainant to practice what she had learned in the course and to orientate herself to New Zealand health policies. If the application failed to meet the visa criteria, then the complainant sought an exception to the immigration instructions on the basis that the work experience would help her a great deal in obtaining registration in the future as a nurse.

[12] A support letter from the complainant's employer (10 April 2018) was provided to Immigration New Zealand. It stated that the complainant had moved to a supervisor's role and was more involved with management. She was working alongside the nurse manager.

[13] Immigration New Zealand wrote to Ms Ramos on 19 April 2018 advising that the complainant's visa application had been declined. This was because it was not satisfied that the offer of employment as a "caretaker" was relevant to the complainant's New Zealand qualification. The amended employment agreement of 20 April 2018 did not

give a job description and did not include a full-time supervisor's role. There was insufficient evidence to substantiate the claim that the complainant had been offered a new full-time position requiring different responsibilities from her previous position. The agency was not satisfied that the New Zealand qualification was a key factor in the employer's decision to employ her in the position offered. There were no special circumstances enabling the grant of a visa as an exception to the immigration instructions.

[14] On 8 May 2018, Ms Ramos wrote to the complainant to say that she had done the best she could, but realised the outcome was disappointing. Ms Ramos asked the complainant to advise her plans. The next move would be to seek a visa under s 61 of the Immigration Act 2009 (for those unlawfully in New Zealand without a visa).

COMPLAINT

[15] The complainant made a complaint to the Authority on about 16 May 2018. She alleged that Ms Ramos had been negligent and incompetent. Ms Ramos was overconfident the application would be successful and had not advised any backup plan should the application fail. Furthermore, Ms Ramos had advised her that she was allowed to work while on the interim visa. But as the complainant doubted her, she rang Immigration New Zealand who informed her she could not work on the interim visa. Ms Ramos would have made a lot of trouble for her and her employer, if she had followed the advice given.

[16] The complainant sought the cancellation of the licence of Ms Ramos and reimbursement for all the time and money lost while waiting for Immigration New Zealand's decision.

[17] In an email the complainant sent to the Authority on 25 August 2018, she stated that Ms Ramos did not give her a satisfactory explanation regarding a backup plan in the event that the post-study visa failed. Nor did Ms Ramos reply to every text or email seeking an update of her situation, so the complainant would telephone her. Their mode of communication was therefore more verbal.

[18] The Authority wrote to Ms Ramos on 11 September 2018 informing her of the details of the complaint and inviting her explanation.

[19] There was no response from Ms Ramos to the Authority's letter.

Complaint referred to Tribunal

[20] The Registrar referred the complaint to the Tribunal on 1 October 2018. It alleges the following breaches of the Code against Ms Ramos:

(1) failing to provide the complainant with sufficient immigration advice to enable her to make an informed decision as to how to proceed with her immigration matters, in breach of cls 1 and 2(e); and

(2) failing to make file notes or to provide written confirmation to the complainant recording any immigration advice supplied and failing to advise her that the visa application had been lodged, in breach of cl 26(a)(iii), (b) and (c).

JURISDICTION AND PROCEDURE

[21] 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.

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

[23] 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]

[24] 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]

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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.

[25] 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]

[26] 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]

[27] The Tribunal has received from the Registrar a statement of complaint (1 October 2018) with paginated supporting documents.

[28] There are no submissions from the complainant.

[29] There is a statement of reply (8 November 2018) from Mr Moses, counsel for Ms Ramos. This is supported by an affidavit from Ms Ramos (sworn 8 November 2018).

[30] No party has requested an oral hearing.

Explanation from Ms Ramos

[31] According to Mr Moses, the first ground of complaint is understood to relate to the adviser not acting professionally, diligently or with due care. This is rejected.

[32] As Ms Ramos deposes in her affidavit, she did advise the complainant of the potential problem with her visa, being that the job offer might not relate to the qualification. In fact, Ms Ramos advised her to consider an essential skills visa. The complainant's problem was that she had chosen to study health management, whereas it might have been better for her to work towards registration as a nurse in New Zealand. This had been discussed with the complainant at their first meeting.

[33] It is submitted that Ms Ramos' advice was adequate. Her shortcoming was not to record it in writing.

[34] The second aspect of the first ground of complaint is that the response of Ms Ramos to Immigration New Zealand's letter of 10 April 2018 is alleged to be inadequate. It is submitted that, even if it is thought the response could have been stronger, the provisions of the Code do not provide for an assessment of excellence.

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[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].

The question is whether the standard of representation was so poor as to fall below the minimum standard expected of a licensed immigration adviser.

[35] As for the second ground of complaint, Ms Ramos acknowledges in her affidavit falling short in relation to recording her advice in writing, and in advising the complainant in writing that her application had been lodged. The complainant had been advised orally of lodgement, but there was an oversight in not confirming that in writing.

[36] The key issue was whether it was wise to pursue a post-study visa. It is accepted that the lack of a written record confirming the advice given as to the key issue, is more problematic. Ms Ramos considered that her oral advice was clear and had been understood. She was clearly wrong about that.

[37] The question therefore arising is whether a disciplinary consequence is required. It is submitted that if the Tribunal determines that the matter crosses the disciplinary threshold, it is nonetheless of only low severity. The breach of a technicality did not, in this instance, materially prejudice the complainant.

[38] According to Mr Moses, it is noteworthy that Ms Ramos has acknowledged that her conduct has fallen short of the Code and has shown insight. She will be amending her practice to ensure adherence with her professional obligations in relation to written advice and record keeping. It might be thought that simply upholding the complaint under the second ground and imposing a censure would be sufficient.

[39] In her affidavit of 8 November 2018, Ms Ramos explains that she did not respond to the Authority's notification of the complaint, as she did not receive that letter.

[40] Ms Ramos confirms what happened, as set out in the submissions of Mr Moses. In particular, at the first meeting on 26 February 2018, she explained to the complainant that Immigration New Zealand would be critical of the relevance of her health management qualification to work as a caregiver. She explained the alternative of an essential skills work visa. However, the complainant instructed her to go ahead with the post-study work visa as her flatmate had succeeded in that category. Ms Ramos recalls saying that the management qualification was probably ill-advised because the complainant would have been better concentrating on obtaining New Zealand registration.

[41] Ms Ramos states that she appreciates that clients must give informed instructions and is confident that she adequately explained to the complainant why there was a risk that the application would be declined.

[42] When Immigration New Zealand wrote on 10 April 2018, Ms Ramos sought the comments of the complainant. The complainant's employer also prepared a letter of support, referring to the management tasks in the complainant's job. She did not believe that her advice was inadequate.

[43] Ms Ramos says in her affidavit that her record keeping is generally good. However, she accepted falling short of the expected standard, in relation to both the advice given at the original meeting and notification that the application had been lodged. The complainant was though told of both verbally. Ms Ramos is confident that the complainant fully understood the advice. She was now claiming that the advice was inadequate, because the application had failed. In saying that, the breach of cl 26(c) of the Code is acknowledged.

[44] As a result of the complaint, Ms Ramos says she has rethought how she documents advice to her clients in order to ensure there is written confirmation of all material discussions.

ASSESSMENT

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

> **General**
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> 1. A licensed immigration adviser must be honest, professional, diligent and respectful and conduct themselves with due care and in a timely manner.
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> **Client Care**
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> 2. A licensed immigration adviser must:
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> …
>
> e. obtain and carry out the informed lawful instructions of the client, and
>
> …
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> **File management**
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> 26. A licensed immigration adviser must:
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> a. maintain a hard copy and/or electronic file for each client, which must include:
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> …
>
> 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

…

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 provide the complainant with sufficient immigration advice to enable her to make an informed decision as to how to proceed with her immigration matters, in breach of cls 1 and 2(e)

[46] In the absence of a response by Ms Ramos to the Authority following the formal notification of the complaint, it is unsurprising that the Registrar should allege a failure to give appropriate advice to the complainant about her immigration options and as to the risk of failure of any post-study visa application. After all, Ms Ramos' file contains no record of any advice given.

[47] Ms Ramos has now explained both the failure to respond to the Authority and what advice she actually gave the complainant. As to the latter, Ms Ramos says that the complainant was properly advised of her options and of the risk attendant upon her preferred approach. Of course, that oral advice should have been recorded on the file and more importantly, confirmed in writing to the complainant (I will discuss these shortcomings next). There is no evidence from the complainant contrary to Ms Ramos' position that the verbal advice was given. As there is no reason not to accept the uncontradicted evidence of Ms Ramos, I find that proper immigration advice was given.

[48] The Registrar alleges that the 12th April response to Immigration New Zealand's letter notifying an adverse factor was inadequate. Ms Ramos should have explained to the complainant the nature of the concerns and how they affected her immigration status.

[49] The nature of Immigration New Zealand's concern (relevance) and how it affected the application (possible rejection) had already been canvassed at the initial consultation, according to the evidence of Ms Ramos. That being so, it is doubtful Ms Ramos needed to repeat that, unless she thought the complainant was confused about them. There is no evidence she was.

[50] In response to Immigration New Zealand's letter, an attempt was made by Ms Ramos and the employer to fashion a managerial role for the complainant, but it was not the fault of Ms Ramos that such a role was found by the agency to be somewhat illusory. I suspect that mirrored the reality.

[51] Mr Moses is correct that the standard of work of a professional adviser mandated by the Code is not "excellence", but nor is it as low as "so poor, as to fall below the minimum standards". The touchstone is "reasonable". While a professional person will strive for excellence, the minimum quality of work expected of a licensed immigration adviser is that of a reasonable professional who is knowledgeable and skilled in immigration matters. That is what licensed advisers are holding themselves out to achieve.

[52] The complainant complains about the lack of a 'Plan B', a backup plan, in the event that the post-study visa was rejected. If, as I accept, Ms Ramos raised at the first consultation the risk of failure of that visa type and discussed the alternative of an essential skills visa, but received an instruction to proceed with the post-study visa, I do not see what backup plan Ms Ramos was required to come up with. When the application did fail and the complainant's immigration status became unlawful, Ms Ramos suggested the only possibility left, which was an application under s 61 of the Immigration Act 2009.

[53] The first head of complaint is dismissed.

(2) Failing to make file notes or to provide written confirmation to the complainant recording any immigration advice supplied and failing to advise her that the visa application had been lodged, in breach of cl 26(a)(iii), (b) and (c)

[54] Ms Ramos failed to make a written record of the verbal immigration advice given to the complainant, particularly at the first meeting. This allegation is not expressly admitted by Ms Ramos but her file contains no such record.

[55] It is accepted by Ms Ramos that she did not confirm her advice at that meeting in writing. She also accepts overlooking to later advise the complainant in writing of the filing of the visa application. According to Ms Ramos, she did though properly advise the complainant verbally of both the problem with a post-study visa, and the later lodgement of the application. But the Code requires written communications with the client of such material matters.

[56] Mr Moses submits that Ms Ramos' failures may not cross the disciplinary threshold warranting a disciplinary process.[8] While I acknowledge that some instances of a failure to keep proper records or to communicate with a client would not justify

[8] *Orlov v New Zealand Law Society* [2012] NZHC 2154 at [79]–[80], *Liston v The Director of Proceedings* [2018] NZHC 2981 at [44]–[45].

referral of a complaint to the Tribunal, the conduct of Ms Ramos does warrant a disciplinary process.

[57] As Mr Moses correctly acknowledges, the key issue was whether the management qualification bore sufficient relevance to the caregiver role. The other possibility for the complainant was an essential skills visa, though it is not known whether she could have satisfied the immigration criteria for that visa. It was such a critical issue that Ms Ramos should have confirmed her advice in writing to avoid any misunderstanding.

[58] The second ground of complaint is upheld. Ms Ramos breached cl 26(a)(iii), (b) and (c) of the Code.

OUTCOME

[59] The complaint is upheld. Ms Ramos has breached cl 26(a)(iii), (b) and (c) of the Code.

[60] The Tribunal can impose sanctions, or it may uphold the complaint but decide to take no further action.[9] While the complaint crosses the disciplinary threshold and warrants being upheld, it does not justify any sanction. Ms Ramos has learned from her mistake and changed her practice regarding record keeping and written communications.

[61] A caution might be appropriate, but this decision will effectively meet that purpose. Furthermore, the public availability of this decision is a sanction in itself.

[62] Mr Moses raises the possibility of censure, but I do not regard the failures of Ms Ramos as of sufficient severity to warrant censure. Nor would I consider a refund or compensation to the complainant, as I find that Ms Ramos did what she was contracted to do, to an adequate or reasonable standard. She is not responsible for the failure of the visa application.

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]

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[9] Immigration Advisers Licensing Act 2007, ss 50, 51.
[10] Immigration Advisers Licensing Act 2007, s 50A.

[64] There is no public interest in knowing the name of Ms Ramos' client.

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

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D J Plunkett
Chair