

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2021] NZIACDT 13

Reference No: IACDT 04/21

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **TI**
Complainant

AND **TIMOTHY JAMES MALCOLM**
Adviser

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 8 June 2021

REPRESENTATION:

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

PRELIMINARY

[1] Mr Malcolm, the adviser, acted for TI, the complainant, on an immigration application, but was tardy in making the application and failed to keep the complainant properly informed of progress. More seriously, he misled her as to when the application would be made.

[2] A complaint to the Immigration Advisers Authority (the Authority) against Mr Malcolm by the complainant was referred to the Tribunal by the Registrar of Immigration Advisers (the Registrar). It alleges negligence and dishonest or misleading behaviour, grounds for complaint under the Immigration Advisers Licensing Act 2007 (the Act), or alternatively breaches of the Licensed Immigration Advisers Code of Conduct 2014 (the Code).

[3] Mr Malcolm has chosen not to engage in the disciplinary process. He has offered no explanation to either the Authority or the Tribunal.

BACKGROUND

[4] Mr Timothy James Malcolm is a former licensed immigration adviser. He practised under the name TM Immigration, in Auckland. His licence expired on 3 February 2021.

[5] The complainant is TI, a national of Germany. She arrived in New Zealand in 2015 and worked as a teacher on temporary work visas from 2016. At the relevant time, her visa was due to expire on 11 January 2022, but she was made redundant as from 14 August 2020 due to the impact of COVID-19.

[6] Accordingly, before mid-July 2020, the complainant contacted Mr Malcolm asking for a quote for a variation of the conditions on her visa, as she had secured a new job offer. She started texting Mr Malcolm on 16 July reminding him that she had been made redundant and wanted a quote to vary her visa conditions.

[7] It was not until 6 August 2020 that Mr Malcolm replied by sending the complainant his terms of engagement. She signed this on 7 August 2020 and paid his fee of \$850.

[8] Shortly afterwards, on 10 August 2020, Mr Malcolm sent her the completed variation application form to check. She returned it to him on the same day.

[9] Commencing on 10 August 2020, the complainant sent Mr Malcolm texts seeking advice concerning her immigration status, as well as the progress of the variation application to be made. He replied to some texts but not to others. He advised her on 11 August 2020 that “everything is fine” and the application “will be sent tomorrow” (emphasis that of the author). She asked him on 24 August if he had heard anything from Immigration New Zealand, to which he replied the next day stating that he had received, “No word from immigration at this point” and referring to the backlog of applications. In fact, no application had been made by him. Mr Malcolm would have known of the urgency as the complainant was then unemployed and could not work until granted a variation permitting her to work for another employer.

[10] There were further texts and emails from the complainant and from her prospective employer to Mr Malcolm. The employer in her email of 2 September 2020 emphasised the anxiety the complainant suffered from, as she had no work. Again, Mr Malcolm ignored most of the communications.

[11] On 7 September 2020, Mr Malcolm sent the complainant the declaration page of the application and asked her to provide her credit card details and a copy of her new passport. The complainant in her reply on the same day asked him whether he was planning to post it that day. He did not reply.

[12] The application was finally received by Immigration New Zealand on 1 October 2020.

[13] The complainant again asked Mr Malcolm by text on 2 October 2020 whether he had heard anything from Immigration New Zealand. Three days later, on 5 October 2020, he told her that he had not heard from the agency. He would follow it up that day. The complainant contacted Immigration New Zealand on the same day and was (wrongly) told that no application had been received. The complainant sent a text to Mr Malcolm asking about this and he replied that he could only assume the application was going through the lodgement stage and had not shown up on Immigration New Zealand’s system.

[14] The following day Mr Malcolm texted the complainant and stated that the application had definitely been delivered to Immigration New Zealand and he was trying to contact the appropriate person to find out where it was in the process. The complainant asked him for an update and for proof that Immigration New Zealand had received her application. Mr Malcolm did not respond to her email.

[15] On 7 October 2020, Mr Malcolm forwarded to the complainant an email from Immigration New Zealand requesting a certified copy of her passport. It referred to an application having been received on 1 October 2020. This was when the complainant learned of when the application had been filed. It was also the last time that Mr Malcolm communicated with her. The complainant immediately sent a copy of her passport to Mr Malcolm and Immigration New Zealand.

[16] On 23 October 2020, Immigration New Zealand wrote to the complainant and Mr Malcolm (using Mr Malcolm's address) recording receipt of the variation application on 1 October 2020, and raising issues which it was said could have a negative impact on the outcome. They were given until 30 October to respond. Mr Malcolm did not copy this letter to her. Nor did he reply to the letter.

[17] Mr Malcolm did not respond to a text from the complainant on 2 November 2020 seeking an update. When she contacted Immigration New Zealand, she found out that the agency had sent a letter on 23 October raising concerns about her application.

[18] The complainant sent an email to Mr Malcolm on 2 November 2020 expressing her concern and disappointment with his service. She stated that it was beyond belief that he had not forwarded Immigration New Zealand's letter of 23 October to her. His lack of communication was completely unacceptable, given that she had paid a fee to him. Her application was likely to be rejected because of his failure to communicate. She asked him for his plan to resolve this, or a refund. Mr Malcolm did not respond.

[19] The complainant followed this up with an email to Mr Malcolm on 4 November 2020 expressing disappointment and shock at the way her case had been handled. She had trusted him. She was now revoking his authority to act for her. Once again, he did not reply.

COMPLAINT

[20] The complainant made a complaint against Mr Malcolm to the Authority on about 27 November 2020. She set out the chronology of her communications with him. It was alleged that he had been negligent, incompetent, lacked capacity, had been dishonest or misleading and had breached the Code. The complainant sought a refund of the \$850 fee paid and compensation for her lost wages since August 2020. She had not been able to work because of repeated delays in the handling of her application.

[21] On 5 February 2021, the Authority sent an email to Mr Malcolm seeking his client file. Reminders were sent to him on 5 and 12 March 2021. There was no reply from him.

[22] The Authority wrote to Mr Malcolm on 26 March 2021 formally advising him of the complaint and requesting his explanation. There was no response from Mr Malcolm.

Complaint referred to Tribunal

[23] The Registrar referred the complaint to the Tribunal on 20 April 2021. It alleges the following against Mr Malcolm:

- (1) negligence, or alternatively a lack of due care in breach of cl 1 of the Code, by –
 - (a) failing to lodge the application in time;
 - (b) failing to lodge the application online;
 - (c) failing to inform the complainant of Immigration New Zealand's letter of 23 October 2020;
 - (d) failing to respond to Immigration New Zealand's letter; and
 - (e) failing to inform the complainant to provide a certified copy of her passport.
- (2) dishonest or misleading behaviour, or alternatively failing to be honest and professional in breach of cl 1 of the Code, by –
 - (a) advising the complainant he had lodged her application when he had not;
 - (b) failing to provide updates about information from Immigration New Zealand;
 - (c) failing to provide document tracking proof to the complainant as requested; and
 - (d) advising the complainant in his agreement not to contact Immigration New Zealand.

- (3) failing to maintain a relationship of confidence and trust and to provide objective advice in breach of cl 2(a) of the Code, by –
 - (a) failing to advise the complainant of the letter of 23 October 2020 and not responding to the letter; and
 - (b) generally failing to respond to her communications.
- (4) failing to provide written advice as to the progress of the application in breach of cl 26(b) of the Code, by failing to inform the complainant he had lodged the application and failing to provide updates to her.
- (5) failing to maintain a client file and to make it available to the Authority in breach of cl 26(e) of the Code, by failing to respond to the Authority's letter of 5 February 2021 requesting his file, with reminders on 5 and 12 March 2021.

JURISDICTION AND PROCEDURE

[24] 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.

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

[26] 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].

[27] 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

[28] 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

[29] 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

Submissions from the parties

[30] The Tribunal has received from the Registrar the statement of complaint (20 April 2021), with supporting documents.

[31] The complainant notified the Tribunal of her change of address, but did not make any submissions.

[32] There was no reply from Mr Malcolm to the Tribunal's invitation to file a statement of reply.

[33] No party has requested an oral hearing.

ASSESSMENT

[34] 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.

Client Care

2. A licensed immigration adviser must:
 - a. maintain a relationship of confidence and trust with the client and provide objective advice

...

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].

⁷ *Z v Dental Complaints Assessment Committee*, above n 6, at [97], [101]–[102] & [112].

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

...

- e. maintain each client file for a period of no less than 7 years from closing the file, and make those records available for inspection on request by the Immigration Advisers Authority, and

...

(1) *Negligence, or alternatively a lack of due care in breach of cl 1 of the Code, by –*

- (a) *failing to lodge the application in time;*
- (b) *failing to lodge the application online;*
- (c) *failing to inform the complainant of Immigration New Zealand's letter of 23 October 2020;*
- (d) *failing to respond to Immigration New Zealand's letter; and*
- (e) *failing to inform the complainant to provide a certified copy of her passport*

[35] I will assess first whether Mr Malcolm lacked due care and therefore breached cl 1 of the Code. The Registrar has alleged five instances of a lack of due care. I agree with the Registrar that all five matters are made out.

[36] Given the urgency since the complainant was out of work and the straightforward nature of the variation application, Mr Malcolm should have made it well before 1 October 2020. Indeed, it should have been made within a day or so of 10 August 2020. It should also have been lodged online to speed up the processing. Additionally, he should have asked the complainant to provide a certified copy of her passport on or before 10 August and not waited until Immigration New Zealand requested it on 7 October.

[37] Further, Mr Malcolm should have immediately informed the complainant of Immigration New Zealand's letter of 23 October identifying problems with the application, taken her instructions and replied before the deadline set one week later.

[38] All of these particulars of a lack of due care are self-evident. Mr Malcolm has chosen not to dispute this head of complaint, or indeed any other. I find that Mr Malcolm has breached cl 1. The first head of complaint is upheld to that extent. There is no need to assess the alternative allegation of negligence.

(2) *Dishonest or misleading behaviour, or alternatively failing to be honest and professional in breach of cl 1 of the Code, by –*

- (a) *advising the complainant he had lodged her application when he had not;*
- (b) *failing to provide updates about information from Immigration New Zealand;*
- (c) *failing to provide document tracking proof to the complainant as requested;
and*
- (d) *advising the complainant in his agreement not to contact Immigration New Zealand*

[39] The Registrar contends that Mr Malcolm was dishonest or misleading in a number of respects. In particular, he advised the complainant on 11 August 2020 that the application “will be sent tomorrow”. Yet, it was not actually filed until 1 October. Then in reply to the complainant’s text on 24 August as to whether he had heard from Immigration New Zealand, he stated (*verbatim*), “No word from immigration at this point. I know there backlog in the lodgement of applications. I will let you know as soon as I have further news”. In fact, at 25 August 2020 when he replied, no application had been made by Mr Malcolm.

[40] It is clear Mr Malcolm would have known on 11 August that the application would not be filed the next day. It is even more obvious that he lied to the complainant on 25 August when he said he was waiting for news from the agency, falsely blaming delays on the agency’s backlog, whereas in fact it was his delay in filing the application that was the problem.

[41] I do not consider the Registrar’s other particulars add materially to the allegation of dishonest or misleading behaviour. While it was unprofessional of Mr Malcolm to require the complainant and other clients to agree not to contact Immigration New Zealand, I doubt if that provision in his standard agreement was in furtherance of any scheme to mislead them.

[42] It is found that Mr Malcolm's conduct was misleading, satisfying the statutory ground of complaint. Additionally, it is observed that Mr Malcolm has chosen to be silent in the face of a serious allegation of dishonesty. He offers no explanation. An adverse inference will be drawn from this.⁸ The second head of complaint is upheld. The alternative breach of cl 1 alleged is dismissed.

(3) *Failing to maintain a relationship of confidence and trust and to provide objective advice in breach of cl 2(a) of the Code, by –*

(a) *failing to advise the complainant of the letter of 23 October 2020 and not responding to the letter; and*

(b) *generally failing to respond to her communications*

[43] I agree with the Registrar that Mr Malcolm's failure to inform the complainant about Immigration New Zealand's letter of 23 October 2020, his failure to reply to that letter and his failure generally to reply to many of the complainant's communications, are breaches of the relationship of trust and confidence and a failure to provide advice where requested.

[44] Mr Malcolm did not reply to texts or emails on 16, 29 July, 1, 3, 10 August, 4, 7, 18 September, 6 October, 2 and 4 November 2020. Moreover, it is apparent from the complainant's emails of 2 and 4 November 2020 that she had actually lost trust in him.

[45] Mr Malcolm does not dispute the Registrar's allegation that he breached cl 2(a) of the Code. I uphold the third head of complaint. In doing so, I acknowledge the overlap with the first head of complaint in relation to the 23 October letter.

(4) *Failing to provide written advice as to the progress of the application in breach of cl 26(b) of the Code, by failing to inform the complainant he had lodged the application and failing to provide updates to her*

[46] The Registrar contends that Mr Malcolm did not inform the complainant when he lodged the application on 1 October 2020. Nor did he update her on its progress, such as when Immigration New Zealand sent the letter of 23 October 2020. This head of complaint is made out.

⁸ *KX v Ji* [2020] NZIACDT 43 at [54].

[47] Mr Malcolm does not challenge the Registrar's allegation. The fourth head of complaint is upheld. Mr Malcolm breached cl 26(b) of the Code. Again, there is some overlap with the first and third heads of complaint in relation to the 23 October letter.

(5) *Failing to maintain a client file and to make it available to the Authority in breach of cl 26(e) of the Code, by failing to respond to the Authority's letter of 5 February 2021 requesting his file, with reminders on 5 and 12 March 2021*

[48] The Registrar sent an email to Mr Malcolm on 5 February 2021 requiring a copy of his client file within 10 working days. Reminder emails were sent on 5 and 12 March 2021. He did not respond to any of these communications.

[49] Mr Malcolm does not challenge the allegation that he breached cl 26(e) of the Code. The fifth head of complaint is upheld.

OUTCOME

[50] The complaint is upheld. Mr Malcolm has been found to have engaged in dishonest or misleading behaviour and to have breached cls 1, 2(a), 26(b) and (e) of the Code.

SUBMISSIONS ON SANCTIONS

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

[52] A timetable is set out below. 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. Given Mr Malcolm's misleading behaviour and his refusal to engage in the disciplinary process, the Tribunal will consider preventing him from reapplying for a licence. The parties are requested to address this in their submissions.

Timetable

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

- (1) The Registrar, the complainant and Mr Malcolm are to make submissions by **30 June 2021**.

- (2) The Registrar, the complainant and Mr Malcolm may reply to submissions of any other party by **14 July 2021**.

ORDER FOR SUPPRESSION

[54] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.⁹

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

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

D J Plunkett
Chair

⁹ Immigration Advisers Licensing Act 2007, s 50A.