IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2021] NZIACDT 19

Reference No: IACDT 09/21

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

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 20 August 2021

REPRESENTATION:

Appellant: Self-represented
Registrar: M Brown, counsel

INTRODUCTION

[1] This is an appeal against the decision of the Registrar of Immigration Advisers (the Registrar) of 11 June 2021, declining to pursue a complaint by ZK (the appellant) against IM, a licensed immigration adviser (the adviser). This was on the basis that it was found to disclose only a trivial or inconsequential matter.

[2] The appellant is aggrieved about paying the adviser's fee and waiting a prolonged period for a decision on a resident visa application, which was ultimately unsuccessful. It failed because of the way her employer structured her income, something the adviser always knew about. She had been led to believe by him that it would be successful and would not have filed it had there been no chance of success.

[3] The essential issue to consider is whether the Registrar has overlooked one of the principal grounds of complaint, being whether the appellant was ever told of the risk to the application by virtue of the nature of her income.

BACKGROUND

[4] The appellant is a national of China. She was working in New Zealand as an assistant team leader in the travel industry.

[5] The adviser is a director of [company], of Auckland. The consultancy employs the unlicensed Ms X.

[6] In April 2018, the appellant approached the adviser seeking advice as to whether her job could be considered skilled employment for residence purposes. It appears they had a meeting on 10 April 2018. The appellant explained how her income was calculated and described it as guaranteed. The adviser recorded in his file notes that the employer's remuneration system was quite unusual. He further recorded that the assistant manager's job description was critical. She needed to get that job, or her application would fail. According to the appellant, the adviser said that the job would qualify as skilled employment, since she would be able to claim points as a retail manager.

[7] After the initial meeting, the file notes state that the appellant called in late September 2018 to tell them she had obtained the position. The adviser and/or Ms X then undertook research into the "income challenge".

[8] There was another meeting on 3 October 2018 between the appellant and the adviser. It was recorded in the adviser's notes:

> Explained our reasoning regarding [the employer's] pay (commission definition), [the appellant] agrees the logic and agrees to provide full agreement copy.

[9] On the same day and presumably at the meeting, the appellant and the adviser signed the adviser's services agreement. He agreed to prepare a resident visa application for her, which would include her husband. The total fee was $8,500.

[10] On 15 October 2018, Ms X sent an email to the appellant (copied to the adviser) setting out the process and documents needed for an expression of interest (expression) and then resident visa application.

[11] This led to an exchange of emails and information between Ms X and the appellant as the information and documents necessary for the expression and visa application were compiled. Such emails continued through November 2018 to January 2019. Some of them were copied to the adviser.

[12] On 8 November 2018, the adviser sent an email to the appellant confirming completion of stage one of the visa application and listing 11 activities undertaken by them. They were comfortable with the expression.

[13] Ms X advised the appellant by email on 9 November 2018 (copied to the adviser) that the expression had been filed. According to Immigration NZ, the expression was filed on 14 November 2018.

[14] Ms X sent an email to the appellant on 14 November 2018 informing her that the expression had been selected and she should start to prepare documentation for the resident visa application, in accordance with the list already sent to her.

[15] Immigration NZ issued an invitation to the appellant to apply for residence on 15 November 2018. On the same day, the adviser sent an email to the appellant attaching the invitation. He added that Ms X would guide her further.

[16] On 16 November 2018, Ms X sent an email to the appellant repeating that the invitation to apply had been received. She had four months to prepare the application, in accordance with the full document list in Immigration NZ's letter. She should prepare those documents and could let them know if she had any questions.

[17] On 31 January 2019, Ms X sent an email to the appellant (copied to the adviser) informing her that the resident visa application had been filed. They would keep her updated about any feedback from Immigration NZ. The agency recorded that the application was filed on 1 February 2019.

[18] The adviser sent an email to Immigration NZ on 20 March 2019 to advise changes to the appellant's employment.

[19] On 1 August 2019, the adviser sent an email to the appellant, replying to her request of the same date, stating that he had contacted Immigration NZ but no officer had been assigned.

[20] Ms X advised the complainant on 19 August 2019 by email (copied to the adviser) that the application had been received by Immigration NZ on 1 February 2019 and that the agency had advised that it took around six to eight months to allocate, so the case was still within the general processing timeframe. They regularly followed it up with Immigration NZ to check the status of the application but due to the shortage of staff there, no officer had been assigned.

[21] It is clear from the consultancy's file notes that the appellant was regularly contacting the adviser and/or Ms X enquiring as to why Immigration NZ had not allocated an officer. Both the appellant and the consultancy were calling Immigration NZ.

[22] Someone has recorded in the file notes on 8 April 2020 that neither the job nor the remuneration met the criteria anymore.

[23] On 6 August 2020, the adviser sent an email to the appellant acknowledging the huge pressure of the residence application, especially given the uncertainty of those in the travel industry. He proposed a Plan B, based on the husband being the principal applicant. Such a change would be requested if the current application failed.

[24] An immigration officer was allocated to the appellant's application on about 4 September 2020.

[25] Ms X sent an email to the appellant on 18 September 2020 reiterating that they would use their professional skill to her best benefit. Based on her instruction, they would start to contact the immigration officer on a daily basis. They had sent the first email and would let her know any feedback.

[26] The immigration officer replied to the adviser on the same day stating that she was waiting for the employer's response. She asked for an alternative email contact. On the same day, the appellant told the adviser of an alternative person and in turn the adviser presumably notified the officer.

[27] On 21 September 2020, Ms X sent another email to the appellant setting out the two main challenges, being her annual salary (below the skilled migrant category requirement) and her current position as a travel expert (different from that described in the application). The immigration officer could query these.

[28] The adviser met the appellant on 22 September 2020. She instructed the adviser to proceed. His notes recorded that the appellant was “Very strong opinioned” and “Reject all alternative advice”.

[29] On 23 September 2020, Immigration NZ wrote to the adviser stating that the appellant’s annual remuneration did not meet the requirements for skilled employment. Her remuneration was $14.42 per hour, but the required threshold for a retail manager was $25 per hour. The information provided by the appellant’s employer showed her remuneration to be a retainer of “$30,000” per annum, being $14.42 per hour. It was acknowledged that she might also be paid commission based on sales or targets, but this was excluded.

[30] According to Immigration NZ’s letter, the expression had claimed an annual salary of $55,000, being $26.44 per hour. Given that her annual retainer was only “$35,000”, it appeared she may have provided false and misleading information.

[31] Ms X sent Immigration NZ’s letter to the appellant on the same day.

[32] The adviser responded to the letter from Immigration NZ on 28 September 2020. He set out his argument as to why the appellant’s remuneration met the requirements of the immigration instructions. Her employer used a sophisticated remuneration program. The retainer of $35,000 stated in the employment contract was not her annual salary. The minimum gross payment that the appellant could receive was $55,000. She received retainer, commissions, profit bonus, another bonus, incentives and public holiday wages. The adviser referred to the Holidays Act 2003.

[33] According to the adviser, there was a difference between a commission and a bonus. A commission was a form of variable-pay remuneration which was actually a component of the base salary. It was not a discretionary payment. Bonuses, one-off payments and other discretionary payments were not included in the calculation of her gross earnings. Her “profit bonus”, not stated in her employment agreement, had not been claimed in the expression. So the expression was filed claiming a conservative remuneration of $55,000, excluding bonuses. She did not therefore provide false or misleading information.

Residence declined

[34] On 6 October 2020, Immigration NZ wrote to the adviser notifying him that the application for residence had been declined. The appellant had been awarded only 90 points, as she did not meet the remuneration requirement to be recognised as having skilled employment. Her remuneration was only $30,000 per annum, whereas she had

claimed $55,000 per annum. At $14.42 per hour, it was less than the minimum of $25 per hour.

[35] According to Immigration NZ's letter, the adviser had stated that the appellant's income comprised a retainer, as well as commission, bonus, incentive and public holiday wages. He had referred to New Zealand legislation and contended that bonuses and commissions were both forms of salaries or wages. Furthermore, the adviser had contended, it could be seen from the payslips that commissions were a regular form of "variable-pay" remuneration and were therefore a component of base salary.

[36] However, Immigration NZ considered that, in accordance with the immigration instructions, the remuneration had to be obtained from the salary specified in the employment agreement. Her base salary was $30,000. As for commission, it was listed irregularly on her payslips and sometimes it was not there at all. Even when present, there was no set amount. The immigration instructions explicitly excluded commission.

[37] It also appeared to the agency that, based on the claimed salary of $55,000, the appellant had provided false and misleading information in the expression.

[38] Ms X advised the appellant by email on the same day that the residence application had been declined. The decision was attached. She could contact Ms X if she had any questions.

[39] The adviser sent an email to the appellant on 7 October 2020 stating that given Immigration NZ's character concern, she may need a character waiver for future applications. He advised her of the right to appeal to the Immigration and Protection Tribunal (to be referred to as "the IPT", to distinguish it from this disciplinary tribunal which will be referred to as "the Tribunal"). In view of the impact of COVID-19, the adviser said he would waive the third instalment of the fee.

[40] Ms X sent another email to the appellant (copied to the adviser) on the same day with information as to how to file an appeal.

Appeal to the IPT

[41] The appellant represented herself in an appeal to the IPT.

[42] In her submissions to the IPT, the appellant stated that as an assistant team leader, her guaranteed minimum salary was $55,000, irrespective of sales. She further advised that at some point, she was demoted to travel consultant with a guaranteed annual income of $50,000, due to the downturn in the industry as a result of COVID-19.

The appellant complained about waiting 20 months for an immigration officer to be allocated to their application. This outrageous delay was mainly caused by Immigration NZ's priority rules. It was incredibly unfair to people like them that a huge number of priority applicants jumped the queue.

[43] It was acknowledged by the appellant that due to the delay by Immigration NZ and the pandemic's impact on her job, she might not be eligible for residence. Her current income at $24 per hour would not meet Immigration NZ's remuneration criteria. But her husband had by then qualified as a skilled migrant.

[44] In its decision of 18 January 2021, the IPT found that Immigration NZ was correct to decline the application. The appellant had to demonstrate that she earned more than $24.29 per hour. The immigration instructions required her to be paid wages or salary and not a retainer or commissions. However, the appellant's employment agreement provided for a retainer ($35,000) and commissions. It also provided for top-ups, to an assured income level. Because of her income, the appellant was not entitled to points for skilled employment. It found there were no special circumstances.

[45] An unnamed lawyer advised the appellant on 19 January 2021 that a further appeal would be unsuccessful. They would have told her at the initial consultation that commission could not be included in her income.

Complaint to the adviser

[46] In the meantime, the appellant had made a written complaint to the adviser on 15 December 2020, including such matters as:

1. failing to provide her with timely updates;

2. failing to personally contact them, with Ms X being the "only person" communicating with them; and

3. failing to understand and respond to issues as they arose.

[47] In respect of the latter, the appellant said that she had asked the adviser if she should obtain a letter from her employer to prove her income, as Immigration NZ had doubted her income was $50,000. If it was not $50,000, then the agency would consider the stated level of income in the expression to be dishonest. But the adviser had said it was not necessary. She had proposed explaining the top-up system which was unique and truly part of her income, but he had declined this.

[48] According to the appellant, these two key points were straightforward. The adviser had tried to shortcut things and hide information from Immigration NZ. The application failed because of her income, but that had remained the same as it had been at the very beginning. The adviser had never pointed out or alerted them to the commission system being a hurdle. If she had known that, she would have got proof from her company.

[49] The managing partner of the consultancy replied to the appellant's complaint letter on 19 January 2021. To the extent relevant, the following points were made:

1. the waiting time of 20 months was solely due to Immigration NZ. Most of it was in the queue pending allocation to an immigration officer;

2. the adviser and Ms X had spent 664 minutes on the phone with her and her husband (office phone only, excluding personal mobile phones);

3. the letter responding to Immigration NZ was based on the facts of the case, the interpretation of the Immigration Act 2009 and the general directions of immigration policies;

4. the appellant's original employment as assistant team leader had come to an end in early 2020. Since she had "almost lost hope for [her] employment", they had tried their best to give her backup options, given she was very likely to have no skilled employment;

5. Ms X did not provide immigration advice, but assisted with clerical work under the direction of the adviser; and

6. they had no grounds to believe that her case was difficult. Unfortunately due to the impact of COVID-19, the appellant lost her assistant team leader job and her remuneration was reduced.

[50] Finally, the managing partner stated that he had noticed from his investigation that they had provided high quality services, much more than they had been engaged to do. Accordingly, he had decided to recall the credit for the third instalment of the fee. An invoice would be sent.

Complaint to the Authority

[51] On 9 February 2021, the Immigration Advisers Authority (the Authority) received the appellant's complaint against the adviser. She alleged negligence, incompetence,

dishonest or misleading behaviour and breaches of the Licensed Immigration Advisers Code of Conduct 2014 (the Code).

[52] A statement from the appellant (9 February 2021) was sent with the complaint. She explained that she obtained the job of an assistant team leader in September 2018. When she first met the adviser on 3 October 2018, he advised that her job description and income met Immigration NZ's skilled migrant requirements as a retail manager. He was extremely confident with the application and never mentioned any obstacles that might be faced. They could never have imagined that, after a long wait of 18 months in the skilled migrant queue, Immigration NZ would decline the application because of the nature of her income. Yet, her income had never changed. Its nature was the same as when she first approached the adviser.

[53] They unsuccessfully appealed to the IPT. It was then they finally understood that Immigration NZ and the IPT were not wrong. Her income did not meet Immigration NZ's rules. It was the adviser who was wrong. She bore all the consequences of this. She suffered stress and lost about $10,000, as well as all the time over two years. She and her husband fully understand English and could have filled in the application forms themselves. They had been hoping for an outcome that, as it turned out, was meant to fail from the first minute they signed the agreement with the adviser. She never qualified as a skilled migrant, but applied due to the adviser's incompetence.

[54] The appellant alleged that during the 18 months waiting in the queue for an immigration officer, the adviser never updated her unless they requested him to do so. He should have given them updates every now and then to keep them in the loop. It was only when they rang Immigration NZ themselves that they found out an officer had been allocated to the application. There was information which they gave to Ms X, such as a change in the contact person in her employer, which was not passed on to the adviser. This delayed the officer for two weeks.

[55] In the two years that the adviser was engaged, he emailed them only six times, one of which was to end the service. She saw him in person only twice. He barely communicated with them over the phone either, unless she insisted that he do so. Ms X was the only person communicating with them 99 per cent of the time.

[56] The adviser was dishonest in insisting that the final service fee of $3,000 be paid. When they first met him, they were told it would not be paid if the visa was not granted. When they were asked for payment, Ms X called her to say that they would not be required to pay. The adviser emailed saying that because of uncertainties caused by

COVID-19, he would waive the fee. Once they made the complaint, the adviser reversed the favour to them and asked for payment.

[57] The appellant stated that the total amount of money they had lost was:

Service fee	$5,500
Immigration NZ fees	$3,240
IPT fee	$ 700
Police certificates	$ 500

[58] According to the appellant, they had made a tremendous effort to get the documents for the application and then for the appeal to the IPT. After the visa was declined, it was extremely stressful for a very long time for her and her husband. This had an impact on her mental health.

[59] In an email to the Authority's investigator on 30 April 2021, the appellant stated that the adviser was "very confident" she qualified for residence and "he didn't mention any risks".

[60] On 11 June 2021, an investigator from the Authority rang the adviser and informed him that he had found instances of the unlicensed Ms X giving immigration advice, which was not permitted. There was a discussion about what was permitted. The investigator stated that this was a matter being brought to the adviser's attention.

Registrar's decision

[61] The Registrar wrote to the appellant on 11 June 2021 recording the determination that the complaint disclosed only a trivial or inconsequential matter and would not therefore be pursued, in accordance with s 45(1)(c) of the Immigration Advisers Licensing Act 2007 (the Act).

[62] It was alleged by the appellant that her title as an assistant team leader (not team leader) would not be sufficient for the visa application, but the Registrar noted that Immigration NZ had never raised her title as a concern.

[63] As for the appellant's remuneration, the structure appeared complex involving top-ups and clawbacks of income. While commission was involved, this was offset by the assured income she received.

[64] From the information available, it appeared to the Registrar that the adviser appeared to be competent in putting together the residence application and that he understood the process.

[65] The appellant had some risk which had increased significantly due to the effects of COVID-19. She had been demoted to travel expert with a corresponding reduction in income. On 21 September 2020, Ms X had emailed the appellant about challenging points with her application. The appellant was aware of issues affecting the industry and the impact that changes in her employment would have on the visa application. There was a risk that Immigration NZ could have raised other concerns or declined the application even if the remuneration was found to be satisfactory. The adviser addressed these in an email on 6 August 2020 by giving her a Plan B whereby her husband would obtain a qualification and become the principal applicant.

[66] It appeared to the Registrar unlikely that if she had applied for residence herself, the outcome would have been any different.

[67] The adviser's fees were quoted as $8,500, plus Immigration NZ's disbursements of $3,000, totalling $11,500. The adviser waived the final instalment of $3,000 after the visa was declined and although she was later required to pay that instalment, she did not do so and there had been no follow up action. The adviser's fees appeared to be reasonable.

[68] The communication from the adviser appeared to be adequate, as there were long periods when there was no update or progress on the application by Immigration NZ. The Authority found records of the adviser contacting Immigration NZ regularly for updates.

[69] It was acknowledged by the Registrar that Ms X appeared to be the main point of contact, but this was not necessarily a breach of the Code. The Tribunal had previously stated that unlicensed individuals were permitted to undertake clerical work, which could include updating clients and communicating regarding a number of matters, so long as they did not provide immigration advice. Immigration NZ records showed that the adviser had contacted the agency for an update in July 2020 and again on 18 September 2020 to introduce himself to the officer. He had been making enquiries as to the status of her application around that time.

[70] The Registrar's review had led him to conclude that there were potential breaches of cls 1 and 3(c) of the Code in that Ms X appeared to be providing immigration advice. These instances were analysed in the letter by the Registrar. It appeared that certain communications constituted immigration advice and should have come from the adviser. It was noted that the adviser was included in some of the emails, so potentially the advice could have come from him and been passed on to Ms X.

[71] The apparent breaches of cls 1 and 3(c) were diminished by a number of factors:

(1) the appellant was aware of the identity of the licensed adviser who had engaged directly with her;

(2) the limited immigration advice given by Ms X appeared to be accurate; and

(3) the Tribunal had stated that activities going beyond clerical work did not cross the threshold justifying a disciplinary process if done on isolated occasions.

[72] Finally, the Registrar informed the appellant in the letter that it had been reiterated to the adviser that unlicensed individuals were only permitted to undertake clerical work.

JURISDICTION AND PROCEDURE

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

[74] 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.

[75] 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).

[76] 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).

[77] 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.

[78] The Tribunal issued directions on 24 June 2021 setting out a timetable for submissions.

Submissions of the appellant

[79] In her letter of 15 June 2021, the appellant says that once she received the IPT's decision, she understood that payment by commission was excluded from the calculation of remuneration. She accepted Immigration NZ's decision that her pay structure did not qualify as a skilled migrant and for that reason the application failed. However, the adviser had assessed her work contract and was fully aware of the commission before she had signed his service agreement. He had advised that it was acceptable and would be considered part of the remuneration. He said that her employment met the remuneration requirement to be recognised as skilled employment, so she started the skilled migrant visa application.

[80] According to the appellant, the Registrar had said that she might not have achieved residence, even if her remuneration was satisfactory. However, no-one could determine what would happen if the remuneration was satisfactory. What is known is that the visa was declined because of the nature of her remuneration. The immigration instructions clearly exclude commission. The error could have been avoided if the

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

adviser was competent. They are not experts in immigration law and this is why they paid the adviser their hard earned salary to give them professional advice.

[81] It is contended that the Registrar did not respond to the fact that they would not have gone ahead if they had been told at the time of the application that commission was excluded. Her pay structure was clearly written in the contract. He never picked up the issue that payment by commission was excluded, as a result of which they went ahead and paid $10,000 in fees and wasted more than two years' time in the process.

[82] The adviser had told her that while a successful outcome could not be guaranteed, based on the information in the application, there should not be an issue unless exceptional circumstances arose. They would not have submitted an application with no chance of success.

[83] The appellant responded to the Registrar's submissions on 15 August 2021. She repeats her contention that the Registrar did not answer her main complaint, which is that the adviser was incompetent because he failed to understand the remuneration criteria clearly written in the immigration instructions. Her income had a base and commission structure, but commission was specifically excluded. This was clearly written in her employment contract, available to him since the first day she approached the adviser. The adviser was super confident and did not make her aware of the risks prior to signing the service agreement. She would not have spent the time, money, effort and hope for the visa application, knowing there was a risk it would fail.

Submissions of the Registrar

[84] Ms Brown, counsel for the Registrar, filed submissions dated 19 July 2021. It is submitted that in reaching a decision not to refer the complaint to the Tribunal, the Registrar considered each issue identified by the appellant. He also considered whether there were other potential grounds of complaint that had not been raised.

[85] The Registrar identified potential breaches of cls 1 and 3(c) of the Code but concluded, based on the information, that a warning would be sufficient to address them. That warning was given during a telephone conversation between the investigator and the adviser on 11 June 2021. It concerned the unlicensed immigration advice given by Ms X. The adviser was told to read the decision of the Tribunal sent to him and to discuss it with other employees. The potential breaches of the Code were diminished by the matters set out in the Registrar's letter.

[86] It is submitted the complaint was properly investigated and rejected by a specialist decision-maker based on a full assessment of the relevant information.

[87] In support, there is an affidavit from Simon Herman van Weeghel, a senior investigator with the Authority (sworn 15 July 2021). He sets out the documents reviewed during the investigation, as well as the steps he took. In particular, Mr van Weeghel noted that the adviser's "Work Flow Log" showed that the adviser had engaged with the file extensively. The investigator also considered that the appellant was aware from the outset of the risks involved, as she had consulted with other licensed immigration advisers who declined to act because her visa application was not likely to be successful. He repeats the conclusions set out in the Registrar's letter.

ASSESSMENT

[88] The gravamen of the appeal to the Tribunal is that the visa application was declined on the basis of the nature of the appellant's remuneration, which she points out was known at the commencement of the engagement with the adviser. While her job title and guaranteed remuneration were adversely affected by the COVID-19 pandemic, while she waited for Immigration NZ to assess the application, such matters were not the reason the application was declined. It failed because her remuneration was dependent on a retainer and commissions, which are expressly excluded by the agency's immigration instructions. Hence, the appellant contends, the adviser was negligent or incompetent.

[89] This was one of the main grounds of the appellant's complaint to the Authority, yet it has not been answered by the Registrar, as the appellant notes in her submissions to the Tribunal. The Registrar's decision of 11 June 2021 overlooks this ground.

[90] In respect of the appellant's remuneration structure, the Registrar says it was complex, involving top-ups and clawbacks, but those were offset by the assured income. That is correct, but the question not answered is whether the visa application should have been made at all, given that the remuneration structure appears on its face to be contrary to the immigration criteria.[2]

[91] Of course, if the appellant had been informed of the problem but nonetheless insisted on going ahead, then the adviser cannot be faulted. But it is the appellant's evidence that she was not advised of the risks. There was no written advice from the adviser, nor is there any record in his file notes of the appellant being warned of the risks prior to the application being filed.

[2] The appellant's remuneration included a retainer and commission, both of which are expressly excluded; see SM6.20.5.b.ii (excluding commission) and the IPT decision (18 January 2021) at [32]–[37].

[92] The adviser was certainly aware of the “income challenge”, as the file notes describe it. The adviser’s note of 3 October 2018 states that he explained his reasoning regarding her pay (referencing commission) and that she agreed with the logic. This begs the question as to what she was told about the immigration criteria for pay and therefore of the risks. Ms X sent an email to the appellant on 21 September 2020 identifying the recently reduced salary as a challenging point, but she made no mention of the underlying problem regarding the retainer or commission. In any event, that is too late as the expression was filed in November 2018 and the application was filed in February 2019. The appellant should have been notified of the risks then.

[93] Given the apparently fatal difficulty with the application due to the remuneration structure, an issue also arises as to whether any oral advice (if given at all) should have been put in writing.

[94] Aside from the statutory ground of complaint of negligence, there could be breaches of cls 1, 9 and 26(a)(iii)/(c) of the Code.

[95] The Tribunal is not stating that such ground or breaches have been made out, only that there is an evidential foundation for the appellant’s allegation, which has not been investigated.

[96] As for the other matters raised by the appellant in her complaint to the Authority, I agree with the Registrar’s decision.

[97] The fees appear to be reasonable and the adviser seems to have appropriately abandoned payment of the last instalment.

[98] I accept that the communication from the adviser and Ms X seems adequate. The adviser cannot be blamed for Immigration NZ’s inordinate delays.

[99] It is my view that the unlicensed Ms X inappropriately undertook “immigration advice” work, as defined in the Act, but the Registrar correctly dealt with this transgression by way of a notification to the adviser.[3] The threshold for referring the complaint to the Tribunal on this ground is not reached.

OUTCOME

[100] The Tribunal should hear the complaint and directs the Registrar to prepare it for filing with the Tribunal. The complaint will be confined to whether the adviser identified

[3] I would not describe the investigator’s discussion with the adviser on 11 June 2021 (recorded in his notes) as a warning. If intended to be a warning, that word should be explicitly mentioned.

prior to filing the expression and/or visa application, the issue as to the appellant's remuneration (that any retainer or commission may be excluded by the immigration criteria) and appropriately warned the appellant as to the risks of the application.

ORDER FOR SUPPRESSION

[101] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.[4]

[102] There is no public interest in knowing the name of the adviser against whom the complaint is made, nor would that be fair at this stage of the process. This will be revisited when the complaint is heard by the Tribunal. Nor is there any public interest in knowing the identity of the appellant.

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

D J Plunkett
Chair

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