

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2021] NZIACDT 20

Reference No: IACDT 05/21

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **HT**
Complainant

AND **SARFRAZ SAIF SHAIKH**
Adviser

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 27 August 2021

REPRESENTATION:

Registrar: Self-represented
Complainant: No appearance
Adviser: P Moses, counsel

PRELIMINARY

[1] Mr Sarfraz Saif Shaikh accepted instructions from HT, the complainant, to urgently seek a work visa as the complainant's visa was due to expire in two days.

[2] The application was promptly prepared by Mr Shaikh and his staff. However, one of the supporting documents the complainant sent him was in the wrong format and could not be uploaded with the application. On the last day of the complainant's then current visa but after hours, Mr Shaikh told his staff to request the complainant to resend the document in the correct format. He did so within the hour, but Mr Shaikh did not become aware of this until three days later. No visa application was filed. The complainant therefore became unlawful in New Zealand and Mr Shaikh's remedial action was unsuccessful.

[3] A complaint to the Immigration Advisers Authority (the Authority) by the complainant has been referred by the Registrar of Immigration Advisers (the Registrar) to the Tribunal. It is alleged Mr Shaikh breached the Licensed Immigration Advisers Code of Conduct 2014 (the Code).

[4] The essential issue is whether the breaches of the Code, admitted by Mr Shaikh, reach the threshold requiring a formal disciplinary decision against him.

BACKGROUND

[5] Mr Shaikh, a licensed immigration adviser, is a director of Immigration Advice New Zealand Ltd (Immigration Advice), of Auckland.

[6] The complainant is a national of India who arrived in New Zealand in 2015 to study, but had been working lawfully from 2017. By 2020, his work visa was due to expire on 25 September 2020. Mr Shaikh was aware of this as he had acted for him on an earlier application.

[7] The complainant secured a new job as a Personal Assistant and informed Mr Shaikh on about 10 August 2020. Mr Shaikh advised changes that needed to be made to the advertisement.

[8] Both the complainant and the new employer sent relevant documents to Mr Shaikh on 22 September 2020.

[9] Not later than 23 September 2020, the complainant contacted Mr Shaikh to apply for another work visa. The complainant signed Immigration Advice's services agreement

on the same day. Mr Shaikh signed on an unknown date. Mr Shaikh agreed to process a work visa application. The fee of \$1,725 was paid on 23 September.

[10] An application was created online immediately by a staff member of Immigration Advice.

[11] On 24 September 2020 at 4:35pm and again at 4:37pm, the complainant emailed further supporting documents to Mr Shaikh and two of his staff. He said all the documents were in PDF format. Mr Shaikh was asked to check that the advertisement was alright or whether it needed to be edited.

[12] Mr Shaikh reviewed the documents in the evening of Friday, 25 September 2020, the day the visa would expire. He noticed that one of the mandatory documents (the advertisement) was not in the required PDF format. At 7pm, he asked a staff member to ring the complainant and tell him it would have to be resent. She did so.

[13] Mr Shaikh says he waited until 7:30pm for the document but, as it did not arrive, he closed his laptop for the night.

[14] At 7:49pm that evening, the complainant emailed the requested document, in the correct format, to the employee who had rung him.

[15] It was not until Monday, 28 September 2020, that Mr Shaikh saw the missing document sent by the complainant.

[16] Mr Shaikh sent an email to the complainant on 29 September 2020 advising that the visa application had not been filed. He set out the circumstances concerning the advertisement sent in the wrong format. As the complainant did not hold a valid visa, he offered two remedial options and to meet to discuss them:

1. Section 61 request at no cost;¹ and
2. Refund of all fees, including that of Immigration New Zealand (Immigration NZ) paid in advance.

[17] An updated services agreement (signed by Mr Shaikh) was sent to the complainant to cover the s 61 application, recording that the fees (professional – \$1,725 and Immigration NZ – \$495) had already been paid.

[18] On 30 September 2020 at 7:24pm, Mr Shaikh emailed the draft s 61 request to the complainant for his approval. He said that Immigration NZ's fee of \$410 was payable

¹ A discretionary visa pursuant to s 61 of the Immigration Act 2009.

only if the request was granted. The complainant replied at 7:55pm approving the request.

[19] On 1 October 2020, Mr Shaikh sent the s 61 request by email to Immigration NZ. He explained the circumstances of the missed visa application in some detail. The visa application had been prepared and it was not intentional that it was not filed before the then current visa expired.

[20] Immigration NZ sent a letter to the complainant on 6 November 2020 notifying him that the s 61 request was refused. No reason was given (nor is one required). He was advised he was unlawfully in New Zealand and would be liable for deportation if he did not leave.

[21] Mr Shaikh advised the complainant of the decision on the same day. He set out two options:

1. File an appeal to the Immigration and Protection Tribunal; or
2. Travel overseas and file a new application.

COMPLAINT

[22] On 9 November 2020, the complainant made a complaint against Mr Shaikh to the Authority. He alleged negligence and dishonest or misleading behaviour.

[23] According to the complainant, he sent all the documents to Mr Shaikh on 24 September 2020, but heard nothing until 7pm on the 25th when a staff member rang to say the advertisement could not be opened. He said he would resend it. He did so at 7:49pm and rang to confirm, but no-one picked up the phone. It was not until 29 September that he received an email to say the application had not been made.

[24] The complainant said he wanted to take action, as he had to apply under s 61 as a result of Mr Shaikh's negligence. Furthermore, he was not given a refund, yet no fee was payable under s 61 if the visa was declined.

[25] The Authority formally wrote to Mr Shaikh on 19 March 2021 to give him details of the complaint and invite his explanation.

Explanation from Mr Shaikh

[26] Mr Moses, counsel for Mr Shaikh, replied to the Authority on 15 April 2021. Mr Shaikh accepted that he had made two mistakes which could be deemed breaches of cl 1 of the Code.

[27] The complainant's application was not lodged because the adviser had not noticed for 24 hours that a mandatory document could not be uploaded on the Immigration NZ portal. The delay had to be seen in light of the tight time frame, as Mr Shaikh had only been instructed two days before the visa was due to expire. The complainant contributed to the problem by leaving his instructions to the last minute. It was acknowledged though that Mr Shaikh accepted the instructions knowing of the urgency. The complainant's possible tardiness was not a defence to Mr Shaikh's obligation under cl 1 to exercise diligence and due care.

[28] The complainant also contributed to the problem by sending the document in the wrong format. Another unfortunate error by him was that he emailed the correct document only to a staff member (who had telephoned him earlier) and not also to Mr Shaikh. While the latter had shut his laptop to attend his daughter's birthday party and lost sight of the matter, there was a significant chance he would have been alerted to the incoming email by his smart watch or phone.

[29] According to Mr Moses, it was apparent that Mr Shaikh had acted professionally and diligently once he realised the filing deadline had been missed.

[30] Mr Shaikh also conceded that, once the s 61 request was declined, he ought to have refunded the \$495 retained for Immigration NZ's s 61 fee. This was an oversight. It should be recalled that the complainant did not ask for a refund, so Mr Shaikh was not given a chance to remedy his oversight. However, this would be remedied without delay if the complainant provided his bank account details.

[31] The key question was whether the matter required a disciplinary consequence. Both of the mistakes could be characterised as administrative errors or simple oversights. In saying that, it was acknowledged that the consequences for the complainant were significant. His visa expired and he became unlawful in New Zealand. It was necessary to recall though that the intended visa application was not certain to be approved. It was not a very specialised role he was seeking.

[32] Mr Moses noted the Tribunal's recognition that a simple mistake had to be treated differently from a professional error of judgement. Mr Shaikh was not unaware of his professional obligations, nor had he misunderstood his duty. This was a service delivery

failure, rather than professional negligence. His conduct did not cross the disciplinary threshold. Counsel identified a number of decisions of the Tribunal where a breach of the Code had occurred, but it was found that referral to the Tribunal was not required.

[33] Furthermore, Mr Shaikh had taken steps to ensure that the errors would not occur again. He is entitled to credit for adopting a constructive approach.

[34] A supporting statement (14 April 2021) from Mr Shaikh was provided to the Authority. He acknowledged that he had previously acted for the complainant and had remained on standby to assist him with the further visa application. It was accepted by Mr Shaikh that a visa application was not lodged before the expiry of the complainant's then current visa, due in a significant part to an oversight by Mr Shaikh. He set out the circumstances, noting that he was hugely busy at the time. Had the email been sent to him, he would have seen it on his devices. The employee who telephoned the complainant did not have access to her emails after hours. In any event, he accepted that if he had earlier noticed the missing document and given the complainant more time, the application may have been lodged in time.

[35] Mr Shaikh additionally accepted an oversight in not refunding the \$495 being held, when the s 61 request was declined. The complainant did not remind him, instead making a complaint to the Authority three days later. It would be refunded as soon as the complainant gave his bank account details.

[36] Mr Shaikh said he was dismayed by the errors and had been forthright in his communications with the complainant and Immigration NZ.

[37] In his statement, Mr Shaikh set out the changes he had made to his practice, as a result of what he had learned from the events. This included a new software system which highlighted crucial applications. A staff member had also moved into a quality assurance role to focus on deadlines. He took his professional obligations very seriously. He asked that his track record be considered when deciding whether the gravity of his mistakes warranted a referral to the Tribunal.

Complaint referred to Tribunal

[38] A statement of complaint was referred by the Registrar to the Tribunal on 30 April 2021. It alleges that Mr Shaikh breached the Code in the following respects:

- (1) leaving it to the evening of 25 September (the day the complainant's visa would expire) to check the documents and then failing to check if the

missing document had been sent, thereby breaching the obligation in cl 1 to be professional, diligent and to exercise due care, and

- (2) failing to refund the fee retained for Immigration NZ, thereby breaching the obligation in cl 1 to be professional, diligent and to exercise due care.

JURISDICTION AND PROCEDURE

[39] 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.

[40] The Tribunal hears those complaints which the Registrar decides to refer to the Tribunal.²

[41] The Tribunal must hear complaints on the papers, but may in its discretion request further information or any person to appear before the Tribunal.³ It has been established to deal relatively summarily with complaints referred to it.⁴

[42] 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.⁵

[43] The sanctions that may be imposed by the Tribunal are set out in the Act.⁶ The focus of professional disciplinary proceedings is not punishment but the protection of the public.⁷

² Immigration Advisers Licensing Act 2007, s 45(2) & (3).

³ Section 49(3) & (4).

⁴ *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376 at [93].

⁵ Section 50.

⁶ Section 51(1).

⁷ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151].

[44] 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.⁸

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

[46] There are no submissions from the complainant.

[47] There is a statement of reply (31 May 2021) from Mr Moses. He repeats his submissions made previously to the Registrar. The underlying facts are not disputed. Mr Shaikh has accepted from the outset that he made mistakes. He recognised his role in the missed deadline and offered a resolution. The refund of \$495 had been made to the complainant.

[48] It is submitted that the errors were service delivery failures, which did not require a disciplinary response. It is somewhat contrived for the Registrar and the complainant to criticise Mr Shaikh for not making the refund earlier, given that the latter did not raise the matter with him. But as notified by Mr Shaikh, he has now adopted a process aimed at ensuring that refunds are not overlooked.

[49] The errors of Mr Shaikh were not failures to understand his obligations, or the immigration law or policy applicable. They were not errors of professional judgement, but simple oversights. But it is acknowledged that the consequences were significant.

[50] It is to be remembered that there was no assurance a work visa application filed on time would have succeeded.

[51] It is recognised by the Tribunal many errors and mistakes are too trivial to warrant an adverse disciplinary finding. A simple mistake of a clerical nature is treated differently from a professional error of judgement. While Mr Shaikh's conduct could be described as a breach of cl 1 of the Code, it does not cross the disciplinary threshold. Of critical importance is that he recognised the error (waiting 24 hours to check the documents), immediately informed the complainant and then did what was practically possible to remedy the mistake. His response was professional and ethical.

[52] A letter from Mr Shaikh to Mr Moses (31 May 2021) was produced. He explains the new operational "CRM" system set up by Immigration Advice, including monitoring expiring visas and fees pending or refundable.

⁸ *Z v Dental Complaints Assessment Committee*, above n 7, at [97], [101]–[102] & [112].

[53] No party requests an oral hearing.

ASSESSMENT

[54] 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.

(1) *Leaving it to the evening of 25 September (the day the complainant's visa would expire) to check the documents and then failing to check if the missing document had been sent, thereby breaching the obligation in cl 1 to be professional, diligent and to exercise due care*

[55] The visa application had to be filed before midnight on 25 September 2020, which was when the complainant's visa would expire. After that deadline, he would be unlawful in this country and would be required to leave. No visa application could be made, though he could request a discretionary visa under s 61. There is no entitlement to a s 61 visa and no reason has to be given for a decline. The complainant's immigration status would become precarious.

[56] Mr Shaikh knew these consequences.

[57] Yet, when the complainant sent the supporting documents to Mr Shaikh and his staff on 24 September (in the late afternoon), one day before the visa expiry, Mr Shaikh did not attend to the application until the early evening of the date of expiry. It is too late. A diligent adviser exercising due care would have assessed the documents much earlier on the 25th, to allow for the very circumstance which happened, namely that one or more documents would not be satisfactory.

[58] Mr Shaikh finally made the assessment, noticed a document in the wrong format and promptly instructed his staff to phone the complainant. She immediately did so. But he then compounds his tardiness in notifying the complainant of the faulty document, by shutting off his laptop 30 minutes later and forgetting about him to attend a private function. A diligent adviser exercising due care would have checked during the evening to see if the complainant had sent the document.

[59] I take into account that Mr Shaikh's employee had been told by the complainant that the document would be resent immediately. I do not know whether the employee told Mr Shaikh of the complainant's response. If she did not, he should have checked

with her as to the response. In other words, he either did know or should have known that the document was to be sent that evening.

[60] Even if I give Mr Shaikh the benefit of the doubt about waiting during the evening for his smart watch or mobile phone to 'ping' him regarding an incoming email, he should have contacted the complainant later in the evening to enquire as to the whereabouts of the document which the complainant had undertaken to resend.

[61] It is not material that Mr Shaikh was very busy at the time. Clients will not know this. It is for Mr Shaikh to regulate his business so he and his staff can manage all their work in a professional way.

[62] Nor do I accept that the complainant contributed to his misfortune. Mr Shaikh was not instructed at the last moment on 22 or 23 September, but was "on standby" from about 10 August 2020.⁹ He was already familiar with the complainant's immigration matters. The complainant inadvertently sent a document in the wrong format only 24 hours before the deadline (if measured by ordinary business hours), but that was ample time for Mr Shaikh to file the online application. I appreciate that the complainant was but one of many clients of Mr Shaikh, but the latter was aware of the urgency of the complainant's application and hence entitled to some priority.

[63] The complainant's failure to copy the resent document to Mr Shaikh is immaterial. He was not told to do so. Mr Shaikh is responsible for his employees. The employee who rang the complainant plainly did not tell him that she would not have access to her emails after hours and that he should send it direct to Mr Shaikh. It is hardly surprising that the complainant would resend the advertisement (after hours) to the employee who asked him (after hours) to resend it. Unless he was told otherwise, he would naturally expect that employee to be waiting for his response, given the obvious urgency. It is Mr Shaikh who is responsible for these loose arrangements.

[64] Mr Shaikh was not professional or diligent, nor did he exercise due care. He has breached cl 1 of the Code. It is to his credit that he has always accepted this.

[65] The real issue is, as Mr Moses raises, whether this transgression reaches the threshold warranting an adverse disciplinary finding.

⁹ Statement of Mr Shaikh (14 April 2021) at [11].

[66] It is well established that a mistake or even breach of a professional rule does not necessarily justify a formal disciplinary action. A failure which is seen as mere inadvertence or an administrative oversight would not warrant action.¹⁰

[67] Mr Moses notes that the Tribunal, in a number of cases, has exercised its discretion to dismiss complaints or appeals, notwithstanding breaches of the Code. A general point to make in response is, as Mr Moses will readily acknowledge, that each case depends on its own unique circumstances.

[68] In *KXBK*, the Tribunal largely declined to assess whether the adviser had been negligent or breached the Code.¹¹ It found the adviser to have been unprofessional in one matter, but it was not satisfied as to the honesty of the client.

[69] In *TOD*, the adviser omitted to send information to Immigration NZ.¹² As Mr Moses notes, the case bears similarities to the present one. But, unlike the multiple failures of Mr Shaikh, it was an isolated oversight.

[70] In *KG*, the adviser incorrectly advised a client, but the issue concerned vocational registration for which the adviser and client share responsibility.¹³ In any event, the application (which was taken out of the adviser's hands) was ultimately successful. There were other heads of complaint, which also did not justify a disciplinary process. This included a breach of the obligation to have a refund policy, but when the complaint was made, the refund was made.

[71] In *TB*, there was a lack of due care by the adviser in considering whether the client's qualification attracted sufficient points.¹⁴ But it was found not to justify a referral to the Tribunal, as the client had been made aware of the correct criteria and should have known his qualification was inadequate.

[72] Mr Moses appropriately draws my attention to these decisions where the Tribunal has accepted that professional breaches did not warrant adverse disciplinary decisions.

[73] However, I do not regard Mr Shaikh's conduct as mere inadvertence, administrative oversight or as minor. There were multiple failures. The first was waiting more than 24 hours to assess the documents and alert the complainant to the missing document. Given the urgency, he should have done this earlier in the day. Next, he made no arrangement with the complainant and/or his staff as to how the correct

¹⁰ *Liston v Director of Proceedings* [2018] NZHC 2981 at [45].

¹¹ *KXBK v GVH* [2019] NZIACDT 74.

¹² *TOD v Registrar of Immigration Advisers* [2020] NZIACDT 31.

¹³ *KG v Registrar of Immigration Advisers* [2021] NZIACDT 5.

¹⁴ *TB v Registrar of Immigration Advisers* [2021] NZIACDT 6.

document would be received after hours in time. Finally, he turned off his laptop and forgot about the complainant's imminent deadline after only 30 minutes.

[74] To those failures, I would add the serious consequences for the complainant. He became unlawful in New Zealand, though I accept Mr Moses' point that the visa application may not have been successful anyway.

[75] I take into account Mr Shaikh's professional response to his errors. While he has made no apology, he was forthright with the complainant and Immigration NZ. He correctly and promptly assessed the complainant's options. He refunded the disbursement monies held for the visa application (dealt with below). Importantly, he has learned from the complaint and made changes to his internal processes to prevent any repeat.

[76] Nonetheless, I find that Mr Shaikh's breach of cl 1 exceeds the disciplinary threshold and warrants a formal decision. The first head of complaint is upheld.

(2) *Failing to refund the fee retained for Immigration NZ, thereby breaching the obligation in cl 1 to be professional, diligent and to exercise due care*

[77] When the deadline passed and it became too late to file the visa application, Mr Shaikh did not refund the \$495 held by him for Immigration NZ's fee on that application. This was done by consent as the complainant instructed him to file a s 61 request. Immigration NZ's fee for the request was \$410, though this would only have been payable if the request was successful.

[78] The s 61 request was refused on 6 November 2020. This should have immediately triggered a refund of the \$495 being held by Mr Shaikh. However, he overlooked doing so. Three days later, on 9 November 2020, the complainant made a complaint to the Authority, which included the failure to make a refund.

[79] When the failure to make a refund was brought to Mr Shaikh's attention by the Authority in February 2021, and again in its formal letter to him on 19 March 2021, he acknowledged his failure and sought the complainant's bank account details to make the refund.¹⁵ The refund was duly made on 22 April 2021.

[80] The Registrar contends this is a breach of the obligation in cl 1 of the Code to be professional, diligent and to exercise due care. Mr Moses accepts that the failure to refund the monies held (for a purpose which has failed) is a breach of cl 1. He submits

¹⁵ Counsel's letter (15 April 2021) to the Registrar.

though that this error was merely an administrative oversight which does not warrant disciplinary action. The complainant at no time requested the refund, instead making a complaint three days after the refund became payable.

[81] Mr Shaikh's omission to refund the money was not the conduct of a professional, diligent adviser. He should have realised the obligation to immediately refund the monies being held, or have had in place a system which alerted him or his accounts staff to the need to do so. However, I agree with Mr Moses that this breach does not justify disciplinary action in this case. The complainant only had to ask for the money. Instead, he immediately incorporated it into a complaint made, not to Mr Shaikh, but to the Authority in the first instance. Once alerted to it, Mr Shaikh duly refunded the money.

[82] The second head of complaint does not reach the disciplinary threshold and is dismissed.

OUTCOME

[83] I uphold the first head of complaint. Mr Shaikh has breached cl 1 of the Code, in that he was neither professional nor diligent and nor did he exercise due care, in missing the deadline to file the complainant's visa application.

SUBMISSIONS ON SANCTIONS

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

[85] 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.

Timetable

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

- (1) The Registrar, the complainant and Mr Shaikh are to make submissions by **20 September 2021**.
- (2) The Registrar, the complainant and Mr Shaikh may reply to submissions of any other party by **4 October 2021**.

ORDER FOR SUPPRESSION

[87] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.¹⁶

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

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

D J Plunkett
Chair

¹⁶ Immigration Advisers Licensing Act 2007, s 50A.