IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2021] NZIACDT 22

Reference No: IACDT 08/21

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

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 3 September 2021

REPRESENTATION:

Appellant:	Self-represented
Registrar:	M Hall, counsel

INTRODUCTION

[1] This is an appeal against the decision of 2 June 2021 made by the Registrar of Immigration Advisers (the Registrar), the head of the Immigration Advisers Authority (the Authority). He decided not to pursue a complaint made by TC (the appellant) against a licensed adviser, EI (the adviser). The Registrar considered that it disclosed only a trivial or inconsequential matter.

[2] The adviser wrongly advised the appellant that a residence application could be made offshore. By the time the adviser discovered the mistake the appellant had left New Zealand. He chose not to return, so the application was not made. The appellant states that the adviser's negligence deprived him of the chance to live in New Zealand.

[3] The essential issues are whether it was the adviser who caused the loss of the chance to seek residence and whether the adviser's mistake reaches the threshold justifying disciplinary action.

BACKGROUND

[4] The appellant is a national of the United Kingdom who was employed in a senior position by a prominent arts organisation (the organisation). He desired to reside in New Zealand.

[5] The adviser is a director of [company], of Auckland. At the relevant time, he was an employee or contractor to another company (the company).

[6] The appellant accepted employment with the organisation in about October 2017. He was issued with a work visa (described by the adviser as a Work to Residence – WTR – visa) by Immigration New Zealand (Immigration NZ) on 16 November 2017, valid until 16 February 2018. He filed an expression of interest on his own behalf in the skilled migrant category of residence, before arriving in New Zealand. It was declined by Immigration NZ in November 2017, as his employment was not considered fulltime.

[7] The appellant arrived in New Zealand in December 2017 and started work with the organisation on 23 January 2018.

[8] In November 2018, the organisation granted the appellant leave without pay from January to September 2019. He left New Zealand with his family.

[9] Also in November 2018, the appellant first sought advice from the adviser about residence and received some preliminary advice.

[10] The appellant next contacted the adviser on 21 April 2019, informing him that he would return to New Zealand and the organisation in early October. He wanted to know whether 23 January 2020 was the earliest date he could apply for residence, and whether he would have to stay in New Zealand after returning in October and also after they had applied until it was granted.

[11] On 16 May 2019, while in London, the appellant signed a service agreement with the company. For a fee of $600 (plus GST), the adviser would represent the appellant in relation to a work (accredited employer) visa and, in particular, "on the implications of a leave of absence on the appropriate time to apply for Residence".

[12] On 29 May 2019, the adviser advised the appellant by email that his absence from New Zealand until September would not result in the 24 months period starting again. The policy required both the holding of a work visa and employment for 24 months. While out of New Zealand, he remained on contract. The time spent overseas would not be deducted.

[13] The adviser sent an email to the appellant on 5 June 2019 telling him that it would take five months to issue residence. He could be granted permanent residence or issued with a visa having travel restrictions, at the discretion of Immigration NZ.

[14] On 13 June 2019, the appellant asked the adviser whether his application would be affected by resigning after making the application, or would he have to stay employed until a decision was made.

[15] On 18 June 2019, the adviser told him that, having lodged the application after 24 months, he could resign. However, he would need another visa until a decision was made. He had to have a valid visa when the decision was made.

[16] The appellant then asked on 27 June 2019 whether, if offered another job, he would have to remain with the organisation until residence was granted.

[17] The adviser responded on the same day, stating that "after 24 months and before residence" it would not matter, though he would have to apply for a visa "between times". He could change jobs provided it was to another accredited employer with at least equal pay.

[18] On 11 November 2019, the appellant told the adviser he had been back in New Zealand for two months. The organisation had made it very clear to him that they did not want him. He had decided to resign. But he wanted to go ahead with residence. He

believed he would be eligible on 23 January 2020. The next day he informed the adviser he commenced work with the organisation on 23 January 2018.

[19] On 16 November 2019, the appellant said to the adviser he wanted to notify the organisation of his resignation (from early February) in writing. But he had to be sure that it would not affect his visa application, so the adviser was asked to confirm this.

[20] The adviser replied on the same day to say that once the appellant's resignation was effective, he would be without a visa. He would have to leave the country until residence was decided.

[21] The appellant immediately responded to state they were planning to go back to the United Kingdom in February and wait for the residence visa to hopefully come through.

[22] On 19 November 2019, the appellant asked the adviser again whether his written resignation in February would affect his application.

[23] The adviser responded that day, telling him that the only concern had been whether the appellant's unpaid leave would be accepted as part of the 24 months. The answer was that it would. Hence, so long as he ceased employment 24 months from the day he started, there would be no issue.

[24] On 24 November 2019, the appellant instructed the adviser to go ahead with the application. He had told the organisation he would be resigning on 1 February 2020.

[25] On 28 November 2019, while in New Zealand, the appellant signed a service agreement with the company. For a fee of $2,500 (plus GST), the adviser would represent him on an application for residence from work.

[26] There followed an exchange of emails between the appellant and the adviser about documents needed for the application.

[27] The adviser was asked by the appellant to put the application on hold, as his wife's mother had become ill and was having an operation. They were not sure of their movements.

[28] The appellant told the adviser on 17 December 2019 that they were travelling to Europe, leaving New Zealand on 12 January. They still wanted to apply for residence. He asked if the application could go ahead, if he (or they) returned before 23 January.

[29] On 18 December 2019, the adviser advised the appellant that he would need to be employed for 24 months, but there was no reason the application could not be lodged while he was out of New Zealand.

[30] In an email to the adviser on 10 January 2020, the appellant confirmed to the adviser that he could go ahead with the application. He was gathering the supporting documents.

[31] The appellant informed the adviser on 21 January 2020 that he was in Europe. He asked whether the adviser could begin the process after 23 January (by which time he would have had two years with the organisation). He had told them he would be resigning on 1 February.

[32] In an email to the adviser on 25 January 2020, the appellant stated that certain documents were on their way to him. He asked whether the application for residence was ready to go. His last day would be 1 February and he understood the application needed to be received before then.

[33] There was an exchange of emails on 27 January 2020 between the appellant and the adviser (not all have been copied to the Tribunal and those copied that are immaterial have been omitted from the record set out below).

[34] In the first (at 9:13am), the adviser informed the appellant that he could not apply for residence under the WTR process unless he was actually in New Zealand. He was asked when he was planning to return.

[35] The adviser sent an email (at 10:16am) to say it was his understanding that the appellant was returning to New Zealand. There was nothing in the residence guide about being present in New Zealand when applying, but the detailed policy required it. It was a mistake on his part.

[36] The appellant informed the adviser (at 11:20am) that he had not resigned, but he had told the organisation of his intention to do so on 1 February. He added (at 11:33am) that because he was in Europe, they would not hold his job open.

[37] The adviser replied (at 11:52am) noting that, as advised earlier, the appellant would need another visa once he left the organisation. That would require an offer of employment.

[38] The appellant then asked (at 12:23pm) why he would need another visa if he was not working there. He stated that the adviser had very clearly said he could apply for

permanent residence if he earned over a stipulated threshold and was employed for two years. If that was not the case, then the adviser had misinformed them. He pointed out that he was still employed by the organisation, so wanted to know why the adviser could not apply on their behalf.

[39] The adviser responded (at 12:50pm) reminding the appellant that the former had said on 18 and 27 June, that the appellant had to have a visa while the decision was being made on his residence application. But he would be visa-less once he left the organisation, so he would need a job offer and another work visa. The adviser acknowledged that he was mistaken about being able to lodge the application while out of New Zealand.

[40] According to the appellant (at 1:13pm), the adviser had stated twice that being away on sabbatical would not negatively affect his application, as he had been consistently employed for two years. He had understood that the key requirements were first, the salary and second, being employed for two years at the time of the application. But now he was being told that he could not lodge the application if not in New Zealand, so there was no point continuing. For the past month, they had been acting on the wrong information. The appellant thanked the adviser for admitting his mistake and appreciated that it was a "slightly complex, stop-start case".

[41] The adviser replied (at 3:23pm) to state that in 20 years, he had never made such an error before. He had dealt with hundreds of WTR applications, but never one where the applicant had been out of the country. If the appellant obtained an offer of employment in the near future, he could still possibly meet the requirements. Despite the work visa issue, he accepted that his error had contributed to the confusion. He was prepared to compensate him for expenses.

[42] On 6 February 2020, the appellant said in an email to the adviser that he was upset about the adviser not using the word "sorry", apart from being robbed of the chance to live in New Zealand, a country they deeply loved. He wanted to be reimbursed for the fee paid ($690) and other expenses, a total of $1,367.

[43] The adviser refunded $1,367 to the appellant on about 11 February 2020. The full text of the adviser's email of that date will be set out, as it is a major element of the complaint:

> Hi [appellant's given name],
>
> I am in receipt of your email. I will deposit the money to your account tomorrow. Funnily enough, I quite enjoyed dealing with the quite difficult circumstances your case presented from the outset. I wish you all the best for the future.

Complaint to the Authority

[44] On 14 March 2020, the Authority received a complaint from the appellant against the adviser.

[45] The appellant alleged negligence and incompetence. He sought the adviser's services for residence for him and his family. The adviser told him there were two key factors, being his salary (it was above the threshold) and his sabbatical (the adviser said it would make no difference as he remained constantly employed).

[46] The adviser also told him that he could travel outside New Zealand while the application was being processed and there was no need for him to be in the country at the time he applied.

[47] According to the appellant, his mother-in-law in Europe became sick and he came to realise that the organisation was not the job for him. He told the organisation he would resign from 1 February, allowing the adviser one week (from 23 January to 1 February) to file the application. They then booked travel to Europe.

[48] It was only then that the adviser informed him that he had been wrong. They would not be able to apply for residence from outside New Zealand. His incompetence had taken away the chance to live in the country they loved. This made them extremely upset and angry. The adviser admitted the mistake and refunded their costs. The appellant told him that an apology would be nice, but the adviser added insult to injury with his response that "[f]unnily enough" he "enjoyed" dealing with the appellant's difficult circumstances.

[49] The appellant considered that there was nothing funny about the clear instruction from the adviser, spending thousands on travel and planning their lives around that information, only to be told at the last minute that the information was wrong and he enjoyed their case. It was outrageous behaviour.

[50] The adviser had admitted his mistakes and reimbursed their costs. However, his tone and manner, as well as his complete failure to provide proper, truthful advice meant the case needed to be looked at carefully. The appellant said he had been denied the chance to apply for residence, though clearly satisfying the rules, due to the incompetence of the adviser. They had not been awarded any compensation. Ten thousand dollars would be fair. There had been no apology. The adviser's arrogant, patronising tone throughout the conversations had led to the complaint, mainly so he could be forced to think about how he wrote to clients in the future.

Explanation from adviser

[51] In his letter of 15 May 2020 to the Authority, the adviser accepted that he had provided incorrect advice.

[52] The adviser said he had first been contacted by the appellant in November 2018. His expression of interest had been declined. The appellant wanted to know whether the offer of employment by the organisation could result in a WTR visa as an alternative path to residence. His initial assessment was that it would. No further advice was sought.

[53] The adviser said he next heard from the appellant in April 2019 by which time he had obtained a WTR visa. He wanted advice about whether his leave of absence would affect the period of 24 months needed for residence. The adviser told him that provided he remained employed by the organisation, the absence would be included in the period. There were further questions in May and June about the effect of any resignation on his visa. He was told he could resign after 24 months, but he would need another visa until a decision was made.

[54] The final time the appellant approached the adviser was in November 2019. He had returned to New Zealand and would have to resign from the organisation. He said on 10 December he had to leave the country and asked for the application to be put on hold. The adviser explained to the Authority that, contrary to the advice earlier given to the appellant, he advised him on about 17 December that he would be able to lodge the application while overseas. But realising his mistake, the adviser said he corrected it on 27 January 2020.

[55] The adviser attached to his letter a timeline of his communications with the appellant.

Registrar dismisses complaint

[56] On 2 June 2021, the Registrar wrote to the appellant stating that the complaint disclosed only a trivial or inconsequential matter and would not be pursued.

[57] The Registrar did not consider the adviser's communications to breach the Code. His occasional delays were not excessive, nor did they have any material effect on the progress of the matter.

[58] However, the Registrar acknowledged potential breaches of the Code. The adviser had admitted giving the wrong advice about the appellant's ability to apply for

residence under the Talent (Accredited Employer) category while being offshore. The relevant immigration instructions at the time stated that applicants had to be in New Zealand at the time they lodged their application. This was a breach of the obligation in cl 1 to be diligent and exercise due care. Nor did the adviser's written service agreement provide for a refund, in breach of cl 19(k).

[59] These potential breaches were diminished by a number of matters, including:

1. It could not be established that the residence application would have been successful. The decision to resign would have left the appellant without a valid visa. He would therefore have needed to find new employment and a new visa. Furthermore, the effect of the pandemic and the lockdowns from March 2020 onwards may have impacted the processing and success of the application, due to Immigration NZ's delays. This could also have impacted on his ability to enter New Zealand.

2. The adviser realised his error prior to lodging the application and admitted it.

3. He refunded the fee and the appellant's costs.

4. The appellant had stated that he was not planning to apply for another visa and there were very few jobs in New Zealand fitting his skills.

JURISDICTION AND PROCEDURE

[60] The grounds for a complaint against a licensed adviser are listed 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 2014 (the Code).

[61] 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.

[62] 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).

[63] 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).

[64] 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.

[65] The Tribunal issued directions on 23 June 2021 setting out a timetable for submissions and supporting evidence.

Submissions of the appellant

[66] In his submissions of 14 June 2021, the appellant expresses strong disagreement with the Registrar's decision.

[67] It is contended that the false and inaccurate information provided by the adviser was responsible for the decision to leave New Zealand before applying for a visa. Had they been told they could only apply while in New Zealand, they would have stayed.

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

Hence, the failure to give them accurate information left them with zero chance of gaining residence. That is the only fact needing investigation.

[68] The Registrar's decision questions whether they would have got a new visa, but that is guesswork and irrelevant. Whether they choose to seek jobs or visas in the future has no relevance to the situation caused by the adviser.

[69] The appellant finished with what he regards as a very important point regarding attitude and professionalism. While mistakes are human, what is not forgivable is when a serious mistake is not followed by an apology, but an extraordinary arrogance in writing:

> Funnily enough, I quite enjoyed dealing with … your case…

[70] The adviser needed to be sat down and told that such glib writing lacked empathy for the situation he had created, single-handedly destroying their dreams. This was an appalling failure of professionalism and decency.

[71] The appellant replied on 3 August 2021 to the Registrar's submissions. He says that it is untrue that he resigned prior to applying for residence which left him without a valid visa. He was employed until 1 February 2020, according to the organisation. He was still in full employment when the application should have been made.

[72] Furthermore, the reason he had no visa is that it was the adviser's job to apply for one immediately after 23 January 2020, by which time he would have completed two years. This was not done because the information the adviser gave was wrong. The adviser had told them it was acceptable to apply from outside New Zealand.

[73] The appellant wants it to be clear that he was still employed at the organisation when he could have applied for residence.

[74] Further submissions were received from the appellant on 17 August 2021. He contends that it reflects poorly on the Authority that someone can act with negligence and incompetence and be absolved of any serious wrongdoing without punishment. This is about showing the Authority that advisers should have the humility to accept when things go wrong and to learn from that. Instead, the adviser wrote to say he "enjoyed" our case and never once offered an apology. The appeal is not about technicalities, but about how humans treat each other.

[75] The adviser has shown negligence and incompetence, as defined in the Cambridge dictionary, though the accusation is not that he is generally negligent or incompetent. He was wholly responsible for them being unable to apply for a visa. There

were a huge number of errors by the adviser, which are listed by the appellant in his letter. There is an eternity of difference between having a chance of a visa and having zero chance. Everything Mr van Weeghel says in his affidavit about resigning is wrong and immaterial (see later).

[76] Then, at the end, emphasises the appellant, there was the callous indifference to the hurt the adviser's failures had caused. His words were thoughtless at best, and cruel at worst. The appellant said he could accept a mistake, but not poor attitude where he is disrespected, such as not looking up basic facts or failing to apologise when a massive error is made.

Submissions of the Registrar

[77] Counsel for the Registrar is Mr Hall. In his submissions of 3 August 2021, counsel contends that the Registrar thoroughly reviewed the complaint and provided reasons for his conclusion. As for the lack of a refund policy, the adviser had since amended his service agreement to include this.

[78] In support, there is an affidavit from Simon Herman van Weeghel (3 August 2021), senior investigator with the Authority. He sets out the process and documents reviewed by him.

[79] Mr van Weeghel considered the adviser's client file, his communications and that he had been licensed for almost 10 years without a single complaint. He considered that, while the adviser made a mistake, that mistake did not amount to incompetence. As for negligence, the conduct was at the lower end of the spectrum, so finding a breach of cl 1 was more appropriate. However, this breach was diminished by the matters set out in the Registrar's letter. So, while the adviser had made an error, it could not be established that the application would have been successful.

[80] Nor was there anything in the adviser's communications suggesting that he had behaved unprofessionally.

ASSESSMENT

[81] It is admitted by the adviser that he was wrong when he advised the appellant he could apply for residence while outside New Zealand. It would appear that, by 23 January 2020, the appellant (and therefore also his family) met the requirements for a residence visa, though it may have been issued subject to travel conditions. I agree with the appellant that it is speculative for the Registrar to state that the application may

not have been successful. Clearly, the adviser did not think so (bar the presence offshore).

[82] Having been advised he could make the application from outside the country, the appellant and his family left New Zealand on about 12 January 2020. It was then intended that the application would be made after 23 January (by which time the appellant would meet the two years criterion) but before 1 February (when he would resign, and his work visa would cease).

[83] It was on 27 January 2020 that the adviser realised his mistake and informed the appellant. He would have to be in New Zealand when the application was made. He would also have to hold a work visa. As the visa he held was linked to the organisation, that meant staying with the organisation.

[84] The appellant says that advice meant the end of the application. He therefore had "zero chance" of residence. He and his family could not live in New Zealand. It was the adviser's wrong advice that caused the loss of the chance.

[85] I accept that the adviser was wrong and that the appellant acted on that wrong advice by leaving New Zealand with his family, but I do not accept that the wrong advice caused the loss of residence or the chance of residence. It is to be remembered that, as at 27 January 2020, the appellant had not actually resigned. He had merely indicated to his employer that he would do so, as from 1 February. The important fact is that he had not. He could simply have rescinded his intention and returned to New Zealand to make the application. The organisation may have been unhappy, but that is what the appellant would have been legally entitled to do.

[86] But he chose not to. I do not need to speculate on why. I merely note that he had gone to Europe because his mother-in-law was ill. But there was another issue as well. The organisation did not want him. Furthermore, the organisation may well be the only entity in this country that could employ a person of his unique, world-class talents. For whatever reason, I find that the appellant made a conscious choice not to return to New Zealand. It may not have been easy for him to return in practical terms and there would have been a cost, but the point is he could have returned, resumed his job and saved the application. There is no suggestion or evidence before me that the organisation had threatened or were intending to dismiss him.

[87] There is another relevant factor. The appellant had been wrongly told he could be outside New Zealand, but he had also been correctly advised by the adviser that he needed to hold a work visa and his resignation would end the visa linked to the

organisation. That advice was somewhat inconsistent with the advice that he could be outside the country. As the appellant queried (27 January 2020 at 12:23pm), why would he need a visa if he was outside New Zealand. However, whether inconsistent or not, the appellant knew that if he resigned, the application would be at an end unless he had another job and visa before then. The appellant therefore knew at the time he resigned, since he did not have another job and visa, that the application would fail. I do not know when that was, but it was after he had been told he had to be in New Zealand.

[88] The appellant did not lose the chance of residence when he left New Zealand as a result of the incorrect advice. Nor did he lose it when he notified his employer of his "intention" to resign before he departed New Zealand. He lost the chance when he resigned, instead of returning.

[89] However, that does not mean that the adviser's wrong advice was not a breach of a professional obligation. The Registrar found that this was a "potential" breach of the obligation in cl 1 of the Code to exercise diligence and due care. In my view, it is a clear breach of cl 1.

[90] The Registrar's decision does not deal with the statutory grounds of negligence and incompetence, but Mr van Weeghel in his affidavit says he considered it to be negligence at the lower end of the spectrum, not incompetence. I agree with his assessment. There has plainly been a breach of reasonable care, hence negligence. It is at the lower end, as it was corrected by the adviser before it became fatal. It does not amount to incompetence which requires more than an isolated mistake.

[91] As for the other "potential" breach of the Code, the adviser's failure to have a provision in his policy concerning refunds, I find that also to be a clear breach. But it caused the appellant no loss, as a refund was readily made to him.

[92] For various reasons (described by the Registrar as factors diminishing the potential breach), the Registrar did not refer the complaint to the Tribunal. It is not every professional breach which justifies a formal disciplinary process. The Registrar has a discretion whether to pursue conduct which amounts to a breach. That is reflected in the options he has as to the outcome of a complaint in s 45(1) of the Act.

[93] Given that the adviser eventually gave the correct advice and admitted his mistake before it was too late for the application, and refunded the fee as well as certain other costs, I agree with the Registrar that the threshold justifying a reference to the Tribunal has not been reached.

[94] The appellant points out other mistakes made by the adviser, but none were material to the putative application. They were all corrected in good time.

[95] This brings me to what is clearly the appellant's real motivation for this complaint. It is the adviser's failure, almost wilful refusal, to apologise for the mistaken advice and the offending sentence in the email of 11 February 2020.

[96] I have considerable sympathy for the appellant in this regard. His complaint is well put, albeit made with more passion than I might have chosen. It would have been so easy for the adviser to apologise. He had readily admitted his mistake, so it is hard to fathom why he did not say sorry when invited to do so on 6 February. While I agree that the sentence in the email of 11 February was thoughtless and glib, I doubt very much that the adviser was deliberately trying to be hurtful. He simply did not sit back to consider how his 'throw-away line' would appear to someone who saw his dream of residence in New Zealand slipping away. The adviser's erroneous advice had contributed to the appellant's situation, even though I have found it did not cause the loss of residence.

[97] I do not propose to determine whether the communication is unprofessional in this case, as it could not justify a formal disciplinary process even if it was.

Conclusion

[98] The Registrar correctly concluded that the complaint did not warrant a formal disciplinary process.

OUTCOME

[99] The appeal is rejected.

ORDER FOR SUPPRESSION

[100] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.[2]

[101] There is no public interest in knowing the name of the adviser against whom the complaint is made, nor would that be fair given the outcome of the appeal.

[102] Nor is there any public interest in knowing the identity of the appellant.

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

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

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D J Plunkett
Chair