IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2021] NZIACDT 06

Reference No: IACDT 07/20

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

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 22 March 2021

REPRESENTATION:

Appellant:	Self-represented
Registrar:	J Perrott, counsel

INTRODUCTION

[1] This is an appeal against the decision of the Registrar of Immigration Advisers (the Registrar) of 2 November 2020, rejecting a complaint made by TB (the appellant) against ON, a licensed immigration adviser (the adviser).

[2] The appellant was advised by the adviser that he had sufficient points for residence. This was based on him having a level 7 qualification, but it transpired that it was only at level 6. The application was not therefore made, but by the time the adviser found out it was at level 6, the appellant had already paid and the adviser had done much of the work. The adviser did, however, make a partial refund.

[3] The appellant primarily alleges dishonesty, that the adviser took his money knowing he did not meet the criteria. The Registrar says the complaint does not disclose any of the available statutory grounds for complaint.

BACKGROUND

[4] These appeals are determined on the papers. The Tribunal has done its best from the documents provided to identify the relevant chronology.

[5] The adviser is a director of [company] of [city] (the adviser's company).

[6] The appellant is a national of Sri Lanka who first came to New Zealand in 2016 on a student visa, but has since held work visas. His current visa expires in April 2021.

[7] On 6 November 2019, the appellant signed a service contract with the adviser's company. For a fee of $5,175 (incl GST), the adviser would process a residence visa application in the skilled migrant category for the appellant. In addition, he would have to pay Immigration New Zealand's fees of $530 and $2,710. On the same day, the appellant paid $500 towards the fee.

[8] According to the adviser, the appellant told her at the first meeting that his New Zealand diploma was at level 7 in the NZQA table. The adviser accordingly calculated that he had sufficient points.

[9] On the following day, 7 November 2019, the appellant sent an email to the adviser noting that the long-term skills shortage list for a production engineer required a level 7 qualification. He asked her to explain this. She replied on the same day telling him that level 7 was for a bachelor's degree and he would also need a letter from Engineering New Zealand.

[10] The adviser says she exchanged about 20 emails and more than 50 Facebook chat messages with the appellant, relating to compiling an Expression of Interest (EOI), in the period from 7 November 2019 to 15 April 2020. This included advice as to whether the appellant's girlfriend could come to New Zealand.

[11] The appellant says the adviser asked him to pay Rs"2.00.000" (understood to be $4,210.53) on 26 January 2020. He paid this amount to her on 4 February.

[12] There is a text message from the adviser to the appellant on 5 February 2020 stating that the application had been completed and she was waiting for payment. He replied asking her to double-check. In a further text, possibly on the same day, the adviser informed him that he would have to pay the full amount after receiving the invitation to apply for residence.

[13] On the same day, 5 February 2020, the adviser sent a text to the appellant asking him whether his qualification was at level 6 or 7. He immediately replied it was at level 6.

[14] There followed text and email communications between them, together with a meeting, as they explored options for the appellant to gain residence in this country. According to the appellant, he was not aware he did not have sufficient points until 3 March 2020 (communication unseen by the Tribunal).

[15] On 12 March 2020, the appellant requested a refund, telling the adviser he was returning to Sri Lanka.

[16] The adviser sent a text to the appellant on 20 March 2020 explaining that she had proceeded on the basis that he had said his diploma was at level 7 and she had no reason to believe he would be wrong about that. The first step towards the residence application had already been completed by the time he said it was at level 6. She and the other employees had invested many hours in the EOI application and in providing advice to him. She could not therefore offer a full refund. The application did not come for free. Despite the significant amount of time spent on the application, it was acknowledged that it was not submitted so she was prepared to offer a refund of $2,530 ($530 being Immigration New Zealand's EOI fee). This was a fair and reasonable assessment.

[17] The refund of $2,530 was paid to the appellant on 20 March 2020.

Complaint to the Authority

[18] On about 19 March 2020, the appellant made a complaint against the adviser to the Immigration Advisers Authority (the Authority).

[19] It was alleged the adviser was dishonest or misleading. The appellant stated that he had paid her $500 in November 2019 and $4,210.53 (including Immigration New Zealand's fee) in January 2020. She told him his application was ready on 5 February 2020 and pushed him for payment of the balance of the fee, but on 3 March 2020 she said his points were not sufficient to seek residence. He started requesting a refund on 5 March 2020. She had ripped him off.

[20] The Authority wrote to the adviser on 10 August 2020 to inform her of the complaint and to seek her comments.

[21] The adviser provided comments to the Authority on 24 March 2020. According to her, the appellant had told her on 6 November 2019 that his diploma was at level 7 and he reconfirmed this in an email to her on 7 November. She had checked the diploma itself and the transcript, but neither disclosed the level. The adviser set out in some detail the work done on the appellant's EOI application, particularly on 4 February 2020. She was about to submit the application on 5 February when she asked him to reconfirm a number of matters, including his qualification level. It was then that she knew it was at level 6 and not level 7.

[22] In her letter to the Authority, the adviser said she had almost completed the EOI process. This had included three in-person consultations of 30 to 45 minutes. After 5 February 2020, the appellant wanted to discuss other options for residence. They had meetings in person on 15 February and 9 March. He requested her to look for a level 7 online course, so that he would be eligible for residence. They also discussed finding a job outside Auckland which would attract bonus points. He asked her to recheck his work experience in Sri Lanka for additional points. He asked whether he could apply for a talent visa.

[23] The adviser said that it was not until 12 March 2020 that the appellant advised that he would go back to Sri Lanka and wanted a refund. She then refunded $2,500, half of the fees collected. Considering the effort she put into the application and that his ineligibility was not her fault, that was a fair outcome.

Registrar's decision

[24] On 2 November 2020, the Registrar wrote to the appellant advising that it had been determined that the complaint did not disclose any of the statutory grounds of complaint, so it would be rejected.

[25] According to the Registrar, the appellant had informed the adviser in November 2019 that his New Zealand qualification was at level 7 in the qualifications framework, but later he told the adviser that it was level 6. This meant that the points for the EOI were less than originally assessed. The adviser then worked with him from February to March 2020 to complete the EOI application by considering other options to achieve the necessary points.

[26] In March 2020, the adviser informed the appellant that he did not have the requisite points to file an EOI, which led to the appellant requesting a refund. The adviser duly refunded $2,530, more than 50 per cent of the fee, on 12 March 2020.

[27] The Registrar found that during the engagement from November 2019 to March 2020, the adviser had undertaken substantial work on the EOI application. There was no evidence to suggest that the adviser was dishonest or misleading.

JURISDICTION AND PROCEDURE

[28] 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.

[29] 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.

[30] 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).

[31] 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).

[32] 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.

[33] A Minute was issued by the Tribunal on 11 November 2020 setting out a timetable for filing evidence and submissions, and requesting clarification from the appellant on one matter.

Submissions of the appellant

[34] In his submissions attached to the appeal form (2 November 2020), the appellant says that when he went to the adviser he was not sure of the level of his qualification, so it was the responsibility of the adviser to check whether it was at level 6 or level 7. At their first meeting, he provided the adviser with his certificate and transcript but the adviser was more concerned about getting the money.

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

[35] According to the appellant's submissions, the adviser insisted on the payment of $500 in advance. The fee was $5,750 (including the $500 advance), plus $530 for the EOI fee plus another $2,710 for the application fee, making a total of $8,890.[2] The adviser insisted that he pay it to a bank in India. The appellant says he paid a total of $4,445, which was half the fee, excluding the $500 advance. In other evidence, the appellant says he paid $4,210.53, including the $500.[3]

[36] A week later, the adviser told the appellant that she could not lodge the application because the qualification was at level 6. She had taken all his hard-earned money which he had sent to his parents. Finally, says the appellant, he wound up without anything. The adviser did not complete the application, but she took the money and then blamed him for saying that the qualification was at level 7.

[37] The appellant acknowledges that $2,530 was refunded, but contends that the adviser had done only $500 worth of work. He needs the balance of $1,680.53 ($4,210.53 – $2,530 = $1,680.53), since he is struggling financially.

[38] On 11 November 2020, the appellant responded to the Tribunal's request for information on one matter.

[39] The appellant sent further submissions and a large volume of supporting documents to the Tribunal on 28 January 2021. He states that the main reason he is taking the issue to the Tribunal is to get justice for immigrants. He does not want anyone to be misled by the adviser. His hard-earned money had been paid to her. She did not ever spend 30 minutes with him at a meeting, contrary to her claim.

[40] According to the appellant, it was only after he made the payment that the adviser raised the question regarding level 6 or 7. He had given her his transcript and qualification on the first day he met her. It was her responsibility to verify them. She could have called NZQA to confirm the level. A New Zealand diploma is at level 6, with level 7 being a bachelor's degree. His certificate clearly identified it as a diploma. He points out that he only knows about such matters now.

[41] The appellant contends that after he made the complaint to the Authority, the adviser's son telephoned him in the course of negotiating a further refund, in response to a negative review about the service given by the adviser's company which the

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[2] The $530 and $2,710 fees are those of Immigration New Zealand. The fees add up to $8,990, not $8,890, but the figure of $8,890 is that given in a text to the appellant from the adviser on about 4 February 2020. It is further noted that the service contract specifies a fee of $5,175, not $5,750.

[3] See Authority complaint form 19 March 2020 at section A3.

appellant had posted on their website. The son requested the removal of the review and agreed to repay the rest of the money if the appellant did so. The appellant duly removed the review, but he was then blocked from the website. No additional refund was made. The son even threatened to make a false accusation to Immigration New Zealand about him.

Submissions of the Registrar

[42] In his submissions of 23 December 2019, Mr Perrott, counsel for the Registrar, sets out the process followed by the Authority on receipt of the complaint. It is contended that the main issue is whether the adviser erred in charging the appellant for her services when her client was not able to obtain the visa he was seeking. There is a live issue as to whether it was the adviser's obligation to assess or ensure that the New Zealand diploma was at level 7, rather than level 6, to give the appellant sufficient points.

[43] According to counsel, in November 2019, the appellant told the adviser that the diploma was at level 7, so she progressed the application. Prior to lodging the expression, she asked for confirmation of the level. He told her on 5 February 2020 it was at level 6. By this time, she had already undertaken significant work. Even then, she explored other areas to see if he could meet the criteria. She then refunded him some of the money paid.

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

ASSESSMENT

[45] The primary complaint made by the appellant is that the adviser was dishonest or misleading.

[46] There are discrepancies in the figures, but in his submission to the Tribunal, the appellant says he paid her $4,945 ($500 initially + $4,445), out of a total fee of $8,890 (including Immigration New Zealand's fees). She took his money despite him being ineligible, since his New Zealand diploma was only at level 6, not the required level 7. He contends that she knew from their first meeting it was only level 6, as he handed over a copy of the certificate. She had a responsibility to check the level with NZQA, but in any event it would have been clear to her he did not meet the standard, as he only had a diploma (level 7 is a bachelor's degree).

[47] In response, the adviser says the certificate and transcript did not specify the level, that the appellant told her at the first meeting on 6 November 2019 it was at level 7 and then he repeated that in an email on 7 November. It was not until 5 February 2020, after she had done almost all the work, that he told her it was actually only at level 6.

Whether adviser dishonest

[48] Turning then to the contemporary correspondence, it is clear that whether or not the appellant told the adviser at the meeting on 6 November that it was at level 7, he immediately raised this issue with her in an email the next day seeking an explanation of the relevant criteria in the long-term skills shortage list for engineering. While the adviser says the appellant confirmed it was at level 7 in an email on 7 November, this does not appear to be correct. He was merely asking for an explanation, including the requirement for a level 7 qualification for a production engineer.

[49] The adviser replied on 7 November saying that level 7 is a bachelor's degree and that the appellant would also need a letter from Engineering New Zealand (as per the long-term skills shortage criteria which had been set out in the appellant's email). This issue was not raised again until the adviser asked the appellant on 5 February to confirm the level.

[50] The adviser's information given to the appellant on 7 November that a level 7 bachelor's degree was required for the engineering position that the appellant claimed to be qualified for, was probably correct. The relevant entry in the long-term skills shortage list for engineering appears to state that a bachelor's degree (at level 7) is required.[4] But the New Zealand Qualifications Framework (unlike the engineering entry in the skills shortage list) does provide for level 7 diplomas. Hence the confusion of both parties initially. The adviser would not necessarily know from the certificate and transcript that the qualification was not at level 7.

[51] I find that the evidence does not support the adviser's contention that the appellant confirmed early in the engagement that his qualification was level 7. What appears to have happened is that both parties incorrectly assumed the qualification was at level 7 and the adviser proceeded on that basis until 5 February.

[4] The copy sent to the Tribunal has some of the text cut off.

[52] Given that the adviser gave the appellant the correct advice on 7 November, there is no corroborative evidence for the allegation of dishonesty. If the adviser was trying to take the appellant's money, knowing he did not meet the criteria, she presumably would not have told him so clearly on 7 November that a bachelor's degree was required. I dismiss the allegation of dishonesty.

Whether adviser lacked due care

[53] Of course, this raises the issue of whether the adviser should have realised immediately on seeing the certificate on 6 November that it was not a bachelor's degree and may not therefore be at the required level 7. Mr Perrot is correct in identifying the live issue as whether it was the adviser's obligation to assess whether the diploma met the level 7 qualification for the production engineer position the appellant was seeking (which appears to be a bachelor's degree).

[54] I find that the adviser had such an obligation. This was an immigration issue, not merely one of vocational registration (as to which the client bears the primary if not the sole responsibility). The level of his qualification was a material factor in whether the appellant had sufficient points. It was an issue which he had raised with the adviser on 7 November. Furthermore, it was clear from the face of the certificate, which the adviser had, that it was not a bachelor's degree and may not therefore have been sufficient.

[55] It follows that the limited evidence seen by me shows a lack of due care by the adviser in considering the level of the qualification. This is a breach of the Code. So, should I require the Registrar to now investigate this possible wrongdoing, in order to prepare the complaint for filing in the Tribunal?

[56] There are two reasons why this apparent breach does not necessarily justify filing the complaint in the Tribunal:

1. The appellant was made aware by the adviser of the need for a bachelor's degree on 7 November. The adviser's email was clear. It requires no expertise in New Zealand immigration criteria to understand her email and hence the need for such a degree. Self-evidently, he must know whether he has such a degree.

2. The adviser made a partial, but substantial, refund.

[57] The Registrar has a discretion whether to refer evidence of breaches of the Code to the Tribunal.[5] This is a case where it is appropriate to defer to the Registrar's exercise of his discretion.

Whether unprofessional threat made

[58] The next allegation made by the appellant is that, after the complaint was filed in the Authority and in the context of further refund discussions and an adverse review posted on the adviser's website, the adviser's son threatened him with a false notification to Immigration New Zealand. The following text was sent by the son to the appellant on 28 September 2020:

> Okay. I am afraid I have some ethical concerns regarding the veracity of your work experience certificates. I think it is my duty to contact INZ to let them know my thoughts. I wanted to discuss with you first but I understand.

[59] This email was during the course of an increasingly heated exchange about a full refund and the adverse review. I am not aware of the adviser having earlier raised any issue with the veracity of the appellant's work experience. On its face, based on the limited evidence before the Tribunal, this might be construed as a threat made for a self-serving purpose. If so, it would amount to professional misconduct. Again, the issue for me is whether I should direct the Registrar to investigate this email and then prepare a complaint for filing in the Tribunal.

[60] I note it came from the adviser's son, not the adviser. It is not known whether the adviser knew about it. It was an isolated text. There is no evidence the son followed through on the threat. Nor is it known whether there was in fact any cause for concern regarding the appellant's work experience.

[61] Of course, all those imponderables would be clarified in any proper investigation. But I have to decide whether the Registrar should be compelled to do so and file a complaint in the Tribunal, based on the evidence before me. The Registrar's decision does not deal with this allegation, but that may be because it was not raised by the appellant until the complaint was made in the Tribunal. On balance, I do not consider this one text from the son to be a sufficient justification to require the Registrar to prepare a complaint for the Tribunal.

OUTCOME

[62] The appeal is rejected.

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[5] Immigration Advisers Licensing Act 2007, s 45(1)(c).

ORDER FOR SUPPRESSION

[63] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.[6]

[64] There is no public interest in knowing the name of the appellant, nor of the adviser against whom a complaint is made but dismissed. Nor would that be fair.

[65] The Tribunal orders that no information identifying the appellant or the adviser (or her company) is to be published other than to Immigration New Zealand.

D J Plunkett
Chair

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