IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2022] NZIACDT 2

Reference No: IACDT 017/21

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 11 February 2022

REPRESENTATION:

Appellant:	Self-represented
Registrar:	M Brown, counsel

INTRODUCTION

[1] This is an appeal against the decision of 17 September 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, FB (the adviser). The Registrar considered that it disclosed only a trivial or inconsequential matter.

BACKGROUND

[2] The appellant is a foreign national. He has worked in New Zealand for some years and desires to reside here.

[3] The adviser is a director of [Immigration advisory company 1] of Auckland. At the relevant time, the adviser was at [Immigration advisory company 2].

[4] On an unknown date, the adviser was instructed by the appellant in relation to both work visa and residence visa applications. It is not known when the work visa application was made.

[5] On about 31 January 2019, the appellant made an application to Immigration New Zealand (Immigration NZ) for residence for him and his family (application signed by him on 7 November 2018). The application identified the adviser as the appellant's immigration adviser and representative (application signed by the adviser on 25 January 2019).

[6] On 28 August 2020, the appellant's work visa expired. His immigration status in New Zealand was then unlawful.

[7] The appellant's employer sent an email to the adviser on 3 September 2020 stating that the appellant had decided not to continue employment. The adviser then sent an email to the appellant on 4 September 2020 referring to the employer's email and stating that he did not understand what was going on. He set out the appellant's options in terms of visas, including keeping alive his residence application. Those options had conditions to be met, which he would be happy to discuss. As for the adviser's fees, he would leave it up to the appellant to decide if they would be paid. He would continue to represent him.

[8] The appellant sent an email to Immigration NZ's work visa officer on 6 September 2020 stating that he was no longer employed by his employer who had mistreated and underpaid him. He had made a complaint to MBIE. In another email to the work visa officer on 20 September 2020, the appellant said he had been living in New Zealand for five years, but his status had become illegal. He requested the officer's help to make the status of him and his family legal.

[9] A residence visa officer wrote to the adviser and the appellant on 2 October 2020 inviting comments (by 16 October 2020) on two concerns regarding the residence application:

1. The appellant no longer met the requirements for skilled employment since he had informed the work visa officer that he no longer worked for the employer.

2. The appellant appeared to have withheld from the residence visa officer the information given to the work visa officer, that he was no longer employed. The appellant may not therefore meet the character requirements for residence.

[10] The adviser sent an email to the residence visa officer on 14 October 2020 at 9:00 am. He requested more time for the appellant to respond to him in relation to the allegation that information had been withheld, raised in the officer's letter of 2 October 2020. He had met with the appellant who had understood that the work visa officer would have kept the notes available for the residence application. The information was not intentionally withheld, nor was there any intent to mislead or confuse Immigration NZ.

[11] In that email to the residence visa officer, the adviser noted that the appellant had been granted a work visa valid until April 2021. The appellant requested the officer to keep the residence application on hold until he could find skilled employment again.

[12] The residence visa officer replied by email to the adviser on 14 October 2020 at 12:39 pm. The officer noted that the appellant had telephoned her on 13 October 2020 disagreeing with the character concern set out in the 2 October letter. The officer agreed that the appellant had informed the work visa officer that he had left his job, who had made a note. The officer advised that she would not extend the due date, nor would she put the residence application on hold.

[13] On 14 October 2020 at 3:47 pm, the adviser sent an email to the appellant. He stated that the officer had decided not to hold open the residence application so that he could find a new job, because it was the appellant who made the decision to end the

employment relationship. As for the character concern, the appellant had the option of addressing this. The officer was waiting for a formal response from the appellant.

[14] On an unknown date, the adviser replied to the residence visa officer's email of 14 October 2020.[1] One of the points made was that the work visa officer had told the adviser in a telephone discussion on 31 August 2020 that the appellant should not worry about his unlawful status because once a work visa was approved, everything would be regularised. That officer had said she would consider a new offer of employment. The officer had also said that the work visa and residence applications could be kept open for as long as possible, so long as it was approved by a manager.

[15] The adviser sent an email to the residence visa officer on 16 October 2020 stating that the appellant was looking to shift the blame onto others. He made the decision to quit his job and not look for other work to salvage his immigration status. He was not returning the adviser's emails. The appellant's phone call with the officer and the information provided by the adviser could be considered the response to the letter (of 2 October 2020).

[16] The adviser sent another email to the residence visa officer on 19 October 2020 stating that he had no formal response from the appellant. The latter had the opportunity to come back with a new job offer prior to Immigration NZ's letter (of 2 October 2020), but he had not produced one that could be analysed according to the immigration instructions.

[17] The residence visa officer wrote to the adviser and the appellant on 23 October 2020 declining the residence application. The appellant did not meet the requirements for skilled employment. As for the character concern, this has not been pursued as he had not been granted points for skilled employment. Immigration NZ might assess the character matter further in relation to any future applications.

[18] The adviser sent an email to the appellant on 24 October 2020 attaching Immigration NZ's letter of 23 October 2020. An option available to him was to appeal to the Immigration and Protection Tribunal. It was noted that the officer had not pursued any character concerns. The adviser further noted that he had written off over $5,000 in relation to work done on his case. As the residence application had been declined, no further work would be undertaken. The adviser was pleased that the appellant was lawful in New Zealand with work rights up to April 2021.

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[1] Documents from Registrar at 021–023.

Complaint to the Authority

[19] On about 11 November 2020, the appellant made a complaint to the Authority against the adviser.

[20] The appellant's grounds of complaint were negligence, incompetence, incapacity, dishonest or misleading behaviour and breach of the Licensed Immigration Advisers Code of Conduct 2014 (the Code). He alleged:

1. The adviser did not act on time to inform Immigration NZ that the appellant had lost his job, so Immigration NZ raised a concern about his character.

2. The adviser breached his confidentiality when he told the appellant's employer that the appellant had said he was not properly paid his holiday pay and "other things".

3. The adviser did not guide him to act in time before his interim visa expired and lied about the visa officer going to issue a visitor visa for him. This led to him and his family being unlawful in New Zealand, which meant they had to pay a large public hospital bill for his wife's surgery.

[21] On 5 February 2021, the Authority wrote to the adviser notifying him of the complaint and seeking his client file. The adviser provided the file on an unknown date.

Registrar dismisses complaint

[22] On 17 September 2021, the Registrar advised the appellant that the complaint disclosed only a trivial or inconsequential matter and would not be pursued.

[23] The Registrar gave the following reasons:

1. As for the claim that the adviser failed to inform Immigration NZ that the appellant had lost his job, the Registrar stated that the appellant had informed his employer that his work visa had expired on 28 August 2020 and he did not intend to renew it. The appellant subsequently made a complaint against the employer for mistreatment. In early September 2020, the appellant informed Immigration NZ of this in support of his application for a new work visa. He was under the impression that this would be passed on to the case officer dealing with the residence application. This did not happen until the adviser responded to Immigration NZ's letter of concern regarding the residence application. Once it became clear that the

information had not been passed on, the adviser informed the visa officer immediately. It appeared that the appellant had not kept the adviser informed of his communications with Immigration NZ. There was not a significant delay in the adviser informing the visa officer of his employment status.

2. There was no evidence supporting the claim that the adviser had breached his trust or confidentiality by sharing information with his employer.

3. It was claimed that the adviser mistakenly informed the appellant that Immigration NZ would issue him and his family with visitor visas before the interim visas expired. The information on the file suggested that the adviser had sent the appellant an email asking him what he meant when he became aware that the appellant was not seeking to renew his work visa. The adviser gave him options to consider in order to avoid becoming unlawful. The adviser offered him a discussion, but the appellant did not take up the offer. There was no evidence to suggest that the adviser informed him that Immigration NZ would unequivocally issue visitor visas before the interim visas expired.

4. The appellant stated that he and his family were unlawful in New Zealand and had lost medical cover. This did not appear to be the result of the adviser's services.

[24] The Registrar also stated in his letter to the appellant that an examination of the adviser's client file showed that the adviser had no written agreement with him. Accordingly, there were potential breaches of cls 18(a) and 26(a)(ii) of the Code relating to failing to provide a written agreement and failing to provide it to the Authority. These potential breaches were diminished by two matters. The first was that the appellant had signed the application for residence listing the adviser as his adviser in the relevant section of the residence application form. The appellant had therefore authorised the adviser to act on his behalf. Furthermore, the issue with the written agreement did not adversely affect the appellant's immigration matters.

[25] On the same day, 17 September 2021, the Registrar wrote to the adviser setting out the contents of his letter that day to the appellant. He reminded the adviser of his obligations to provide clients with a written agreement and to provide the Authority with a copy of all written agreements.

JURISDICTION AND PROCEDURE

[26] 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.

[27] 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.

[28] 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).

[29] After considering the appeal, the Tribunal may:[2]

(a) reject the appeal; or

(b) determine that the decision of the Registrar was incorrect, but nevertheless reject the complaint upon another ground; or

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

(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).

[30] 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.

[31] The Tribunal issued directions on 5 November 2021, setting out a timetable for submissions and supporting evidence.

Submissions of the appellant

[32] In his notice of appeal (10 October 2021), the appellant states that the complaint was not properly investigated. He was not contacted for further proof. According to the appellant, the immigration adviser did not take action until the appellant was unlawful. The immigration officer intentionally tried to make him and his family unlawful.

[33] The appellant made further submissions to the Tribunal on 12 January 2022:

1. The Registrar did not contact him after he made the complaint and made the decision on the basis of information provided by the adviser. The Registrar did not include phone calls between various people, such as those between the adviser and the visa officers.

2. The adviser did not update his residence file with the job loss, so the visa officer raised a character concern and this was mentioned in the decline of the residence application. The appellant says he did not hide any information from Immigration NZ, but he and his family will be punished.

3. If the Registrar found that the adviser did inform Immigration NZ about the job loss, then why did Immigration NZ raise a character concern.

Submissions of the Registrar

[34] In counsel's submissions of 7 December 2021, Ms Brown contends that the Registrar provided reasons in the letter of 17 September 2021 for the conclusion that the matters disclosed were only trivial or inconsequential. The complaint has been properly considered and rejected by a specialist decision-maker who came to a conclusion based

on a full assessment of the relevant information. The adviser had been warned concerning the breaches of the Code identified, which were minor.

[35] At the request of the Tribunal, the Registrar provided further documents on 27 January and 3 February 2022.

ASSESSMENT

[36] The appellant's principal complaint against the adviser is that the latter did not inform the residence visa officer about the appellant leaving his employer, so that officer raised a character concern regarding withholding information from the officer.

[37] Putting to one side the residence visa officer's lack of judgement in raising this as a character issue (given that her colleague, the work visa officer, had been informed by the appellant and there was a written note of this in Immigration NZ's presumably electronic file), the residence visa officer ultimately did not draw any such conclusion in the letter declining residence on 23 October 2020. She may have realised the absurdity of such a finding. After all, the residence visa officer knew about the loss of employment from the appellant's own disclosure to the work visa officer. In other words, the appellant self-evidently disclosed the fact to Immigration NZ.

[38] Furthermore, in circumstances where the appellant chooses to communicate directly with the visa officers, in parallel with the adviser and without reference to him, it is less clear who would be responsible for any failure to inform the officer of some material fact.

[39] As for the allegation of a breach of confidentiality, the Tribunal agrees with the Registrar that there is no evidence of any such breach by the adviser in his communications with the employer. Even if there had been such a disclosure, there is no evidence of any prejudice to the appellant.

[40] Nor has the appellant provided any evidence of the adviser not guiding him properly before his interim visa expired. Similarly, there is no evidence that the adviser lied to the appellant concerning the issue of a visitor visa.

[41] The Registrar correctly found that the public hospital charges arising from the failure to have a visa, were not the responsibility of the adviser. The appellant appears to have become unlawful because he chose to leave his employment. He may have had good reason to do so, but he appears not to have informed the adviser who did not know until told by the employer after the appellant had become unlawful. There is no evidence

that the adviser bears any responsibility for the appellant and possibly his family becoming unlawful.

[42] While the appellant complains about the inadequacy of the Registrar's investigation, he has not provided any additional evidence to the Tribunal which might found his allegations. It is apparent that the Registrar obtained the adviser's file. The allegations and the evidence provided by the appellant did not justify a further investigation.

[43] As for the potential breaches of the Code discovered by the Registrar, the Tribunal agrees that the absence of a written agreement is a breach of cl 18(a). In the circumstances here, that would not justify a formal disciplinary process in the Tribunal. The Registrar dealt appropriately with that by issuing a reminder (described by counsel as a warning) on 17 September 2021.

[44] In respect of the breach of cl 26(a)(ii), that has been misdescribed by the Registrar as a failure to provide the written agreement to the Authority. It is not. It is a failure to maintain a file containing a written agreement. The Tribunal agrees that such a breach in the circumstances here does not justify a disciplinary process. As the Registrar found, such breaches did not affect the appellant's immigration matters.

Conclusion

[45] The Registrar correctly concluded that the complaint did not warrant a formal disciplinary process beyond the letter of reminder.

OUTCOME

[46] The appeal is rejected.

ORDER FOR SUPPRESSION

[47] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.[3]

[48] There is no public interest in knowing the name of the adviser against whom the complaint is made. Nor is there any public interest in knowing the identity of the appellant.

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

[49] 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