

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2022] NZIACDT [28]

Reference No: IACDT 024/21

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **DD**
Complainant

AND **ALICIA PABELLON**
Adviser

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 15 November 2022

REPRESENTATION:

Registrar: Self-represented
Complainant: Self-represented
Adviser: E Fleming, counsel

PRELIMINARY

[1] The complainant, DD, who was studying for a PhD in New Zealand, consulted the adviser, Alicia Pabellon, about residence. A residence application was duly made, but it was withdrawn when Immigration New Zealand (Immigration NZ) pointed out that the complainant did not qualify. In particular, Ms Pabellon had relied on a PhD when in fact the complainant was still studying towards that qualification.

[2] A complaint by the complainant against Ms Pabellon to the Immigration Advisers Authority (the Authority) has been referred by the Registrar of Immigration Advisers (the Registrar) to the Tribunal. It is alleged that she has been negligent, a ground of complaint under the Immigration Advisers Licensing Act 2007 (the Act), or has breached the Licensed Immigration Advisers Code of Conduct 2014 (the Code).

BACKGROUND

[3] The complainant, a national of Sri Lanka, was studying in New Zealand for a PhD. He commenced this course in September 2016, funded by a scholarship awarded by the university. He was due to complete it in 2019. His student visa was due to expire on 12 October 2019.

[4] Ms Pabellon, a licensed immigration adviser, is a director of ASP Immigration Services Ltd (ASP Immigration), of Palmerston North.

[5] The complainant had been offered a fixed term contract for 10 months as a researcher/tutor (commencing 14 May 2018). In conjunction with the relevant research project, an application had been made by the university for a Marsden Fund grant to extend the project for three years starting in March 2019.

[6] On 13 April 2018, Ms Pabellon advised the complainant in writing that he satisfied the criteria for residence as a skilled migrant. She calculated his points as follows:

Offer of skilled employment	50
Region outside Auckland	30
PhD	70
Age	30
	180

[7] On 14 April 2018, the complainant and ASP Immigration entered into a service agreement. Ms Pabellon would prepare and file for the complainant a residence application under the skilled migrant category (as a university lecturer). The fee was

\$5,750 (incl. GST), payable in instalments as the work progressed. The complainant duly paid the total fee in instalments as well as \$530 to Immigration NZ.

[8] Ms Pabellon filed the expression of interest (expression) on 16 May 2018 claiming 185 points. The breakdown of points is not apparent to the Tribunal, except as to 70 points being claimed for a PhD said to have been obtained on 16 May 2018. The expression stated the complainant was a university lecturer. Ms Pabellon sent an email to the complainant on the same day advising that the expression had been filed. Then on 26 May 2018, she informed him that it had been selected and he could apply for residence. Immigration NZ formally wrote to the complainant on 28 May 2018 to invite him to apply for residence.

[9] On 29 July 2018, Ms Pabellon filed the residence application.

[10] Immigration NZ sent a letter to Ms Pabellon on 20 September 2018 seeking a response to certain concerns:

- (1) The complainant had a fixed term contract which began on 16 July 2018 and was due to end on 14 March 2019, less than the minimum of 12 months for skilled employment. Furthermore, his contract did not state the mandatory requirement relating to hours of work.
- (2) The expression stated he was a university lecturer, but the university had confirmed he was a research officer and senior tutor.
- (3) The complainant had claimed 70 points for a PhD, but he was only an enrolled student.
- (4) He had claimed to meet the English language criterion through completion of the PhD in New Zealand (the qualification involving at least one year of academic study).
- (5) It appeared the complainant had given false and misleading information in the expression.

[11] According to Immigration NZ's letter, the points that could be awarded were:

Age	30
Skilled employment	0
Qualifications	0
Bonus for qualifications	0
	30

[12] In an email from the complainant to Ms Pabellon on 27 September 2018, he noted the “totally contrasting” calculation of points between her and the visa officer:

- (1) He did not have a PhD.
- (2) She described him as a university lecturer which the visa officer said was wrong.

[13] Ms Pabellon replied to the complainant on the same day:

- (1) There were only three choices on the expression system. It was clearly stated he was a PhD student with a student visa expiring on 12 October 2019. It was amended on the residence application. The English language requirement was two academic years of study in New Zealand.
- (2) She had presumed incorrectly. There was no research officer position for educational institutions, so she had categorised him as a lecturer.

[14] On 1 October 2018, the complainant and ASP Immigration entered into a “service refund agreement”, whereby the latter refunded \$2,300. It recorded that the Marsden Fund application had been unsuccessful. This had adversely affected the application, so it was withdrawn.

[15] Ms Pabellon then wrote to Immigration NZ on 4 October 2018 withdrawing the application. She explained that the Marsden Fund application to sustain the continuous position had not been approved. She had not been able to check details overlooked by her staff, for which she was truly sorry. A character waiver was sought.

[16] Immigration NZ wrote to the complainant on 16 November 2018 confirming the application had been withdrawn. As substantive work had been done, the fee and levy would not be refunded.

COMPLAINT

[17] On 20 May 2021, the complainant made a complaint against Ms Pabellon to the Authority. He stated that the points claimed by her were wrong. He had a job offer for 10 months and she advised he was eligible for residence. She had claimed 185 points, but he was eligible for not more than 160. Immigration NZ raised concerns when the application was made and Ms Pabellon advised him to withdraw it. She was negligent and incompetent. He had lost time and money, and suffered mental stress.

[18] The complainant sent an email to the Authority on 1 October 2021. He said that Ms Pabellon had filled out the expression. He never suggested to her that he had completed the PhD. Furthermore, he had told her his contract was only for 10 months and that the extension was dependent on a Marsden Fund application. If Ms Pabellon had assessed the application correctly, it would have been apparent that he did not have enough points. She knew he would not get residence, yet she asked him to file the application.

[19] In an email to the Authority on 12 October 2021, Ms Pabellon accepted that a mistake was made. Her staff completed the details of the expression and this was not rectified on the residence application. There was no intention of providing false and misleading information and she was very sorry.

[20] On 21 October 2021, the Authority formally wrote to Ms Pabellon advising details of the complaint and inviting her explanation.

[21] Counsel for Ms Pabellon is Ms Fleming. She wrote to the Authority on 10 November 2021. It was accepted that Ms Pabellon had made a mistake relying on the uncompleted PhD to demonstrate the English language requirement. In hindsight, it was further accepted that the complainant should have been advised to file his expression only after completing the PhD and/or securing an offer of employment for at least 12 months. Ms Pabellon was very remorseful for this breach of cl 1 of the Code. It was totally out of character and was the first complaint against her. She had already compensated the complainant for her error by refunding \$2,300.

Complaint filed in the Tribunal

[22] The Registrar filed a statement of complaint (21 December 2021) in the Tribunal alleging negligence on the part of Ms Pabellon, or alternatively breaches of cl 1 of the Code (lack of due care and diligence), by:

- (1) Failing to recognise (across multiple stages of the process) that the complainant's academic qualification had not been completed and did not qualify for the points claimed.
- (2) In doing so, providing inaccurate advice to the complainant leading to the application being withdrawn.

JURISDICTION AND PROCEDURE

[23] 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 Act:

- (a) negligence;
- (b) incompetence;
- (c) incapacity;
- (d) dishonest or misleading behaviour; and
- (e) a breach of the code of conduct.

[24] The Tribunal hears those complaints which the Registrar decides to refer to the Tribunal.¹

[25] The Tribunal must hear complaints on the papers, but may in its discretion request further information or any person to appear before the Tribunal.² It has been established to deal relatively summarily with complaints referred to it.³

[26] 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.⁴

[27] The sanctions that may be imposed by the Tribunal are set out in the Act.⁵ The focus of professional disciplinary proceedings is not punishment but the protection of the public.⁶

[28] 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.⁷

[29] The Tribunal has received from the Registrar the statement of complaint (21 December 2021), with supporting documents.

¹ Immigration Advisers Licensing Act 2007, s 45(2) & (3).

² Section 49(3) & (4).

³ *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376 at [93].

⁴ Section 50.

⁵ Section 51(1).

⁶ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151].

⁷ *Z v Dental Complaints Assessment Committee*, above n 6, at [97], [101]–[102] & [112].

[30] There is a statement of reply (19 January 2022) from the complainant. He says it was obvious he was ineligible for the skilled migrant visa. The matter had cost him \$8,775 in total, including a consultation fee of \$5,750. If Ms Pabellon had done the eligibility assessment correctly in the first place, he would not have wasted his money, time and energy. The whole process had negatively affected his mental health and personal life. He requests the return of his money, including the monies paid to Immigration NZ, as well as compensation for his losses (time, energy and mental health).

[31] Ms Pabellon has also filed a statement of reply (13 January 2022), attaching counsel's submissions (10 November 2021) to the Authority.

ASSESSMENT

Negligence or alternatively breaches of cl 1 of the Code (lack of due care and diligence), by:

- (1) *Failing to recognise (across multiple stages of the process) that the complainant's academic qualification had not been completed and did not qualify for the points claimed.*
- (2) *In doing so, providing inaccurate advice to the complainant leading to the application being withdrawn.*

[32] Clause 1 of the Code stipulates:

General

1. A licensed immigration adviser must be honest, professional, diligent and respectful and conduct themselves with due care and in a timely manner.

[33] It is conceded by Ms Pabellon that she breached cl 1 of the Code by relying on the uncompleted PhD to satisfy the English language criterion of immigration instructions. It is further conceded that the expression should have been filed only after the complainant had completed the PhD and/or secured an offer of employment for at least 12 months (provided he could also meet the English language criterion).

[34] The complainant did not satisfy a number of criteria and both the expression and residence application were doomed to failure when filed:

- (1) Without a completed qualification in New Zealand, he could not satisfy the English language criterion using that method (presumably he would have had to sit a formal test).

- (2) His employment did not satisfy the definition of skilled employment for immigration as it was for less than 12 months.

[35] If the complainant had skilled employment and could meet the English language criteria, he would appear to have had sufficient points (160), based on his Sri Lankan qualification.

[36] The Tribunal does not accept Ms Fleming's submission that this was a one-off event at the lower end of the spectrum of such breaches. Not only were there two glaring errors, but Ms Pabellon made this set of mistakes twice, being at the expression stage and later when the residence application was filed. It is difficult to comprehend how she thought the complainant could possibly have met the criteria for residence. Ms Pabellon is responsible for any mistakes by her staff, but in any event, she should have assessed the application itself irrespective of any clerical work undertaken by her staff.

[37] The Tribunal finds that Ms Pabellon lacked due care and diligence in advising the complainant to go ahead with the expression and later residence application. While both of the Registrar's heads of complaint are made out and will be upheld, the first (failing to recognise that the qualification had not been completed) is merely a necessary ingredient of the second (inaccurate advice). In other words, they are not independent mistakes.

[38] In light of the upholding of the alternative head involving a breach of cl 1, there is no need to formally consider whether Ms Pabellon's conduct also amounts to negligence, though it might be thought there is no material difference between a lack of reasonable care (negligence) and a lack of due care (breach of cl 1). The negligence head of complaint is dismissed.

OUTCOME

[39] The complaint is upheld. Ms Pabellon has breached cl 1 of the Code.

SUBMISSIONS ON SANCTIONS

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

[41] A timetable is set out below. Any request that Ms Pabellon undertake training should specify the precise course suggested. 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. Ms Pabellon is invited to explain why

she should not refund all the fees paid by the complainant, including those paid to Immigration NZ, given the application could not possibly succeed.

Timetable

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

- (1) The Registrar, the complainant and Ms Pabellon are to make submissions by **6 December 2022**.
- (2) The Registrar, the complainant and Ms Pabellon may reply to submissions of any other party by **20 December 2022**.

ORDER FOR SUPPRESSION

[43] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.⁸

[44] There is no public interest in knowing the name of Ms Pabellon's client.

[45] The Tribunal orders that no information identifying the complainant is to be published other than to Immigration NZ.

D J Plunkett
Chair

⁸ Immigration Advisers Licensing Act 2007, s 50A.