IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2023] NZIACDT 3

Reference No: IACDT 08/22

IN THE MATTER	of a referral under s 48 of the Immigration Advisers Licensing Act 2007
BY	**THE REGISTRAR OF IMMIGRATION ADVISERS** Registrar
BETWEEN	**MT** Complainant
AND	**LL** Adviser

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 02 February 2023

REPRESENTATION:

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

PRELIMINARY

[1] [The complainant], engaged [the adviser], to seek an essential skills work visa as a [Job title]. He already had a job offer. The visa application was made. As he did not have a visa, he could only work for a trial period. The employer then arguably terminated the employment. The adviser nonetheless continued with the application. In parallel, the complainant himself made a migrant exploitation visa application which was granted. It is alleged that the adviser pursued the original visa application, knowing that the offer on which it was based was no longer legitimate.

[2] A complaint by the complainant against the adviser 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 dishonest or misleading or alternatively breached the Licensed Immigration Advisers Code of Conduct 2014 (the Code), these being grounds for complaint under the Immigration Advisers Licensing Act 2007 (the Act).

BACKGROUND

[3] The complainant and his wife are nationals of [Country]. They arrived in New Zealand in 2017. The complainant was working as a [Job title].

[4] The adviser, a licensed immigration adviser, is a director of [LB Ltd], of [City].

[5] On 22 July 2021, the complainant's wife contacted the adviser requesting a meeting. There was an initial consultation the same day. The complainant said he had received an offer of employment as a [Job Title]. The adviser sent an email to the complainant on the same day setting out her fees and summarising their discussion. A services agreement was entered into on 23 July (unseen by the Tribunal). The adviser agreed to assist the complainant and his wife to apply for an essential skills work visa and partnership visa respectively.

[6] The adviser also telephoned the employer on 23 July 2021 and sent him an email seeking further information. She attached a draft advertisement. Advertising was undertaken in July 2021.

[7] On about 26 August 2021, the complainant's visa application was filed. The processing of the application suffered delays due to the COVID-19 pandemic, so the adviser exchanged emails with the visa officer as she sought urgency.

[8] The employer was keen for the complainant to start work, but he could not because he did not have a visa. He was, however, able to undertake a trial period from 4 to 6 October 2021.

[9] On 5 October 2021, the complainant sent an email to the employer engaging the disputes section of the employment contract. He noted that the employer told him the position required more experience. He asked for training to be made available to him. He said he had a right to a fair and reasonable dismissal process. The employer replied on 6 October 2021. He said the complainant had misled him as to his experience and ability. During the trial, there was a major safety issue. The employer offered to pay 80 hours at $30 hourly.

[10] The complainant sent an email to the adviser on 6 October 2021 stating that the employer was unable to keep the employment agreement as he required more experience. The complainant sought advice from her as to his entitlement to a fair and reasonable dismissal process. He wanted to know his options regarding the employment situation without escalation to the Employment Relations Authority. He asked her not to withdraw his visa application until the situation was successfully solved.

[11] The adviser replied to the complainant on the same day. She said he could not legally work in New Zealand. It was a very grey area. The employer had the right to end the employment within 90 days without reason. She understood the employer would pay him. He should start looking for another job. She said they would wait for the visa to be approved and either get a variation or a new visa when he obtained a new job.

[12] On 7 October 2021, the complainant made a report of exploitation to the Ministry of Business, Innovation and Employment (MBIE). Neither the adviser nor the employer was aware of this.

[13] The adviser sent an email to the complainant and his wife on 13 October 2021 to say she was still working on the visas. She had been assured approval was imminent. She had spoken to the employer who supported the application process. As soon as he got a new job, she would “submit a visa or variation”.

[14] Immigration New Zealand (Immigration NZ) approved the complainant’s essential skills work visa on 20 October 2021. The adviser immediately informed the complainant.

[15] The complainant was advised by MBIE on 22 October 2021 that he was eligible to apply for a migrant exploitation protection visa. He applied for the visa on 27 October and it was granted the following day, 28 October.

[16] The complainant sent an email to the adviser that same day, 28 October 2021, stating that he did not agree with the way she and his employer had handled the situation. She had advised him to wait for a visa, even though the employment relationship did not exist. She had not informed Immigration NZ of the truth. He had reported the matter as migrant exploitation and received a protection visa. She was asked to stop representing him and his wife with Immigration NZ.

[17] Also, on the same day, the adviser received an email from the employer telling her he had been required by MBIE's employment mediation service to attend a mediation. At some point, there was a successful mediation. The outcome is not known, except the complainant did not subsequently work for the employer.

COMPLAINT

[18] On about 22 October 2021, the complainant made a complaint to the Authority. He said that the employer had dismissed him on 6 October. The employer told him he had spoken with the adviser and they agreed he would work until midday on 6 October and he would be paid for two weeks. The adviser advised him on 6 October to look for another job, wait for the visa to be approved and then get a variation or a new visa. He had asked the adviser not to withdraw the application because he was hoping to resolve the problem with the employer through training or other options. He could not understand why she wanted him to wait for the visa to be approved as he would not be able to work even when the visa was approved (as he had no job from 6 October). He wanted a refund of the fees paid for him and his wife.

[19] The complainant appears to have provided with the complaint an undated document titled, "Summary of the employment situation".[1] He stated, amongst other things, that he asked the adviser not to withdraw the application only because he was hoping to solve the problem with the employer with some training.

[20] On 15 February 2022, the Authority formally advised the adviser of the details of the complaint and sought her explanation.

[21] Mr Moses replied to the Authority, on behalf of the adviser, on 1 March 2022. He noted that, as could be seen from the adviser's statement and the employer's letter (accompanying counsel's letter), following the initial combustion of the employment relationship on 6 October, the employer reconsidered his position. The employer told the adviser on 13 October that he would not withdraw the job offer and would continue

[1] Registrar's bundle at 18.

to support the visa application. As matters developed, it became clear that the employer either did not mean to terminate the job, or resiled from the termination once he had a chance to consider the matter again. The adviser's instinctive response, in allowing everyone time to calm down, was correct. Crucially, the adviser did not know of the exploitation complaint. She did not therefore know that the complainant did not want to work for the employer if the visa was granted.

[22] It was noted that the complainant had asked the adviser on 6 October not to withdraw the visa application because he wanted to resolve the matter with the employer. According to counsel, the adviser's email of 6 October (advising him to look for another job) was prepared in haste. Her subsequent email of 13 October (again referring to him obtaining a new job) was not an example of unambiguous written advice. She did not adequately clarify in either email that his search for alternative work was to be a back-up if the relationship with the employer could not be resolved.

[23] It was acknowledged by counsel that the Act and the Code required the adviser to conduct herself with integrity and honesty. There was potentially a conflict between the duties owed to Immigration NZ and those owed to the client. Here, the adviser had information that there were doubts about the complainant's suitability for the role and the possibility of the employer wanting to withdraw the job offer. That was not something she was entitled or obliged to relay to Immigration NZ. Rather, she needed the complainant's instructions as to his position. He instructed her not to withdraw the application because he wanted to resolve the matter with the employer through training if possible.

[24] As for the exploitation visa, the adviser did not know of this and therefore that the complainant had changed his mind about wanting to work for the employer. It was unfair to attribute to the adviser responsibility for the failure to inform Immigration NZ (of the breakdown in the relationship with the employer), in a situation where the complainant had not informed her but had informed Immigration NZ. The grant of the work visa to an applicant for an exploitation visa was potentially a failure by Immigration NZ. This would be the result of the silo like nature of the government agency.

[25] Counsel submitted that there were no breaches of the Act or Code. If he was wrong and the adviser had an obligation to tell Immigration NZ of a change of circumstances, there was a professional error of judgement and not dishonesty. At worst, the adviser negligently breached her obligation under cl 31 of the Code.

The adviser's statement

[26] In support, a statement from the adviser (1 March 2022) was provided to the Authority. She explained that her professional background was predominantly human resources. Honesty and integrity had been central to her career and she was distraught at the allegation of dishonesty.

[27] The adviser stated that on 6 October 2021, the complainant's wife telephoned her to say that the employer had told him his driving was not good enough for the job. His wife was angry and upset. At first sight it appeared that the job offer had been withdrawn. She rang the employer. He was also angry as he thought the complainant had lied to him about his skills, so there was not a good chance to discuss anything with the employer. The complainant emailed her that day asking her not to withdraw the application until the issue was resolved. She understood this to mean the possibility of further training.

[28] The adviser was therefore unsure if the employment could be saved. If it could not, she advised him to start looking for alternative employment. Reading her email again, she could see that it was rushed. She was jumping the gun in suggesting he look for alternative employment. She was not suggesting he do so, regardless of whether the offer remained valid. She thought the offer was not dead. The sensible thing was for everyone to take a deep breath and calm down.

[29] According to the adviser, on 13 October 2021, she again spoke to the employer. He said he needed a driver and could not find anyone. He did not withdraw the offer. She emailed the complainant on the same day confirming her understanding that the employer wanted to work it out and that he would continue to support the application. She said to the complainant that if he got an alternative job, he could later apply for a variation of the visa. She thought it was important he had a Plan B. She did not know then of his complaint of exploitation. Had she known that the relationship had broken down completely, she would not have advised him to continue with the work visa application.

[30] The complainant was then granted the visa on 20 October 2021 and the adviser informed him of this, thinking that he had worked through the issues with the employer. The adviser said she did not become aware of the exploitation visa matter until the complainant's wife told her on 28 October 2021. Had she known earlier, the application would have to have been withdrawn.

Letter from the employer

[31] Counsel also provided to the Authority a letter from the employer addressed to him (25 February 2022). He said he was unimpressed with the complainant's driving skills. He spoke to the adviser. He realised it would be problematic for the complainant if he withdrew the job offer. Also, he did not have the driver that he needed and could not find anyone else. He therefore agreed to support the application and did not withdraw the offer.

Complaint filed in the Tribunal

[32] The Registrar filed a complaint (12 April 2022) in the Tribunal alleging against the adviser:

(1) Dishonest or misleading behaviour, or in the alternative breaches of cls 1 and 31(a) of the Code by continuing the work visa application and keeping the complainant lawful, rather than following the correct procedure by advising Immigration NZ of the employment problem.

JURISDICTION AND PROCEDURE

[33] 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.

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

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

[35] 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]

[36] 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]

[37] 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]

[38] 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]

[39] The Tribunal has received from the Registrar the statement of complaint (12 April 2022), with supporting documents.

[40] There are no submissions from the complainant.

[41] There is a memorandum (18 May 2022) from Mr Moses on behalf of the adviser, together with a statement of the adviser (18 May 2022). The statement emphasises that the adviser was instructed not to withdraw the visa application until the issue had been successfully resolved. She thought that further training might resolve it. The adviser rejects the assertion that she was aware the offer was no longer legitimate. She had no reason to doubt that the complainant would start employment once the visa was granted.

ASSESSMENT

[42] 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.

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

Applications

31. A licensed immigration adviser must:

    a. not deliberately or negligently provide false or misleading documentation to, or deliberately or negligently conceal relevant information from, the decision maker in regard to any immigration matter they are representing, and

    …

(1) Dishonest or misleading behaviour, or in the alternative breaches of cls 1 and 31(a) of the Code by continuing the work visa application and keeping the complainant lawful, rather than following the correct procedure by advising Immigration NZ of the employment problem

[43] The Registrar alleges that the adviser was dishonest or misleading by suggesting to the complainant that he look for another job, while waiting for the visa to be approved and then obtaining a variation or a new visa to support the new job. She did not notify Immigration NZ that he no longer possessed a legitimate offer of employment from the employer linked to the visa application. The Registrar relies on the adviser's two emails to the complainant of 6 and 13 October 2021. In both emails she advised him to look for another job, to wait until he got a visa (in other words, not to withdraw the visa application) and then to seek a variation of the visa or a new one (which would be linked to the new employer).

[44] The adviser acknowledges that her emails are ambiguous. She says it was her understanding from the complainant that he did not want the visa application withdrawn as he wanted to successfully solve the situation with the employer, by further training. Her advice about seeking another job was intended as a Plan B in case the relationship with the employer could not be restored.

[45] The information as to the employment relationship given to the adviser on 6 October 2021 was equivocal. It did not clearly point to the sundering of the relationship. The complainant had expressly asked her not to withdraw the visa application in his email. This was because he wanted to successfully solve the "issue". She says she thought that was a reference to further training. The complainant's email of 6 October does not mention training, though the Tribunal does not know whether his wife mentioned that possibility when she rang the adviser that day. Certainly, the complainant had put the option of training to the employer on 5 October. The complainant said in his summary provided with the complaint that he was hoping to solve the problem with training which was why he asked her not to withdraw the application.

[46] The possibility of a resolution of the employment dispute, through retraining, was a reasonable option for the adviser to have in mind. While her phone call with the employer on 6 October was not productive, on 13 October he agreed that the employment offer was not or would not be withdrawn. He had not been able to find another driver.

[47] It is unsurprising that the Registrar found the adviser's emails to the complainant to be suspicious. The Tribunal, however, accepts the adviser's explanation that resolution of the problem and maintenance of the employment relationship remained in her mind a real option. She did not know about the complainant's resort to an exploitation visa and nor did the employer. There was no dishonesty or misleading behaviour in maintaining the visa application. Nor was there any lack of diligence or due care, nor negligence on her part, in failing to inform Immigration NZ of the employment situation (to the extent known to her).

OUTCOME

[48] The complaint is dismissed.

ORDER FOR SUPPRESSION

[49] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.[9]

[50] There is no public interest in knowing the name of the complainant or the adviser.

[51] The Tribunal orders that no information identifying the complainant, the adviser or the adviser's firm is to be published other than to Immigration NZ.

D J Plunkett
Chair

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