

**IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL**

Decision No: [2019] NZIACDT 82

Reference No: IACDT 019/18

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

**BY** **THE REGISTRAR OF  
IMMIGRATION ADVISERS**  
Registrar

**BETWEEN** **DKD**  
Complainant

**AND** **GREGORY FRANCISCO  
SMITH**  
Adviser

**SUBJECT TO SUPPRESSION ORDER**

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**DECISION**  
Dated 12 December 2019

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**REPRESENTATION:**

Registrar: Self-represented  
Complainant: No appearance  
Adviser: No appearance

## PRELIMINARY

[1] Mr Smith, the adviser, was instructed by the complainant to obtain a residence visa. An expression of interest (EOI) was duly filed by Mr Smith. When Immigration New Zealand issued an invitation to apply for residence (invitation), Mr Smith was late contacting the complainant and ultimately failed to file the application within the time set by Immigration New Zealand.

[2] The complaint made to the Immigration Advisers Authority (the Authority) has been referred to the Tribunal in accordance with the Immigration Advisers Licensing Act 2007 (the Act). It is alleged Mr Smith has breached the Licensed Immigration Advisers Code of Conduct 2014 (the Code).

[3] Mr Smith has failed to respond to the complaint.

## BACKGROUND

[4] Mr Gregory Francisco Smith was at the relevant time a licensed immigration adviser based in Auckland. He was a director of Impact Migration Services Ltd. A renewal of his licence was refused by the Registrar of Immigration Advisers (the Registrar), the head of the Authority, on 20 October 2015.

[5] It is recorded that other complaints against Mr Smith, largely similar to the one made by the complainant, have been upheld by the Tribunal.<sup>1</sup>

[6] The complainant had been living in New Zealand since 2011 and for most of that time held an essential skills work visa. In April 2014, a new work visa was approved, valid until 15 April 2015. She was working as a children's programme coordinator.

[7] At about the same time, the complainant approached Mr Smith for assistance in applying for residence for her and her family. She had used Mr Smith for some earlier immigration applications, including the April 2014 work visa.

[8] On 8 December 2014, Mr Smith lodged an EOI for residence under the skilled migrant category on behalf of the complainant.

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<sup>1</sup> *Allen v Smith* [2015] NZIACDT 5, [2015] NZIACDT 97; *Choudhary v Smith* [2015] NZIACDT 8, [2015] NZIACDT 98; *Hettige & Gerreyn v Smith* [2015] NZIACDT 9, [2015] NZIACDT 99; *February v Smith* [2015] NZIACDT 10, [2015] NZIACDT 100, [2015] NZIACDT 100 (addendum).

[9] Immigration New Zealand issued an invitation to the complainant on 19 January 2015, valid for four months. It was due to expire on 20 May 2015. It was sent by email to Mr Smith.

[10] On 23 March 2015, the complainant contacted Immigration New Zealand and said she had not received an invitation. She was informed that it had been issued to Mr Smith in January 2015.

[11] The complainant says Mr Smith did not contact her about the invitation until April 2015. He confirmed then that she had been selected out of the pool and was invited to apply for residence. Shortly afterwards, Mr Smith contacted her again to advise that her residence application would be hand delivered to Immigration New Zealand no later than "21 May 2015".<sup>2</sup>

[12] It appears that Mr Smith undertook no further work on the residence application and the invitation expired on 20 May 2015.

[13] Unaware that the application had not been lodged, the complainant paid Mr Smith \$1,803 for his services on 20 July 2015.

[14] Through 2015 and into 2016 the complainant contacted Mr Smith enquiring as to the progress of the residence application she thought had been made, but received no satisfactory reply or no reply at all.

[15] On 20 October 2015, the Registrar refused to renew Mr Smith's adviser's licence.

[16] In April 2016, the complainant became aware that Mr Smith's licence had been refused and also that he had not lodged her residence application. She raised this with Mr Smith.

[17] Mr Smith refunded \$2,000 to the complainant on 28 July 2016.

## **COMPLAINT**

[18] The complaint against Mr Smith was lodged with the Authority by the complainant on 3 March 2017. She set out the chronology which is recorded earlier in this decision. According to her, the news that her residence application had not been filed was devastating to her husband who was still living in South Africa. He passed away in September 2016 after suffering a severe heart attack. She had contacted Mr Smith on

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<sup>2</sup> Complainant's complaint to the Authority (3 March 2017) at 11.

numerous occasions for the return of the application fees, but he only paid a small portion back.

[19] The Authority formally wrote to Mr Smith on 24 October 2017, setting out the details of the complaint and inviting his explanation. There was no reply from him.

#### *Complaint referred to Tribunal*

[20] The Registrar filed a complaint with the Tribunal on 21 May 2018, alleging the following misconduct by Mr Smith:

- (1) failing to inform the complainant in a timely manner that an invitation had been issued and then failing to submit a residence application prior to the expiry of the invitation, thereby being negligent, a statutory ground of complaint;
- (2) alternatively, failing to inform the complainant in a timely manner that an invitation had been issued and then failing to submit a residence application prior to the expiry of the invitation, thereby failing to exercise diligence and due care and to conduct himself in a timely manner, in breach of cl 1 of the Code; and
- (3) failing to provide the complainant with a written agreement before proceeding with his services, in breach of cl 18(a) of the Code.

#### **JURISDICTION AND PROCEDURE**

[21] 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.

[22] The Tribunal hears those complaints which the Registrar decides to refer to the Tribunal.<sup>3</sup>

[23] The Tribunal must hear complaints on the papers, but may in its discretion request further information or any person to appear before the Tribunal.<sup>4</sup> It has been established to deal relatively summarily with complaints referred to it.<sup>5</sup>

[24] 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.<sup>6</sup>

[25] The sanctions that may be imposed by the Tribunal are set out in the Act.<sup>7</sup> The focus of professional disciplinary proceedings is not punishment but the protection of the public.<sup>8</sup>

[26] 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.<sup>9</sup>

[27] The Tribunal has received from the Registrar a statement of complaint (21 May 2018) with supporting documents. It was served on the complainant and adviser. There were no responses from either party.

## **ASSESSMENT**

[28] 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.

### **Written agreements**

18. A licensed immigration adviser must ensure that:
  - a. when they and the client decide to proceed, they provide the client with a written agreement

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<sup>3</sup> Immigration Advisers Licensing Act 2007, s 45(2) & (3).

<sup>4</sup> Section 49(3) & (4).

<sup>5</sup> *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376 at [93].

<sup>6</sup> Section 50.

<sup>7</sup> Section 51(1).

<sup>8</sup> *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151] (citation omitted).

<sup>9</sup> *Z v Dental Complaints Assessment Committee*, above n 8, at [97], [101]–[102] & [112].

- (1) *Failing to inform the complainant in a timely manner that an invitation had been issued and then failing to submit a residence application prior to the expiry of the invitation, thereby being negligent, a statutory ground of complaint*
- (2) *Alternatively, failing to inform the complainant in a timely manner that an invitation had been issued and then failing to submit a residence application prior to the expiry of the invitation, thereby failing to exercise diligence and due care and to conduct himself in a timely manner, in breach of cl 1 of the Code*

[29] The complainant states that Mr Smith did not contact her regarding the invitation until April 2015, about three months after it was issued by Immigration New Zealand on 19 January 2015 in an email to Mr Smith. It was due to expire on 20 May 2015. Despite instructions from the complainant to file a residence application, Mr Smith did not do so and the invitation duly expired.

[30] There is no denial of the allegations by Mr Smith, nor any denial that they amount to negligence.

[31] Mr Smith's conduct falls well below the standard of reasonable care of a competent and professional licensed adviser. It is found that Mr Smith has been negligent, a statutory ground of complaint.

[32] There is no need to consider the alternative second ground of complaint.

- (3) *Failing to provide the complainant with a written agreement before proceeding with his services, in breach of cl 18(a) of the Code*

[33] It is alleged that Mr Smith failed to provide the complainant with a written client agreement before proceeding with such services as he did provide. He does not deny the allegation.

[34] Mr Smith is found to have failed to provide the complainant with a written agreement before proceeding.

## **OUTCOME**

[35] I uphold the first and third heads of complaint. Mr Smith has been negligent. He has also failed to provide a written agreement, in breach of cl 18(a) of the Code.

## SUBMISSIONS ON SANCTIONS

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

[37] A timetable is set out below. Any request that Mr Smith undertake training should specify the precise course suggested. Any request for the 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. In light of the sanctions previously imposed on Mr Smith and his failure to respond to this complaint, the Tribunal will look at preventing him from reapplying for any licence for the maximum period permitted. Submissions are specifically invited on any such sanction.

### *Timetable*

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

- (1) The Registrar, the complainant and Mr Smith are to make submissions by **21 January 2020**.
- (2) The Registrar, the complainant and Mr Smith may reply to the submissions of any other party by **4 February 2020**.

## ORDER FOR SUPPRESSION

[39] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.<sup>10</sup>

[40] There is no public interest in knowing the name of the complainant. The Tribunal has a general practice of suppressing the names of complainants (apart from Immigration New Zealand) and clients, particularly foreign nationals, in order to encourage them to report wrongdoing.

[41] The Tribunal orders that no information identifying the complainant is to be published other than to Immigration New Zealand.

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D J Plunkett  
Chair

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<sup>10</sup> Immigration Advisers Licensing Act 2007, s 50A.