

**BEFORE THE IMMIGRATION ADVISERS
COMPLAINTS AND DISCIPLINARY TRIBUNAL**

Decision No: [2015] NZIACDT 76

Reference No: IACDT 024/14

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

A Q

Complainant

AND

Viveg Lingam Mudaliar

Adviser

**THE NAME AND ANY INFORMATION IDENTIFYING THE COMPLAINANT IS NOT TO BE
PUBLISHED**

DECISION

REPRESENTATION:

Registrar: In person.

Complainant: In person.

Adviser: In person.

Date Issued: 23 June 2015

DECISION

Introduction

- [1] The Registrar of the Immigration Advisers Authority referred this complaint to the Tribunal. The facts on which the complaint is based are:
- [1.1] Mr Mudaliar received instructions and entered an agreement to provide immigration services in relation to a work visa application for the complainant.
- [1.2] Mr Mudaliar lodged an application for a work visa when the complainant's current visa was about to expire. If Immigration New Zealand had accepted the application as successfully lodged, the complainant would not have lost his status of being in New Zealand lawfully while Immigration New Zealand considered the application.
- [1.3] However, Immigration New Zealand did not accept the lodgement; as a result, the complainant was in New Zealand unlawfully when his visa expired. There were two reasons for not accepting the application. First, there was no police clearance and, second, the job description lacked detail.
- [1.4] There was a potential answer to the lack of a police clearance, as the complainant was not staying in New Zealand long enough to require the police clearance. Mr Mudaliar did not raise this point with Immigration New Zealand.
- [1.5] Mr Mudaliar decided to proceed to obtain a police clearance. Because, the complainant had become unlawful in New Zealand, he lodged a request under section 61 of the Immigration Act 2009. It is a discretionary provision. He submitted the police clearance, but resubmitted the same job description that Immigration New Zealand rejected earlier. He did not provide reasons why Immigration New Zealand should now accept the job application they had already rejected.
- [1.6] Immigration New Zealand rejected the section 61 request, but Mr Mudaliar did not notify the complainant.
- [1.7] The other aspect of the complaint is that Mr Mudaliar had an agreement with the complainant for the original application, but did not do anything to establish the professional engagement for the two section 61 requests.
- [2] Mr Mudaliar did take issue with the claim he failed to notify the complainant when the second section 61 request failed; but otherwise has not challenged the allegations in a specific way. The Tribunal has accordingly examined the material to establish the facts, and then considered:
- [2.1] Whether Mr Mudaliar took proper care with lodging the application, and making a request under section 61;
- [2.2] Whether he did notify the complainant when the second section 61 request failed; and
- [2.3] Whether he was required to have a further agreement for the section 61 requests.
- [3] The Tribunal found each of those aspects of the complaint established.

The complaint

- [4] The Registrar's Statement of Complaint put forward the following background as the basis for the complaint:
- [4.1] The complainant engaged Mr Mudaliar to assist with immigration matters. Between 15 February 2013 and 10 June 2013, he assisted with a work visa application and two subsequent requests under section 61 of the Immigration Act 2009 (the Immigration Act).

- [4.2] On 15 February 2013, Mr Mudaliar submitted the work visa application for the complainant; Immigration New Zealand replied on 22 February 2012. Immigration New Zealand wrote to Mr Mudaliar and said they could not accept the application, as it did not have a Police Clearance Certification (PCC) or a detailed job description.
- [4.3] The complainant's visa expired on 18 February 2013; accordingly, the failed lodgement resulted in him being in New Zealand unlawfully (a successful lodgement would have deferred that outcome).
- [4.4] The complainant was not intending to stay in New Zealand for more than 24 months. In those circumstances, the PCC was not required. Mr Mudaliar did not take this up with Immigration New Zealand at the time, and instead obtained a PCC from Fiji for the complainant. He then lodged a request for a visa under section 61 of the Immigration Act. When he did so, he provided the same job description that Immigration New Zealand had previously said was inadequate. Immigration New Zealand refused the request.
- [4.5] On 10 June 2013, Mr Mudaliar submitted a further request under section 61, but did not provide further information relating to the PCC or the job description. Immigration New Zealand declined that request also. Mr Mudaliar did not notify the complainant that Immigration New Zealand declined this request.
- [4.6] Mr Mudaliar had one written agreement in relation to the application and two requests under section 61. It did not cover the two requests, only the original application.
- [5] The Registrar identified potential infringement of professional standards during the course of Mr Mudaliar's engagement, the allegations were that potentially:
- [5.1] Mr Mudaliar breached clause 1.1(a) of the Licensed Immigration Advisers Code of Conduct 2010 (the 2010 Code). The provision required him to perform his services with due care, diligence, respect and professionalism. The circumstances were:
- The initial application*
- [5.1.1] Mr Mudaliar submitted the work visa application; Immigration New Zealand treated it as a failed lodgement and accordingly the complainant was in New Zealand unlawfully.
- [5.1.2] Mr Mudaliar, for sound reasons, was of the view that a PCC was not required due to the short duration of the complainant's proposed stay. However, Mr Mudaliar first raised this issue with Immigration New Zealand on 6 May 2013; by that time his client was in New Zealand unlawfully for an extended period due to the failed lodgement.
- The first section 61 request*
- [5.1.3] Mr Mudaliar submitted the first section 61 request with the same job description, and did not attempt to justify the document, notwithstanding Immigration New Zealand having said it was inadequate when submitted with the original application.
- [5.2] Mr Mudaliar breached clause 3(a) of the 2010 Code. The provision required him to maintain proper professional business practices, including confirming in writing to clients when he lodged applications and provide ongoing timely updates. The circumstances were:
- [5.2.1] Mr Mudaliar failed to inform the complainant when Immigration New Zealand declined the second section 61 request.
- [5.3] Mr Mudaliar breached clauses 1.5(a), (b) and (d) of the 2010 Code. The provisions required him to ensure he provided written notice of the terms of an agreement for the provision of professional services and all significant matters relating to it, that the agreement contained a full description of the services, and that the client confirmed the agreement in writing. The circumstances were:

[5.3.1] The agreement related only to the initial application, not the subsequent section 61 requests.

[6] The grounds of complaint were wider; the complainant has not filed a statement of reply seeking to pursue the wider grounds of complaint. Accordingly, the Tribunal will only consider the grounds the Registrar considered to have potential support.

The responses

[7] The complainant did not file a statement of reply, and was not required to do so if he agreed with the contents of the Statement of Complaint.

[8] Mr Mudaliar did file a statement of reply, the key matters he raised were:

[8.1] He accepted he only had a written agreement for the initial application, but did have an oral agreement for the section 61 requests.

[8.2] There was no fee for the section 61 applications.

[8.3] The complainant was kept fully informed at all times, including informing the complainant when Immigration New Zealand declined the second section 61 request.

[8.4] Immigration New Zealand was at fault in refusing the work visa application and declined the section 61 requests in a summary manner.

[8.5] The complainant did not give Mr Mudaliar an opportunity to seek an appointment with Immigration New Zealand.

Mr Mudaliar did not provide evidence to support his response

[9] On 17 April 2015, the Tribunal issued directions. Those directions pointed out to Mr Mudaliar that his response to the Statement of Complaint was in essence an email of a page in length and the Statement of Complaint included some 180 pages of documentation. The directions then noted:

Mr Mudaliar has indicated he does not seek an oral hearing, and accordingly the email is his full answer to the complaint. The Tribunal has not attempted to complete an analysis of the complaint and the response. However, it is evident Mr Mudaliar's response is general in nature, and fails to respond at an evidential level to the material before the Tribunal. Mr Mudaliar should consider that clause 3(f) of the Code of Conduct required him to confirm in writing the details of material discussion with clients. He has claimed he did have such discussions, and he should produce or refer to written confirmation in the record; or explain why he cannot support claims with the written material.

More generally, the Code of Conduct required Mr Mudaliar to document his engagement with his client. He has responded to the complaint without identifying the relevant documents. The Tribunal requires him to do so, or explain why he cannot do so. The Tribunal may well find unspecified and undocumented assertions are not a persuasive answer to the statement of complaint; which contains allegations, and references to the documentary record that supports the allegations.

[10] The directions told Mr Mudaliar that he was entitled to take legal advice and allowed him a further 15 working days to provide affidavits, submissions and to apply for an oral hearing. Mr Mudaliar requested additional time and, on 13 May 2015, the Tribunal allowed him until 18 May 2015 to take the steps required or apply for an adjournment. Mr Mudaliar took no steps and no application for an adjournment has been received.

Discussion

The standard of proof

- [11] The Tribunal determines facts on the balance of probabilities; however, the test must be applied with regard to the gravity of the finding: *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [55].

The facts

- [12] The Registrar provided a chronology and supporting documentation; for the most part, Mr Mudaliar has not challenged the information beyond an overall denial of liability. However, there is one specific factual matter requiring a finding. Mr Mudaliar says he notified the complainant that the second section 61 application failed and points to a file note. Other records show that the complainant approached Immigration New Zealand to find out what happened to the section 61 application. He says Mr Mudaliar did not inform him, and that was the reason for approaching Immigration New Zealand.
- [13] The Tribunal invited Mr Mudaliar to provide sworn evidence of his claim that he notified his client; he has not done so. In addition, the 2010 Code required him to confirm the provision of such advice in writing to his client and to keep a record of that advice for at least 7 years; he has not produced evidence of doing so. Accordingly, I accept the complainant's statement and I am satisfied on the balance of probabilities that Mr Mudaliar failed to give his client this information.
- [14] There is a documentary record in relation to the allegation that Mr Mudaliar submitted an application that Immigration New Zealand regarded as defective and his attempts to rectify the situation under section 61. Mr Mudaliar has not provided evidence that substantially adds to, or alters the implications of that written record. I will accordingly regard the record as speaking for itself.
- [15] Mr Mudaliar has admitted the only agreement he had with the complainant did not deal with the section 61 applications.

Lack of care, diligence and professionalism

- [16] The complaint that Mr Mudaliar performed his services without the necessary care, diligence and professionalism has two elements. First, that he submitted the initial application without the correct documentation, then, that he failed to follow up effectively with the section 61 requests.
- [17] The professional services required of Mr Mudaliar were critical. Lodging the application successfully was very important for his client, as his visa was about to expire. When Immigration New Zealand returned the application as a failed lodgement, his client became unlawful in New Zealand. There were two grounds for the failed lodgement:
- [17.1] The lack of a PCC; and
- [17.2] The deficient job description.
- [18] Mr Mudaliar's first response should have been to demonstrate to Immigration New Zealand why the PCC was not necessary. He attempted to do that on 6 May 2013 after the delay resulting from obtaining a PCC from Fiji, he should have raised the issue in February immediately after Immigration New Zealand told him the lodgement failed. Mr Mudaliar should also have urgently obtained a satisfactory job description and attempted to immediately obtain a lawful immigration status for his client. Delay when a person is in New Zealand unlawfully is inevitably detrimental to their immigration prospects.
- [19] If Mr Mudaliar replied to Immigration New Zealand showing there was no PCC required, and he dealt with the job description, he ought to have appreciated that improved his client's prospects that Immigration New Zealand would:
- [19.1] Accepted the lodgement; or

- [19.2] Be willing to accept a section 61 request, as the only issue was potentially rectifiable issue of the job description, which was Mr Mudaliar's fault not his client's fault.
- [20] However, instead Mr Mudaliar embarked on a course of action, which he should have seen was not a competent way of dealing with the situation he faced:
- [20.1] He did not take any action until 6 May 2013, given that his client was in New Zealand unlawfully that was in itself problematic.
- [20.2] The time required to obtain the PCC from Fiji probably caused the delay, however Mr Mudaliar should have immediately explained to Immigration New Zealand it was not required and possibly then have taken steps to get the PCC in case Immigration New Zealand disagreed.
- [20.3] When he made the section 61 request, he had not obtained a more satisfactory job description. One of the statutory characteristics of a section 61 request is that Immigration New Zealand is not required to give reasons for declining a request. Accordingly, as Immigration New Zealand had previously identified the unsatisfactory job description as the reason for the failed lodgement Mr Mudaliar should have understood resubmitting a document that caused a failed lodgement would likely lead to the request failing also.
- [20.4] Accordingly, I am satisfied that Mr Mudaliar's actions fell far short of minimum professional standards in circumstances where his client faced serious immigration issues. I am satisfied that Mr Mudaliar's service delivery in relation to the initial application and the first section 61 request lacked due care, diligence and professionalism for the reasons discussed. Accordingly, I find that he breached clause 1.1(a) of the 2010 Code.

Mr Mudaliar's failure to communicate with his client

- [21] For the reasons discussed at [13], I am satisfied on the balance of probabilities that Mr Mudaliar failed to notify his client when the second section 61 request failed. He accordingly breached clause 3(a) of the 2010 Code that required him to provide ongoing timely updates. His client had to be informed urgently, he was in New Zealand unlawfully and had to take proper steps on account of being in New Zealand unlawfully.

Mr Mudaliar did not have a written agreement for the two section 61 requests

- [22] Mr Mudaliar accepts his written agreement did not cover the two section 61 requests. The most significant concern regarding this aspect of the complaint is that he was required to make his client aware in writing and in plain language of all significant matters relating to the section 61 applications.
- [23] The complainant was in New Zealand unlawfully, the section 61 requests did not automatically alter that position. Mr Mudaliar should have explained with some care what his client's situation was, and what his options were. Had he done so, the complainant may well have put Mr Mudaliar into a position to produce a more considered and effective response to the failed lodgement.
- [24] I accordingly find Mr Mudaliar breached clauses 1.5(a), (b) and (d) of the 2010 Code. He failed to provide written notice of:
- [24.1] The terms of an agreement for the provision of professional services with a full description of the services and an explanation of all significant matters relating to them, and
- [24.2] Did not have his client confirm an agreement in writing.

Decision

- [25] The Tribunal upholds the complaint pursuant to section 50 of the Act; Mr Mudaliar breached clauses 1.1(a), 3(a), and 1.5(a), (b) and (d) the 2010 Code. Those clauses are grounds for complaint pursuant to section 44(2)(e) of the Act.
- [26] In other respects, the Tribunal dismisses the complaint.

Submissions on Sanctions

- [27] The Tribunal has upheld the complaint; pursuant to section 51 of the Act, it may impose sanctions.
- [28] The Authority and the complainant have the opportunity to provide submissions on the appropriate sanctions, including potential orders for costs and compensation. Whether they do so or not, Mr Mudaliar is entitled to make submissions and respond to any submissions from the other parties.
- [29] Any application for an order for the payment of costs or expenses under section 51(1)(g) should be accompanied by a schedule particularising the amounts and basis for the claim.

Timetable

- [30] The timetable for submissions will be as follows:
- [30.1] The Authority and the complainant are to make any submissions within 10 working days of the issue of this decision.
- [30.2] Mr Mudaliar is to make any further submissions (whether or not the Authority or the complainant makes submissions) within 15 working days of the issue of this decision.
- [30.3] The Authority and the complainant may reply to any submissions made by the adviser within 5 working days of her filing and serving those submissions.

Order prohibiting publication of the complainant's name or identity

- [31] As the complainant was in New Zealand unlawfully, the Tribunal orders that his name, and any information that may identify him, is not to be published.
- [32] This order recognises that persons seeking advice regarding their unlawful status in New Zealand are entitled to complain regarding professional misconduct, without fear of publication that may adversely affect them.
- [33] The Tribunal reserves leave for the complainant or the Registrar to apply to vary this order. The order does not prevent:
- [33.1] The complainant disclosing the decision to his professional advisers, or any authority he considers should have a copy of the decision, or

[33.2] The adviser disclosing the decision to any barrister or solicitor of the High Court of New Zealand in its original form for the purpose of obtaining legal advice.

DATED at WELLINGTON this 23rd day of June 2015.

G D Pearson
Chair