

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

Decision No: [2016] NZIACDT 12

Reference No: IACDT 022/15.

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Shivangani Ashika Chand

Complainant

AND

Maria Charina (Charie) Shearer

Adviser

DECISION

REPRESENTATION:

Registrar: Ms C Pendleton, lawyer, MBIE, Auckland.

Complainant: No appearance.

Adviser: In person.

Date Issued: 18 March 2016

DECISION

Introduction

- [1] The Registrar of the Immigration Advisers Authority referred this complaint to the Tribunal. The complaint is that Ms Shearer did not file a request for a visa for some three months after getting instructions to do so. She misled her client, and her client's employer, saying she had filed the request when that was not true. The complaint is that Ms Shearer was negligent in the delay in filing the request, and engaged in dishonest and misleading behaviour.
- [2] Ms Shearer accepted the grounds of complaint, and explained the circumstances, which led to her actions.
- [3] The Tribunal has upheld the complaint, and accepted Ms Shearer's explanation of the circumstances.

The complaint

- [4] The Registrar's Statement of Complaint put forward the following background as the basis for the complaint:
 - [4.1] The complainant submitted an application to Immigration New Zealand for a further work visa on 22 May 2014. Immigration New Zealand declined the application, then the complainant was in New Zealand unlawfully without a visa.
 - [4.2] At that point, the complainant engaged Ms Shearer to assist with her immigration matters. They entered an agreement for Ms Shearer to request a visa under section 61 of the Immigration Act 2009, and the complainant paid \$1,006.25.
 - [4.3] The complainant provided the documentation to make the application on 16 July 2014. The following day Ms Shearer told the complainant she had filed the request, and a decision would take some 5 weeks.
 - [4.4] The complainant made weekly inquiries in the following weeks, and Ms Shearer told her Immigration New Zealand was processing the request. On 18 October 2014, Ms Shearer realised that she had not filed the request, but told the complainant's employer that the request was in progress, but Immigration New Zealand requested more information. The employer provided that information, and then Ms Shearer submitted the request to Immigration New Zealand on 22 October 2014.
 - [4.5] The Registrar identified potential infringements of professional standards during the course of Ms Shearer's engagement, the allegations were that potentially she engaged in dishonest or misleading behaviour, and she was negligent. They are grounds for upholding a complaint pursuant to section 44 of the Immigration Advisers Licensing Act 2007. The Statement of Complaint alleges:
 - [4.5.1] Ms Shearer engaged in dishonest or misleading behaviour in that:
 - [4.5.1.1] On 17 July 2014 she told the complainant she lodged the request, when it had not been lodged;
 - [4.5.1.2] She provided misleading information to the complainant, to the effect that Immigration New Zealand was dealing with request in the period following 17 July 2014.
 - [4.5.1.3] She told the complainant's employer that Immigration New Zealand asked for more information, when that was untrue.
 - [4.5.1.4] She told both the complainant and her employer that after delay Immigration New Zealand was now processing the request, when she had still not submitted the request.

- [4.5.2] She was negligent, as she failed to lodge the request for some three months when the complainant was unlawfully in New Zealand, and the matter was urgent.

The responses

- [5] The complainant filed a statement of reply, as far as that is relevant for present purposes she agreed with the contents of the Statement of Complaint.
- [6] Ms Shearer filed a statement of reply; she appeared to accept the allegations, and expressed concern the Statement of Complaint did not include her personal circumstances.

Procedure

- [7] It appeared to the Tribunal that Ms Shearer might not have fully understood the matters in issue.
- [8] The Tribunal requested that Ms Shearer appear, so the Tribunal could discuss the issue with her; and potentially take sworn evidence. She appeared, and explained the circumstances. The Tribunal did not conduct a full oral hearing. The nature of the process was to provide an opportunity to ensure Ms Shearer understood the grounds of the complaint, and responded in an informed way. The hearing has otherwise been on the papers.
- [9] The Registrar and the complainant had the opportunity to request a full oral hearing, and attend the hearing whether a full oral hearing or a more limited inquiry, and to cross-examine if Ms Shearer gave evidence. As it transpired, the Registrar attended the hearing, but the complainant did not attend.
- [10] At the hearing, Ms Shearer very frankly accepted she had “covered up” her mistake by misleading the complainant and her employer. The Registrar was content to accept Ms Shearer’s admissions as the extent of the Tribunal’s findings. I particularly note, that when the Tribunal emphasised Ms Shearer had the right to give evidence regarding a mistaken belief, she was at pains to ensure the Tribunal understood she had misled the complainant and her employer in a “cover up”.

Discussion

Preliminary

- [11] It is to Ms Shearer’s credit she has admitted what occurred. It is appropriate that I should set out my findings regarding the circumstances. I uphold the complaint based on Ms Shearer’s acceptance of the grounds of complaint, and the papers before the Tribunal.

Findings

- [12] Ms Shearer provided an explanation, which was different in some respects from the Statement of Complaint. She explained the circumstances in this way:
- [12.1] She did tell the complainant she had lodged the request on 17 July 2014. At that time, she believed she had lodged it. She had prepared the application and believed she had sent it to Immigration New Zealand. However, due to a family bereavement she was in an emotional turmoil at that time.
- [12.2] She continued to believe she had lodged the request until 22 August 2014, at that point, she looked at her file and realised the request was still in the file. Accordingly down to this point she had given the complainant incorrect information, but did so due to a mistaken belief.
- [12.3] From 22 August 2014, she covered up her failure to lodge the application, and the fact she had mistakenly told her client she had already filed it. She provided misleading information to both the complainant and her employer, as particularised in the Statement of Complaint after 22 August 2014.

- [12.4] Accordingly, Ms Shearer made a mistake, and rather than frankly disclose it to her client, she tried to cover it up by providing false information. Ms Shearer said her emotional state at the time was not good, and that had a bearing on her conduct. Accordingly, she accepts the Tribunal should uphold the complaint that she engaged in dishonest and misleading behaviour.
- [13] In relation to the second ground of complaint, namely negligence, it relies on Ms Shearer's failure to lodge the application for some three months after taking instructions. Her client was in New Zealand unlawfully without a visa, at risk of enforcement action, and accordingly the circumstances were urgent.
- [14] This second ground of complaint is ancillary to the first ground, and adds little or nothing to the complaint. At least from 22 August 2014, Ms Shearer was aware she had not filed the request, and did not file it until 22 October 2014. When she did file it she explained to Immigration New Zealand, the delay was her personal responsibility. Various elements of Ms Shearer's management are potentially negligent as they were causative of the failure to file the request in a timely way. They include, the initial failure to check she had in fact filed the request, her misunderstanding the requirements for filing the request, and then delaying unduly after discovering she had not filed the application. Ms Shearer responsibly accepts those circumstances establish this ground of complaint.
- [15] However, the negligent elements are no more than background to Ms Shearer's decision to cover up her error when she discovered it on 22 August 2014. The proper decision would have been to disclose the true position to her client, and potentially seek her client's approval to notify Immigration New Zealand she was preparing an application and seek a short period of delay in enforcement action while she did so.
- [16] Accordingly, I uphold the complaint on the grounds of dishonest and misleading behaviour, and negligence. However, I expressly find that Ms Shearer has very frankly accepted responsibility for her conduct before the Tribunal. She expressly rejected an opportunity to dispute the allegations, and wished to ensure the Tribunal did understand what she had done. I do not regard the circumstances as a professional person misleading their client for their personal advantage; rather that Ms Shearer made a mistake, and at the time lacked the experience, skill, and personal strength to manage her mistake properly. She attempted to cover it up rather than disclose her mistake to her client. The information before the Tribunal indicates Ms Shearer is a person of honest character, who made a serious mistake, which she acknowledges and regrets.
- [17] Accordingly, I would be assisted by Ms Shearer providing confirmation of her health and personal circumstances to the extent they may have affected her decisions during the relevant period of time; and any information relevant to her maintaining standards of professional service delivery since that time, and for the future.
- [18] I would also appreciate the Registrar's perspective of sanctions that would adequately protect the public interest in the circumstances of this case.

Decision

- [19] The Tribunal upholds the complaint pursuant to section 50 of the Act; Ms Shearer engaged in dishonest and misleading behaviour, and was negligent, they are grounds for complaint pursuant to section 44(2)(e) of the Act.

Submissions on Sanctions

- [20] The Tribunal has upheld the complaint; pursuant to section 51 of the Act, it may impose sanctions.
- [21] 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, Ms Shearer is entitled to make submissions and respond to any submissions from the other parties.

Timetable

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

[22.1] The Authority and the complainant are to make any submissions within 10 working days of the issue of this decision.

[22.2] The adviser 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.

[22.3] 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.

DATED at Wellington this 18th day of March 2016

G D Pearson
Chair