

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

Decision No: [2016] NZIACDT 24

Reference No: IACDT 048/14

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Thi Thanh Thu Nguyen

Complainant

AND

Yijun (Alex) Hu

Adviser

DECISION

REPRESENTATION:

Registrar: Marija Urlich, lawyer, Ministry of Business, Innovation and employment, Auckland.

Complainant: In person.

Adviser: In person.

Date Issued: 16 May 2016

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] Immigration New Zealand wrote to Mr Hu explaining his client did not have a current police clearance.
- [1.2] Shortly after that Mr Hu assisted her to apply for a work visa, it was necessary for her to do so before her visa expired.
- [1.3] As Mr Hu filed the visa application without a police clearance, Immigration New Zealand rejected the attempt to lodge the application, and the complainant was in New Zealand unlawfully.
- [1.4] Mr Hu took time to remedy the absence of a police clearance, and request a visa.
- [1.5] Then Mr Hu failed to provide a copy of his file for the Immigration Advisers Authority to evaluate this complaint when requested under a statutory power.
- [2] Mr Hu denied some of the facts, and generally blamed the complainant. When the Tribunal set the complaint down for hearing to take his evidence and hear his explanation, he failed to take any steps. Accordingly, the Tribunal heard the complaint on the papers, and found Mr Hu provided neither a basis to support his challenge to the facts, nor any reasoning which could justify his apparent failure to meet standards of service delivery, and compliance with statutory requests. Accordingly, the Tribunal found the written record established the grounds for complaint.

The complaint

- [3] The Registrar's Statement of Complaint put forward the following background as the basis for the complaint:
- [3.1] The complainant engaged Mr Hu to assist with immigration matters, between January 2012 and April 2013. Mr Hu was aware that the complainant had limited English language skills, and often required an interpreter to assist.
- [3.2] On 2 November 2012, Immigration New Zealand wrote to the complainant care of Mr Hu. In this letter Immigration New Zealand gave notice the complainant had her visitor visa application approved, but should provide a police clearance certificate (PCC), less than 6 months old. The letter prominently notified the requirement to provide the PCC. Mr Hu did not explain the PCC requirement to the complainant.
- [3.3] On 18 January 2013, Mr Hu agreed to assist the complainant to apply for a work visa, and entered into a written agreement. The agreement stated (incorrectly) that a PCC was not required for the application.
- [3.4] On 24 January 2013, Mr Hu completed the work visa application; he did not have an interpreter to assist communication with the complainant. He indicated on the application form that no PCC was required, because Immigration New Zealand had a PCC that was less than 24 months old (which was not correct).
- [3.5] Immigration New Zealand received the application on 28 February 2013, after Mr Hu submitted it; the timing was critical as on 29 January 2013 the complainant's visa expired.
- [3.6] On 1 February 2013, Immigration New Zealand rejected the application, as it did not have a current PCC supporting it. That is to say, Immigration New Zealand did not consider the application met the requirements for lodgement. Accordingly, the complainant was now in New Zealand unlawfully, whereas she would have been

granted a visa while Immigration New Zealand considered the application if she had lodged a valid application before her visa expired.

[3.7] On 12 February 2013, Mr Hu took steps to request a visa for the complainant under section 61 of the Immigration Act 2009. That is a request for a discretionary exercise of authority, which is the only option for a person who is unlawfully in New Zealand, other than leaving New Zealand, to apply for a visa. Immigration New Zealand declined the request, which Mr Hu lodged on 26 February 2013. Immigration New Zealand did not respond to a second request Mr Hu submitted on 6 April 2013. Immigration New Zealand has a statutory power not to consider such applications.

[4] The Registrar identified potential infringements of professional standards during the course of Mr Hu's engagement, the allegations were that potentially:

[4.1] Mr Hu was negligent, which is a ground for complaint under section 44(2)(a) of the Immigration Advisers Licensing Act 2007. The circumstances were:

The work visa application

[4.1.1] Immigration New Zealand's letter of 2 November 2012 put Mr Hu on notice of the requirement for a current PCC; he failed to communicate that to the complainant.

[4.1.2] His agreement to apply for a work visa indicated a PCC was not required, but he did not take steps to review or challenge the view Immigration New Zealand expressed in its letter of 2 November 2012.

[4.1.3] He drafted the work visa application without using an interpreter to communicate with the complainant. He indicated no PCC was necessary, and did not submit one with the work visa application, accordingly it failed.

[4.1.4] Those actions potentially amounted to negligence due to:

[4.1.4] Failing to explain the 2 November 2012 letter to the complainant;

[4.1.4] Failing to tell the complainant she required a current PCC to apply for a work visa;

[4.1.4] Failing to make proper inquiries regarding the need for a work visa.

[4.1.5] Alternatively, the same circumstances amounted to breaches of clauses 1.1(a) and 1.1(f) of the Licensed Immigration Advisers Code of Conduct 2010.

Delay in submitting the section 61 request

[4.1.6] On 1 February 2013, when Immigration New Zealand notified the failed lodgement of the work visa application, they invited the complainant to lodge a request with a current PCC or a statutory declaration if it was not available immediately.

[4.1.7] On 12 February 2013, Mr Hu obtained a statutory declaration from his client, and first informed the complainant she needed a new PCC on that day.

[4.1.8] On 26 February 2013, Mr Hu submitted the request for a visa under section 61 using the statutory declaration. On 14 March 2013, the complainant provided Mr Hu with a current PCC, Immigration New Zealand did not receive it until 12 April 2013.

[4.1.9] Those actions potentially amounted to negligence due to:

[4.1.9] Failing to inform the complainant of the need to respond promptly to Immigration New Zealand; and

[4.1.9] His delaying lodging the request under section 61.

[4.2] Mr Hu breached clause 26(e) and 3(c) of the Licensed Immigration Advisers Code of Conduct 2014. The provisions required him to maintain a client file, and make it available on request by the Immigration Advisers Authority; and to comply with immigration law including the Act. The circumstances were:

[4.2.1] On 14 May 2014 and 15 July 2014, the Immigration Advisers Authority wrote to Mr Hu requesting that he produce his file; he did not respond to the requests.

[4.2.2] On 14 October 2014, the Immigration Advisers Authority wrote to Mr Hu informing him of the grounds of complaint, he then provided some of documentation, but not a complete file.

[4.2.3] He breached the provisions in the Code by failing to produce a file on request.

[5] 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

[6] 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.

[7] Mr Hu did file a statement of reply; he took issue with the facts on which the complaint relied. In significant respects, he attributed delay to the complainant's actions. He did not support his claims with documentation.

Mr Hu did not take to opportunity to provide evidence to support his response

[8] On 11 June 2015, the Tribunal issued directions. Those directions pointed out to Mr Hu that his response did not address the complaint satisfactorily. It gave Mr Hu a warning that he should understand the gravity of the complaint, and that it was not satisfactory to fail to provide his file and then make unsubstantiated allegations of fact.

[9] The Tribunal set down a timetable for an oral hearing. Mr Hu failed comply, at all, with the timetable, and on 11 September 2015, the Tribunal cancelled the oral hearing and gave Mr Hu notice it would hear the complaint on the papers. That is the routine form of hearing under section 49 of the Act.

Discussion

The standard of proof

[10] 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

[11] The Registrar provided a chronology and supporting documentation; and Mr Hu has not challenged the information, beyond an overall denial of liability, unsupported claims the complainant was responsible for his failings, and vague justifications unsupported by evidence.

Negligence

[12] Mr Hu ought to have been aware his client's visa would expire soon, and been very aware of Immigration New Zealand's warning regarding the need to for a PCC. If a person is in New Zealand unlawfully, not only is that status a breach of New Zealand law, in addition the person

is exposed to enforcement processes, and potentially long-term adverse consequences for any potential migration to New Zealand.

- [13] In the face of an explicit notification from Immigration New Zealand, Mr Hu:
- [13.1] Failed to explain to his client the notification in Immigration New Zealand's 2 November 2012 letter, until 12 February 2013;
- [13.2] He then became aware his client was about to lodge an application for a work visa:
- [13.2.1] He failed to inform her she had to have a PCC to lodge it,
- [13.2.1] He did so notwithstanding having to consider the issue when drafting the agreement to provide that service, and
- [13.2.1] Again when drafting the application, and
- [13.2.1] He continued to overlook the absence of a PCC against the background of having to lodge the application successfully, to avoid his client being in New Zealand unlawfully.
- [13.3] Then when notified the lodgement failed, notwithstanding the gravity of his client being in New Zealand unlawfully, through his own delinquent failure to properly evaluate his client's position in the face of an express notice from Immigration New Zealand, he:
- [13.3.1] Failed to inform immediately she needed to get a PCC;
- [13.3.1] Failed to immediately inform Immigration New Zealand the lack of a PCC was his own fault, as he did not tell his client she needed a PCC;
- [13.3.1] Failed to secure a statutory declaration and lodge a section 61 request immediately, or with any real urgency.
- [14] Mr Hu has not provided any sensible excuse for his delinquent failure to identify the need for a PCC. Even if Mr Hu failed to notice Immigration New Zealand's initial warning, and then overlooked the issue; his failure to respond with the urgency after his client was in New Zealand unlawfully was a disgraceful further lapse. The repeated failures approach the level of gross negligence. This is a case where Mr Hu failed to respond properly to repeated notifications from Immigration New Zealand.
- [15] Accordingly, I am satisfied that each of the elements of Mr Hu's service delivery identified in the Statement of Complaint as negligent, was negligent. I uphold the complaint Mr Hu was negligent on that basis. Accordingly, it is not necessary to consider potential breaches of the Licensed Immigration Advisers Code of Conduct 2010.

Failure to produce file

- [16] Immigration Advisers Authority informed Mr Hu it was considering a complaint, and issued a statutory demand under section 57(1)(c) and (d) of the Act. He received two statutory notices, failed to comply either, and then produced some but not all of the information requested.
- [17] He has not explained his failure to comply with the statutory requests.
- [18] Section 69 of the Act provides it is an offence not to comply with a request under section 57 of the Act.
- [19] Mr Hu did not have the records as required by clause 26 of the 2014 Code, or he did and withheld them. Given the statutory imperative to comply with the Immigration Advisers Authority's request, Mr Hu breached clause 3(c) of the 2014 Code.
- [20] I accordingly find Mr Hu breached clause 3(c) of the 2014 Code, in the respects identified in the Statement of Complaint.

Decision

- [21] The Tribunal upholds the complaint pursuant to section 50 of the Act; Mr Hu he was negligent, and breached clause 3(c) of the 2014 Code in the respects identified. They are grounds for complaint pursuant to section 44(2)(a) and (e) of the Act.
- [22] In other respects, the Tribunal dismisses the complaint.

Submissions on Sanctions

- [23] The Tribunal has upheld the complaint; pursuant to section 51 of the Act, it may impose sanctions.
- [24] 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 Hu is entitled to make submissions and respond to any submissions from the other parties.
- [25] 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.

Purported withdrawal of complaint

- [26] The complainant purported to withdraw this complaint, based on a “settlement”. A complainant cannot withdraw a complaint, as a complaint before the Tribunal is a statutory process, with public interest considerations. In this case, one of the serious elements in the complaint is a failure to comply with statutory obligations, which the Registrar raised not the complainant.
- [27] The Tribunal requests that both Mr Hu and the complainant disclose all relevant circumstances and documentation relating to the “settlement”. If any of the material is of a protected nature, they should seek legal advice. The Tribunal will consider the material in relation to sanctions, and accordingly the parties should provide any submissions on the settlement material, which they wish the Tribunal to consider.

Timetable

- [28] The timetable for submissions will be as follows:
- [28.1] The Authority and the complainant are to provide any submissions within 10 working days of the issue of this decision.
- [28.2] Mr Hu 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.
- [28.3] 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 16th day of May 2016.

G D Pearson
Chair