

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

Decision No: [2016] NZIACDT 66

Reference No: IACDT 019/15

IN THE MATTER of an appeal under s 54 of the Immigration
Advisers Licensing Act 2007

AGAINST A decision of **The Registrar of Immigration
Advisers**

By **Edana Blieden**
Complainant

DECISION

REPRESENTATION:

Registrar: Mr M Denyer, Ministry of Business, Innovation and Employment, Auckland.

Complainant: In person.

Date Issued: 4 October 2016

DECISION

Introduction

- [1] This is an appeal against the Registrar's decision not to refer a complaint to the Tribunal, on the basis that it did not disclose statutory grounds for complaint. The Registrar made this decision after investigating the merits.
- [2] The essence of the complaint is that Ms Blieden held a position of employment, which Immigration New Zealand found did not meet the relevant immigration instruction requirements. However, a later application succeeded. She says the adviser failed to manage her residence application properly.
- [3] In reply, the adviser provided information for the Registrar, which indicated that Ms Blieden gave him an employment agreement, job description and instructions that showed her employment met the standard in the relevant immigration instruction. That view was confirmed, as the employment documentation was initially successful when lodged with Immigration New Zealand. However, when Immigration New Zealand investigated the employment at the stage Ms Blieden applied for a residence visa, Ms Blieden and her employer disclosed further information. That information caused Immigration New Zealand to conclude the true nature of the employment was not at the level indicated in the employment documentation.
- [4] The Tribunal has to evaluate all the material before it, and decide whether the material now before it is sufficient to conclude the complaint should be referred to the Tribunal.
- [5] The Tribunal has rejected the appeal, as the adviser's explanation of what occurred is consistent with the adviser meeting professional standards; and has concluded the material supporting the complaint does not justify further investigation, or determination of the complaint by the Tribunal.

The grounds of appeal

- [6] This is an appeal under section 54 of the Immigration Advisers Licensing Act 2007, against a decision of the Registrar not to pursue a complaint.
- [7] The Registrar decided Ms Blieden's complaint did not disclose any of the statutory grounds for complaint and for that reason rejected it under section 45(1)(b) of the Immigration Advisers Licensing Act 2007.
- [8] Ms Blieden now appeals on the grounds:
 - [8.1] The complaint discloses negligence;
 - [8.2] Incompetence; and
 - [8.3] A breach of clause 3(d) of the Licensed Immigration Advisers Code of Conduct 2010 (the 2010 Code) relating to the refund of fees.

- [9] The complaint relates to a licensed immigration adviser.
- [10] The narrative supporting the appeal identified by Ms Blieden is that she paid \$9,500 for professional services. The service was poor, a residence application failed, and a second application was successful due to better preparation.

The decision appealed against

- [11] The Registrar provided an affidavit and submissions setting out the process she used to evaluate the complaint, the information she considered and the reasons for her decision.
- [12] The Registrar considered the following specific issues as potential grounds for complaint (which are wider in some respects than the grounds of this appeal):
- [12.1] Whether the adviser gave adequate advice relating to lodging expressions of interest.
- [12.2] Whether a refund should have been paid.
- [12.3] Whether correct advice was provided regarding whether Ms Blieden's employment was suitable for a residence visa application on the basis of skilled employment.
- [12.4] Whether the adviser gave appropriate advice to Ms Blieden regarding Immigration New Zealand's verification process.
- [12.5] Whether the adviser's response to a letter from Immigration New Zealand was adequate.
- [13] The Registrar proceeded on the basis that any of those issues could be grounds for a complaint, but found the evidence did not support any of them. The Registrar reviewed all of the material before her to evaluate whether there were other grounds disclosed and did not find any.
- [14] Accordingly, the Registrar decided there were no grounds for complaint disclosed, and she determined the complaint must be rejected.

Ms Blieden's response

- [15] Ms Blieden did not respond to the Registrar's affidavit and submissions, apparently relying on the original grounds for her appeal.

Discussion

The issue

- [16] Ms Blieden's complaint failed, as the Registrar does not consider the evidence supports the complaint, so it cannot be referred to the Tribunal. She considers she has taken her investigation far enough to make that determination.

- [17] Ms Blieden had the opportunity to provide facts or reasoning to show the Registrar is wrong in her view.
- [18] Section 54 requires the Tribunal to reject the appeal, determine it should hear the appeal, or set in place a process to determine the matter under the adviser's complaints procedure. The last of those options has been pursued on the Registrar's direction.
- [19] The Tribunal will evaluate the Registrar's decision, but with the advantage of any material supporting the appeal and on a *de novo* basis.

The complaint

- [20] The crux of the complaint is that the adviser performed poorly, and should have refunded Ms Blieden's fees when her immigration initiatives failed.
- [21] I have reviewed all of the material filed by the parties. First I consider the material Ms Blieden filed, and note the material was not a comprehensive record:
 - [21.1] She sought a refund of fees under a "performance guarantee" in the contract for providing professional services. The effect of the guarantee was that part of the fee would be refunded if the residence application failed. There were exceptions, including not holding a "skilled job".
 - [21.2] The complaint also referred to negligence, incompetence and a breach of the 2010 Code.
 - [21.3] In support of the allegation of negligence or incompetence, Ms Blieden said the adviser failed to provide adequate advice relating to her employment, and whether it qualified as skilled employment. She claimed the adviser then prepared the residence visa application without adequate information relating to her employment.
 - [21.4] Immigration New Zealand made inquiries regarding Ms Blieden's employment and were concerned the employment was not at a level to qualify as skilled; explanations did not satisfy Immigration New Zealand. Ms Blieden considered the adviser failed to manage this part of the process adequately.
 - [21.5] Potential factors relating to the position of employment were the employer's financial situation, the seniority of the position, and information provided by the adviser concerning those matters.
 - [21.6] Ms Blieden says the information submitted to Immigration New Zealand did not meet Immigration New Zealand's requirements and accordingly, the outcome was foreseeable. Therefore, she says the adviser failed to adequately prepare the application. She also says that she should have been prepared better for Immigration New Zealand's inquiries.

[21.7] In support of that contention, Ms Blieden relies on her subsequent residence application succeeding based on the same employment.

[22] The Registrar, after considering Ms Blieden's complaint, considered it could be addressed under the adviser's internal complaints procedure. The response from the adviser was:

[22.1] The application was declined as Ms Blieden provided information to the adviser showing her employment was skilled; and

[22.2] Her and her employer then provided different information to Immigration New Zealand.

[23] Ms Blieden declined (due to her obligations of confidentiality to her employer) to disclose information relating to her second application for the internal complaints process.

The Registrar's investigation and analysis

[24] The Registrar then decided the complaint did not meet the requirements to refer it to the Tribunal. It is only necessary to review the registrar's investigation in relation to the grounds of the appeal. They resolve one critical issue. That is whether the residence application process was deficient in relation to Ms Blieden's employment. Within this, there are a number of dimensions including: whether the position of employment was initially evaluated properly, whether it was described properly in the application, whether Ms Blieden was adequately prepared to deal with questions, whether Immigration New Zealand's concerns were addressed properly, and if there were deficiencies, whether the agreement or the 2010 Code provides for a refund.

[25] A key element in the Registrar's investigation was a letter from the adviser to the Registrar dated 3 October 2013. This letter provides the adviser's response. It claims:

[25.1] The job description, employment agreement and instructions which Ms Blieden provided indicated her employment met the relevant immigration instructions. Immigration New Zealand declined the application not because of the description and supporting evidence, but due to the information Ms Blieden and her employer provided to Immigration New Zealand when Immigration New Zealand made inquiries.

[25.2] Two licensed immigration advisers reviewed the information supporting the employment before the adviser filed the application with Immigration New Zealand. If the information supporting the employment was on its face unsatisfactory, then Immigration New Zealand would have rejected the application, for a work visa that relied on the same information, and had the same requirements.

[25.3] When Immigration New Zealand made inquiries of Ms Blieden, there was an initial telephone call, giving the opportunity to prepare for the interview; there was no need for any additional preparation. The information Ms Blieden and her employer provided to Immigration New Zealand was not consistent with the information lodged

with the application, but apparently they provided accurate information to Immigration New Zealand's investigator.

[25.4] In essence, Ms Blieden's application failed as the work she in fact performed was different, and at a lower level than the description in her employment documentation.

[25.5] The practice where the adviser worked had safeguards, which were observed:

[25.5.1] An agreement to provide services is only signed when a second and fully Licensed Immigration Adviser has agreed with the case strategy;

[25.5.2] Instructions to the client are only sent when reviewed by a second fully Licensed Immigration Adviser; and

[25.5.3] No visa application is filed without a review by a fully Licensed Immigration Adviser.

[25.6] In this case, the employment was a position as a "Store Manager", and the adviser reviewed the employment agreement and job description, additional factors supporting the position meeting the requirements were:

[25.6.1] The reporting chain;

[25.6.2] Ms Blieden's role in managing and training other staff, and responsibility for performance of the business;

[25.6.3] The salary level; and

[25.6.4] The degree of autonomy.

[25.7] The information held did not lead, and should not have led, to concerns regarding the position of employment.

[26] On 20 February 2015, the adviser's counsel wrote to the Authority. He said that the adviser's practice commissioned an audit by Immigration New Zealand of the two applications, being Ms Blieden's disputed application that failed, and the second application that succeeded. Immigration New Zealand took the view that both decisions were correct on the information provided for the respective applications. The letter noted Ms Blieden refused to provide the material supporting the second application to assist with the adviser's complaints process.

[27] The Registrar accepted the explanation from the adviser as it was a coherent explanation, supported by evidence, and Ms Blieden had not provided grounds to reject it.

The Tribunal's evaluation

- [28] I am satisfied that the Registrar correctly decided Ms Blieden's complaint did not disclose any of the statutory grounds for complaint and for that reason rejected it under section 45(1)(b) of the Immigration Advisers Licensing Act 2007.
- [29] The information provided by the adviser provides a compelling explanation that:
- [29.1] the practice where he worked had robust review processes in place; and
- [29.2] Ms Blieden's employment agreement, terms of employment, and job description all on their face established Ms Blieden employment met the relevant immigration instruction.
- [30] Objective support is derived from Immigration New Zealand initially accepting that the information established Ms Blieden qualified; that only changed after investigation.
- [31] I can give little weight to Ms Blieden's second application succeeding after the first application failed. The evidence is that Immigration New Zealand considers both decisions were correct on the information held at the time. That implies there were changed circumstances leading to different results. The Tribunal does not have the information to establish a different explanation. Ms Blieden has not produced the documentation relating to the two decisions, and explained the outcome was for reasons other than changed circumstances.
- [32] I have considered Ms Blieden's claim that she was not adequately prepared for Immigration New Zealand's inquiries. The first difficulty is that she has not provided the information to make and evaluate a comparison between what she supplied the adviser and what she and her employer told Immigration New Zealand. However, I note that coaching a client to provide answers that are anything other than the truth is unprofessional. Given that Ms Blieden relied on holding a senior administrative role, she should have been in a position to provide the correct information with little assistance. In essence, she was asked to explain what she did at work, and had the documentation lodged with the application for reference.
- [33] I have also considered the extent to which the adviser should have effectively reviewed or audited the information relating to Ms Blieden's employment, before relying on it. However, the general position is that a licensed immigration adviser can rely on employment documentation at face value, and an assurance from a client that it is accurate. Accordingly, in the absence of some trigger causing concern, it is not usual or necessary to make further inquiries. There is no evidence such a trigger alerted the adviser in this case. The first concern about the true nature of the position followed Immigration New Zealand's investigation.
- [34] In addition, I have considered whether the adviser provided an adequate response to Immigration New Zealand after their concerns following the investigations. The materials before me do not provide any foundation for taking the view that the response was

inadequate. I also observe that the response had to avoid overstating the true position. It appears that the information Ms Blieden and her employer provided to Immigration New Zealand's investigator was different from the employment agreement and job description. That would potentially lead to Immigration New Zealand taking the view that Ms Blieden provided misleading information. A great deal of care was required; casting doubt on what Ms Blieden told the investigator could have led to permanent adverse consequences for Ms Blieden's immigration prospects. It was likely that the only remedy would be to materially alter Ms Blieden's employment.

Conclusion

[35] I am satisfied that the evidence before me does not establish that the Tribunal would probably find the complaint disclosed any of the statutory grounds for complaint under section 45(1)(b). The evidence does not establish the Registrar was probably wrong in her conclusion that the adviser was not negligent or incompetent. On the contrary, the evidence on the balance of probabilities establishes the adviser's practice had a well developed system for supervision, and indicates:

[35.1] The information the complainant and her employer provided regarding her employment, on its face, indicated her employment met immigration standards; the adviser lodged the application with appropriate information;

[35.2] The presentation of the information to Immigration New Zealand, on its face, met Immigration New Zealand's requirements;

[35.3] The adviser adequately prepared Ms Blieden and her employer for Immigration New Zealand's inquiries, as they should have simply confirmed that the written material she and her employer provided accurately described the reality of her employment;

[35.4] The reason for Immigration New Zealand taking an adverse view was information Ms Blieden and her employer provided, which was either inconsistent with information provided in the application, or they failed to confirm elements of the information previously provided; and

[35.5] The adviser could not have embarked on a strong effort to alter Immigration New Zealand's view following its investigation, without creating a risk of adverse findings.

[36] Accordingly, the reason for Immigration New Zealand declining the application was that Ms Blieden's employment was not skilled employment under the relevant immigration instruction. It follows that the performance guarantee under the agreement was not triggered.

[37] This appeal accordingly fails in relation to the grounds relied on, namely negligence, incompetence and a breach of clause 3(d) of the 2010 Code.

Decision

[38] The Tribunal rejects the appeal.

DATED at Wellington on this 4th day of October 2016

G D Pearson
Chair