

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

Decision No: [2017] NZIACDT 10

Reference No: IACDT 020/14

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

BY **The Registrar of
Immigration Advisers**

Registrar

Between **E B T**

Complainant

AND **Viveg Lingam Mudaliar**

Adviser

**THE NAME AND ANY PARTICULARS IDENTIFYING THE COMPLAINANT ARE NOT
TO BE PUBLISHED**

SECOND INTERIM DECISION
(IMPOSING SANCTIONS)

REPRESENTATION:

Registrar: Ms S Blick, lawyer, Ministry of Business Innovation and
Employment, Auckland.

Complainant: In person.

Adviser: Mr N King, Lawyer, Auckland.

Date Issued: 28 July 2017

DECISION

Introduction

- [1] The Tribunal upheld this complaint in a decision dated 6 August 2015, *EBT v Mudaliar* [2015] NZIACDT 79, and subsequently issued an interim decision on sanctions *EBT v Mudaliar* [2015] NZIACDT 92. The interim decision reserved orders relating to the refund of fees, costs and compensation. Instead of completing the timetable, Mr Mudaliar appealed the interim decision. I understand the District Court refused to deal with the appeal until all the issues relating to sanctions have been resolved.
- [2] The parties have produced further material relating to the reserved issues. The complainant is acting for himself; there is some complexity in identifying what is at issue. Accordingly, I indicated I would consider the material, and set out a view of the remaining issues, giving due consideration to the material before me, and then give the parties an opportunity to respond before making a final decision.

The issues

- [3] The substantive decision found:
 - [3.1] Mr Mudaliar failed to complete the client engagement documentation and, accordingly, breached clauses 1.5(a), (b), (d), 3, and 8(b), (c) and (d) of the Licensed Immigration Advisers Code of Conduct 2010 (the 2010 Code).
 - [3.2] He dishonestly prepared and submitted documentation to Immigration New Zealand to support his client's residence application. In essence, he drafted a job description to fit an immigration requirement, rather than one that described what his client, in fact, did. Accordingly, the Tribunal found Mr Mudaliar engaged in dishonest and misleading behaviour, which is a ground of complaint under section 44(2)(d) of the Act. He also breached clause 5.2 of the 2010 Code.
- [4] The Tribunal observed that the deficiencies in the client engagement documentation were at the lower end. However, dishonestly misrepresenting a client's employment to Immigration New Zealand is inevitably an extremely serious matter. That conduct not only undermines the reliance Immigration New Zealand places on licensed immigration advisers, but it may also have serious consequences for an

innocent client. In this case, Mr Mudaliar's client and her employer were innocent parties.

[5] The remaining issues in relation to sanctions are:

[5.1] Whether there should be an order for the refund of fees, and if so, the amount of those fees;

[5.2] Whether there ought to be an award providing compensation for the costs of pursuing the complaint; and

[5.3] Any other compensation that may be awarded.

The complainant's position

[6] In a memorandum dated 27 July 2016 the complainant sought compensation for the loss of monetary opportunities, and the cost of further immigration applications (estimated at \$25,000). In addition, he sought actual costs of \$105,815, and a further amount described as "compensation" bringing the total of costs and compensation to \$474,926.46.

[7] The complainant also seeks the recovery of \$3,684.35 being fees paid to the adviser.

Discussion

Refund of fees

[8] In its interim decision, the Tribunal identified in paragraph [41.1] that it anticipated a potential order for the refund of fees for work where the adviser did not have a written agreement, had not set out fees correctly and performed the work dishonestly. The complainant says that those fees amount to \$3,684.35.

[9] As matters stand, the onus is on the adviser to establish that claim is incorrect. If there is no further information, the Tribunal will order that the adviser pay \$3,684.35 as a refund of fees.

Compensation and costs

[10] The complainant has drawn a distinction between compensation and costs. That is, costs in the sense of costs that he has incurred by paying money. The distinction is not an appropriate one in this context, as the power to award compensation applies to expenditure and other types of loss. The complainant claims a total of \$474,926.46.

- [11] The essential principles that the Tribunal will apply to this claim are that:
- [11.1] the compensation must be recoverable on general civil principles; and
 - [11.2] the compensation is for loss or damage that has a causal link with the professional misconduct that the Tribunal upheld as a ground of complaint.
- [12] The relevant findings are as follows:
- [12.1] There was a failure to document the client engagement process, including fees. The significance of this matter is limited in terms of compensation; it is, of course, relevant to the recovery of fees.
 - [12.2] The second ground of complaint was dishonest or misleading behaviour. The short point is that the adviser knowingly presented false and misleading information concerning the complainant's wife's (the applicant) occupation. The result was that the application failed as the job description was not correct.
- [13] The relevant circumstances concerning this aspect of the complaint are fully set out in the substantive decision. In essence, the applicant did not qualify for the visa she sought and the adviser used a job description which was different from the work that she actually undertook. It is important to have regard to the circumstances and the effect of the deceptive description on the complainant and the applicant.
- [14] The first point is that if the adviser had used the correct job description, the application would have failed. Had the adviser substituted one obviously non-complying job description for another, or another complying description for a different complying description, the allegation against him would have been much less serious. The allegation was that he deliberately substituted a job description that would qualify for a visa when in fact the complainant's wife had a different occupation, which did not qualify. Unless Immigration New Zealand noticed that the applicant's job description was wrong; she would have obtained a visa she did not qualify for.
- [15] Accordingly, what the adviser did was not the cause of the applicant failing to obtain a visa. The extent of the adverse effect on the applicant was to create the impression that she had provided false information to Immigration New Zealand. That, in itself, is of course a serious matter,

as it could potentially adversely affect her prospects of immigration to New Zealand indefinitely.

- [16] For that reason, the Tribunal took care to make it very clear that the adviser was solely responsible for the attempted deception, and that the applicant was a victim of that attempted deception. That is set out at paragraph [63] of the substantive decision. Accordingly, in the absence of evidence to the contrary, the Tribunal could not infer the adviser's conduct which it upheld as a ground of complaint adversely affected the complainant or the applicant's immigration opportunities in New Zealand. That is aside from the need to satisfy Immigration New Zealand of the Tribunal's findings and, potentially, satisfy further inquiries from Immigration New Zealand regarding that matter.
- [17] In these circumstances, the Tribunal does not appear to be in a position to be satisfied that any compensation could be awarded for the loss of immigration opportunities. As matters stand, the Tribunal could not be satisfied that the outcome of the complainant and his wife's endeavours to migrate to New Zealand would have been any different regardless of the conduct of the adviser.
- [18] The Tribunal does in some cases allow modest awards in the nature of general damages, recognising that clients in some complaints have inevitably suffered significant detriment, even if not quantified in any precise way. In the present case, the deceptive application has plainly caused a great deal of anguish. Furthermore, there is no doubt that if the applicant wishes to seek a visa in New Zealand in the future, she will have to address the fact that she was an applicant where the application contained deceptive information. There will inevitably be costs involved in securing Immigration New Zealand's acceptance that she was not at fault for providing false information, even though that is a finding in the Tribunal's decision.
- [19] However, the Tribunal is careful to ensure that awards in the nature of general damages are not simply a form of additional punishment and, accordingly, the awards are modest. In the circumstances, and subject to any further submissions, the Tribunal would award compensation of \$2,500 to the complainant's wife as an award in the nature of general damages. It includes \$1,000 in relation to bringing the complaint, as discussed under the following heading.

Costs of pursuing the complaint

- [20] The considerable effort that the complainant and his wife have expended to pursue the complaint justifies some compensation. There is some doubt as to whether an order in favour of the complainant can be made under s 51(1)(g), or whether the order ought to be made as part of the order for compensation.
- [21] Accordingly, subject to any further submissions, the order for compensation in the nature of general damages of \$2,500 would specifically include the sum of \$1,000 as compensation for the cost of pursuing the complaint.

Further submissions

- [22] Any party may make further submissions on the proposed orders within 10 working days of the issue of this second interim decision; any party may reply to a submission of the other party within a further 5 working days after receiving that submission.
- [23] Unless there are any further submissions that alter the Tribunal's interim view, it will issue a final decision referring to this interim decision and making the orders indicated for the reasons given in this decision.

DATED at WELLINGTON this 28th day of July 2017.

G D Pearson
Chair