

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

Decision No: [2017] NZIACDT 13

Reference No: IACDT 010/17

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

BY **The Registrar of Immigration
Advisers**

Registrar

BETWEEN **Hiren Mhatre**

Complainant

AND **Neha Gokhale**

Adviser

DECISION

REPRESENTATION:

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

Complainant: In person.

Adviser: In person.

Date Issued: 29 August 2017

DECISION

The complaint

- [1] This is a case where the complainant and the Registrar have sharply different views as to the facts. The Registrar set out her view of the facts in the statement of complaint, it is relatively uncomplicated:
- [1.1] On 19 September 2016, the complainant engaged the adviser to lodge a partnership-based temporary visa application on his behalf. A written agreement of 27 September 2016 provided terms for the professional engagement. The complainant's partner was in New Zealand studying, and nearing a point where she would be seeking a work visa so that she could work in New Zealand after study.
- [1.2] On 30 October 2016, the complainant delivered a partnership-based temporary visa application form to the adviser. The timing was significant as the complainant was reaching a point in time when his temporary visa would expire, and if it did expire he could not apply for another visa until he had left New Zealand. He could make a request under section 61 of the Immigration Act 2009, but it is a purely discretionary provision.
- [1.3] On the same day, 30 October 2016, the adviser lodged an online post-study award visa application without informing the complainant.
- [1.4] On 3 November 2016, the adviser lodged the paper-based application for a partnership-based temporary visa, without informing the complainant.
- [1.5] On 5 November 2016, Immigration New Zealand returned the application for the partnership-based temporary visa (the paper-based application) because the online post-study work visa application was already being processed. In addition, the paper-based visa application was incomplete, because it required a form from the complainant's partner indicating she supported the application; that form was missing.
- [1.6] The adviser did not inform the complainant that the partnership-based temporary visa application had been returned.
- [1.7] On 10 November 2016, the adviser's licence expired.

[1.8] On 15 November 2016, the complainant made enquiries about his application and was informed by Immigration New Zealand that the adviser had lodged both an online post-study work visa application and a partnership-based temporary visa application on his behalf, and that the latter had been returned by Immigration New Zealand on 5 November 2016.

[1.9] On 8 February 2017, the Authority sent the adviser a letter requesting her client's file to process the complaint. She did provide a copy of her file, but it did not include a copy of the post-study work visa application or the partnership-based temporary visa application.

[2] Based on those facts the Registrar identified the following potential grounds for complaint:

Negligence, or breach of Clauses 1 and 26(b) of the Code of Conduct 2014.

[2.1] Negligence is a ground for complaint under section 44 of the Immigration Advisers Licensing Act 2007 ("the Act"). Clause 1 of the Licensed Immigration Advisers Code of Conduct 2014 ("the Code") requires that a "licensed immigration adviser must be honest, professional, diligent and respectful and conduct themselves with due care". Clause 26(b) of the Code requires that an adviser must confirm in writing to a client when applications have been lodged and make ongoing timely updates.

[2.2] The Registrar says the adviser breached those obligations as:

[2.2.1] she filed a post-study work visa application on 30 October 2016, rather than a partnership-based temporary visa application; and

[2.2.2] she did not inform the complainant about lodging the applications or provide updates when Immigration New Zealand rejected the application.

Deficiencies in file keeping

[2.3] The second aspect of the complaint is in relation to Clauses 26(a)(i) and 26(e) of the Code. The first of those provisions requires that an adviser must maintain a file, including a full copy of the client's application, and the latter that a licensed immigration adviser makes those records available for inspection on request by the Authority.

- [2.4] The Registrar accepts that the adviser did maintain a client file except in one respect, says the adviser failed to include a copy of either of the two applications she lodged for the complainant.

The responses

Format for the hearing

- [3] The complainant and the adviser both filed written replies to the Registrar's statement of complaint. For present purposes, it is sufficient to note that they disagreed about essential facts; so, it was inevitable that rather than determining the complaint on the papers, the Tribunal should hear from the parties. Given, the obligation to deal with matters on the papers to the extent possible pursuant to s 49 of the Act, and the fact that neither the complainant nor the adviser were represented, the Authority took the approach that the hearing would be, essentially, an inquisitorial enquiry by the Tribunal. Nonetheless, when the adviser and the complainant gave evidence, the other party and counsel for the Registrar were given the opportunity to cross-examine.
- [4] The following paragraphs provide the essential elements of the response by the adviser and the complainant to the Registrar's view of the facts and grounds for complaint. It includes both the written responses and the oral elaboration of what they said.

The adviser

- [5] The adviser accepts that she was less formal than she might have been in a usual client interaction. The complainant and his wife were introduced by a mutual friend; she only charged \$250 for the work, compared with a typical fee of \$1,500 to \$2,000 for the work involved.
- [6] The adviser says she maintained regular contact with the complainant, but more so with his wife and went through the process of gathering the necessary information to lodge the application. She explained that she was very conscious that unless she filed the application by 30 October 2016, the complainant's temporary visa would expire. If that happened, he would then face the difficulty of being in New Zealand unlawfully, and the consequential constraints on making an application for a visa. The difficulty being that there is a general prohibition on seeking a visa when in New Zealand without holding a current visa. The principal exception is s 61 of the Immigration Act 2009, which allows a request to be made, but the decision is entirely discretionary and Immigration New Zealand is not required to give any reasons for

its decision. In these circumstances, the adviser regarded lodging the application no later than 30 October 2016 as imperative.

- [7] The adviser said that she generally communicated with the complainant via telephone contact with his wife. She also produced a copy of an email pointing out the need for the visa application, and the form from the complainant's wife in support of the application. There were various other documents that she discussed, including bank statements, which had different dates giving the impression that they were obtained progressively by the complainant in the mid part of October 2016.
- [8] The 30th of October 2016 was a Sunday. The adviser says that she had prepared the written application for a partnership-based temporary visa by engaging with the complainant, writing out the relevant parts of the form and dating the form 27 October 2016. She says she did that in good time to be ready to file the application on 27 October 2016. The following day was a Friday; she wanted to file the application on that day at the latest. She said she provided that date as she had emphasised to the complainant that was the date by which she needed to have the form returned so that she could lodge it with Immigration New Zealand. She had not drafted the whole of the form required from the complainant's partner. However, given that the complainant's wife was completing a Level 7 course in New Zealand the adviser did not consider that should be a difficulty. As it transpired, the complainant took both papers away, saying it was so his wife could review them.
- [9] The complainant had not returned the papers; accordingly, the adviser says she sent an email to the complainant's wife on 28 October 2016 at 7:13 pm. It asked for at least the application form and, preferably, the form giving the complainant's support. The complainant delivered the paper form application on 30 October 2016 to her home office—that day was a Sunday. He did not bring the form his wife had to provide. Accordingly, the adviser concluded that she would have to lodge the application online so that the complainant was not in New Zealand without a permit and, accordingly, barred from lodging the application. She had no previous experience with lodging applications online and says that while she is confident with computers, this was a new task for her.
- [10] The adviser accepts without reserve that she made an error when lodging the form online; she selected a post-study work visa application form from the "drop down" menu rather than the correct

application which was a partnership-based temporary visa. She said that the errors were a combination of inexperience and working under a tight time pressure.

- [11] The adviser says she realised she had made a mistake with the post-study work visa and promptly lodged the paper-based application as well as the online application.
- [12] The adviser received the rejected paper-based application from Immigration New Zealand on 5 November 2016. She says that she reported that to the complainant's wife, but that she had first made enquiries with Immigration New Zealand. She said that the Immigration New Zealand Helpline advised her that she would have to wait until Immigration New Zealand had rejected the online application before she could advance matters further.
- [13] The adviser said her licence had expired by the time Immigration New Zealand had rejected the online application. At that point, she was no longer a licensed immigration adviser, so could not advance matters further with Immigration New Zealand. On 23 November 2016, she sent an email to the complainant's wife. The email was addressed to the complainant's wife, but it had the text of a letter addressed to Immigration New Zealand. She says her intent was that this email would be conveyed to Immigration New Zealand to identify that she had made the error by lodging the wrong application.
- [14] The adviser accepts that the two immigration forms were not on her file. She says it was simply a question of not having taken copies given the urgency at the time, and the contents of her file make it very clear that the applications did exist.

The complainant

- [15] The complainant has a wholly different view of the facts.
- [16] The difference can be identified relatively shortly:
 - [16.1] The complainant says he never completed the paper-based application at all. He says that the document was entirely created by the adviser with no reference to him. He says that the signature on the document is a forgery.
 - [16.2] The complainant says the adviser forged the copy of the email of 28 October 2016 (the email purporting to ask the complainant to bring the application form to the adviser), because she never sent such an email.

[16.3] He says that the online application was made without any authority to lodge it and that the adviser essentially fabricated an application at the point in time when his visa was expiring.

Discussion

The standard of proof

[17] 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

[18] The fundamental difference between the adviser's position and the complainant's allegations make it necessary to prefer one account over the other. Both cannot be correct, or explained in terms of a misunderstanding. The complainant's allegation is, without doubt, a very serious one; it is necessary to be sure before making the adverse finding sought by the complainant. His allegation is that the adviser wholly abandoned any element of integrity as a licensed immigration adviser and began forging documents. The Registrar did not support the allegation.

[19] To evaluate such a serious allegation it is inevitable that a decision-maker looks to identify a cogent reason for the conduct. There has been nothing in the evidence that has suggested that the adviser was under any type of pressure, or would gain anything by forging documents. It appears that the extent of her concern regarding the absence of the completed application was the effects of not filing on time for the complainant and his wife. The adviser had gathered a body of material to support the application; she submitted that material with the online application. The material included a photograph, marriage certificate, rent agreement, lease extension, bank records, utility bills and other material. Accordingly, the evidence shows the adviser had been actively gathering the material required for lodging the application prior to 30 October 2016; that is apparently inconsistent with finding that she failed to carry out her instructions, and forged a document to cover up that failure.

[20] For the reasons discussed below, there is no doubt that the adviser did make an error and lodged the wrong application form. However, the material in the file does not indicate that the adviser was generally non-compliant with her professional obligations. The evidence does not suggest the adviser was not capable of performing the work to a

high standard; she has completed the formal qualifications to be a licensed immigration adviser and she was an immigration officer employed by Immigration New Zealand before becoming a licensed immigration adviser.

- [21] Considering all of these circumstances, the allegation that the adviser was a dishonest person who fabricated documents is not a plausible conclusion on the totality of the evidence. Furthermore, I have been unable to identify any specific evidence that could provide a reasonable foundation for finding any of the impugned documents were forged. The allegation is entirely dependent on the complainant's evidence that has no independent support.
- [22] I must, accordingly, conclude that the complainant's claim that the two applications and email of 28 October 2016 are forgeries created without his knowledge or authority is wrong. Given this finding it is inevitable that, to the extent that the adviser's evidence differs from the complainant's, I must prefer the evidence from the adviser. I note that in some respects this concerns what the adviser says regarding telephone conversations between her and the complainant's wife. Neither the Registrar, nor the complainant called the complainant's wife to give evidence.

Negligence or service delivery failures

- [23] The first ground of complaint I must evaluate is negligence or a breach of Clause 1 of the Code, and an alleged breach of clause 26(b) of the Code. Section 44 of the Act provides that negligence and breaches of the Code are grounds for complaint.
- [24] The particulars in support of this ground of complaint relate to erroneously filing a post-study work visa application rather than the correct partnership-based temporary visa application and failing to keep the complainant properly informed.
- [25] The adviser, for obvious reasons, accepts that she erroneously lodged the wrong visa application. It is necessary for me to evaluate, first, whether the mistake was a result of the adviser's negligence or carelessness, and then, if so, whether or not the gravity is sufficient to trigger the disciplinary threshold.
- [26] There is some inevitability that any professional dealing with an online application in circumstances of urgency may make errors. The evidence indicates the application was lodged relatively late at night on a Sunday; and it was due to the complainant's failure to deliver the

necessary documentation at an earlier point in time. The error is not one of professional judgement. It was a simple mistake of failing to select the right type of application from a menu providing various options. Furthermore, the appellant realised what had happened reasonably promptly after making the mistake, and then filed the paper application in an attempt to correct the mistake.

- [27] In all these circumstances, I cannot find that the adviser was negligent, or breached any of the elements of Clause 1 of the Code. She made a mistake and that was as far as it went.

- [28] To the extent that there is room for criticism of the adviser, it lies not in the original mistake, which was no more than a product of human frailty. The adviser did not respond in the appropriate way when she identified that she had made a mistake. She should have written to Immigration New Zealand, explained the error that she had made when completing the computer form, submitted the written application with an explanation and requested that Immigration New Zealand correct the error. However, it is not necessary or appropriate for the Tribunal to do more than make that observation. The Registrar has not notified the failure to redress the error as a ground supporting the allegation of negligence or a breach of Clause 1 of the Code. For that reason, the adviser did not fully develop her explanation regarding her response. She did, however, mention in evidence she had made contact with Immigration New Zealand and sought advice as to the proper approach when she realised she made an error. She says she followed the advice given by Immigration New Zealand. Given the explanation, and that the adviser's response was not particularised as a ground of complaint it is not appropriate for the Tribunal to explore the issue further. Accordingly, there is no adverse finding regarding the adviser's response given her personal circumstances, after she realised she made a mistake.

- [29] The second element of this ground of complaint is that the adviser failed to confirm in writing when the application had been lodged, provide ongoing updates, and inform the complainant that his partnership-based temporary visa application had been rejected.

- [30] The adviser has not identified confirmation in writing regarding the lodging of the application, but says that she reported did so orally, both in relation to the original application and the rejection of the partnership-based temporary visa application. For the reasons already identified, I accept the evidence. It necessarily follows that the adviser

failed to confirm in writing to the complainant that the two applications had been lodged.

- [31] In this case, given that one application was lodged with an error, and a second lodged to correct the error, the obligation to report in writing was not a simple technicality. This was an exceptional case, where there was an important professional obligation.
- [32] When something has gone wrong with a client's immigration affairs, they are entitled to know what happened; the Code requires that they are entitled to a report in writing even if nothing goes wrong.
- [33] Accordingly, I must find that, given the failure to report in writing applied to two applications and the circumstances made it very clear that there ought to be a written record of what had happened, the adviser breached the Code in this respect. The breach clearly falls within the area where an adverse disciplinary finding is appropriate and necessary.
- [34] Accordingly, the adverse finding is that the adviser breached Clause 26(b) of the Code, in that she failed to confirm in writing to the complainant when the two applications had been lodged. I also find that the breach is mitigated by her reporting orally. Evidence of the fact that the complainant and his wife were aware of the first application being lodged is supported by the fact that they authorised a credit card payment to allow the lodgement. I also accept the adviser's evidence that she engaged with the complainant on Sunday 30 October 2016 when he delivered the written application, and he was, accordingly, fully aware of that lodgement.
- [35] In relation to the second lodgement of an inconsistent application, the adviser says she told the complainant's wife who was her main point of contact. Given the conclusions discussed regarding the evidence from the complainant and the adviser, I have no reason to reject the adviser's evidence on that point.

Failure to maintain a proper client file

- [36] Clause 26(a)(i) of the Code requires that a licensed immigration adviser must maintain a file that includes "a full copy of the client's application".
- [37] The adviser accepts that she did not keep copies of the applications on the file. She has explained reasons that mitigate that failure. In essence, she maintains that the failure arose due to the relatively urgent circumstances. There is no evidence suggesting that there was

any attempt at deception; the file made it obvious what applications were lodged, and when they were lodged.

[38] While the matter is at the low end, I am satisfied that an adverse finding must be made. There was a clear breach of an explicit requirement. This was an occasion when the adviser must have fairly quickly realised that she had made a mistake and she ought to have known that it was important that her file accurately documented what had happened.

[39] The Tribunal, accordingly, finds the adviser breached clause 26(a)(i) of the Code.

Decision

[40] The Tribunal upholds the complaint pursuant to s 50 of the Act; the adviser breached the Code in the respects identified and that is a ground for complaint pursuant to s 44(2)(e) of the Act.

[41] In other respects, the Tribunal dismisses the complaint.

Submissions on Sanctions

[42] The Tribunal has upheld the complaint; pursuant to section 51 of the Act, it may impose sanctions.

[43] 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, the adviser is entitled to make submissions and respond to any submissions from the other parties.

[44] 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

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

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

[45.2] 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.

[45.3] 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, Tuesday, 29 August 2017

G D Pearson
Chair