BEFORE THE IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2017] NZIACDT 3

Reference No: IACDT 001/16

IN THE MATTER	of a referral under s 48 of the Immigration Advisers Licensing Act 2007
BY	**The Registrar of Immigration Advisers** Registrar
BETWEEN	**S S** Complainant
AND	**N L** Adviser

DECISION

REPRESENTATION:

Registrar: Mr M Denyer, Lawyer, MBIE, Auckland

Complainant: No attendance at hearing

Adviser: Mr N L

Date Issued: 4 April 2017

DECISION

Introduction

[1] The Registrar of the Immigration Advisers Authority referred this complaint to the Tribunal. The foundation for the complaint is that the complainant's life partner sought a work visa, and took advice from the adviser. The Registrar has identified two elements of the professional advice which she says were deficient:

[1.1] The complainant's partner (the applicant) had already spent 22 months holding a work visa issued on a partnership-based entitlement. Other than as an exception to policy, the maximum period for which such a visa would issue is 24 months. The Registrar says Mr L failed to identify this as an obstacle to the applicant getting a work visa; and

[1.2] Ultimately, the applicant's attempt to gain a work visa failed, notwithstanding an attempt to seek Ministerial intervention. The adviser allegedly communicated the result to the applicant in a perfunctory way, and failed to follow up adequately.

[2] The adviser denies he failed to identify the problem of the maximum of 24 months allowed for the visa category relied on. He said the 24 month issue was secondary to a more pressing issue. Immigration New Zealand was likely to reject the work visa, and also deny the applicant any long-term immigration prospects. That was important, because the applicant and the complainant were a couple; the complainant had a residence visa and the applicant was ultimately relying on his residence status to get residence herself. The real problem affecting both the work visa and the plan for a residence visa was that Immigration New Zealand considered the complainant had procured his residence visa using a false declaration regarding his relationship status. They took the view he failed to disclose his relationship with the applicant.

[3] The adviser said, in respect of the communications after the request for Ministerial intervention failed, he initially communicated only briefly with the applicant. However, he said he had attempted to follow up with telephone calls but that there was no response.

[4] The first issue for the Tribunal to determine is whether the adviser had in fact identified the 24 month limit, and if so, whether his decision to focus on the false declaration was appropriate in all the circumstances.

[5] The second issue is whether the initial brief communication regarding the outcome was adequate, and then whether in fact the adviser did follow up adequately.

[6] The Authority has determined that neither ground of complaint has been made out on the facts.

The complaint

[7] The Registrar's statement of complaint put forward the following background as a basis for the complaint:

[7.1] On 4 August 2014, the complainant, the applicant and the adviser met to discuss the applicant's immigration circumstances. At the time, the applicant held a work visa issued under the partnership category which was due to expire on 30 August 2014.

[7.2] The adviser was instructed to prepare a work visa application, and complete the appropriate formalities. The Registrar says that at a meeting on 5 August 2014 there was a discussion concerning the applicant not having been declared as a partner on the complainant's residence visa application in late 2011, which had caused a residence application, which the applicant lodged, to be declined. The essence of the problem was that the complainant's immigration status in New Zealand, on which the applicant relied, had allegedly been procured through failing to disclose that he was in a relationship with the applicant.

[7.3] After lodging the work visa application, consistent with the concerns relating to the failure to declare the relationship at an earlier stage, Immigration New Zealand sent an email identifying concerns about the application. The key elements giving rise to concerns were:

[7.3.1] The complainant failed to declare the applicant as his partner in his 2011 residence visa application.

[7.3.2] The applicant's residence visa application in 2013 had been declined under policy F2.5. That policy required residence applications to be declined if an applicant for a visa was not declared in the eligible partner's application and should have been. There is an exception where there was no intention to mislead and non-disclosure did not affect the outcome of the eligible partner's application.

[7.3.3] The current work visa application would have to be declined under policy WF2.5, because she depended on her relationship with the complainant, and he would not be eligible to support a residence application within 12 months due to the non-disclosure.

[7.4] The adviser responded to Immigration New Zealand endeavouring to show that there was no intention to mislead during the complainant's residence application. Immigration New Zealand were not satisfied that there was an absence of intent to mislead and, accordingly, on 15 October 2014, declined the applicant's visa application.

[7.5] On 20 October 2014, the complainant and the adviser entered into another service agreement; the adviser was instructed to submit a request for Ministerial intervention. He did so on 31 October 2014.

[7.6] On 26 March 2015, the request for Ministerial intervention was declined on the basis that:

[7.6.1] The reason for Immigration New Zealand originally declining the work visa application was wrong. The failure to declare the relationship with the complainant on the residence application did not make him ineligible as a supporting partner under policy WF2.5.

[7.6.2] However, policy WF2.1(b) specifies that work visas under the partnership category can only be issued for a maximum 24 months, except as an exception to instructions. It inferred that there should be no exception to instructions, unless the complainant had a pathway to residence.

[7.6.3] The reason the applicant did not have a pathway to residence was the complainant's attempt to mislead Immigration New Zealand. The report said:

> The officer considered that there was both an intention to mislead and that [the complainant] would not have been granted residence as a secondary applicant in the SMC application approved in February 2012. By their own account, [the applicant] and [the complainant] were living together in a partnership during the period when the SMC application was being assessed. Had [Immigration New Zealand] been aware of their relationship at the time, it is unlikely [the complainant] would have been considered as single, or a dependent child.

[7.6.4] In terms of the effect of the attempt to mislead on the applicant's future, the relevant instruction was F2.5(e). While the complainant could still be a supporting partner for a work visa, unless Immigration New Zealand could be persuaded the complainant had not attempted to mislead, this particular instruction blocked the applicant from having a pathway to residence.

[7.7] The adviser provided a copy of the Minister's decision (issued by his delegate) but did not provide further advice or support.

[8] The Registrar identified potential infringements of professional standards. The allegations were that potentially: the adviser was negligent or, alternatively, breached clauses 1, 2(a), and 9(a) − (b) of the Licensed Immigration Advisers Code of Conduct 2014 (the 2014 Code). The grounds for potential breach of those obligations were:

[8.1] The adviser failed to identify the 24 month limit in policy WF2.1.

[8.2] The adviser failed to identify for the applicant that she could likely only obtain a visa for a longer term as an exception to instructions.

[8.3] The adviser also failed to identify the same issue when advising on the request for Ministerial intervention.

[9] The Registrar alleges that this amounted to negligence, a failure to provide objective advice or the pursuit of an application that had little or no hope of success.

[10] The second aspect of the complaint alleges that the adviser potentially breached clauses 1 and 2(a) of the 2014 Code by failing to properly communicate after the request for Ministerial intervention was declined. The grounds were:

[10.1] The adviser provided the applicant with a "one-line email". He provided no further information or advice.

[10.2] The adviser did make some attempt to contact the complainant by telephone but was unsuccessful, and the complainant says that efforts to contact the adviser were unsuccessful.

[10.3] The Registrar alleges this response by the adviser was not sufficient to maintain a relationship of trust and confidence and failed to provide advice on further options regarding the applicant's lawful status in New Zealand.

The responses

[11] The complainant supported the statement of complaint. However, when an oral hearing took place to resolve potential differences between the complainant's account and that of the adviser, the complainant did not attend the hearing.

[12] The adviser said that it was important to give proper dimension and perspective to the circumstances in which he found himself in when the complainant and the applicant first consulted him. He said he was aware of the issue relating to the 24 month limit and discussed it with his clients. However, in the overall scheme of things it was not the real issue facing the complainant and the applicant. The issue of overwhelming importance was the complainant's attempt to mislead Immigration New Zealand. For the reasons the Minister's delegate set out, Immigration New Zealand took the view the complainant had effectively procured his residence status in New Zealand by providing false information regarding his relationship with the applicant.

[13] Accordingly, the adviser considered that endeavouring to explain and justify the failure to declare the relationship was critical for any real solution. The complainant and the applicant were in a long term relationship, one had residence, the other sought residence, and the work permit was only an incidental issue in the overall situation. The appellant says that while he discussed the issue of the 24 month limit with the complainant and the applicant, they all understood, for obvious reasons, that the issue of real substance to be addressed was the provision of what Immigration New Zealand considered was misleading information.

[14] In relation to the second issue, the advisor says that his first step of sending the information from the Minister's delegate, which set out the consequences of the decision, was a reasonable first step. He said that he followed that up with attempts to make contact, but was unsuccessful.

[15] Accordingly, the adviser maintains that in relation to the allegations against him, he discharged his professional duties properly. He accepted that he should have recorded details about the 24 month limit in writing and communicated them to his client; however, that is not one of the grounds of complaint.

Discussion

The standard of proof

[16] The Tribunal determines that 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.

The facts

[17] Only the adviser gave oral evidence. It was clear that there were contentious elements relating to the facts. In the absence of a witness who disagrees with what the adviser has said in his sworn testimony, which was subject to cross-examination, if his evidence is plausible and consistent with the record, I have no reason to reject the his account.

[18] There is nothing implausible in what the adviser has said. The most that can be said is that he should have had a written record of the issue relating to the 24 month time period, and provided that information in writing to the complainant and the applicant. However, a sensible perspective on how much weight ought to be given to the 24 month time limit in the circumstances is provided by Immigration New Zealand's reaction. When the application for a work visa was lodged, Immigration New Zealand made no mention at all of the 24 month time limit. Immigration New Zealand was entirely focused on the failure to declare the relationship with the applicant when the complainant obtained his residence visa. That response is consistent with the adviser's evaluation of the significance of the 24 month time period for his client's future.

[19] Accordingly, I have no grounds to reject the adviser's claim that he did identify the 24 month time limit, but recognised that the proper focus was on the complainant having procured residence using misleading information regarding his relationship status.

[20] The same applied when the request was made to the Minister. Immigration New Zealand had not raised the 24 month time limit at that point.

[21] The next factual issue to determine is whether the adviser attempted to make telephone contact with the complainant after the Minister's delegate declined the request. It is plausible that he did so. In the absence of evidence to the contrary, the Authority must accept that evidence.

Failure to recognise or take adequate action in relation to the 24 month time limit

[22] As indicated, I am satisfied that the adviser did raise the 24 month time limit. I am also satisfied that he correctly identified that this issue was not the real obstacle to the applicant obtaining a satisfactory outcome. The reality is that at no time did Immigration New Zealand ever regard the 24 month time limit as the pivotal issue, and neither did the Minister. Immigration New Zealand did not see fit to mention the issue.

[23] The Minister's delegate fully explained the position:

[23.1] Immigration New Zealand had in fact made an error in thinking that the complainant's failure to declare his relationship was an obstacle to him being a supporting partner for the work visa.

[23.2] However, the reason why the Minister's delegate would not issue a work visa was the immigration instruction that related to the applicant seeking a residence visa. She had no pathway to residence due to the complainant attempting to mislead Immigration New Zealand.

[23.3] Accordingly, if the Minister granted a work visa contrary to instructions, that did not really advance matters; the applicant still had no path to residence. In these circumstances, the time limit for a work visa became relevant.

[24] While not expressed directly, it appears implicit that if the applicant did have a pathway to residence, it would have been quite possible she may have been granted a further work visa as an exception to instructions.

[25] In short, all of the problems identified by the decision makers in Immigration New Zealand, and under the Minister's delegation, identified that the applicant's problems lay with the complainant's attempt to mislead when he obtained his residence visa. They were correct to view the matter in that way.

[26] I have accepted as a fact that the adviser did identify the 24 month issue, and I am also satisfied that he correctly made the judgement that the 24 month issue was not the significant obstacle to the applicant's objectives. He identified the real objective to the applicant was the attempt to mislead. It necessarily follows that he was not negligent; he acted with due care and maintained the other professional standards. It also follows that the application and request was not futile or grossly unfounded; it was an unsurprising and reasonable attempt to try and overcome the serious obstacle arising out of the complainant's attempt to mislead Immigration New Zealand.

Failure to communicate properly after the decline of the Ministerial intervention

[27] There is no dispute that the adviser sent a copy of the relevant information provided by the Minister's delegate after having made the decision. That information included a review of the consequences, including issues relating to the applicant's unlawful status in New Zealand, the need to leave so as not to imperil any possible future applications; and other factors that could be relevant.

[28] I have accepted as a fact that the adviser followed that up with a number of attempts to make telephone contact. There can be no doubt that the applicant was well informed of her circumstances by the Minister's delegate; that was one of the functions of the communication from the delegate.

[29] There are limits to what a professional person can or should do in terms of endeavouring to seek to contact a client. A client has every right to engage another adviser, or not to seek further services from a professional person offering them. They may or may not choose to inform the professional. If this was a case of a naive person who did not have the information regarding the consequences of the decision, there may well be a different obligation on their professional adviser. In this case, the adviser gave evidence that the applicant held a good position of employment in New Zealand, and there is no reason to suppose that she was not informed and able to make sound decisions. In fact, she followed the advice from the Minister's delegate and did leave New Zealand as she was obliged to do.

[30] In these circumstances, I am satisfied that the adviser was professional, diligent, took proper care and, in all respects, discharged his professional obligations regarding informing the applicant and the complainant of their circumstances.

Decision

[31] The Tribunal dismisses the complaint.

DATED at Wellington on this 4th day of April 2017

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G D Pearson
Chair