

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

Decision No: [2017] NZIACDT 7

Reference No: IACDT 04/16

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Kentaro Shihaku

Complainant

AND

Kotaro Mizoguchi

Adviser

DECISION

APPLICATION FOR THE TRIBUNAL TO WITHDRAW
ON THE GROUNDS OF BIAS AND MISCONDUCT

REPRESENTATION:

Registrar: Mr A Dumbleton, lawyer, MBIE, Auckland.

Complainant: Mr Tan Otomo (agent).

Adviser: Mr A J B Holmes, lawyer, Auckland.

Date Issued: 19 June 2017

DECISION

Background

- [1] This is a decision concerning a complaint by Mr Mizoguchi. He says that the Tribunal has engaged in misconduct, and exhibited bias when hearing the professional disciplinary complaint against him. He says the Tribunal has acted unfairly by behaving as a “prosecutor and judge”, and treated him unfairly by not giving him notice of questions before asking them.
- [2] He contends that the Tribunal has not only misconducted itself, but has done so in a manner that is incapable of rectification. Accordingly, the Tribunal cannot now deal with the complaint against Mr Mizoguchi.
- [3] The Tribunal must consider the merits of the contentions, and determine whether it has misconducted itself, and if so, the consequences of that.

This application

- [4] This application is in the form of a memorandum, the central elements appear to be claims that the Tribunal has engaged in misconduct by:
 - [4.1] acting “as prosecutor and judge”, hence acting in a biased manner; and
 - [4.2] failing to give notice of the subject of questions, before asking questions of Mr Mizoguchi at a hearing.

The procedural history

- [5] This is a professional Disciplinary Tribunal which deals with complaints against licensed immigration advisors under the Immigration Advisors Licensing Act 2007 (the Act). Section 49 of the Act has three principles, which have some tension between them. The principles are:
 - [5.1] The Tribunal may regulate its procedures as it thinks fit.
 - [5.2] Matters or complaints must be heard on the papers.
 - [5.3] Despite the requirement to hear matters on the papers, the Tribunal may request further information from any person or request that any person appear before the Tribunal to make a statement or an explanation.
- [6] In some cases, the power to require persons to attend before the Tribunal has been necessary because there is simply a direct conflict of evidence between witnesses. The conflict can only be resolved by hearing evidence of the opposing accounts and allowing the testimony to be subject to the usual process of cross-examination. There are also instances where a complainant or a licensed immigration advisor provides information that requires further examination. In some cases, because it is potentially implausible or inconsistent with other

material; and others, it is not expressed in a manner that adequately explains the position in a comprehensible form.

- [7] In this case, the Registrar lodged a Statement of Complaint, and Mr Mizoguchi answered it. It is a procedure mandated by the Tribunal through a practice note.
- [8] One of the features of the Tribunal's process has been (since its inception) that the Registrar has steadfastly taken the view that she has neither the power nor the duty to prosecute any complaints before the Tribunal. In her view, the extent of her role is to file the particulars of a complaint, together with supporting evidence. She does in some cases cross-examine witnesses and present evidence at an oral hearing. The Registrar does, it appears, accept that she has a responsibility to ensure that she provides material information for the Tribunal to consider.
- [9] In this case, Mr Mizoguchi's initial response to a complaint appeared to be made without the benefit of legal assistance. The form of the response left questions, some assertions he made lacked factual support, and he failed to address a number of issues.
- [10] In these circumstances, the Tribunal put Mr Mizoguchi on notice of the observations of the High Court in *ZW v Immigration Advisors Authority*¹, regarding the imprudence of failing to take legal advice when dealing with a significant professional disciplinary complaint before the Tribunal. The Tribunal also indicated that it would arrange an oral hearing which was limited in scope. The limitation was that Mr Mizoguchi would be the only witness, he would give sworn evidence, be questioned by the Tribunal, and the Registrar and complainant would be limited in cross-examination to issues explored by the Tribunal. This was a case where Mr Mizoguchi's explanation did not in itself provide a satisfactory answer to the complaint, but did indicate that there were a number of issues he raised which needed further exploration.
- [11] While establishing a confined oral hearing for the limited inquisitorial process described, the Tribunal did leave it open to the parties to apply to have an oral hearing in a different form. However, no party sought to have a different form of hearing.
- [12] Prior to the hearing, Mr Mizoguchi instructed counsel and filed a statement which amplified his response to the complaint. At the oral hearing, counsel for Mr Mizoguchi had Mr Mizoguchi affirm his written statement, and I explored the issues raised by Mr Mizoguchi's initial response and his further response provided with the assistance of counsel.
- [13] The questioning reached a point where it became evident that Mr Mizoguchi did not necessarily have satisfactory answers to some matters of concern. The Tribunal allowed Mr Mizoguchi to consult with his counsel, notwithstanding that he was in the course of an examination.
- [14] The Tribunal formed the view that Mr Mizoguchi had not provided a satisfactory explanation. However, it determined that before any conclusions were reached, Mr Mizoguchi must be

¹ *ZW v Immigration Advisors Authority* [2012] NZHC 1069.

given particulars of all areas where he was at risk of adverse finding. Further, the Tribunal determined that he should have the opportunity to prepare a response in consultation with counsel. Accordingly, during the course of that hearing, the Tribunal ceased the examination, and issued an oral direction, which set out the circumstances as it perceived them to be, in the following terms:

[5] Having examined the statement that was filed on 9 December 2016 and having endeavoured to question Mr Mizoguchi as to possible misunderstandings that would have made the circumstances rather more innocuous than a potential view; I have concluded that the issues that the Tribunal should explore are:

[5.1] Whether the quantum of the refund was adequate;

[5.2] Whether Mr Mizoguchi met his professional obligations in terms of the pressure that he applied and in particular, that he appeared to refuse to be willing to refund any money unless his client agreed not to pursue a complaint to the Authority; and further

[5.3] That the settlement deed itself on its face appears potentially to have the complainant indemnify Mr Mizoguchi against the costs of a complaint being pursued.

[6] Those matters, depending on the circumstances, are potentially serious professional disciplinary issues.

[7] Accordingly, when having begun to explore those issues with Mr Mizoguchi, and it not being apparent to me that there was necessarily an answer that was exculpatory; at least in terms of what Mr Mizoguchi understood at the time, I explored with counsel what their view of the matter was. Particularly I asked that counsel for the Registrar explain to me what the Registrar's view of the issue was. As it has transpired counsel for the Registrar is not able to obtain instructions immediately from the Registrar as she is currently on annual leave. Counsel for Mr Mizoguchi urges on the one hand that the matter has been set down for hearing today, however he takes the position that he is not in a position to deal completely with the issues relating to the quantum of the refund, the circumstances of securing the refund, and the terms of the settlement.

[8] In these circumstances, I am satisfied that the appropriate course is to adjourn this examination. I will not proceed to deal with the matter on the papers further until the Registrar has had an opportunity to indicate what her view is. Because, there may be circumstances that satisfy the Registrar that this is not a matter that needs to be inquired into, and I would certainly consider that, nonetheless the Tribunal does have an inquisitorial power and an obligation to deal properly with complaints that are before it and pursue matters that appear to be potential disciplinary issues.

[15] As it transpired, the Registrar took the view that additional issues relating to the complaint should be pursued before the Tribunal. She filed an amended Statement of Complaint including additional grounds.

[16] Counsel for Mr Mizoguchi contended that the process had been "not in accordance with the principles of natural justice", but failed to provide any particulars of that claim.

[17] In these circumstances, the Tribunal required that counsel for Mr Mizoguchi provide particulars of the grounds on which he relied regarding the alleged breach of natural justice, so the

Tribunal could consider his claim. The application for the Tribunal to regard itself as disqualified to hear the complaint was then lodged, in the form of a memorandum.

Mr Mizoguchi's position

[18] It appears that in essence the following matters are the foundation for Mr Mizoguchi's claim that the Tribunal has breached its obligations relating to natural justice:

[18.1] In the course of questioning, Mr Mizoguchi was taken by surprise as the Tribunal failed to put him on notice of possible questions it might ask.

[18.2] The Tribunal's only function is to "make decisions on matters about immigration advisors that are referred to the Tribunal by the Registrar under s 48". Accordingly, by asking questions raised by the statement Mr Mizoguchi filed before the examination, the Tribunal acted as both "prosecutor and judge".

[18.3] Accordingly, Mr Mizoguchi's claim was that the Tribunal was biased in accordance with the principles in *Muir v Commissioner of Inland Revenue*² Approved in the Supreme Court in *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd*³

The Registrar's response

[19] The Registrar did not accept the contention that there has been a breach of natural justice; though of course accepted that the principles of natural justice must be scrupulously followed by this Tribunal.

[20] The Registrar took the view that the pertinent facts explored by the complaint process had remained the same throughout. What had been raised were potential further grounds of the complaint under the Code of Conduct arising from the facts that had always been in contention.

[21] In the Registrar's view, allowing the adjournment and giving notice to Mr Mizoguchi of the potential further grounds ensured fairness.

The complainant's position

[22] The complainant did not take a position on this issue.

Discussion

The issue

[23] In my view, this matter is resolved by considering three points:

[23.1] Whether the Tribunal is entitled to ask questions of persons as part of an inquisitorial process;

² *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495.

³ *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2010] 1 NZLR 35.

[23.2] If the Tribunal is entitled to ask such questions, whether it is a breach of natural justice not to put that person on notice of the particular questions before asking them; and

[23.3] If new issues arise, what procedural safeguards are appropriate to protect a person subject to the Tribunal's jurisdiction.

Does the Tribunal have inquisitorial powers?

[24] Section 49(4)(b) of the Act provides that the Tribunal may “request that any person appear before the Tribunal to make a statement or explanation”. Typically, professional disciplinary tribunals exercise this aspect of their jurisdiction as the circumstances require in a particular case, or aspect of a case. A particular hearing may be of an inquisitorial nature, adversarial nature, or both. While not a professional disciplinary tribunal, an example of a statutory recognition of the two characters a Tribunal may have appears in the Immigration Act 2009 s 218(2). The provision expressly provides that the Immigration and Protection Tribunal has both an adversarial and inquisitorial nature.

[25] Even where a judicial body has no, or a very limited inquisitorial function (for example, a criminal court), questioning by a decision maker does not in itself amount to acting as a prosecutor. The Tribunal is a specialist Tribunal⁴ which must apply its expertise in professional conduct in an immigration setting. The Tribunal must of course not substitute its own knowledge for evidence, or use its own expertise without disclosing the foundation for it and giving the opportunity for a response. It has a duty to explore issues with witnesses to ensure transparency in the process.

[26] The Supreme Court has set out the obligations on professional disciplinary tribunals to conduct an inquiry, not a simple adversarial trial:

[115] As well, the present statutory context supports retaining the flexible approach. Consistent with its purpose of public protection, the Act does not extend to those subject to its disciplinary processes all of the protections afforded to a defendant at a criminal trial. This emphasises the significant differences in the two types of proceedings. **The Tribunal is engaged in an inquiry rather than a trial.** It can receive evidence that would not be admissible in a court of law. It must observe the rules of natural justice, but is **mandated to take an inquisitorial approach in doing so.** The statutory scheme reflects the long established view that proceedings such as those before the Tribunal are not criminal in nature. (emphasis added)

[27] Similar principles are evident in *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2015] 2 NZLR 606 at [57]-[62] (HC), and *Auckland District Law Society v B* [2002] 1 NZLR 721 at [103] (CA).

Does the Tribunal have to give advance notice of questions?

[28] In this case, the Tribunal did not go beyond exploring facts that were already on the record; indeed, the focus of the questioning was a statement supplied by Mr Mizoguchi with the assistance of his counsel shortly before the hearing. Before asking questions concerning the material, the Tribunal had no reason to suppose that Mr Mizoguchi would not be in a position

⁴ *Loh v Immigration Advisors Complaints and Disciplinary Tribunal* [2014] NZHC 1166 at [64].

to provide a satisfactory explanation, particularly as the significance and gravity of most of the matters in contention largely turned on whether Mr Mizoguchi was acting in good faith, even if misguided.

- [29] If in the course of an inquisitorial process, it was necessary to issue an advance questionnaire which set out questions, anticipated answers, and gave indications of alternative further lines of inquiry depending on the answers, the process would be unworkable. Counsel for Mr Mizoguchi has been unable to provide any authority that supports the proposition that he has advanced. There is no obligation to give advance notice of potential questions. In this case, the questions all related to matters plainly in the records; primarily matters which Mr Mizoguchi had put into the record.
- [30] The authorities, rather than requiring advance notice of questions, point to obligations to give notice of potential adverse conclusions, and allow a person to answer the potential concern. Counsel for Mr Mizoguchi referred to *re Erebus Royal Commission; Air New Zealand Limited v Mahon*.⁵ There is no suggestion in that decision that the Royal Commission could not raise questions about matters. The decision makes it clear that having raised issues, the duty was then to put persons at risk of potential adverse conclusions on notice of that risk, and give them the opportunity to provide answers before adverse conclusions were reached.

What safeguards are required when new issues arise?

- [31] In this case, it became apparent that on the facts before the Tribunal it was possible that there could be adverse conclusions reached regarding how Mr Mizoguchi conducted himself, which went beyond the provisions in the Code of Conduct the Registrar had already identified. The Tribunal took the step of enquiring as to whether the Registrar wished to provide particulars of further potential adverse conclusions. When the Registrar indicated that she wished to do so, the Tribunal then gave Mr Mizoguchi the opportunity of providing further evidence and submissions, after taking the advice of counsel. Counsel for Mr Mizoguchi has been unable to provide any authority that suggests that those steps are either inappropriate or inadequate.

Conclusion

- [32] In my view, the submissions for Mr Mizoguchi have wholly failed to provide any foundation for the claim that the Tribunal is biased, or has misconducted itself. The processes have been an unexceptional exploration of the facts founding the complaint, attended by routine safeguards to allow Mr Mizoguchi to have the full opportunity to respond. In support of the allegations of bias against the Tribunal, Mr Mizoguchi relied on *Muir v Commissioner of Inland Revenue*. In my view, the material principle in that case is:

- [35] The requirement of independence and impartiality of a Judge is counterbalanced by the Judge's duty to sit, at least where grounds for disqualification do not exist in fact or in law. This duty in itself helps protect judicial independence against manoeuvring by parties hoping to improve their chances of having a given matter determined by a particular Judge or to gain forensic or strategic advantages through delay or interruption to the proceeding.

⁵ *Erebus Royal Commission; Air New Zealand Limited v Mahon* [1983] NZLR 662.

Decision

- [33] The Tribunal dismisses Mr Mizoguchi's application; it will complete hearing the complaint on Monday 3 July 2017.
- [34] Mr Mizoguchi may make any application regarding process to ensure he can fairly present facts, and submissions to support his position. However, the Tribunal has already made directions that on their face appear to ensure he can take those steps.

DATED at WELLINGTON this 19th day of June 2017

G D Pearson
Chair