

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2019] NZIACDT 51

Reference No: IACDT 034/17

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **IMMIGRATION NEW ZEALAND
(MARCELLE FOLEY)**
Complainant

AND **FILIPINAS (FIL) RODRIGUEZ**
Adviser

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 23 July 2019

REPRESENTATION:

Registrar: Self-represented
Complainant: Self-represented
Adviser: V Farrow, counsel

PRELIMINARY

[1] A prospective employer approached Ms Filipinas (Fil) Rodriguez, the adviser, to obtain a foreign welder for his business. Ms Rodriguez suggested (Mr B), a metal fabricator, who had little experience as a welder. The employer accepted him following representations from Ms Rodriguez that he had welding experience. An application to Immigration New Zealand for a work visa was duly made and was successful. However, the employer terminated Mr B's services on his first day of work as he did not have sufficient welding skills.

[2] Ms Rodriguez accepts she misunderstood the employer's requirements and the proper classification of Mr B's occupation, but denies that she deliberately misled the employer.

BACKGROUND

[3] Ms Rodriguez is a licensed immigration adviser. She is a director of Dunedin Business Management Solutions and South Immigration Matters Ltd.

[4] The prospective employer sent an email to Ms Rodriguez on 19 April 2016. He was looking to recruit foreign "welding operators with experience in aluminium fabrication", as he had been unsuccessful in finding a suitable domestic candidate.

[5] On the same day, Ms Rodriguez asked the employer to send her a job description and the wage rate for someone with "3 or 5 years full-time experience in aluminium fabrication".

[6] In his reply of 20 April 2016, the employer stated the role required "Aluminium extrusion and plate, fillet and butt, Mig and Tig welding" and that the candidate demonstrate "past engineering and welding experience". The email subject-matter for the exchange between Ms Rodriguez and the employer was "Aluminium fabricators/welders". It is assumed this caption was inserted by Ms Rodriguez.

[7] On 19 May 2016, the employer informed Ms Rodriguez that the candidate:

... would need to be able to weld to the requirements of BS EN ISO 9606/2/2012 for MIG fillet welding; horizontal, vertical and preferably butt welding also.

[8] In May 2016, Ms Rodriguez visited the employer's premises in Auckland to better understand the role and travelled to Manila to interview prospective candidates.

[9] There were further email exchanges between Ms Rodriguez and the employer. The employment agreement sent by the employer described the position as “factory worker”. The schedule to the agreement largely replicated the list of duties sent to her earlier by email, with the first two listed items being welding of different types.

[10] On 29 July 2016, Ms Rodriguez contacted by Facebook messenger a Filipino client, Mr B, regarding the job vacancy. She asked him if he was an aluminium fabricator and he confirmed that he was. Ms Rodriguez requested his CV and that he write clearly that he was an aluminium fabricator.

[11] In a telephone discussion on 1 August 2016 between Ms Rodriguez and Mr B, he acknowledged previous welding experience.¹

[12] Ms Rodriguez put forward Mr B to the employer on 3 August 2016 as an excellent candidate for the vacancy. She sent his CV which stated that he had worked as an aluminium fabricator and installer.

[13] The employer sent an email to Ms Rodriguez on 5 August 2016 acknowledging that Mr B was a good candidate, but asking whether he had aluminium welding experience as his CV did not specifically mention it. On the same day, Ms Rodriguez replied:

I have spoken with him and that was the most important thing I have mentioned. He confirms that he did.

[14] After receiving the employment agreement, Mr B voiced his concern to Ms Rodriguez on 6 August 2016 about the job title “welder”, reiterating that he worked as an aluminium fabricator.

[15] On 7 August 2016, Ms Rodriguez advised Mr B:

I changed the position to welder because INZ might not consider your application if the job description of your previous work is not good enough.

[16] Mr B reiterated that he was “really not a welder”. Ms Rodriguez responded, still on 7 August 2016:

Aluminium fabricator is what they need anyway.

Metal fabricator is classified as a welder so we can still call you welder here.

¹ Ms Farrow’s letter of 25 September 2017 at [16] and her submissions of 8 November 2017 (marked “B”) at [3](c).

[17] In a text message to Ms Rodriguez on 8 August 2016, Mr B said:²

Ma'am I have my record but not from my previous work as a welder.

[18] On 21 September 2016, Mr B repeats in a message to Ms Rodriguez that he was really an aluminium fabricator. Later the same day, she responded:

Welder is metal fabricator so we still call you welder here.

[19] In the work visa application, dated 28 September 2016, lodged on behalf of Mr B by Ms Rodriguez, she described the position as welder (ANZSCO code 322313). In the work history section, only one employer was identified where he had spent more than four years as an "Aluminium fabricator/installer (technician)".

[20] On 7 October 2016, Mr B again reiterated that the job title was welder, but he was really an aluminium fabricator as his records stated. Ms Rodriguez replied:

It's ok. The title of WELDER (General) in NZ is equivalent to metal fabricator.

You know, if your job description from overseas is not good enough, you will be declined.

[21] Mr B was granted a work visa by Immigration New Zealand in October 2016 as a welder for the employer and flew to New Zealand in January 2017. He commenced work on 17 January 2017, but his employment was terminated later that same day after it was found he did not have the required welding skills.

[22] In response to the employer's telephone call to Ms Rodriguez informing her of the termination of Mr B's employment, Ms Rodriguez sent an email to the employer on 17 January 2017. She apologised and took full responsibility for the error. Mr B had said he was an aluminium fabricator, but he had been given the employment agreement and had studied it. She offered to fly him back to Manila and refund his fees. She would pay the fees of the Philippines' agency of US\$1,927.

COMPLAINT

[23] A complaint, dated "June 2017", was lodged by Immigration New Zealand (Marcelle Foley) with the Immigration Advisers Authority (the Authority). It alleged that Ms Rodriguez knew or should reasonably have known what the employer was seeking, and that Mr B was not a suitable candidate. She chose to proceed with the application knowing that it was likely there would be a poor outcome for Mr B as his skills and experience did not match those required by the employer.

² Registrar's supporting documents at 146.

[24] On 16 August 2017, the Authority formally notified Ms Rodriguez of the complaint and sought her explanation.

[25] On 25 September 2017, Ms Farrow, counsel for Ms Rodriguez, replied to the Authority. She set out the history of the communications between Ms Rodriguez, the employer and Mr B.

[26] It was contended by Ms Farrow that Ms Rodriguez honestly believed that Mr B had the requisite skills required for the vacancy, based on her understanding of the nature of the job and Mr B's industry experience. When advised that the employer did not regard Mr B as having the necessary welding experience, she accepted responsibility. She immediately offered to pay his travel back to Manila and to refund all his fees and costs in relation to both the application and his travel to New Zealand. However, Mr B elected to travel to another city in New Zealand where he had family, so she met the cost of that travel. She continued to communicate with Mr B and made all reasonable attempts to ensure that he had a plan and was informed of his rights and obligations to Immigration New Zealand. She also assisted him to find alternative work, but he decided to stay in another city.

[27] It was submitted by Ms Farrow that the distinction between the two occupations, aluminium fabricator and welder, had become confused. Both occupation titles had been applied to the vacancy at the early stages of the communications with the employer. As there was no code for aluminium fabricator in the ANZSCO occupation list, Ms Rodriguez considered that the relevant classification could be metal fabricator (322311) or welder (322313).

[28] The ANZSCO description for metal fabricator read:

Marks off and fabricates structural steel and other metal stock to make or repair metal products and structures such as boilers and pressure vessels.

Specialisations:

...

Metal Fabricator - welder

[29] The ANZSCO occupation description for welder read:

Fabricates and repairs pressure vessels and pipes using various welding techniques.

[30] Ms Farrow argued there was therefore crossover in the descriptions for metal fabrication and welding. Ms Rodriguez had identified the occupation code for welder as being the most appropriate, based on her understanding of the job description and of

Mr B's experience and qualifications. While Mr B had advised that he was not a welder but was an aluminium fabricator, Ms Rodriguez had decided that the more generalised occupation code of welder, which included the definition of fabrication of metal products, was appropriate. She considered that the general occupation of welder was equivalent to a metal fabricator.

[31] Ms Rodriguez accepted in hindsight that she should have made further enquiries of the distinction between aluminium fabricator and welder and had she done so, Mr B's placement would have been avoided. She did not set out to deliberately mislead the employer or Mr B and believed that she had taken sufficient steps to understand the position.

[32] Finally, Ms Farrow recorded that Ms Rodriguez was remorseful, had acknowledged her errors and had identified the future action needed to ensure there was no recurrence.

[33] On 17 October 2017, the Registrar of Immigration Advisers (the Registrar), the head of the Authority, referred the complaint to the Tribunal. The following breaches of the Licensed Immigration Advisers Code of Conduct 2014 (the Code) are alleged:

- (1) by advising the employer that Mr B had confirmed he had the required welding skills when she had not asked him about that at that point in time, Ms Rodriguez may not have been honest or conducted herself with due care, in breach of cl 1;
- (2) by advising the employer that Mr B had confirmed he had the required welding skills when she had not asked him about that at that point in time, Ms Rodriguez may have misrepresented her client, in breach of cl 29(d);
- (3) by putting forward Mr B as a suitable candidate despite concerns raised by both the employer and Mr B, Ms Rodriguez may not have been honest or conducted herself with due care, in breach of cl 1;
- (4) by putting forward Mr B as a suitable candidate despite concerns raised by both the employer and Mr B, Ms Rodriguez may have misrepresented her client, in breach of cl 29(d); and
- (5) by failing to give adequate consideration to Mr B's concerns about the job title and therefore causing him to lose confidence in her, Ms Rodriguez failed to maintain a relationship of confidence and trust with Mr B, in breach of cl 2(a).

JURISDICTION AND PROCEDURE

[34] The grounds for a complaint to the Registrar made against an immigration adviser or former immigration adviser are set out in s 44(2) of the Immigration Advisers Licensing Act 2007 (the Act):

- (a) negligence;
- (b) incompetence;
- (c) incapacity;
- (d) dishonest or misleading behaviour; and
- (e) a breach of the code of conduct.

[35] The Tribunal hears those complaints which the Registrar decides to refer to the Tribunal.³

[36] The Tribunal must hear complaints on the papers, but may in its discretion request further information or any person to appear before the Tribunal.⁴ It has been established to deal relatively summarily with complaints referred to it.⁵

[37] After hearing a complaint, the Tribunal may dismiss it, uphold it but take no further action or uphold it and impose one or more sanctions.⁶

[38] The sanctions that may be imposed by the Tribunal are set out in the Act.⁷ The focus of professional disciplinary proceedings is not punishment but the protection of the public.⁸

[39] It is the civil standard of proof, the balance of probabilities, that is applicable in professional disciplinary proceedings. However, the quality of the evidence required to meet that standard may differ in cogency, depending on the gravity of the charges.⁹

[40] The Tribunal has received from the Registrar the statement of complaint, dated 17 October 2017, together with supporting documents.

³ Immigration Advisers Licensing Act 2007, s 45(2) & (3).

⁴ Section 49(3) & (4).

⁵ *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376 at [93].

⁶ Section 50.

⁷ Section 51(1).

⁸ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151] (citation omitted).

⁹ *Z v Dental Complaints Assessment Committee* at [97], [101]–[102] & [112].

[41] There are no submissions from the complainant.

[42] Ms Farrow, on behalf of Ms Rodriguez has filed a statement of reply, dated 8 November 2017, together with her submissions to the Authority of 25 September 2017, further submissions (marked "B") and other supporting documents.

ASSESSMENT

[43] The Registrar relies on the following provisions of the Code:

General

1. A licensed immigration adviser must be honest, professional, diligent and respectful and conduct themselves with due care and in a timely manner.

Client Care

2. A licensed immigration adviser must:
 - a. maintain a relationship of confidence and trust with the client and provide objective advice

...

Advisers

29. A licensed immigration adviser must not misrepresent or promote in a false, fraudulent or deceptive manner:

...

- d. the client

...

(1) *By advising the employer that Mr B had confirmed he had the required welding skills when she had not asked him about that at that point in time, Ms Rodriguez may not have been honest or conducted herself with due care, in breach of cl 1*

[44] The employer first advised Ms Rodriguez on 19 April 2016 that he sought a welder with experience in aluminium fabrication. His subsequent communications make it clear it was a welding position. When he saw Mr B's CV which made no mention of welding, he asked Ms Rodriguez on 5 August 2016 whether Mr B had welding experience. Ms Rodriguez replied on the same day advising that she had spoken to him and he had confirmed that he did.

[45] It is alleged that Ms Rodriguez had not asked Mr B about his welding experience at that point in time.

[46] Counsel for Ms Rodriguez accepts that she had not specifically asked Mr B at that point whether he had welding experience. Accordingly, the issue is whether Ms Rodriguez has been dishonest and deliberately misled the employer, or has not understood the distinction between welding and fabrication.

[47] I have no doubt that Ms Rodriguez simply did not appreciate the difference, which is really between fabrication by welding and fabrication without welding. After all, as the ANZSCO code description makes clear, a welder “fabricates ... using various welding techniques”. In other words, a welder fabricates, as does a fabricator. Fabrication is just a synonym for making or constructing.

[48] It is not hard to see how someone inexperienced in the engineering industry might see little difference between welding and fabrication, or might see welding as a specialisation within fabrication or as just another manner of fabricating.

[49] I note also that the employer in his first communication with Ms Rodriguez had sought a welder with experience in aluminium fabrication. The subject-matter of the communications between the employer and Ms Rodriguez was “Aluminium fabricators/welders”. In her first communication with Mr B on 29 July 2016, Ms Rodriguez asked him to emphasise that he was an aluminium fabricator. This reflected her understanding of the role.

[50] The exchanges between Ms Rodriguez and Mr B, including changing his title to welder to fit Immigration New Zealand’s (and the employer’s) requirements for the position, all point to confusion on her part and not to deliberate deception.

[51] It would not make sense for Ms Rodriguez to attempt to deliberately deceive the employer on 5 August. Mr B had prior to then been presented to the employer as an aluminium fabricator, who had little or no welding experience, not as a welder. As soon as he arrived at the factory, it was clear to the employer he had little welding experience. The experienced employer was never going to be misled. Her conduct is better explained by confusion on her part, rather than by deception.

[52] In the visa application, Ms Rodriguez had stated the position was welder, yet in the same document Mr B’s only work experience described him as a fabricator. She did not ask Mr B to modify his CV for the employer or for Immigration New Zealand by adding some welding experience. This is not how a dishonest person would present as a welder someone with little experience in welding.

[53] Ms Rodriguez was being untruthful when she said to the employer on 5 August that welding experience was the most important thing she had spoken to Mr B about. She had however, according to her evidence, spoken to him four days earlier and he had advised having welding experience. This seems credible as on 8 August Mr B confirms having welding experience in his text to her.

[54] Ms Rodriguez's confusion, as against deception, is best seen in her communications with Mr B on 7 August and 21 September 2016. In the latter, she said:

Welder is metal fabricator but so we still call you welder here.

[55] I conclude that Ms Rodriguez thought that as a fabricator Mr B could fabricate by welding. This was reinforced by his confirmation that he had welding experience.

[56] While Ms Rodriguez was not dishonest, it is clear she did not exercise due care. It was her obligation as a professional adviser to understand the difference between a fabricator and a welder. The employer was emphasising fabrication by welding and even identified the various welding techniques he required. She visited his premises and should have made inquiries in order to understand the employer's criteria. She should have asked Mr B whether he was experienced in the techniques identified by the employer.

[57] A professional adviser, lacking knowledge and experience of the engineering industry, would have better informed herself, particularly given the employer's emphasis on the need for quite specific welding experience. In counsel's submissions, Ms Rodriguez accepts that she failed to accurately make inquiries because she misunderstood the industry distinction between the two occupations.

[58] I find that Ms Rodriguez failed to conduct herself with due care, in breach of cl 1 of the Code.

(2) *By advising the employer that Mr B had confirmed he had the required welding skills when she had not asked him about that at that point in time, Ms Rodriguez may have misrepresented her client, in breach of cl 29(d)*

[59] An adviser must not misrepresent his or her client "in a false, fraudulent or deceptive manner." This is a *mens rea* wrong. There must be an intention to mislead another person by misdescribing the client. I have already found that Ms Rodriguez misunderstood Mr B's experience and what the employer required and did not intend to deceive the employer or Immigration New Zealand. It follows that this head of complaint is not made out.

(3) *By putting forward Mr B as a suitable candidate despite concerns raised by both the employer and Mr B, Ms Rodriguez may not have been honest or conducted herself with due care, in breach of cl 1*

[60] I have already found that Ms Rodriguez was not dishonest in her communications with the employer. However, she did not conduct herself with due care in advancing Mr B as a suitable candidate for a welding position. This is a breach of cl 1 of the Code.

(4) *By putting forward Mr B as a suitable candidate despite concerns raised by both the employer and Mr B, Ms Rodriguez may have misrepresented her client, in breach of cl 29(d)*

[61] As Ms Rodriguez did not knowingly intend to mislead the employer, she has not misrepresented her client. I dismiss this head of complaint.

(5) *By failing to give adequate consideration to Mr B's concerns about the job title and therefore causing him to lose confidence in her, Ms Rodriguez failed to maintain a relationship of confidence and trust with Mr B, in breach of cl 2(a)*

[62] The Registrar says Mr B has lost confidence in Ms Rodriguez. An adviser's obligation to maintain a relationship of confidence and trust is about being trustworthy, honest and acting in good faith. It is not about whether the client has lost confidence because of a mistake by the adviser. Mr B may well have lost confidence in her because she did not understand his work experience and the employer's vacancy, but this is not what cl 2(a) is directed at. I dismiss this head of complaint.

OUTCOME

[63] The first and third heads of complaint are partly upheld. Ms Rodriguez has not conducted herself with due care, in breach of cl 1 of the Code.

SUBMISSIONS ON SANCTIONS

[64] As the complaint has been upheld, the Tribunal may impose sanctions pursuant to s 51 of the Act.

[65] A timetable is set out below. Any requests that Ms Rodriguez undertake training should specify the precise course suggested. Any request for repayment of fees or the payment of costs or expenses or for compensation must be accompanied by a schedule particularising the amounts and basis of the claim.

Timetable

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

- (1) The Registrar, the complainant and Ms Rodriguez are to make submissions by **15 August 2019**.
- (2) The Registrar, the complainant and Ms Rodriguez may reply to submissions of any other party by **29 August 2019**.

ORDER FOR SUPPRESSION

[67] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.¹⁰

[68] There is no public interest in knowing the name of Ms Rodriguez's client.

[69] The Tribunal orders that no information identifying Mr B is to be published other than to the parties.

D J Plunkett
Chair

¹⁰ Immigration Advisers Licensing Act 2007, s 50A.