

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2019] NZIACDT 4

Reference No: IACDT 032/18

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **A P**
Complainant

AND **J K**
Adviser

SUBJECT TO SUPPRESSION ORDER

DECISION

Date: 5 February 2019

REPRESENTATION:

Registrar: In person

Complainant: In person

Adviser: In person

PRELIMINARY

[1] Mr K, the adviser, has been the subject of many complaints which have been upheld by the Tribunal and his licence has been cancelled. As a result of his health, he has been found to lack capacity to practice as an adviser. The complaint here relates to alleged failings in relation to his diligence and communications with the complainant.

[2] Given Mr K's medical condition, it is not possible for him to defend the complaint, so the only proper course of action is to uphold the complaint to the extent necessary to order a refund of the fees paid.

BACKGROUND

[3] Mr K was a licensed immigration adviser.

[4] A series of complaints were brought before the Tribunal by the Registrar of Immigration Advisers (Registrar), the head of the Immigration Advisers Authority (Authority). A Notice of Suspension of Licence was issued against Mr K by the Tribunal on 22 December 2017. This was followed by 15 decisions (substantive and sanctions) issued by the Tribunal between 18 June and 24 September 2018 cancelling his licence and ordering the refund of fees paid by the individual clients.¹ In two cases, the Tribunal also ordered Mr K to pay compensation to those particular clients. A myriad of professional violations was found to have been committed by him between about August 2013 and September 2017, such as:

- failing to have written agreements with his clients;
- failing to make clear his fees;
- filing futile applications and appeals;
- writing unprofessional communications to clients; and
- failing to hold securely documents such as passports.

[5] Mr K was found to have breached obligations in both the 2010 and 2014 Codes of Conduct. This included cls 1.5 and 8(b) of the 2010 Code and cls 1, 9, 18(a), 19(f) and 29(b) of the 2014 Code. It was also found there was no blameworthiness on Mr K's part as the unprofessional conduct was caused by a medical condition.

¹ [citations removed].

[6] The statutory grounds of complaint upheld under s 44(2) of the Immigration Advisers Licensing Act 2007 (the Act) were negligence, incapacity and a breach of the Codes.

[7] The incapacity related to Mr K's medical condition. He had a stroke in February 2017 but was found by the Tribunal to have been suffering from mental impairment as far back as mid-2015. A series of acute events led to severe and permanent consequences, to the extent that he lost his mental capacity to deal with complaints.

COMPLAINT

[8] A complaint against Mr K was lodged with the Authority by Ms P on 3 April 2018.

[9] Mr K was engaged by Ms P and her husband, Mr O, in July 2016 in respect of a residence application. An expression of interest in the name of Mr O, with Ms P included, was filed by Mr K on 3 August 2016.

[10] Immigration New Zealand wrote to Mr O, courtesy of Mr K, on 8 September 2016 stating that they would not be invited to apply for residence. This was because their expression of interest showed insufficient points. However, Mr K did not inform Mr O or Ms P of the decline of the application until 29 March 2017. The last email from him to them was on 26 April 2017 and thereafter he did not communicate, despite their requests to do so.

[11] They had paid him \$7,750 on 13 July 2016, which Ms P wants refunded.

[12] The Registrar of the Authority filed a Statement of Complaint (dated 19 October 2018) with the Tribunal.

[13] The Registrar contends that Mr K has breached the 2014 Code in the following manner:

- (1) failed to provide the client with a written agreement, in breach of cl 18(a);
- (2) incorrectly calculated the points for the expression of interest and thereby failed to exercise diligence and due care, in breach of cl 1;
- (3) failed to notify the client of the 8 September 2016 decline of the expression of interest until 29 March 2017 and thereby failed to conduct himself with due care and in a timely manner, in breach of cl 1; and

- (4) failed to communicate with the client from 26 April 2017 and thereby failed to conduct himself with due care and in a timely manner, in breach of cl 1.

[14] As a result of Mr K's medical condition, it is contended that the ground of incapacity is disclosed.

[15] Mr K's family did not provide the relevant file to the Authority as requested, nor did they respond to the complaint as invited.

JURISDICTION AND PROCEDURE

[16] 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 Act:

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

[17] The Tribunal hears those complaints which the Registrar decides to refer to the Tribunal.²

[18] The Tribunal must hear complaints on the papers, but may in its discretion request further information or any person to appear before the Tribunal.³

[19] 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.⁴

[20] 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.⁵

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

³ Section 49(3) & (4).

⁴ Section 50.

⁵ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [101]–[102] & [112].

[21] The sanctions that may be imposed are set out at s 51(1) of the Act:

51 Disciplinary sanctions

- (1) The sanctions that the Tribunal may impose are—
- (a) caution or censure:
 - (b) a requirement to undertake specified training or otherwise remedy any deficiency within a specified period:
 - (c) suspension of licence for the unexpired period of the licence, or until the person meets specified conditions:
 - (d) cancellation of licence:
 - (e) an order preventing the person from reapplying for a licence for a period not exceeding 2 years, or until the person meets specified conditions:
 - (f) an order for the payment of a penalty not exceeding \$10,000:
 - (g) an order for the payment of all or any of the costs or expenses of the investigation, inquiry, or hearing, or any related prosecution:
 - (h) an order directing the licensed immigration adviser or former licensed immigration adviser to refund all or any part of fees or expenses paid by the complainant or another person to the licensed immigration adviser or former licensed immigration adviser:
 - (i) an order directing the licensed immigration adviser or former licensed immigration adviser to pay reasonable compensation to the complainant or other person.

[22] The Tribunal issued a Minute on 8 January 2019 concerning the proposed outcome of the complaint, being that the complaint would be upheld and there would be an order directing a refund of fees and disbursements amounting to \$7,750. The Registrar responded on 10 January 2019 accepting that would be an appropriate outcome. There was no response on behalf of Mr K.

ASSESSMENT

[23] There is no evidence that Mr K's condition has improved since the Tribunal last issued a decision on 24 September 2018.

[24] As Mr K no longer has the capacity to defend or otherwise give instructions concerning the complaint, the only appropriate course of action is to uphold the complaint to the extent necessary to order a refund of fees to Ms P and Mr O. Accordingly, I formally find that Mr K has incapacity in terms of s 44(2)(c) of the Act.

OUTCOME

[25] As a statutory ground of complaint has been upheld, the Tribunal has jurisdiction to impose sanctions. Mr K's licence has already been cancelled. The sanction will be an order for the payment by Mr K to Ms P or Mr O of \$7,750, being the fees and disbursements paid by them.

ORDER FOR SUPPRESSION

[26] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.⁶

[27] Given the medical circumstances of Mr K, it is not appropriate to publish his name or identity. His licence has already been cancelled. Nor is there any public interest in knowing the name or identity of the complainant, Ms P, or her husband, Mr O.

[28] The Tribunal orders that no identifying information relating to the adviser or complainant is to be published other than to the parties or Immigration New Zealand.

D J Plunkett
Chair

⁶ Immigration Advisers Licensing Act 2007, s 50A.