IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2024] NZIACDT 2

Reference No: IACDT 003/23

IN THE MATTER	of an appeal against a decision of the Registrar under s 54 of the Immigration Advisers Licensing Act 2007
BY	**NS** Appellant
AND	**THE REGISTRAR OF IMMIGRATION ADVISERS** Registrar

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 08 January 2024

REPRESENTATION:

Appellant:	Self-represented
Registrar:	M Denyer, counsel

INTRODUCTION

[1] This is an appeal by NS (the appellant) against a decision made on 6 July 2023 on behalf of the Registrar of Immigration Advisers (the Registrar) rejecting a complaint against DE (the adviser), on the ground that it did not disclose any of the statutory grounds of complaint.

[2] The appellant and his wife were the employers of a person from Vietnam who was identified by the adviser's wife as someone who could work in their business. On arrival in New Zealand, the appellant and his wife quickly discovered she did not have the requisite skills and experience. An agent in Vietnam used by the employee has admitted to the appellant's wife that the employee's work history was fake. This is a key point, according to the appellant. It was evidence not given to the Registrar.

[3] The issue for the Tribunal is whether the evidence of wrongdoing by the employee and the agent can be linked to the adviser.

BACKGROUND

[4] MM (the adviser's wife) was/is the director of a beauty company, which previously had two salons. UU (the appellant's wife) was an employee at one of the salons. In September 2018, the appellant and his wife purchased that salon. They set up their own company, NU Ltd (the beauty company). In about July 2019, the beauty company advertised for a nail technician and beauty therapist.

[5] In September 2019, the adviser's wife was in Vietnam and was approached about a nail technician looking to relocate to New Zealand. She sent a message to the appellant's wife saying she had sourced a nail technician with the required skillset. It was UK (who will be known as [the employee]). The appellant's wife wanted to proceed. The adviser and [the employee]'s agent in Vietnam exchanged emails on 4 September 2019. The adviser sent the professional services agreement to the agent on the following day. On that day, 5 September, the adviser contacted the appellant's wife to inform her he would represent [the employee] as her immigration adviser. [The employee] and the adviser entered into the professional services agreement on 10 September 2019 (unseen by the Tribunal). The fee was USD 3,500. The adviser then worked with the agent to assemble the documents and information for the visa application.

[6] On 12 September 2019, the agent sent an email to the adviser. He stated that [the employee] underwent a nail skill test that day. She had earlier studied for 2.5 years, but had lost her certificate. She was waiting to get another one. [The employee] was also waiting for her boss to sign evidence of previous work as a nail technician.

[7] [The employee] signed an employment agreement with the beauty company on 27 September 2019 (unseen by the Tribunal).

[8] It is understood that the visa application was made by the adviser on about 27 September 2019. In his covering letter to Immigration NZ, the adviser stated that [the employee] had two years and nine months of professional experience as a nail technician (letter unseen by the Tribunal).

[9] As part of the visa process, the following documents were sent by the adviser to Immigration New Zealand (Immigration NZ):

1. Certificate (15 October 2019) signed by the rector of a community college stating that [the employee] had completed a styling and beauty care program specializing in nail art.

2. Training Certificate (15 October 2019) stating that [the employee] studied in the styling and beauty care program specializing in nail art at the college, from 11 August to 11 September 2019.

[10] On 18 November 2019, Immigration NZ granted [the employee] a work visa. She arrived in New Zealand on about 27 December 2019. She says she went to work for the beauty company, though the appellant says that aside from training, she never worked for them. She quickly developed an allergic reaction to certain chemicals used in the business. By this time, it had become evident to the appellant and his wife that her qualifications were fake. Furthermore, [the employee] disclosed that the adviser and his mother-in-law had taken money from her and her family in Vietnam.

[11] A text was sent by the agent to the appellant's wife on 29 December 2019 at 16:27, which reads:

> My problem is that I have fabricated a fake work history for [the employee].

[12] The agent immediately sent another text at 16:28:

> Hence when it comes to document fraud, if caught, I'll face heavy penalties and severe punishments.

[13] On 6 January 2020 at 18:50, [the employee] sent a text to the appellant's wife stating that her hands were allergic to certain chemicals and asking if she could wear gloves. The wife replied at 21:43 agreeing she could wear gloves.

[14] On 9 January 2020, the appellant's wife sent a text to the adviser's wife. She stated that while the agent had given the money back, he had told [the employee]'s family

that the adviser's mother-in-law had taken USD 4,500. The appellant's wife thought it would be a good idea for the adviser's mother-in-law to contact [the employee]'s parents.

[15] On about 12 January 2020, [the employee] left New Zealand to return to Vietnam.

Complaint to the Authority

[16] On about 17 March 2023, the appellant made a complaint against the adviser to the Immigration Advisers Authority (the Authority). The contents of the complaint have not been sent to the Tribunal.

[The employee]'s version of the events

[17] At the request of the adviser, [the employee] sent an email to him and his wife on 25 April 2023 setting out at length her version of what happened. [The employee] said the beauty industry has been her hobby since 2015, doing professional make-up, nail technology, eyelash extension and skin therapy. She had worked in the industry for a while, but the money was not great. [The employee] was qualified as an art teacher. In 2018, she was introduced to an agent and was advised to take an English course, which she did in Vietnam. At the same time, she was working at a salon as a nail and make-up artist. It took almost a year.

[18] According to [the employee], she was met by the appellant's wife at the airport on arriving in New Zealand. She stayed with the appellant and his wife at their house. She started work and "picked it up very quickly". She was paid for her work, but after deducting her living costs she had no money left. [The employee] said she took photos and a video of her work, including applying eyelash extensions. She was required to use a powder, a product she had not used before, as a gel was used in Vietnam. Her skin reacted to the chemicals. [The employee] stated that the appellant's wife would not allow her to use gloves. Her skin condition worsened, so she left and went back to Vietnam. The Vietnamese agent refunded the fees paid.

[19] In her email, [the employee] stated that her qualification and experience were truthful.

[20] [The employee] set out the details of her poor relationship with the appellant's wife. [The employee] does not accept the "slander" of the adviser's wife by the appellant's wife.

The adviser's explanation

[21] The adviser provided an explanation to the Authority on 26 April 2023. He denied the allegations made:

1. He had not approached the beauty company offering staff. The beauty company was short-staffed and the adviser's wife had been trying to help them since March 2019.

2. He had not made or used fraudulent documents. [The employee] had the necessary qualifications and experience.

3. He had not received USD 20,000. His fees were outlined in the written service agreement. He had no knowledge of third-party agreements [the employee] made until "9 January 2019" (presumably 9 January 2020).

Registrar's letter dismissing complaint

[22] On 6 July 2023, the Registrar wrote to the appellant advising that it had been determined that the complaint did not disclose any of the statutory grounds of complaint and would be rejected.

[23] In conclusion, it appeared to the Registrar that the adviser undertook substantive work by communicating with the appellant and [the employee]'s agent to prepare the visa application and charged the fee set out in the agreement. There was no cogent evidence showing that the adviser was aware of the USD 4,500 commission charged by the adviser's mother-in-law. Moreover, [the employee] confirmed in her letter of "5 April 2023" (presumably a reference to the letter of 25 April 2023) that she paid VND 450 million to the agent as a package for her study in English for one year and other associated costs and that most had been refunded when she returned home.

[24] The Registrar further found that Immigration NZ had approved the visa based on verification of the claimed work experience in Vietnam. [The employee] also confirmed in her letter that she had truthfully gained her qualification and experience, and that she chose to return to Vietnam due to an allergic reaction to one product used in the business and her mistreatment by the appellant and his wife. The Registrar found there was no evidence her work experience and qualification were fraudulent.

JURISDICTION AND PROCEDURE

[25] The grounds for a complaint against a licensed adviser are listed in s 44(2) of the Immigration Advisers Licensing Act (the Act):

(a) negligence;

(b) incompetence;

(c) incapacity;

(d) dishonest or misleading behaviour; and

(e) a breach of the Licensed Immigration Advisers Code of Conduct 2014 (the Code).

[26] Section 45(1) provides that on receipt of a complaint, the Registrar may:[1]

(a) determine that the complaint does not meet the criteria set out in section 44(3), and reject it accordingly;

(b) determine that the complaint does not disclose any of the grounds of complaint listed in section 44(2), and reject it accordingly;

(c) determine that the complaint discloses only a trivial or inconsequential matter, and for this reason need not be pursued; or

(d) request the complainant to consider whether or not the matter could be best settled by the complainant using the immigration adviser's own complaints procedure.

[27] In accordance with s 54 of the Act, a complainant may appeal to the Tribunal against a determination of the Registrar to reject or not pursue a complaint under s 45(1)(b) or (c).

[28] After considering the appeal, the Tribunal may:[2]

(a) reject the appeal; or

(b) determine that the decision of the Registrar was incorrect, but nevertheless reject the complaint upon another ground; or

[1] The Registrar must otherwise refer the complaint to the Tribunal for determination; see Immigration Advisers Licensing Act 2007, s 45(2).
[2] Immigration Advisers Licensing Act, s 54(3).

(c) determine that it should hear the complaint, and direct the Registrar to prepare the complaint for filing with the Tribunal; or

(d) determine that the Registrar should make a request under section 45(1)(d).

[29] The adviser against whom the complaint is made is not a party to the appeal and has not been served. The appeal itself cannot result in the Tribunal upholding the complaint against the adviser.

[30] The Tribunal issued procedural directions on 25 August 2023.

Submissions of the appellant

[31] In his "Appeal reasoning & Evidence" (undated), the appellant states:

1. In a text sent by the agent to the appellant's wife on 29 December 2019, he acknowledged fabricating [the employee]'s work history. The agent told his wife because he was worried about legal repercussions in Vietnam. This is a key point.

2. He and his wife were not aware [the employee] used an agent in Vietnam until after she arrived in New Zealand.

3. Immigration NZ failed to verify [the employee]'s qualifications and work experience.

[32] In further comprehensive submissions (6 November 2023), the appellant says that:

1. He and his wife should be treated as the client of the adviser. They did not pay him any money, but he was using his immigration experience to provide them with advice in accordance with s 7 of the Act. Section 7 does not require that the advice be for reward.

2. The adviser had a conflict of interest working with his wife, his mother-in-law and the agent. The adviser's mother-in-law received a finder's fee of USD 4,500 which was not disclosed to them. He should have declared the conflict to them. He never explained it to them.

3. There is concern in relation to [the employee]'s letter. The main area of concern is her motive for attacking him and his wife. The appellant acknowledges that their relationship with her did break down towards the

end. The allegations [the employee] makes about how she was treated are untrue or can be explained. They never charged her anything to live with them. She never raised any issues directly with them. [The employee] never officially worked for them. The shop was closed over the Christmas break and they uncovered her lack of skills and experience. She also became very allergic to the chemicals.

4. The adviser did not act professionally. After they had explained to him the issues with [the employee], he ceased all communications with them.

5. It is conceded that the adviser may not have known about the lack of qualifications and experience. It is debatable whether he knew or helped, but he should have undertaken a level of due diligence before filing the documents. There were alarm bells around [the employee]'s qualifications.

[33] The appellant sent a commentary to the Tribunal (undated). He notes that [the employee]'s qualification records a date of issue of 15 October 2019, after her visa application was lodged. Furthermore, the course was only 30 days long, whereas the website states it is a course of three months. The assumption he and his wife make is that she wrote a negative letter against them, as she feared retribution resulting from findings from this case or from other government departments.

[34] The appellant produced the following documents:

1. Letter (14 September 2023) from a person employed by the beauty company at the same time as [the employee]. The author says that [the employee] told her she was allergic to many different things and had never done nails in Vietnam. Nor had [the employee] informed her of any mistreatment by the appellant and his wife.

2. Witness statement (11 July 2023) from a friend of the appellant's wife as to her good character.

Submissions of the Registrar

[35] In his submissions (20 October 2023), Mr Denyer refers to Ms Wu's affidavit filed in support of the submissions. It is significant that the complaint was not made by the client ([the employee]) and that she has supported the adviser. Ms Wu found no evidence of dishonest or misleading behaviour by the adviser.

[36] Ms Wu acknowledges that the appellant has now provided further evidence to support his allegation that [the employee] provided false information. However, there is still no evidence substantiating dishonest or misleading behaviour by the adviser.

[37] As for the allegation that the adviser was aware of excessive fees being charged by the agent and his company, it is not disputed that [the employee] paid fees to both. However, there is no evidence indicating the adviser was involved or aware of these third-party arrangements. Unlike the adviser, they were all based in Vietnam.

[38] It is acknowledged though that the Tribunal has the option of hearing the complaint. In all the circumstances, it is submitted that the complaint was properly rejected.

[39] There is an affidavit (19 October 2023) from Vivian Wu, an investigator with the Authority and the signatory of the Registrar's decision of 6 July 2023 rejecting the complaint. Ms Wu sets out the steps followed in the investigation. She additionally notes:

1. The visa applicant ([the employee]) was not the complainant to the Authority and did not support the appellant's version of the events, a somewhat unusual feature of the complaint.

2. [The employee]'s qualifications and experience were regarded as genuine by Immigration NZ. There was no evidence establishing they were fraudulent. Even if they were false, there was nothing to suggest the adviser was aware of it.

3. In documentation filed by the appellant on appeal, purportedly from the agent, the latter admits helping [the employee] fabricate her qualifications and/or experience. Notwithstanding this, the adviser was given the impression by [the employee] and the agent that her qualifications were genuine.

4. There were no grounds for the claim that the adviser had charged about USD 21,000. The adviser's mother-in-law had received USD 4,500 from the agent because of her referral of [the employee]. This came out of the total fees of USD 21,000 that [the employee] paid to the agent, which was for services provided by the agent for almost a year, including translations and studying English. There is no evidence the adviser received any part of the fees or that he was involved in paying a commission to his mother-in-law.

5. The appellant refers to the receipt of poor client service from the adviser and to not being properly advised about conflicts of interest. These are based on a misunderstanding by the appellant that he was a client of the adviser.

6. The appellant has provided additional information in the appeal process, but there is nothing to indicate that the adviser would have been aware of any misleading qualification or work documents. The new documents appear to show that the adviser and his mother-in-law may each have some sort of working relationship with the agent, that all three parties received money from [the employee] and that there might be a conflict of interest since the mother-in-law benefitted financially. There may also be a conflict of interest with respect to a pre-existing relationship between the adviser and [the employee] and the adviser's role in effectively recruiting [the employee]. The additional material appears to raise these matters as possible issues for the Tribunal.

ASSESSMENT

[40] The first issue to address is the appellant's contention that he was a client of the adviser. He was not. The Act regulates "immigration advice" given by a person.[3] This is defined as the use of knowledge or experience in immigration to advise or represent "another person in regard to an immigration matter". That other person is the adviser's client for the purposes of the Act. He was representing [the employee] in regard to an immigration matter, not the appellant. She had a written agreement with the adviser and paid his fee. The appellant did not.

[41] It is conceivable that a sponsoring employer could be a commercial client of an adviser, but the employer is not a client for the purposes of the Act. It is outside the jurisdiction of the Tribunal to assess the complaint in terms of general contractual or tortious duties, if any. The adviser's professional obligations under the Code of Conduct 2014 are owed to [the employee].

[42] The difficulty faced by the appellant in advancing his complaint is that, unusually, it is not supported by the adviser's client. Indeed, her version of the events is contrary to that of the appellant and is supportive of the adviser. In saying that, there is some reason to doubt [the employee]'s story:

[3] Immigration Advisers Licensing Act, s 7.

1. She says her experience was truthful, but the agent says in a text that he fabricated it.

2. She says the appellant's wife would not allow her to use gloves once she developed the allergic reaction, but an exchange of texts between [the employee] and the wife show that the latter was supportive of the use of gloves.

[43] Notwithstanding these doubts as to the veracity of [the employee]'s story, the appellant has not produced any evidence linking what appears to be the wrongdoing of [the employee] and the agent to the adviser. This is the Tribunal's critical finding and it is fatal to the progress of the complaint.

[44] The agent does not accuse the adviser of any knowledge of his fabrication. His communications with the adviser during the preparation of the visa application show that he represented [the employee] as qualified and experienced.[4] Of course, [the employee] denies fabrication and therefore any wrongdoing by the adviser. Even the appellant rightly concedes the adviser may not have known of the lack of qualifications and experience.

[45] So, the question for the Tribunal to assess is whether a full investigation by the Registrar and/or the Tribunal might realistically uncover evidence of any wrongdoing on the part of the adviser. The Tribunal concludes that such an outcome is unlikely:

1. Both the agent and [the employee] reside in Vietnam. It would be speculative to conclude they are likely to co-operate from afar. It is not known whether the appellant tried recently to engage the agent's co-operation, but it is noted his texts are dated in December 2019, more than four years ago. The Tribunal has the texts, but not a statement from the agent putting them in context or linking any fabrication to the adviser. There is an obvious risk he would regard co-operation as contrary to his interests. There is no reason to believe [the employee] will co-operate or recant her story.

2. These events are four years old. The adviser will have his records, but the agent and [the employee] may not, even if they were to co-operate. The effluxion of time since these events also reduces the chance of assistance from the witnesses.

[4] See the agent's email to the adviser (12 September 2019).

[46] The appellant contends that the adviser lacked diligence in assessing [the employee]'s qualifications and experience. He points to certain "alarm bells" (the date and duration of the last and possibly only qualification, the loss of an earlier certificate). However, the qualification was accepted as genuine by Immigration NZ. What, if any, verification was undertaken by the government agency is not known. It would seem there were no alarm bells for Immigration NZ. The Tribunal would not regard the discrepancies identified by the appellant as significant.

[47] The appellant and Ms Wu refer to possible conflicts of interest, given what may be additional fees paid by [the employee]'s family to the agent and/or the adviser's mother-in-law and/or the adviser. It is significant though that there is no evidence these fees were not known by [the employee]. It is not material that the appellant and his wife were not aware of them. What is important is whether [the employee] agreed to them. In the absence of cooperation from [the employee], the conflict of interest complaints must fail.

Conclusion

[48] The evidence presented by the appellant concerning the application is suspicious. However, there is a lack of reliable evidence linking wrongdoing by [the employee] and the agent to the adviser. The Tribunal concludes that any further investigation is unlikely to uncover additional probative evidence.

OUTCOME

[49] The appeal is rejected.

ORDER FOR SUPPRESSION

[50] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.[5] It must balance the public's interest in knowing of wrongdoing by advisers and also of the Tribunal's jurisprudence, with the privacy of individuals.

[51] There is no public interest in knowing the name of the adviser against whom the complaint is made or of his wife, particularly given the complaint has failed. Nor is there any public interest in knowing the identity of the appellant or his wife, nor of the client "[the employee]".

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[5] Immigration Advisers Licensing Act, s 50A.

[52] The Tribunal orders that no information identifying the adviser or his wife, the appellant or his wife (or their beauty company) or the client, is to be published other than to Immigration NZ.

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D J Plunkett
Chair