

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

Decision No: [2018] NZIACDT 19

Reference No: IACDT 011/18

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

BY **The Registrar of
Immigration Advisers**

Registrar

BETWEEN **Q N**
Complainant

AND **S I**
Adviser

SUBJECT TO CONFIDENTIALITY ORDER

DECISION

REPRESENTATION:

Registrar: Mr A Dumbleton, lawyer, Legal Group, MBIE, Auckland

Complainant: In person

Adviser: In person

Date Issued: 18 June 2018

Introduction

Mr I's circumstances

- [1] Mr I was a licensed immigration adviser. He had a stroke and his health deteriorated further after that happened. This is one of several complaints from the time Mr I was unwell and still practising.
- [2] Professional disciplinary regimes are usually separate from health-related competency issues. However, the Registrar does not have the power to step in and administer the practice of a licensed immigration adviser. Practitioners are not required to give a power of attorney to another licensed immigration adviser either; which is the way some other professions manage cases like this one.
- [3] I will take Mr I's situation into account when deciding the complaint. He is not able to understand the complaint due to his health; family members have been cooperative, but they are not licenced immigration advisers. I am dealing with the complaint without any response from Mr I, but this is not due to any fault on his part.
- [4] The Registrar, as the Tribunal's rules require, issued a notice of complaint. It sets out the grounds for complaint she thinks have been established. She provided the written documents supporting the complaint and says the documents prove the relevant facts. I will look at the Registrar's grounds of complaint, and the evidence provided to support them, but will not draw any inference from Mr I's inevitable silence.

The Registrar's grounds of complaint

- [5] The Registrar's account of the complaint is the only view presented. Accordingly, I will set out details of the grounds as she put them in her statement of complaint. The statement of complaint has references to the supporting documents and copies of them attached. The details are:

Breach of clause 18(a) of the Code of Conduct 2014 in relation to written agreements

Clause 18: A licensed immigration adviser must ensure that (a) when they and the client decide to proceed, they provide the client with a written agreement.

The Complainant engaged the Adviser for assistance in submitting an Expression of Interest to INZ and an application for residence under the Skilled Migrant Category.

The Complainant paid the Adviser a total of \$2,500 for his services in two instalments in July 2017.

It appears the Adviser did not meet his obligations under clause 18(a) of the Code of Conduct 2014, by failing to ensure that a written agreement was provided to the Complainant, once he decided to proceed. Alternatively, the Adviser's failure to provide a written agreement may have been related to his medical issues and deteriorating health, and therefore may amount to Incapacity rather than a breach of clause 18(a) of the Code of Conduct 2014.

Incapacity

The Complainant engaged the Adviser for assistance with his immigration matters. The Adviser submitted an EOI which was successfully selected from the pool, however, due to serious medical issues, the Adviser was unable to continue acting on the Complainant's behalf following receipt of the Invitation to Apply for residence.

The Complainant has been communicating with [a member of Mr I's family] since the Adviser became unwell however, he has been unable to obtain a refund of fees paid to the Adviser.¹⁹

On 25 October 2017 a medical report, dated 15 September 2017, was provided to the Authority. The report of [a medical practitioner] states that the Adviser suffers from severe depression and cerebrovascular disease. The report also notes the Adviser's total lack of competence to manage his affairs in relation to his property, partial capacity to communicate and poor understanding of his situation.

While the Adviser's health may have been impaired following the stroke in February 2017, it appears that he continued to provide his services until he became seriously unwell in early August 2017.

Based on the information available, it appears that the circumstances giving rise to the complaint relate to the Adviser's state of health and his resulting inability to manage his practice. It appears the Adviser is no longer in a position to provide his services or meet his obligations as a licensed immigration adviser under the Code of Conduct 2014 on account of being medically incapacitated.

Discussion

Evidence

- [6] The Tribunal determines facts 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 at [55].
- [7] In this case, the gravity is at the lower end. The unusual factor is that Mr I cannot respond. The complainant has brought the complaint and provided evidence for it, and the Registrar has investigated. She has presented the relevant information available to her.

- [8] I have examined the material and I am satisfied what the registrar says about the complaint is supported by the material. In some respects, proof relies on the absence of material showing Mr I did perform his duties. For example, there is no written agreement. I rely on what the complainant has said and the Registrar's failure to find contradictory material.
- [9] The information I have presents sufficient proof to establish the facts in the Registrar's statement of complaint; notwithstanding my caution because Mr I cannot respond.

Mr I's deterioration

- [10] Mr I suffered a stroke in February 2017. A medical report the Authority provided says Mr I presented in February with an apparent anterior circulation transient ischemic attack (TIA). He had speech difficulty and confusion. The report refers to Mr I reporting fluctuations in his condition. The report discusses ongoing language dysfunction, and some uncertainty as to the cause.
- [11] It is not clear when Mr I first experienced TIAs, or other effects on his cognition from a vascular cause.
- [12] Accordingly, throughout the time the events giving rise to the complaint occurred, Mr I's mental faculties may not have been functioning well, and the overall trajectory was further and serious decline. Certainly, by February 2017 his problems were serious, and I must consider it likely they existed earlier than that. The medical report refers to significant underlying causes, which were not new.
- [13] While the medical assessment was obviously thorough, it was not an attempt to measure cognitive ability with reference to his professional service delivery; or to put it on a timeline.

Absence of a written agreement

- [14] A written agreement is an integral part of commencing a professional engagement under the Licensed Immigration Advisers Code of Conduct 2014 (Code of Conduct 2014). The evidence shows Mr I commenced an engagement, received payments, and should have been providing professional services; but there was no written agreement. That is sufficient to establish this ground of complaint.
- [15] However, it is necessary to consider this ground of complaint alongside the second ground of incapacity. For the reasons I will discuss, I do not find there is proof Mr I intentionally breached this obligation.

Incapacity

[16] Incapacity is a ground for complaint under s 44(2)(c) of the Immigration Advisers Licensing Act 2007 (the Act). The word may refer to a range of situations, including blameworthy conduct where a licensed immigration adviser does not have the capacity to perform work they agree to perform, when they ought to have known that was the case. If those were the limits of this ground of complaint, the evidence would not establish it was made out.

[17] In my view, the evidence does establish Mr I was probably practising when he was incapable. If that was not the case, he must have been deliberately breaching his professional duties. The evidence does not support that. In my view, given the medical history, Mr I may not have understood he lacked capacity, potentially thinking his situation was temporary and he would recover quickly. I place it as being equally likely that:

[17.1] Mr I failed to understand he was incapable; and

[17.2] he knew or should have known he lacked capacity to deliver the professional services promised to the complainant, but persisted regardless.

[18] As neither of the possibilities regarding Mr I's awareness of his situation is more likely on the evidence, he is entitled to the finding he suffered incapacity, without insight or moral blameworthiness.

[19] I must decide whether incapacity without blameworthiness is a ground for complaint. When doing so I am mindful of the decision of the Health Practitioners Disciplinary Tribunal (HPDT) in *Re Tolland* [2010] NZHPDT 325 (9 September 2010). The HPDT observed at [39]:

Negligence, in the professional disciplinary context, does not require the prosecution to prove that there has been a breach of a duty of care and damage arising out of this as would be required in a civil claim. Rather, it requires an analysis as to whether the conduct complained of amount to a breach of duty in a professional setting by the practitioner. The test is whether or not the acts or omissions complained of fall short of the conduct to be expected of a [practitioner] in the same circumstances ... This is a question of analysis of an objective standard measured against the standards of the responsible body of a practitioner's peers.

[20] The professional setting is varied, but duties of competence, application of skill, honesty, disclosure and propriety are shared by a wide range of professionals. Immigration advisers have much in common with other professionals. Section 3 of the Act affirms it is

intended to protect the interests of consumers receiving immigration advice, which corresponds to the duties other professionals have to the public engaging their services.

- [21] In a professional disciplinary setting, it is generally necessary to determine whether any lapse is sufficiently serious as to warrant the complaint being upheld as a professional disciplinary matter. Though the statutory context is quite different, there is a discussion of the underlying policy issues in *Orlov v New Zealand Law Society (No 8)* [2012] NZHC 2154.
- [22] However, the statutory context is important. There have been numerous decisions of this Tribunal that evaluate whether a complaint is serious enough to uphold as a professional disciplinary matter. Nothing in this decision is intended to alter what is said in those decisions. The issue I now need to decide is whether “incapacity” as a ground of complaint in s 44(2) includes “innocent” incapacity. Effectively, the question is whether the Tribunal has jurisdiction where a matter is one of simple competence or capacity.
- [23] To deal with the question, the starting point is s 3 of the Act, which states the purpose of the Act is “to promote and protect the interests of consumers receiving immigration advice”. I must assume, when passing the Act, Parliament recognised incapacity, and a lack understanding of the incapacity will occur for some licensed immigration advisers. When it does occur, the Registrar may refuse to renew a licence as the person will not meet the requirements for renewal. However, she cannot cancel a licence on that ground. Section 27 allows cancellation when a person is simply not entitled to hold a licence; it gives no power to the Registrar to make an evaluation of incapacity.
- [24] The power to suspend or cancel a licence based on an evaluation of merit lies solely with this Tribunal. This is not the same as the structure for other professional licensing and disciplinary regimes; some of them have sophisticated competence assessment regimes that may be engaged at any point in time. Against this background, it would be unsurprising if simple “incapacity” could be brought before the Tribunal. It may be significant that “incompetence” and “incapacity” are included in s 44(2) separately from the Code of Conduct 2014.
- [25] The Code of Conduct 2014 contains a set of professional practice standards, which includes a requirement to work within a licensed immigration adviser’s limits of knowledge and skills (cl 8). To fail to do so knowingly, or through lack of care, is blameworthy. Generally, the

concept of a disciplinary threshold fits well with those requirements, and incompetence or incapacity in the context of working outside limits of knowledge and skill will fall within that part of the Code of Conduct.

[26] However, when the Act deals with “incompetence” and “incapacity” in s 44(2) separately from the Code of Conduct, it would not be surprising if it covers more than a practitioner working outside of their limits of knowledge and skills. I am satisfied that is the correct approach to the Act. In summary, my reasons are:

[26.1] The wording of s 44(2)(c) is consistent with that view, indeed to conclude otherwise I would have to read down the provision; “incapacity” is a word that covers Mr I’s situation.

[26.2] Cases of simple incompetence and incapacity, where a practitioner lacks awareness are uncommon, but inevitable. Parliament must have been concerned to deal with them in the Act. The Act generally regulates the profession, and it is necessary to deal these cases to achieve the objectives set out in s 3 of the Act.

[26.3] The Tribunal is the only body given the powers to suspend licenses, cancel licences, or order the refund of fees and compensation. Those powers are potentially required to deal with the consequences of incapacity where a practitioner lacks awareness.

[26.4] The Act has some indications that the Tribunal is not solely concerned with “disciplinary” matters. Section 41(a) says the Tribunal makes decisions about “matters”, and it is named the “Immigration Advisers Complaints and Disciplinary Tribunal”. That is consistent with the Tribunal dealing with complaints that include competence issues, rather than only truly disciplinary issues.

[26.5] It is possible to exercise the professional disciplinary powers to address simple incapacity fairly in relation to a licensed immigration adviser. In such cases, identifying the lack of blameworthiness, recognising that punitive elements of sanctions have no place, and using confidentiality orders are among the powers available for that purpose.

[27] Accordingly, I am satisfied that on the evidence before me Mr I lacked the capacity to deliver professional services to the complainant due to his health, and that is a ground for complaint. I uphold that ground of complaint.

Decision – upholding a ground of the complaint

[28] The Tribunal upholds the complaint in the respects identified:

[28.1] Mr I failed to have a written agreement, which breached the Code of Conduct 2014; but

[28.2] that finding is upheld as ancillary to the finding Mr I suffered incapacity, and there is no blameworthiness in his conduct.

Sanctions

[29] For the reasons discussed, subject to hearing from the parties, it appears Mr I's career has ended and there will be no question of him being licensed again. His licence has been suspended but may need to be cancelled to complete the process. It is likely not appropriate to impose a penalty.

[30] It does appear appropriate to make orders for the refund of fees, or any compensation that may be justified. The complainant should identify what his claims are for the refund of fees (apparently the whole of the fees paid), the amount of any compensation and the grounds for requiring Mr I to pay compensation.

Timetable

[31] The Registrar and the complainant may file submissions regarding sanctions within 10 working days of the issue of this decision.

[32] Mr I's representatives may file a reply within a further 10 working days.

[33] Any party may apply to vary the timetable.

Publication of the adviser's name

[34] The Registrar is requested to indicate whether, in her view, Mr I's identity should be published. The Complainant and Mr I's representatives may of course also take a position on this matter.

[35] The name or information that may identify Mr I, the complainant, and all persons referred to in this decision, other than the Registrar, are not to be published until the Tribunal gives its final decision on confidentiality.

DATED at WELLINGTON this 18th day of June 2018.

G D Pearson
Chair