

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2019] NZIACDT 80

Reference No: IACDT 016/19

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **KBN**
Complainant

AND **PHILIP LESLIE WHAREKURA**
Adviser

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 9 December 2019

REPRESENTATION:

Registrar: M Denyer, counsel
Complainant: Self-represented
Adviser: P Moses, counsel

PRELIMINARY

[1] Mr Philip Leslie Wharekura, the adviser, was instructed by Mr KBN, the complainant, who sought residence in New Zealand. The complainant is dyslexic. Mr Wharekura told him that he had sought from the Associate Minister of Immigration an exemption from the English criterion for residence. In fact, Mr Wharekura never sought the exemption and had created fake emails from the Associate Minister's office to show the complainant.

[2] The Registrar of Immigration Advisers (the Registrar), the head of the Immigration Advisers Authority (the Authority), alleges dishonest or misleading behaviour by Mr Wharekura, a statutory ground of complaint under the Immigration Advisers Licensing Act 2007 (the Act) and a breach of the Licensed Immigration Advisers Code of Conduct 2014 (the Code). Mr Wharekura admits his misconduct.

BACKGROUND

[3] Mr Wharekura is a licensed immigration adviser. He is a director of NZ Educational and Training Services Limited, based in Rotorua. His licence was suspended by the Tribunal on 26 September 2019 as a result of the matters giving rise to this complaint.¹

[4] The complainant is a foreign national who has been working in New Zealand since 2015 on temporary work visas. He is dyslexic and unable to score a high enough mark on the IELTS test to meet Immigration New Zealand's written English threshold.

[5] The complainant contacted Mr Wharekura for assistance with a residence application. The first meeting was on 16 May 2018. Mr Wharekura suggested that the complainant seek a special direction from the Minister of Immigration exempting him from the writing component of Immigration New Zealand's English language criterion.

[6] Sometime later, Mr Wharekura told the complainant he had contacted the Dyslexia Association and was waiting for a letter from it.

[7] The complainant paid Mr Wharekura \$400 on 27 November 2018.

[8] Mr Wharekura wrote a document, dated 27 November 2018, which was addressed to the "Section 61 Team". It introduced the complainant and explained his

¹ *KBN v Wharekura* [2019] NZIACDT 66.

circumstances, including his dyslexia. An exemption from the IELTS residence requirement was requested.

[9] The complainant continued to contact Mr Wharekura through January to March 2019 seeking an update, but the answer was always “No, nothing yet”. Mr Wharekura told the complainant he had received an email from the Minister’s office acknowledging receipt of the application. About four or five weeks later, Mr Wharekura told him that no decision would be made as all applications were on hold due to the Minister being in Nelson as a result of the floods or fires and then in Christchurch because of the mosque shootings.

[10] On 19 March 2019, the complainant and his partner met Mr Wharekura. On the same day, Mr Wharekura sent an email to the complainant’s partner attaching the submission he said he had made to the Minister’s office (it is assumed this is the document dated 27 November 2018). He advised there was no other way to gain residence, with the skilled migration category being the only category open to the complainant. Mr Wharekura said he could not give any timeframe for a decision due to the event in Christchurch, as every available officer was processing family visas for those affected.

[11] At a meeting on 25 March 2019, Mr Wharekura suggested to the complainant that he make a partnership-based application, given the relationship with his partner, a New Zealand national.

[12] Mr Wharekura sent an email to the partner on 9 April 2019 stating that he wanted to talk to her about the relationship option. He met the couple on 15 April 2019 to discuss the relationship criteria.

[13] On 20 April 2019, Mr Wharekura sent another email to the partner summarising the evidence necessary to show a partnership, which he said had “no risk of being approved” (the Tribunal speculates as to whether Mr Wharekura meant no risk of *not* being approved). He expressed his understanding of their concern that it encroached on their privacy.

[14] On 3 May 2019, Mr Wharekura had another meeting with the complainant and his partner. They advised they did not prefer an application based on their relationship. He explained that a skilled migrant category application was unlikely to be successful.

[15] In response to an email on 10 May 2019 from the partner for an update, Mr Wharekura replied on the same day stating that “nothing moving as yet”. He said the

same in social media chat messages exchanged with the complainant on 29 and 30 May 2019. Mr Wharekura continued to say the submission was being considered. He said in one text that he had called, but had not obtained anything of use.

[16] On 30 May 2019, Mr Wharekura sent an email to the complainant and his partner attaching two emails from the Associate Minister's office:

- (1) The first email was from a named person at Parliament addressed to Mr Wharekura, dated 17 January 2019. It stated that the application for a special direction for the complainant had been accepted for consideration and a final decision would be made by the Associate Minister of Immigration in due course.
- (2) The second email from the Associate Minister himself (using the email address of a Parliamentary staff member) was dated 28 February 2019. It was addressed to Mr Wharekura's company. The Minister regretted to advise that all special direction assessments were on hold until further notice. He would be in Nelson monitoring the fires and preparing a relief package once the extent of the damage had been established.

[17] The complainant's partner became suspicious of the emails from the Associate Minister's office and went to her local Member of Parliament who informed her that no such communications had been sent.

[18] On 10 June 2019, Mr Wharekura admitted in an email to the complainant's partner that he had falsified the emails from the Associate Minister's office and did not lodge the special direction request at all. He accepted it was a gross violation of his responsibilities to the complainant. He did not do it because of financial advantage, but because the special direction would not be successful and it would cost the complainant time and money. Mr Wharekura acknowledged that it had not been his call to make. He apologised and advised the email address of the Authority so that a complaint could be made.

[19] In two text messages to the partner on 10 June 2019, Mr Wharekura said he thought that the easier and most cost-effective way was to apply under the partnership pathway. He should not have made that decision for the complainant. He offered his sincere apologies.

[20] Mr Wharekura refunded the \$400 to the complainant on 27 June 2019.

COMPLAINT

[21] The complaint against Mr Wharekura was lodged with the Authority by the complainant on 13 June 2019.

[22] When contacted by the Authority, Mr Wharekura wrote to it on 24 July 2019 stating that he did not dispute the complaint. He had misled the complainant and failed him and the profession. In doing so, he had breached the Code. He was deeply remorseful and was lost as to how he ended up in that position.

[23] Mr Wharekura explained that he had a great deal of empathy for his clients and never thought he would lie to one. He had let the complainant down. He acknowledged not getting a written agreement signed. Mr Wharekura said he did not want to charge the complainant a fee until he knew there was a viable application with a reasonable expectation of success. It was accepted that his assertion that he had approached the Minister's office was reprehensible.

[24] The Authority wrote to Mr Wharekura on 8 August 2019 formally advising him of the details of the complaint and inviting his response.

[25] On 12 August 2019, Mr Wharekura sent an email to the Authority disputing certain facts concerning his fee, but stating that he did not otherwise dispute any of the statements made in the complaint. He accepted he had made a serious error of judgement as he had assumed he knew what was best for the complainant. He had explained the alternative pathway for residence which was partnership-based, but the complainant had not wanted to take this path as he wanted to pursue a case in relation to his dyslexia. Mr Wharekura did not feel that this direction would have offered a successful outcome.

[26] Mr Wharekura appreciated that it was not his decision to make and that in hindsight, he should have proceeded with the application as directed by the complainant. Instead, he had provided him with a fake email to try and make him take the option of a partnership visa which he thought was better for him. Mr Wharekura acknowledged that the matter should be referred to the Tribunal. He expressed his deep remorse, as well as his understanding of the ramifications of what he had done. He advised the Authority that he would not contest the allegations.

[27] In his email to the Authority, Mr Wharekura referred to his contribution to the migrant community, having been on the first migrant committee formed in Rotorua and also to his free weekly clinics at both the Rotorua Community Law Centre and the Citizens Advice Bureau.

Complaint referred to Tribunal

[28] On 2 September 2019, the Registrar filed the statement of complaint with the Tribunal (dated 13 August 2019). The following statutory ground of complaint and breach of the Code by Mr Wharekura are alleged:

- (1) conducting himself in a way which is dishonest and misleading by providing dishonest and misleading updates to the complainant and falsifying emails from the Associate Minister's office; or alternatively
- (2) breaching cl 1 by providing dishonest and misleading updates to the complainant and falsifying emails from the Associate Minister's office.

JURISDICTION AND PROCEDURE

[29] 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.

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

[31] 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 It has been established to deal relatively summarily with complaints referred to it.⁴

[32] 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.⁵

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

³ Section 49(3) & (4).

⁴ *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376 at [93].

⁵ Section 50.

[33] The sanctions that may be imposed by the Tribunal are set out in the Act.⁶ The focus of professional disciplinary proceedings is not punishment but the protection of the public.⁷

[34] 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.⁸

[35] The Registrar has filed a statement of complaint, dated 13 August 2019, together with supporting documents. A memorandum from the Registrar's counsel, Mr Denyer, dated 30 August 2019, seeking suspension of Mr Wharekura's licence was also filed.

[36] The Tribunal issued a Notice of Intention to Suspend Licence on 9 September 2019. Mr Moses, counsel for Mr Wharekura, filed submissions in reply on 23 September 2019. The Tribunal then issued a Notice to Suspend Licence against Mr Wharekura on 26 September 2019.

[37] Mr Moses subsequently filed a statement of reply to the substantive complaint on 23 October 2019, with an affidavit from Mr Wharekura (sworn on 22 October 2019) in support.

[38] There were no responses from the Registrar or the complainant.

ASSESSMENT

[39] The Registrar relies on cl 1 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.

(1) *Conducting himself in a way which is dishonest and misleading by providing dishonest and misleading updates to the complainant and falsifying emails from the Associate Minister's office; or alternatively*

⁶ Section 51(1).

⁷ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151] (citation omitted).

⁸ *Z v Dental Complaints Assessment Committee*, above n 7, at [97], [101]–[102] & [112].

(2) *Breaching cl 1 by providing dishonest and misleading updates to the complainant and falsifying emails from the Associate Minister's office*

[40] As noted above, a statutory ground of complaint to the Tribunal is dishonest or misleading behaviour.

[41] Mr Wharekura's conduct in falsely advising the complainant that he had made a submission to the Associate Minister, falsely advising updates (even claiming that he had made a phone call) and then creating fake emails from the Minister and/or his office which were sent by him to the complainant, is self-evidently dishonest. Mr Wharekura intended to deceive the complainant into believing that a request for exemption from the written English criterion had been submitted to the Minister. All of this is admitted.

[42] It is useful to record here Mr Wharekura's reflections on his conduct set out in his affidavit, though it is more relevant to sanctions, the next stage of the disciplinary process.

Mr Wharekura's affidavit

[43] In his candid affidavit, Mr Wharekura sets out in some detail his professional history, his contact with the complainant, his motivation for the wrongdoing to the extent he can explain it, and briefly his family circumstances.

[44] Mr Wharekura starts by fully accepting the substance of the Tribunal's decision. He acknowledges that he has been dishonest, that his conduct has been serious and that it has had consequences for the complainant, his other clients, the immigration system, his family and his business. Aside from a driving offence many years ago, he has never been charged with or convicted of any criminal offending, in particular of any dishonesty offending.

[45] According to Mr Wharekura, he spent many years tutoring in the hospitality industry and then worked for 10 years for a Chinese-owned business, which included establishing and managing a restaurant. As a result of this work, he became involved in the immigration issues of the staff and found himself to be good at it, as well as the work being enjoyable. He established a business in Chinese education tours which was successful and personally rewarding.

[46] This led Mr Wharekura to complete the Immigration Certificate at the Bay of Plenty Polytechnic, following which he obtained a full licence as an adviser in March 2015. He never had to advertise and clients generally came to him as referrals from former clients. He established a good reputation and ran a successful business. He

found he had a real affinity for his clients and their communities and for several years did very good work.

[47] When the complainant came to him, he was not told of his partnership with a New Zealand citizen. Hence, Mr Wharekura initially thought that the complainant would be able to obtain a special direction waiving the English language test in the skilled migrant category of residence, in light of his dyslexia. This was raised with the complainant, but following the research done by Mr Wharekura he came to the view that it was not a good option.

[48] It was not until February 2019 that the complainant first hinted at having a New Zealand partner, but this was not confirmed by him until March 2019. Mr Wharekura therefore advised the complainant that he would have a better chance of getting residence in the partnership category, but the latter was reluctant to use this approach. Mr Wharekura now understands that the complainant was at that time still legally married and may therefore have thought that his relationship with his New Zealand partner would not be acceptable to Immigration New Zealand. While he explained to the complainant that a waiver was unlikely to be successful, the complainant did not wish to accept that advice and insisted on pursuing a special direction.

[49] The complainant had instructed him to file the request for a special direction as early as in November 2018, but at that time he was very busy with other work. However, that was not the reason he did not file the request. For a period of about five months, he did not do so, largely because he thought it was the wrong approach. He had even drafted the request to the Minister. He could have easily filed that request, as instructed, but felt that the chance of the complainant getting residence that way was very poor. He explained this to the complainant on a number of occasions, but the latter did not want to hear of it.

[50] Then in March 2019, Mr Wharekura forwarded to the complainant an outline of his request to the Minister's office, claiming incorrectly that he had already filed the request. Mr Wharekura says he did not make this claim because of the money, noting that \$400 is not a large fee.

[51] Mr Wharekura says he struggles to understand himself why he behaved in this way. It was completely idiotic, as well as dishonest. He must have taken leave of his senses and now feels terribly embarrassed. He confirms that it is something he has not done before, as he is not given to fabricating documents or lying to his clients.

[52] It is acknowledged by Mr Wharekura that the complainant will feel cheated and may even think that his chances of obtaining residence have been undermined. However, Mr Wharekura believes that the actual prejudice to the complainant is probably relatively limited. It is recognised that he has wasted the complainant's time. His misconduct has not cost the complainant his residence, whose best chance continues to lie in the partnership category. Mr Wharekura understands that his behaviour has reflected badly on the licensed immigration adviser profession and the New Zealand immigration system. Immigrants have to be able to trust the integrity of advisers.

[53] There have been significant consequences for Mr Wharekura professionally and personally. He had about 40 open files at the time it became clear that interim suspension was inevitable. These clients have now been handed over to others. In doing so, he has refunded fees in excess of \$7,000 and expects to refund as much as \$20,000. He would have expected to create revenue of about \$100,000 annually, if he was able to continue practicing. Without question the most difficult part of addressing the repercussions of his conduct had been telling his children. He has let them down.

Conclusion

[54] I have already found, as admitted by Mr Wharekura, that his conduct was dishonest. As Mr Moses acknowledges, this behaviour is towards the upper end of the spectrum of professional misconduct.

[55] It is accepted that Mr Wharekura did not do so for financial advantage, the usual motivation for dishonesty. The fee of \$400 for a special direction is particularly modest. It is difficult to understand his motivation. That is hardly surprising as Mr Wharekura finds it difficult to understand it himself. Counsel aptly describes Mr Wharekura as being as shocked and dismayed by his conduct as the complainant is. According to counsel, it is not the behaviour of someone who lives by deception. Rather, it is the behaviour of a person who has gravely failed in his duty to his client and his profession, but whose moral compass is not broken. This can be explored in a sanctions hearing.

[56] I am inclined to agree with Mr Moses that there is limited prejudice to the complainant. Mr Wharekura's conduct in pretending the first step of the skilled migrant application was already underway delayed any residence application for many months. However, it is not clear, even now, whether the complainant has made a residence application. Even if he has, I cannot see how Mr Wharekura's conduct will have harmed his prospects. I will review this issue further in assessing sanctions.

OUTCOME

[57] The first head of complaint is upheld. Mr Wharekura's behaviour is dishonest. This is a statutory ground of complaint. There is no need to consider the alternative second head of complaint concerning breach of the Code.

[58] In the meantime, the suspension of Mr Wharekura's licence continues.

SUBMISSIONS ON SANCTIONS

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

[60] Mr Wharekura has sought an oral hearing for sanctions. The Tribunal has jurisdiction to do so and I accept this would be helpful in the circumstances.⁹

[61] Directions are set out below. Any request that Mr Wharekura 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. It is inevitable that the Tribunal will in the public interest consider removing Mr Wharekura from the profession and preventing him from reapplying for another licence, so the parties are invited to address the possible continued suspension or cancellation of his licence and a prohibition against reapplying.

Directions

[62] The directions concerning sanctions will be as follows:

- (1) There will be a hearing on sanctions in the New Year. The case manager will liaise with counsel and the parties to identify a convenient date and the appropriate venue. It could be Auckland unless inconvenient to the parties or any witnesses. It will be scheduled for one day, though this is probably generous. Any witness must provide a written statement.
- (2) The Registrar, the complainant and Mr Wharekura are to make submissions and provide the statements of any witnesses 21 days before the hearing.

⁹ Immigration Advisers Licensing Act 2007, s 49(4).

- (3) The Registrar, the complainant and Mr Wharekura are to provide any witness statements in reply no later than seven days before the hearing. Written reply submissions are optional as the parties will have that opportunity at the hearing.

ORDER FOR SUPPRESSION

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

[64] There is no public interest in knowing the name of Mr Wharekura's client.

[65] The Tribunal orders that no information identifying the complainant is to be published other than to Immigration New Zealand.

D J Plunkett
Chair

¹⁰ Immigration Advisers Licensing Act 2007, s 50A.