IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2019] NZIACDT 74

Reference No: IACDT 009/18

IN THE MATTER	of a referral under s 48 of the Immigration Advisers Licensing Act 2007
BY	**THE REGISTRAR OF IMMIGRATION ADVISERS** Registrar
BETWEEN	**KXBK** Complainant
AND	**GVH** Adviser

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 1 November 2019

REPRESENTATION:

Registrar:	Self-represented
Complainant:	Self-represented
Adviser:	Self-represented

PRELIMINARY

[1] The complainant, KXBK, instructed Mr GVH, the adviser, to obtain a work visa with a view to obtaining residence. The application was duly made by the adviser but was unsuccessful as the complainant did not meet the specified criteria. The complainant sought a refund from the adviser and a partial refund was eventually given when the Immigration Advisers Authority (the Authority) notified the adviser of the complaint.

[2] It is alleged that the adviser was negligent or breached the Licensed Immigration Advisers Code of Conduct 2014 (the Code) by failing to exercise diligence and due care, since he filed an application which had little hope of success. Furthermore, he acted unprofessionally in offering to refund his fee if the complaint was withdrawn.

[3] The essential issue to consider is whether, despite mistakes by the adviser, the circumstances of this complaint warrant a disciplinary finding.

BACKGROUND

[4] The adviser is a director of THM (TH), based in Wellington. He is a licensed immigration adviser.

[5] The complainant, a national of the Philippines, first entered New Zealand in December 2012 on a work visa issued under the work experience for student instructions. He was issued with an essential skills work visa on 14 May 2013. He worked as a housekeeping supervisor in the hospitality industry in the South Island.

[6] On 26 April 2017, the complainant attended a free seminar conducted by the adviser's company. At the conclusion, he paid $100 and had a personal consultation with the adviser. The file note of the adviser stated that the complainant:[1]

> Wants to apply even doesn't qualify??
>
> Wants to take a chance.

[7] On about 27 April 2017, the complainant signed a written agreement with the adviser's company for the provision of immigration services. The adviser was identified as the person responsible. The company agreed to prepare and lodge with Immigration New Zealand an application for a work visa under the work to residence instructions – South Island contribution policy. The fee was $5,455, plus certain extras.

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[1] The adviser's file note undated; Registrar's supporting documents at 23.

[8] The complainant was invoiced $5,868 by the adviser's company on 27 April 2017, which he paid on 4 May 2017.

[9] The complainant and his employer had another meeting with the adviser on 21 May 2017. The file note of the adviser recorded that he was advised that the complainant had been employed from December 2012 to May 2017, hence the complainant was six to seven months short of the criterion of five years set out in the instructions. The note further recorded a question mark as to whether the complainant wanted to proceed.[2]

[10] A member of the adviser's staff telephoned Immigration New Zealand's contact centre on 22 May 2017 to obtain some information about the complainant's immigration history.

[11] The adviser lodged the complainant's work visa application with Immigration New Zealand on 19 June 2017. In the covering letter of 14 June, an exception to instructions was requested as the complainant had only held an essential skills work visa in the South Island since 2 December 2012, a period of four and a half years, just short of the requirement of five years.

[12] Immigration New Zealand sent a potentially prejudicial information (PPI) letter to the adviser on 19 July 2017 advising that the complainant did not meet the requirements for full-time employment over the five years from 22 May 2012 to 22 May 2017. Employment had to be for a guaranteed minimum of 30 hours per week, but the employment agreement provided for the employer to reduce his weekly hours below that. Furthermore, he had only worked in the South Island on an essential skills visa for three and a half years and not for the required five years.

[13] The adviser spoke to the complainant about the PPI letter on 20 July 2017. The complainant advised that his first visa was under the essential skills category. He was asked by the adviser to provide the visa approval letter. The complainant also told the adviser that he had a new employment agreement and would send him a copy.

[14] The adviser telephoned Immigration New Zealand's contact centre on the same day enquiring about the complainant's visa history. He was informed that the first work visa was issued under the work experience for student instructions and not under the essential skills work visa instructions.

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[2] The adviser's file note (21 May 2017); Registrar's supporting documents at 25.

[15] The adviser explained to the complainant on 27 July 2017 that the contact centre had said that he had not arrived on an essential skills visa, but on a trainee visa.[3] The adviser's file note recorded that he considered this to be new information.

[16] According to the complainant, sometime in July 2017, he received a phone call from the adviser advising him that he did not meet any of the requirements because his first visa was not considered and "offering me to go under residence application".[4] This appears to be a reference to applying under a different category of residence.

[17] The adviser spoke to the complainant on 31 July 2017 and asked him to send the new employment agreement as soon as possible.

[18] On 31 July 2017, the adviser responded to Immigration New Zealand's letter. He told Immigration New Zealand that the complainant had arrived in New Zealand in December 2012. After completing an internship, he had been granted an essential skills work visa on 15 May 2013, so between 22 May 2012 and 22 May 2017 he had undertaken lawful employment in the South Island for a period of four years and seven days.

[19] According to the adviser's letter, the complainant had been working in a city in the South Island since his arrival and had been contributing to the critical local hospitality industry. The complainant had also signed a new employment agreement for a full-time job.

[20] The adviser recorded in his file notes that he had to reply to Immigration New Zealand without the new agreement, which the complainant had said would be provided the following day.

[21] On 1 August 2017, the adviser sent an email to the complainant to tell him he needed a letter from his employer guaranteeing him 30 hours weekly, otherwise his visa would not be approved.

[22] The complainant sent an email to the adviser on 2 August 2017 advising that his employer could not guarantee 30 to 40 hours weekly in quiet times.

[23] The adviser replied by email to the complainant on the same day stating that, as explained before, the visa could only be granted if he had a full-time job for a minimum of 30 hours weekly. As his employer could not provide a guarantee, his application did not meet the employment requirement.

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[3] The adviser's file note (27 July 2017); Registrar's supporting documents at 18.
[4] Complaint dated 3 September 2017; Registrar's supporting documents at 3.

[24] On 7 August 2017, Immigration New Zealand declined the complainant's work visa. He had not worked for more than five years in the South Island as the holder of an essential skills work visa. Furthermore, the employment agreement sent to Immigration New Zealand permitted the employer to reduce his hours below the minimum of 30 hours per week.

[25] The complainant received an email from the adviser's company on 10 August 2017 informing him that his application had been declined.

[26] The adviser spoke to the complainant by phone that day to discuss the possibility of a reconsideration, but the complainant did not agree because of the slim chance of success. There was a discussion about another category of residence he could qualify for in the future.

[27] On 14 August 2017, the complainant sent a text to the adviser requesting a refund of half or at least some of the money paid to him. He had just received a phone call from home saying his mother was not well and he needed to send her some money as soon as possible. He was struggling and stressing as to what to do.

[28] On 15 August 2017, the adviser sent a text to the complainant declining to make a refund. He said there was a fixed fee for the application which was based on the time required for preparing and lodging it. The fee was not dependent on the outcome of the application. As the application had been filed and finalised, the fee could not be refunded.

COMPLAINT

[29] The complainant made a complaint to the Authority on 7 September 2017 (form signed 3 September 2017). He said he was told by the adviser's company (he does not say by whom) that he qualified for the work to residence visa under the South Island contribution policy. But Immigration New Zealand said that he did not meet any of the requirements because his first visa had not been considered. He had told the company about the first visa in his first consultation. The company offered him "to go" under a residence application, but he did not want to use a different category because he did not think he was qualified.

[30] According to the complainant, if the adviser's company was not sure of his chance under the South Island contribution policy, he would not have gone through the process and paid the fee in full. He had been told that he would not receive a single cent from what he had paid, even though no residence application had been made. He wanted his money back because he had been misled.

[31] The Authority notified the adviser of the complaint on 18 September 2017 at 9:04 am.

Adviser requires withdrawal of complaint before refund

[32] On the same day, 18 September 2017, at 11:55 am, the adviser sent an email to the complainant requiring his signature on an attached "Refund Settlement", if he agreed to it. The document was in the form of a statement:

> **Refund Settlement**
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> I, [the complainant], resident of [address deleted] have agreed to a refund settlement offered to me by [the adviser] in the form of 50% refund of service fee which is equivalent $2,702.50.
>
> I would like to further clarify my statement provided to the Immigration Adviser's Authority (IAA) on 07 September 2017 with the following clarification:
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> 1. During my consultation on Wednesday, 26 April 2017, at Sofitel Hotel in [deleted], I was advised that I do not meet the policy requirements in terms of 5 year work contribution to South Island and a request for an exception to instructions will be submitted if I decided to apply for the work visa under South Island Work Contribution instructions; and
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> 2. This advice was repeated to me again after two weeks when I met [the adviser] at the Hilton Hotel in [deleted];
>
> 3. I admit that I was asked for my consent to apply for work visa without meeting the requirements multiple times during my face to face meetings with [the adviser];
>
> 4. I understand that my request for refund was solely considered on compassionate grounds; and
>
> 5. I am happy to withdraw my complaint that I made to IAA on 7 Sep 2017 and apologise for any inconvenience to all parties.
>
> I confirm that the above statement is true and correct to the best of my knowledge.

[33] At 12:28 pm that day, the adviser sent an email to the complainant referring to his telephone discussion with him also on that day and said he looked forward to "that letter to IAA". As soon as the Authority confirmed the withdrawal of the complaint, the refund would be actioned.

[34] At 9:17 pm on 18 September 2017, the complainant sent an email to the adviser stating that he had been in touch with a lawyer who told him he should get back $3,165.50. He understood that the adviser had done some work, but believed it was fair for him to get back the amount paid in advance. It was important for him to get back the money.

[35] The complainant then sent an email to the adviser at 9:42 pm responding to the refund settlement statement. He disagreed with the statements at items 2 and 3. The complainant said he had been given hope that he had a few choices and categories to get residence. He did not want to change the statement he had given the Authority as he never told lies. What he was complaining about was not getting back the money paid in advance ($3,165.50) and nothing else.

[36] On 19 September 2017 at 11:00 am, the adviser sent an email to the complainant referring to the meeting on 26 April 2017. At that meeting, the complainant had been told by the adviser that he had stayed in the South Island for less than the minimum requirement and he could choose to seek an exception to instructions, but there was no guarantee of success. The adviser clearly remembered the complainant's statement, "I do not have any other option and would like to try". At the second meeting, the complainant was asked if he wanted to apply and he confirmed that he did.

[37] The adviser said in his email that the complainant had informed him multiple times that he had arrived in New Zealand on an essential skills visa and the adviser had only found out this was not correct when Immigration New Zealand issued the PPI letter. Furthermore, the complainant had told him on 1 August 2017 by telephone that he had signed a second employment agreement, but the complainant later said there was no second contract as the employer was not willing to amend the agreement. The adviser recorded that, when the complainant asked him for a refund, he never mentioned that he had been given wrong advice. The adviser confirmed his willingness to consider a refund if the complainant accepted the inaccuracies in his statement.

[38] The complainant agreed to accept a refund of half of the fee ($2,702.50). He signed the "Refund Settlement" statement set out above. It bears the date of 18 September 2017 against the complainant's signature, though he must have signed it on 19 or 20 September 2017.

[39] The adviser sent the complainant's statement to the Authority on 20 September 2017. He enquired as to whether it was sufficient for the withdrawal or dismissal of the complaint.

[40] In reply the same day, the Authority requested the adviser's file for the complainant. He was advised that a complaint could not be withdrawn.

[41] On 10 January 2018, the Authority formally advised the adviser of the details of the complaint and invited his explanation.

Adviser's explanation to Authority

[42] On 31 January 2018, the adviser responded to the complaint. He denied all the allegations. He accepted having made a simple human error in not noticing the provision in the employment agreement allowing part-time employment, but stated that the omission did not meet the threshold for the tort of negligence. It would not have made any difference to the outcome of the application.

[43] The adviser said that during both meetings with the complainant, the latter confidently confirmed he had been in New Zealand on essential skills work visas since December 2012. The complainant's statement to the Authority, that he had told the adviser his first visa was not under the essential skills instructions, was a lie. Had he expressed any concern about his first work visa, the adviser's staff would have confirmed the nature of the visa by calling the contact centre before the visa application was lodged.

[44] The adviser regarded as preposterous the allegation that he was negligent in not checking the first work visa. There was no doubt in his mind that the complainant did not hold a work visa under any instructions other than for essential skills and this was what any reasonable person would have believed.

[45] In the first meeting with the complainant, it was made very clear to him that he did not meet the requirement for five years and that there was no guarantee an exception to the instructions would be granted. The notes from the first and second meetings supported this. The complainant's application was not futile, as the adviser had represented clients who did not meet the five years rule but had been granted exceptions, including one recently who had been five months short.

[46] When the complainant sought a refund, he did so on compassionate grounds. At that point, the adviser had no provision in his refund policy to consider a request on such a ground, though it had since been added to the policy. The complainant did not qualify for a refund, as he was provided with the service promised to him.

[47] According to the adviser, the complainant had intentionally provided false information in the complaint. In response, the adviser had phoned the complainant to confront him about the false allegations. The adviser alleged that in that call, the complainant provided "clear and undeniable evidence of the fact that the complainant had made an informed decision to apply for a work visa".

[48] The adviser did not accept that he had tried to influence or compel the complainant to sign a refund settlement agreement. Anyone with a sound and

reasonable mind could easily read the level of desperation that the complainant had shown to get some money.

[49] In summary, the adviser emphasised that the complaint was based on falsified, fabricated and contradictory statements. The evidence undeniably proved that the complainant applied while clearly knowing the odds. While the complaint should be dismissed, he would honour the commitment and refund the agreed amount on compassionate grounds.

[50] There was an exchange of emails between the Authority and the complainant in February 2018. The complainant made it clear he was only interested in getting some of his money back, which had already been agreed with the adviser.

[51] Th adviser refunded NZD 2,705.50 to the complainant on 12 March 2018.

Complaint referred to Tribunal

[52] The complaint was referred to the Tribunal by the Register of Immigration Advisers (the Registrar), the head of the Authority, on 2 March 2018. The following statutory ground of complaint and breaches of the Code by the adviser are alleged:

(1) failing to confirm the complainant's visa history and recognise that his employment agreement did not meet the visa requirements, which would have disclosed that the application had little hope of success, thereby being negligent; or

(2) failing to confirm the complainant's visa history and recognise that his employment agreement did not meet the visa requirements, which would have disclosed that the application had little hope of success, thereby failing to exercise diligence and due care, in breach of cl 1; and

(3) offering the complainant a refund if the complaint was successfully withdrawn, thereby being unprofessional, in breach of cl 1.

JURISDICTION AND PROCEDURE

[53] 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.

[54] The Tribunal hears those complaints which the Registrar decides to refer to the Tribunal.[5]

[55] The Tribunal must hear complaints on the papers, but may in its discretion request further information or any person to appear before the Tribunal.[6] It has been established to deal relatively summarily with complaints referred to it.[7]

[56] 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.[8]

[57] The sanctions that may be imposed by the Tribunal are set out in the Act.[9] The focus of professional disciplinary proceedings is not punishment but the protection of the public.[10]

[58] 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.[11]

[59] The Tribunal has received from the Registrar a statement of complaint (2 March 2018) with supporting documents.

[60] There are no submissions from the complainant who no longer supports the complaint.

[61] There is a statement of reply and comprehensive submissions (both dated 21 March 2018) from the adviser, with supporting documents. In summary, the adviser does not accept that he has breached any professional obligations. The adviser sent further information to the Tribunal on 20 April 2018.

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[5] Immigration Advisers Licensing Act 2007, s 45(2) & (3).
[6] Section 49(3) & (4).
[7] *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376 at [93].
[8] Section 50.
[9] Section 51(1).
[10] *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151] (citation omitted).
[11] *Z*, above n 10, at [97], [101]–[102] & [112].

[62] The adviser requests an oral hearing, but given the outcome the Tribunal does not require the appearance of any person.[12] The complaint will be determined on the papers.

ASSESSMENT

[63] The Registrar relies on the following provision 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) Failing to confirm the complainant's visa history and recognise that his employment agreement did not meet the visa requirements, which would have disclosed that the application had little hope of success, thereby being negligent

(2) Failing to confirm the complainant's visa history and recognise that his employment agreement did not meet the visa requirements, which would have disclosed that the application had little hope of success, thereby failing to exercise diligence and due care, in breach of cl 1

[64] The Registrar alleges that the adviser's failure to confirm the complainant's visa history and recognise that his employment agreement did not comply with the visa requirements, prior to lodging the visa application, was either negligent or a breach of the adviser's obligation to be diligent and exercise due care.

[65] The adviser says the complainant repeatedly told him from the time of their first meeting on 26 April 2017 that he arrived in New Zealand on an essential skills visa. The adviser did not therefore know the complainant only had a student / trainee visa for the first six months until Immigration New Zealand told him on 20 July 2017. The complainant denies this. He says he told the adviser about his first visa at the first meeting.

[66] The complainant's email to the adviser on 18 September 2017 at 9:42 pm responding to the settlement statement, is not clear about this. He did not express any disagreement with item 1 in the refund statement, though he did reject item 3.

[67] The complainant denies being told he did not meet the requirements, but this denial cannot be reconciled with the adviser's request to Immigration New Zealand on 14 June 2017 for an exception to the instructions. The complainant was still six months

[12] Immigration Advisers Licensing Act 2007, s 49(4)(b).

short of the required five years, even if his entire period in New Zealand was relevant. In other words, irrespective of what the complainant told the adviser about the first visa, he did not meet the stipulated period. It seems to me highly likely that the adviser told the complainant of this and had instructions to seek that exception.

[68] I note in this regard that the adviser's file notes of his two meetings with the complainant support the position that it was made clear to the latter that he did not comply with the requirements. Additionally, the adviser's record of the phone call with the contact centre on 20 July, where he described as new information that the first visa was as a trainee, also supports the adviser's recollection as to what the complainant told him.

[69] I accept the adviser's contention that the complainant advised him at the beginning that he was always on an essential skills visa and that the adviser did not learn otherwise until told by Immigration New Zealand. I further accept that the adviser informed the complainant that he did not meet the visa requirements, but the complainant instructed him to proceed anyway by seeking an exception.

[70] However, an adviser should never rely on a client for information about immigration status. Clients can be mistaken. The adviser should have either asked the complainant for his passport to check his visa history or asked Immigration New Zealand's contact centre. Indeed, a staff member phoned the centre as early as 22 May 2017 and should have enquired then, as the adviser belatedly did on 20 July 2017.

[71] A diligent adviser exercising due care would have found out before the application was filed with Immigration New Zealand that the first visa period would not be counted. In this case though, that is not material as the complainant instructed the adviser to file the application knowing that he did not meet the stipulated period of five years. I have already noted that, irrespective of the status of the first visa, the complainant did not meet the requisite period of five years. I decline to speculate on whether he would have gone ahead with the application knowing he satisfied a period of only just over four of the five required years, rather than four and a half years which both he and the adviser thought he satisfied when the application was filed.[13]

[72] As for the non-compliant employment agreement, the adviser accepts that he failed to identify this problem, but denies negligence or a breach of the Code. When this was identified by Immigration New Zealand as a problem, it appears the complainant initially misled the adviser into believing there was a new compliant agreement, but in fact there was not, as his employer had refused to change it.

[13] Given the provision at WR 7.10.1 of the South Island contribution work visa instructions, I agree with the adviser that an application based on only four years was not on its face futile.

[73] An error by an adviser as to a client's immigration history or as to whether the client's employment is compliant with Immigration New Zealand's criteria can certainly be negligent and/or a breach of the Code. However, I decline to assess that in this case. I am not satisfied as to the honesty of the complainant in respect of his communications with the adviser or the Authority. His evidence is unreliable. I take into account that he no longer supports this complaint, having achieved his sole objective of a partial refund.

[74] Furthermore, it is not every mistake by an adviser that warrants a disciplinary finding. In the circumstances here, the adviser's mistakes do not cross the disciplinary threshold.

[75] I decline to uphold the first and second heads of complaint.

(3) Offering the complainant a refund if the complaint was successfully withdrawn, thereby being unprofessional, in breach of cl 1

[76] The Registrar alleges the adviser was unprofessional in linking a refund to the withdrawal of the complaint.

[77] There is no doubt the adviser did offer a refund on condition that the complaint was withdrawn. That is made clear by his email of 18 September 2017 at 12:28 pm.

[78] The adviser says the complainant was not entitled to a refund, as his policy did not provide for a refund on compassionate grounds. The adviser is not necessarily correct, since his client agreement of 27 April 2017 states that refunds "will be assessed on the basis of what is fair and reasonable". Compassionate grounds would be relevant to such an assessment.

[79] Furthermore, the mistake by the adviser in lodging a visa application with two non-compliant items (period working, weekly hours) when he had advised his client of only one (period working, and even getting that one wrong – four years, not four and a half years) might have justified a partial refund. On the other hand, the mistake(s) by the adviser were not the basis for the refund request.

[80] However, irrespective of whether a refund at some level was justified, I agree with the Registrar that the adviser's approach of linking a refund to the withdrawal of the complaint was unprofessional.

[81] Nonetheless, for the same reasons given above for declining to uphold the first and second heads of complaint, I decline to uphold the third. Given the unreliable nature of the complainant's evidence and his motivation in pursuing the complaint, it does not

warrant formally disciplining the adviser. The complainant was only ever interested in the return of some money. He used the complaint process merely as leverage for a refund. He has succeeded in achieving that.

OUTCOME

[82] The complaint is dismissed.

ORDER FOR SUPPRESSION

[83] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.[14]

[84] There is no public interest in knowing the name of the adviser's client. Given the outcome of the complaint, there is no public interest in knowing the name of the adviser, nor would that be fair.

[85] The Tribunal orders that no information identifying the complainant or the adviser (or his company) is to be published other than to Immigration New Zealand.

D J Plunkett
Chair

[14] Immigration Advisers Licensing Act 2007, s 50A.