IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2020] NZIACDT 3

Reference No: IACDT 015/19

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

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 23 January 2020

REPRESENTATION:

Appellant: Self-represented
Registrar: M Denyer, counsel

INTRODUCTION

[1] This is an appeal against the decision of 12 August 2019 made by the Registrar of Immigration Advisers (the Registrar), the head of the Immigration Advisers Authority (the Authority). He rejected a complaint of deception made by Mr MM against a licensed adviser, Ms M (T) D.

[2] The essential issue for the Tribunal is whether there is sufficient evidence, or indeed any evidence, of wilful deceit by the adviser that would justify returning the complaint to the Authority for a more thorough investigation.

BACKGROUND

[3] The following narrative is the best that can be ascertained from the limited documentation produced to the Tribunal.

[4] The appellant, a national of China, is a qualified and experienced chef. He instructed the adviser in about September 2017. At the time, he was residing in China.

[5] The adviser is based in Auckland. She is an employee of M J Ltd (MJ).

[6] The adviser entered into an agreement with the appellant to provide immigration advice services. It was signed by the parties on 13 October 2017. It provided for the adviser to represent the appellant in seeking a New Zealand work visa (China Special or Essential Skills categories). The fee was $12,000.

[7] It is understood that the adviser found employment for the appellant. He alleges that on 21 November 2017, the adviser sent him photographs purportedly of “the H” restaurant where he would work, but which depicted a different restaurant at another location.

[8] According to the appellant, the H restaurant subsequently closed on 7 January 2018 and reopened on 7 February 2018 under a different name and ownership after redecoration.

[9] The appellant further states that on 30 January 2018, the adviser sent him an employment agreement to work as a chef at the H restaurant.

[10] The appellant signed the individual employment agreement with M Group Ltd on 10 February 2018. The employer’s signature is undated. The appellant alleges this company no longer owned the restaurant by this time. However, the adviser did not inform him until he arrived in New Zealand some months later.

[11] On 12 March 2018, the adviser applied on behalf of the appellant for a work visa. The application stated that he had been offered a full-time position as a chef by the M H A D Group Ltd at ## I Street, Auckland. The employment agreement of 10 February 2018 was sent to Immigration New Zealand.

[12] A note in Immigration New Zealand's file, dated 29 May 2018, recorded that the visa officer called the employer to obtain information about the restaurant. The officer was satisfied that the job offered was that of a chef.

[13] Immigration New Zealand, satisfied that the employment was genuine, issued a work visa to the appellant on about 25 June 2018 linked to M's restaurant.

[14] The appellant arrived in New Zealand on 6 August 2018.

[15] According to the appellant, he met the adviser on the following day. She told him that the employer had sold the business to T D Group Ltd, which had renamed it U T Restaurant. He was told he would have to transfer his employment agreement to the new employer.

[16] The appellant therefore signed an individual employment agreement with "T D Group Ltd, T/A U T Restaurant" on 7 August 2018. The employer signed it the next day.

[17] The adviser and the appellant also entered into a second agreement for immigration advice services on the same day. It provided for the adviser to seek a variation of the appellant's visa conditions due to the change of employer. The fee was waived.

[18] On 10 August 2018, the adviser wrote to Immigration New Zealand applying for a variation of the appellant's work visa. It was explained that he had obtained the offer to work at M's restaurant in late 2017 and a work visa had been issued. Shortly after his arrival in New Zealand, he found that the business had been sold and the trading name changed, but the new employer agreed to take over his employment agreement. The new business was at the same location. The second employment agreement of 7 August 2018 was sent to the agency.

[19] It is understood the variation was approved and a new visa issued by Immigration New Zealand on about 13 September 2018.

Complaint to adviser's employer

[20] The appellant made a complaint against the adviser to her employer, M J, on about 28 March 2019. On 2 April 2019, he informed M J that he would temporarily suspend his complaint to the Authority while he waited for their internal solution.

[21] On 9 April 2019, M J replied following an internal investigation. The appellant was advised (to the extent material):

1. The photograph of the workplace provided to him by the adviser was the same one he had sent M J. It was therefore verified.

2. The adviser had communicated with him fully about the change of employer, after she had learned of the situation. With his consent, a new employment agreement had been signed and a variation lodged with Immigration New Zealand.

3. The fee was in line with both M J's standard fees and the Authority's guidance as to reasonable fees. The job search fee was in line with the market rate. The services had been completed.

4. The adviser had not promised that the results of the qualifications assessment would be available after 45 days. His qualifications had been "cancelled" by the New Zealand Qualifications Authority (NZQA) because the signatory of one supporting document provided by him had denied signing the document.

[22] In conclusion, M J stated that the complaint was inconsistent with the facts. There was no fraud or deception. If the appellant was not satisfied, he could ask them to re-examine the complaint, or he could appeal to the Authority.

[23] The appellant replied by email 11 minutes later with photographs and posing the question:

> Below photos are that of M H A?

[24] Three minutes later, the appellant said in a further email to M J that he was not told before his arrival in New Zealand that the restaurant had changed its name.

[25] Then 22 minutes later, still on 9 April 2019, the appellant notified M J by email that he was dissatisfied with the result and would provide evidence based on the Authority's requirements. If the Authority confirmed the violation and deception, he would

publicise it on all Chinese media. If the Authority determined that M J was reasonable, he would apologise to it.

[26] M J then sent the appellant an email on 12 April 2019 seeking further evidence so the matters could be verified.

Complaint to Authority

[27] On about 18 April 2019, a complaint was made by the appellant against the adviser to the Authority. His letter setting out the complaint was dated 20 April 2019.

[28] The appellant complained that false photos, purportedly of the H restaurant, had been sent to him by the adviser in order to exaggerate the scale of the restaurant. That restaurant had closed on 7 January 2018 and a seafood restaurant had opened on 7 February 2018 after redecoration. The photographs she had provided him were of a completely different restaurant, the "Newmark Huajia Yiyuan" restaurant. The Tribunal speculates that "Newmark" is Newmarket, Auckland.

[29] In addition, the adviser provided him on 30 January 2018 with an employment agreement for the H restaurant, which did not exist then, but he did not know this. The agreement given to Immigration New Zealand in March 2018 was fictitious. The adviser was cheating the visa officer and himself. This had been done to obtain high agency fees.

[30] The adviser had also falsely promised that his whole family could apply for residence if he worked in New Zealand for two years, again in order to obtain high fees. She illegally obtained a service fee of $24,000 ($12,000 for a job search and $12,000 for the visa application).

[31] Furthermore, the adviser had promised that NZQA would take only 45 days to certify his qualification, but it actually took six months. Even though he had paid the fee of $1,760 to M J on 28 September 2018, the adviser did not lodge the application with NZQA until 14 December 2018.

[32] The appellant also complained about an issue concerning delivery of his passport and about other assistance (not relating to immigration) which M J promised but did not complete.

[33] The appellant sought an apology, a refund of the fees and the cancellation of the adviser's licence.

[34] In support of his complaint, the appellant sent a letter to the Authority on 20 April 2019. He pasted into the letter copies of restaurant photographs, an advertisement for the new seafood restaurant and a notice stating that the H restaurant had closed down (both apparently dated on or before 7 February 2018), as well as copies of electronic communications between himself and the adviser.

Registrar's letter dismissing complaint

[35] On 12 August 2019, the Registrar wrote to the appellant advising him that the complaint had been rejected, as it did not disclose any of the statutory grounds of complaint. It had been found that the first client agreement provided for the preparation of a work visa, which had been approved by Immigration New Zealand on 25 June 2018. The second client agreement provided for an application to vary the conditions, which was approved on 13 September 2018.

[36] There was no evidence that the adviser had given false advice regarding his New Zealand residence eligibility, which was information that was publicly available on the Immigration New Zealand website.

[37] There may have been issues and a misunderstanding regarding the return of his passport, but the adviser had assisted him by going to the delivery office to pick up and return the passport instead of waiting for the courier delivery.

[38] There may have been a discussion with the adviser as to providing assistance to find rental accommodation in New Zealand, but this activity fell outside the scope of immigration advice.

[39] It appeared to the Registrar from the information available that the adviser had provided adequate immigration advice and service to him in accordance with the two written agreements that had been signed.

JURISDICTION AND PROCEDURE

[40] The grounds for a complaint against a licensed adviser are listed 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.

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

(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.

[42] 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).

[43] After considering the appeal, the Tribunal may:[1]

(a) reject the appeal; or

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

(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).

[44] 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.

[1] Immigration Advisers Licensing Act, s 54(3).

[45] In respect of the complaint here, the Registrar rejected it in accordance with s 45(1)(b) as it did not disclose any of the statutory grounds for a complaint. Accordingly, the Tribunal has jurisdiction to consider the appeal.

[46] The Tribunal issued directions on 30 October 2019 setting out a timetable for the receipt of submissions and evidence.

[47] The appellant provided submissions on 29 and 30 August 2019 with supporting documents, a further submission on 21 November 2019, and additional submissions on 17 January 2020. He adds to his complaint that his employer asked him to work 60 hours per week, but paid him for only 40 hours. He had already sued him and had the support of the New Zealand courts.

[48] The appellant contends that he was deceived and unfairly treated by the adviser. Her fraud did exist and the evidence is conclusive. The photographs sent to him did not depict the restaurant he was to work at. She had also deceived Immigration New Zealand when she lodged the employment agreement of 10 February 2018, as she knew the H restaurant had closed down on 7 January 2018.

[49] The Registrar's counsel, Mr Denyer, provided submissions on 12 December 2019, an affidavit from the Authority's investigator, Ms Joy Lepaola Sunia Vaea (sworn 12 December 2019), together with supporting documents. It is submitted, in conclusion, that the complaint has been properly considered and rejected by the specialist decision-maker for such matters.

ASSESSMENT

[50] The appellant's principal allegation is that the adviser "forged visa materials, deceived the visa officer and myself, and illegally obtained a service fee of 24,000 NZD".[2] She did this, according to him, by using "fake photos to pretend to take photos of the H Food Group". The appellant asserts that the photographs sent to him were of another Auckland restaurant in a different location. This was done to exaggerate the scale and strength of the restaurant. Furthermore, he was deceived into signing the employment agreement sent to him on 30 January 2018, as that restaurant had closed by then and reopened in February 2018 under different ownership and a different name.

[51] The appellant sent a photograph (presumably one of those he had been sent by the adviser) with his complaint to M J. The adviser's employer replied on 9 April 2019 to say it was the same one that had been provided to him by the adviser. That reply rather

[2] Submissions to Tribunal (30 August 2019).

misses the appellant's point, which is that the photograph sent to him by the adviser was of a different restaurant.

[52] The Registrar's letter does not mention the photographs. Unfortunately, the Authority's investigator in her affidavit also misses the point about the photograph or photographs. She says the photographs could not deceive Immigration New Zealand because they were not sent to the agency. However, the appellant does not allege Immigration New Zealand was deceived by photographs. He says it was him who was deceived by them. Immigration New Zealand, he says, was deceived by the employment agreement of 10 February 2018 since the employer specified in that agreement no longer owned the identified restaurant.

[53] While the Registrar overlooked the allegation concerning the photographs and the investigator did not properly understand it, I have to assess whether there is sufficient evidence of deception by the adviser to warrant returning this complaint to the Authority for a proper investigation in order that a complaint can be prepared for a hearing before the Tribunal.

[54] I find, however, that in respect of the photographs, which is the gravamen of the allegation of deception of the appellant himself, there is not even *prima facie* evidence of deceit by the adviser.

[55] First, I do not know which restaurant the photographs depict. There is no evidence from the appellant corroborating his allegation they depict a different restaurant entirely. It is not enough for the complainant to send a photograph, claim it is of a different restaurant, and then expect the Authority to investigate. He must provide some *prima facie* evidence of wrongdoing beyond his own assertion. Moreover, even if the photographs are of a different restaurant, there is a complete absence of evidence that the adviser knew this. She presumably got the photographs from the employer. There is no basis for believing the adviser knew they were not of the H restaurant (which was open when the photographs were sent by her to the appellant in November 2017).

[56] Next, it is alleged by the appellant that the restaurant had closed and a new one under different ownership had opened by the time he signed the employment agreement on 10 February 2018. There is some evidence that the appellant is correct about this. But critically, did the adviser know this? There is no evidence she did. This is what the adviser's employer was saying to him on 9 April 2019. M J says the adviser informed the appellant of the change of employer (on 7 August 2018, one day after he arrived in New Zealand), after learning of the situation herself. There is no evidence to the contrary. In other words, there is no reason to believe she knew of the change of

employer before 30 January 2018 when she sent the employment agreement to him, or even before his arrival in New Zealand.

[57] This brings me to one of the Registrar's observations in the letter rejecting the complaint on 12 August 2019, which is that the appellant received the contracted services. Putting to one side the likely unregulated employment and rental services provided by the adviser, she agreed to represent him in seeking a work visa. Later, she agreed to seek a variation of the visa's conditions for him. The adviser attended to both applications and they were approved by Immigration New Zealand. She was therefore successful in performing the contracted immigration services. The appellant was able to take up the position of chef at the very location he originally signed up to, though the identity of his employer was different and, according to his case, the scale of the restaurant was different from what he had been led to believe.

[58] The Registrar's overall conclusion in his letter is that the appellant received adequate immigration advice and services in accordance with the two client agreements. I agree.

[59] It is not apparent to me, on the evidence provided by the appellant, what his real problem with the adviser is which led to this complaint. Perhaps it is the high fee. I have some sympathy for him on this aspect of the complaint. At $12,000 for a work visa and a variation, it seems high to me, though I note from the adviser's file that the original application was not straightforward as issues arose in relation to a number of matters, including the appellant's health. The additional $12,000 as a job search fee is outside the scope of the Authority's jurisdiction.

[60] The Registrar's investigator in her affidavit states that the immigration fee is reasonable. I defer to the investigator's knowledge of the market. While I regard it as high, I cannot conclude that it is outrageous or so excessive as to be unprofessional. At $12,000 the fee, of itself, does not warrant further investigation.

[61] The appellant apparently has a dispute with the employer over the hours worked and his wages. That appears to be in the hands of the appropriate judicial process. That is unfortunate, but has nothing to do with the adviser.

Conclusion

[62] There is no evidential basis warranting an investigation of the photograph(s). There is no reason to believe the adviser knew the restaurant's ownership had changed before 30 January 2018, or even before the appellant's arrival in New Zealand. There is

no evidence of deception by the adviser. I consider that the Authority's investigator has adequately investigated the various other complaints made by the appellant to the extent they relate to immigration services.

[63] There is no proper basis to return the complaint to the Authority for further investigation and hence the preparation of a complaint to be heard by the Tribunal.

OUTCOME

[64] The appeal is rejected.

ORDER FOR SUPPRESSION

[65] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.[3]

[66] There is no public interest in knowing the name of the adviser against whom the complaint is made. Nor would that be fair given that the complaint was dismissed by the Authority and will not be restored by the Tribunal.

[67] Nor is there any public interest in knowing the identity of the appellant or his employer.

[68] The Tribunal orders that no information identifying the adviser or appellant, or their respective employers, is to be published other than to Immigration New Zealand.

D J Plunkett
Chair

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