IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2020] NZIACDT 1

Reference No: IACDT 021/18

IN THE MATTER	of a referral under s 48 of the Immigration Advisers Licensing Act 2007
BY	**THE REGISTRAR OF IMMIGRATION ADVISERS** Registrar
BETWEEN	**T I (G) M** Complainant
AND	**ANNE MARIE HANNING** Adviser

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 9 January 2020

REPRESENTATION:

Registrar:	Self-represented
Complainant:	No appearance
Adviser:	No appearance

PRELIMINARY

[1] Ms Anne Marie Hanning, the adviser, represented Mr T I (G) M, the complainant, for some years in respect of a number of visa applications. On receiving an instruction to seek another work visa for him, Ms Hanning failed to enter into a client agreement and failed to recognise that the employment documents did not comply with Immigration New Zealand's visa instructions.

[2] The Registrar of Immigration Advisers (the Registrar), the head of the Immigration Advisers Authority (the Authority), has referred this complaint to the Tribunal. It alleges that Ms Hanning has satisfied a ground for complaint under the Immigration Advisers Licensing Act 2007 (the Act) and has breached the Licensed Immigration Advisers Code of Conduct 2014 (the Code).

[3] Ms Hanning admits failing the complainant and being disappointed with her own performance.

BACKGROUND

[4] Ms Anne Marie Hanning is a licensed immigration adviser and director of Hanning Immigration Adviser & Management Services Ltd.

[5] The following somewhat incomplete narrative has been compiled from the relatively few documents sent to the Tribunal. That is particularly so in respect of documents concerning the complainant's wife, who was included in some or all of the complainant's immigration applications. In view of Ms Hanning's admissions to the Authority, a complete record is not required in order to determine this complaint.

[6] The complainant has been living in New Zealand since 2005 and for most of that time has held a work visa. He works as a supervisor of vineyard workers. Ms Hanning has represented him on immigration matters since about 2008.

[7] According to the complainant, he had no income between April and July 2012 due to issues with his then employer.

[8] On 21 May 2017, the complainant contacted Ms Hanning by email enquiring about the South Island Contribution visa scheme, which provided a pathway to residence for a migrant worker. He wanted to apply and sought her advice.

[9] Ms Hanning replied to the complainant on 30 May 2017 by email apologising for the delay and sending him some information and an application form for the visa.

[10] As Ms Hanning had not responded promptly, the complainant had by then approached another adviser for assistance. That adviser sent an email to the complainant's employer on 2 June 2017 with some information regarding the South Island Contribution visa.

[11] The employer appears to have contacted Ms Hanning, who replied with a text to the employer on 9 June 2017 stating that the complainant should be told that she charged $300 plus GST for a visa for 30 months. She added that later, there would be residence arising from the work visa.

[12] On 16 June 2017, the employer formally offered the complainant permanent employment. The individual employment agreement had been signed by the employer on 31 May 2017, and was signed by the complainant on 17 June 2017.

[13] On 10 July 2017, Ms Hanning sent to the complainant the relevant forms and information for him and his wife to apply under the South Island Contribution category.

[14] On 1 August 2017, the complainant sent all his documents and a completed visa application form to Ms Hanning.

[15] A work visa application (South Island Contribution category) for the complainant was filed with Immigration New Zealand by Ms Hanning on about 18 August 2017.

[16] The complainant's then current work visa expired on 15 September 2017. It is understood he was granted an interim visa while awaiting the decision on the visa application made on 18 August.

[17] Ms Hanning sent an invoice for $920 to the complainant on 27 September 2017. It was for the visa applications of both the complainant and his wife.

Immigration New Zealand sends "PPI" (adverse information) letter

[18] On 14 November 2017, Immigration New Zealand wrote to the complainant (courtesy of Ms Hanning) advising that he did not appear to be a *bona fide* applicant because of a number of matters.

[19] First, information from the IRD showed that the complainant had ceased employment with an earlier employer in March 2012, until applying for a visa for employment with a new employer in July 2012. While not employed for the period from March to July 2012, he did not inform Immigration New Zealand of his change in circumstances. Furthermore, he had received only nominal or no income in November 2012, January 2013 and March 2013. This did not comply with the terms of his work

visa which had been issued on the basis of 30 hours per week. It appeared he had not undertaken full-time employment for those months.

[20] Immigration New Zealand said in the letter that, since the complainant had not worked in the South Island for the five years between 22 May 2012 and 22 May 2017 as the holder of an Essential Skills work visa, he did not meet the visa instructions under the South Island category.

[21] In addition, the complainant's employment agreement did not state clearly that he was guaranteed full-time employment of no less than 30 hours per week. It merely stated that his "ordinary hours" would be 40, but that the number of hours worked in any week could be varied according to the seasonal variation. This did not meet the visa instructions.

[22] The complainant was informed that he was required to provide any further information by 21 November 2017. Ms Hanning was advised in an email to her on the same day that, if the complainant did not meet the requirements for the South Island Contribution visa, a change to the Essential Skills visa could be requested. An application to change the visa would not be considered unless it was made before the deadline set.

[23] The complainant sent a text to Ms Hanning on 17 November 2017 advising he had sent his "statement" to her. He also sent to her on the same day an email explaining what had happened to him in the period from March to July 2012 (this is presumably his statement).

[24] Following a discussion between Ms Hanning and the complainant on 20 November 2017, the latter provided more information to her about the events of 2012 in an email on 21 November 2017 at 4:16 pm.

[25] Ms Hanning sent an email to the visa officer on 22 November 2017 attaching two responses from the complainant (presumably the emails of 17 and 21 November). She said that Immigration New Zealand was aware of the situation in regard to one of his former employers, which had not been paying the staff or paying their tax. The employer had closed down. The workers had been trying to find other work. This was a problem where the workers were genuine, but the employers were dubious. The complainant and his wife had been working hard and had been treated very badly by these employers. She apologised for her limited response, due to being "knocked by a bad flu".

[26] On 24 November 2017, Ms Hanning sent "the latest SMR [Skills Match Report] from Work & Income" concerning the complainant, to the visa officer.

Immigration New Zealand declines visa

[27] The immigration officer sent a brief email to Ms Hanning on 24 November 2017 at 1:29 pm advising that the application failed.

[28] Then at 1:55 pm that day, Ms Hanning sent an email to the employer seeking urgent help. She referred to the relevant passage from Immigration New Zealand's letter of 14 November concerning guaranteed full-time hours. It was noted by her that Immigration New Zealand had stated that a decision had yet to be made on the application, so there was an opportunity to provide additional evidence. Ms Hanning asked the employer to get back to her as soon as possible. The Tribunal observes that Ms Hanning already knew by this time that the application had been declined.

[29] Ms Hanning also telephoned the complainant at about the same time to advise him of the outcome and discuss options.

[30] At 3:57 pm on the same day, 24 November 2017, Immigration New Zealand emailed a formal letter to Ms Hanning advising that the complainant's visa application had been declined. The letter recorded that the complainant had been advised on 14 November why he did not appear to be a *bona fide* applicant. In reply, he had stated that he had not informed the agency in 2012 that his employment had ceased, as he was looking for other employment. He had also said that his previous employer had not given him work for the duration promised. Even so, according to the agency, the complainant should have notified them. This did not mitigate the substantial breach of his visa conditions. He chose to remain in New Zealand in breach of his visa. Nor had he filed any amendment to his employment agreement in relation to the minimum guarantee of 30 hours per week.

[31] In a separate letter from Immigration New Zealand to the complainant's wife on the same day, her application for a work visa was declined because of the decline of the complainant's visa.

[32] The complainant then remained in New Zealand unlawfully.

[33] The complainant engaged another adviser who lodged a request with the Minister of Immigration on 2 December 2017 for visas for himself and his wife under s 61 of the Immigration Act 2009 (discretionary power to grant a visa to a person unlawfully in New Zealand).

[34] The new adviser explained to the Minister the circumstances regarding the complainant's lack of work in 2012. His then employer told him to take a holiday and wait for a call to return to work, which was expected when the pruning season started.

He was not unemployed at that time. As it became apparent to the complainant that he was unlikely to be called, he started looking for work before his visa ran out. He had asked Ms Hanning whether he should tell Immigration New Zealand, but she told him to find another employer and she would then apply to vary his visa conditions.

[35] As for the employment agreement, the Minister was told that the employer had corrected it and advised Ms Hanning, but she did not request a copy despite contact from the employer on numerous occasions. According to the new adviser, Ms Hanning tried to cover up her failure to address the problem with the employment agreement, by seeking the employer's help on 24 November, after Immigration New Zealand had already declined the visa application. The revised employment agreement was never given to Immigration New Zealand. The new adviser informed the Minister that a complaint against Ms Hanning had been laid with the Authority.

[36] The complainant and his wife were issued with visitor visas by Immigration New Zealand on 28 February 2018.

COMPLAINT

[37] The complaint against Ms Hanning was lodged by the complainant with the Authority on 12 December 2017 (complaint form signed 5 November 2017). The complainant set out in a chronology his communications with Ms Hanning. He complained about her late reply to some communications and her failure to reply at all to others. It was only on the day that his application had been declined by Immigration New Zealand that she asked the employer to revise the employment contract. The complainant wanted the adviser to return his money since she did not do her work properly.

[38] There followed some exchanges between the Authority and Ms Hanning.

[39] Ms Hanning advised the Authority on 4 April 2018 that she was not aware of the requirement to have a new client agreement for every application. The initial agreement in 2008 was in storage.

[40] On 4 May 2018, the Authority wrote to Ms Hanning formally setting out the substance of the complaint and seeking her explanation.

Ms Hanning's explanation to Authority

[41] Ms Hanning replied to the Authority on 21 May 2018. She said that at the time the complainant contacted her, she was very busy preparing for the new dairy season,

as well as the normal renewal of client visas. She was receiving more than 40 emails and phone calls on a daily basis. Ms Hanning said she endeavoured to respond to every one and had not been taking on new clients, as she worked on her own and did not have any clerical support.

[42] It was not correct that she did not respond to the complainant's phone calls and text messages. She did not answer phone calls when she was with other clients, but always told them to leave a message. She endeavoured to return all messages and emails the same day if possible, but 40 plus per day was a lot to manage and she may have missed four or five calls.

[43] As for her response to Immigration New Zealand's PPI letter, she sent it to the complainant with instructions to share it with his employer. She had severe flu for 10 days at that time.

[44] In reply to the allegation that she did not identify anything in the complainant's visa application that would raise concerns, Ms Hanning said she went over the visa conditions with the complainant and confirmed that he was on a skilled migrant visa for the time required. It was accepted she should have "gone more in depth" with the information provided. All migrants were keen to get their applications in as soon as possible and she was trying to keep on top of the workload.

[45] When the complainant sent the relevant information on 17 November responding to the PPI letter, Ms Hanning said she sought further clarification from him. He replied on 21 November at 4:16 pm, the day the response was due. She did not check her emails until that evening as she was ill in bed, but replied to Immigration New Zealand the next day.

[46] In reply to the allegation of negligence, Ms Hanning acknowledged being very disappointed with herself for failing the complainant in this instance. She understood that he and his wife were not satisfied with what happened. She tried to call him several times but got no reply. She wanted to offer assistance for no further fee if he was still happy for her to continue, or even give him a refund. However, he refused her calls.

[47] Ms Hanning advised that, in the eight and a half years since she had worked as a licensed adviser, this was the first complaint she had ever received.

[48] As for the complainant's lack of income, Ms Hanning explained that many vineyard workers took the opportunity in the off-season to return home for a couple of months while still having a full-time job available for their return.

[49] In response to the allegation regarding the faulty wording in the employment agreement, this had been brought to the employer's attention on another occasion and the employer had altered the wording. Ms Hanning said she had been assured it would be used in the future. She did not check it as she trusted the employer would continue with the correct agreement. She was not qualified in employment law and worked in the areas of her knowledge and expertise.

[50] As for the allegation that she did not have a client agreement, Ms Hanning said she was not aware of the requirement to provide a client with a new agreement every time there was a process, but she would now do this. She completely missed the fact that this was a different category of work visa. She thought it was the same criteria as the Essential Skills work visa.

[51] Ms Hanning explained that her ill health had contributed to her failure to do a thorough check on the application. This had been caused by burnout and taking on too much work, as well as the lack of support and a computer system which had crashed. Furthermore, her flat had flooded. She accepted that mistakes had been made on her part, for which she was sorry. These would be rectified. She was working 16 to 18 hours daily to keep up with the work, six to seven days per week.

[52] According to Ms Hanning, she had been looking for options for support, but had been unsuccessful. Recently, she had met two other advisers to see if they could work together for mutual benefit. She was participating in as many relevant training webinars and seminars as was possible and affordable. There was a shortage of advisers in Invercargill, as there was in Marlborough where she did work (and where the complainant was from). She had made changes to her operations and offered a refund to the complainant which she trusted would atone for the errors and satisfy the complaints process.

Complaint referred to Tribunal

[53] On 7 June 2018, the Registrar referred the complaint to the Tribunal. It was alleged that Ms Hanning's conduct satisfied a statutory ground of complaint and/or was a breach of the Code in the following respects:

(1) failing to verify that the complainant's employment history and employment agreement met the visa requirements before filing the application and failing to address Immigration New Zealand's concerns in a timely manner, thereby being negligent;

(2) alternatively, failing to verify that the complainant's employment history and employment agreement met the visa requirements before filing the application and failing to address Immigration New Zealand's concerns in a timely manner, thereby failing to exercise diligence and to conduct herself with due care and in a timely manner, in breach of cl 1;

(3) not providing the complainant with a written agreement when he decided to proceed with the South Island Contribution Work visa application, in breach of cl 18(a); and

(4) alternatively, not ensuring that changes to the initial written agreement were recorded and accepted in writing, in breach of cl 18(d).

JURISDICTION AND PROCEDURE

[54] 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.

[55] The Tribunal hears those complaints which the Registrar decides to refer to the Tribunal.[1]

[56] The Tribunal must hear complaints on the papers, but may in its discretion request further information or any person to appear before the Tribunal.[2] It has been established to deal relatively summarily with complaints referred to it.[3]

[57] 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.[4]

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[1] Immigration Advisers Licensing Act 2007, s 45(2) & (3).
[2] Section 49(3) & (4).
[3] *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376 at [93].
[4] Section 50.

[58] The sanctions that may be imposed by the Tribunal are set out in the Act.[5] The focus of professional disciplinary proceedings is not punishment but the protection of the public.[6]

[59] 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.[7]

[60] The Tribunal has received from the Registrar a statement of complaint, dated 7 June 2018, with supporting documents.

[61] No submissions or evidence were received from the complainant or the adviser.

[62] No party requests an oral hearing.

ASSESSMENT

[63] The Registrar relies on the following provisions 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.
>
> **Written agreements**
>
> 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
>
> …
>
> d. any changes to a written agreement are recorded and accepted in writing by all parties.

(1) Failing to verify that the complainant's employment history and employment agreement met the visa requirements before filing the application and failing to address Immigration New Zealand's concerns in a timely manner, thereby being negligent

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[5] Section 51(1).
[6] *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151] (citation omitted).
[7] *Z v Dental Complaints Assessment Committee*, above n 6, at [97], [101]–[102] & [112].

(2) Alternatively, failing to verify that the complainant's employment history and employment agreement met the visa requirements before filing the application and failing to address Immigration New Zealand's concerns in a timely manner, thereby failing to exercise diligence and to conduct herself with due care and in a timely manner, in breach of cl 1

[64] In answer to the allegation of negligence, Ms Hanning in her explanation of 21 May 2018 to the Authority expresses being very disappointed with herself in failing the complainant. She wanted to offer him services without payment of further fees if he wished to proceed, or a refund of fees already paid.

[65] In regard to the lack of guaranteed minimum hours in the employment agreement, Ms Hanning told the Authority she had earlier been assured (at the time the problem arose for another employee) that the proper wording would be used in the future.

[66] It was Ms Hanning's responsibility to check the agreement used for the complainant. That is particularly so, if she knew the problem had arisen in the past in respect of that employer.

[67] A professional and diligent adviser would not rely on an assurance given earlier by the employer in the context of someone else's application. Checking that the agreement satisfies Immigration New Zealand's criterion regarding minimum hours does not require any expertise in employment law. Immigration advisers routinely check that Immigration New Zealand's visa criteria relating to employment agreements have been satisfied.

[68] Ms Hanning was invited by the Tribunal to contest the Registrar's statement of complaint if she did not agree with any part of it, but has chosen not to do so. While in her explanation to the Authority she appears to have accepted being negligent, I intend to assess these heads of complaint in terms of the Code obligation to be diligent and to conduct herself with due care and in a timely manner.

[69] It seems to me somewhat self-evident that Ms Hanning did not conduct herself with diligence or due care in failing to identify the missing contract provision. She was aware this had earlier been a problem with this particular employer. She then compounded her unprofessional performance by failing to respond to Immigration New Zealand's notification of the missing contract provision in the PPI letter. This also amounted to a lack of diligence and due care, and a failure to respond in a timely manner. Her email of 22 November 2017 responding to the PPI letter did not address this fatal flaw in the complainant's application. It was not until after Ms Hanning was notified of

the decline of the application that she belatedly contacted the employer seeking urgent help, but even then she offered no advice as to how to remedy the problem.

[70] Additionally, I agree with the Registrar that Ms Hanning should have identified the problem with the complainant's lack of income in 2012 and 2013 before the application was filed. This would have been straightforward to do from the complainant's IRD record. She could then have 'front-footed' the earlier breach of his visa conditions and provided an explanation, rather than leave it to Immigration New Zealand to discover it and question the complainant's *bona fides*. Ms Hanning failed to exercise diligence and due care in this regard.

[71] Ms Hanning says she was overworked at the time, but that is not a defence or adequate justification for her failures in representing the complainant. A professional person is expected to regulate his or her own workload in order to render a professional service to all clients. It is not easy to turn work away but this must be done rather than to perform inadequately.

[72] Ms Hanning also notes in her explanation to the Authority that she had poor health at the time of the application and/or PPI letter. She offers no evidence concerning this, which seems to have spanned an unduly long period. If her condition was truly debilitating and prolonged, she should have declined work or made other arrangements for her clients to be properly represented.

[73] I find that Ms Hanning breached cl 1 of the Code. The second head of complaint is upheld. There is no need to assess the alternative first head.

(3) Not providing the complainant with a written agreement when he decided to proceed with the South Island Contribution Work visa application, in breach of cl 18(a)

(4) Alternatively, not ensuring that changes to the initial written agreement were recorded and accepted in writing, in breach of cl 18(d)

[74] Ms Hanning acknowledges she did not enter into a new written agreement with the complainant when he instructed her in June 2017 to proceed with an application under the South Island Contribution category. She told the Authority she was not aware she needed a new agreement every time a new visa category was instructed.

[75] Ms Hanning apparently had an agreement with the complainant dating back to her original instructions from him in about 2008. She said it was in storage and could not provide it.

[76] It is noted that Ms Hanning has still not provided the agreement, even to the Tribunal. In any event, as the Registrar points out, it would pre-date the current Code and would not be compliant with the detailed mandatory requirements of cl 19 thereof. This includes a "full description of the services to be provided".[8] This means either a new agreement, or at least an updated schedule of services and fees, must be signed by both parties each time a new application is instructed.

[77] The obligation to have a written agreement complying with the Code is important. It sets out essential information for the client. It protects not just the client, but also the adviser.

[78] Ms Hanning has not shown that there was a written agreement as envisaged by the Code. I uphold the third ground of complaint. There is no need to consider the alternative fourth ground of complaint.

OUTCOME

[79] The second and third heads of complaint are upheld. Ms Hanning has failed to exercise diligence and due care or to conduct herself in a timely manner. She has also failed to have a written agreement with the complainant. She has breached cls 1 and 18(a) of the Code.

SUBMISSIONS ON SANCTIONS

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

[81] A timetable is set out below. Any request that Ms Hanning undergo training should specify the 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.

Timetable

[82] The timetable for submissions will be as follows:

(1) The Registrar, the complainant and Ms Hanning are to make submissions by **3 February 2020**.

[8] Code of Conduct 2014, cl 19(e).

(2) The Registrar, the complainant and Ms Hanning may reply to the submissions of any other party by **18 February 2020.**

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.[9]

[84] There is no public interest in knowing the name of Ms Hanning's client.

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

D J Plunkett
Chair

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