BEFORE THE IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2018] NZIACDT 23

Reference No: IACDT 013/18

IN THE MATTER	of a referral under s 48 of the Immigration Advisers Licensing Act 2007
BY	**The Registrar of Immigration Advisers** Registrar
BETWEEN	**C O** Complainant
AND	**S I** Adviser

SUBJECT TO CONFIDENTIALITY ORDER

INTERIM DECISION

REPRESENTATION:

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

Complainant: In person.

Adviser: In person.

Date Issued: 18 June 2018

Introduction

Mr I's circumstances

[1] Mr I was a licensed immigration adviser. He had a stroke and his health deteriorated further after that happened, and he was likely unwell earlier. This is one of several complaints from the time Mr I was unwell and still practising.

[2] Professional disciplinary regimes are usually separated from health-related competency issues. However, the Registrar does not have power to step in and administer the practice of a licensed immigration adviser. Practitioners are not required to give a power of attorney to another licensed immigration adviser either; which is the way some other professions manage cases like this one.

[3] I will take Mr I's situation into account when deciding the complaint. He is not able to understand the complaint due to his health; family members have been cooperative, but they are not licenced immigration advisers. I am dealing with the complaint without any response from Mr I, but this is not due to any fault on his part.

[4] The Registrar, as the Tribunal's rules require, issued a notice of complaint. It sets out the grounds for complaint she thinks have been established. She provided the written documents supporting the complaint, and says the documents prove the relevant facts. I will look at the Registrar's grounds of complaint, and the evidence provided to support them; but, will not draw any inference from Mr I's inevitable silence.

The Registrar's grounds of complaint

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

> **Negligence**
>
> *Section 44(2)(a) of the Immigration Advisers Licensing Act 2007: "The grounds for complaint may be any 1 or more of the following in relation to the immigration adviser or former licensed immigration adviser complained of … negligence".*
>
> The complainant engaged the Adviser to submit an EOI and application for residence to INZ on her behalf in September 2015.
>
> The complainant's bank records show she paid $3480 for the Adviser's services.
>
> The complainant's ITA was valid between 14th September 2016 and 15th January 2017.

However, it appears no applications were made by the Adviser to INZ regarding the complainant. Subsequently, the ITA for the complainant expired, causing the complainant to lose her opportunity of obtaining New Zealand residence.

There is no record of an ITA being lodged for the complainant on INZ's computer system.

Based on the information available, it appears that the adviser may have been negligent by failing to ensure that the complainant's application was submitted to INZ within the valid timeframe of the invitation.

Breach of Clause 1 of the Code of Conduct 2014 or Incapacity in relation to being honest and diligent regarding client communication

Clause 1 of the Licensed Immigration Advisers Code of Conduct 2014: "A licensed immigration adviser must be honest, professional, diligent and respectful and conduct themselves with due care and in a timely manner".

Section 44(2)(c) of the Immigration Advisers Licensing Act 2007: "The grounds for complaint may be any 1 or more of the following in relation to the immigration adviser or former licensed immigration adviser complained of … incapacity".

The complainant engaged the Adviser to submit an EOI and application for residence to INZ on her behalf in September 2015.

The complainant's bank records show she paid $3480 for the Adviser's services.

On 17th March 2017, after the expiry of the complainant's ITA, the complainant contacted the Adviser requesting an update about her application.

On 17th March 2017, the Adviser informed the complainant that there was no news due to "many applications", and that "processing times had increased from 5 to more than 6 months".

On 24th April 2017; the Adviser again responded to the complainant, informing her there was "no update due to many changes" which was causing delays. The Adviser tells the complainant "things will be improved in June / July".

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

Although the complainant has been able to periodically communicate with the Adviser since he became unwell, the complainant has been unable to obtain a full refund of service fees, gain accurate and truthful information regarding her application, and get the Adviser to contact [her solicitor].

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

The Adviser's failure to provide accurate information to the Complainant may have been related to his medical issues, and

therefore may amount to incapacity rather than a breach of clause 1 of the Code of Conduct 2014.

Based on the information available, it appears that the circumstances giving rise to the complaint relate in part to the Adviser's state of health and his resulting inability to manage his practice. It appears the Adviser is no longer in a position to provide his services or meet his obligations as a licensed immigration adviser under the Code of Conduct 2014 on account of being medically incapacitated.24

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

Clause 18(a) of the Licensed Immigration Advisers Code of Conduct 2014: "A licensed immigration adviser must ensure that ... when they and the client decide to proceed, they provide the client with a written agreement".

The complainant engaged the Adviser to submit an EOI and application for residence to INZ on her behalf in September 2015.

The complainant claimed she did not sign or receive a written agreement from the Adviser.

The Adviser did not submit a client file or any further evidence to the Authority that disproved the Complainant's claim.

By failing to ensure that a written agreement was provided to the complainant once she decided to proceed, it appears the Adviser did not meet his obligations under clause 18(a) of the Licensed Immigration Advisers Code of Conduct 2014.

Discussion

Evidence

[6] The Tribunal determines facts on the balance of probabilities; however, the test must be applied with regard to the gravity of the finding: *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [55].

[7] In this case the gravity is at the lower end, given the findings I make that the grounds for complaint arose due to incapacity. The unusual factor is that Mr I cannot respond. The complainant has brought the complaint and provided evidence for it, and the Registrar has investigated. She has presented the relevant information available to her.

[8] I have examined the material, and I am satisfied what the Registrar says about the complaint is supported by the material. In some respects, proof relies on the absence of material showing that Mr I did perform his duties properly. For example, there is no written agreement. I rely on what the complainant has said, and the Registrar’s failure to find contradictory material.

[9] The information I have presents sufficient proof to establish the essential facts in the Registrar's statement of complaint; notwithstanding my caution because Mr I cannot respond.

Mr I's deterioration

[10] The events subject to the complaint commence in the period from 14 September 2016 that was the period when Mr I should have file the complainant's application. He did not suffer a stroke until February 2017. A medical report the Authority provided says Mr I presented in February with an apparent anterior circulation transient ischemic attack (TIA). He had speech difficulty and confusion. The report refers to Mr I reporting fluctuations in his condition. The report discusses ongoing language dysfunction, and some uncertainty as to the cause.

[11] It is not clear when Mr I first experienced TIAs, or other effects on his cognition from a vascular cause. However, I cannot ignore the fact the Tribunal is dealing with eight complaints that are strikingly similar, and they do not commence with Mr I starting an immigration practice. Instead the complaints commence after Mr I was, apparently, a competent practitioner, and they coincide with an increasingly obvious progression of medical incapacity developing more or less in the period the complaints arose. There is no medical report based on an examination in September 2016. However, in the absence of contrary evidence, given the evaluation in February 2017, the progressive nature of his illness, and numerous complaints arising; my view is Mr I was probably he was incapable of practising from September 2016 (potentially earlier). While the medical assessment was obviously thorough, it was not an attempt to measure cognitive ability with reference to his professional service delivery; or to put it on a timeline. I am satisfied the inference I have drawn from the circumstances is justified, and consistent with the medical information available.

Negligence

[12] Given my findings regarding Mr I's incapacity from September 2016 the allegation of negligence cannot succeed, if it turns on how Mr I conducted himself. The decision of the Health Practitioners Disciplinary Tribunal (HPDT) in *Re Tolland* [2010] NZHPDT 325 (9 September 2010). The HPDT observed at [39]:

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

> standard measured against the standards of the responsible body of a practitioner's peers.

[13] A practitioner who has lost mental capacity is not generally guilty of professional misconduct for what follows from their illness. Potentially, they could be accountable for failing to put in place mechanisms to guard against such contingencies; and the degree of impairment and insight will be relevant. However, there is no evidence Mr I had foresight when he was well, and the regulatory mechanisms of the profession do not mandate safeguards Mr I failed to implement.

[14] In these circumstances, though Mr I failed his client in a way that would be negligent aside from his incapacity; I must dismiss this ground of complaint.

Client communication

[15] The Registrar has put the issue of client communications on the alternatives of a breach of the Code of Conduct 2014, or incapacity. My view of a breach of the Code of Conduct 2014 is the same, in principle, as negligence. The Code of Conduct 2014 is generally aimed at choices a practitioner makes regarding their professional conduct (including taking adequate care). Though there are some requirements that are absolute, such as banking of money and having a written agreement for the delivery of professional services. Accordingly, I dismiss this ground of complaint as a breach of the Code of Conduct 2014. Mr I's failures in this regard were due to incapacity.

[16] While the Registrar has raised the issue of incapacity, she did so only with reference to client communication. It is necessary to examine the issue of incapacity in some detail; accordingly, I discuss it below.

Absence of a written agreement

[17] A written agreement is an integral part of commencing a professional engagement under the Licensed Immigration Advisers Code of Conduct 2014 (Code of Conduct 2014). The evidence shows Mr I commenced an engagement, received payments, and should have been providing professional services; but there was no written agreement. That is sufficient to establish this ground of complaint. The absence of the agreement is the breach, but the implications turn on the circumstances.

[18] However, it is necessary to consider this ground of complaint alongside the ground of incapacity. For the reasons I will discuss, I do not find there is proof Mr I intentionally breached this obligation.

Incapacity

[19] Incapacity is a ground for complaint under s 44(2)(c) of the Immigration Advisers Licensing Act 2007 (the Act). The word may refer to a range of

situations, including blameworthy conduct where a licensed immigration adviser does not have the capacity to perform work they agree to perform; when they ought to have known that was the case. If those were the limits of this ground of complaint the evidence would not establish it was made out.

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

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

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

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

[22] I must decide whether incapacity without blameworthiness is a ground for complaint. When doing so I am mindful of the HPDT's observations in *Re Tolland* [2010] NZHPDT 325 (refer above [[12]).

[23] The professional setting is varied, but duties of competence, application of skill, honesty, disclosure and propriety are shared by a wide range of professionals. Immigration advisers have much in common with other professionals. Section 3 of the Act affirms it is intended to protect the interests of consumers receiving immigration advice, which corresponds to the duties other professionals have to the public engaging their services.

[24] In a professional disciplinary setting, it is generally necessary to determine whether any lapse is sufficiently serious as to warrant the complaint being upheld as a professional disciplinary matter. Though the statutory context is quite different, there is a discussion of the underlying policy issues in *Orlov v New Zealand Law Society (No 8)* [2012] NZHC 2154.

[25] However, the statutory context is important. There have been numerous decisions of this Tribunal that evaluate whether a complaint serious enough to uphold as a professional disciplinary matter. Nothing in this decision is intended to alter what is said in those decisions. The issue I now need to decide is whether "incapacity" as a ground of complaint in s 44(2) includes "innocent" incapacity. Effectively the question is whether the Tribunal has jurisdiction where a matter is one of simple competence or capacity.

[26] To deal with the question the starting point is s 3 of the Act, which states the purpose of the Act is "to promote and protect the interests of consumers receiving immigration advice". I must assume, when passing the Act, Parliament recognised incapacity, and a lack understanding of the incapacity will occur for some licensed immigration advisers. When it does occur, the Registrar may refuse to renew a licence as the person will not meet the requirements for renewal. However, she cannot cancel a licence on that ground. Section 27 allows cancellation when a person is simply not entitled to hold a licence; it gives no power to the Registrar to make an evaluation of incapacity.

[27] The power to suspend or cancel a licence based on an evaluation of merit lies solely with this Tribunal. This is not the same as the structure for other professional licensing and disciplinary regimes; some of them have sophisticated competence assessment regimes that may be engaged at any point in time. Against this background, it would be unsurprising if simple "incapacity" could be brought before the Tribunal. It may be significant that "incompetence" and "incapacity" are included in s 44(2) separately from the Code of Conduct 2014.

[28] The Code of Conduct 2014 contains a set of professional practice standards, which includes a requirement to work within a licensed immigration adviser's limits of knowledge and skills (cl 8). To fail to do so knowingly, or through lack of care, is blameworthy. Generally, the concept of a disciplinary threshold fits well with those requirements, and incompetence or incapacity in the context of working outside limits of knowledge and skill will fall within that part of the Code of Conduct.

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

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

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

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

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

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

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

[31] However, the Registrar has only particularised this construction as an alternative to the Code of Conduct 2014 in relation to client communication. In my view, it applies to all of the issues raised. Accordingly, while I would find as a fact Mr I failed to deliver his professional services at a proper level; the only ground I can uphold is incapacity, and the failure to have a written agreement. However, the significance of not having a written agreement turns on the incapacity.

[32] If that approach is correct then sanctions would be approached while recognising an absence of blameworthiness. Regardless, it appears likely Mr I would be obliged to pay compensation for losses following his failure to meet his professional obligations. Compensation would follow usual civil liability, and his contractual and fiduciary obligations would likely protect his clients.

[33] I am conscious the conclusion I propose amounts to reducing the "charges" of professional offending, and substituting a finding relating to competence. This hearing has been on the papers, so I have not been able to put the issues to the parties. Accordingly, the parties are entitled to be heard before the Tribunal makes final findings on this issue. Leave will be reserved for any party to take issue with the proposed findings, and the extent to which the Tribunal proposes to uphold the complaint.

Decision – upholding a ground of the complaint

[34] The Tribunal will uphold the complaint on the ground of incapacity, subject to hearing further evidence and argument if any party objects. In particular, as from September 2016 Mr I suffered from incapacity, the complaint will be upheld on that basis; and the Tribunal finds his incapacity led to the failures in professional service delivery particularised by the Registrar (above [5]), being that Mr I failed:

[34.1] to file the complainant's ITA;

[34.2] comply with client communication obligations; and he

[34.3] breached the Code of Conduct 2014 by not have a written agreement.

Next steps

[35] **If any party objects to the proposed findings relating to incapacity, the consequences of the incapacity, or the formulation of the findings, they are to give notice within five workings days of this decision issuing**. The Tribunal will then convene a telephone conference to discuss how to complete the hearing.

[36] If there is no challenge to the proposed decision it will take effect as the decision of the Tribunal.

[37] If the proposed finding is the final decision it appears:

[37.1] Mr I's career has ended and there will be no question of him being licensed again. His licence has been suspended, but may need to be cancelled to complete the process.

[37.2] It is likely a monetary penalty will be appropriate.

[37.3] Orders for the refund of fees, and any compensation that may be justified would follow.

[38] All parties should address any issues relating to sanctions. The complainant should identify the claim for the refund of fees (apparently the whole of the fees paid), the amount of any compensation and the grounds for requiring Mr I to pay compensation.

Timetable

[39] If there is no objection to the proposed conclusion:

[39.1] The Registrar and the complainant may file submissions regarding sanctions within 15 working days of the issue of this decision.

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

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

Publication of the adviser's name

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

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

DATED at WELLINGTON this 18th day of June 2018.

_____
G D Pearson
Chair