BEFORE THE IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2018] NZIACDT 2

Reference No: IACDT 006/16

IN THE MATTER	of a referral under s 48 of the Immigration Advisers Licensing Act 2007
BY	**The Registrar of Immigration Advisers** Registrar
BETWEEN	**Manya Sharma** Complainant
AND	**Amar Dev (Amar) Manchanda** Adviser

DECISION

REPRESENTATION:

Registrar: Ms R Denmead, lawyer, MBIE, Auckland.

Complainant: In person.

Adviser: In person.

Date Issued: 2 February 2018

DECISION

Preliminary

[1] This is a complaint against Mr Manchanda, he was a licensed immigration adviser. Since this complaint was heard, he has died. It is necessary to complete the process for determining the complaint.

[2] The essence of the complaint arises from the following events:

[2.1] First, Mr Manchanda was asked to assist the complainant in urgent circumstances (her visa was due to expire in a few days' time). The application Mr Manchanda prepared was a failed lodgement with Immigration New Zealand (INZ), due to the absence of a current police certificate;

[2.2] At that point, the complainant was in New Zealand unlawfully and had limited options to request a visa, as generally a person who is in New Zealand without a current visa cannot apply for a visa; and

[2.3] When the complaint was made, the Registrar required that Mr Manchanda provide a copy of his file, but he did not provide file notes that he later relied on.

[3] The essential features of the grounds of complaint are, Mr Manchanda failed to take adequate care over the absent police certificate, did not give adequate advice and failed to follow up advice in writing, and he failed to provide the Registrar with a full copy of his file.

[4] The essential facts are not contentious, though what was said in client interactions between Mr Manchanda and the complainant is disputed. The issue for the Authority to determine is whether Mr Manchanda took adequate care in relation to the application that resulted in a failed lodgement and his client interactions. He has accepted he failed to maintain the proper standard for written client communications and did not supply all of his file when the Registrar required it.

[5] The Tribunal has determined that Mr Manchanda failed to take due care with the initial lodgement; and, as Mr Manchanda accepted, he failed to maintain the required standards for his written communications and delivery of his records to the Registrar. In terms of the discussions between Mr Manchanda and the complainant, the evidence is not adequate to reach an adverse finding. The Authority is satisfied the proper focus in respect of advice provided to the complainant is on the absence of written confirmation of advice. Mr Manchanda accepted he failed to do that. The complaint has been upheld on that basis.

The Complaint

The background facts

[6] The Registrar filed a statement of complaint, it set out a factual narrative, and identified three potential grounds for complaint. The main elements of the factual background in the statement of complaint were as follows:

[6.1] On 22 August 2015, the complainant engaged the adviser to assist her with immigration matters. At that time, she held a post-study work visa which was due to expire on 28 August 2015. She wished to remain in New Zealand and find employment relevant to her New Zealand qualification. Her previous employment had ended and she needed to find a new position.

[6.2] To pursue this objective, she entered into a written agreement with the adviser to provide immigration services relating to a visitor visa application.

[6.3] On 26 August 2015, the adviser submitted a visitor visa application to INZ for the complainant.

[6.4] On 29 August 2015, INZ returned the visitor visa application explaining that it was incomplete as a valid Police certificate from the complainant's country of citizenship had not been provided. She had previously submitted a Police certificate which had expired on 8 April 2015.

[6.5] Due to these developments, the complainant was in New Zealand unlawfully without a visa. On 1 September 2015, the adviser submitted a request for a visitor visa under s 61 of the Immigration Act 2009 (the 2009 Act). The nature of a s 61 request is that it is entirely discretionary, INZ does not need to give reasons for its response; it is however the primary option to seek a visa when a person is in New Zealand unlawfully without a current visa.

[6.6] On 4 September 2015, the complainant told the adviser she had been offered full-time employment. On 14 September 2015, the complainant entered a written agreement with the adviser to provide services relating to a request for a work visa. On 16 September 2015, the adviser issued a receipt for $230 in respect of his professional fees. On 23 September 2015, the complainant received an offer of employment. On 24 September 2015, the adviser telephoned INZ and asked that they consider a request for a post-study work visa under s 61 rather than a visitor's visa based on the offer of employment.

[6.7] Later that day, the adviser emailed INZ advising that he had assessed the documents relating to the complainant's offer of employment and

found that the job was not relevant to her qualifications. He requested INZ consider granting a visitor visa for two months, so that the complainant could find suitable work.

[6.8] On 24 September 2015, the complainant engaged another licensed adviser to assist with her immigration matters. On 28 September 2015, the complainant's new adviser emailed Immigration New Zealand stating that the complainant had been incorrectly informed by the adviser regarding the validity of her Police certificate and that the offer of employment was relevant to her qualifications, so she should qualify for a visa.

[6.9] On 7 October 2015, INZ granted the complainant a six month open work visa under s 61.

[7] In summary, the essential facts identified by the Registrar are that the adviser failed to identify that the complainant did not have a current Police certificate and also failed to recognise when she obtained an offer of employment which did meet the requirements for a post-study work visa. Accordingly, her endeavours to obtain a post-study work visa and manage the period while she did not have the offer of qualifying employment failed. The Registrar also identified other issues arising from the advice provided, communications and provision of records in response to the complaint.

The grounds of complaint identified by the Registrar

Potential breach of cl 1 of the Code

[8] The Registrar identified two grounds for complaint. The first ground involved an alleged breach of cl 1 of the Code of Conduct 2014 (the Code) in relation to providing advice and services. The particulars relate to two aspects of the client relationship between the adviser, and the complainant. First, the advice relating to the Police certificate, second the management of the s 61 request.

[9] In relation to the Police certificate, the Registrar identified that it appears the complainant engaged the adviser to submit a visitor visa application to INZ, as her work visa was due to expire in six days. During the consultation, there was some discussion between the complainant and the adviser regarding the need for a Police certificate to be provided to INZ.

[10] The complainant contends that the adviser told her that it was not necessary to submit a Police certificate with her application, whereas the adviser claims he trusted the complainant and did not make further inquiries.

[11] A requirement under INZ's immigration instructions state that any person applying for a temporary visa who intends to stay in New Zealand for 24 months or longer (including the time already spent in New Zealand prior to the

application being made) needs to have character checks carried out. If the Police certificates were submitted with a previous application, they can be accepted to support a further application for a temporary visa within 24 months of the date of the issue of the certificate.

[12] When it rejected the initial application INZ noted:

[12.1] The complainant's Police certificate (which was submitted to INZ in May 2013 as part of her student visa application) had expired on 8 April 2015; and

[12.2] The complainant's existing certificate did not meet the 24-month requirement.

[13] There was no dispute the certificate had expired. The issue is whether the adviser ought to have made further inquiries or taken steps to protect the complainant.

[14] The second aspect of the complaint in relation to cl 1 of the Code relates to the request for visas under s 61.

[15] The complainant contends that during the course of her dealings with the adviser, he failed to explain the nature of a s 61 request to her, and also failed to explain that she was in New Zealand unlawfully and the consequence of that status. Of importance is that a request under s 61 is entirely discretionary, no reasons need to be given by INZ and being unlawfully in New Zealand may have serious adverse consequences for a person's immigration opportunities in the future.

[16] The Registrar has particularised the potential breach under cl 1 of the Code with reference to the adviser's duty to be diligent and conduct himself with due care, and that in particular:

[16.1] He potentially failed to properly assess whether a Police certificate was required or whether the complainant's existing Police certificate met immigration instructions; and

[16.2] Failed to explain the meaning of s 61 and the limitations of that request made under it, or the consequences of being in New Zealand unlawfully.

Potential breach of cls 26(c) and 26(e) of the Code of Conduct 2014

[17] The second aspect of the ground of complaint identified by the Registrar relates to potential breaches of cls 26(c) and 26(e) of the Code, in relation to file management. There are two dimensions, the first is in relation to cl 26(c), which requires a licenced immigration adviser to confirm in writing to the client the details of all material discussions with the client. The second is that a licenced

immigration adviser pursuant to s 26(e) must maintain a client file for a period of not less than seven years after closing the file and make the records available for inspection on request by the Immigration Advisers Authority.

[18] In relation to the first aspect, the Registrar alleges that the adviser did not confirm the details of material discussions which took place between himself and the complainant in writing. Accordingly, that was potentially to a breach of his professional obligations.

[19] In relation to the second aspect of the complaint, the Authority wrote to the adviser on 9 October 2015 requesting a copy of the full client file relating to the complainant. He produced a client file on 27 October 2015. When, on 17 March 2016, the Authority wrote to the adviser setting out specific grounds of complaint, the adviser then provided copies of file notes. He had not provided those notes when he supplied his client file to the Authority and sought to rely on those file notes as a contemporaneous record of his interactions with the complainant.

[20] Accordingly, the Registrar considers that the adviser potentially failed to discharge his obligation to provide the file notes when requested to do so.

Procedure

[21] After reviewing the material presented by the Registrar, and the adviser's initial response, the Tribunal requested that the adviser appear before the Tribunal to make a statement and provide an explanation in respect of the complaint. An oral hearing was convened for that purpose.

[22] The Tribunal hears complaints on the papers under s 49 of the Immigration Advisers Licensing Act 2007 (the Act), but may in its discretion request information or request that persons appear before the Tribunal.

[23] In this case, it appeared that it was necessary to obtain further particulars and details of the response the adviser's response to the complaint.

Mr Manchanda's answer to the complaint

[24] Initially the adviser provided an outline of his position and in addition completed a statement of reply form.

[25] In relation to the allegation that the adviser lacked care and professionalism, his position was that that was not the case. His said the complainant was mistaken about when she had last provided a Police certificate to INZ. He accepts it is unfortunate he did not double check the information by telephoning INZ and has changed his practices to make those enquiries. He accepts that double-checking his client's recollection would be best practice, but contends that it was not essential, given that the complainant is highly educated and competent, and

nothing put him on alert as to potential inaccuracy in the information he was provided.

[26] The adviser disputed the claim regarding the advice he gave the complainant regarding her circumstances after she was unlawfully in New Zealand. He claimed he gave adequate and accurate information. He said he did notify the complainant that she was unlawfully in New Zealand and her best option was to make a request for a visa under s 61 of the 2009 Act. He says that he also explained the general nature of her circumstances. He referred to file notes that are generally consistent with that proposition.

[27] In relation to the first ground of complaint, the adviser says that while his practice was not ideal, it did not fall sufficiently short of acceptable standards to amount to a professional disciplinary offence.

[28] The adviser accepted that he did breach both cls 26(c) and 26(e) of the Code. He says that he did have handwritten file notes, but did not provide those notes to the Registrar when his file was requested. He says he has since gained a better understanding of the requirements and says that while the breaches are not trivial, they are at the very low end of the spectrum.

The oral hearing

[29] It is necessary for the Tribunal to resolve the conflict between the adviser and the complainant relating to the communications during the professional relationship.

[30] Inevitably, any two persons engaging in a discussion will have different perspectives regarding what occurred. That is one of the reasons why the Code has numerous requirements to communicate in writing with clients. One of those provisions is cl 20(c). It requires that a licenced immigration adviser must "confirm in writing to the client the details of all material discussions with the client". The adviser accepts that he did not do that in relation to the two critical issues where he is alleged not to have provided information that was appropriate or adequate. In addition, the adviser has produced some file notes that, to some extent, support his claims. However, he failed to provide a copy of those file notes when he was asked to provide the whole of his client file.

[31] Inevitably a licenced immigration adviser will face some level of scepticism when they produce self-serving file notes that they failed to disclose when first asked.

[32] Against this background, it is necessary to evaluate the merits of the adviser's oral evidence given at the hearing.

[33] One of the first matters to consider is the objective reality the medical certificate had expired and whether or not the job offer that the complainant met the requirements for a post-study work visa.

[34] In that regard, the adviser drew attention to an email from INZ when it granted the work visa after the complainant engaged a new immigration adviser. This email of 2 October 2015 stated:

> I have now reviewed your submissions.
>
> Based on the documents on hand in relation to [the complainant's] new employment I am not convinced that the grant of a two year work visa is warranted. However, considering the client's immigration history, the reason for becoming unlawful, the level and the field of the NZ qualification she has obtained, I am prepared to grant her a six months open work visa. This will give her an opportunity to either test her eligibility for a work visa under normal immigration instructions on the basis of this employment, or try to obtain another job offer, perhaps more relevant to her New Zealand qualifications.

[35] That communication is sufficient to indicate that in the absence of further evidence the adviser may have reasonably reached a similar conclusion to the immigration officer, namely it was not clear that the position of employment did qualify. Certainly, the evidence before this Tribunal is not clear enough to reach a conclusion that the adviser was wrong in his evaluation or wrong to a point where it potentially invokes a professional disciplinary response.

[36] In relation to the validity of the Police and medical certificates, the complainant's new adviser when seeking a visa under s 61 stated in an email addressed to INZ:

> I would just like to quickly inform you the reason [the complainant] came under s 61 – [the complainant] had asked her previous [licenced immigration adviser] about the validity of her Police and medical certificate and she was informed that they are valid.
>
> When the application was returned as failed lodgement, and when she questioned the same with the [licenced immigration adviser], he said he got confused and thought she was applying for a student visa instead of visitor's visa and here the medicals would be valid for 36 months instead of 24.

[37] INZ's position as from the time it rejected the initial application for a visitor's visa is that the Police certificate was out of date.

[38] It appears clear that the Police certificate was in fact out of date in the circumstances. However, there is no evidence to support the claim that the adviser was confused as to whether he was applying for a student visa or a visitor's visa for the complainant.

[39] The best evidence to make an evaluation of the level of care exercised by the adviser is to identify the material submitted to INZ when the adviser submitted a visitor visa application under cover of his letter dated 26 August 2015. Section

F of the visitor visa application is a section headed “Character”. It identifies that all principal applicants must complete this section. The box that has been ticked in this application is one that states “you do not have to provide Police certificates if … you are not intending to be in New Zealand for 24 months or longer”. The ticked box indicated that was the complainant’s situation. This is a form that the complainant engaged the adviser to assist her to complete accurately. It was plain the form was not completed appropriately because the form also identified that time already spent in New Zealand counted and when this was pointed out at the oral hearing the adviser accepted that he was responsible for an oversight.

[40] Accordingly, at the hearing it became established to a point where it was no longer disputed by the adviser that the complainant did not have a current Police certificate, and incorrect certification on the visitor visa had been lodged with INZ, and the adviser was responsible for that form.

[41] The oral hearing advanced matters little beyond the apparently objective view expressed by the immigration officer dealing with the s 61 request made by the new adviser. Namely that the complainant had successfully achieved high level qualifications, was working generally within the industry where she could deploy those qualifications and for that reason she was entitled to some leniency. However, whether the job offer met the requirements for issue of a post-study work visa for the applicant was not established. Certainly, the immigration officer indicated he was not convinced. The evidence did not go beyond that with any certainty.

Discussion

The standard of proof

[42] The Tribunal determines facts on the balance of probabilities. However, the test must be applied with regard to the gravity of the potential finding.[1]

[43] Given the allegations of dishonesty, the gravity is at the high end. Accordingly, I make findings on the basis I must be sure of the findings.

Breach of C 1 of the Code

[44] As already discussed the allegation against the adviser is that he was potentially lacking in diligence or failed to exercise due care in relation to the Police certificate, and also the submission of the s 61 request and consequences of being unlawfully in New Zealand.

[45] I am satisfied the adviser did through lack of diligence, or due care, fail to address the issue relating to a Police certificate correctly. Ultimately the

[1] *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [55].

differences of view as to what the complainant told the adviser, and the need to verify that information with INZ is of little importance. The fact plainly emerged at the oral hearing that the adviser was responsible for providing the certificate on a completely wrong basis. He accepted that.

[46] I accept it is, in some cases, easy to tick the wrong box on a lengthy form. However, the adviser had very good reason to be on alert regarding the importance of this matter. His client was a young woman who had invested a great deal in putting herself in the position where she had obtained high level qualifications in New Zealand and had a good prospect of permanent residence. To achieve that, she needed to utilise the regime where a person who has gained New Zealand qualifications can obtain relevant work experience under a post-study visa as a gateway to residence. The complainant had embarked upon that process and had obtained initial employment which qualified. She needed to take steps to remain in New Zealand lawfully and obtain a further position of employment. Instructions of that kind are critical and any licenced immigration adviser is required to understand their importance.

[47] When a person gets into a situation where they are unlawfully in New Zealand, the whole of their immigration future can be compromised. It was accordingly of critical importance that an application for a visa in the circumstances identified was not rejected as a failed lodgement, if at all possible. There may be circumstances where that is unavoidable and a client needs to be informed of that fact. If it is merely a technical obstacle, in some cases INZ may provide some accommodation. In these circumstances, it was a serious error to tick the wrong box, which is likely to result in a failed lodgement. The adviser was under a strong duty to ensure that he did make sure that the Police clearance was current. He failed to do that, and instead provided clearly wrong and spurious information to INZ. If the appellant needed a new police clearance and had failed to get it in time, then the adviser needed to ensure he addressed that in an open way with INZ. It can be seen when the new adviser lodged the further application that INZ was sympathetic to a fully disclosed explanation of the appellant's circumstances.

[48] In my view, breaches of professional duty relating to advice concerning the complainant's status in New Zealand and the limits of making a request for a visa under section 61 are not matters that gave rise to breaches of cl 1 of the Code. That is a decision on the facts of the case, but those matters are proved under cl 26(c) of the Code and discussed under the following heading.

Breach of Cl 26(c) and (e) of the Code

[49] The second aspect of this ground of complaint relates to the adequacy of the advice the adviser gave to the complainant. It is inherently problematic to truly evaluate the advice in anything approaching an objective manner because the

adviser failed to meet his professional obligation to set out the important parts of his advice in writing.

[50] For the reasons already discussed the complainant was in a critical situation when she instructed the adviser. There was a real risk that time and money invested in gaining qualifications with a view to working towards a career in New Zealand could be lost, if the situation was not managed well. A great deal was at stake, the adviser had a strong duty to ensure that the complainant fully understood what would happen if her application for a visitor's visa was not successful and the potential consequences for her. I do not however attach overwhelming importance to the oral discussions. Oral discussions about such important matters can leave opportunity for misunderstanding about critically important matters. I accept the adviser probably understood that he had identified, at the correct time, that the complainant had become unlawfully in New Zealand as she did not have a current visa; and, that he gave advice on that issue. It is possible he earlier gave some indication of the risks of the visitor's visa application failing and potential consequences of the complainant being in New Zealand unlawfully due to lack of a current visa. However, the real substance of this aspect of the complaint lies under the failure to comply with cl 26(c) of the Code.

[51] The adviser's obligation under the provisions of cl 26 of the Code was to confirm in writing to the complainant the details of all discussions with her. The adviser admits that did not happen, for the reasons identified that plainly was a very important step to take. Given the uncertainty of the evidence relating to what was and was not conveyed orally, I do find the allegation that the adviser breached cl 1 in relation to oral discussions established. That however, does not diminish the importance of the breach in relation to cl 26(c) of the Code. The adviser responsibly admitted breaches of cls 26(c) and 26(e) of the Code. It does remain to give some dimension and perspective to the significance of those aspects of the allegations against him.

[52] For the reasons I have already discussed, written confirmation of the significance of the complainant entering into a situation where she was unlawfully in New Zealand and ensuring she understood the limited opportunities to rectify that situation was of critical importance. A great deal turned on it. I must inevitably regard this breach as a serious lapse from the professional standards required of the adviser.

[53] In relation to the failure to provide the Registrar with a full copy of the adviser's file, that too is a matter of significant gravity. The Registrar has adopted a prudent practice where after receiving a complaint, rather than providing the adviser with full details of the complaint she first requests a copy of the adviser's file. After having considered both the adviser's file and the complaint, that

information is in some cases sufficient to determine that the complaint is based on a misunderstanding of the complainant.

[54] The requirement to provide a file which includes client records, without an opportunity to make additions to the file in the light of the particulars of the complaint, puts the adviser is in a strong position to affirm the integrity of their file. It is an important protection that makes it very difficult to accuse an adviser of altering their file after the event to respond to the complaint.

[55] When a licenced immigration adviser is requested to provide a file by the Registrar when she investigates a complaint, it is a statutory obligation with serious penalties if the adviser fails to comply. In this case the adviser failed to produce the documents he now relies on as evidence of his communications with the complainant. The failure to produce the documents when required to do so under a statutory process reflects badly on the adviser. The provision of file notes that relate to the particulars of the complaint after not disclosing them when required to do so is a concerning development. He was either careless in failing to provide the file notes when first required to do so, or at worst, he was at risk of the suggestion of dishonest fabrication.

[56] In the present case, I accept on the evidence that the adviser failed to take the request from the Registrar sufficiently seriously to properly evaluate what his obligations were. This was his perspective and I do not have a basis for reaching a contrary finding.

Decision

[57] The Tribunal upholds the complaint pursuant to section 50 of the Act.

[58] The adviser breached the Code of Conduct 2014 in the respects identified. These are grounds for complaint pursuant to section 44(2) of the Act.

Submissions on Sanctions

[59] The Tribunal has upheld the complaint. Therefore, pursuant to section 51 of the Act, it may impose sanctions.

[60] The Tribunal has been informed that the adviser has died since the hearing. As this is a professional disciplinary matter, which is a civil proceeding, the proceeding continues. In relation to questions of deterrence and punishment, which are relevant to an extent when imposing sanctions for professional disciplinary matters, the adviser's death has made those matters largely or wholly irrelevant. Certainly, they do not apply to the adviser.

[61] The parties are requested to provide submissions on sanctions.

[62] The following timetable will apply:

[62.1] The Registrar and the complainant may provide submissions on sanctions. The complainant is entitled to seek compensation as part of the sanctions, if she does so she should ensure that any losses claims follow from the breaches upheld by the Tribunal. She should also provide particulars of her losses, and evidence of the costs. This material should be provided within 15 working days of this decision. The adviser's representative may provide any submissions in reply within a further 10 working days.

[62.2] When these submissions have been presented, if any party wishes to convene a telephone conference to discuss any outstanding issues relating to sanctions they may do so within 3 working days of the adviser's representative filing her submissions.

DATED at WELLINGTON this 2nd day of February 2018

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G D Pearson
Chair