IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2016-485-000102
[2016] NZHC 2624

UNDER	s 4 Judicature Amendment ACt 1972
IN THE MATTER OF	An application for review of a decision under s 51 Immigration Adviser Licensing Act 2009 ("the Act")
BETWEEN	APURVA KHETARPAL Applicant
AND	IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL First Respondent
	IMMIGRATION ADVISERS AUTHORITY Second Respondent
	J (COMPLAINANT) Third Respondent

Hearing:	27 October 2016
Counsel:	S L Laurent for Applicant First Respondent abides K Muller and E Lay for Second Respondent No appearance required for Third Respondent
Judgment:	2 November 2016

JUDGMENT OF COLLINS J

Introduction

[1] This judgment explains why I am dismissing Ms Khetarpal's application to judicially review a decision of the Immigration Advisers Complaints and Disciplinary Tribunal (the Tribunal).[1]

[2] In summary, the Tribunal made no judicially reviewable errors when it found Ms Khetarpal had acted dishonestly in her dealings with a client who had retained Ms Khetarpal to file an application for a work visa.

Background

[3] Ms Khetarpal was at all relevant times an immigration adviser, licensed under the Immigration Advisers Licensing Act 2007 (the Act).

[4] On 17 April 2012, Mr J and his employer approached Ms Khetarpal for assistance. Mr J had been in New Zealand unlawfully since 2 August 2007. He was working as a chef.

[5] Mr J was told by Ms Khetarpal that she could submit to Immigration New Zealand (INZ) a request for the Minister of Immigration to grant Mr J a work visa. Such an application would need to be made under s 61 of the Immigration Act 2009. That section provides:

> **61 Grant of visa in special case**
>
> (1) The Minister may at any time, of the Minister's own volition, grant a visa of any type to a person who—
>
> (a) is unlawfully in New Zealand; and
>
> (b) is not a person in respect of whom a deportation order is in force; and
>
> (c) is not a person in respect of whom a removal order is in force.
>
> (2) A decision to grant a visa under subsection (1) is in the Minister's absolute discretion.

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1 Immigration Advisers Complaints and Disciplinary Tribunal Decision No. [2015] NZIACDT 95.

[6] Ms Khetarpal told Mr J that the fee for her services would be $6,000 plus GST payable in two instalments. Half would need to be paid "up front" and the other half would be paid once the visa was granted.

[7] On 3 September 2012, Mr J's employer signed an agreement with Global Visas Ltd (Global Visas), the company that Ms Khetarpal worked for at that time. The contract specified that the fees for carrying out the services were to be $6,900, together with a "government fee" of $350. The contract recorded Ms Khetarpal would, on receipt of all relevant information from the client, prepare the application for a s 61 work visa on the basis of the information supplied and promptly lodge the application with INZ.

[8] Mr J's employer paid Global Visas $3,450 on 3 September 2012.

[9] Although it is not clear from the records, it would seem Mr J signed an incomplete and undated INZ 1015 work visa application form at about this time.

[10] On 17 October 2012, Mr J's employer telephoned Global Visas requesting an update and noting that he had not heard from Ms Khetarpal. The office administrator told Mr J's employer that she would forward his message to Ms Khetarpal.

[11] On 10 December 2012, Mr J's employer says he went to Global Visas and spoke with Ms Khetarpal. He asked her for an update on the progress of the application.

[12] Ms Khetarpal says she spoke with Mr J's employer monthly, or thereabouts, about his lack of progress in providing information. However Ms Khetarpal did not record in writing these communications.

[13] On 21 December 2012, Ms Khetarpal sent an email to an officer in INZ. She identified Mr J and said:

> ... he is a qualified Thai chef with an offer of employment. The NZ employer has made extensive and consistent efforts to recruit from within NZ, including through WINZ, without any success. It is for the benefit of the NZ employer that we believe that INZ will be willing to consider the

> work visa. The position offered is quite specific and the employer is most credible. I'll submit the application in the week of the 7th Jan, as soon as we re-open. If you could allow us time till then, I'd be most thankful.

[14] On 24 December 2012, the officer in INZ emailed Ms Khetarpal saying her client had been unlawfully in New Zealand since 2007 but that he would:

> ... allow [Mr J] the opportunity to test his eligibility to regularise his status and will suspend compliance until 11 January to allow time for him to submit an application. Should his application be declined he must make arrangements to depart NZ or face the real possibility of deportation and lengthy ban periods.

[15] As of 11 January 2013 no s 61 application had been filed. It would appear that in late January or early February 2013 Mr J's employer delivered to Global Visas a volume of documents which, amongst other things, verified the steps he had taken to recruit for the position he had offered to Mr J.

[16] On or about 26 April 2013, Ms Khetarpal left her position at Global Visas and commenced working as an immigration adviser at a new business.

[17] On 2 May 2013, Mr J's employer visited Global Visas and was told that no application had been filed with INZ on behalf of Mr J.

[18] On 21 June 2013, Mr J complained to the Immigration Advisers Authority (the Authority) about the way Ms Khetarpal had dealt with his case.

[19] On 26 September 2014, the Registrar of the Authority lodged a notice of charge (the charge) about Ms Khetarpal with the Tribunal. The complaint alleged breaches of the Licensed Immigration Advisers Code of Conduct (the Code) and s 44(2)(d) of the Act.

[20] The charge alleged the following breaches of the Code:

(1) A breach of cl 8 of the Code, which requires a licensed immigration adviser to set out payment terms and conditions and ensure that fees, disbursements and payment terms and conditions are provided to clients in writing prior to the signing of any written agreement.

(2) A breach of cl 1.1 of the Code, which requires a licensed immigration adviser to carry out the lawful and informed instructions of clients with due care, diligence, respect and professionalism.

(3) A breach of cl 4 of the Code, which requires a licensed immigration adviser to maintain a separate client's bank account for holding all clients' funds paid in advance for fees and disbursements.

[21] Section 44(2) of the Act specifies the statutory grounds of complaint against an immigration adviser. That subsection states:

> ...
>
> (2) 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:
>
> (a) negligence:
>
> (b) incompetence:
>
> (c) incapacity:
>
> *(d) dishonest or misleading behaviour:*
>
> (e) a breach of the code of conduct.
>
> (emphasis added)

[22] The charge alleging dishonest and misleading behaviour contained the following particulars:

> A licensed immigration adviser must never behave in a dishonest or misleading manner.
>
> When the complainant requested updates from the adviser regarding his immigration matter the adviser led him to believe that everything was under control.
>
> Suggesting that the matter was under control when no request had been submitted or prepared would appear to be misleading.
>
> In April 2013 the adviser told the complainant that his request was "pending" with INZ. In fact, no request had been submitted to INZ.
>
> By informing the complainant that his request was "pending" with INZ when no request had even been submitted, the adviser appears to have acted dishonestly.

The Tribunal's decision

[23] The Tribunal conducted an oral hearing during which evidence was given by, inter alia, Mr J, his employer and Ms Khetarpal. It was apparent during the hearing that neither Mr J, or his employer, had a good understanding of English or the immigration processes. The Tribunal recognised there were a number of points of difference between the written statements and the oral evidence of Mr J and his employer. The Tribunal decided it could place little reliance on their oral evidence.[2]

[24] The Tribunal based most of its decision on Ms Khetarpal's own evidence. In particular, the Tribunal concluded:[3]

(1) The $3,450 was obtained by Ms Khetarpal in circumstances where she failed to comply with her obligation to obtain informed instructions and to give clear written advice regarding Mr J's immigration prospects.

(2) Ms Khetarpal failed to set out in writing what information was required from Mr J's employer and failed to properly inform Mr J of the risks he faced.

(3) Ms Khetarpal advised INZ of Mr J's unlawful presence in New Zealand. She did so without first obtaining his informed instructions.

(4) Ms Khetarpal failed in her duty to lodge a request under s 61 of the Act.

(5) Ms Khetarpal did not tell Mr J or his employer that an application under s 61 of the Act had not been lodged with INZ.

[25] The Tribunal found that Ms Khetarpal had breached her duty under the Code when she:

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2 Immigration Advisers Complaints and Disciplinary Tribunal Decision No. [2015] NZIACDT 95, above n 1, at [24].

3 At [43].

(1) failed to perform services and carry out informed instructions; and

(2) failed to deposit her client's funds into a separate account and deal with those funds in accordance with the Code.

[26] In relation to the allegation of misleading or dishonest conduct under s 44(2)(d) of the Act, the Tribunal:

(1) Concluded Ms Khetarpal did "dishonestly mislead her client, taking fees, causing him to understand his request was being managed properly, while knowing she was not progressing it using her professional skills and in accordance with the ... Code".[4]

(2) Decided that Ms Khetarpal had not specifically represented to Mr J or his employer that she had lodged an application under s 61 of the Act or with INZ.[5]

[27] The complaint by Mr J was one of three faced by Ms Khetarpal. The Tribunal issued a separate sanctions decision relating to the complaint by Mr J and the other two complainants. In relation to the complaint by Mr J, the Tribunal ordered:

(1) Ms Khetarpal's licence under the Act be cancelled and that she be precluded from applying for another licence under the Act until she had complied with three requirements set out in the Tribunal's order.[6]

(2) That she be censured.

(3) That she pay a penalty of $2,500.

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4 Immigration Advisers Complaints and Disciplinary Tribunal Decision, above n 1, at [44] and [49].

5 At [45] and [50].

6 Namely, completing the requirements for the issue of the Graduate Diploma in New Zealand Immigration Advice (Level 7), having in place a supervision regime approved by the Registrar and practising over a two year period under a provisional licence in full compliance with a supervision regime.

(4) That she pay Mr J $2,500 as compensation.

(5) That she refund the $3,450 to Mr J's employer.

(6) Pay $1,000 by way of costs in relation to the hearing.

[28] Under ss 51(3) and 81 of the Act a decision imposing a sanction may be appealed to the District Court. Further appeals may be made to the High Court on questions of law. There is no provision in the Act for appealing a decision of the Tribunal upholding a complaint. Judicial review is, however, an available procedure in appropriate cases to challenge findings of the Tribunal when it concludes there have been breaches of the Code and the Act by an immigration adviser.

Grounds for judicial review

[29] Six specific grounds for judicial review are set out in the statement of claim. Two of those grounds were abandoned prior to the hearing, and a third was merged into one of the remaining grounds. The three grounds for judicial review advanced before me can be summarised in the following way:

(1) The Tribunal erred by drawing an inference that Ms Khetarpal acted dishonestly when she contacted INZ with the intention of having Mr J deported so that she could keep the fees paid by Mr J's employer.

(2) The Tribunal erred by relying on the evidence of Mr J and his employer when it concluded Ms Khetarpal had led them into believing the application was under control. In particular, it is said this finding was unreasonable or a mistake of fact when it is appreciated that Mr J and his employer gave consistent evidence of false testimony during the hearing and that the employer did not provide necessary documents to Global Visas Ltd until early 2013.

(3) The Tribunal erred by reaching a finding that Ms Khetarpal had been dishonest.

[30] When advancing these grounds of judicial review Mr Laurent explained that Ms Khetarpal accepted for the purposes of the hearing before me that she had breached her responsibilities under the Code. The application for judicial review sought to only challenge the finding that Ms Khetarpal had acted dishonestly.

Analysis

First ground of judicial review

[31] The first ground of judicial review can be dealt with succinctly because it is based on a misunderstanding of [42] of the Tribunal's decision.

[32] The Tribunal said:

> ... I am sure (in the sense that this term reference is the highest end of the sliding scale of the balance of probabilities), that Ms Khetarpal took funds from her client, did little or no work, did not inform her client of the peril he was in, *and expected that in due course he would be deported. The interaction with Immigration New Zealand was likely to hasten his deportation.* She maintained some ineffective communication with her client through his prospective employer to create the impression she was providing services in return for the fees she solicited. (emphasis added)

[33] Mr Laurent submitted that the emphasised portions of [42] of the Tribunal's decision implied that Ms Khetarpal sought to have Mr J deported so that she could keep the fees that had been paid on his behalf without doing any work. It was submitted this finding was unreasonable.

[34] The implication suggested by Mr Laurent grafts too much onto [42] of the Tribunal's decision. The fact Ms Khetarpal expected Mr J would in due course be deported was reasonable in the circumstances. His chances of gaining a visa under s 61 of the Act were remote. But the Tribunal did not go so far as to say that Ms Khetarpal was acting contrary to Mr J's interests by intentionally trying to have him deported in order to benefit from the fees paid by Mr J's employer without having to do any work.

Second ground of judicial review

[35] The second ground of judicial review is also premised on misunderstandings.

[36] The first aspect of this ground of judicial review was that the Tribunal relied on the false testimony of Mr J and his employer. It is clear however that the Tribunal placed very limited reliance on the evidence of Mr J or his employer. The Tribunal only appeared to accept their evidence when they said that they had paid a significant sum of money and expected that there would be action taken to assist Mr J to obtain a work visa.[7]

[37] It was open to the Tribunal to accept this evidence, even if the Tribunal did not place reliance on other aspects of the evidence of Mr J or his employer.

[38] It was not disputed that Mr J's employer had paid a significant sum of money or that they could reasonably have anticipated that they would receive proper and meaningful assistance from Ms Khetarpal.

[39] The evidence that Mr J and his employer had paid a large sum of money and expected that Ms Khetarpal would take action to progress the application under s 61 of the Act was not tainted or adversely affected in any way by the unsatisfactory nature of the balance of their evidence.

[40] The second aspect of this ground of judicial review was that the Tribunal failed to account for Mr J's employer's responsibility to provide documents for the s 61 application. In particular, it was submitted the documents supplied in early 2013 indicated Mr J and his employer knew they needed to supply additional material. This was said to be inconsistent with a belief on their part the application was "under control".

[41] There is nothing inconsistent in this. Mr J and his employer could consistently know they had to obtain and provide further information for the s 61 application and believe the matter was under control. The key point is that Mr J and his employer did not appreciate the lack of progress on the application or the implications of it.

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7 Immigration Advisers Complaints and Disciplinary Tribunal Decision, above n 1, at [24] and [35].

[42] Most of the adverse findings against Ms Khetarpal were based upon her own evidence. For example, the Tribunal did not accept Ms Khetarpal had "communicated with [Mr J] or his prospective employer in the manner required to gain informed instructions before notifying [INZ]". The Tribunal said, "at the least she had to confirm that discussion in writing, and did not do so on her own admission".[8]

[43] The Tribunal recorded that Ms Khetarpal:[9]

> ... must have known her client paid money to her in the belief that she would take care of his interests and let him know of any adverse developments. She never gave him the information required to understand either his situation, or what was required to provide the best chance of a favourable outcome.

[44] This finding was clearly available to the Tribunal and was not impugned in any way by the unsatisfactory character of most of the evidence given by Mr J and his employer.

Third ground of judicial review

[45] The most important finding in this case concerned the "allegations of dishonesty". It is accepted that a finding of dishonesty normally involves the drawing of inferences.

[46] In *Loh v Immigration Advisers Complaints and Disciplinary Tribunal* I said:[10]

> "Dishonesty" is usually inferred. The Court of Appeal acknowledged the need to draw an inference [of] dishonesty in *Amaltal Corporation Ltd v Maruha Corporation*. The Court of Appeal said:[11]
>
> > ... This is not a case in which there is what North Americans would call a "smoking gun" – that is, a single document which explicitly states: "we can rip X off, this way". Cases in which there is such hard evidence do not get to trial, for obvious reasons. A Court has to draw an inference.

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8 Immigration Advisers Complaints and Disciplinary Tribunal Decision, above n 1, at [38].
9 At [39].
10 *Loh v Immigration Advisers Complaints and Disciplinary Tribunal* [2014] NZHC 1166 at [60].
11 *Amaltal Corporation Ltd v Maruha Corporation* [2007] 1 NZLR 608 (CA) at [134].

[47] I also noted in *Loh v Immigration Advisers Complaints and Disciplinary Tribunal* that dishonesty is synonymous with a "lack of probity" and simply means "not acting as an honest person would do in the circumstances" and "acting in bad faith".[12]

[48] Here, the Tribunal drew an inference from all of the factual circumstances when it concluded Ms Khetarpal had acted dishonestly. The Tribunal's finding of dishonesty was based upon its assessment of all of the relevant evidence. The key features of the Tribunal's decision which led to its finding of dishonesty were:

(1) Global Visas received $3,450 to process an application under s 61 of the Act on behalf of Mr J.

(2) Ms Khetarpal was the person in Global Visas who arranged for Mr J's employer to pay that fee.

(3) Ms Khetarpal clearly led Mr J and his employer to believe that she was progressing the application when she failed to progress the application using professional skills.

(4) Ms Khetarpal took no steps to actually file the application, notwithstanding that she had told INZ that she would do so in the week of 7 January.

(5) Ms Khetarpal's failure to inform Mr J and his employer of the fact that she had not filed an application with INZ was a major failure on her part.

[49] When all these factors are considered holistically, the Tribunal was entitled to draw the ultimate inference that Ms Khetarpal acted dishonestly in her dealings with Mr J and his employer.

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12 *Loh v Immigration Advisers Complaints and Disciplinary Tribunal,* above n 10, at [58].

Conclusion

[50] The application for judicial review is dismissed.

[51] The second respondent is entitled to costs on a scale 2B basis.

D B Collins J

Solicitors:
Laurent Law, Auckland for Applicant
Crown Law Office, Wellington for First and Second Respondents