

**BEFORE THE IMMIGRATION ADVISERS  
COMPLAINTS AND DISCIPLINARY TRIBUNAL**

Decision No: [2016] NZIACDT 42

Reference No: IACDT 046/15

**IN THE MATTER**

of a referral under s 48 of the  
Immigration Advisers Licensing Act  
2007

**BY**

**The Registrar of Immigration  
Advisers**

Registrar

**BETWEEN**

**Masanobu and Atsuko  
Kashimoto**

Complainants

**AND**

**Kotaro Mizoguchi**

Adviser

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**DECISION**

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**REPRESENTATION:**

**Registrar:** Mr A Dumbleton, lawyer, MBIE, Auckland.

**Complainant:** Mr Nishimura, Rosebank Law, Auckland.

**Adviser:** In person.

Date Issued: 30 August 2016

## DECISION

### Introduction

- [1] The Registrar of the Immigration Advisers Authority referred this complaint to the Tribunal. The facts on which the complaint is based are:
- [1.1] Mr Mizoguchi failed to obtain a written agreement for the services as required under the Code of Conduct.
- [1.2] After the complainants terminated his instructions, he attempted to have them sign a back dated agreement, and withheld a refund because they did not do so.
- [2] Mr Mizoguchi accepted the essential facts, and indeed presented an opinion from a barrister confirming his conduct breached the Code; none-the-less, he attributed blame to his clients.
- [3] The Tribunal found each of those aspects of the complaint established.

### The complaint

- [4] At a telephone conference all parties agreed that the grounds of complaint for the Tribunal to deal with are:
- [4.1] Whether Mr Mizoguchi breached clauses 18(c) and 1 of the Licensed immigration Advisers Code of Conduct 2014 (the 2014 Code) as he did not have an agreement to provide professional services, and sought to have a backdated agreement signed; and
- [4.2] Whether he breached clause 24(c) of the 2014 Code in relation to refunding fees.
- [5] Accordingly, it is not necessary to consider wider elements of the complaint.
- [6] The Registrar identified the first ground for the complaint as:
- [6.1] Mr Mizoguchi provided the complainant with a written agreement, apparently prepared for another client; his clients did not sign or confirm the agreement in writing.
- [6.2] When the complainants terminated Mr Mizoguchi's services, he sent them an agreement, backdated from May 2015 when he sent it, to 20 November 2014.
- [6.3] The failure to have a written agreement breached clause 18(c) and the attempt to procure a backdated agreement breached Mr Mizoguchi's duty of professionalism.
- [7] The Registrar's particulars of the second ground are:
- [7.1] The complainants paid \$3,200 in application fees (which had not been disbursed), and \$8,050 in professional service fees.
- [7.2] Mr Mizoguchi declined to refund the fees until the complainants signed the back dated agreement.
- [7.3] The conduct breached the obligation to provide prompt refunds.

## The responses

- [8] The complainant filed a statement of reply, which in material respects agreed with the Registrar's statement of complaint.
- [9] Mr Mizoguchi did file a statement of reply, the relevant matters he raised were:
- [9.1] He blamed his client for not signing the agreement;
- [9.2] He appeared to agree delaying the refund related to seeking to have his clients sign the back dated agreement.
- [9.3] He produced an opinion from a barrister, that observed:
- [9.3.1] It was likely many of Mr Mizoguchi's actions were in breach of the 2014 Code;
- [9.3.2] He ought to immediately refund the full Immigration New Zealand application fee; and
- [9.3.3] There was a real likelihood the Tribunal would order the refund of all fees, with interest, and impose sanctions.

## Discussion

### *The standard of proof*

- [10] 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].

### *The facts*

- [11] The Registrar provided a chronology and supporting documentation; and Mr Mizoguchi has effectively admitted the grounds.
- [12] It is inescapable Mr Mizoguchi failed to obtain a written agreement and then delayed providing a refund because his client did not sign a backdated agreement.

### *No written agreement and attempt to procure backdated agreement*

- [13] The client engagement process plainly requires a written agreement, accordingly as there was no written agreement Mr Mizoguchi breached clause 18(c) of the 2014 Code.
- [14] The attempt to procure a back dated agreement was unprofessional. Mr Mizoguchi should have never have presented his client with a backdated agreement as it was misleading; the position is aggravated:
- [14.1] He apparently did so in an attempt to hide his failure to obtain a written agreement; and
- [14.2] He breached his professional obligation to refund fees to apply pressure his clients.
- [15] I accordingly uphold this ground of complaint.

### *Failure to refund fees*

- [16] Clause 24(c) clearly required Mr Mizoguchi to refund fees. He had an obligation to refund fees and unpaid disbursements; he failed to do so for the unacceptable reason identified, namely to pressure his client to sign a backdated agreement.

- [17] As Mr Mizoguchi did not have a written agreement, and accordingly appears to have failed to undertake the proper client disclosure process some, and likely all, of the professional fees should have been refunded.

### **Decision**

- [18] The Tribunal upholds the complaint pursuant to section 50 of the Act; Mr Mizoguchi breached the 2014 Code in the respects identified, and that is a ground for complaint pursuant to section 44(2)(e) of the Act.
- [19] In other respects, the Tribunal dismisses the complaint.

### **Submissions on Sanctions**

- [20] The Tribunal has upheld the complaint; pursuant to section 51 of the Act, it may impose sanctions.
- [21] The Authority and the complainant have the opportunity to provide submissions on the appropriate sanctions, including potential orders for costs and compensation. Whether they do so or not, Mr Mizoguchi is entitled to make submissions and respond to any submissions from the other parties.
- [22] If the Registrar and the complainants seek costs, they are requested to provide evidence of their actual costs.
- [23] Given the apparent absence of a written agreement, and client engagement process the parties are invited to address the question of whether all or some of the professional fees should be refunded.
- [24] The Registrar is requested to report on Mr Mizoguchi's compliance with existing orders of the Tribunal.

### *Timetable*

- [25] The timetable for submissions will be as follows:
- [25.1] The Authority and the complainants are to make any submissions within 10 working days of the issue of this decision.
- [25.2] Mr Mizoguchi is to make any further submissions (whether or not the Authority or the complainants make submissions) within 15 working days of the issue of this decision.
- [25.3] The Authority and the complainants may reply to any submissions made by the adviser within 5 working days of him filing and serving those submissions.

**DATED** at WELLINGTON this 30<sup>th</sup> day of August 2016.

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**G D Pearson**  
Chair