BEFORE THE IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2011] NZIACDT 1

Reference No: IACDT 010/10

IN THE MATTER	of a referral under s48 of the Immigration Advisers Licensing Act 2007
BY	**Immigration Advisers Authority** Authority
BETWEEN	**JM** Complainant
AND	**DTM** Adviser

FOR PUBLICATION COPY

DECISION

REPRESENTATION:

Adviser

In person

Date Issued: Wednesday 19 January 2011

Decision

The Referral

[1] This matter was referred to the Tribunal pursuant to section 45 of the Immigration Advisers Licensing Act 2007 (the Act) by the Registrar of the Immigration Advisers Authority. It concerns a complaint of failing to notify the Complainant of the terms of service, and inappropriate fees charged for services.

[2] The facts supporting the complaint also raise questions of whether the Adviser was a party to an unlicensed person unlawfully providing immigration advice, and other breaches of his professional obligations.

[3] The Registrar has referred the complaint as a breach of Clauses 1.4, 1.5, 2.1 and 8 of the Code of Conduct. The Code having been developed pursuant to section 37 of the Act.

[4] Clauses 1.4 and 1.5 of the Code require that a licensed immigration adviser explain and provide a copy of the code of conduct before entering into an agreement to provide professional services, and that the agreement be in writing. Clause 2.1 relates to holding written authority, and clause 8 addresses the setting of fees.

[5] Clause 1.1 of the Code also requires that a licensed immigration adviser perform services with professionalism.

Factual Issues

[6] The Tribunal undertook a review of the whole of the papers presented, and issued a minute dated 1 December 2010. Among other procedural matters, the minute identified the factual matters in issue, and the potential conclusions that could be reached on the papers before the Tribunal. The parties were given an opportunity to respond.

[7] The minute indicated the followings factual findings were open:

[7.1] The Adviser was working in association with SNJ. The terms of the association were not established in the papers.

[7.2] The senior person in charge of the affairs of that company was SN. He was formerly a lawyer, but not at the time. He was not a licensed immigration adviser either. Accordingly, SN could not lawfully provide immigration advice (as defined in section 7 of the Immigration Advisers Licensing Act 2007 “the Act”).

[7.3] There was at least one other licensed immigration adviser engaged by SNJ, AHX.

[7.4] SNJ was contacted by the Complainant, who had previously been a client of the company (this was about 12 January 2010, but the precise day is not clear, and not apparently crucial).

[7.5] SN engaged in a telephone discussion with the Complainant. The Adviser and DTM were party to the discussion as it was conducted with a “speaker telephone” in their presence. SN did speak in that telephone conversation, and the Complainant and AHX listened but were not active in the discussion.

[7.6] The telephone conversation took place in urgent circumstances, as the Complainant had struck immigration difficulties while attempting to travel to New Zealand from the United Kingdom.

[7.7] The Complainant says the situation was not so urgent that written communication was not possible, as the communication had been initiated by an email seeking assistance. However, no written service agreement, or outline of fees was provided to the Complainant, according to the Complainant. The Adviser contends there was an oral

discussion relating to fees, and it was agreed that a fee of $2,500 plus GST would be charged.

[7.8] Following the initial discussion on 13 January 2010, a letter was written to Immigration New Zealand, on the letterhead of SNJ and signed by DTM.

[7.9] The Adviser was involved in providing advice, and the key letter to Immigration New Zealand was under his name.

[7.10] The intervention was successful; the Complainant obtained a visa and travelled to New Zealand.

[7.11] The Complainant was presented with an invoice dated 3 February 2010 for the immigration services provided, for $2,868-75. The Complainant complained, and SN provided particulars of the amount claimed, and increased the fee to $4,837-50.

[8] The minute also raised the following potential view:

[8.1] The Adviser put himself into a situation where his professional practice was part of an unlawful provision of immigration advice by SNJ;

[8.2] SN was unlawfully providing immigration advice in the presence of the Adviser in the telephone conversation identified previously. In a letter dated 28 April 2010, the Adviser indicated SN was actively involved in dealing with the Complainant in relation to activities that could be regarded as coming within section 7 of the Act.

[8.3] When a complaint was made in relation to fees, SN dealt with the issue, when it was a responsibility of the Adviser and AHX. Furthermore, SN's dealings in relation to the complaint were unprofessional, and largely devoid of any regard for the duties of care, respect and professionalism under the Code of Conduct (I drew the Adviser's attention to the terms of email communications apparently sent by SN to the Complainant).

[8.4] Further, the fees charged appeared not to have been agreed, and potentially founded on a pretence as to the work undertaken, and gross overcharging (particularly on the $4,837.50 figure). In that regard I noted:

[8.4.1] The Adviser's work has been charged at the rate of $350 per hour. The material before me does not establish the hourly rates were fair and proper (AHX and the Adviser both claimed hourly rates of $350), or the time engaged was correct.

[8.4.2] SN's work had been costed at $400 per hour. He is not lawfully entitled to provide immigration advice. It appeared on the information before me he did provide immigration advice, and it seemed implausible that the fee related to something else. His services have been described by him as "management" of the two licensed immigration advisers. A view of the scope of "Immigration Advice" as defined in section 7 of the Act was that the only work an unlicensed person could provide would be purely administrative services, such as secretarial or accounting assistance. The papers left open the inference that in fact SN's time was costed at more than the licensed immigration advisers, as he was acting as the person with the most knowledge, and experience in assisting the Complainant in regard to the immigration matter being dealt with, and taking a lead role in the provision of that assistance.

[9] The parties were invited to respond to the potential findings.

Legal issues

[10] A legal issue which requires elucidation is the nature of the prohibition on an unlicensed person providing immigration advice. That has implications for the proper scope of the professional obligations of an immigration adviser in a corporate environment. The issue impacts on my view of the facts in the present case.

[11] Of course, the central legal question is whether the material presented requires that the complaint should be upheld.

The positions of the parties

[12] The Complainant, in response to the minute, provided some details of a complaint SN had apparently lodged with the General Chiropractic Council. I do not consider that issue has any bearing on the complaint before me, and I disregard it entirely. He also raised some questions regarding the extent to which SN and the Adviser respectively engaged with him.

[13] The Adviser responded to the minute through SNJ. First with a letter from SN dated 5 December 2010, and second in a letter from the Adviser dated 9 December 2010 (both on the letterhead of the company). The Adviser had earlier provided material that was taken into account when the minute was issued, and of course also for the purposes of this decision.

[14] I have considered the response in full.

[15] Key aspects of the response to the minute presented by SN were that SN is said to have been a "Non-Advising Principal". Further:

[15.1] SNJ had not requested payment of $4,837.50, only $2,868.75. The calculation of $4,837.50 was for the purposes of illustration only. The fee was reasonable, including on a comparative basis.

[15.2] The Complainant falsely stated that the work was *pro bono*, whereas he had first sought cost estimates from other Advisers and was fully aware of the issue of costs.

[15.3] That the Complainant presented with a history that made his immigration position problematic, and requiring urgent work (which the Complainant requested). Other matters relating to the Complainant's employment history are also raised. I do not consider they are relevant, beyond potentially being perceived as making the Adviser's work more complex.

[15.4] There had been a history of SNJ undertaking work for the Complainant without fee, as there had been referrals from a personal friend of SN. That friend had been the Complainant's employer.

[15.5] The Complainant sent SN emails that were "insulting, wildly inaccurate and completely false and misleading". I note the Complainant has failed to present a copy of any emails to the Tribunal which are self evidently of that nature, and there is no material that satisfied me I could take that view of the emails I have received. Further, SN says the Complainant has "misled Immigration New Zealand, [and SNJ]." There is no material presented that either evidences or particularises those allegations.

[15.6] SN as a "non advising principal" is entitled to set professional fees, complete clerical work, and undertake duties that do not conflict with the role of the Adviser."

[16] The Adviser's letter's key points were:

[16.1] He was employed on a fulltime basis by SNJ.

[16.2] It was evident to him that SN and the Complainant had a long standing professional relationship when he required the services in issue.

[16.3] The work was attended to urgently, and effectively.

[16.4] The Adviser only became aware more recently that SN was not allowed to give immigration advice, though he had formerly been a solicitor who practised immigration law.

[16.5] A former and current copy of client instruction agreements which SNJ use was presented, and they clearly indicate that it is a named licensed adviser who is to

provide immigration advice. Though the Adviser does not suggest this from was presented to the Complainant or signed by him.

[16.6] The fees were fair and reasonable.

[16.7] SN was the point of contact for complaints in relation to fees, and the "heated exchange of emails" proceeded without the Adviser (or the other licensed adviser) having an opportunity to be involved.

[16.8] The Adviser has since "recommended" that SNJ direct complaints to the licensed advisers.

[16.9] SN's role "may be" covered by the scope of "clerical work" as defined in section 5 of the Act. That apparently included, in the adviser's view, taking instructions from clients.

Decision

[17] First, I must reach conclusions regarding the differing accounts of the evidence presented by the Adviser and the Complainant. I prefer the evidence of the Complainant, where the accounts differ. To a significant extent the two accounts coincide, however there are differences.

[18] In reaching my view of the Adviser's credibility, I am conscious I have not heard oral evidence from the parties. That, however, is the nature of the process mandated under the Act. I have not received an application to request appearances under section 49(4) of the Act, and do not consider the circumstances require that step to be taken on the Tribunal's own motion. I approach the facts on the basis I must consider all the material before me, and reach factual determinations on the balance of probabilities, but subject to a sliding scale reflecting the gravity of the allegations. In the present case, I regard the allegations as at the serious end of that scale.

[19] I have concluded the Adviser's response is not reliable. The reasons for doing so are first the Complainant has provided a coherent and plausible account of events; which is also consistent with the written record the parties have presented. The complaint, being coherent, plausible, and consistent, cannot be dismissed as failing to meet the standard of proof. The Adviser has not accepted the allegations, so this is a case where I must reach a view as to whether I should accept the Complainant or the Adviser's contention on each material point where they differ.

[20] I have considered the Adviser's response to the complaint fully, against all the material I have been presented with. I find the Adviser's response takes the approach of avoiding key issues, despite them having been clearly raised in the Tribunal's minute. For example, the issue of increasing the fee from $2,868.75 to $4,837.50 was raised in the minute.

[21] The letter dated 5 December 2010 responded to that point in the minute by asserting:

> "under no circumstances have SNJ requested or invoiced $4837.50 to [the Complainant]."

[22] However, the minute drew attention to an email forwarded to the Authority on 19 March 2010, which included a series of emails where SN said to the Complainant:

> "The revised invoice that will be amended and sent to the small claims court as requested by you is as follows $4,837.50. ... The invoice as requested by you will be revised [to $4,837.50]."

[23] Plainly, there was a request for additional fees. If not; it was a threat to charge more if the Complainant was not compliant.

[24] To deny there was a request to pay $4,837.50 fails to address the written record, despite being requested to do so. The Adviser's letter did not take the matter further. This is illustrative only on the key points the Adviser fails to respond to the substance of the complaint with more than

unsupported assertions, or a refusal to accept that apparently serious breaches of the Act are matters of importance.

[25] A central issue is that the Complainant describes SN as integrally involved in providing immigration advice. The Complainant said that while the Adviser may have been in attendance by speaker phone "all emails and telephone conversations during the application were made with SN to my knowledge" (with one exception identified by the Complainant). The minute raised the issue of a claim that SN's work could be appropriately costed at $400 per hour, and his services included "management" of the two licensed advisers. Apart from SN being described as a "Non-Advising Principal", the only reasoned response to this issue is to claim SN's role was "clerical work" as defined in section 5 of the Act, and accordingly not "immigration advice" as defined in section 7. The Adviser apparently conceded SN was involved in dealing with the Complainant, but he is less than clear on the extent of the dealing.

[26] Clerical Advice is defined in section 5 in these terms:

> "**clerical work** means the provision of services in relation to an immigration matter, or to matters concerning sponsors, employers, and education providers, in which the main tasks involve all or any combination of the following:
>
> (a) the recording, organising, storing, or retrieving of information:
>
> (b) computing or data entry:
>
> (c) recording information on any form, application, request, or claim on behalf and under the direction of another person."

[27] I do not accept the Adviser's claim "clerical work" extends to taking instructions in immigration matters from clients, as he appears to suggest. Taking instructions, and advising on the proper approach when gathering the relevant facts, is frequently the crucial phase of a professional engagement. It is not clerical work under the Act. It is a core function of providing immigration advice under section 7.

[28] The Adviser drew particular attention to the terms of paragraph (a) of the definition. The phrase points to the keeping of professional files, whether electronic, paper or otherwise. There may of course be questions as to the boundaries of that work. However, it is wholly unconvincing to suggest it includes taking instructions from clients. It could equally be claimed that "organising information" includes drafting submissions to Immigration New Zealand. On that approach, it would follow virtually all work immigration advisers undertake is "clerical work". That is neither the natural scope of the phrase, nor is it consistent with the purpose of the Act. It would substantially undermine the protection of consumers receiving immigration advice by fully or substantially eroding the reservation of professional services to licensees.

[29] The Adviser has been presented with a well articulated, plausible and consistent professional disciplinary allegation, and has failed to truly identify the facts he accepts, and narrate an alternative view of the events. I must conclude that is because he is not in a position to present facts that are different from the complaint advanced by the Complainant.

[30] SN has consistently denigrated the Complainant, and wholly failed to support or particularise the allegations.

[31] Prior to the complaint, SN's communications with the Complainant were not consistent with the conduct expected from a processional adviser. For example, he wrote in an email of 19 March 2010: "Your response is a complete fabrication of untruths and please be advised that it is an offence to perjure yourself in court. Quite frankly you should be ashamed of yourself and you are a liar."

[32] This denigration of the Complainant continued when SN responded on behalf of the Adviser to the minute issued by the Tribunal. In this response, the allegation (among others) is made that the Complainant misled Immigration New Zealand. It is a serious allegation, and the letter provided no evidence to support it or the earlier abusive allegations. I do not consider any of that material affects the credibility of the Complainant. I have taken into account the

submissions made by SN to the extent they assist the Adviser. However, I have not taken any adverse effect or implication from those submissions. I have treated the unsupported allegations as a matter reflecting on SN's judgement, not the Adviser.

[33] I, accordingly, conclude the facts are the potential views outlined in the minute and set out above. That is subject to the conclusions that follow in relation to the quantum of fees. In that regard, I am satisfied the submissions made by SN in his 5 December 2010 letter establish the actual fee invoiced was probably reasonable as a fixed fee. The key findings being:

[33.1] The Adviser failed to establish and regulate the professional relationship with the Complainant.

[33.2] There was a failure to provide proper terms of engagement in accordance with the Code. The Complainant believed the services would be provided without fee. That may or may not have been a reasonable belief, but that is not relevant. The point is that there was a failure to provide proper terms of engagement (and ancillary initial steps under the Code), and the difficulties that arose over fees were a direct consequence.

[33.3] SN was actively involved in unlawfully giving immigration advice as defined by the Act. The Adviser was a party to that, and allowed it to occur in a professional relationship for which he was responsible, along with the other licensed immigration adviser.

[33.4] The Complainant was subject to unprofessional communication and abuse from SN in the context of a professional relationship for which the Adviser was responsible.

[33.5] I am not satisfied the fee was an unreasonable measure of the value of the services on a fixed fee basis; and potentially justified on a time and attendance basis. I am however satisfied:

[33.5.1] There was a history of providing services without fee,

[33.5.2] There was no agreement to pay fees in accordance with the Code,

[33.5.3] The provision of services was unlawful in that SN was providing immigration advice as part of the services, and

[33.5.4] SN acted unprofessionally in making threats to recover more fees when the Complainant refused to pay.

[34] It is necessary to consider the issues relating to an Adviser acting as an employee, or similar capacity where the employer or principal has a contractual relationship with the client to whom professional services are provided.

[35] Section 6 of the Act is clear, unless a person is licensed under the Act, or exempt from the requirement to be licensed, they may not provide immigration advice. Section 63 provides it is an offence to breach that requirement. "Immigration Advice" is defined in section 7. There are exceptions which are not presently material. Section 7(a) provides "Immigration Advice":

> "means using, or purporting to use, knowledge of or experience in immigration to advise, direct, assist, or represent another person in regard to an immigration matter relating to New Zealand, whether directly or indirectly and whether or not for gain or reward; ..."

[36] The scope is broad. The complainant is clear SN was taking the lead in providing advice relating to his immigration affairs. I am satisfied the Adviser was aware of that, and a party to it.

[37] Licensed immigration advisers must be the only persons (unless exempt) who give professional advice and assistance to immigration clients. Of course, clerical assistance and the like is not excluded (as discussed previously).

[38] It is evident a key element of the mechanism in the Act is that licensed immigration advisers are clearly identified; client relationships commence with the Adviser identifying their standing, and providing of a copy of the Code (Code clause 1.4). The scope of section 6 is wide, and one no doubt intended to ensure licensed advisers are not able to be used as a "front" for unlicensed operators. The legislation is structured to effect functional exclusion from the professional relationship of any person who is not either licensed or exempt.

[39] The legislation provides an important privilege to licensed immigration advisers in allowing them to exclusively provide immigration advice (along with exempt persons). However, consistent with that, licensed advisers carry professional obligations. They are personally responsible for the professional relationship, regardless of whether they are employees, or otherwise.

[40] Dealings in relation to fees in my view come with section 7, so a licensed immigration adviser must deal with the client in relation to fees (unless it is simply a clerical aspect such as issuing invoices, which is provided for in section 7(b)(iii)). Determining the value of professional work, and negotiating what is to be paid requires knowledge and experience in immigration, and assists with an immigration matter.

[41] The purpose of the Act is set out in section 3, and it includes promoting and protecting the interests of consumers receiving immigration advice. Abusive practices in relation to fees were certainly among the concerns the Act was intended to meet. Some confirmation licensed immigration advisers are responsible for dealing with fees as well as other aspects of the professional relationship is found in the scope of disciplinary sanctions. Licensed immigration advisers will potentially be personally responsible under section 51(1)(h) for the refunding of fees in the event such an order is made as a disciplinary sanction. It will not be an answer to say their employer received the fees.

[42] Accordingly, licensed immigration advisers are given the freedom to practise as employees where they have little control over the business practices of their employer. However, they do so at their peril unless they establish proper protection for their professional independence, and assurance they can ensure they manage and deliver service for all aspects of the professional relationship (alone or with another licensed adviser). It is not open to the Adviser to claim they are subordinate to an employer or contractor, or say an unlicensed person was responsible for aspects of the professional relationship.

[43] In this case, the Adviser allowed himself to be one of the two licensed advisers in the professional relationship with the Complainant. It follows he is responsible, along with the other licensed adviser for the delivery of professional services. I am satisfied the other adviser did not take a role that absolved the Adviser from responsibility for any of the professional obligations I find were breached. The Adviser accepted in a letter to the Authority dated 28 April 2010, "I was in charge of [the Complainant] and his partner's application for a work visa". There are some uncertainties regarding what telephone conversations the Adviser participated in, however I do not consider that can alter the outcome. The Adviser was clearly the principal licensed adviser, and equally clearly SN was involved in the delivery of professional services.

[44] I have considered the circumstances in which the Adviser failed to provide the Complainant with a copy of the Code, and enter into a written agreement for the provision of services. I accept there was urgency in the present case.

[45] With his submission, in response to the minute, the Adviser supplied a copy of a section of the Authority's guidelines in relation to difficulty in obtaining a written agreement, which acknowledged circumstances where there may be difficulties. I do not exclude the possibility there may be instances where a person is in immediate need of immigration advice, and full compliance with a requirement of the Code may not be immediately possible or appropriate. However, such cases are rare and usually of notional rather than real concern. In the present case, there were discussions, email communication; and a complete and unjustified failure to establish a professional relationship in accordance with the Code. I, accordingly, find there was a breach of clauses 1.4, 1.5, 2.1 and 8 of the Code. The very problems compliance with the code is intended to avoid followed the breach.

[46] It follows I find the complaint is upheld. The conduct was in breach of clauses 1.4, 1.5, 2.1 and 8 of the Code of Conduct, in relation to the failure to establish a proper professional relationship.

[47] In addition, I find:

[47.1] The Adviser was a party to the unlawful provision of immigration advice by SN (both taking instructions from the Complainant, and dealing with him in relation to fees, being a necessary and important parts of "immigration advice" under the Act), and

[47.2] Further abusive and threatening communications from SN to the Complainant were a breach of the Complainant's entitlement to be treated professionally. The Adviser permitted SN to deal unprofessionally with the Complainant. I accept the material before me does not establish that the Adviser was a party to SN's misconduct or aware of it at the time. Nonetheless, it was only able to occur as the Adviser failed to take responsibility for a key element of the professional relationship.

[48] Those two matters amount to a breach of clause 1.1 of the Code which requires that the Adviser act with professionalism in performing his services.

[49] Section 44(2) of the Act sets out the grounds for complaints under the Act, breaching the code is one of the grounds.

[50] Given the finding, disciplinary sanctions under section 51 of the Act may be imposed by the Tribunal.

[51] The sanctions which are potentially open are prescribed by section 51 which provides:

"**Disciplinary sanctions**

(1) The sanctions that the Tribunal may impose are —

(a) caution or censure:

(b) a requirement to undertake specified training or otherwise remedy any deficiency within a specified period:

(c) suspension of licence for the unexpired period of the licence, or until the person meets specified conditions:

(d) cancellation of licence:

(e) an order preventing the person from reapplying for a licence for a period not exceeding 2 years, or until the person meets specified conditions:

(f) an order for the payment of a penalty not exceeding $10,000:

(g) an order for the payment of all or any of the costs or expenses of the investigation, inquiry, or hearing, or any related prosecution:

(h) an order directing the licensed immigration adviser or former licensed immigration adviser to refund all or any part of fees or expenses paid by the complainant or another person to the licensed immigration adviser or former licensed immigration adviser:

(i) an order directing the licensed immigration adviser or former licensed immigration adviser to pay reasonable compensation to the complainant or other person."

Submissions on disciplinary sanctions

[52] The Authority and the Complainant have the opportunity to provide submissions on the appropriate sanctions, including potential orders for costs, refund of fees, and compensation.

[53] It appears unlikely the present case is one in which issues would arise in relation to the refund of fees or compensation. It appears fees have not been paid, and could not be recovered due to the failure to agree on fees, and the unlawful delivery of service. Compensation was not originally raised as an issue. However, the Authority and Complainant may pursue those issues if they choose to do so.

[54] Any application for an order for the payment of costs or expenses under section 51(1)(g) should be accompanied by a schedule particularising the amounts, and basis for the claim.

[55] The Adviser will have the opportunity to respond to any submissions from the Authority and the Complainant. In any event, the Adviser may make further submissions on penalty.

[56] Should the Adviser have a submission regarding inability to pay a penalty, that submission is to be supported by a statement of assets and liabilities, and particulars of income and outgoings.

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

[57.1] The Authority and the Complainant are to make any submissions within 10 working days of the issue of this decision, and

[57.2] The Adviser is to make any further submissions (whether or not the Authority or the Complainant make submissions), within 15 working days of the issue of this decision.

DATED at WELLINGTON this 19th day of January 2011

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G D Pearson
Chair