

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

Decision No: [2011] NZIACDT 14

Reference No: IACDT 022/10

IN THE MATTER

of a referral under s48 of the Immigration
Advisers Licensing Act 2007

BY

Immigration Advisers Authority
Authority

BETWEEN

Allister Rhonda
Complainant

AND

Glen William Standing
Adviser

DECISION

REPRESENTATION:

Adviser

In person

Date Issued: 7 April 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 refund money held to pay fees to Immigration New Zealand, and ancillary issues.
- [2] The Registrar has referred the complaint as a breach of the Code of Conduct developed pursuant to section 37 of the Act (published www.iaa.govt.nz).
- [3] Clause 4 of the Code requires a licensed immigration adviser to deal with client funds in a separate bank account, hold funds on behalf of the client, and use them only for the purpose for which they were paid to the Adviser. Clause 3 requires an Adviser to maintain professional business practices relating to the payment of any refunds upon completing or ceasing a contract.

Factual Issues

- [4] The Tribunal undertook a review of the whole of the papers presented, and issued a minute dated 18 November 2010. Among other procedural matters, the minute identified the factual matters in issue, the potential conclusions that could be reached on the papers before the Tribunal, and raised some queries. The parties were given an opportunity to respond.
- [5] The papers then before the Tribunal indicated the complaint was in essence:
 - [5.1] The Adviser was engaged to assist with immigration matters for the Complainant, his wife, and their child.
 - [5.2] The Complainant and his wife decided against immigrating to New Zealand, and stopped the application process. A cancellation form was duly completed, and the Adviser agreed there was a refund of NZ\$1,800.00 due to the Complainant.
 - [5.3] \$1,800.00 was due, and the Adviser received the documentation requesting the refund by 19 April 2010. The refund was completed by 11 August 2010.
 - [5.4] The delay was unacceptable, and amounted to a breach of the Adviser's professional obligations.
- [6] The minute raised further questions as to:
 - [6.1] The overall issue of whether the Adviser met his professional obligations in relation to a client who decided not to proceed with an instruction he had engaged the Adviser to complete. The additional issues being:
 - [6.2] Whether the Adviser's terms of engagement were proper and appropriate in relation to what was to occur in the event a client did not proceed with the original instructions; and
 - [6.3] Whether the Adviser properly determined what refund was due to the Complainant in the circumstances that arose. Concerning both:
 - [6.3.1] The basis on which the Adviser calculated the money to be repaid to the Complainant, and
 - [6.3.1] The figure calculated.

Legal issues

- [7] The Adviser raised a legal question regarding jurisdiction over the agreement between the Adviser and the Complainant. The agreement was dated 8 July 2008. The Adviser contended there was no jurisdiction over the terms of the agreement, and only events from 4 May 2009 were within the Tribunal's jurisdiction.
- [8] The Immigration Advisers Licensing Act 2007 came into force a year after it received the Royal assent, which was on 4 May 2007. The Act and the Authority operated as from 5 May 2008.
- [9] In terms of the point of law, even if an agreement did predate the Act coming into force, an Adviser is obliged to conduct a professional relationship on proper and fair terms which comply with the Code. It is no answer to say an Adviser is entitled to perpetuate an agreement which is inappropriate as it predated the Act.
- [10] However, nothing turns on the issue in the present case due to the conclusion I reach.

The positions of the parties

- [11] The Complainant, in response to the minute, indicated he had been desperate to get a refund, and had just accepted what was offered; which was followed by a delay in being paid.
- [12] The Adviser responded to the minute by letter dated 30 November 2010. The key information in the response was:
- [12.1] A former employee had done much of the work.
- [12.2] The contract was terminated about April 2010.
- [12.3] The Adviser believes he has acted in a professional manner.
- [12.4] The refund of \$1,800.00 was incorrect. The records indicated a deposit of \$1,800 not the \$2,656.00 was in fact received. It was an error made by a former staff member.
- [12.5] Allowing for exchange rates, a refund of \$2,388.94 should have been made.
- [12.6] There was a delay of some three months, not the four months the papers indicated. The delay was a result of family medical issues and out of the Adviser's control.
- [12.7] The terms of the agreement were reasonable and fair, including the level of fee.
- [12.8] The work in fact undertaken before cancellation was sufficient to justify the whole fee.
- [12.9] The Adviser was arranging payment of the balance of \$588.94 in relation to the miscalculation of fees, and a further payment of \$1,500.00 as compensation for stress and inconvenience to the Complainant.
- [13] The Complainant indicated he would accept the offer of payment to conclude the matter.

Decision

- [14] While the Complainant has indicated he accepts the offer, which does not conclude the complaint, as the complaint is before the Tribunal, a decision will be made as to whether it is upheld or not, and, if so, address disciplinary sanctions. Addressing the complaint has an element of public interest, which is not satisfied by a Complainant's view of an offer of compensation.
- [15] I am satisfied the Tribunal is entitled to consider the fairness of the terms of engagement. However, the information before me indicates the terms of the engagement were applied fairly and work to justify the fee charged had been carried out.

- [16] The provision in the agreement that cancellation or withdrawal of the application would result in no refund may be unfair. However, it may apply only after the point where the work of completing and filing the application had been undertaken. That would be different from an agreement that did not allow cancellation without penalty if a client had an immediate change of mind. Further, in this case the term was counterbalanced by the provision for a full refund of professional fees if certain agreed outcomes were not achieved. I am not satisfied on the information before me the term was unfair as drafted, and applied in this instance.
- [17] It follows the only outstanding issue is the process of refunding the fees that held for payment to Immigration New Zealand. I am satisfied on the evidence before me the miscalculation of the amount was a clerical error, and not detected by the Adviser. The error was not so large it ought to have been immediately obvious. Accordingly, I make no adverse finding regarding the error as to the amount that should have been refunded.
- [18] The remaining question is the delay in paying the refund.
- [19] It is important to recognise the receipt of funds paid by a client to an Adviser, which the Adviser cannot take as their own, will be held on trust.
- [20] Broadly, any money an Adviser receives from a client other than for payment of fees already due and owing will be held on trust, to hold for a time, or to immediately pay as fees to Immigration New Zealand or the like.
- [21] The Code of Conduct requires a separate bank account is maintained for such funds, and that funds are held in that account. The code also stipulates the funds are held on behalf of the client, and only for the purpose for which they were received. It also requires that professional practises are applied to payment of refunds.
- [22] In my view, the status of such funds is simply that they are held on a bare or simple trust, and the Adviser is obliged to deal with them in accordance with the client's instructions. The funds are not the property of the Adviser and dealing with them other than in accordance amounts to a misappropriation of the funds.
- [23] It is important advisers appreciate the obligations that apply to trust funds are absolute, and meticulous compliance is essential. Any departure will potentially be regarded as dishonest. It is entirely different from an ordinary debt.
- [24] It appears the Adviser has regarded the obligation to refund the money he held as akin to an ordinary debt. The delay may be excusable if it were an ordinary debt, but it is inexcusable to delay returning funds held on trust. Advisers must:
- [24.1] Keep accurate records to ensure those funds are clearly identified, and kept apart from their own funds; and
- [24.2] Deal with those funds in accordance with their client's directions.
- [25] I have considered the Adviser's explanation that family illness caused delay in paying the funds to the Complainant. It is of course inevitable pressure of various kinds does intrude, and from time to time some departure from the ideal will occur in the best managed environment. However, the explanation is wholly inadequate to explain a delay of three months.
- [26] I expressly find the material before me does not indicate the Adviser acted dishonestly. What occurred appears to be a failure to understand the obligations on an Adviser in relation to client funds.
- [27] It follows I find the complaint is upheld. The conduct was in breach of clauses 3 and 4 of the Code of Conduct.
- [28] Section 44(2) of the Act sets out the grounds for complaints under the Act and breaching the code is one of the grounds. However, I do not find the conduct in the present case was dishonest. The material before me satisfies me it was through a failure to appreciate the obligations that apply to funds held on trust.

- [29] Given the finding, disciplinary sanctions under section 51 of the Act may be imposed by the Tribunal.
- [30] 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 two 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

- [31] 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.
- [32] It appears that the funds have not been refunded to the Complainant and compensation of \$1,500.00 paid. I will take that into account in dealing with the appropriate disciplinary sanctions. The Authority and Complainant may pursue those issues if they choose to do so; otherwise I will assume the Complainant's indication he is satisfied with the refund and compensation stand.
- [33] 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.
- [34] 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.
- [35] 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.
- [36] The timetable for submissions will be as follows:
- [36.1] The Authority and the Complainant are to make any submissions within 10 working days of the issue of this decision, and
 - [36.2] The Adviser 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.

[37] The parties should note that the usual course for a decision that has been upheld is that it will be published. Should the parties wish to make any submissions regarding publication that should be done when filing submissions on sanctions.

DATED at WELLINGTON this 7th day of April 2011



A handwritten signature in black ink, appearing to read "G D Pearson".

G D Pearson
Chair