

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

Decision No: [2011] NZIACDT 19

Reference No: IACDT 012/10

**IN THE MATTER**

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

**BY**

**Immigration Advisers Authority**  
Authority

**BETWEEN**

**Brendon Barry**  
**Vanessa Barry**  
Complainants

**AND**

**Artika Archina Devi**  
Adviser

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**DECISION**

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**REPRESENTATION:**

**Adviser**

In person

Date Issued: 6 July 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 carry out client instructions with due care, diligence and professionalism. The key feature being that the Adviser was alleged to have misled the Complainants by indicating employment would be available, and then accepted instructions to obtain work permits for positions of employment that were not available.
- [2] The Registrar has referred the complaint as a breach of the Code of Conduct, the Code having been developed pursuant to section 37 of the Act (published [www.iaa.govt.nz](http://www.iaa.govt.nz)). Clause 1 of the Code requires a licensed immigration to, with due care, diligence, respect and professionalism, perform his or her services, act on proper instructions, and pursue their clients' interests. Clause 5 prohibits an immigration adviser from misrepresenting immigration opportunities.
- [3] The referral was also under section 44(2) of the Immigration Advisers Licensing Act 2007, which makes dishonest or misleading behaviour grounds for complaint.

### Factual Issues

- [4] The Tribunal undertook a review of the whole of the papers presented and issued a minute dated 21 April 2001. 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.
- [5] The minute raised the following matters.
- [6] First, the key events and circumstances raised by the complaint appeared to be:
  - [6.1] On 18 September 2009, the Complainants met with the Adviser and paid \$800 as a deposit for the fees to assist them with applying for a residence permit. They had responded to an advertisement in the New Zealand Herald newspaper regarding vineyard employment opportunities.
  - [6.2] This was followed with a further payment of \$1,200 and a written agreement was signed in relation to the provision of professional services to apply for the residence permit. The Adviser led the Complainants to believe she would in the interim be able to provide temporary positions of employment under the Supplementary Seasonal Employment Policy.
  - [6.3] On 25 September, the Complainants paid a further \$500 each to apply for a work permit under the Supplementary Seasonal Employment Policy.
  - [6.4] The Adviser presented the Complainant, Mr Brendon Barry, with an employment agreement for work in Blenheim with BK Horticulture Ltd. He signed it on 26 August 2009. The agreement had been "pre-signed" by BK Horticulture Ltd.
  - [6.5] BK Horticulture Ltd had limited work available and its licence to employ seasonal workers under the relevant policy was about to expire. The Adviser did not inform the Complainants of those difficulties.
  - [6.6] The Adviser submitted applications for work permits to Immigration New Zealand. Those applications were made on the basis the Complainants could use them to take up positions of employment with BK Horticulture Ltd. This relied on the company having permission to employ the Complainants under a specific aspect of the Seasonal Employment Policy (SSE/TRSE).

- [6.7] The Complainants travelled from Auckland and presented for work with BK Horticulture Ltd in late October 2009. They were informed there was limited work available and the company's entitlement to engage workers holding SSE/TRSE permits had expired during that month. The Complainants made wider inquiries and found all the SSE/TRSE entitlements held by employers in the Marlborough region were expiring by the end of November 2009. They endeavoured to obtain work in other areas relying on their permits, without success.
- [6.8] The Adviser failed to respond to telephone queries from the Complainants regarding their plight.
- [6.9] The Complainants and their three dependent children suffered financial hardship as a result of relying on the Adviser's conduct. That was a result of relocating in reliance on the understanding they had obtained work permits and work and having to meet travel and accommodation costs.
- [7] The Adviser claimed:
- [7.1] The Complainants initially contacted the Adviser regarding applying for residence permits and a few weeks later returned to inquire into getting work permits under the Seasonal Work Permit Policy.
- [7.2] Work permits were obtained and there were difficulties making contact to get passports collected as the family were now in Blenheim.
- [7.3] The Adviser was inquiring about documentation to advance work permits but the Complainants were "fooling" her as they had engaged another immigration adviser.
- [7.4] The agreement to provide immigration services was binding and the Complainants had breached the contract by engaging another adviser.
- [7.5] The Adviser said (verbatim):
- "I believe that [my company] who did not bridged [breach?] the contract, but it was bridged by Mr & Mrs Vanessa and Brendon Barry.
- I haven't misled Mr & Mrs Vanessa and Brendon Barry as I have provided my service according to the policy under Immigration adviser authority with the successful application under TRSE policy."
- [7.6] BK Horticulture Ltd did not notify the Adviser their SSE/TRSE authority was expiring in October 2009. The Adviser had communicated by telephone with BK Horticulture Ltd, and did not have any formal agreement or written communication.
- [7.7] The Adviser did a pre-signed employment agreement. It was supplied a result of a telephone discussion with the director of BK Horticulture Ltd in August 2009. He had said there was a need for 15 people to work on his farm.
- [7.8] At the time the Complainants were presented with an agreement, the director of BK Horticulture Ltd was on vacation. The Adviser checked to see that the company was still registered as a seasonal employer on the Immigration New Zealand website, and relied on that.
- [8] The Authority contacted the director of BK Horticulture Ltd. He said it was the Adviser who approached him regarding seasonal workers, and at the time the company's TRSE permits were valid for a few months, expiring in September 2009. He did not recall sending pre-signed employment agreements. In October 2009, there was no work in the vineyards and all staff were laid off.
- [9] The parties were informed the papers then before the Tribunal appeared to leave open the view:

- [9.1] The Adviser led the Complainants to believe she would provide work permits and positions of employment.
- [9.2] The Adviser had negligently failed to ascertain that the positions of employment were available and should have done so before:
- [9.2.1] First, applying for work permits, and
- [9.2.2] Second, before causing the Complainants to believe they had permits and work, and should relocate to Marlborough.
- [9.3] As a result of the failure to meet her professional obligations, the Complainants were entitled to terminate their agreement with her.

### **The positions of the parties**

- [10] The parties did not provide a substantive response to the minute.

### **Decision**

- [11] I am satisfied the facts set out in the complaint (as recorded in the minute) have been established. The written material supports the facts set out in the complaint.
- [12] The Adviser has not provided a response that explains or justifies her conduct. She seemed more concerned the Complainants had to consult another adviser to assist after they faced difficulties in Marlborough.
- [13] The material before the Tribunal shows the Adviser misled the Complainants by saying there were positions of employment available, and they should engage her to obtain relevant work permits. In reliance on that representation the Complainants travelled to Marlborough to take up positions of employment.
- [14] The Adviser failed to make proper inquiries into the positions of employment (which she introduced to the Complainants). She either knew there was no work or was indifferent as to whether the positions were available. Before putting her clients to the expense of getting work permits and travelling to Marlborough, she had to make proper inquiries to discharge her professional obligations. As a minimum, that required direct contact with the employer whose employment contract was being presented to her client.
- [15] It was a costly process for the Complainants and their family, facing not only the Adviser's fees but also the cost of relocation and loss of other opportunities. It is delinquent for a professional adviser to either knowingly place a client in that position or be so indifferent as to fail to make proper inquiries.
- [16] I am conscious of the seriousness of concluding that the Adviser acted as she did intentionally misleading the Complainants so as to generate fees and I am not satisfied the evidence supports that conclusion. I do find the Adviser was grossly negligent in failing to make proper inquiries to ensure that employment was available, accurately represent the facts to the complaints, and only then applying for work permits. There is no more favourable view open on the material before me.
- [17] The Adviser then failed to respond to the queries when the Complainants discovered the true situation. The Adviser has criticised the Complainants then engaging another adviser to assist them. That criticism leaves the concern the Adviser failed to accept professional responsibility in her dealings with these clients.
- [18] I find there was a breach of Clause 1 of the Code. The Adviser failed to provide service with care, respect, diligence or professionalism. Her conduct amounted to an egregious disregard for a licensed professional's obligations to clients.
- [19] I also find her conduct was misleading. She represented positions of employment were available. It was implicit that her clients should have confidence that she, as a licensed professional adviser, had made proper and adequate inquiries. She had not and must have

been aware she had no current knowledge as to whether work would be available. To present an apparently regular contract of employment to a vulnerable client in such a situation is misleading. The conduct amounts to a breach of section 44(2) of the Immigration Advisers Licensing Act 2007 (as does the breach of the Code).

[20] Given the complaint is upheld, the Tribunal may impose disciplinary sanctions under section 51 of the Act.

[21] 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**

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

[23] 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.

[24] The Complainants should indicate the extent of their losses, so the Tribunal can consider an order for compensation at an appropriate level.

[25] The Adviser will have the opportunity to respond to any submissions from the Authority and the Complainants. Whether or not they make submissions, the Adviser may provide submissions on penalty.

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

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

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

[27.2] The Adviser 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.

[28] The parties are notified this decision will be published, with the names of the parties, after five working days unless any party applies for orders not to publish any aspect.

**DATED** at WELLINGTON this 30<sup>th</sup> day of June 2011

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**G D Pearson**  
Chair