BEFORE THE IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2011] NZIACDT 2

Reference No: IACDT 011/10

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

FOR PUBLICATION COPY

DECISION

REPRESENTATION:

Adviser

In person

Date Issued: 21 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 Clause 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 (published www.iaa.govt.nz).

[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, 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.

[7] The minute raised the following matters.

[8] Central to the complaint is the circumstances in which the Adviser practised as an immigration adviser, and the papers then before the Tribunal indicated the view was open that the following applied:

[8.1] The Adviser was employed by SNJ, and paid about $50 an hour for his work as an immigration adviser.

[8.2] 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”).

[8.3] There was at least one other licensed immigration adviser working with SNJ, DTM.

[8.4] 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 was not clear, and not apparently crucial).

[8.5] 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 DTM listened but were not active in the discussion.

[8.6] 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.

[8.7] However, 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.

[8.8] 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.

[8.9] The Adviser was involved in providing advice, but did not communicate with the Complainant, or put his name to any written or electronic records.

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

[8.11] 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.

[9] The minute also gave notice that wider issues than simply the failure to notify the Complainant of the terms of service, and fees arose on the facts presented, the view being open that:

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

[9.2] SN was unlawfully providing immigration advice in the presence of the Adviser in the telephone conversation identified previously;

[9.3] When a complaint was made in relation to fees, SN dealt with the issue, when it was a responsibility of the Adviser and DTM. 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 draw the Adviser's attention to the terms of an email dated 19 March 2010 apparently sent by SN to the Complainant).

[9.4] Further, the fees charged appear not to have been agreed, and potentially founded on a pretence as to the work undertaken, and gross overcharging. In that regard, the minute noted:

[9.4.1] The Adviser has claimed he was engaged for about an hour, whereas SN claimed the Adviser was engaged for five hours, and charged for that time.

[9.4.2] The Adviser's work has been charged at the rate of $350 per hour. This was not necessarily consistent with a normal ratio of fees to salary in a professional services firm, for an employee paid about $50 per hour. The Adviser stated in correspondence he is paid "by hourly rate at mid two-digits", which appeared to be approximately $50/hour. So both the amount of time engaged by the Adviser, and the hourly rate may not be justified.

[9.4.3] SN's work had been costed at $400 per hour. He was not lawfully entitled to provide immigration advice. It appeared on the information he potentially provided immigration advice, and it seemed implausible the fee relates to something else. His services were described as "management" of the two licensed immigration advisers. A view of the scope of "Immigration Advice" as defined in section 7 of the Act is 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.

[10] The minute notified the Adviser that the material could lead to the conclusion that:

[10.1] The Adviser (as part of a joint enterprise with SN and DTM), failed to enter into an appropriate agreement relating to the provision of professional services, including dealing with issues relating to fees;

[10.2] The Adviser was part of a joint enterprise in which he together with SN and DTM were unlawfully providing immigration advice, with SN taking a lead role though he was not lawfully entitled to be providing "Immigration Advice", as defined in the Act;

[10.3] The consequence of the joint enterprise was that the Complainant was not charged proper fees, and there was a dishonest and unprofessional attempt to misrepresent the work undertaken, and an unprofessional response to a complaint regarding fees.

[11] The Adviser was given the opportunity to respond, and in addition the minute requested (pursuant to section 49(4)(a) of the Act) that the Adviser does provide the following further information, in particular a full explanation of:

[11.1] His professional role as an employee of SNJ.

[11.2] How he attempted to ensure his professional obligations to the Complainant as a licensed immigration adviser were discharged in the environment he worked, including, but not limited to:

[11.2.1] How he sought to ensure immigration advice was only provided by a licensed immigration adviser;

[11.2.2] The roles he, DTM, and SN had in the delivery of professional services to the Complainant;

[11.2.3] What steps he took to ensure a proper professional relationship was established, including an agreement for the provision of services, and notification and agreement as to the fees to be charged; and

[11.2.4] What steps he took to ensure any complaint would be addressed professionally and properly (and in relation to the complaint in fact made, his response to what the proper fee was, and the manner the complaint was addressed by SN).

Legal issues

[12] A legal issue which requires elucidation is the nature of the prohibition on an unlicensed person providing immigration advice. This affects the question of whether the Adviser was party to the unlawful provision of immigration advice.

[13] Of course, the central legal question is whether the material presented requires that the complaint should be upheld and, if so, in what respects.

The positions of the parties

[14] 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 two licensed advisers respectively engaged with him. The comments add nothing to illuminate the role of the Adviser (who was not communicating directly with the Complainant).

[15] The Adviser responded to the minute by letter dated 6 December 2010. The key information in the response was:

[15.1] The Adviser claims he had a role of "assisting and overseeing" complicated cases, and he identifies the subject of the present complaint as being an example of such a case.

[15.2] A copy of material presented at a workshop training event conducted by the Authority was supplied, which recognised a licensed immigration adviser may confer with another licensed adviser regarding a case.

[15.3] There was also a copy of a memorandum dated 20 October 2009 between the Adviser and SNJ. This memorandum indicates:

[15.3.1] The Adviser was an employee of SNJ,

[15.3.2] The parties had an understanding of the legal boundaries under the Act in relation to the exclusive areas of work that had to be performed by licensed immigration advisers. Though, the agreement said the parties would generally "Regard [SNJ] as the advisor's primary client and [SNJ's] client as secondary in terms of giving out immigration advice and providing immigration service ...".

[15.4] There was also a copy of two forms of draft agreements between SNJ and a client, but no suggestion there was such a contract in the present case. One form explicitly provided for the name of a licensed immigration adviser to be set out, the other did not. The memorandum had the original form of agreement attached, and the later form with express reference to the licensed adviser was an update of July 2010.

[15.5] There were also copies of the Code supplied with the letter.

[15.6] The Adviser said he: "provided advice in terms of certain direction and approach for a character waiver in this case to assist my young colleague, DTM, who works fulltime at SNJ and is also a licensed immigration advisor."

[15.7] The Adviser is concerned that there are aspects of the relationship with SNJ that may need to be "further clarified and modified." It is a matter which he has raised with the Authority.

[15.8] The Adviser is concerned having seen the record relating to the complaint that SN "may appear to be giving immigration advice rather than help collect information as directed, due to his past history as being an immigration lawyer." It is for that reason the current form of the relationship has an agreement that clearly identifies a licensed adviser.

Decision

[16] There is no crucial difference between the terms of the complaint, and what the Adviser has said. In essence, he has accepted in his letter to the Authority dated 26 April 2010, and his submission to the Tribunal dated 6 December 2010:

[16.1] He was a party to the provision of immigration advice to the Complainant, "assisting and overseeing immigration matters due to the complicated nature of the exact case";

[16.2] He was aware SN was communicating with the Complainant and helping "collect information as directed" (the Adviser's submission dated 6 December 2010). In his letter of 26 April 2010 to the Authority, he had said:

> "[The Complainant] called in [by telephone] and asked to speak to [SN] soon after. Accordingly, [SN] communicated with him over the phone to collect further information on his revocation and receiving instructions on how to solve his immigration problem."

[16.3] He says he was aware of, and took steps to ensure the requirements of the Code of Conduct were complied with. But, in this case there was no written agreement to engage professional services (or other initial steps under the Code), but that was excusable due to urgency;

[16.4] He had no direct communication with the Complainant himself although he has not challenged key aspects of the potential findings notified in the minute. They include

that he was present at a "speaker telephone" discussion where SN was engaged in a discussion with the Complainant, and he and the other licensed adviser listened; and that SN's actions were unlawful.

[16.5] It was also clearly put to the Adviser that he potentially faced a finding he placed himself in a position where his professional practice was part of an unlawful provision of immigration advice. His response does not challenge the facts which were outlined, and on which that potential finding could be made.

[16.6] He has not challenged the potential finding that none of the formal steps required to establish a client relationship were undertaken, including having a written agreement, and proper arrangements relating to fees.

[16.7] He says the fees were in fact proper and reasonable.

[17] 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 as the issues extend to being a party to an unlicensed person unlawfully giving immigration advice.

[18] I must reach a view as to whether I find each material point established on this basis.

[19] I conclude the material before me establishes:

[19.1] The Adviser (as part of a joint enterprise with SN and DTM), failed to enter into an appropriate agreement relating to the provision of professional services, failed to get an authority, and failed to deal with (or deal adequately with) issues relating to fees (all of which were required by the Code);

[19.2] The Adviser was part of a joint enterprise in which he together with SN and DTM were unlawfully providing immigration advice. SN was to the Adviser's knowledge unlawfully providing "Immigration Advice", as defined in the Act.

[20] The material shows that the Adviser, and DTM and SN were all engaged in the initial phase of taking instructions, and determining a course of action. The Adviser knew or ought to have known no client relationship with the Complainant had been established in compliance with the Code.

[21] I am not satisfied the Adviser had any further role beyond the initial work, and further he may have reasonably believed another licensed immigration adviser (DTM) had taken responsibility for the client relationship. It follows the conduct that followed the initial contact and work was neither something I can consider the Adviser was party to, nor something which he was obliged to be aware of and manage. Accordingly, I do not find the unprofessional and unlawful conduct engaged in by SN later in the professional relationship was a matter for which the Adviser is responsible.

[22] The Adviser contends the fees initially charged may have been reasonable, that is the fee of $2,868.75. On the material before me that may be so, however I do not consider it material as the Adviser was not involved in the fee that was set, whether it was $2,868.75, or SN's communications regarding a fee of $4,837.50. The sole issue on which I have made an adverse finding in relation to fees is that the Adviser allowed work to be undertaken without setting out the fees and disbursements to be charged, which is a breach of part 8 of the Code.

[23] Section 6 of the Act provides, 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; ..."

[24] The scope is broad. The complainant has acknowledged SN was actively taking instructions, established the client relationship and accordingly providing immigration advice as defined. I am satisfied the Adviser was aware of that, and a party to it, on the basis of his admissions in his letter to the Authority dated 26 April 2010.

[25] 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 are not excluded.

[26] 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) (along with the other Code requirements). 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. An unlicensed person dealing with a client cannot be justified as helping to collect information. Gathering information and taking instructions are central elements in providing professional services to the public, and squarely within the scope of "immigration advice" as defined in section 7.

[27] 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.

[28] The purpose of the Act is set out in section 3, and it includes promoting and protecting the interests of consumers receiving immigration advice.

[29] 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 in the initial phases.

[30] 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, and 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 requirements of the Code may not be immediately possible. 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.

[31] 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.

[32] In addition, I find the Adviser was a party to the unlawful provision of immigration advice by SN. Accordingly, he was a party to an enterprise in which the Complainant was provided immigration advice unlawfully, and that amounts to a serious failure to act professionally. That is a matter which amounts to a breach of clause 1.1 of the Code. That provision requires that the Adviser act with professionalism in performing his services, which is not consistent with providing services in breach of the Act.

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

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

[35] 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

[36] 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.

[37] 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.

[38] 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.

[39] 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.

[40] 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.

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

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

[41.2] 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.

DATED at WELLINGTON this 21st day of January 2011

_____

G D Pearson
Chair