

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

Decision No: [2011] NZIACDT 21

Reference No: IACDT 017/10

IN THE MATTER

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

BY

Immigration Advisers Authority
Authority

BETWEEN

Zaim Zamil Nabi
Complainant

AND

Artika Archina Devi

DECISION

REPRESENTATION:

Adviser

In person

Date Issued: 7 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 failure to:
- [1.1] Enter into an appropriate agreement to provide services and otherwise commence a client relationship with the necessary disclosure,
 - [1.2] Take adequate steps to ensure the Complainant maintained lawful status in New Zealand, and
 - [1.3] Keep the Complainant informed of issues relating to progress with his immigration affairs, and financial dealings with the Adviser.
- [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). Clause 1 of the Code sets out the requirements for commencing a professional engagement, clause 2 has the obligations to ensure a client maintains lawful status in New Zealand, clause 3 requires an adviser to report to clients, clause 8 requires an adviser to issue invoices, and clause 9 requires that the complaints procedure be provided.
- [3] Section 44(2) of the Immigration Advisers Licensing Act 2007, provides a breach of the Code is 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 2011. 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] In early September 2009, the Complainant engaged the adviser to provide immigration advice.
 - [6.2] A written agreement to provide immigration services dated 10 September 2009 was signed for the Adviser and the Complainant. However, the agreement had little information on the services to be provided other than to say:
 - [6.2.1] There would be an application for a student visa; and
 - [6.2.2] A fee of \$3,500 was set with \$2,500 to be paid immediately and a further \$1,000 after a visa was issued;
 - [6.3] Orally, the Complainant was told the Adviser would locate a suitable educational facility and access to an appropriate educational course.
 - [6.4] The agreement did not contain a full description of the services to be provided. The Complainant was not told he could seek independent legal advice prior to entering into the agreement. Both are requirements of the Code of Conduct.
 - [6.5] The Adviser did not provide the Complainant with a copy of the Adviser's internal complaints procedure before entering into the agreement. That is a further requirement of the Code of Conduct.
 - [6.6] The record provided to the Tribunal is incomplete, however it appears the key steps in relation to the Complainant's immigration applications were:

- [6.6.1] The Adviser submitted an application for a student permit on 25 September 2009 and it was declined.
- [6.6.2] The Complainant's visa expired while he was still in New Zealand. Accordingly, on 17 November 2009, the Adviser submitted an application under section 35A of the then current Immigration Act 1987. On 14 January 2010, the application was granted and a visitor's permit was issued.
- [6.6.3] An application for a student visa was lodged on 25 January 2010 and on 1 April 2010 it was approved (subject to certain conditions).
- [6.7] The Complainant has requested information regarding the services provided but has never had an adequate explanation. The Code of Conduct requires an immigration adviser shall confirm in writing when applications are lodged and provide timely updates. The papers on the Tribunal's record do not include any communication of that kind.
- [6.8] He has had two receipts which fail to particularise the work undertaken (except by reference to the agreement which does not particularise the work). The receipts are not GST invoices.
- [6.9] A payment of \$200 was made and not receipted.
- [6.10] When an adviser issues invoices, they are required by the Code of Conduct to provide an invoice containing a full description of the services the invoice relates to.
- [6.11] The Adviser had threatened to refer the Complainant to a debt collection agency, despite failing to meet its requirements in relation to invoicing and the other issues identified.
- [7] The Adviser responded to the complaint claiming:
 - [7.1] The initial application for a student permit was filed promptly but declined as the Complainant was not a *bona fide* student.
 - [7.2] The section 35A application was lodged as the Complainant had no current permit.
 - [7.3] A written agreement was entered into, performed by the Adviser, and the fees claimed should be paid in full, the services being:
 - [7.3.1] Enrolment in two courses;
 - [7.3.2] Application for student permit (declined);
 - [7.3.3] Section 35A visitors permit application (granted);
 - [7.3.4] Student permit (granted).
 - [7.4] It was appropriate to use a debt collection agency to recover fees.
- [8] The Adviser has failed to answer the issues relating to the alleged breaches of the Code of Conduct.
- [9] The papers then before the Tribunal left open the view that:
 - [9.1] The Adviser failed to enter into a professional engagement in accordance with the Code of Conduct:
 - [9.1.1] Failing to adequately identify the services to be provided in the written agreement; also

- [9.1.2] Failing to provide advice regarding obtaining independent legal advice prior to entering the agreement; and
- [9.1.3] Not providing a copy of the Adviser's internal complaints procedure prior to entering into the agreement.
- [9.2] The Adviser failed to take adequate steps to prevent the Complainant being in the position of not having a permit and being unlawfully in New Zealand, including providing advice to ensure the Complainant was aware of the consequences of being in that position if it was not possible to obtain a permit.
- [9.3] The Adviser has failed to issue invoices with a full description of the services provided.
- [9.4] The Adviser failed to confirm in writing when applications were lodged and provide timely updates.
- [9.5] The Adviser referred outstanding fees to a debt collection agency knowing she had breached the requirements of the Code in relation to the contract on which she relied and the performance of her obligations.

The positions of the parties

- [10] The Adviser has provided a written response to the minute, the main elements being:
 - [10.1] The information before the Tribunal when the minute was issued had missing facts.
 - [10.2] The Tribunal should not rely on the written agreement signed by the Complainant. It was a "generic version" which has since been updated.
 - [10.3] The Complainant was advised of services to be provided and other aspects orally, and was fully informed in that way.
 - [10.4] The Complainant is "using a technical fault in our older agreement to escape his obligation to honour the payment that he owes us".
 - [10.5] The Complainant got the result he was expecting, and without his consent it would have been impossible to complete the various steps required. That included an awareness of fees for educational courses.
 - [10.6] The Complainant "got a solid advantage by engaging our services".
 - [10.7] The Complainant was offered a copy of the Adviser's internal complaints procedure and "refused to [take it], on his own volition, ... claiming it was of no use to him."
 - [10.8] The Complainant was responsible for being in New Zealand unlawfully without a permit.
 - [10.9] "You have concluded that we failed to provide our client with the requisite invoice. This is untrue. It is an integral part of our business that we issue an invoice to each and every one of our clients. There has been a case however, where certain clients insisted against being given such invoices. Apparently they see no use of the invoices and hence do not see any point in being in possession of one. This is what happened in this case. This client was issued with an invoice, but he advised us that it would be of no use for him to be in possession an invoice. This is why this client does not have the relevant invoice." (verbatim)
 - [10.10] There were no reports regarding when applications were lodged and the like. It was done in oral consultations.
 - [10.11] The Complainant has misrepresented the circumstances. The Adviser said: "Even though we might not have followed the code of conduct precisely, it is obvious that we have not breached any of the obligations which the code places on us as agents." The deficiencies were due to inexperience.

[10.12] The Complainant is in breach of his obligation by not paying.

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. There is no element of the Complainant's account that is implausible or inconsistent with the written record.
- [12] I have considered the explanation offered by the Adviser. The Adviser admits failing to comply with the Code's requirements; in particular, the requirement to ensure that there is a written agreement that sets out in writing the terms of the engagement and the services to be provided.
- [13] It is not credible that the Adviser lacked the experience to set out matters in writing but could at that time articulate the same information orally.
- [14] The Adviser's explanation relating to invoices is implausible. She has failed to produce an invoice and claimed the Complainant made a point of refusing to accept an invoice.
- [15] I also have regard to the fact only after the minute issued did the Adviser challenge what the Complainant said regarding breaches of the Code.
- [16] I am required to determine this matter on the papers (section 49(3)), provided there is an absolute discretion to request further information or require appearances. No doubt the provision has regard to the fact the Authority has investigated and given the parties the opportunity to put forward material before the issue is referred to the Tribunal.
- [17] The material in the papers satisfies me the facts alleged in the complaint are true. The Adviser's response has not cast doubt on the complaint; and it has not reached the threshold for me to decide it is necessary or appropriate to make further inquiries beyond those made already, or to require appearances.
- [18] I find there were multiple breaches of the Code:
- [18.1] The Adviser failed to provide a written agreement for the provision of services that contained an adequate description of the services, and failed to inform the Complainant that he could seek independent legal advice. She breached clause 1 of the Code for those reasons.
- [18.2] The Adviser failed to inform the Complainant of the importance of maintaining lawful status in New Zealand by holding a current permit. This is a critical immigration issue, and I find that in the present case the Adviser should have communicated in writing to ensure there was no room for misunderstanding. She breached clause 2.1 of the Code.
- [18.3] The Adviser failed to report on progress regarding the Complainant's immigration affairs. Communication should have been in writing to ensure there was no room for misunderstanding. She breached clause 3 of the Code.
- [18.4] The Adviser failed to issue invoices (apart from one for \$2,500 which was deficient and unexplained). That is a breach of clause 8 of the Code.
- [18.5] The Adviser failed to provide the Complainant with a copy of her internal complaints procedure. That is a breach of clause 9 of the Code.
- [19] Given the complaint is upheld, the Tribunal may impose disciplinary sanctions under section 51 of the Act.
- [20] 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

- [21] 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.
- [22] 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.
- [23] The Complainant should indicate the extent of his losses including fees paid for courses that were not beneficial, so the Tribunal can consider an order for compensation at an appropriate level.
- [24] The Tribunal understands that fees of \$2,700 have been paid, and unless any party indicates to the contrary that will be the basis used when considering a potential order to refund all or part of the fees.
- [25] The Adviser will have the opportunity to respond to any submissions from the Authority and the Complainant. 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 Complainant 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 Complainant 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 30th day of June 2011

G D Pearson
Chair