

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

Decision No: [2011] NZIACDT 22

Reference No: IACDT 015/10

IN THE MATTER

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

BY

Immigration Advisers Authority
Authority

BETWEEN

Maureen Raj Singh
Complainant

AND

Artika Archina Devi
Adviser

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 failing to carry out client instructions to progress an application for a residence visa/permit; and then failing to communicate and return personal documents.
- [2] The Registrar has referred the complaint as incompetence amounting to a breach of section 44(2) of the Act. The Code of Conduct developed pursuant to section 37 of the Act (published www.iaa.govt.nz) is also material. Section 44(2) makes a breach of the Code grounds for upholding a complaint.
- [3] Clause 1 of the Code requires a licensed immigration adviser to, with due care, diligence, respect and professionalism, perform his or her services, act on proper instructions, and pursue their clients' interests. That clause also requires personal documents to be secured and returned to a client.

Factual Issues

- [4] The Tribunal undertook a review of the whole of the papers presented and issued a minute dated 4 May 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] On 4 May 2009, the Complainant engaged Fast Track Immigration & Employment Services Ltd in Fiji to apply for a residence visa/permit. She entered into a written agreement with Fast Track Immigration Services Ltd. The Adviser is the licensed immigration adviser responsible for the conduct of this company.
- [6.2] On 8 September 2009, the Adviser sent the Complainant an email telling her the Fiji office was closing and the New Zealand office would continue with the engagement. The issues relating to the conduct of the Adviser all relate to the period when the company for which she is the licensed immigration adviser was:
- [6.2.1] Responsible for the conduct of the Complainant's immigration application, and
- [6.2.2] Had informed the Complainant the New Zealand branch of the company would be dealing with the issues.
- [6.3] The Adviser told the Complainant to pay a further \$2,000 (Fijian dollars) and that was paid on 10 September 2009. In an email, dated 8 September 2009, it was said:
- "This is Artika the director and licensed immigration adviser under INZ of fast track immigration & employment service ltd here in New Zealand and Fiji islands.
- I would like to advice to all our valid customers that all our operations will be done by our New Zealand head office.*
- Please be advice that you have to clear all out pending payments which are overdue sum of \$2000FJD ..."* (verbatim)
- [6.4] Though the fee was paid, the Adviser failed to progress the application, communicate in a professional and timely way with the Complainant and failed to return documents.

- [6.5] Significant factual elements alleged in the conduct complained of, and related events are:
- [6.5.1] The initial dealings with the Fiji office were satisfactory from the Complainant's point of view. This included arranging a NZQA assessment.
 - [6.5.2] The point where the New Zealand office took over was the point where an Expression of Interest was to be lodged with Immigration New Zealand. This should have been the next step when the payment of \$2,000 was made on 10 September 2009.
 - [6.5.3] By 18 November 2009, the Complainant had reached the point of telling the Adviser's office that the service was not acceptable as they failed to give her a case number and receipt for her documents; and accordingly, she would lodge a complaint unless that was addressed. A series of correspondence had preceded this point without the Complainant receiving answers to elementary questions. In short, there appeared to be an attempt to deceive her and lead her to believe her application had been lodged when that was not true.
 - [6.5.4] The Adviser's office said in an email of 18 November that the "application is under process and we will send the receipt with the approval letter". There was still no response providing the information requested or a frank explanation of what the true situation was.
 - [6.5.5] On 11 December 2009, the Adviser's office stated, "I don't have [the information] it is with Ronald and his office is locked".
- [7] The Adviser claimed:
- [7.1] The responsibility was not hers as a person associated with the Adviser's company was corresponding using her name without authority;
 - [7.2] The Complainant "was a customer of Fiji therefore I let [Ronald a Fiji employee] handle her case". (verbatim) The Adviser was aware that an email had informed the Complainant the New Zealand office was dealing with the case.
 - [7.3] The Adviser was aware of dishonesty in the Fiji office and that was the reason for it being closed (not perpetrated by Ronald, but another former employee).
 - [7.4] As the work was done in Fiji, the Adviser has no responsibility.
 - [7.5] In an email dated 11 March 2010 to the Authority, the Adviser said a person who had been engaged by the Fiji office said the Complainant's Expression of Interest had not been lodged. She did not say whether that was correct or not.
- [8] The minute notified the parties that the papers presently before the Tribunal appeared to leave open the conclusions that:
- The Adviser's role*
- [8.1] The Adviser was the licensed immigration adviser responsible for the conduct of Fast Track Immigration and Employment Services Ltd. It was a company through which she provided immigration services and she was responsible for the professional relationship with the Complainant throughout.
 - [8.2] The Adviser knew the Complainant had been told she was a licensed immigration adviser and would be dealing with her case. Furthermore, \$2,000 (Fijian dollars) had been requested and paid on that basis.
 - [8.3] The Adviser was responsible for the conduct of Fast Track Immigration and Employment Services Ltd and was obliged to ensure that a proper and professional service was delivered to the Complainant.

Failure to act competently and communicate

[8.4] Furthermore, the Adviser:

[8.4.1] Failed to progress competently and effectively the Complainant's application for a residence permit/visa.

[8.4.2] Failed to report to the Complainant regarding the progress of her application.

[8.4.3] Failed to respond professionally to communications from the Complainant.

[8.4.4] Failed to respond to the complaints made regarding the failure to deliver a professional service. That potentially included an egregious failure to take responsibility for the Complainant not receiving a professional service when the Adviser became aware of the circumstances. That being, at the latest, when she was fully informed of all material circumstances by the Authority. It appears even then she failed to take action to ascertain whether an application had been lodged and, if not, to take remedial steps.

[8.4.5] Overall, the view appeared open the Adviser was responsible for the professional relationship and failed to take responsibility for that relationship.

The positions of the parties

[9] The Adviser responded to the minute by letter dated 29 June 2011.

[10] The key elements in the response were:

[10.1] The facts set out in the minute were not disputed, but were said to be incomplete.

With reference to the issues outlined in para [8.1] above:

[10.2] The Adviser has "an exceptional approval record" in applications made to Immigration New Zealand on behalf of clients.

[10.3] The present case arose when the Adviser was investigating fraudulent behaviour by staff in Fiji.

[10.4] The Adviser sent the email dated 8 September 2009 to all her clients; it was generic and not intended to go to the Complainant as the Adviser "was not handling her case at that time".

[10.5] The Complainant's affairs were initially dealt with by the Adviser's company in Fiji by a person who was engaging in theft. The Fiji office was closed and the case referred to another former staff member.

[10.6] The Adviser's only personal role was in referring the matter to the former staff member. She never "took any responsibility [for] the level of service [the Complainant] would be provided".

[10.7] After the complaint, the Adviser obtained the file from the former staff member and found "her application was pending because she had failed to pay the requisite fees". The engagement was terminated and arrangements made to return documents but they were not uplifted.

[10.8] The former staff member who had taken over the file corresponded using the Adviser's Fiji company email, though his identity was known to the Complainant, the only exception being the 8 September 2009 email, which the Adviser accepted she sent.

[10.9] The Adviser did not understand why she was being held accountable as a licensed immigration adviser for the client's instructions; she regarded it as a matter for the Fiji office.

With reference to the issues outlined in para [8.2] above:

- [10.10] The Complainant knew the Adviser was a licensed immigration adviser but was “being looked after by [the former staff member]”.
- [10.11] It appeared to the Adviser that the Complainant was under the impression the former staff member was a licensed immigration adviser.
- [10.12] The Complainant did not question the former staff member’s conduct.

With reference to the issues outlined in para [8.3] above:

- [10.13] The Adviser “abdicated” her responsibility as the director of the Fiji practice in May 2009, the former staff member accused of theft took over and did things the Adviser would not condone, and should not be responsible for.

General comments:

- [10.14] When the Complainant first lodged her application, offshore advisers could operate without being licensed.
- [10.15] The Adviser’s New Zealand licence “should not be impeached” on the basis of what was occurring in Fiji.
- [10.16] The Adviser was not licensed at the time.
- [10.17] The Adviser would investigate the possibility of the former staff member refunding fees.

Decision

- [11] I am satisfied the facts set out in the complaint (as recorded in the minute) have been established. The file supports the facts set out. The Adviser has accepted the facts, which establish the Complainant did not receive services delivered with due care, diligence, respect or professionalism.
- [12] The facts establish:
 - [12.1] Failure to progress the registration process;
 - [12.2] Failure to communicate honestly and openly with the Complainant; and
 - [12.3] Failure to return personal documents.
- [13] I am satisfied the Adviser was responsible for the whole of the professional engagement. She has not identified any other licensed adviser (only claimed the Complainant may have thought the former staff member was licensed).
- [14] The Adviser cannot isolate herself from responsibility by pointing to her Fiji office as she attempted to do. She was responsible for that office; she has accepted the Complainant engaged the Adviser’s company to provide professional services.
- [15] The Adviser was responsible for discharging the professional obligation.
- [16] The Adviser has been a licensed immigration adviser since 17 April 2009. That was prior to the Complainant engaging with the Adviser’s company. It is true immigration services could be provided by an unlicensed person outside New Zealand for a year later than in New Zealand while the new regime was being implemented. That did not absolve a person who was licensed from providing anything other than professional services that met the standards of their profession, wherever they provided services.
- [17] The Adviser operated in Fiji. As from 17 April 2009, she was obliged to ensure that operation met her professional obligations. To find otherwise would be to allow a person to hold

themselves out as a qualified professional, subject to the disciplines of their profession, and be free to ignore them for clients outside New Zealand. The fact advisers outside New Zealand had an additional period of grace before having to hold a licence is not warrant for such conduct. The Adviser was at all material times a licensed immigration adviser and responsible for the whole of the practice she undertook.

- [18] Regardless, the Adviser did, as she admits, personally inform the Complainant by email she was taking responsibility for her case as from 8 September 2009. The issues which constitute the unprofessional conduct are after that point in time.
- [19] It is an unacceptable response for the Adviser to now claim the email she sent was “generic”, and she did not intend to send it to the Complainant as she was not handling the case at the time. The Adviser had an obligation to be satisfied that each client in the Fiji office was subject to a professional “hand over” or other proper arrangement that protected their interest. She also had an obligation to honour what she said in her email, whether or not she regarded it as “generic” or issued in error. She did not ever tell the Complainant the email was issued in error. On the contrary, the email was personalised, and discussed fees in specific terms with reference to the Complainant. The key points in the email are quoted in paragraph [6.3] above.
- [20] Accordingly, I find there was a breach of clause 1 of the Code. The Adviser failed to progress the work she was engaged to perform, failed to communicate with her client regarding what had occurred, and also failed to secure and return personal documents.
- [21] The conduct was in breach of clauses 1.1 and 1.3 of the Code of Conduct. The former requires a licensed immigration adviser to perform their services with due care, diligence, respect and professionalism. The Adviser did not do so. Clause 1.3 requires that a licensed immigration adviser return personal documents to clients on request without delay; she failed to do so.
- [22] Section 44(2) of the Act sets out the grounds for complaints under the Act, breaching the code is one of the grounds. In addition, the section provides incompetence is a ground for upholding a complaint. By any measure, the Adviser’s conduct has been incompetent to a point far beyond the threshold of warranting a complaint being upheld. She has wholly failed to either advance her client’s interests or take responsibility for her failure to do so. Even now, she appears to have no appreciation of the concept of accepting professional responsibility for her own conduct.
- [23] It follows I find the complaint is upheld.
- [24] For completeness, I note the minute put the Adviser on notice that the complaint potentially extended to an attempt to deceive the Complainant regarding the progress with her application. Given the seriousness of making that finding, it is necessary to be satisfied at a standard that reflects the gravity of doing so. The email of 18 November 2009 is the particular point of concern. It said “your application is under process and we will send the receipt with the approval letter”. That was misleading or overtly false. However, the Adviser claims not to have been personally aware of the email. I accept that was the case. Her failure was one of engagement and supervision. The issue does not add materially to the findings previously discussed. I will regard this matter as simply one of the consequences of the Adviser’s failure to ensure the Complainant received services delivered with professionalism.
- [25] Given that the complaint is upheld, the Tribunal may impose disciplinary sanctions under section 51 of the Act.
- [26] 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

- [27] 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.
- [28] 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.
- [29] 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.
- [30] 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.
- [31] The timetable for submissions will be as follows:
 - [31.1] The Authority and the Complainant are to make any submissions within 10 working days of the issue of this decision, and
 - [31.2] 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.
- [32] 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 7th day of July 2011

G D Pearson
Chair