

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

Decision No: [2011] NZIACDT 23

Reference No: IACDT 03/11

IN THE MATTER

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

BY

Immigration Advisers Authority
Authority

BETWEEN

Rozina Rozmeen Nisha
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 obtain recognition of the Complainant's professional qualifications as a necessary part of pursuing an immigration application and then failing to return personal documents.
- [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).
- [3] 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 client's 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 15 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] The Adviser is the director of Fast Track Immigration & Employment Services Ltd and the only licensed adviser associated with the company. The company had a presence in Fiji and New Zealand.
 - [6.2] On 9 May 2009, the Complainant, who was resident, in Fiji engaged the Adviser to pursue an application for residence in New Zealand. Initially, she dealt with the Fiji office.
 - [6.3] The Complainant and the Adviser entered into a written agreement relating to applying for a residence visa or permit. The agreement provided the company would first make an application for the Complainant to be registered with the New Zealand Teachers Council. The agreement had provisions relating to the termination of the agreement including that the client could withdraw, but would receive no refund of fees.
 - [6.4] From 9 May 2009 to 15 August 2009, the Complainant paid fees totalling FJ\$2,738 to the Adviser. In September 2009, the Adviser's Fiji office closed and the Adviser dealt with the file in Auckland.
 - [6.5] On 7 October 2009, the Adviser's office informed the Complainant another NZ\$80 should be paid due to an increase in registration fees. On 16 October 2009, the Complainant paid a further NZ\$736.69.
 - [6.6] In October 2009, the Adviser lodged the Complainant's application with the Teachers Council.
 - [6.7] On 10 May 2010, the Adviser met with the Complainant and was told her application was in progress.
 - [6.8] In May 2010, the Teachers Council closed the application due to lack of documentation. It appears the Adviser knew of that development and failed to inform the Complainant. Furthermore, the Teachers Council had requested the information from the Adviser twice and no steps had been taken by the Adviser. The Adviser did request further documents in June 2010 and they were supplied by the Complainant.

- [6.9] On 8 August 2010, the Complainant communicated with the Teachers Council direct and was informed that her application was closed in May 2010 due to lack of documentation.
- [6.10] On 12 August 2010, the Complainant complained to the Adviser about her conduct and on 13 August 2010 received an email saying a new application had been submitted to the Teachers Council.
- [6.11] On 18 August 2010, the Complainant informed the Adviser she wished to terminate the agreement as the Adviser had failed to fulfil her obligations and requested that her personal papers be returned.
- [6.12] The Adviser retained personal documents belonging to the Complainant and her family, including birth certificates and a marriage certificate.
- [7] The Complainant sought a full refund of the fees she paid being FJ\$2,738 and NZ\$736.69. She seeks a refund which includes the fee for applying to the Teachers Council as she had to lodge a new application.
- [8] The Adviser's response to the complaint had been:
- [8.1] Initially, the work was not under her "adviser licence" as it was in Fiji, but accepted she was responsible after the Fiji office closed.
- [8.2] The initial work related to a NZQA assessment, which was successful.
- [8.3] The service was provided and the Complainant is not entitled to any refund.
- [9] In support of the explanation, the Adviser produced:
- [9.1] A NZQA assessment certificate dated 28 July 2009.
- [9.2] Letters and emails from the Teachers Council:
- [9.2.1] Dated 6 December 2009, which said that there had been previous correspondence and information was still outstanding for the Complainant's application. It said that unless there was a response by 6 January 2010 the application would be closed.
- [9.2.2] Dated 5 March 2010, which discussed difficulties with the form of the application submitted on behalf of the Complainant. The letter said the matters had to be corrected by 31 March 2010 or a new application would be required.
- [9.2.3] Dated 17 May 2010, indicating the application was closed due to lack of progress.
- [10] The parties were informed the papers presently before the Tribunal appeared to leave open the conclusions that:
- The Adviser's role*
- [10.1] The Adviser was the only licensed immigration adviser engaged by the company through which she provided immigration services and she was responsible for the professional relationship with the Complainant throughout.
- Failure to act competently and communicate*
- [10.2] Further:
- [10.2.1] The Adviser completed the NZQA assessment process effectively.

- [10.2.2] The Adviser failed to competently and effectively progress the application to the Teachers Council. In particular, failed to respond to concerns the Teachers Council had regarding the scope of the information supporting the application, and then failed to communicate the developments to the Complainant so the application could be progressed.

Retention of personal documents

- [10.3] In addition, the Adviser was responsible for failing to return personal documents.

The response of the parties to the minute

- [11] The Complainant, in response to the minute, explained further about the position relating to fees and reiterated other aspects of the complaint. She explained that the fees paid were \$2,038 (Fijian dollars) and \$700 (New Zealand dollars) rather than \$2,738 (Fijian dollars) as it had appeared in the materials.
- [12] The Adviser responded to the minute by letter dated 29 June 2011, there was a delay in the response due to the Adviser failing to keep the Tribunal notified of a change in her address.
- [13] The key elements in the Adviser's response were:
- [13.1] The Adviser accepted she was responsible for the professional relationship.
- [13.2] She said there were two applications to the Council and she communicated with the Complainant effectively and promptly. However, the Complainant failed to provide necessary information and, for that reason, could not respond to the Council when the first application was queried.
- [13.3] The issue concerning the return of the documents arose as the Complainant required the documents be sent to a third party. Inexplicably, the Adviser said the third party was not authorised to receive the documents, despite accepting the Complainant gave that direction.
- [14] The Complainant responded to the Adviser's letter of 29 June 2011, by email dated 6 July 2011.
- [15] The Complainant rejected the claim the Adviser had communicated with her effectively, asked for documents, or informed her of the file being closed. She reiterated she found out what had happened to her application by contacting the Council herself. She also repeated her earlier claims, she was dissatisfied with the Adviser's performance, commented on the effects, and noted the Adviser had failed to refund fees paid.

Decision

- [16] 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 and the Adviser has not engaged with the issues. Initially, she simply asserted she performed the services required. She provided some material and it only served to demonstrate that she failed to progress the registration process, and provided nothing to indicate she communicated with her client effectively.
- [17] After the minute which directed the Adviser to the central issues, she simply asserted she communicated and acted efficiently and effectively. She provided no documentation to support that claim. The Complainant has provided a coherent and readily understood narrative of the events. That narrative is supported by the documents provided to the Tribunal, including the third party material created by the New Zealand Teachers Council.
- [18] The Adviser claims the Complainant was unresponsive to communications but has provided no documents to support her claim that she communicated with her client regarding the outstanding need to supply information and pay fees to the Council. The Complainant did act with determination and initiative when the record shows she became aware of developments.

- [19] The Adviser claimed, in effect, that there were undocumented communications telling the Complainant of difficulty with her application. I find that claim implausible and inconsistent with both the Complainant's evidence and the written record. Accordingly, I do not accept the claim. I accept the Complainant's evidence that she asked about the progress of her application and was misinformed by staff at the Adviser's office. In addition, the New Zealand Teachers Council had by letters dated 6 December 2009 and 5 March 2010 raised queries, and when the Adviser personally met with the Complainant on 10 May 2010 she had failed to inform her of that.
- [20] The record shows after that meeting, the Adviser followed up with the New Zealand Teachers Council by email. Email correspondence between 13 and 17 May 2010 makes it very clear the Adviser had failed to follow through with the information and payment of fees the New Zealand Teachers Council required. The Council had a six month timeframe and the Adviser had taken no effective action so the file was closed.
- [21] The Adviser's claim that she properly failed to deliver the documents to a third party at the request of the Complainant as the third party was "not authorised" misapprehends the Adviser's professional responsibilities. It was the Adviser's client who was entitled to determine who was authorised to uplift documents. Furthermore, when the complaint was made, the Complainant said documents still remained in the hands of the Adviser. She has provided no evidence of having returned the documents, simply claiming that she had done so. The Code requires documents be returned in a secure form, which will ensure there is a record of documents being returned. I am not satisfied the Adviser has returned the documents; certainly she has provided no evidence. I am satisfied there was delay in returning documents, at least to the point of being delinquent.
- [22] I am satisfied the Adviser was responsible for the whole of the professional engagement, as she now accepts. The Adviser entered into a written agreement with the Complainant and the lapse from professional standards in issue came after that point in time.
- [23] Accordingly, I find there was a breach of clauses 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 failed to return personal documents.
- [24] In particular, 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 passports and other personal documents to clients on request without delay. She failed to do so, either by not accepting proper instructions from the Complainant or non-performance.
- [25] Section 44(2) of the Act sets out the grounds for complaints under the Act and breaching the code is one of the grounds.
- [26] Given the finding, disciplinary sanctions under section 51 of the Act may be imposed by the Tribunal.
- [27] 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

- [28] 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.
- [29] The Complainant has indicated she seeks a refund of fees paid. That is part of the penalty the Tribunal will consider. In response to the minute, the Complainant indicated the fees paid were in total \$2,038 (Fijian dollars) and approximately \$700 (New Zealand dollars). I will treat that as an accurate estimation unless any party indicates I should take a different view of the amount.
- [30] 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.
- [31] 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.
- [32] 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.
- [33] The timetable for submissions will be as follows:
- [33.1] The Authority and the Complainant are to make any submissions within 10 working days of the issue of this decision; and
- [33.2] 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.
- [34] 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